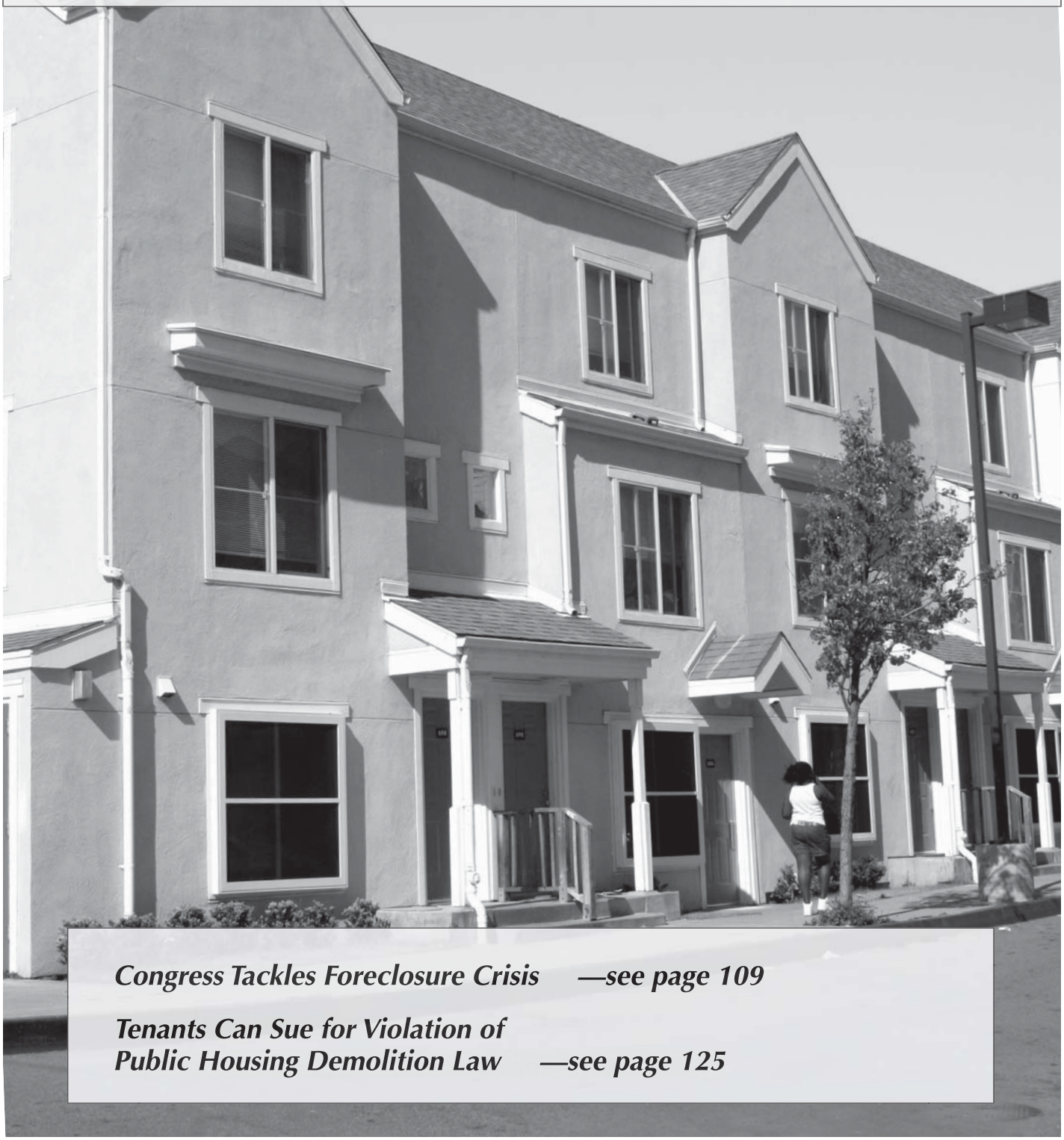
NATIONAL HOUSING LAW PROJECT

advancing housing justice

Housing Law Bulletin

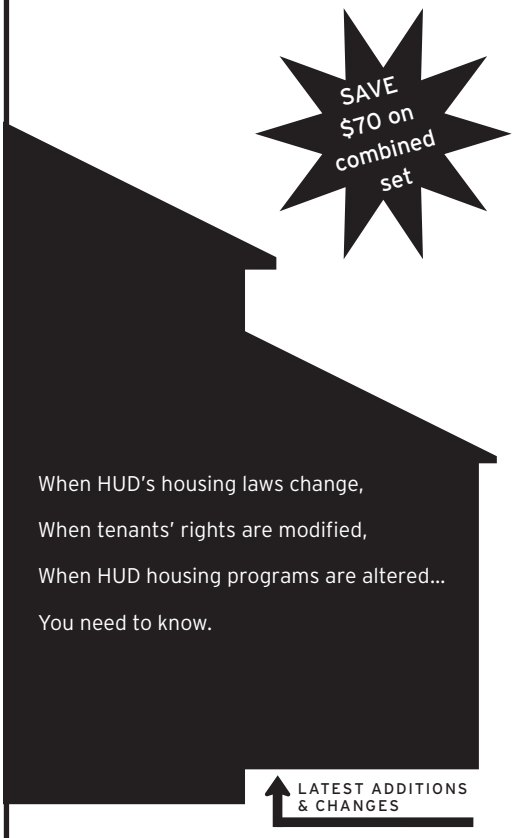
Volume 38 • June 2008

Published by the National Housing Law Project



COMPREHENSIVE CURRENT AUTHORITATIVE

NHLP's HUD Housing Programs: Tenants Rights (3rd Edition 2004) and 2006-2007 Supplement with Updated CD ROM



Dubbed the Green Book by users across the country, *HUD Housing Programs: Tenants Rights (3rd Ed. 2004)* is a comprehensive, issue-oriented guide to the federal housing programs. Meticulously researched and clearly written by expert NHLP staff attorneys and outside contributors, it is the only book that explains and analyzes all applicable laws central to effectively representing tenants assisted under the HUD programs. NHLP's comprehensive manual provides a practical road map through the complexity of the federal housing programs, including public housing, subsidized rental housing, vouchers, section 8 homeownership, and others. Evictions, resident participation, loss of units, utility allowances and other key issues are also covered.

The companion *2006–2007 Supplement* offers new information and the latest developments in the law on tenants' rights under the HUD housing programs since publication of the 3rd Edition of the Green Book in 2004. With your purchase of the *2006–2007 Supplement*, you also receive, at no charge, the latest edition of the CD-ROM document library that includes all documents from the 3rd edition and new material from the *2006–2007 Supplement*.

The essential resource for anyone working within the scope of the federal housing programs. The *HUD Housing Programs: Tenants Rights* and the *2006–2007 Supplement* provide the most up-to-date and comprehensive guide to the federal housing programs available anywhere and contain the most recent applicable authorities for virtually all common problems encountered in a federal landlord-tenant relationship including state and federal cases, federal statutes and regulations, and HUD handbooks, notices, and opinion letters.

Complete pricing and order form on page 133.

ORDER NOW! SPECIAL SAVINGS—$70 OFF SEPARATE VOLUME PRICE

Housing Law Bulletin

Volume 38 • June 2008

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

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

www.nhlp.org • nhlp@nhlp.org

Table of Contents

Cover: *Plaza East, a 193-unit public housing development owned by the San Francisco Housing Authority. Revitalization completed in 2002.*

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is $175.

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

Congress Tackles Foreclosure Relief and GSE Reform*

The current mortgage foreclosure crisis worsened significantly in May, when more than a quarter-million homes nationwide received foreclosure-related filings,[1] a 48% increase over filings in May 2007. Foreclosures during the first quarter of 2008 also rode a pronounced upward trend, with foreclosure activity up 23% over the previous quarter, and 112% over the first quarter of 2007.[2] Although predictions vary, some experts believe that foreclosures are not likely to peak until fall 2008, when interest rates on many adjustable-rate mortgages (ARMs) reset and payments become unaffordable for borrowers.[3] The Congressional Budget Office (CBO) has estimated that 2.2 million homeowners with subprime and alt-A mortgages, the most abusive mortgage loans, will have foreclosure proceedings initiated against them between October 1, 2008, and September 30, 2011.[4]

With no end to the crisis in sight, Congress is grappling with legislation to curb the growing tide of foreclosures and help people stay in their homes. Of the numerous bills that have been introduced in the House and Senate, the American Housing Rescue and Foreclosure Prevention Act (H.R. 3221) passed the full House on May 8, and the Federal Housing Finance Regulatory Reform Act was approved by the Senate Committee on Banking, Finance, and Urban Affairs on May 20.

H.R. 3221

On May 8, the House passed the American Housing Rescue and Foreclosure Prevention Act of 2008, H.R. 3221, which provides foreclosure relief and Federal Housing Administration (FHA) refinancing loans for homeowners, modernizes the FHA, reforms the Government Sponsored Enterprises (GSEs) such as Fannie Mae and Freddie Mac, and establishes a housing trust fund. The bill was packaged as three amendments to a version of the

*Katherine Lehe, a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and a summer intern at the National Housing Law Project, is the author of this article.

[1]RealtyTrac, Foreclosure Activity Increase 7 Percent in May (June 13, 2008), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4728&accnt=64847.

[2]RealtyTrac, U.S. Foreclosure Activity Increases 23 Percent in First Quarter (April 29, 2008), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4566&accnt=64847.

[3]Associated Press, *Foreclosure Filings Jump, and Fall is Forecast as Peak*, N.Y. Times, June 14, 2008, http://www.nytimes.com/2008/06/14/business/14mortgage.html?sq=foreclosure&st=cse&scp=1&pagewanted=print.

[4]Cost Estimate, Congressional Budget Office, Federal Housing Finance Regulatory Reform Act of 2008 8 (June 9, 2008), http://www.cbo.gov/ftpdocs/93xx/doc9366/Senate_Housing.pdf [hereinafter CBO Cost Estimate].

bill previously approved by the Senate, and was passed by the House in three separate votes.[5]

The Bush Administration has stated that the President will veto H.R. 3221 if presented in its current form.[6] Two portions of the bill passed, but fell short of a veto-proof majority. The main housing amendment passed by a 266-154 vote, and an amendment providing that H.R. 3221 would not preempt state foreclosure laws passed by a 256-160 vote. Only the amendment containing the bill's tax provisions passed by a veto-proof margin of 322-94.[7]

Allowing homeowners facing foreclosure to refinance their mortgages with loans they can realistically afford, and reducing borrowers' loan principal, are important components of homeowner relief that have been sought by advocates.

An earlier version of H.R. 3221 would have authorized Community Development Block Grant Funds to create a Neighborhood Stabilization Fund. This fund would have allocated grant and loan funds to states to purchase vacant foreclosed properties in order to stabilize communities hardest hit by the foreclosure crisis. These provisions were omitted due to concern that they would undermine Republican support for the bill, and were packaged instead in the stand-alone Neighborhood Stabilization Act of 2008, discussed elsewhere in this *Bulletin*. Similarly, the bill did not include proposed protections for renters facing eviction from properties in foreclosure. Several renter protection bills have been introduced in Congress, and are also discussed elsewhere in this *Bulletin*. The bill does not include provisions allowing a write-down of mortgage principal in bankruptcy.

FHA Refinancing and Foreclosure Relief

Allowing homeowners facing foreclosure to refinance their mortgages with loans they can realistically afford, and reducing borrowers' loan principal, are important components of homeowner relief that have been sought by advocates.[8] H.R. 3221 includes mortgage refinancing provisions added to address criticism that a prior version of the bill passed by the Senate on April 10 did not do enough to assist distressed homeowners.[9] These provisions would authorize up to $300 billion in FHA-insured refinancing loans for homeowners facing foreclosure on owner-occupied principal residences.[10] The refinancing loans would be securitized through an additional $300 billion increase in Ginnie Mae commitment authority.[11] Participation in the refinance program is voluntary, by both borrowers and lenders, and would require lenders to accept the new loan as full satisfaction of the current mortgage.[12]

The refinancing provisions of the bill would require mortgage holders to accept a substantial write-down in the value of the existing mortgage. Refinance loans could not exceed 90% of the home's current appraised value.[13] Further, the costs of the refinance loan would be subtracted from the new loan amount, resulting in the final refinance loan being no more than 85% of the home's current value.[14] Mortgages on single-family homes could be refinanced with loans up to 125% of the median area home price or $729,750, whichever is less.[15] Mortgages insured under the program would have a fixed interest rate for the entire term,[16] which would be extended to forty years.[17] The Oversight Board would establish reasonable limits on origination fees, and would require interest rates to

[5]Memo to Members, National Low Income Housing Coalition, House Passes Massive Housing Bill (May 9, 2008), Vol. 13, No. 19, *at* http://nlihc.org/detail/article.cfm?article_id=5115 [hereinafter NLIHC, House Passes Massive Housing Bill]. H.R. 3221 includes, as part of three amendments, the FHA Housing and Homeowner Retention Act of 2008 (H.R. 5830), the Federal Housing Finance Reform Act of 2007 (H.R. 1427), the Expanding American Homeownership Act of 2007 (H.R. 1852), the Emergency Mortgage Loan Modification Act of 2008 (H.R. 5579), the Housing Assistance Tax Act of 2008 (H.R. 5720), and an amendment providing that H.R. 3221 would not preempt state laws addressing foreclosure of residential properties.

[6]Statement of Administrative Policy, Executive Office of the President, Office of Management and Budget, House Amendments to Senate Amendment to H.R. 3221—Foreclosure Prevention Act of 2008 1 (May 6, 2008), http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr3221-r.pdf [hereinafter Statement of Administrative Policy].

[7]Barry G. Jacobs, *House Passes Comprehensive Mortgage Foreclosure Relief Bill*, 36 Housing and Dev. Rep. Current Dev. 289, 316 (May 19, 2008).

[8]H.R. 3221 also includes heightened foreclosure protections for military service members. The bill would extend current restrictions on the sale, foreclosure, or seizure of property owned by service members from ninety days to one year after completion of military service. Further, bankruptcy could not be the basis for denying disabled veterans' participation in federal mortgage or subsidy programs. *Id*.

[9]NLIHC, House Passes Massive Housing Bill, *supra* note 5. Most of the bill's mortgage foreclosure provisions were originally part of H.R. 5830. *Id*.

[10]H.R. 3221, 110th Cong. § 112 (2008), *adding* §§ 257(c)(1), (h) to Title II of the National Housing Act.

[11]H.R. 3221, at § 112, *adding* § 257(k)(2) to the National Housing Act. *See also Financial Services Committee Approves FHA Refinancing Bill for Homeowners Facing Foreclosure*, 36 Housing and Dev. Rep. Current Dev. 257, 259 (May 5, 2008).

[12]H.R. 3221, at § 112, *adding* § 257(c)(6)(B) to the National Housing Act.

[13]H.R. 3221, at § 112, *adding* § 257(c)(4) to the National Housing Act. The bill would impose civil money penalties on lenders, mortgage brokers, realtors, and other interested parties in the program's refinancing transactions who attempt to improperly influence appraisals. H.R. 3221, at § 112, *adding* § 257(g) to the National Housing Act.

[14]Staff of House Comm. on Fin. Serv., 110th Cong., Economic and Housing Rescue Legislation Introduced in the House, FHA Housing Stabilization and Homeownership Retention Act (May 1, 2008), *at* http://financialservices.house.gov/FHA.html. *See also* Jacobs, *supra* note 7, at 316.

[15]Jacobs, *supra* note 7, at 316.

[16]H.R. 3221, at § 112, *adding* § 257(c)(10) to the National Housing Act.

[17]H.R. 3221, at § 204, *amending* § 203(b) of the National Housing Act.

be commensurate with market-rate interest rates on comparable loans.[18] The bill would also require the mortgage holder to waive any prepayment penalties, as well as all fees related to default or delinquency, and would require reduction of the borrower's debt service payments.[19]

Provisions of the bill would also encourage servicers of pooled home loans to modify loans or develop plans to avoid foreclosure.[20] Although the final version of the bill omitted provisions authorizing the FHA to refinance loans on a bulk basis, the bill would require the Federal Reserve Board to study the potential need for auctions or bulk refinancing.[21]

In addition to the refinancing provisions, the bill would require HUD to establish new underwriting standards for high-risk borrowers. It would also authorize adjustments in mortgage insurance premiums based on risk associated with the borrower and mortgage products. The bill would establish a program Oversight Board consisting of the Secretary of the Treasury, the HUD Secretary, and the Chairman of the Board of Governors of the Federal Reserve System.[22]

Eligibility for Refinance Loans

The FHA refinancing program would be available for mortgages originated on or before December 31, 2007.[23] Refinancing loans would be available for one- to four-unit owner-occupied residences.[24] The bill includes a number of provisions designed to prevent borrowers from intentionally defaulting on mortgage loans in order to utilize the program. To be eligible for refinancing, borrowers must have been paying at least 35% of their income toward their existing mortgages.[25] Borrowers would also be required to certify that they did not provide false information to secure the existing loan, they have not intentionally defaulted on the mortgage, they do not own any other homes, and that the home is their principal residence.[26] Homeowners convicted of fraud in the previous seven years are ineligible for the program.[27] The bill would also allow the government to retain a share of the future home-price appreciation as an exit premium to be paid upon refinance, sale, or other disposition of the mortgaged home.[28]

H.R. 3221 includes several provisions to help ensure that borrowers will not default on the refinanced loans. The bill would require the Oversight Board to establish underwriting standards to ensure that borrowers have a reasonable expectation of repaying the mortgage, considering the borrower's income, assets, liabilities, payment history, and other applicable criteria.[29] This determination would not be made solely on the basis of the borrower's current credit scores or any delinquency or default on their current mortgage. H.R. 3221 would also require that post-refinancing debt payments not exceed 43% of a borrower's income. However, payments up to 50% of income could be approved based on the borrower's payment history.[30]

The bill would require the mortgage holder to waive prepayment penalties and all fees related to default or delinquency, and require reduction of the borrower's debt service payments.

In addition, participation in the program requires the release of all existing liens on the property, including any second mortgages.[31] The bill would also prohibit borrowers from taking out any second mortgages within five years of refinancing, except as the Oversight Board determines to be necessary for the maintenance of the property.[32] Because second mortgage holders might well choose to keep their existing loans because of the even slight possibility of future repayments, this restriction could effectively bar a significant portion of distressed homeowners from eligibility. However, H.R. 3221 includes provisions that could allow subordinate mortgage holders to receive compensation for the extinguishment of their liens, which may in turn encourage participation.[33] The Oversight Board would establish a voluntary program for senior mortgage holders to pay subordinate mortgage holders an amount determined by a Board-established formula in satisfaction of the subordinate mortgage. The Board may also establish a short period for senior and subordinate lien holders to negotiate extinguishment of the subordinate lien for a different payment amount. In addition, the Oversight Board may require the mortgagor

[18]H.R. 3221, at § 112, *adding* § 257(f) to the National Housing Act.
[19]H.R. 3221, at § 112, *adding* §§ 257(c)(5), (7) to the National Housing Act.
[20]Jacobs, *supra* note 7, at 289.
[21]H.R. 3221, at § 113.
[22]*Id*. § 112, *adding* § 257(a) to the National Housing Act.
[23]*Id*. at § 112, *adding* § 257(c)(3) to the National Housing Act.
[24]*Id*. at § 112, *adding* § 257(b)(1) to the National Housing Act.
[25]*Id*. at § 112, *adding* § 257(c)(2)(B) to the National Housing Act.
[26]*Id*. at § 112, *adding* §§ 257(c)(1), (2)(A) to the National Housing Act.
[27]*Id*. at § 112, *adding* § 257(c)(12) to the National Housing Act.
[28]The exit premium paid to the federal government would be secured through a lien on the property that is subordinate to the FHA-insured mortgage, but senior to all other mortgages. H.R. 3221, at § 112, *adding* § 257(8) of the National Housing Act.
[29]H.R. 3221, at § 112, *adding* § 257(d) of the National Housing Act.
[30]Borrowers may pay up to 50% of their income toward the refinanced mortgage if they have made at least six months of full, timely payments prior to the refinancing. H.R. 3221, at § 112, *adding* § 257 (d)(2) of the National Housing Act.
[31]H.R. 3221, at § 112, *adding* § 257(c)(6)(B) to the National Housing Act. *See also CBO Estimates About 500,000 Loans Would Be Refinanced Under House-Approved FHA Program*, 36 Housing and Dev. Rep. Current Dev. 289, 306 (May 19, 2008) [hereinafter H.D.R., *CBO Estimates*].
[32]H.R. 3221, at § 112, *adding* § 257(c)(8)(F) to the National Housing Act.
[33]*Id*. at § 112, *adding* § 257(c)(6)(B) to the National Housing Act.

to share a portion of future home equity with the subordinate lien holder.

According to CBO estimates, second mortgages have been taken out on 40% of homes with sub-prime and alt-A first mortgages, the most abusive loans contributing to the current foreclosure crisis.[34] Although the CBO estimates that 2.8 million loans would be eligible for refinancing, this figure would be reduced significantly by the subsequent lienholder release requirement. The CBO estimates that about 500,000 home mortgages would be refinanced under the program.[35]

Because many homeowners at risk of mortgage default and delinquency are not well-versed in home finance, mortgage counseling services are essential to foreclosure prevention.

Foreclosure Counseling and Legal Services

Because many homeowners at risk of mortgage default and delinquency are not well-versed in home finance, mortgage counseling services are essential to foreclosure prevention. To address this need, the bill would authorize the appropriation of $230 million for services targeting mortgagors with one- to four-family residences during fiscal years 2008 and 2009.[36] Funds would be allocated to communities and states based on the 2007 and 2008 levels of delinquencies and foreclosures, and at least 15% of these funds would be provided to organizations targeting minority and low-income homeowners. Of the total appropriation, $35 million in grants would be allocated to legal organizations to assist homeowners facing foreclosure and tenants who live in homes at risk of or in foreclosure. At least 60% of the legal assistance grants would be designated for legal services for low-income homeowners and tenants.

FHA Modernization

The bill also includes general FHA modernization provisions. The limit on FHA loans for one-family homes would be increased to 125% of the area median home price or 175% of the Fannie Mae-Freddie Mac conforming loan limit, whichever is less. The bill would provide that FHA-insured mortgage loans would have a term of up to forty years.[37] In addition, the modernization provisions simplify downpayment requirements and authorize no-downpayment loans.

[34]H.D.R., *CBO Estimates*, *supra* note 31, at 307.
[35]*Id.* at 306. Although the full budgetary impact of the bill will depend on the number of loans refinanced and the likelihood of borrower default, the CBO estimates that the program will cost $1.7 billion. *Id.*
[36]H.R. 3221, at § 112, *adding* § 257(o) to the National Housing Act.
[37]*Id.* at § 204, *amending* § 203(b)(3) of the National Housing Act.

GSE Reform and Housing Trust Fund Provisions

H.R. 3221 would also enact regulatory reforms of the GSEs, many of which were previously approved by the House as the stand-alone bill H.R. 1427 in May 2007.[38] The bill would also add new provisions to finance an affordable housing trust fund with revenue from the GSEs.[39]

In order to consolidate and improve oversight of the GSEs, the reform measures would abolish the Office of Federal Housing Enterprise Oversight and Federal Housing Finance Board as the current regulators of the GSEs, and would instead establish a new Federal Housing Finance Agency (FHFA) to regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.[40] Responsibility for housing goals and program approval would be transferred from HUD to the FHFA.[41] The bill would establish goals for single-family and multi-family special affordable housing, replacing the enterprises' current affordable housing goals.[42]

Mortgage portfolio limits for Fannie Mae and Freddie Mac would be set by the FHFA based in part on the potential risk to GSEs, but would not take into account the potential risk to the larger financial system, an additional provision sought by the Bush Administration.[43] Under the bill, the FHFA director would establish and maintain a housing price index used to annually adjust the conforming loan limit up or down for one- to four-unit properties. The limit would be set at either the basic loan limit or 125% of the area median price for the applicable residence size, and would not exceed 175% of the basic limit.[44] This change would take effect in 2009, and would not include the additional adjustments in loan limits for high-cost housing areas previously authorized by the House.[45]

National Affordable Housing Trust Fund

Although advocates were disappointed that the National Affordable Housing Trust Fund Act of 2007 (S. 2523) was not adopted as an amendment to the final version of H.R. 3221, the bill does include provisions that would create a temporary National Affordable Housing Trust Fund from 2008 to 2012, funded by annual contributions from the GSEs.[46] The purpose of the fund is to provide grants to increase homeownership for extremely low- and very low-income households, to increase and preserve the supply of rental and owner-occupied housing

[38]H.R. 1427, the Federal Housing Finance Reform Act of 2007, was included as an amendment to the version of H.R. 3221 passed by the House. *See* NHLP, *House of Representatives Passes Affordable Housing Fund*, 37 HOUS. L. BULL. 110 (June/July 2007); NLIHC, House Passes Massive Housing Bill, *supra* note 5.
[39]*Id.*
[40]Jacobs, *supra* note 7, at 316.
[41]*Id.*
[42]*Id.*
[43]*Id. See also* Statement of Administrative Policy, *supra* note 6, at 3.
[44]Jacobs, *supra* note 7, at 316.
[45]*Id.*
[46]H.R. 3221, at § 340, *replacing* §§ 1337, 1338 of the Housing and Community Development Act of 1992.

for extremely low- and very low-income households, and increase investment in housing in low-income areas and areas of chronic economic distress.[47] However, the bill stops short of creating a permanent, independent trust fund that could accept funding from multiple sources.[48] The bill also provides that if a comparable Affordable Housing Trust Fund is later created, funds from the H.R. 3221 fund will be diverted into the newly created fund.[49] Unlike S. 2523, the bill would not require grant recipients to match a specified percentage of the funds received from the trust fund, a provision sought by advocates. The program would sunset after five years.

Under H.R. 3221, Fannie Mae and Freddie Mac would be required to make contributions equal to 1.2 basis points for each dollar (or 1.2 cents for every 100 dollars) of the GSE's average total mortgage portfolio during the preceding year.[50] The FHFA Director would be empowered to temporarily suspend the allocation of GSE revenue to the fund upon a finding that the allocations are contributing or would contribute to the financial instability or undercapitalization of the enterprise, or would prevent the enterprise from successfully completing a capital restoration plan.[51]

For 2008 only, the bill would allocate 100% of grant funds to hurricane-affected areas of Louisiana and Mississippi. Seventy-five percent of these funds will be allocated to the Louisiana Housing Finance Agency, and the remaining 25% to the Mississippi Development Authority.[52] After the fund's first year, grants would be allocated among the states and federally recognized Indian tribes based on a HUD-set formula, including factors such as proportions of national population, families that pay more than 50% of annual income for housing, extremely low- or very low-income families, families residing in substandard housing, extremely old housing stock, the cost of rehabilitating or developing housing, and any other factors HUD determines appropriate.[53]

Grant funds could be used to produce, preserve and rehabilitate rental housing and homeownership housing for first-time homebuyers, as well as for the development of related public infrastructure.[54] At least 10% of all funds must be used to support homeownership for first-time homebuyers, and up to 12.5% could be used for public infrastructure development.[55] All funded activities must benefit extremely low- and very low-income households. The bill would not impose affordability requirements on the housing units constructed or rehabilitated with housing trust funds.

Federal Housing Finance Regulatory Reform Act of 2008

On May 20, the Senate Committee on Banking, Finance, and Urban Affairs approved the Federal Housing Finance Regulatory Reform Act of 2008 (an unnumbered bill) by a bipartisan vote of 19-2.[56] The bill would provide foreclosure relief and FHA refinancing loans for homeowners, FHA modernization, GSE reforms, and a permanent Housing Trust Fund and Capital Magnet Fund. Although the bill would address many of the same issues as H.R. 3221, there are significant differences between the bills that are expected to be considered by the House and Senate in the coming weeks.

To gain support for the bill from Senator Shelby (R-AL), ranking member of the Committee, Senator Reed (D-RI) suggested a compromise that would divert GSE revenues designated for the Housing Trust Fund (HTF) and Capital Magnet Fund (CMF) to cover the potential costs of the bill's foreclosure relief program. The provisions of this compromise would divert 100% of GSE contributions to the HOPE for Homeowners foreclosure relief program in the first year.[57] Fifty percent of GSE contributions would go to the foreclosure program in the second year and 25% in the third year. The total amount of GSE contributions would then be allocated to the HTF and CMF every year thereafter. Although advocates opposed this provision, legislators believed it necessary to address Sen. Shelby's concerns that the mortgage refinancing program could prove costly to taxpayers, and ultimately to have the bill approved by the Committee.

However, a CBO Cost Estimate for the bill released on June 9 estimates that the Federal Housing Finance Regulatory Reform Act programs would increase net revenues by $800 million over the next ten years.[58] This suggests

---

[47] *Id.* at § 340, *replacing* §§ 1337(a)(1)-(3) of the Housing and Community Development Act of 1992.

[48] Memo to Members, National Low Income Housing Coalition, Senate Passes Foreclosure Prevention Act of 2008; Dodd Vows To Do More (April 11, 2008), Vol. 13, No. 19, *at* http://www.nlihc.org/detail/article.cfm?article_id=5039 [hereinafter NLIHC, Senate Passes Foreclosure Prevention Act of 2008].

[49] H.R. 3221, at § 340, *replacing* § 1337(o) of the Housing and Community Development Act of 1992.

[50] *Id.*, *replacing* § 1337(b)(1) of the Housing and Community Development Act of 1992.

[51] *Id.*, *replacing* §§ 1337(b)(2)(A)-(C) of the Housing and Community Development Act of 1992.

[52] *Id.*, *replacing* § 1337(c)(1) of the Housing and Community Development Act of 1992.

[53] H.R. 3221, at § 340, *replacing* § 1337(c)(2) of the Housing and Community Development Act of 1992.

[54] *Id.*, *replacing* § 1337(g) of the Housing and Community Development Act of 1992.

[55] *Id.*, *replacing* § 1337 of the Housing and Community Development Act of 1992.

[56] Memo to Members, National Low Income Housing Coalition, Action on Housing Trust Fund Expected Before July 4 Recess (June 6, 2008), Vol. 13, No. 23, *at* http://www.nlihc.org/detail/article.cfm?article_id=5261 [hereinafter NLIHC, Action on Housing Trust Fund Expected Before July 4 Recess]. The Act has not yet been assigned a bill number.

[57] S. ____, 110th Cong. § 131 (2008), *adding a new* § 1338 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (this amends the same statute as H.R. 3221, using a different name).

[58] CBO Cost Estimate, *supra* note 4, at 1.

that the risk associated with the bill's mortgage refinancing program has been overstated, and that diversion of GSE revenues from the Housing Trust Fund is unnecessary. The bill is expected to be taken up by the full Senate prior to the July 4 Congressional recess.[59] In a June 9th speech to the National Press Club, Federal Housing Administration Commissioner Brian Montgomery argued that the Senate proposal would be too risky to taxpayers.[60] Although Montgomery did not explicitly state that President Bush would veto the bill, his comments indicate that the Administration does not support the bill.

The HOPE for Homeowners program would require all subordinate liens to be extinguished, including any second mortgages.

FHA Refinancing and Foreclosure Relief

To address to need for mortgage foreclosure relief for homeowners, the bill incorporates the HOPE for Homeowners Act as Title VI of the bill. Like H.R. 3221, the bill would authorize up to $300 billion in refinancing loans insured by the FHA for homeowners facing foreclosure. The refinancing loans would be securitized through an additional $300 billion increase in Ginnie Mae commitment authority.[61] Participation in the HOPE for Homeowners program would be voluntary on the part of lenders and borrowers, and would require lenders to accept the new loan as full satisfaction of the current mortgage.[62] The bill would establish a Board of Directors for the program composed of the HUD Secretary, the Secretary of the Treasury, and the Chair of the Federal Deposit Insurance Corporation (FDIC).[63] Unlike H.R. 3221, the bill would also establish procedures for an auction to refinance mortgages on a bulk basis, if feasible.[64] The bill does not include any protections for renters facing eviction after their residences are foreclosed.

One purpose of the bill is to reduce mortgage loan principal obligations and interest rates to help distressed homeowners avoid foreclosure, thereby supporting long-term, sustainable homeownership.[65] Refinanced mortgages would have a fixed interest rate and a thirty-year term.[66] The bill would require the Board to ensure that interest rates on refinanced loans are commensurate with market-rate interest on comparable loans, and to reasonably limit loan origination fees.[67] The total amount of the loan principal that could be insured under the program would be the amount equal to the borrower's reasonable ability to pay, or the amount established at auction for bulk refinances, whichever is less. In either case, the amount of insured mortgage principal would not exceed 90% of the home's current value minus loan costs, meaning that the existing mortgage holder would receive no more than 87% of the property's current value.[68] The maximum dollar amount that could be insured is 132% of the 2007 conforming loan limit, which is currently $550,440 for a single-family home.[69] The program would require the waiver of all loan prepayment penalties, as well as penalties and fees assessed for default or delinquency.[70]

Borrowers would be required to share equity and any appreciation in value with the federal government.[71] Any equity created from sale, disposition, or subsequent refinancing would be shared between the government and borrower based on a five-year phase-in schedule. Any appreciation in property value upon sale or disposition of the property would be shared equally between the borrower and government.

Like H.R. 3221, the HOPE for Homeowners program would require all subordinate liens to be extinguished, including any second mortgages,[72] and would prohibit borrowers from taking out a second mortgage within five years of refinancing.[73] As discussed above, resistance on the part of second mortgage holders to release their liens could make many homeowners ineligible for the program. However, subordinate mortgage holders may be encouraged to participate by a provision that would allow them to receive a portion of the property's future appreciation that the homeowner would otherwise share with the federal government.[74]

The CBO estimates that 400,000 borrowers would refinance troubled loans under the HOPE for Homeowners program from 2009 through 2011, taking into consideration the high number of subprime and alt-A mortgages with second mortgage liens.[75] The program would sunset

[59]NLIHC, Action on Housing Trust Fund Expected Before July 4 Recess, *supra* note 56.
[60]Alan Zibel, *FHA Chief Warns Against Broad Housing Intervention*, Business Week, June 9, 2008, http://www.businessweek.com/ap/financialnews/D916PT080.htm.
[61]S. ____, at § 402, *adding* § 257(q) to Title II of the National Housing Act.
[62]S. ____, at § 402, *adding* § 257(s) to the National Housing Act.
[63]S. ____, at § 402, *adding* § 257(r) to the National Housing Act.
[64]S. ____, at § 402, *adding* § 257(e)(5) to the National Housing Act.
[65]S. ____, at § 402, *adding* § 257(b) to the National Housing Act.
[66]S. ____, at § 402, *adding* § 257(j) to the National Housing Act.
[67]S. ____, at § 402, *adding* § 257(r) to the National Housing Act.
[68]S. ____, at § 402, *adding* § 257(e)(2) to the National Housing Act. *See also* CBO Cost Estimate, *supra* note 4, at 7.
[69]S. ____, at § 402, *adding* § 257(6) to the National Housing Act. *See also Senate Panel Okays Foreclosure Relief Bill with Amendment To Create Housing Trust Fund*, 36 Housing and Dev. Rep. Current Dev. 321, 323 (June 2, 2008) [hereinafter H.D.R., *Senate Panel*].
[70]S. ____, at § 402, *adding* § 257(e)(3) to the National Housing Act.
[71]S. ____, at § 402, *adding* § 257(k) to the National Housing Act.
[72]S. ____, at § 402, *adding* § 257(e)(4)(B) to the National Housing Act.
[73]S. ____, at § 402, *adding* § 257(e)(7) to the National Housing Act.
[74]S. ____, at § 402, *adding* § 257(e)(4) to the National Housing Act.
[75]CBO Cost Estimate, *supra* note 4, at 8.

after five years, and no new commitments to insure refinanced mortgages would be made after December 31, 2012.[76]

Eligibility for Refinance Loans

FHA refinancing would be available for mortgages originated on or before January 1, 2008.[77] The bill includes certification requirements similar to those in H.R. 3221 to prevent borrowers from intentionally defaulting on mortgages to qualify for the program. To be eligible, borrowers must have been paying at least 31% of their income toward their total mortgage debt as of March 31, 2008.[78] Borrowers would also have to certify that they have not knowingly furnished false information to secure the mortgage, and that they have not intentionally defaulted on any debt, not just their current mortgage.[79] No homeowner who has been convicted of fraud would be eligible for the program, and the income of every applicant must be documented and verified by the IRS for the most recent two-year period.[80] Borrowers must occupy the home as their principal residence and be unable to afford their mortgage payments, and must not have a current ownership interest in any other home.[81]

Foreclosure Counseling Services

The bill would also authorize grants to provide financial education and counseling services to homeowners and prospective homebuyers. [82] The initial version of the bill would have appropriated $100 million for counseling services, but the version of the bill as approved by the Committee would simply authorize "sums as are necessary" to provide services.[83] The bill does not include provisions similar to those in H.R. 3221 that would allocate funds to states and tribes based on delinquency and foreclosure rates in prior years, and require a percentage of funds to be targeted toward minority and low-income homeowners. The bill would distribute grants to eligible organizations certified by HUD or the Office of Financial Education, and would require a report on the effectiveness of the program in improving the financial situation of participating households.[84] Unlike H.R. 3221, the Senate bill would *not* authorize funds for legal services for homeowners or renters facing foreclosure and displacement.

Nationwide Mortgage Licensing System and Registry

In an effort to reduce mortgage fraud, enhance consumer protection, and increase responsibility in the subprime mortgage market, the bill would also establish a Nationwide Mortgage Licensing System and Registry (NMLSR).[85] The bill would require state-licensed loan originators to participate in the NMLSR, which would establish uniform reporting requirements and license applications.[86] The bill would encourage states to establish their own loan originator licensing systems, but would grant HUD authority to establish such systems in states that do not create their own.[87]

Fannie Mae and Freddie Mac would also have a duty to serve underserved markets, including manufactured housing, subprime borrowers and rural markets.

GSE Reform and Housing Trust Fund Provisions

Like H.R. 3221, the Senate bill would enact regulatory reforms of the GSEs. The bill would also require Fannie Mae and Freddie Mac to make annual contributions to a permanent housing trust fund, discussed in more detail below. To consolidate oversight of the GSEs, the bill would establish a new Federal Housing Finance Agency (FHFA) to regulate Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance.[88] The FHFA would have authority over housing goals, mortgage portfolio limits, and capital standards.[89] The Senate bill would require GSE holdings to be backed by sufficient capital for the safe and sound operation of the enterprises.[90]

Significantly, the bill would impose on Fannie Mae and Freddie Mac a duty to undertake activities relating to mortgages on housing for very low-, low- and moderate-income families.[91] Fannie Mae and Freddie Mac would also have a duty to serve underserved markets, including manufactured housing, subprime borrowers, rural markets, and to conduct activities that facilitate a secondary market in affordable housing preservation.[92] Goals for single-family home purchase mortgages, including one-to four-family owner-occupied properties, single-family

[76]S. _____, at § 402, *adding* § 257(r) to the National Housing Act.
[77]S. _____, at § 402, *adding* § 257(s)(3)(B) to the National Housing Act.
[78]S. _____, at § 402, *adding* § 257(e)(1)(B) to the National Housing Act. The Board would be able to determine that an amount higher than 31% is appropriate. *Id*.
[79]S. _____, at § 402, *adding* § 257(e) to the National Housing Act. The borrower would be liable to the FHA for any benefits received through reduction of the mortgage based on misrepresentations. *Id*.
[80]S. _____, at § 402, *adding* § 257(e) to the National Housing Act.
[81]S. _____, at § 402, *adding* §§ 257(e), (s)(3) to the National Housing Act.
[82]S. _____, at § 132.
[83]S. _____, at § 132(e).
[84]S. _____, at § 132(f).
[85]S. _____, at § 602. *See also* H.D.R., *Senate Panel*, *supra* note 69, at 324.
[86]*Id*.
[87]*Id*.
[88]S. _____, at § 101, *amending* § 1311 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[89]H.D.R., *Senate Panel*, *supra* note 69, at 324.
[90]S. _____, at § 109, *amending* § 1369E of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[91]S. _____, at § 129.
[92]S. _____, at § 129. The duty to serve underserved markets also includes providing assistance to depository institutions in meeting their obligations under the Community Reinvestment Act (CRA). *Id*.

mortgage refinancings, and multifamily special affordable housing would replace Fannie and Freddie's current affordable housing goals.[93]

The Senate bill would establish a housing price index to annually adjust the conforming loan limit for GSEs. Rather than reducing loan limits if the index declines, as would H.R. 3221, the Senate bill would offset any loan limit reductions from future increases in the index.[94] Unlike H.R. 3221, the bill would provide adjustments in the conforming loan limit for areas with high housing costs.[95] However, the bill would prohibit Fannie Mae and Freddie Mac from holding loans in their portfolios that exceed the basic loan limit, except to the extent that such mortgages would be held for the purposes of securitization.[96] This restriction on Fannie and Freddie's portfolio holdings particularly will affect states with high housing costs, and has drawn concern from Senators Charles Schumer (D-NY) and Mel Martinez (R-FL).[97]

National Housing Trust Fund

Advocates were pleased that most of the key provisions of the National Affordable Housing Trust Fund Act of 2007 (H.R. 2523) were included in the Senate bill. The bill would establish a permanent housing trust fund that could accept contributions from Fannie Mae and Freddie Mac, as well as other sources that could be dedicated by Congress. Fannie Mae and Freddie Mac would contribute annually an amount equal to 4.2 basis points for each dollar (or 4.2 cents per 100 dollars) of the enterprises' total new business purchases.[98] After the first three years of the program, 65% of these contributions would be allocated to the Housing Trust Fund, and the remaining 35% to a Capital Magnet Fund.[99] Unlike S. 2523, the bill would not require grant recipients to match a specified percentage of the funds received from the trust fund, a provision long sought by advocates to increase public investment in affordable housing.

Grants from the Housing Trust Fund would be allocated to states and tribes using a needs-based formula, and then distributed to qualified agencies and organizations with a demonstrated experience and capacity to conduct eligible activities.[100] Funds could be used for the production, preservation, and rehabilitation of rental housing and housing for ownership by first-time homebuyers.[101] In contrast to H.R. 3221, public infrastructure development would not be eligible for funding. No more than 10% of the funds could be used for homeownership activities, whereas H.R. 3221 requires a minimum 10% of funds be allocated to homeownership.[102] Under the Senate bill, every state would receive a minimum of $3 million in Fund grants.[103]

Advocates were pleased that most of the key provisions of the National Affordable Housing Trust Fund Act of 2007 (H.R. 2523) were included in the Senate bill.

The allocation formula would take into consideration the following factors: the state's shortage of rental units affordable and available to extremely low-income households (those below 30% of area median income, or ELI) and very low-income households (those below 50% of area median income, or VLI) relative to other states, with priority consideration given to the shortage of housing for ELI households; the state's relative number of ELI households living with incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50% of their income towards rent; and the state's relative number of VLI households paying such rent burdens.[104] Like H.R. 3221, the bill would not impose affordability requirements on the housing units constructed or rehabilitated with HTF funds.

To ensure that the fund is used to help those households with the greatest housing needs, the bill would require that 75% of all HTF funds be used for activities benefiting ELI families, and 25% for activities benefiting VLI families.[105] This provision, central to the National Housing Trust Fund Campaign, was adopted by Senator Reed and Senator Dodd in the version of the bill as passed by the Committee. Significantly, there is no provision in the Senate bill that would prohibit the use of HTF funds for activities benefiting undocumented immigrants.

---

[93]S. ____, at § 129. *See also* H.D.R., *Senate Panel*, *supra* note 69, at 324.
[94]S. ____, at § 124. *See also* H.D.R., *Senate Panel*, *supra* note 69, at 324.
[95]S. ____, at § 124. Loan limits in high cost housing areas would be equal to the median home price for the area, or 132% of the basic loan limit, whichever is less. *Id*.
[96]S. ____, at § 124.
[97]*Id*. *See also* H.D.R., *Senate Panel*, *supra* note 69, at 324.
[98]S. ____, at § 131, *replacing* § 1337 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4567).
[99]S. ____, at § 131, *replacing* § 1337 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[100]S. ____, at § 131, *adding a new* § 1338(c) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[101]S. ____, at § 131, *adding a new* § 1338(c)(7) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[102]S. ____, at § 131, *adding a new* § 1338(c)(9) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[103]S. ____, at § 131, *adding a new* § 1338(c)(4) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.
[104]S. ____, at § 131, *adding a new* § 1338(c)(3) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. The formula would take into consideration state construction costs relative to other states. *Id*.
[105]S. ____, at § 131, *adding a new* § 1338(c)(7) to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

The Capital Magnet Fund (CMF) created by the bill would be used to attract private capital through a competitive grant program.[106] Capital brought in by the CMF could be used for affordable housing as well as economic development or community service activities, and would be distributed to certified Community Development Financial Institutions. Advocates hope that when the bill is conferenced with the House, its provisions can be changed either to omit the CMF altogether to increase revenue for the Housing Trust Fund, or to require CMF funds to be used exclusively for affordable housing.

Administration's Position

In response to the mortgage foreclosure crisis, the Bush Administration launched the FHASecure program in August of 2007, in combination with a risk-based pricing structure for FHA loans that took effect January 1, 2008.[107] Initially, the FHASecure program provided FHA-insured refinancing loans for homeowners in non-FHA ARMs who only missed mortgage payments after their interest rate reset, and who had strong credit histories.[108] To qualify for FHASecure, homeowners must have made all payments in the six months before the ARM teaser interest rate expired.[109] In addition, homeowners must have had an interest rate that reset or will reset between June 2005 and December 2008, 3% cash or equity in the home, a sustained employment history, and income sufficient to make the mortgage payments.[110] Under the risk-based pricing structure for FHA-insured loans, borrowers with less favorable credit profiles pay higher loan premiums.[111]

In an effort to allow more distressed homeowners to utilize the program, on April 9 Assistant Secretary for Housing and FHA Commissioner Brian Montgomery announced the expansion of FHASecure to make some borrowers with a history of delinquent payments on ARMs prior to an interest rate reset eligible for refinancing. Under the expanded program, homeowners who were late on up to two thirty-day payments or one sixty-day payment in the previous twelve months qualify for FHASecure loans to refinance up to 97% of their mortgage.[112] Homeowners with ARMs who were late on up to three thirty-day payments or one ninety-day payment in the last twelve months qualify for FHASecure loans to refinance up to 90% of their mortgage.[113] Homeowners with fixed-rate mortgages are eligible for the program if they are current on mortgage payments.[114]

The Bush Administration expects the FHASecure program to help up to 240,000 families avoid foreclosure,[115] as compared to the 500,000 and 400,000 estimated to be helped by H.R. 3221 and the Senate's Federal Housing Finance Regulatory Reform Act, respectively.

What's Next

Because the housing provisions of H.R. 3221 did not pass the House with a super-majority vote sufficient to override the threatened Presidential veto, the bill is unlikely to be successful in its current form. Negotiations have been taking place between chairs of the Senate Banking Committee and the House Committee on Financial Services, Sen. Dodd (D-CT) and Rep. Barney Frank (D-MA), respectively, to establish a compromise between H.R. 3221 and the Senate bill.[116] Representative Frank has sent a list of requested changes to the Senate Committee, which includes an increase in the conforming loan limit for high-cost areas, a provision opposed by Senator Shelby.[117] The full Senate could consider the bill in late June.[118] Although the Administration has signaled opposition to the bill, Rep. Frank predicts that President Bush will ultimately sign the bill because the Administration supports its provisions on stronger GSE regulation and FHA modernization.[119] The National Housing Trust Fund Campaign supports the Senate bill in its current form.[120] Resolution of the many policy differences appears likely before the election recess. ■

---

[106]H.D.R., *Senate Panel*, *supra* note 69, at 323.

[107]Jacobs, *supra* note 7, at 253; Press Release, United States Department of Housing and Urban Development, No. 07-123, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, Keep Their Homes, FHA to Implement New "FHASecure" Refinancing Product (August 31, 2007), *available at* http://www.hud.gov/news/release.cfm?content=pr07-123.cfm [hereinafter Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance].

[108]Jacobs, *supra* note 7, at 253.

[109]*Id*.

[110]Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, *supra* note 107.

[111]*Id*.

[112]Memo to Members, National Low Income Housing Coalition, Senate Appropriations Holds Hearing on FHA's Role in Crisis (April 11, 2008), Vol. 13, No. 15, *at* http://nlihc.org/detail/article.cfm?article_id=5040; *Guidance Issued for Expanded FHASecure Program; Risk-Based MIP Structure to Be Implemented*, 36 Housing and Dev. Rep. Current Dev. 289, 292 (May 19, 2008) [hereinafter H.D.R., *Guidance Issued*].

[113]H.D.R., *Guidance Issued*, *supra* note 112, at 292.

[114]*Id*.

[115]Press Release, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, *supra* note 107.

[116]Memo to Members, National Low Income Housing Coalition, Senate Action on GSE Bill is Imminent (June 13, 2008), Vol. 13, No. 24, *at* http://www.nlihc.org/detail/article.cfm?article_id=5275 [hereinafter NLIHC, Senate Action on GSE Bill is Imminent].

[117]Steve Sloan, *Frank Offers GSE Changes Ahead of Senate Vote*, American Banker, June 16, 2008, http://www.americanbanker.com/errornocookies.html?url=%2F%24nocookies%24%2Farticle.html%3Fid%3D20080613LDEZC8D1.

[118]*Id*.

[119]*Frank Predicts President Will Sign Mortgage Foreclosure Relief Bill*, 36 Housing and Dev. Rep. Current Dev. 321, 324 (June 2, 2008).

[120]NLIHC, Senate Action on GSE Bill is Imminent, *supra* note 116.

As Impacts Spread, Congress Considers Additional Foreclosure Policies*

The current mortgage foreclosure crisis has not just affected homeowners who lose their homes when their mortgage payments become unaffordable, but has also displaced countless renters and left thousands of homes vacant in neighborhoods across the country. According to the Center on Budget and Policy Priorities, more than 25% of foreclosures affect households with renters, who frequently face abrupt eviction after building owners default on mortgage payments and lenders take over.[1] Displaced renters must then incur significant relocation expenses, often without receiving their security deposits, and then face tough rental markets and sometimes homelessness.

Particularly alarming is the scale on which the foreclosure crisis is affecting renters. RealtyTrac estimates that through the end of April 2008 more than 38% of properties in foreclosure nationwide were "not-owner occupied."[2] Although this figure includes second homes as well as rental properties, the National Low Income Housing Coalition (NLIHC) estimates that a significant number of homes in the latter stages of foreclosure nationwide are rental properties or multi-unit buildings.[3] A closer study by the NLIHC of foreclosures in four New England states revealed that the number of multifamily units in the latter stages of foreclosure is increasing at a higher rate than single-family home foreclosures.[4]

As both owners and renters are displaced by foreclosures, thousands of properties remain vacant throughout the country.[5] In March 2008, almost 3% of homes that had once been owner-occupied were vacant nationally, the highest percentage since the Census Bureau began recording this figure.[6] According to the Center on Budget and Policy Priorities, high concentrations of foreclosure vacancies in neighborhoods nationwide are contributing to falling property values and rising crime rates, and are weakening many local tax bases.[7] Because of the high concentration of subprime mortgages in predominantly African-American and Latino neighborhoods,[8] this surge in foreclosure vacancies and the attendant social problems is likely to disproportionately affect minority communities.

To stem the growing tide of displaced renters and foreclosure vacancies, advocates are pursuing legislation that would establish federal protections for renters facing eviction due to foreclosure, and allocate funds to revitalize neighborhoods hardest hit by foreclosure vacancies. Advocates also have called for heightened protections for Section 8 voucher recipients, who risk losing their subsidies if they cannot find new housing quickly enough after being displaced by a foreclosure.[9]

H.R. 5818

On May 8, the House passed the Neighborhood Stabilization Act of 2008 (H.R. 5818), introduced by Representative Maxine Waters (D-CA) to address the national increase in owner-abandoned foreclosed properties. The primary goal of the bill is to quickly occupy vacant properties in order to stabilize and ensure the safety of neighborhoods with large numbers of foreclosure vacancies.[10] To this end, the bill would allocate funds to purchase vacant foreclosed properties at a discount from their current value for rehabilitation and resale for homeownership and rental housing.[11] H.R. 5818 was passed by a vote of 239-188 and has been referred to the Senate Committee on Banking, Housing and Urban Affairs.[12]

---

*Katherine Lehe, a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and a summer intern at the National Housing Law Project, is the author of this article.

[1]Rather than assume the role of landlord when building owners lose their rental properties, mortgage lenders typically evict renters after repossessing homes. Statement by Barbara Sard, Director of Housing Policy, Center for Budget and Policy Priorities, House Action on Foreclosure Legislation 1 (May 7, 2008), *at* http://www.cbpp.org/5-7-08housstmt.htm [hereinafter CBPP Statement].

[2]Thelma Gutierrez and Wayne Drash, *Man Pays $30K in Rent, Faces Eviction*, CNN, May 29, 2008, *at* http://www.cnn.com/2008/LIVING/wayoflife/05/28/renters.booted/.

[3]Research Note, National Low Income Housing Coalition, No. 08-01, Properties, Units, and Tenure in the Foreclosure Crisis: An Initial Analysis of Properties at the End of the Foreclosure Process in New England 2 (May 8, 2008), *available at* http://www.nlihc.org/doc/RN-08-01-Multi-Unit-Foreclosure-FINAL-05-06-08.pdf.

[4]In Connecticut, Massachusetts, New Hampshire, and Rhode Island during the first quarter of 2008, the number of multi-family units in the latter stages of foreclosure was more than five times greater than during the same period in 2007, and the number of single-family homes was 3.5 times greater. Memo to Members, National Low Income Housing Coalition, NLIHC Research: Multifamily Foreclosure Growing in New England, Nationwide (May 9, 2008), Vol. 13, No. 19, *at* http://www.nlihc.org/detail/article.cfm?article_id=5122.

[5]*See* CBPP Statement, *supra* note 1, at 1.

[6]Vikas Bajaj, *Contractors Are Kept Busy Maintaining Abandoned Homes*, N.Y. Times, May 27, 2008, http://www.nytimes.com/2008/05/27/business/27home.html?partner=rssnyt.

[7]CBPP Statement, *supra* note 1, at 1.

[8]The high concentration of subprime mortgages in black and Hispanic neighborhoods is documented in federal loan records. This pattern also emerges when comparing middle-income or upper-income neighborhoods with comparable minority neighborhoods. *See* Vikas Bajaj and Ford Fessenden, *What's Behind the Race Gap?*, N.Y.Times, November 4, 2007, http://www.nytimes.com/2007/11/04/weekinreview/04bajaj.html.

[9]CBPP Statement, *supra* note 1, at 2.

[10]Press Release, House Committee on Financial Services, 110th Congress, Neighborhood Stabilization Act of 2008 (H.R. 5818) (April 17, 2008), *at* http://www.house.gov/apps/list/press/financialsvcs_dem/press0417083.shtml.

[11]*See* CBPP Statement, *supra* note 1, at 1.

[12]Memo to Members, National Low Income Housing Coalition, House Passes Neighborhood Stabilization Bill (May 9, 2008), Vol. 13, No. 19, *at* http://www.nlihc.org/detail/article.cfm?article_id=5116 [hereinafter NLIHC, House Passes Neighborhood Stabilization Bill].

The bill would provide a total of $15 billion in Community Development Block Grants for state and local governments, including $7.5 billion in loans and $7.5 billion in grants, which HUD would allocate directly to states, cities and counties.[13] Funds could be distributed to cities that are among the 100 largest metropolitan cities in the country, or that have a population of at least 50,000 and a foreclosure rate at or above 125% of the state rate.[14] Funds could also be distributed to urban counties that are among the fifty largest, and to rural areas.[15] Grants and loans could then be administered directly by state, city, or county entities, designated housing finance agencies or departments, or "any other designee," including nonprofit organizations.[16]

Eligible Activities[17]

Loans could be used to fund the rehabilitation of vacant foreclosures, and to purchase or finance the purchase of foreclosed homes for resale as owner-occupied and rental housing.[18] Loan funds could be used to purchase single-family homes with an appraised value equal to or less than 110% of the average area single-family home price.[19] Multi-family housing could be purchased for up to the applicable FHA Section 207 limit.[20] Single-family homes and multi-family housing up to sixty-four units would be eligible for purchase with program funds.[21] All loans disbursed under the program would be zero-interest, non-recourse loans.[22] Loans made to purchase or finance housing for homeownership would have a three-year term, and loans made to purchase or finance rental housing would have a five-year term.[23]

Grant funds could be used to pay the costs associated with the purchase of housing acquired with loan funds, as well as operating and holding costs.[24] Grants could also be used to demolish deteriorated or unsafe foreclosed housing, and to pay administrative and planning costs associated with the program.[25] Grants could not be used for downpayment assistance.[26]

Neither loan nor grant funds allocated under the program may be used to benefit undocumented immigrants.[27] The bill would allow the federal government to share in any profits from the resale properties assisted with program funds.[28]

Income-Targeting Provisions

The bill would require recipients to establish allocation plans that prioritize activities that serve low-income communities and households, and includes specific provisions for the income-targeting of grant and loans funds. Properties purchased to resell for homeownership could only be resold to families with incomes at or below 140% of area median income (AMI).[29] Properties purchased for rental, rent-to-own, or lease-purchase housing could only be occupied by households with incomes at or below AMI, and rents could not exceed market rate for comparable units in the area.[30]

Grant recipients would be required to use at least half of all grant funds to provide housing for families with incomes less than 50% of the AMI, classified as very low-income families.[31] Of this half, at least 50% must be used to provide housing for families with incomes less than 25% of the AMI (extremely low-income families), for a total floor of at least 25% of overall grant funds.[32]

In utilizing grant and loan funds, recipients would be required to prioritize activities that serve the lowest-income families for the longest period of time, and to provide housing for income-qualifying homeowners whose mortgages have been foreclosed.[33] The bill would also require that funded activities not result in a significant net loss in rental housing in the area.[34] Recipients would have to establish additional allocation priorities, which may include providing housing for homeless persons or activities in accordance with a state's ten-year plan to end homelessness.[35] However, the bill stops short of requiring recipients to prioritize activities that provide housing for the homeless.

The bill would also require recipients to establish a general plan that allocates funds to activities that serve households with the greatest housing needs.[36] Plans would have to prioritize the allocation of funds to low- and

---

[13]*House Approves $15 Billion Bill for Acquisition, Rehab of Foreclosed Home by State, Local Governments*, 36 Housing and Dev. Rep. Current Dev. 291 (May 19, 2008) [hereinafter H.D.R.].
[14]H.R. 5818, 110th Congress, § 8 (2008).
[15]*Id.*
[16]*Id.* at § 4.
[17]Political activities, advocacy, lobbying, counseling services, travel expenses, and tax return assistance are all ineligible for grant or loan assistance under the program. H.R. 5818, at § 8(c).
[18]H.R. 5818, at § 8.
[19]*Id.* at § 13(7).
[20]*Id.*
[21]*Id.* at § 13(4).
[22]*Id.* at § 6(d).
[23]*Id.* at § 6(d).
[24]*Id.* at § 8(b).
[25]*Id.* at § 8.
[26]*Id.* at § 8(b).
[27]*Id.* at § 16.
[28]In general, the government would receive 20% of the net gain from funded activities, and 50% in the case of for-profit property owners. H.D.R., *supra* note 3, at 291.
[29]H.R. 5818, at § 8.
[30]*Id.* at § 8.
[31]*Id.* at § 8(d).
[32]*Id.* at § 8(d). However, in some circumstances the Secretary may waive the requirement that 25% of grant funds be targeted to extremely low-income families. *Id.*
[33]H.R. 5818, at § 4(b).
[34]*Id.*
[35]H.R. 5818, at § 4(b)(11).
[36]H.R. 5818 would also give priority to activities serving veterans, members of the Armed Forces, teachers, and emergency responders in the allocation of housing rehabilitation funds. H.R. 5818, at § 4(b)(8).

moderate-income neighborhoods with high concentrations of vacancies.[37] Funding recipients would have to give priority emphasis to geographical areas with the greatest need, including those with the highest percentages of home foreclosures, the highest percentages of homes financed by subprime mortgage loans over ninety days delinquent, or areas likely to face a significant rise in foreclosure rates.[38] However, advocates have expressed concern that the proposed funding allocation formula is based on data that is biased against low- and moderate-income housing markets, and underestimates the extent of subprime loans, delinquencies, foreclosures, and Real Estate Owned properties in low- to moderate-income communities.[39]

H.R. 5818 would require a minimum ninety-day notice to vacate for all tenants in rental properties that receive funds provided under the bill.

Renter Protections

Advocates had hoped to include significant protections for all renters who face eviction when their residences are foreclosed. Although the version of H.R. 5818 as passed by the House omitted many significant renter protections proposed by advocates, the bill does include protections for tenants in housing purchased with H.R. 5818 funds, including separate protections for Section 8 tenants.

H.R. 5818 would require a minimum ninety-day notice to vacate for all tenants in rental properties that receive funds provided under the bill.[40] Tenants with a lease agreement would be allowed to stay for six months after the notice of foreclosure, or for the remainder of their lease, whichever comes first.[41] Advocates had hoped to extend eviction protections to tenants in all rental housing facing foreclosure. Because most tenants in foreclosed homes are likely to be evicted before the property can be purchased with program funds, these renter protections are unlikely to have a significant impact.

The bill would provide several protections for Section 8 voucher holders renting from owners who utilize program funds.[42] New owners would be required to take subject to any existing Section 8 lease and Housing Assistance Payment (HAP) contract.[43] Further, vacating the property prior to sale would not constitute good cause for termination of the tenancy unless the unit is unmarketable while occupied, or unless the owner seeks to personally occupy the property.[44]

The bill's voucher nondiscrimination provision would prohibit owners who purchase housing with H.R. 5818 funds from refusing to lease to tenants on the basis of their voucher assistance.[45] However, these protections are likely to have a narrow impact because they would be limited to Section 8 tenants in properties that receive H.R. 5818 funds.

Additional Tenant Protection Bills

H.R. 5963 and S. 3034

Two identical bills introduced in the House and Senate would enact stronger renter protections sought by advocates. H.R. 5963 was introduced by Representatives Keith Ellison (D-MN), Carolyn McCarthy (D-NY), and Michael Capuano (D-MA) on May 5, 2008, and is currently in the House Committee on Financial Services.[46] S. 3034, introduced by Senator John Kerry (D-MA) on May 19, 2008, has been referred to the Senate Committee on Banking, Housing, and Urban Affairs. Both are titled the Protecting Tenants at Foreclosure Act of 2008. The bills' protections would extend to all renters in foreclosed homes, not only those who live in housing assisted by H.R. 5818 funds.

Both bills would extend the ninety-day notice to vacate requirements to tenants in all rental properties facing foreclosure.[47] Tenants under leases entered into before a notice of foreclosure would be allowed to occupy the unit for the remainder of the lease term. Exceptions would be allowed if the unit is sold to a purchaser who will occupy the unit as a primary residence, provided the tenant is given a ninety-day notice. Although some advocates have proposed that the problem of renter displacement upon foreclosure be addressed by allocating funds for relocation expenses, no such provision has been included in the House or Senate bills.[48]

The bills would also amend Section 8(o)(7) of the Housing Act of 1937 to include protections for all Section 8 voucher holders. These provisions would require subsequent purchasers of foreclosed properties to take

[37]H.R. 5818, at § 4(b)(3).
[38]*Id.* at § 4(b).
[39]Memo to Members, National Low Income Housing Coalition, House Hearing Addresses the Targeting of Funds for Foreclosed Properties (May 23, 2008), Vol. 13, No. 21, *at* http://www.nlihc.org/detail/article.cfm?article_id=5159.
[40]H.R. 5818, at § 8(i).
[41]*Id.* These provisions would not affect the requirements for the terminations of any federally subsidized tenancy. H.R. 5818, at § 8(i)(1)(B)(ii).
[42]H.R. 5818, at § 8(h).
[43]*Id.*
[44]The bill provides that these provisions "shall not preempt any state or local laws that provide more protection for tenants." H.R. 5818, at § 8(h)(2).
[45]H.R. 5818, at § 8(h).
[46]*See* Memo to Members, National Low Income Housing Coalition, Organizations Express Support for Foreclosure-Related Bills (May 16, 2008), Vol. 13, No. 20, *at* http://www.nlihc.org/pubs/issue.cfm?id=574.
[47]S. 3034, 110th Cong. § 2(1) (2008); H.R. 5963, at § 2(1).
[48]*See* CBPP Statement, *supra* note 1, at 2.

subject to any existing Section 8 lease and HAP contract.[49] The bills also include provisions governing the ability of owners who purchase foreclosed properties to terminate a Section 8 tenancy by vacating the unit. The bills would provide that under the initial term of a Section 8 lease, vacating the property prior to sale would not constitute good cause for the termination of a tenancy.[50] Under subsequent lease terms, vacating the property prior to sale would constitute good cause if the property is unmarketable while occupied, or if the subsequent owner occupies the unit as a primary residence.[51] The bills do not include the voucher non-discrimination provisions included in H.R. 5818.

H.R. 6116

The House Committee on Financial Services is also considering the Saving Family Homes Act of 2008 (H.R. 6116), introduced by Representative Raul Grijalva (D-AZ) on May 21, 2008.[52] The bill would allow owners of moderate-value single-family homes to stay in their residences as renters for twenty years after a mortgage foreclosure.[53] The plan is modeled after the foreclosure prevention proposal from Dean Baker of the Center for Economic Policy Research.[54] The bill has been referred to the House Committee on Financial Services.

What's Next

H.R. 5818 was referred to the Senate Committee on Banking, Housing and Urban Affairs after it passed the House on May 8, and there are currently no plans for the bill to be taken up by the Senate.[55] Because H.R. 5818 was passed by a House vote of only 239-188, even after Senate passage it is unlikely to receive the two-thirds majority necessary to override the President's threatened veto.[56] Currently, H.R. 5963 and H.R. 6116 both remain in the House Committee on Financial Services, and S. 3034 in the Senate Committee on Banking, Housing, and Urban Affairs. Further House or Senate action on these three renter protection bills remains uncertain. ■

[49]These provisions would not affect state or local laws that provide longer periods or additional protections for tenants. S. 3034, at § 3 (2008), *amending* § 8(o)(7) of the United States Housing Act of 1937; H.R. 5963, at § 3, *amending* § 8(o)(7) of the United States Housing Act of 1937.
[50]H.R. 5963, at § 3; S. 3034, at § 3, *amending* § 8(o)(7) of the United States Housing Act of 1937.
[51]*Id.*
[52]Memo to Members, National Low Income Housing Coalition, Own-To-Rent Bill Introduced in House (May 23, 2008), Vol. 13, No. 21, *at* http://www.nlihc.org/detail/article.cfm?article_id=5161 [hereinafter NLIHC, Own-To-Rent Bill].
[53]H.R. 6116, 110th Cong. § 2 (2008).
[54]NLIHC, Own-To-Rent Bill, *supra* note 52.
[55]NLIHC, House Passes Neighborhood Stabilization Bill, *supra* note 2.
[56]Statement of Administrative Policy, Executive Office of the President, Office of Management and Budget, H.R. 5818—Neighborhood Stabilization Act of 2008 1 (May 6, 2008), http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr5818-r.pdf.

Efforts to Erode Rent Control Continue

Several recent actions in California and Maryland demonstrate that rent control legislation remains vulnerable to constitutional challenges by property owners. In California, a series of cases alleging that mobile home rent control ordinances violate the Takings Clause of the Fifth Amendment has produced mixed results, with at least one court deeming an ordinance unconstitutional. Meanwhile, the U.S. Court of Appeals for the Fourth Circuit will examine whether the city of Takoma Park, Maryland's rent control ordinance effects a regulatory taking.

Mobile Home Rent Control Litigation

In *MHC Financing, Ltd. v. City of San Rafael*,[1] a federal district court recently ruled that a mobile home park rent control ordinance that held rents well below market value was unconstitutional. Plaintiff MHC Financing, Ltd. (MHC) owns Contempo Marin Mobilehome Park in San Rafael, California.[2] MHC leases plots of land known as "pads" for placement of mobile homes.[3] MHC owns 311 properties throughout the United States and Canada containing 112,779 pads.[4] The company's forty-eight California properties include several rent-controlled mobile home parks.[5] As part of its effort "to realize the value of our Properties subject to rent control," MHC has initiated several lawsuits challenging rent control ordinances.[6]

There are 396 mobile home pads at Contempo Marin, and approximately 1,000 people live at the park.[7] Lessees at Contempo Marin who wish to relocate have typically sold their mobile homes, rather than pulling them from the park.[8] Purchasers of the mobile homes take over the pad leasehold on which the mobile home is located.[9]

In 1989, San Rafael enacted the Mobilehome Rent Stabilization Ordinance, which limited annual pad rental increases to a graduated percentage of the consumer price index (CPI).[10] In 1993, the city enacted vacancy control provisions, which required that the below-market rents be passed on when tenants transferred ownership of their mobile homes to new tenants.[11] In 1999, the city limited annual rent increases to 75% of any increase in CPI.[12] In

[1]No. 00-3785, 2008 WL 440282 (N.D. Cal. Jan. 29, 2008).
[2]*Id.* at *2. MHC is now known as Equity Lifestyle Properties, Inc.
[3]Equity Lifestyle Properties, Inc., Form 10-K at 3 (Feb. 28, 2008).
[4]*Id.*
[5]*Id.*
[6]*Id.* at 11.
[7]MHC Fin., Ltd. v. City of San Rafael, No. 00-3785, 2008 WL 440282, at *2 (N.D. Cal. Jan. 29, 2008).
[8]*Id.*
[9]*Id.*
[10]*Id.* at *5.
[11]*Id.*
[12]*Id.* at *6.

October 2000, MHC filed a lawsuit challenging the ordinance on the grounds that it violated the Takings Clause of the Fifth Amendment.

After a bench trial, the court made several findings regarding the ordinance's economic impact. The court found that the 1999 amendments caused pad rents to fall progressively behind market rents.[13] MHC was restricted to average pad rentals of $675 in 2006, while the estimated market rent was $1,700.[14] The court also found that the value of the below-market pad rental was capitalized into the selling price when mobile homes were sold to incoming tenants.[15] Homes with average replacement values of $27,000 were sold for average premiums of $67,000 because purchasers would enjoy below-market rents.[16]

The court next examined whether the ordinance constituted a regulatory taking using the factors set forth in *Penn Central Transportation v. City of New York*.[17] Those factors are (1) the magnitude of a regulation's economic impact; (2) the degree to which the regulation interferes with legitimate property interests; and (3) the character of the governmental interest.

After analyzing the first factor, the court found that the ordinance was "functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land."[18] The court found that the below-market rents deprived MHC of approximately $5.2 million in annual net operating income, or 75% of the net operating income that MHC would realize under market conditions.[19] Further, the court found that the park's value was less than $23 million, but that the park would be worth $120 million without the ordinance.[20]

The court next analyzed whether the ordinance interfered with MHC's reasonable investment-backed expectations. The court found that when MHC purchased the park in 1994, it had a reasonable expectation that it would be provided a reasonable return on its property value.[21] The court found that the 1999 amendment capping annual rent increases at 75% of any increase in CPI frustrated MHC's expectations by transferring much of the park's value to the tenants, and denying MHC a return on its capital in an escalating real estate market.[22] The court noted that approximately 90% of the ordinance's economic impact on MHC's rents was a function of the ordinance's application after 1999.[23]

In analyzing the character of the ordinance, the court found that the city singled out MHC to bear a burden that should be borne by the public as a whole.[24] The court noted that mobile home park owners were the only landowners in San Rafael that were prohibited from obtaining market value for any part of their property.[25] However, the court found no evidence that mobile home parks had contributed disproportionately to San Rafael's affordable housing shortage.[26] Based on the *Penn Central* factors, the court found that the ordinance gave rise to a regulatory taking.[27]

The court next examined whether the ordinance met the public use test required for a taking under the Fifth Amendment.[28] The court stated that MHC was required to prove by a preponderance of the evidence that the public purposes asserted as justification for the ordinance were without reasonable foundation, or that the city imposed the ordinance under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.[29]

The city cited three interests furthered by the ordinance: (1) protection of mobile home owner equity; (2) creation of more affordable housing; and (3) protection of fixed-income residents.[30] The court rejected the city's first argument because mobile home owners' equity is limited to the salvage value of the mobile home, and the tenant has no interest in the mobile home's "placement value."[31] The court next found that the ordinance failed to create more affordable housing or protect fixed-income residents because the benefit of lower rents was entirely offset by the premium mobile home purchasers paid for the below-market rents.[32] Further, the court found that vacancy control decreased the availability of affordable housing by discouraging investment in new mobile home parks.[33] Because the city's assertion of a public purpose was pretextual and without reasonable basis, and because the ordinance's "singular purpose" was to transfer property value from one private party to another, the court found that the ordinance constituted a private taking.[34]

---

[13] *Id.* at *7.
[14] *Id.* at *12.
[15] *Id.* at *8.
[16] *Id.*
[17] 438 U.S. 104 (1978). The Supreme Court has held that Escondido, California's mobile home rent control ordinance did not authorize an unwanted physical occupation of mobile home owners' property and thus did not amount to a *physical* taking. Yee v. City of Escondido, 503 U.S. 519 (1992). In contrast to MHC Financing, Ltd. v. City of San Rafael, the issue of whether a mobile home rent control ordinance constituted a *regulatory* taking was not before the *Yee* Court.
[18] MHC Fin., Ltd. v. City of San Rafael, No. 00-3785, 2008 WL 440282, at *13 (N.D. Cal. Jan. 29, 2008).
[19] *Id.* at *12.
[20] *Id.*
[21] *Id.* at *14.
[22] *Id.* at *15.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at *16.
[27] *Id.* at *17.
[28] *Id.* at *19.
[29] *Id.* (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) and Kelo v. City of New London, 545 U.S. 469, 478 (2005)).
[30] *Id.* at *20.
[31] *Id.* at *21.
[32] *Id.* at *22.
[33] *Id.* at *23.
[34] *Id.* at *25.

MHC also raised a substantive due process challenge under the Fourteenth Amendment. The court acknowledged that the Supreme Court in *Lingle v. Chevron USA, Inc.*[35] suggested that a regulatory taking may be challenged as a denial of substantive due process.[36] However, the court found that *Lingle*'s due process discussion was dicta because the plaintiff had voluntarily dismissed this claim prior to the Supreme Court's review of the case.[37] The court therefore followed longstanding Ninth Circuit precedent in concluding that a deprivation of property cannot be challenged via substantive due process.[38]

Due to the fact-intensive nature of the court's *Penn Central* analysis, it is difficult to predict this case's impact upon the more than 100 California cities that have mobile home rent control ordinances, or upon similar ordinances nationwide. The court repeatedly noted the magnitude of MHC's income deprivation and the amount of the benefit transferred to mobile home owners. Further, much of the court's inquiry focused on the ordinance's vacancy control provisions, which differ significantly among jurisdictions.

The city plans to appeal.[39] According to the city, this is the first reported decision in which this type of mobile home rent control ordinance has been found to be either a private taking or a violation of *Penn Central*.[40] The city states that California courts have repeatedly held similar mobile home ordinances to be valid.[41] The city also notes that the Ninth Circuit has repeatedly held that mobile home rental control ordinances are rationally related to legitimate public policies.[42]

Recent outcomes in other mobile home rent control cases illustrate the complexity and fact-specific nature of these cases. MHC has also challenged Santee, California's rent control ordinances. In contrast to *MHC Financing, Ltd. v. City of San Rafael*, a superior court recently found that MHC had not incurred any damages from enforcement of these ordinances primarily because they afforded MHC a fair rate of return.[43] The court found that the San Rafael case was "not persuasive" because the decision was rendered in a different jurisdiction and involved the application of a different rent control ordinance.[44]

In *Surf and Sand, LLC v. City of Capitola*, a federal district court recently found that a mobile home park owner's challenge to Capitola, California's ordinance regulating conversion of the park to resident ownership was not ripe.[45] The park had been covered for several years by Capitola's rent control and park closure ordinances.[46] Surf and Sand sought to subdivide the park and convert it to resident ownership.[47] Capitola then adopted a conversion ordinance stating that any plan by an owner to convert a mobile home park to resident ownership would be presumed to be a "sham" conversion unless a majority of the tenants approved it.[48] Surf and Sand argued that the conversion ordinance, in conjunction with the rent control and park closure ordinances, constituted an unconstitutional deprivation of the true economic value of the park.[49] The court dismissed Surf and Sand's claims as unripe because it had not alleged that it carried out a tenant survey, that a majority of the tenants opposed the conversion, or that it had attempted to rebut the presumption of a sham conversion.[50]

Although it is difficult to make generalizations about these decisions, it is likely that owners will continue to challenge mobile home rent control ordinances. MHC estimates that the annual rent "subsidy" to tenants in California (apparently, mobile home) rent control jurisdictions may be in excess of $15 million, and has stated that its goal is "to achieve a level of regulatory fairness in [these] jurisdictions, and in particular those jurisdictions that prohibit increasing rents to market upon turnover."[51] In California jurisdictions regulating rents on ordinary rental housing, the state has required vacancy decontrol for many years, permitting rents to be re-set at market levels when tenants move out, thus reducing the scope of lost profits. In any event, facial takings challenges to rent controls on ordinary rental housing have been rejected by the state's highest court.[52] Further, California voters recently rejected a ballot initiative that would have phased out all forms of rent control (see accompanying story).

---

[35]544 U.S. 528 (2005).

[36]MHC Fin., Ltd. v. City of San Rafael, No. 00-3785, 2008 WL 440282, at *26 (N.D. Cal. Jan. 29, 2008).

[37]*Id.* at *28.

[38]*Id.* at *25.

[39]On February 12, 2008, the court requested both parties to brief the issue of whether the court should stay its judgment pending appeal. On February 20, 2008, MHC sent letters to park residents informing them that it considered the ordinance to be unenforceable, and that as of March 1, 2008, it would raise pad rents to $1,925 per month. This increase would more than double (and, in some cases, triple) the residents' current rents. The court later informed the parties that its January 29, 2008, order was not intended to immediately invalidate the ordinance, and that the status quo would remain in effect until briefing on the stay is completed.

[40]City of San Rafael's Brief in Support of Mot. for Stay of Inj. at 16, MHC Fin. Ltd. v. City of San Rafael, No. 00-3785 (N.D. Cal. Mar. 14, 2008).

[41]*Id.* (citing Sandpiper Mobile Vill. v. City of Carpinteria, 12 Cal.Rptr.2d 623 (Cal. App. 1992); Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd., 35 Cal. Rptr. 2d 315 (Cal. App. 1994)).

[42]*Id.* at 16-27 (citing Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1055 (9th Cir. 2004); Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994); Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 690 (9th Cir. 1993)).

[43]MHC Fin., Ltd. v. City of Santee, No. GIC 77094, slip op. at 22-23 (Cal. Super. Ct. Jan. 25, 2008).

[44]*Id.* at 12-13.

[45]Surf & Sand, LLC v. City of Capitola, No. 07-5043, 2008 WL 413748, at *4 (N.D. Cal. Feb. 13, 2008).

[46]*Id.* at *1.

[47]*Id.*

[48]*Id.*

[49]*Id.* at *2.

[50]*Id.* at *4.

[51]Equity Lifestyle Properties, Inc., Form 10-K at 22 (Feb. 28, 2008).

[52]Fisher v. City of Berkeley, 37 C.3d 644 (1984), *aff'd on other grounds*, 475 U.S. 260 (1986).

Park Ritchie, LLC v. City of Takoma Park

Attacks on rent control are being waged not only in California, but also in Takoma Park, Maryland. In *Park Ritchie, LLC v. City of Takoma Park*,[53] an apartment building owner claimed that the city's Rent Stabilization Act is an unconstitutional taking under the Fifth Amendment. The act restricts annual rental increases in excess of 70% of the CPI.[54] The owner argued that the act prevented landlords from receiving a reasonable return on their investments and forced landlords to subsidize low-income tenants' rents.[55] The owner alleged that operating costs for Park Ritchie Apartments were approximately 83% of its gross revenues, while the average cost-to-revenues ratio in the Washington, D.C. area for housing units not subject to rent control was 50% to 60%.[56]

The city filed a motion to dismiss, arguing that the owner's claim was barred by Maryland's statute of limitations. The city argued that the owner knew or should have known of the act when the owner purchased the property in 1987, and the owner was therefore required to file the complaint, which was a facial challenge, within three years of purchase.[57] The city also argued that the act did not amount to an unlawful taking because the owner would not endure a permanent physical occupation of the

[53]Park Ritchie, LLC v. City of Takoma Park, No. 07-2336 (D. Md. filed 2007).
[54]Compl. at 6, Park Ritchie, LLC v. City of Takoma Park, No. 07-2336 (D. Md. Aug. 31, 2007).
[55]*Id.* at 8-9.
[56]*Id.* at 10.
[57]Defs.' Mot. to Dismiss at 4, Park Ritchie, LLC v. City of Takoma Park, No. 07-2336 (D. Md. Sept. 18, 2007).

California Voters Reject Anti Rent-Control Measure

On June 3, 61% of California voters rejected Proposition 98, a ballot measure which would have phased out rent control and broadly limited state and local governments' ability to take private property. Meanwhile, 62.5% of voters approved Proposition 99, a narrower measure that protects owner-occupied, single-family residences from eminent domain.

Although Proposition 98's stated purpose was to prohibit state and local governments from using their eminent domain power to take property for the benefit of any private entity,[1] the measure would also have phased out rent control ordinances. The measure broadly defined "taking" as any action by the government "limiting the price a private owner may charge another person to purchase, occupy, or use his or her real property."[2] In addition to rent control ordinances, this broad definition could have nullified a variety of other laws, including inclusionary zoning ordinances and environmental protections. Proposition 98 was supported by groups representing taxpayers, landlords, farmers, and owners of mobile home parks. Despite the measure's defeat, its supporters have vowed to seek legislation expanding restrictions on eminent domain powers, and have stated that if the legislature fails to act, they will consider qualifying yet another ballot measure.[3]

Proposition 99 was proposed in direct response to Proposition 98 and will not affect rent-control ordinances. Instead, the successful competing measure prohibits the use of eminent domain to take an owner-occupied, single-family residence for the benefit of a private entity.[4] The measure was supported by associations representing cities, counties and redevelopment agencies, as well as tenants' groups.

Proposition 98's demise is of interest to advocates and tenants nationwide because it is part of a wave of state responses to the Supreme Court's decision in *Kelo v. City of New London*.[5] The measure illustrates the need for advocates to carefully examine proposed eminent domain legislation to ensure that it will not negatively impact rent control or inclusionary zoning ordinances. Further, the measure is an example of recent efforts by real estate and landlord interests to erode tenant protections throughout the country. The effectiveness of strategies used to oppose Proposition 98, such as proposing an alternative ballot measure and forming alliances with tenant advocates, city officials, redevelopment associations, and environmental activists, should be informative for future efforts to preserve rent control or other forms of threatened land use regulation. ■

[1]California Property Owners and Farmland Protection Act § 2(b).
[2]*Id.*, § 3.
[3]Statement of Jon Coupal, President, Howard Jarvis Taxpayers Association, Proponents of Prop. 98 Respond to Election Outcome, Vow to Work on Legislative Solution to End Eminent Domain Abuse (June 4, 2008), *at* http://www.yesprop98.com/modules/article/list/release.php?_adctlid=v%7Cwynx8c5jjesxsb%7Cx6hhfyh45ysr9z&pi=wynxp4qld3kyxw&id=x5za0r6zqdcdr5&done=index.php%3Fpi%3Dwynxp4qld3kyxw.
[4]Homeowners and Private Property Protection Act § 2.
[5]545 U.S. 469 (2005).

property.[58] In an opinion containing little analysis, a federal district court recently held that the act did not effect a regulatory taking, and that the owner's action was barred by the statute of limitations.[59] The owner has appealed the case to the Fourth Circuit. Although there is little rent control legislation in Maryland, any novel decision from the Fourth Circuit on the takings claim could have a broader impact on litigation challenging rent control ordinances elsewhere. ■

[58]*Id.* at 7.
[59]Park Ritchie, LLC v. City of Takoma Park, No. 07-2336, slip op. at 1 (D. Md. Jan. 29, 2008).

Tenants Can Sue for Violation of Public Housing Demolition Law*

A group of public housing residents in Dublin, California, recently scored a first-round victory in their fight to save their homes from demolition. The residents survived a motion to dismiss for failure to state a claim, which had argued that Section 1437p of the United States Housing Act of 1937[1] does not confer enforceable individual rights to tenants of public housing. The interlocutory order in *Arroyo Vista Tenants Ass'n v. City of Dublin*[2] kept the tenants' suit alive, holding that specific provisions of the statute[3] do provide tenants with the rights to receive notice and relocation assistance from their public housing authority before displacement, demolition, or disposition can take place, and that these rights are enforceable under 42 U.S.C. § 1983.[4]

Background

Arroyo Vista is a 150-unit public housing apartment complex located in Dublin, California, a suburb of Oakland. It is the only public housing located within Dublin, and is managed by the Dublin Housing Authority (DHA). In July 2006, without either notifying the tenants or obtaining permission from the Department of Urban Development (HUD) to dispose of the property, DHA selected two private developers to acquire, demolish, and redevelop the property. One year later, on July 17, 2007, the City of Dublin approved a Development Agreement between DHA, Housing Authority of Alameda County (HACA), and the developers—nonprofit Eden Housing and for-profit Citation Homes Central—to demolish the apartment complex and redevelop the site as a mixed-income housing development consisting of 184 market-rate ownership units and 194 "affordable" rental units.

Approximately one month later, the DHA submitted a Disposition Application to HUD, seeking agency approval of its plan to sell and replace the public housing units. HUD did not immediately respond to the application. However, even without approval from HUD, DHA began to set in motion its plans for disposition. HACA, which administers the voucher program for the county in which Dublin is located, set aside 200 vouchers for the Arroyo Vista residents, without any plans to request replacement vouchers. The tenants assert that representatives of the agencies encouraged residents to move, urging them to take Section 8 vouchers immediately, or to risk not being granted one later. DHA and HACA representatives presented the demolition of Arroyo Vista as inevitable, telling several residents that they would need to move by November 2008.

Minority populations in Dublin are relatively small: according to the U.S. Census Bureau, in 2000 the municipality was 72.7% White, 12.1% Asian, and 10.5% African American. However, the more than 400 residents of Arroyo Vista constitute a uniquely diverse enclave in the suburb. According to a HACA report submitted to HUD in September 2007, the population at the housing complex is 52% White, 28% African American, 15% Asian, and 4% Native Hawaiian or Pacific Islander. The income levels of 65% of the residents are extremely low (less than 30% of the area median income), and an additional 24% are very low (less than 50% of the area median income). As proposed, the redeveloped "affordable" rental units are to rely on tax credit and HUD Section 202 funding. Even though the rents for these units will be below market, they will be financially out of reach for, at minimum, the 44% of Arroyo Vista families whose income is below $15,000. Because there is no other public housing in Dublin, the redevelopment plan would thus likely force many or most Arroyo Vista residents out of Dublin altogether, certainly with a disparate impact on the city's minority communities. Additionally, a majority of the "affordable" units will be reserved for seniors, precluding maintenance of the complex's family-dominated population. By the time the residents filed their action in court, more than twenty units had already been vacated.

In October 2007, four Arroyo Vista tenants and a tenants' organization filed a petition for a writ of mandate in state court against DHA, the City of Dublin, and HACA, alleging that DHA's failure to notify residents of the demolition and to provide them with relocation assistance

*Antonia M. Konkoly, a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and a summer intern at the National Housing Law Project, is the author of this article.
[1]42 U.S.C. § 1437p (2007).
[2]No. 07-05794 (N.D. Cal. May 12, 2008) (order denying motion to dismiss) (hereinafter, "May 12 slip op.").
[3]42 U.S.C. § 1437p(a)(4) (2007).
[4]May 12 slip op. at 19-20.

was in violation of the United States Housing Act of 1937.[5] After DHA, HACA, and Dublin removed the case from state to federal district court, the residents sought a preliminary injunction and defendants moved for summary judgment. Declining to rule on either of these motions, the court instead requested, *sua sponte*, supplemental briefing on the issue of whether the specific statutory provision at issue, 42 U.S.C. § 1437p(a)(4), creates rights enforceable by 42 U.S.C. § 1983, treating the issue as a Rule 12(b)(6) motion to dismiss for failure to state a claim.[6]

Legal Standard for § 1983 Claims

In order to sustain a § 1983 claim, the residents needed to assert a violation of a federal *right*, not merely violation of a federal *law*.[7] Under the Supreme Court's decision in *Blessing v. Freestone*, a federal statute establishes an enforceable federal right where it passes a three-factor test: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) 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; and (3) the statute must unambiguously impose a binding obligation on the defendants.[8]

Gonzaga University v. Doe[9] further modified the first prong of the *Blessing* test, holding that only unambiguously conferred rights, not broader or vaguer benefits or interests, are enforceable. In determining whether a statute contains rights-creating language, a court must examine the text and structure of the statute for an "an unmistakable focus on the benefited class rather than on the person or entity regulated,"[10] as well as agency regulations, legislative history, and other relevant surrounding statutes. Moreover, per *Blessing*, the district court further noted that the inquiry should focus not on the "statute in its entirety,"[11] but rather on the specific statutory provision at issue.

Thus, in its ruling, the district court emphasized that the issue before it was narrow, limited *only* to the specific question of whether *subsection (a)(4)* of 42 U.S.C. § 1437p creates enforceable individual rights to receive, from a public housing authority, notice and relocation assistance before displacement, demolition, or disposition can occur.[12] The court noted that the residents were not asserting, and therefore the court did not need to decide, whether other subsections of § 1437p, among them the requirements that a PHA make certifications regarding the physical condition of the housing units[13] and develop an application for disposition in consultation with affected residents,[14] *also* created individually enforceable rights.[15]

Does § 1437p Create Enforceable Rights Under § 1983?

Several prior decisions had considered the issue of whether 42 U.S.C. § 1437p, in its various permutations that had existed over the years, created enforceable rights. However, Congress had explicitly disapproved of the result in a case that found no enforceable right, *Edwards v. District of Columbia*.[16] A group of cases that followed *Edwards* either relied on a subsection of the statute that is no longer in existence or, the court found, did not engage in sufficiently thorough analyses under *Blessing* and *Gonzaga*.[17] After a close examination of these prior holdings, the court found them not to be determinative of the narrow issue before it, and instead applied the *Blessing* and *Gonzaga* frameworks anew to the current version of the statute, as it was amended in 1998.[18]

With respect to the first prong of the *Blessing* test, whether Congress unambiguously conferred a right, as opposed to a broad or vague benefit or interest, the court held that the current text of § 1437p(a)(4) contained both "consistent and repeated" identifications of the benefited class as well as an articulation of "specific and detailed" entitlements.[19] In reaching this determination, the court specifically noted, first, that the five enumerated provisions of subsection (a)(4)[20] each contain "individually-focused terminology."[21] Secondly, the court noted that the 1998 amendment substantially expanded on the conditions

---

[5]42 U.S.C. § 1437p (2007).
[6]May 12 slip op. at 4.
[7]*Id.* (citing Blessing v. Freestone, 520 U.S. 329, 340 (1997)).
[8]*Blessing*, 520 U.S. at 340-341.
[9]536 U.S. 273, 283 (2002).
[10]May 12 slip op. at 5 (citing Price v. City of Stockton, 390 F.3d 1105, 1110 (9th Cir. 2004)).
[11]*Id.* (quoting *Blessing*, 520 U.S. at 342).
[12]*Id.* at 9.
[13]42 U.S.C. §§ 1437p(a)(1)-(2) (2007).
[14]*Id.* § 1437p(b)(2)(A).
[15]May 12 slip op. at 8.
[16]821 F.2d 651 (D.C. Cir. 1987) (holding that the pre-1998 version of § 1437p did not create enforceable rights). Following this decision, in 1988 Congress amended § 1437p to include the following provision: "(d)…A public housing agency shall not take any action to demolish or dispose of a public housing project or portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in subsections (a) and (b) of this section." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121(d), 101 Stat. 1815, 1838-39 (1988). The stated Congressional purpose behind the amendment was to clarify that "no [PHA] shall take any steps towards demolition and disposition without having satisfied the statutory criteria. This provision is intended to correct an *erroneous* interpretation of the *existing* statute by…[*Edwards*] and shall be fully enforceable by tenants of and applicants for the housing that is threatened." H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469 (emphasis added). However, as part of the 1998 overhaul of the entire Housing Act, Congress both substantially rewrote § 1437p and removed subsection (d). Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2570-73 (1998).
[17]*See* May 12 slip op. at 11-14.
[18]*Id.* at 14.
[19]*Id.* at 15.
[20]*See* 42 U.S.C. § 1437p(a)(4)(A) (2007) ("each family residing in a project subject to demolition"); *Id.* § 1437p(a)(4)(B) ("each resident to be displaced"); *Id.* § 1437p(a)(4)(C) ("each displaced resident"); *Id.* § 1437p(a)(4)(D) ("residents who are displaced"); *Id.* § 1437p(a)(4)(E) ("residents residing in the building").
[21]May 12 slip op. at 15.

of relocation assistance: although the pre-1998 version of the statute only stated generally that displaced residents "will be given assistance" by the PHA,[22] the current version specifies that such assistance include an offer of comparable housing, the payment of actual and reasonable relocation expenses, and any necessary counseling.[23] Finally, although the former version of § 1437p contained no requirement that a PHA notify displaced residents, the 1998 amendment added such a rule, not only providing that notification be given but also specifying the content and timing of the notice.[24]

In finding that § 1437p(a)(4) passed the first prong of the *Blessing* test, the court also disposed of two interrelated counterarguments. The first of these involved the legislative evolution of the statute: the 1998 amendment had deleted a provision (the former subsection (d)) that had specifically prohibited a PHA from taking any action to demolish or dispose of public housing without obtaining HUD approval. The court rejected, however, the contention that this deletion was dispositive of Congressional intent to create or maintain individually enforceable rights in this context.[25] Congress had, by its own stated intention, added the former subsection (d) in 1988, with the specific purpose of clarifying the "erroneous interpretation of the [then]-existing statute" handed down by *Edwards*.[26] Even without the presence of former subsection (d), then, § 1437p had *always* created individually enforceable rights for the tenants of threatened housing, and the court stated that these rights "do[] not hinge on the presence or absence of former subsection (d)."[27]

Secondly, the court addressed an interpretive issue relating to the corresponding HUD regulations. Following the 1998 amendment, HUD had revised its implementing regulations, maintaining language mirroring former subsection (d) despite its deletion from the statute.[28] However, HUD explained that these regulatory provisions were retained "to make certain that HUD can track units being phased out for funding purposes…[and were] not intended to create any private right of action."[29] The court dismissed these comments, stating that agency regulations alone "cannot nullify rights legitimately conferred by Congress any more than regulations alone can give rise to rights."[30]

Having thus found that the residents of Arroyo Vista had satisfied the first prong of the *Blessing* and *Gonzaga* tests, the court next turned to the second and third prongs—respectively, that the right conferred is "not so 'vague and amorphous' that its enforcement would strain judicial competence," and that the statute "unambiguously impose a binding and mandatory obligation" on the agency.[31] The court found that the residents satisfied both prongs. With respect to the second prong, the court held that the benefits conferred to the residents under § 1437p(a)(4)—namely, the rights to notification of demolition and to enumerated relocation benefits—are "specific and judicially enforceable."[32] With respect to the third prong, the court noted that the "repeated and consistent" use of the term "will"[33] to denote PHA obligations indicated that the tenant rights and corresponding PHA obligations were mandatory—notwithstanding the fact that the provisions in question are embedded in the section of the act detailing criteria for HUD approvals for demolitions and dispositions. [34]

Finally, the court noted that the Arroyo Vista residents' fulfillment of the three-factor *Blessing* test established their right to notification and relocation assistance only presumptively: under *Blessing*, the burden now shifted to DHA and HACA to show that Congress intended to foreclose a § 1983 remedy.[35] However, *Blessing* made clear that this is a "difficult" burden to meet, [36] and the court held that in this instance the DHA and HACA had not done so, as § 1437p neither contains any express intention to foreclose such a remedy nor creates any comprehensive enforcement scheme that might impliedly foreclose the remedy.[37]

Conclusion

As demolitions and dispositions of public housing increase in the face of financial strains on housing authorities, advocates are fighting to protect residents and ensure that affordable housing is not lost. The Arroyo Vista Tenants Association faces a much longer fight ahead, but the

[22] *Id.* at 14.
[23] *Id.*; 42 U.S.C. §§ 1437(a)(4)(iii)(I)-(III) (2007).
[24] May 12 slip op. at 15; 42 U.S.C. §§ 1437(a)(4)(A)(i)-(iii)(I) (2007).
[25] May 12 slip op. at 17.
[26] *See id.*; H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469.
[27] May 12 slip op. at 17.
[28] *See* 71 Fed. Reg. 62,354 (Oct. 24, 2006); 24 C.F.R. § 970.7(a) ("A PHA must obtain written approval from HUD before undertaking any transaction involving demolition or disposition of PHA-owned property"; 24 C.F.R. § 970.25(a) ("A PHA may not take action to demolish or dispose of a public housing development…without obtaining HUD approval").
[29] May 12 slip op. at 17-18; 71 Fed. Reg. 62,354 (Oct. 24, 2006).
[30] May 12 slip op. at 18 (quoting *Price*, 390 F.3d at 1112).
[31] *Id.* (citing *Blessing*, 520 U.S. at 340-41).
[32] May 12 slip op. at 18.
[33] *Id.*; 42 U.S.C. § 1437p(a)(4)(A)-(E) (2007) (providing, respectively, that HUD shall approve an application for demolition or disposition if the PHA certifies that it "will notify" displaced residents, "will provide" for the payment of relocation expenses, "will ensure" that displaced residents are offered comparable housing, "will provide" any necessary counseling, and "will not commence" demolition prior to the relocation of all residents).
[34] May 12 slip op. at 18. Here, the court relied on a recent Ninth Circuit case, *Ball v. Rodgers*, finding enforceable rights in a provision of the Medicare Act requiring a state to make specified "assurances" before the Department of Health and Human Services can grant a waiver for reimbursement of alternative care. 492 F.3d 1094, 1105-06, 1112-15 (9th Cir. 2007).
[35] May 12 slip. op. at 19.
[36] *Blessing*, 520 U.S. at 346-47.
[37] May 12 slip op. at 19.

District Court, by recognizing that tenants have a private right of action to enforce their relocation rights, provided a well-reasoned opinion for advocates to use in ensuring tenants have the resources they need and are treated fairly when a housing authority seeks to dispose of its public housing stock. Stay tuned for more updates as this case moves forward. ■

Recent Cases

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

Public Housing: Denial of Admission, Violation of Fair Housing Act

Parrott v. City of Union Point Housing Authority, 2008 WL 2302685 (M.D.Ga., May 29, 2008). An applicant for public housing, who had a thirty-four-year-old murder conviction and no other intervening criminal proceedings, brought suit under the Fair Housing Act (FHA) against the housing authority for rejecting his application for admission. The applicant claimed that the rejection was discriminatory because the housing authority admitted two other persons who had been convicted of murdering African-American persons while he had been convicted of killing a Caucasian person. The housing authority sought to dismiss the complaint for failure to state a claim, alleging that it had made a racially neutral decision based on the applicant's criminal record and that as a convicted felon he was not within a class of persons protected by the FHA. The court rejected the housing authority's argument based on the fact that the plaintiff alleged sufficient facts to show that the decision was racially motivated and, if proven, could constitute a violation of the FHA.

Public Housing: Remaining Household Member

Rodriguez v. Hernandez, 2008 WL 2095848 (N.Y.A.D., May 20, 2008). On appeal from a Supreme Court decision, the court upheld the housing authority's denial of the plaintiff's status as a remaining household member. The court found that the plaintiff was not granted permission to live in her mother-in-law's dwelling on a permanent basis and that her income was never considered in determining the rent for the public housing dwelling. Accordingly, she was not a member of the household entitled to remain in the dwelling upon the death of her mother-in-law.

Public Housing: Eviction, Drug Violation, Fair Housing Protections

Public Housing Agency of St. Paul v. Ewig, 2008 WL 2106692 (Minn.App., May 20, 2008) (Unpublished). The lower court decided that the housing authority was not entitled to evict a resident who had used crack cocaine and allowed others to use it in her dwelling on the basis that she was handicapped and therefore protected by the Fair Housing Act (FHA). The appellate court reversed, finding that the resident had violated her lease agreement and that the FHA does not protect current users of drugs.

Voucher Program: Denial of Voucher for Failure to Report Additional Household Members

Gerena v. Donovan, 2008 WL 2025009 (N.Y.A.D., May 13, 2008). The appellate court affirmed a preservation department's decision to deny the plaintiff an enhanced voucher on the ground that the plaintiff failed to notify the department that his wife and children were living with him in the apartment, thus violating the Housing Choice Voucher program regulations.

Voucher Program: Termination Hearing Decision Not Based on Substantial Evidence

Bush v. Mulligan, 2008 WL 1989794 (N.Y.A.D., May 6, 2008). An elderly Section 8 voucher resident who suffered vascular dementia was terminated from the program for failing to report receipt of Social Security benefits for eight months. Although the voucher holder submitted uncontroverted evidence at the termination hearing that she had dementia and loss of memory, the hearing officer upheld the termination on the grounds that the voucher holder committed fraud and was negligent in failing to report the receipt of the Social Security benefits. The appellate court reversed, finding that the hearing officer's decision was not based upon substantial evidence presented at the hearing.

Voucher Program: Use of Hearsay Evidence at Termination Hearing

Cintron v. Housing Authority of San Diego County, 2008 WL 1923101 (Cal.App., May 2, 2008)(Unreported). A voucher

[1]http://www.westlaw.com.
[2]http://www.lexis.com.
[3]For a list of courts that are accessible online, see http://www.uscourts.gov/links.html (federal courts) and http://www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also http://www.courts.net.

holder whose voucher was terminated by the housing authority challenged the hearing officer and lower court's decision upholding the termination, on the grounds that both relied on hearsay and prejudicial evidence. The court of appeals upheld the termination finding that HUD regulations authorized reliance on hearsay testimony and that the hearsay evidence that was introduced was reliable and was generally corroborated by nonhearsay testimony. The court rejected the voucher holder's argument that the decision was based on prejudicial information both because there is no right to exclude prejudicial information and the hearing officer explicitly stated that he did not base his decision on that information.

HUD as Landlord: Eviction without Good Cause or Due Process

Linares v. Jackson, 2008 WL 1931204 (E.D.N.Y., May 5, 2008). HUD filed a motion for reconsideration of a district court decision holding that its regulation allowing for termination of residents' leases without good cause or an opportunity for a hearing violated the Constitution. In its motion, HUD argued that the case was moot because the plaintiffs no longer lived in the development, that HUD had agreed to abide by the good cause requirement and to provide residents a hearing opportunity, and that the court's order declaring the HUD regulation unconstitutional went beyond the plaintiff's request for relief. The court denied HUD's motion, finding that the residents' leaving the HUD-owned apartment building did not moot the case because the issue is capable of repetition yet evading review. It also concluded that HUD's voluntarily agreeing to give the residents' a right to a hearing did not moot the case. Finally, it concluded that a court has the power and authority to grant relief that it believes appropriate even though the plaintiffs may not have asked for it. Accordingly, the court found that the HUD regulation, found at 24 C.F.R. § 247.10, is unconstitutional and ordered HUD to cease its enforcement of that regulation. The court did, however, grant HUD's motion insofar as it dismissed the need for further hearings to establish the scope of notice and hearing that HUD must provide residents.

Fair Housing Act: Failure to Establish *Prima Facie* Case of Familial Discrimination

Khalil v. Farash Corp., 2008 WL 1995003 (2nd Cir., May 7, 2008). Families with children brought an FHA claim against the landlord alleging that a rule prohibiting tenants from congregating or allowing children to play on the grounds of an apartment building discriminated against them on the basis of familial status. The district court rejected the plaintiffs' claims and the court of appeals affirmed. It held that the plaintiff had not shown that the rule was applied only to children, and hence it could not find a violation of the FHA. It also held that the non-renewal of the plaintiffs' lease was not a violation of the FHA because the plaintiffs did not show that the non-renewal was pretextual. Lastly, the court of appeals found that the plaintiffs failed to show that the rule was applied only to families with children, therefore failing to show that the rule or its application were discriminatory.

HOME Program: Relocation Benefits

Woods v. Alexandria Housing Partners, 2008 WL 2169530 (C.D.Cal., May 22, 2008)(Unreported). The court issued a preliminary injunction precluding the City of Los Angeles, its redevelopment agency and private developers from removing any further residents of the Alexandria Hotel without providing them with relocation benefits as required by the HOME program. It further ordered the city and redevelopment agency to provide relocation assistance to residents who have been evicted. The court also ordered the private defendant (the redeveloper), to provide remaining tenants with heat, hot and cold water, elevator service and clear access to the building.

Rural Rental Housing: Owner Who Accepted Incentives to Remain in Program Is Entitled to Damages for Breach of Right to Prepay Loan

Tamerlane, Ltd. v. U.S., 2008 WL 2043253 (Fed.Cl., May 8, 2008). The owner of two Section 515 developments, one of which accepted incentives to remain in the program in lieu of prepaying the RHS loan, brought a damage action against the RHS seeking damages for his right to prepay the Section 515 loans, which was abridged by the passage of the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). On cross motions for summary judgement, the court held that the right of the owner to prepay both loans was repudiated by the passage of ELIHPA and abridged when the owner sought to prepay one loan and brought damage suit against RHS on the other loan. The court rejected all RHS arguments that the owner's acceptance of incentives was a bilateral modification of the loan agreement, an accord and satisfaction, or any other bar to recovery. Accordingly, it granted the owner's motion for summary judgment and rejected the RHS cross motion. ■

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—Rural Housing Service/Rural Development (RD)), Federal Housing Finance Board, and the Veterans Administration issued in May of 2008. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

HUD Federal Register Notices

73 Fed. Reg. 24,710 (May 5, 2008)
Semiannual Regulatory Agenda

Summary: HUD is publishing its agenda of regulations already issued or that it expects to be issued over the next several months. The agenda also includes rules currently in effect that are under review and describes those regulations that may affect small entities.

73 Fed. Reg. 24,606 (May 5, 2008)
Relocation and Real Property Acquisition, Recordkeeping Requirements Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as Amended (URA)

Summary: HUD has submitted to the Office of Management and Budget (OMB) an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to HUD-funded projects involving the acquisition of real property or the displacement of persons as a direct result of acquisition, rehabilitation or demolition, which are subject to the URA. Agencies receiving HUD funding for such projects are required to document their compliance with applicable requirements of the URA and its implementing government-wide regulations at 49 CFR part 24.

Comments Due Date: June 4, 2008.

73 Fed. Reg. 25,026 (May 6, 2008)
Section 8 Housing Choice Vouchers: Implementation of the HUD-VA Supportive Housing Program

Summary: This notice sets forth the policies and procedures for the administration of tenant-based Section 8 Housing Choice Voucher rental assistance under the HUD-Veterans Affairs Supportive Housing program administered by local public housing agencies that have partnered with local Veterans Affairs medical centers.

Effective Date: May 6, 2008.

73 Fed. Reg. 26,136 (May 8, 2008)
New System of Records

Summary: The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing public notice of its intent to establish a new Privacy Act system of records. The new system is titled Litigation and Enforcement Information System. The proposed system of records is necessary, as it will contain OFHEO generated records in connection with civil and administrative proceedings, including enforcement actions brought by or against OFHEO, and other proceedings in which OFHEO participates or has an interest in, and are relative to enforcement of, the Safety and Soundness of Freddie Mac and Fannie Mae.

Comment and Effective Dates: Written comments must be received by or before June 9, 2008. If no public comments are received, the proposed new system of records will become effective on June 17, 2008.

73 Fed. Reg. 26,134 (May 8, 2008)
Notice of Proposed Information Collection: Optional Relocation Payment Claim Forms; Comment Request

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to application for displacement/relocation assistance for persons (families, individuals, businesses, nonprofit organizations and farms) displaced by, or temporarily relocated for, certain HUD programs.

Comments Due Date: July 7, 2008.

73 Fed. Reg. 26,135 (May 8, 2008)
Section 5(h) Homeownership Program for Public Housing: Submission of Plan and Reporting

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to public housing agencies' (PHAs) maintenance of sales and financial records of their plan. Residents may apply to PHAs to purchase units.

Comments Due Date: June 9, 2008.

---

[1]http://www.access.gpo.gov/su_docs.
[2]http://www.hudclips.org/cgi/index.cgi.
[3]To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.
[4]http://www.rdinit.usda.gov/regs.

73 Fed. Reg. 26,953 (May 12, 2008)
Real Estate Settlement Procedures Act (RESPA) Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs: Extension of Public Comment Period

Summary: This notice extends the public comment period for an additional thirty-day period for HUD's proposed rule entitled "Real Estate Settlement Procedures Act"; Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs," published on March 14, 2008. The public comment period for this proposed rule is scheduled to close on May 13, 2008. HUD is extending the public comment period to June 12, 2008.

Comment Due Date: June 12, 2008.

73 Fed. Reg. 27,031 (May 12, 2008)
Fiscal Year 2008 Super NOFA for HUD's Discretionary Programs

Summary: This publication contains the thirty-six funding opportunities that constitute HUD's FY 2008 Super NOFA. This publication also provides a revised Appendix A that lists the programs contained in the FY 2008 Super NOFA and corrects two items contained in the General Section published on March 19, 2008.

Dates: Application deadline and other key dates are contained in each individual program NOFA and in Appendix A of this notice.

73 Fed. Reg. 28,833 (May 19, 2008)
Notice of Proposed Information Collection: Comment Request; Section 8 Renewal Policy Guide

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Section 8 Renewal Guide, which represents a contract renewal policy which is consistent with current statutes and existing regulations. The modifications of the Section 8 renewal policy and recent legislation are implemented to address the essential requirement of preserving low-income rental housing affordability and availability. The Section 8 Renewal Policy Guide will include recent legislation modifications for renewing of expiring Section 8 policy(ies) Guidebook.

Comments Due Date: July 18, 2008.

73 Fed. Reg. 28,863 (May 19, 2008)
Section 8 Housing Choice Vouchers: Implementation of the HUD-VA Supportive Housing Program; Correction

Summary: This notice makes various corrections to a previous notice published on Tuesday, May 6, 2008.

73 Fed. Reg. 29,775 (May 22, 2008)
Certification and Funding of State and Local Fair Housing Enforcement Agencies

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the fact that state and local government agencies apply for certification of substantial equivalency with the Fair Housing Act. Once determined to be substantially equivalent, HUD enters into a cooperative agreement with such an agency though which funding is provided in support of fair housing enforcement.

Comments Due Date: June 23, 2008.

73 Fed. Reg. 30,136 (May 23, 2008)
Public Housing Admissions/Occupancy Policies and Procedures

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the fact that public housing agencies (PHAs) that enter into an Annual Contribution Contract with HUD must develop, maintain, and keep on file the admission and occupancy policies. These policies are reflected in a PHA's Admissions and Occupancy Policies.

Comments Due Date: June 23, 2008.

73 Fed. Reg. 30,137 (May 23, 2008)
Public Housing Inventory Removal Application

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected centralizes and standardizes HUD's review and approval of non-funded, noncompetitive requests of public housing agencies to remove public housing property from their inventories via disposition, demolition, voluntary conversion, required conversion, home ownership, or eminent domain proceedings.

Comments Due Date: June 23, 2008.

73 Fed. Reg. 30,138 (May 23, 2008)
Research Plan for a Study of Rents and Rent Flexibility

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to a survey of a sample of housing authorities and households recently admitted or on the waiting list for public housing or Housing Choice Vouchers to assess inequities and inefficiencies in the current rent system relating to subsidizing rents, setting rents/payment standards, and verifying income. The information collected will provide the needed information regarding PHA and tenant perceptions of alternative rent structures and their feasibility/practicality of incorporating them at a later date. The information shall be collected, analyzed and evaluated to provide recommendations for effective reforms.

Comments Due Date: June 23, 2008.

73 Fed. Reg. 30,964 (May 29, 2008)
Data Collection for the Housing Counseling Outcome Evaluation

Summary: HUD has submitted to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to a study designed to gather statistically accurate information on outcomes realized by clients of HUD-funded housing counseling agencies seeking assistance to either purchase a home (pre-purchase clients) or to resolve or prevent a mortgage delinquency (foreclosure mitigation clients).

Comments Due Date: June 30, 2008.

HUD Notices

PIH-2008- 23 (May 16, 2008)
Exclusion of Tax Rebates from the Internal Revenue Service (IRS) Under the Economic Stimulus Act of 2008 Notice

Summary: This notice excludes the one-time IRS economic stimulus payments (tax rebates) from all interim and annual income determinations.

PIH 2008 – 24 (May 29, 2008)
Extension—Guidance on Integrated Pest Management

***Summary*:** This notice extends Notice PIH 2007-12 (HA), which will expire on May 31, 2008, for another year until May 31, 2009. The purpose of this notice is to inform public housing agencies and Tribally Designated Housing Entities about Integrated Pest Management. PHAs provide decent, safe, sanitary and affordable housing to more than one million families. Pest problems routinely rate as one of the top concerns by residents.

CPD-08-05 (May 2, 2008)
Implementing the New Freedom Initiative and Involving Persons with Disabilities in the Preparation of the Consolidated Plan Through Citizen Participation

***Summary*:** The purpose of this notice is to reissue CPD Notice 05-03 to make it clear that Community Development Block Grant (CDBG), HOME, and Housing Opportunities for Persons With AIDS (HOPWA) funds can be used to respond to the challenges raised by *Olmstead v. L.C,* the New Freedom Initiative, and Executive Order 13217. The changes in this reissued notice include the provision of a specific section on other publications that can be used for guidance as well as specific information on the use of HOME and HOPWA funds for this initiative. This notice provides direction concerning the manner in which jurisdictions may incorporate the objectives of the New Freedom Initiative in identifying the needs of persons with disabilities and targeting CDBG, HOME, and HOPWA resources to meet those needs during the development of the jurisdictions' consolidated plans. It also provides guidance on how to involve persons with disabilities and organizations representing persons with disabilities in the citizen participation process for the consolidated plan.

Rural Housing Service Federal Register Notice

73 Fed. Reg. 30,880 (May 29, 2008)
Notice of Expiring Expanded Rural Area Definition

Summary: On March 13, 2006 (71 FR 12671-74), a notice was published regarding the availability of hurricane disaster assistance that expanded the rural area definition for USDA Rural Development's housing programs. Notice is hereby given that the expanded rural area definition (which increased the population limits to 75,000) under the March 13, 2006 notice will expire at the end of the current fiscal year, September 30, 2008, for areas covered under the Hurricane Katrina or Rita declarations. Financial assistance in these expanded communities must be obligated by the above-mentioned dates. Financial disaster assistance will continue in areas meeting the rural area definition of Sec. 520 of the 1949 Housing Act until such appropriations are expended.

Rural Housing Service – Unnumbered Letters

Results of the 2008 Multi-Family Housing Annual Fair Housing Occupancy Report (May 28, 2008)

Summary: RHS presents the 2008 Rural Development Multi-Family Housing Annual Occupancy Report, including both Rural Rental Housing Section 515 and Farm Labor Housing Section 514 demographics. These results are based on April 2008 data from the Multi-Family Information System. This report presents data from the past three years, comparing information from year 2006 to 2008.

Improper Payment Information Act Compliance Report Section 521 - Rental Assistance Program (May 28, 2008)

Summary: This year's Multi-Family Housing Improper Payment Information Act Report details the findings and recommendations of the study that was undertaken to determine the error rate of payments in the Rental Assistance program. The report determined that the error rate of gross dollars improperly calculated against the fiscal year (FY) 2007 program outlay to be 8.17%. This is approximately triple the rate from last year's audit. The report revealed that subsidy payment calculation errors were made 7.5% of the time on Agency overpayment of subsidy to tenants and 0.3% on Agency underpayment of subsidy to tenants, and Agency improper payment of subsidy was estimated at $72.4 million. Unauthorized assistance over- and under-payments of $100 or less were not counted in the error rate. ■

NATIONAL HOUSING LAW PROJECT | **PUBLICATION ORDER FORM**

PUBLICATION	UNIT PRICE	QTY.	TOTAL PRICE
Combined Set: HUD Housing Programs: Tenants' Rights (3d ed. 2004) **and new 2006-2007 Supplement** (SAVE $70 on combined set)	$ 415		
HUD Housing Programs: Tenants' Rights 2006-2007 Supplement	$ 130		
Housing Law Bulletin (10-issue subscription)	$ 175		
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	$ 5		
Housing for All: Keeping the Promise (1995)	$ 5		
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$ 10		
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$ 10		

SUBTOTAL (All prices include shipping)

CALIFORNIA SALES TAX (Excludes Bulletin | 8.75% in Alameda County | 8.25% in rest of CA)

TOTAL

BILLING INFORMATION

All orders must be prepaid. Please do not send cash.

☐ I've enclosed a check or money order made payable to **National Housing Law Project**

☐ Please bill my ☐ **MasterCard** ☐ **Visa**

card number / exp date

name on card

organization

street address

city / state / zip

signature

SHIPPING INFORMATION

name

organization

street address

city / state / zip

telephone / fax

email

MAIL TO

National Housing Law Project
Publications Clerk
614 Grand Avenue, Suite 320
Oakland, CA 94610

QUESTIONS

For information on first-class mailing and large quantity discounts, call 510.251.9400 x3108

NATIONAL HOUSING LAW PROJECT
advancing housing justice

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

FIRST CLASS MAIL