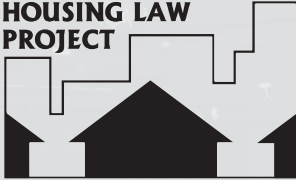


NATIONAL
HOUSING LAW
PROJECT



advancing housing justice

Housing Law Bulletin

Volume 40 • March 2010

Published by the National Housing Law Project



***HUD Introduces Transformation of
Rental Assistance Proposal***

—see page 73

HUD Seeks Residents' Input on New Policies

—see page 76

2010 Supplement to HUD Housing Programs: Tenants' Rights Available Soon! Have You Ordered Your Copy?

2010 Supplement and Manual Pricing	per unit price	quantity	extended price
2010 Supplement to HUD Housing Programs: Tenants' Rights Manual	\$150	_____	_____
HUD Housing Programs: Tenants' Rights	\$350	_____	_____
Combined Set Extra Savings: HUD Housing Programs:	\$425	_____	_____



	Bulk Order Discount (5 or more) deduct 10%	\$ _____
(8.25% for CA residents; Alameda County sales tax 9.75%)	California Sales Tax	\$ _____
	Shipping + Handling (\$5 per book)	\$ _____
	Total Amount Due	\$ _____

shipping information

name

organization

street address

city / state / zip

telephone / fax

email

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

billing information

I've enclosed a check payable to **National Housing Law Project** \$ _____

Please bill my
 MasterCard Visa \$ _____

card number exp date

name on card

billing address

street address

city / state / zip

signature

All orders must be prepaid. Billing name, address and signature required for all credit card orders. Books will be shipped USPS Media Rate. Please allow 4 to 6 weeks for delivery from date of publication. **Estimated publication date is April 15, 2010** and is subject to change.

For questions about your order, please contact **Wendy Mahoney** at **510.251.9400 x3108** or **wmahoney@nhlp.org**. Thank you.

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

Fax order form (credit card orders only) to
510.451.2300

Housing Law Bulletin

Volume 40 • March 2010

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

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

www.nhlp.org • nhlp@nhlp.org

Table of Contents

	Page
HUD Introduces Transformation of Rental Assistance Proposal.....	73
HUD Seeks Residents' Input on New Policies	76
FY 2011 HUD Budget Proposes Changes and Cuts..	79
No Significant Changes in Proposed Budget for RD Housing Programs	82
Homelessness Prevention and Rapid Re-Housing Program: Emerging Issues.....	84
State and Local Measures Safeguard Tenants' Rights During Foreclosure.....	87
Public Housing Disposition Case Settled with Substantial Tenant Protections.....	92
The Impact of <i>Ashcroft v. Iqbal</i> on Housing Cases ...	94
Recent Cases	98
Recent Housing-Related Regulations and Notices..	102



Cover: The Department of Housing and Urban Development Secretary (HUD) Shaun Donovan meets with residents on January 20, 2010. HUD's recent efforts to engage residents are discussed on page 75 of the *Bulletin*.

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

HUD Introduces Transformation of Rental Assistance Proposal

One of the most significant proposals in the Department of Housing and Urban Development's (HUD) budget proposal for Fiscal Year (FY) 2011 is \$350 million for HUD's Transformation of Rental Assistance (TRA) initiative.¹ The proposal seeks to preserve public and multifamily HUD-assisted housing, streamline rental assistance programs and promote resident mobility. This would be accomplished by converting public housing units and privately owned properties² to a single program—and a single funding stream—for long-term property-based assistance contracts. The proposal is a multiyear effort, and the first phase would focus on public housing authorities (PHAs) and public housing.

TRA would permit PHAs to raise private capital to address the immediate and long-term deferred maintenance and rehabilitation needs of the developments. The argument is that private financing is essential to preserve affordable units because Congress will not fund the \$20 billion to \$30 billion capital backlog in the public housing stock.³ In addition, the Administration does not support the status quo for public housing. It argues that it will be more cost-effective to make public housing subject to market discipline. By involving private parties, public housing will have broader appeal and will be less likely to suffer from funding shortfalls in the future. It is the isolation of public housing that makes it subject to cuts in the federal budget, particularly during economic downturns.⁴

The Administration also argues that TRA is necessary to combine and streamline the 13 HUD programs that provide rental assistance to very low-income families, thereby reducing cost. A single TRA program also has the potential to simplify and equalize the application process for families seeking housing assistance.

¹While proposing to allocate \$350 million to TRA, HUD also proposes to cut the PHA capital fund. For 2011, \$2.04 billion is proposed, which is less than the \$2.5 billion appropriated in 2010 and less than what was appropriated in 2004 and 2005. In 2009 the American Recovery and Reinvestment Act appropriated \$4 billion for the capital fund, which supplemented the annual appropriation of \$2.45 billion. It would take only an additional \$2.5 billion per year in capital funds to fully eliminate the public housing capital backlog within 10 years. The proposed federal budget for 2011 is \$3.8 trillion. An additional \$2.5 billion per year for the public housing backlog would amount to only two-thirds of one-tenth of 1% of the Administration's overall proposed budget for FY 2011. See Sherwood Research Associates, *Housing News Highlights* (Feb. 5, 2010) (on file with NHLP). For the operating fund, HUD proposes \$4.83 billion, which is 100% of the operating subsidy formula and continues the 2010 budget policy to adequately fund the operating fund. These funding levels are significantly greater than the 2007 (\$3.86 billion) and 2008 (\$4.2 billion) levels.

²This includes properties that are assisted by Section 8 Moderate Rehabilitation, Rent Supplement or Rental Assistance Program.

³HUD Webcast, FY 2011 Budget: Transformation of Rental Assistance (Feb. 3, 2010), <http://portal.hud.gov/portal/page/portal/HUD/webcasts/archives>.

⁴*Id.*

The conversion of public housing units to long-term property-based contracts is intended to stem the tide of deterioration and ward off demolition. It is *not* an attempt to dispose of the public housing stock.⁵ Upon conversion:

- Public ownership of the properties will be maintained.⁶
- There will be no change in who is assisted.
- Rents will remain income-based.
- Conversion will not be cause for eviction.⁷

Additionally, the PHA will not become the contract administrator for the properties it owns. TRA would include \$290 million to provide rental assistance and cover administrative fees for the anticipated 300,000 converted units. HUD estimates that this first phase will enable PHAs to secure \$7.5 billion in private capital.

The new property-based contracts will contain a mobility feature, which means that the resident could move out of the unit with a voucher *and* the unit would remain affordable for the next eligible tenant. This model is derived from the current project-based voucher program, which permits families to move with a voucher after one year of residency in a project-based voucher development.⁸ The rental assistance remains with the development, and the family seeking to move goes to the top of the Housing Choice Voucher waiting list and receives the next available voucher.⁹

What Properties Will HUD First Target for Conversion?

HUD has identified three types of housing that can be converted during what it calls “Phase One” of TRA. First, PHAs that have only public housing units and do not administer a voucher program may *voluntarily* convert units *subject to threshold requirements* without

⁵HUD PowerPoint Presentation, FY 2011 Budget: Transformation of Rental Assistance at slide 4 (Feb. 3, 2010), <http://portal.hud.gov/portal/page/portal/HUD/webcasts/archives>.

⁶This is the first written reference by HUD to “public ownership” of the converted public housing units. This is a key provision that public housing tenants asked for in a January 20, 2010, meeting with HUD Secretary Shaun Donovan and senior HUD staff. This appears to be a new position for HUD and is an example of HUD responding to resident voices.

⁷HUD has stated that “[t]he conversion of contracts . . . shall not be grounds to evict tenants or terminate families’ rental assistance.” Public and Indian Housing, Transforming Rental Assistance, 2011 Summary Statement and Initiatives C-9, <http://hud.gov/offices/cfo/reports/2011/cjs/tra2011.pdf>. In addition, Assistant Secretary for Public and Indian Housing Sandra Henriquez and other senior HUD staff have stated that public housing tenants will go to sleep and wake up after the transformation and not notice the difference.

⁸24 C.F.R. § 983.260 (2009).

⁹§ 983.260(c).

competition.¹⁰ HUD anticipates that 150,000 of the 240,000 eligible units would be converted. There are approximately 1,640 PHAs that own public housing units but do not administer a voucher program. With a few significant exceptions,¹¹ these PHAs have a small number of public housing units.

Second, PHAs that own public housing units and/or other federally assisted housing and also administer a voucher program may convert their developments to TRA only on a *competitive* basis. PHAs that agree to combine the administration of their voucher program with other agencies will be given a preference in the competition. HUD’s goal is to convert 130,000 units.

Third, private owners of rent supplement, Section 236 Rental Assistance Program and Section 8 moderate rehabilitation units will be able to convert their developments, though HUD has not yet provided details on the application process.

What Funds Will Assist Units that Are Converted?

HUD proposes to allocate \$290 million to fill the gap in the first year to convert approximately 300,000 units. Its rent-setting procedures and underwriting guidelines “will support the goals of placing converted assets on a sustainable footing from a physical and financial standpoint and assuring that strong ownership and management are rewarded.”¹² HUD also says that “[b]ecause of necessary processing steps, the actual outlay impact in 2011 from converting 280,000 units of public housing to Section 8 assistance will be minimal.”¹³

Changes to the Voucher Program

To increase mobility, TRA sets aside \$50 million to assist some PHAs in approximately 50 regions to expand the geographical service areas for their voucher programs. HUD recognizes that real choice can only come from access to a wide range of neighborhoods. TRA encourages PHAs to work together to create regional partnerships for voucher administration. This should help ease the administrative difficulties that voucher holders face when moving from the jurisdiction of one PHA to the jurisdiction of another.

To foster mobility, part of the \$50 million will be used to provide some PHAs with the funds for additional

¹⁰HUD PowerPoint Presentation, *supra* note 5, at slide 16.

¹¹For example, the Housing Authority of Hawaii has 5,373 public housing units, the Housing Authority of Puerto Rico has 54,084 and the Housing Authority of the Virgin Islands has 3,284. Other PHAs that do not administer a voucher program but have a number of public housing units include Hempstead, New York (1,309 units), Trenton, New Jersey (1,843), Sacramento City, California (1,843) and Athens, Georgia (1,255).

¹²Public and Indian Housing, *supra* note 7, at C-2.

¹³It is anticipated that 20,000 non-public housing units will be converted.

services for residents to understand the voucher process, provide housing search assistance, and improve outreach to landlords in a broad range of communities to encourage them to participate.

Evaluating the Proposal

There are a number of positive aspects to the TRA proposal. First, the Administration is focusing on public housing, recognizing that it is of value and worth preserving, that the need to take action to preserve it is urgent and that the status quo will result in the continuing loss of units. Second, it is important that HUD is seeking the input of residents, as well as other interested parties, including PHAs and academics, regarding the viability of the plan that it proposes.¹⁴ Third, HUD is recognizing that there are essential tenant protections that should be preserved, including that there should be no eviction due to any conversion, that any TRA units must have rent based on income that is affordable to extremely low-income families, and that public housing and residents of other federally assisted housing should have the opportunity to move out of assisted housing and continue to receive housing assistance. To ensure that mobility is more than an aspiration, HUD is proposing that funds be appropriated to expand the local administration of the voucher program to cover larger geographical areas, to attract more landlords to participate in the program and to provide mobility counseling.

However, the full scope of TRA is not known, as HUD is continuing to release the details. Because the proposal is not fully developed, there are many unanswered questions. These are summarized below.

Tenant Rights

Of great concern to public housing residents is the question of what tenant protections will be available in TRA-funded units. HUD has stated that under TRA “essential resident protections” will continue¹⁵ and that HUD staff will “draft authorizing legislation that will combine best features of project-based vouchers and the project-based section 8 policies.”¹⁶ Residents seek more assurances, since retention of beneficial public housing policies has not been mentioned. Public housing residents want to retain the best of public housing and eliminate policies that do not benefit¹⁷ residents. Those policies that public housing residents want to retain include:

- A commitment to an informal hearing for applicants who are denied.
- The right to be evicted only for good cause.¹⁸
- The right to a grievance procedure prior to eviction and to address other tenant complaints about PHA action or inaction.
- The right to organize and be recognized by a PHA in accordance with 24 C.F.R. part 964.
- The right to know about and comment on policies that pertain to public housing as is now available through the PHA plan process.

Preventing the Loss of Public Housing Units

There are concerns about the preservation of this housing for the long term. For example, what will happen if TRA allows for the leveraging of funds, the property is mortgaged and there is a subsequent default and/or foreclosure? HUD has stated that it anticipates that the mortgages will be FHA-insured and that steps will be taken to reduce the chance of default and foreclosure to a point that the threat will be “di minimus.”¹⁹ But no details have been provided as to what safeguards will be put in place to ensure that the risk is in fact minimal.²⁰ Also, there are many very small PHAs that will be able to convert to TRA on a noncompetitive, voluntary basis. Will these PHAs have the expertise to leverage the financing without threatening the long-term affordability of the housing?

Sufficiency of the Funds

There are concerns about whether \$2.9 billion is sufficient to permit the conversion of 300,000 units and provide for their rehabilitation. HUD has stated that it wants to “place participating properties on a sustainable financial and physical footing.”²¹ But to date, HUD is not requiring that converted units be rehabilitated. Residents have noted that any conversion of public housing must be conditioned on a plan and financing package for the complete renovation of the developments and a long-term capital plan for the developments. Unless this is a condition of TRA, the objective of preserving the housing will not be realized.

The HUD 2011 budget provides for nearly \$10,000 per unit for the voucher program and only \$7,000 per unit for public housing. TRA would provide an additional

¹⁴For additional information regarding HUD’s efforts to seek residents’ input, see article starting on page 76 of this issue of the *Bulletin*.

¹⁵HUD PowerPoint Presentation, *supra* note 5, at slide 8.

¹⁶*Id.* at slide 19.

¹⁷Residents want to see the elimination of the community service requirement (24 C.F.R. 960, subpart F) and arbitrary and rigid no-trespass rules, which ban invited family and friends from visiting residents.

¹⁸Residents want to see a modification of the one-strike rule so as to avoid the eviction of innocent family members and to permit others a second chance prior to eviction.

¹⁹See HUD Webcast, *supra* note 3.

²⁰HUD has stated that a PHA must meet “threshold requirements” to be able to voluntarily convert public housing, but there has been no explanation of what those thresholds must be. See HUD PowerPoint Presentation, *supra* note 5, at slide 16.

²¹*Id.* at slide 9.

\$1,000, raising questions about the sufficiency of the funds. A partial answer may be that the PHAs that would be converting during the first phase of the TRA—those with no voucher program—are from areas with low Fair Market Rents. If so, the question remains as to whether these PHAs will be able to leverage the dollars that HUD believes may be leveraged, \$7.5 billion or approximately \$25,000 per unit.

Mobility

There are several questions regarding TRA's potential impact on resident mobility. It is unclear how PHAs that do not administer a voucher program will be able to provide mobility. It is also unclear how voucher waiting lists will be managed to allow residents in converted units to move with a voucher. Finally, more information is needed regarding the steps that are planned to protect and minimize the waiting period for those families on the voucher waiting list.

Local Involvement by Residents

HUD is seeking resident input on TRA, and residents are responding. Residents are also seeking to have input on any local decisions to convert public housing to a new funding stream. It is unclear whether such decisions will be a required component of the PHA annual plan. Guidance is needed as to how PHAs will notify resident councils, seek their opinions and respond to any resident comments.

HUD has also stated that it wants to engage residents and empower them. Yet HUD's proposed FY 2011 budget eliminated the Resident Opportunities and Self-Sufficiency (ROSS) Program, which was a potential source of funds for resident participation and also provided for tenant services and self-sufficiency programs.²² More information is needed as to how HUD intends to meet its objective of engaging and empowering residents. ■

²²There was no real justification for the elimination of funds, other than encouraging PHAs to use operating subsidy funds for self-sufficiency activities and noting that since 2008, ROSS grants had been used for service coordinators, whose role is to leverage resources in the community.

HUD Seeks Residents' Input on New Policies

As part of its Transforming Rental Assistance (TRA) initiative, the Department of Housing and Urban Development (HUD) is proposing to change the manner in which the low-income housing programs are funded, as discussed in detail in the article starting on page 73 of this issue of the *Bulletin*. HUD currently provides deep rental assistance to more than 4.3 million households through 13 different programs administered by three different divisions within HUD—Public and Indian Housing (PIH), Multifamily Housing, and Community Planning and Development (CPD). The three major programs are vouchers, public housing and project-based Section 8. One of HUD's reasons for transforming rental assistance is that there are some unjustifiable differences among the programs. For example, there are differences among the rules for setting rents, owner incentives, characteristics of contracts, family income requirements, target groups to be served, the local agencies (if any) that administer the programs, tenant mobility, physical condition standards for the units, and access to private capital for maintenance, upkeep and renovation.

In discussing federal rental assistance, HUD has set forth some broad principles. According to HUD, rental assistance should:

- be simple to use and administer;
- be flexible in that it may be either tenant-based or project-based;
- assure resident choice/resident mobility;
- reduce the number of families with worst-case housing needs;
- provide affordability for extremely low-income families;
- promote deconcentration of race and/or poverty for people and places.
- create opportunities to leverage capital for improving the quality of the housing; and
- help residents achieve self-sufficiency.

HUD Efforts to Engage Residents

Because HUD is considering significant changes to low-income housing, it organized three meetings—one in October involving public housing, another in November for the voucher program and the third in January regarding project-based Section 8. In each instance, these meetings were held with the housing industry, and included a few academics and advocates. At the October public

housing meeting, *two* residents were invited at the urging of the National Low Income Housing Coalition (NLIHC), and those residents rightly noted the dearth of resident representation. (The other meetings may not have had any resident representatives.) HUD Secretary Shaun Donovan noted the residents' concerns and decided to take action.

HUD staff asked the National Housing Law Project (NHLP) to identify a representative group of public housing tenants and a representative group of voucher participants to meet with the Secretary and HUD staff for the purpose of discussing:

- the future of the HUD rental assistance programs;
- ways to maintain resident voices as policy proposals move forward; and
- building an engaged and informed group of residents with an ongoing, meaningful participatory role in HUD policies and programs.

NHLP, honored by the request, agreed to undertake that effort with grant support from the Rockefeller and MacArthur Foundations. In late 2009, NHLP reached out to its national¹ and local partners and the Housing Justice Network to identify a group of public housing residents. HUD senior staff then held a web-based meeting with a large number of public housing residents² and their partners. Further, the Secretary met with a smaller subgroup of 37 public housing residents and some of their partners.³ A second meeting with the Secretary is planned with public housing residents, voucher participants and project-based Section 8 residents.⁴ That meeting is tentatively

¹The national groups included NLIHC, National Peoples Action (NPA), National Economic and Social Rights Initiative (NESRI) and the Advancement Project.

²This meeting was recorded and may be accessed. To listen to the recorded phone conference, please follow these steps: (1) Dial 1.866.803.1430 to access the playback center; (2) Press "1" to indicate you would like to listen to the recording; (3) Enter 5144940# for your Conference ID; (4) Enter 4295292# for your Playback ID.

³These 37 residents, selected from a pool of 60 who expressed interest in attending and who were able to participate in a series of web-based meetings and phone calls, are from 17 states plus the District of Columbia and represent 28 cities. They are from small cities of under 100,000 (including Meriden, Connecticut; Houma, Louisiana; Cleveland, Tennessee; Charlottesville, Virginia; Dublin, California; and Camden, New Jersey) to some of the largest cities in the nation (such as New York City, Los Angeles, Chicago, Philadelphia, Detroit, Baltimore, Boston, Washington, D.C., Nashville-Davidson and Seattle). There are also residents from mid-sized cities (less than 500,000), including New Orleans, Kansas City, Miami, Minneapolis, Cincinnati, Buffalo and Sarasota. Finally, there are residents from smaller cities of less than 200,000, including Richmond, Virginia; Tacoma, Washington; and Clarksville, Tennessee. The residents also reflect the diversity of the resident population of public housing, representing families with children and families with disabled or elderly household members. Additionally, the residents represent working families and those who are unable to work or are retired. The racial and ethnic diversity of public housing residents is also well represented.

⁴NHLP is not organizing or identifying the Section 8 project-based residents. HUD is assuming that responsibility.

scheduled for mid-April. Prior to the next meeting, senior HUD staff will conduct a web-based meeting to discuss voucher issues with the voucher participants and will host at least one other web-based meeting with resident representatives of the three major affordable housing programs to discuss its TRA proposal.

Prior to the HUD meetings, the public housing residents and voucher participants engaged in a number of telephone calls to determine common issues, prioritize those issues and address the issues and questions posed by HUD regarding the general proposal for the transformation of rental assistance programs. The issues on which the Secretary sought residents' opinions included:

- resident organizing and involvement in PHA planning;
- resident protections and responsibilities;
- resident choice of where to live;
- services that best promote resident success;
- public and private rental housing; and
- shifting rental assistance programs to a single funding stream.

For each of these topics, residents were asked to address a series of questions. These questions included the following:

Group 1: Resident Organizing and Involvement in PHA Planning

- When is resident involvement most important?
- How involved in planning processes are residents in your community? Should residents be more involved? What policies/programs would allow for that?
- Do residents in your community organize to collectively improve public housing? If yes, do residents get money for resident organizing? From where? How is the money spent?
- Do you feel PHAs are responsive to your community's organizing needs? If so, what makes it work well? If not, how could it be improved?
- How effective are Resident Advisory Boards (RABs)? How can they be improved?
- Has asset management changed your experience with PHA planning processes? For better or worse? In what ways?

Group 2: Resident Protection and Responsibilities

- If you were designing a housing program, what resident protections would you make sure to include?
- What resident protections do you think are most important?

- Are current HUD rules on resident protections adequate? How can they be strengthened?
- What is the minimum someone should pay in rent? What is the maximum?
- What is the best way to set rents? Is percentage of income always the right way?
- For what offenses should residents be evicted?

Group 3: Resident Choice of Where to Live

- Should public housing residents have the chance to move with a Section 8 voucher? Why? Why not?
- Should public housing residents have to stay in public housing for some amount of time before being able to move with a voucher?
- Should the chance for a public housing resident to have a voucher depend on a resident completing training or services?
- Have there been any efforts in your area to organize voucher tenants? Do you think it can be done?
- How easy/hard is it for public housing residents to get on waiting lists in your community? Should there be one-stop shopping to apply for subsidized housing? For how large an area?

Group 4: Services that Best Promote Resident Success

- How do you define success? Does the definition differ for families with children? Families with elderly members? Families with disabled members?
- Based on that definition, what services could help residents reach their goals?
- Assuming that there's a limited amount of money available for subsidized housing and supportive services, what tradeoffs would you and others in your community suggest, in order to have access to better services?
- What's the best way for you to access services? Be connected with those that exist in the community, or have more services available to you in the public housing development?
- In your community, what partnerships exist between public housing agencies and service providers?

Group 5: Public and Private Rental Housing

- If you have lived in both public and privately owned rental housing, what are the similarities? What are the differences?

- What qualities of privately owned affordable rental units would you like to see in public housing?
- Are there things about privately owned affordable housing that concern you?

Group 6: Shifting Rental Assistance Programs to a Single Funding Stream

- What are the benefits of a single funding stream?
- What are the risks?
- What opportunities are created if HUD moves rental assistance programs to a single funding stream?

Next Steps

Public housing residents, voucher participants and project-based Section 8 residents will soon engage with HUD to address their issues and concerns regarding the TRA proposal. This will be done in web-based meetings and at the mid-April meeting. Voucher participants and public housing residents who are leaders in their community, along with their partners, are urged to contact NHLP if they are interested in joining in this effort. ■

FY 2011 HUD Budget Proposes Changes and Cuts

On February 1, 2010, Shaun Donovan, Secretary of the Department of Housing and Urban Development (HUD), presented a briefing on HUD's Fiscal Year (FY) 2011 budget.¹ The Secretary spoke for more than an hour and, along with a panel of his senior staff, answered questions. His budget requests discretionary funding authority of \$41.6 billion, a 5% decrease from FY 2010's request of \$43.6 billion.² However, the Secretary said that because the projected receipts of the Federal Housing Administration (FHA) and the Government National Mortgage Association (Ginnie Mae) will be \$6.9 billion, the actual cash available to the department, if the budget is approved as proposed, is 3% more than in FY 2010.

Background

In a year of tight fiscal constraints, the enactment of this budget would be an achievement. The discretionary authority is subject to annual appropriation, and therefore should be the focus of outreach to members of Congress as the budget process moves forward. Given the range of initiatives and targeted funding addressing community recovery and transformation, local advocacy groups, as well as state and local governments, will hopefully recognize and accept this challenge.

As a context for this budget, the Secretary posited that we face a very different housing situation than we did 23 months ago. Then, the country was hemorrhaging 700,000 jobs a month, had seen home prices fall every month for 30 straight months, had seen residential investment fall by more than 40% in 18 months, experienced a growth rate of negative 6.3% and lost nearly \$10 trillion of stock value. In the intervening year, the Secretary said, HUD responded by assisting more than 1 million homeowners avoid foreclosure, improving FHA underwriting,³ developing partnerships with the Department of Transportation and the Environmental Protection Agency, housing thousands of displaced Gulf Coast families, committing over 98% of the \$13.6 billion in stimulus money, and proposing and creating transformational initiatives to improve how HUD does business.

With this funding, Secretary Donovan said, the FY 2011 budget will continue "full funding for core programs that most impact families and communities." It will serve 2.4 million families living in public housing and in

project-based Section 8 developments. According to the Secretary, it will also support 35,000 additional vouchers, will more than double the rate at which HUD dollars will create permanent supportive housing for the homeless, support FHA and Ginnie Mae's current countercyclical market support role, and raise the number of households served in all programs from 5.3 million at the end of FY 2009 to 5.5 million by the end of FY 2011.

The New HUD

During FY 2010,⁴ HUD introduced transformational initiatives, such as Choice Neighborhoods, Sustainable Communities and the Energy Innovation Fund. In FY 2011, it seeks to restructure core programs and to transform rental assistance. At the same time, it proposes to promote large-scale job creation by offering competitive Community Development Block Grant (CDBG) Catalytic Fund grants (alongside the formula CDBG funding) and will reform HUD's homeless programs through implementation of the Homeless Emergency Assistance and Rapid Transition to Housing Act.

FY 2010 saw the beginnings of partnerships on sustainability with the Department of Transportation, the Department of Education (ED) and the Environmental Protection Agency. The FY 2011 proposal expands inter-departmental work by linking HUD's Choice Neighborhoods Initiative with ED's Promise Neighborhoods and combining housing with the Department of Health and Human Services' (HHS) mainstream services, such as health care and Temporary Assistance for Needy Families (TANF). Finally, HUD plans to step up its overhaul and oversight of the FHA.

Proposed Cuts and Increases

In response to the President's mandate to rein in spending, HUD proposes to cut funding for the public housing capital fund,⁵ HOME Investment Partnerships,⁶ Native American Housing Block Grants,⁷ housing programs for the elderly⁸ and Section 811 Supportive Housing Program for Persons with Disabilities.⁹ Reductions are also proposed, under Public and Indian Housing, for Veterans Affairs Supportive Housing¹⁰ and Native Hawaiian Housing Block Grants.¹¹ Under Community Planning and Development, the Economic Development Initiative,¹² Neighborhoods Initiative Program,¹³ the Rural Innovation

⁴FY 2010 saw a 9% increase over the FY 2009 HUD request.

⁵HUD, *supra* note 1, at 37-41 (from \$2.5 billion to \$2.044 billion).

⁶*Id.* (from \$1.825 billion to \$1.65 billion).

⁷*Id.* (from \$700 million to \$580 million).

⁸*Id.* (from \$825 million to \$274 million).

⁹*Id.* (from \$300 million to \$90 million).

¹⁰*Id.* (from \$75 million to \$0).

¹¹*Id.* (from \$13 million to \$10 million).

¹²*Id.* (from \$173 million to \$0).

¹³*Id.* (from \$22 million to \$0).

¹HUD, INVESTING IN PEOPLE AND PLACES: FY 2011 BUDGET, <http://portal.hud.gov/portal/page/portal/HUD/documents/fy2011budget.pdf>; OMB, Budget of the United States Government, Fiscal Year 2011, <http://www.whitehouse.gov/omb/budget/Overview/>.

²The total HUD proposed budget is \$48.9 billion.

³This would involve, among other things, withdrawing approval for more than 280 lenders.

Fund,¹⁴ Self-Help and Assisted Homeownership¹⁵ and the Brownfields Economic Development Initiative¹⁶ would all be zeroed out. The Office of Fair Housing and Equal Opportunity would face an 18% reduction.¹⁷

Increases are requested for tenant-based rental assistance,¹⁸ the public housing operating fund,¹⁹ and Policy Development and Research.²⁰ Also of interest is a proposed \$10 million for tenant resources, information and outreach grants for private multifamily subsidized housing, which continues level funding from the FY 2010 budget and supports the rebuilding of a program that was enacted in 1997²¹ and subsequently defunded.

After a decade of concerted effort spearheaded by the National Low Income Housing Coalition, \$1 billion is requested for the National Housing Trust Fund.²²

Five Interrelated Objectives

The vision,²³ Secretary Donovan said, is to move away from the one-size-fits-all approach and achieve five interrelated objectives intended to transform the agency. The first objective is to “strengthen the nation’s housing market to bolster the economy and protect consumers.”²⁴ The plan is to continue the aggressive engagement of FHA and Ginnie Mae with level funding of mortgage insurance, which now covers 30% of all home mortgages in the market, and Home Equity Conversion Mortgages.²⁵

The second objective is to “meet the need for quality affordable rental homes.”²⁶ This is to be accomplished through increases in funding for project-based Section 8, tenant-based rental assistance, public housing operating funds and homeless assistance grants.²⁷ Recognizing that the country is at risk of losing hundreds of thousands of deeply subsidized housing units, the Secretary sees

¹⁴*Id.* (from \$25 million to \$0).

¹⁵*Id.* (from \$82 million to \$0).

¹⁶*Id.* (from \$18 million to \$0).

¹⁷*Id.* (from \$72 million to \$61 million). Although, as the Secretary pointed out, the FY 2009 amount had been \$54 million. The Secretary also touted the Westchester County, New York, settlement related to grantee obligations to affirmatively further fair housing as an example of HUD’s new engagement in fair housing. See NHLP, *Historic Settlement Reached in Desegregation Case Against Westchester County*, 39 HOUS. L. BULL. 249, 260 (2009).

¹⁸*Id.* (from \$18.18 billion to \$19.55 billion).

¹⁹*Id.* (from \$4.77 billion to \$4.83 billion).

²⁰*Id.* (from \$48 million to \$87 million).

²¹Pub. L. No. 165-65, tit. V, § 514, 111 Stat. 1344, 1394 (1997).

²²Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, div. A., tit. I, § 1331, 122 Stat. 2712 (2008). The NHTF funding is located under Mandatory Programs.

²³A more detailed description of this vision will be set forth in HUD’s strategic plan.

²⁴HUD, *supra* note 1, at 4.

²⁵12 U.S.C. § 1715z-20.; HUD, *supra* note 1, at 40.

²⁶HUD, *supra* note 1, at 4.

²⁷The decrease in funding for public housing capital funds is possibly considered acceptable because of the \$4 billion of stimulus money that went to these accounts P.L. No. 111-05, § 2, div. A, tit. XII, 123 Stat 115, 214 (2009).

the \$350 million proposed for the Transforming Rental Assistance Initiative as a way to create financial and physical sustainability,²⁸ provide residents with greater mobility within the system,²⁹ and increase administrative efficiency.³⁰ The proposal envisions the restructuring of funding into systems designed to meet the particular needs of public housing agencies (PHAs) with different portfolios: PHAs with public housing only, PHAs with public housing and vouchers (including project-based vouchers), PHAs with project-based Section 8, and PHAs with vouchers only. Multifamily, rent supplement properties and moderate rehabilitation properties administered by PHAs would have their own systems. Partly in recognition of the 56% increase in rural and suburban homelessness in the past year, the second objective also has a homeless assistance component.³¹

The vision, Secretary Donovan said, is to move away from the one-size-fits-all approach and achieve five interrelated objectives intended to transform the agency.

The third objective is to “utilize housing as a platform for improving quality of life.”³² Under this objective, HUD proposes to suspend funding for new Section 202 and 811 programs for FY 2011 in order to totally redesign them.³³ HUD also proposes funding for 10,000 new homeless and special needs vouchers in collaboration with HHS and ED. Four thousand will be housing choice vouchers for currently homeless individuals, and 6,000 will be competitively awarded to cities and states whose proposals offer the best chance of integrating their use with TANF and other services. ED will assist in identifying families and children for this program.

Fourth, HUD proposes to “build inclusive and sustainable communities free from discrimination.”³⁴

²⁸This would be accomplished by putting participating properties on a sustainable financial and physical footing and enabling owners to leverage private capital.

²⁹This would be accomplished by encouraging regional partnerships, protecting project-based subsidies for owners, and providing mobility assistance to tenants.

³⁰This would be accomplished by, among other things, consolidating resident protection regulations and creating a single form of rental assistance.

³¹See HUD, *supra* note 1, at 38.

³²HUD, *supra* note 1, at 6.

³³Components in play include requirements related to market demand, capacity of sponsors, development timeframes, service models and more adequate construction costs reducing the need for tax credit investment.

³⁴HUD, *supra* note 1, at 6, 39. When asked at the briefing how he justified a reduction in funding for FHEO in light of this goal and the sad history of HUD in this regard, Secretary Donovan suggested that the current budget request should be viewed more as a significant increase from FY 2009 than a reduction from FY 2010.

FY11 Budget Chart for Selected HUD Programs (in millions)

HUD Program (set asides indented)	FY05 Enacted	FY06 Enacted	FY07 Enacted	FY08 Enacted	FY09 Enacted	FY10 Enacted	FY11 President's Request
Tenant Based Rental Assistance	14,766	15,417	15,920	16,391	16,817	18,184	19,551
Contract Renewals	13,463	13,949	14,436	14,666	15,034	16,339	17,310
Tenant Protection Vouchers	163	178	149	200	150	120	125
Administrative Fees	1,200	1,238	1,281	1,351	1,450	1,575	1,791
Family Self Sufficiency Coordinators	46	47	47	49	50	60	60
Family Unification Program Vouchers				20	20	15	0
Veterans Supportive Housing Vouchers				75	75	75	0
Nonelderly Disabled Vouchers				30	30	0	0
Disaster Housing Assistance Program							66
Homeless Special Needs Demonstration Vouchers							85
Section 811 Mainstream Vouchers							114
Project Based Rental Assistance	5,298	5,037	5,976	6,382	7,500	8,552	9,382
Public Housing Capital Fund	2,579	2,439	2,439	2,439	2,450	2,500	2,044
Emergency/Disaster Grants	30	17	17	19	20	20	20
Resident Opportunities and Supportive Services	53	38	38	40	40	50	0
Public Housing Operating Fund	2,438	3,564	3,864	4,200	4,455	4,775	4,829
HOPE VI	143	99	99	100	120	135	0
Choice Neighborhoods Initiative						65	250
Native American Housing Block Grants	621	624	624	630	645	700	580
Native Hawaiian Housing Block Grants	9	9	9	9	10	13	10
Housing Opportunities for Persons with AIDS	282	286	286	300	310	335	340
Community Development Fund	4,671	4,178	3,772	3,866	3,900	4,450	4,380
CDBG Formula Grants	4,110	3,711	3,711	3,593	3,642	3,990	3,990
Economic Development Initiative Grants	262	307	0	180	165	173	0
Catalytic Investment Grants							150
Sustainable Communities Initiative						150	150
Rural Innovation Fund						25	0
University Community Fund						0	25
Brownfields Redevelopment	24	10	10	10	10	18	0
Energy Innovation Fund						50	0
HOME Investment Partnership Program	1,900	1,733	1,733	1,704	1,825	1,825	1,650
HOME Formula Grants	1,789	1,690	1,690	1,629	1,821	1,825	1,650
American Dream Downpayment Initiative	50	25	25	10	0	0	0
Self-Help Homeownership Opportunity Program	25	20	20	26.5	26.5	27	0
Housing Counseling Assistance	42	42	42	50	65	87.5	88
Homeless Assistance Grants	1,241	1,327	1,442	1,586	1,677	1,865	2,055
Rural Housing and Economic Development	24	17	17	17	26	0	0
Housing for the Elderly (Section 202)	741	735	735	735	765	825	274
Housing for Persons with Disabilities (Section 811)	238	237	237	237	250	300	90
Fair Housing and Equal Opportunity	46	46	46	50	54	72	61
Fair Housing Assistance Program	26	26	26	26	26	29	28
Fair Housing Initiatives Program	20	20	20	24	28	43	33
Healthy Homes & Lead Hazard Control	167	152	152	145	140	140	140
Policy Develop. & Research (excluding academic grants)	45	36	36	28	32	48	87
Total Budget Authority (includes items not listed on chart)	32,040	34,270	33,650	37,600	41,500	43,581	41,590

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

Contending that HUD is the most “place-based” department in the entire federal government, the Secretary pointed out that 58,000 of the 66,000 census tracts in the country have HUD housing. HUD must, therefore, make those neighborhoods into places people will choose to live. The Sustainable Communities Initiative, Choice Neighborhoods Initiative, CDBG catalytic competitive grants and funding for capacity building for nonprofits are all designed to work toward that end.

Fifth, and clearly the center of the proposal, Secretary Donovan and his team intend to “transform the way HUD does business.”³⁵ HUD’s strategic plan has received input from over 1,500 stakeholders. In FY 2010, \$259 million was allocated to HUD’s Transformation Initiative.³⁶ That sum included funding for tenant-based rental assistance, public housing capital and operating funds, CDBG, HOME, homeless assistance grants and funding to combat mortgage fraud. Under the Transformation Initiative for FY 2011, HUD proposes to almost double tenant-based assistance,³⁷ more than triple public housing operating funds,³⁸ and increase homeless assistance by 50%,³⁹ raising this package of expenditures to \$476 million.⁴⁰ This is balanced by the effective elimination of additional money for the HOPE-VI Program.⁴¹

Conclusion

Secretary Donovan and his staff are promoting the HUD FY 2011 budget as an exposition of a transformational vision for the department. According to the Secretary, it is a vision that leaves behind outmoded systems and begins the creation of a housing program for the 21st century. True to this vision, the Secretary and his senior staff have assiduously courted the imagination, concerns and hopes of a broad range of people and organizations—residents, advocates, developers, lenders and owners/operators—that are invested in the successful future of federally assisted housing in the decades to come. Where the money will go and what it will buy is at the heart of these initiatives. Ideally, residents and advocates will continue to educate themselves about this future and continue to engage in shaping it. ■

³⁵*Id.* at 6.

³⁶*Id.* at 41.

³⁷*Id.* (from \$100 million to \$195 million).

³⁸*Id.* (from \$15 million to \$48 million).

³⁹*Id.* (from \$13 million to \$21 million).

⁴⁰*Id.*

⁴¹The HOPE-VI authority went from \$120 million in FY 2009, to \$200 million in FY 2010 (the increase being viewed by the House as actual HOPE-VI funding and by the Senate as a placeholder for Choice Neighborhoods) to zero in the FY 2011 request.

No Significant Changes in Proposed Budget for RD Housing Programs

The President’s budget for Fiscal Year (FY) 2011 proposes few changes in funding for the rural housing programs administered by Rural Development (RD) or the Rural Housing Service.¹ Indeed, the only significant changes made in the proposed budget are the elimination of the Rural Rental Housing Preservation program and slightly higher funding for the Section 515 Rural Rental Housing direct loan program. The Section 502 Single Family Direct Home Loan Program would receive a small increase in funding, while the Guaranteed Home Loan program would be funded at \$12 billion, the same level as in the FY 2010 appropriations. A major fee increase is proposed for the guaranteed program to practically eliminate all government costs for the program. All the remaining RD loan and grant programs would be funded at about the same level as they were funded in FY 2010.

Rental Housing Programs

Starting in 2006, the agriculture appropriations acts have authorized funding for a program to restructure and revitalize the aging RD multifamily rental housing stock.² In FY 2009 and FY 2010, \$20 million and \$25 million were made available for the program. The FY 2011 budget proposes no funding for the program because it is an “unauthorized” demonstration program which serves developers, rather than low- and very low-income tenants. The derivation of this conclusion is not clear as the Department of Agriculture called for a revitalization program in a 2004 study³ and has lauded its implementation for the last three years. The program is similar to the HUD revitalization program and has successfully preserved and revitalized a limited number of Section 515 developments, all of which are required to stay in the program for an additional 20 years. A bill permanently authorizing the program has been introduced in the House of Representatives and is currently awaiting action.⁴ The Administration has in the past supported passage of this revitalization bill.

¹Administratively, the Department of Agriculture has incorporated the Rural Housing Service programs into its Rural Development Division, and it refers to the programs as Rural Development Housing Programs. Apparently, the department has not asked Congress to change the agency’s name, as the President’s budget as well as Federal Register publications continue to reference the programs as Rural Housing Service programs. This article will refer to the programs as RD housing programs.

²*See, e.g.*, Pub. L. 111-80, 123 Stat. 2105 (Oct. 21, 2009).

³Rural Rental Housing – Comprehensive Property Assessment and Portfolio Analysis (Nov. 2004), <http://www.rurdev.usda.gov/rhs/mfh/Property%20Assessment/Property%20Assessment.htm>.

⁴H.R. 2876, Rural Housing Preservation Act of 2009.

The Section 515 multifamily rental housing program funding is proposed to increase by \$25.7 million to a total of \$95.2 million. The increase practically matches the amount that was previously made available for the restructuring and revitalization of the RD rental housing stock. Thus, if RD uses any of the Section 515 funding for revitalization and restructuring instead of new construction, the new construction portion of the program will effectively remain at the \$69.5 million level it has been at for the past two fiscal years.

The Rental Assistance Program, which is used to subsidize rents in Section 515 rental housing and Section 514/516 farm labor housing, would be reduced somewhat from \$980 million in the current year to \$966 million in FY 2011. The President's budget states that this is not expected to have an adverse impact on the number of assisted households because it simply reflects a reduction based on a better analysis of projected needs. Unfortunately, the proposed budget would eliminate the \$6 million earmark for preservation and restructuring, which was available in the past three years. Thus, if RD allocates some of the Section 515 program funding to revitalization and restructuring, it would not have Rental Assistance to limit rent increases for residents in those developments.

The FY 2011 budget would continue to fund the Rural Voucher Demonstration Program at \$18 million, a slight increase over the \$16.4 million that was available for the program in the current fiscal year. The vouchers are intended to protect residents of Section 515 developments from displacement when owners of the developments are

allowed to prepay their loans pursuant to the provisions of the Emergency Low Income Housing Preservation Act of 1987.⁵

Homeownership Loan Programs

The President's budget would make a modest \$79 million increase in funding for the Section 502 direct loan homeownership program. This increase is not expected to substantially increase the number of Section 502 loans as housing and construction prices are expected to increase, thereby keeping the number of loans at the FY 2010 level.

The Section 502 guaranteed home loan program is budgeted at \$12 billion for FY 2011, the same as it was in FY 2010. However, major structural changes are proposed, including converting the program into a direct endorsement program and charging borrowers an annual fee in addition to the existing guarantee fee. Such a fee is consistent with fees charged by the Department of Housing and Urban Development and the Veterans Administration in connection with their insured single family home loan programs. The expected consequence of charging this fee is to eliminate any direct costs to the government as a result of administering the program. In FY 2009 and FY 2010 the \$12 billion loan program had a direct budgetary impact of \$79 million and \$173 million, respectively. It is expected that the new fee will eliminate the government's cost of running the program. Moreover, by converting the program into an endorsement program, RD expects to lessen the demands that the program has placed on its field staff, which has had to review and approve each loan submitted for a guarantee. The direct endorsement program would allow RD to approve certain lenders whose loan submissions would be approved automatically by the agency.

FY11 Budget Chart for Selected Rural Housing Programs (in millions)

Program	FY 2010 Appropriations	FY 2011 Proposed Budget
Section 515 Rural Rental Housing Loans	\$69.5	\$95.2
Section 521 Rental Assistance	\$980	\$966
Rural Voucher Demonstration Program	\$16.4	\$18
Section 514 Farm Labor Housing Loans	\$27.3	\$27
Section 516 Farm Labor Housing Grants	\$9.9	\$10.0
Rental Housing Preservation Demonstration	\$25	\$0
Section 538 Guaranteed Rental Housing Loans	\$129.1	\$129.1
Section 502 Direct Homeownership Loans	\$1,121	\$1,200
Section 502 Guaranteed Home Loans	\$12,000	\$12,000
Section 504 Home Repair Loans	\$31.6	\$31
Section 504 Elderly Home Repair Grants	\$31.6	\$31
Section 523 Self Help Technical Assistance Grants	\$41.9	\$37
Section 533 Housing Preservation Grants	\$9.4	\$9.4

Other Loan and Grant Programs

Few significant changes are proposed for the remaining RD programs. The Section 504 home repair program is being reduced from \$34.4 million to \$34 million. The companion elderly home repair grant program is also being reduced from \$31.6 million to \$31 million. While these cuts are minor, they are nonetheless a reduction in commitment to very low-income households in need of home repairs.

The farm labor housing loan program is proposed to be funded at \$27 million, a small reduction over its current funding at \$27.3 million. The cut should not affect the program as it relies very heavily on Rental Assistance to make developments economically viable. The farm labor housing grant program would be increased slightly from \$9.9 million to \$10 million in FY 2011. ■

⁵The rural provisions of that act are codified at 42 U.S.C.A. § 1472(c) (West 2003).

Homelessness Prevention and Rapid Re-Housing Program: Emerging Issues

In fall 2009, local jurisdictions began to receive funding from the Department of Housing and Urban Development (HUD) for the Homelessness Prevention and Rapid Re-Housing Program (HPRP).¹ The American Recovery and Reinvestment Act of 2009 included \$1.5 billion in HPRP funds. These funds are available to assist homeless households and households who would become homeless but for the assistance.² Common uses of HPRP funds include rental assistance, security deposits, utility payments and moving costs. Grantees that administer HPRP assistance must verify and document the eligibility of applicant households and must recertify participant households once every three months.³ This article discusses a number of concerns that advocates have raised about eligibility verification and documentation for HPRP.

Verification of Income

To receive HPRP assistance, a household must have a total income at or below 50% of Area Median Income.⁴ HUD guidance outlines how to determine and calculate household income and specifies what items do and do not count toward household income.⁵ HUD makes clear, for example, that Social Security benefits and Supplemental Security Income (SSI) are included in household income, but deferred periodic amounts of Social Security benefits and SSI are not.⁶

In addition, HUD guidance instructs grantees how to document income eligibility. The publication notes that documentation must be recent. Documentation dated within 30 days prior to the time of application is sufficient for HPRP purposes.⁷ Acceptable types of documentation, in order of preference, include:

- written verification from a third party, such as an employer, Social Security Administration or a public benefits office;

¹For extensive background information on HPRP, see NHLP, *HUD Implements Homelessness Prevention and Rapid Re-Housing Program*, 39 Hous. L. Bull. 99, 110 (Apr./May 2009).

²Notice of Allocations, Application Procedures, and Requirements for Homelessness Prevention and Rapid Re-Housing Program Grantees Under the American Recovery and Reinvestment Act of 2009, at 22, available at <http://www.hudhre.info/index.crm>.

³*Id.*

⁴*Id.* at 23.

⁵HUD, *Income: Eligibility Determination and Documentation Requirements* (2009), available at http://www.hudhre.info/documents/hprp_IncomeDocReqs.pdf.

⁶*Id.* at 3.

⁷*Id.* at 5.

- oral verification from a third party, given over the telephone or in person to HPRP staff; and
- an affidavit of income as reported by the applicant household.⁸

The publication contains a chart that lists acceptable types of documentation for each source of income.⁹ “HUD expects a conscientious and reasonable effort to be made by grantees (and subgrantees) to use the highest documentation standard possible.”¹⁰ HUD recognizes, however, that the standard of documentation used will depend on grantee resources. Some grantees may have a third-party verification process in place that could be used for the HPRP application process. Other grantees, such as small nonprofits, may not have the resources to obtain the highest level of documentation.¹¹ In addition, HUD acknowledges that the standard of documentation used will depend on the form of HPRP assistance given. It may not be reasonable, for example, for an applicant household to provide third-party verification for one-time or emergency assistance, given the time-sensitive nature of the assistance.¹² Nevertheless, HUD notes that an applicant self-declaration should be used as a last resort, and if used, grantees must provide an explanation.¹³

Verification of Housing Status

To qualify for HPRP assistance, a household must be homeless (for rapid re-housing assistance) or at risk of losing its housing (for homelessness prevention assistance) and must meet both of the following circumstances: (1) “no appropriate subsequent housing options have been identified,” and (2) “the household lacks the financial resources and support networks needed to obtain immediate housing or remain in its existing housing.”¹⁴ HUD has published guidance on how to determine and document the housing status of each applicant.¹⁵ The publication contains a chart that lists acceptable types of documentation for each living situation.¹⁶

Of particular interest to advocates is HUD’s list of the acceptable types of documentation that may be used to prove that a household is at risk of homelessness. HUD describes this list as “not all inclusive,”¹⁷ leaving room for advocates to argue that a client is at risk of homelessness even if she cannot provide one of the types of documenta-

⁸*Id.*

⁹*Id.* at 6-10.

¹⁰*Id.* at 5.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 6.

¹⁴Notice, *supra* note 2 at 23.

¹⁵HUD, *Housing Status: Eligibility Determination and Documentation Requirements*, http://www.hudhre.info/documents/HPRP_HousingStatusReqs.pdf.

¹⁶*Id.* at 4-10.

¹⁷*Id.* at 10.

tion on HUD's list. The types of documentation on HUD's list include, but are not limited to, an eviction notice; a court order based on eviction action notifying the applicant that she must leave her dwelling; a notice indicating that a building that an applicant is renting is being foreclosed on; utility shut-off notice; a notice from the landlord or a government entity that an applicant's housing is condemned; a foreclosure notice from a lending institution; and a self-declaration from the applicant.¹⁸ A self-declaration is acceptable only if third-party documentation cannot be obtained.¹⁹ The HPRP worker must document attempts to obtain third-party documentation. HUD has issued a self-declaration of housing status template.²⁰

A separate chart instructs grantees how to verify and document subsequent housing options and the financial resources and support networks available to applicant households.²¹

HUD has not established requirements for the proper treatment of household assets in the financial resources analysis.²² Instead, HUD guidance instructs each grantee to determine "whether an applicant household is required to spend down its assets and, if so, by how much, for the purpose of determining eligibility and the type and level of HPRP assistance."²³ HUD cautions grantees that all subgrantees within a local Continuum of Care must adopt uniform policies on the treatment of assets and must apply the policies in a consistent manner to all applicant households.²⁴

Households Receiving Other Rental Assistance

Several local jurisdictions have maintained that households receiving rental assistance under another government program, such as Section 8, do not qualify for HPRP assistance. HUD's Virtual Help Desk has clarified that an applicant household may receive HPRP assistance for a different period of time or for "cost types" not covered by another federal, state or local subsidy program.²⁵ For example, a household receiving Section 8 voucher assistance may not receive HPRP funds for rental assistance for the current month or future months.²⁶ If the household's income decreases, HUD expects the public housing agency (PHA) to recalculate the tenant share of the rent payment. If, however, a voucher household falls behind in rent due to a time lag between the decrease in

household income and the recalculation of the tenant contribution by the PHA, the household may receive HPRP funds to cover rental arrears.²⁷ HUD has also clarified that tenants living in Low-Income Housing Tax Credit projects may be eligible for HPRP assistance because the rental subsidy received by a tax credit property is not considered the same "cost type" as direct rental assistance to the tenant.²⁸ Additionally, an applicant household receiving rental assistance under another government program may receive HPRP assistance for other cost types, such as security deposits, moving expenses or utility deposits.²⁹

Utility Issues

Several questions have arisen as to whether an applicant may receive HPRP assistance with utility payments where the applicant is already receiving some form of assistance for paying utilities. According to HUD's Virtual Help Desk, households receiving utility payment assistance through the Low Income Home Energy Assistance Program (LIHEAP) may be eligible for HPRP rental assistance, but do not qualify for HPRP utility assistance.³⁰ This is due to HUD's position that HPRP assistance cannot be provided to households for the same period of time and for the same cost types that are being provided through another governmental program. As a result, HUD has determined that a household that is receiving LIHEAP assistance with a gas bill is not eligible for HPRP assistance with other utilities.³¹ Similarly, HUD has determined that HPRP funds cannot be used to cover utility costs for public housing tenants that exceed the tenants' utility allowances.³² According to HUD, if a participant is receiving utility assistance under another program, even if it is only partial assistance, HPRP funds may not be used for utility assistance during that same period.³³

Eligibility of Non-Citizens

In the Frequently Asked Questions (FAQ) section of its Homelessness Resource Exchange website, HUD has clarified that certain non-citizens may be eligible for HPRP assistance.³⁴ HUD has taken the position that

¹⁸*Id.* at 8-10.

¹⁹*Id.* at 10.

²⁰Homeless Prevention and Rapid Re-Housing Program, Self-Declaration of Housing Status, <http://www.hudhre.info/hprp/index.cfm?do=viewHPRPTools>.

²¹HUD, Housing Status, *supra* note 15 at 11.

²²*Id.* at 2.

²³*Id.*

²⁴*Id.*

²⁵HUD, Frequently Asked Questions (FAQs): Detail (Aug. 14, 2009), <http://www.hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=121&faqid=566#detail>.

²⁶*Id.*

²⁷*Id.*

²⁸HUD, Frequently Asked Questions (FAQs): Detail (Oct. 29, 2009), <http://www.hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=122&faqid=693#detail>.

²⁹See note 25, *supra*.

³⁰*Id.*

³¹HUD, Frequently Asked Questions (FAQs): Detail (Jan. 6, 2010), <http://www.hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=122&faqid=708#detail>.

³²HUD, Frequently Asked Questions (FAQs): Detail (Jan. 6, 2010), <http://www.hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=122&faqid=707#detail>.

³³*Id.*

³⁴HUD, Frequently Asked Questions (FAQs): Detail (Jan. 6, 2010), <http://www.hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=121&faqid=706#detail>.

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) applies to HPRP.³⁵ PRWORA lists categories of qualified aliens who are entitled to receive federal assistance.³⁶ According to HUD, state and local governments that directly administer HPRP assistance must “first verify that an alien is a qualified alien before using HPRP funds to assist him or her.”³⁷ Nonprofit grantees, however, are under no such obligation.³⁸ If a nonprofit grantee does decide to pursue verification of immigration status, it must follow the requirements set forth in interim guidance published by the Department of Justice.³⁹

Several grantees have denied HPRP assistance to mixed immigration status households that include a member who does not have qualifying immigration status under Title IV. This result seems to be at odds with the approach taken in other federal programs assisting the homeless, such as Shelter Plus Care and the Supportive Housing Program for the Homeless, which do not have immigration restrictions. Further, even in federally subsidized housing programs that have immigration restrictions, mixed immigration status families may still receive assistance, as long as it is prorated to reflect the presence of ineligible household members.⁴⁰ HUD has not yet published guidance on the appropriate treatment of mixed immigration status households seeking HPRP assistance.

A related issue that has arisen is whether an applicant must produce a Social Security number (SSN) to be eligible for HPRP assistance. While HUD has not yet squarely addressed this issue, the guidance it has published regarding the recordkeeping requirements for HPRP grantees suggests that an SSN is not required. Grantees must use the Homeless Management Information System (HMIS) to record information on individuals who receive HPRP funds. HUD’s guidance instructs grantees that they may enter a specific code into HMIS if an HPRP applicant doesn’t know or doesn’t have an SSN, or if the applicant refused to provide an SSN.⁴¹ HUD’s guidance also notes that under 5 U.S.C. § 522a, a government agency cannot deny shelter or services to clients who refuse to provide their SSNs.⁴² Additionally, HUD has issued an HMIS intake template that contains checkboxes allowing agencies to choose from the following options when conducting intake: full SSN reported; partial SSN reported;

client does not know or does not have SSN; client refused to provide.⁴³ This indicates that agencies are not required to record the SSN if the client does not have one.

Eligibility of Formerly Incarcerated Individuals

HPRP assistance may be available to individuals leaving prison or jail. HUD does not require that grantees disqualify individuals based on past criminal activity.⁴⁴ In fact, HUD guidance explains that individuals who were homeless prior to incarceration and served less than 180 days may qualify for rapid re-housing assistance.⁴⁵ Individuals who served more than 180 days may qualify for homelessness prevention assistance.⁴⁶ Grantees may, however, adopt stricter eligibility criteria on past criminal activity.⁴⁷ Grantees that choose to provide HPRP assistance to formerly incarcerated individuals should work with local landlords to develop strategies to reduce barriers to housing for the population.⁴⁸

Conclusion

As local jurisdictions continue to administer HPRP, several concerns about eligibility verification and documentation remain unaddressed by HUD. Several grantees have denied HPRP assistance to households receiving SSI on the grounds that the households will not be able to sustain housing after the HPRP subsidy ends. Such policies have a disproportionate impact on people with disabilities. In addition, HUD guidance recommends, but does not mandate, that grantees and subgrantees develop and make public an appeal process for applicant households denied HPRP assistance.⁴⁹ Many grantees, however, have not established such an appeal process, leaving applicant households with no means of redress. Until HUD provides guidance on these critical issues, advocates must use existing statutes, regulations and guidance to persuade local agencies to adopt reasonable policies and practices regarding eligibility for HPRP funds. ■

³⁵*Id.*

³⁶8 U.S.C.A. § 1641 (Westlaw Feb. 5, 2010).

³⁷See note 34, *supra*.

³⁸*Id.*

³⁹*Id.*; See Interim Guidance on Verification of Citizenship, Qualified Alien Status, and Eligibility under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61m344 (Nov. 17, 1997).

⁴⁰24 C.F.R. § 5.506(b)(2).

⁴¹HUD, Homeless Management Information System (HMIS) Data Standards 45-46, http://www.hudhre.info/documents/HMISDataStandards_July2009.pdf.

⁴²*Id.* at 46.

⁴³HUD, HPRP HMIS Data Collection – Intake Template, <http://www.hudhre.info/hprp/index.cfm?do=viewHPRPData>.

⁴⁴HUD, Frequently Asked Questions (FAQs): Detail (Jan. 6, 2010), <http://hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=121&faqid=704#detail>.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹HUD, Frequently Asked Questions (FAQs): Detail (Aug. 14, 2009), <http://hudhre.info/index.cfm?do=viewFaqById&topicID=102&subTopicID=126&faqid=583#detail>.

State and Local Measures Safeguard Tenants' Rights During Foreclosure*

In May 2009, the Protecting Tenants at Foreclosure Act (PTFA) was enacted to provide a national baseline to safeguard tenants against procedures in many states that afforded tenants few or no rights after a foreclosure.¹ The law applies to any foreclosure on a federally related mortgage loan² or on any dwelling or residential real property after May 20, 2009.³ Under the PTFA, a bona fide tenant is entitled to stay in the residence for 90 days or until the end of the lease, whichever is longer.⁴

Even before the enactment of the PTFA, some state and local governments had turned their attention to tenants' rights after foreclosure. Since the PTFA does not preempt state or local laws that provide greater protections to tenants,⁵ states and localities are now enacting additional protections for tenants on issues such as pre-foreclosure notice to tenants, post-foreclosure eviction notice requirements, and protecting tenants from utility shutoffs. Many of these laws, including those enacted before the PTFA's passage and those introduced after the PTFA was signed into law, will remain in place after the PTFA sunsets at the end of 2012. This article surveys these state and local laws and is offered as a guide for advocates attempting to expand upon the protections the PTFA provides.

Pre-Foreclosure Notice to Tenants

Tenants are often caught unaware in the foreclosure process, and frequently the first notice they receive that their home has been foreclosed on is the eviction notice served by the bank or the new owner.⁶ The PTFA partially addresses this issue by giving tenants more time to move before they can be evicted, but a number of states have enacted legislation to give tenants even earlier notification of foreclosure.

*The author of this article is Michelle Garfinkle, a J.D. candidate at UC Hastings College of the Law. Katherine Joseph, a graduate research fellow at the UC Hastings Center for State and Local Government Law, provided additional research assistance.

¹See NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY & NATIONAL LOW INCOME HOUSING COALITION, WITHOUT JUST CAUSE: A FIFTY-STATE REVIEW OF THE (LACK OF) RIGHTS OF TENANTS IN FORECLOSURE, http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf

²26 U.S.C.A. § 2602 (Westlaw Feb. 23, 2010).

³Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632-34 (2009).

⁴*Id.*

⁵*Id.*

⁶WITHOUT JUST CAUSE, *supra* note 1, at 7 (indicating that, as of February 2009, only 17 states required notice of foreclosure for tenants); Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 15 (2009), available at <http://www.albanygovernmentlawreview.org/articles/2/1/Glashausser.pdf>.

California

In California, a trustee is required to post and mail a notice of trustee's sale at least 20 days before the foreclosure sale.⁷ The pre-foreclosure notice informs tenants that they must receive 60 days' notice if their landlord wants to evict them after foreclosure, and that other laws may prohibit eviction or give longer notice before eviction.⁸ The section expressly provides that it pertains only to "loans secured by the residential real property and if the billing address for the mortgage is different than the property address."⁹

Chicago, Illinois

Chicago requires owners of properties facing foreclosure to notify all of their tenants in writing "that a foreclosure action has been filed against the owner or landlord."¹⁰ Owners must also give written notice to "any other third party who has a consistent pattern and practice of paying rent to the owner or landlord on behalf of a tenant."¹¹ If a tenant demonstrates that the owner or landlord violated this section, he or she is entitled to recovery of \$200.¹²

Minnesota

For foreclosures on properties with one to four dwelling units, Minnesota law requires the foreclosing party to give notice to tenants indicating that the lease is still valid during the foreclosure process. The notice must also state that during the six-month redemption period following the foreclosure sale, the tenant cannot be asked to move.¹³ Also, the new owner must give written notice following the redemption period to evict the tenant.¹⁴ A violator of this statute is liable to the tenant for \$500.¹⁵

Minneapolis, Minnesota

Minneapolis goes beyond the notice requirements set forth in the Minnesota statute. In Minneapolis, owners must "notify the tenant(s), in writing within seven (7) days, if the owner/landlord receives a notice of mortgage foreclosure sale . . . or a notice of a contract for deed cancellation."¹⁶ The notice must be delivered "by personal service with affidavit of service by a third party, or by certified mail, return receipt requested."¹⁷ Additionally, the ordinance makes failure to comply with the notice require-

⁷CAL. CIV. CODE § 2924.8 (effective Jul. 8, 2008).

⁸*Id.*

⁹*Id.*

¹⁰CHICAGO, ILL., MUN. CODE § 5-12-095 (enacted Oct. 8, 2008), available at http://www.chicityclerk.com/tenantsVRSlandlords.php#5_12_095.

¹¹§ 5-12-095.

¹²§ 5-12-095.

¹³MINN. STAT. ANN. § 580.042 (effective Aug. 1, 2008).

¹⁴§ 580.042.

¹⁵§ 580.042.

¹⁶MINNEAPOLIS, MINN. CODE OF ORDINANCES § 244.265 (2009) (enacted May 22, 2009), available at http://library1.municode.com/default-test/home.htm?infobase=11490&doc_action=whatsnew.

¹⁷§ 244.265.

ments punishable as a misdemeanor.¹⁸ This diverges from other jurisdictions, which generally provide for fines or monetary recovery for the tenant.¹⁹

New York

New York requires the foreclosing party to notify tenants of an impending foreclosure through a notice delivered by both certified and first-class mail.²⁰ The February 2010 issue of the *Bulletin* provides an in-depth discussion of recent developments in New York law.²¹

North Carolina

North Carolina requires the posting of a notice 20 days in advance of a foreclosure sale.²² The notice must also be mailed first class to interested parties at least 20 days before sale, and if the property has fewer than 15 rental units, notices must be mailed to tenants occupying the property.²³

Maryland

Maryland's statute requiring pre-foreclosure notice provides example language and details the information that the notice must provide.²⁴ The notice must indicate that the property may be sold any time after 45 days from the date of the notice and must inform tenants that they could be evicted after foreclosure even if they have complied with the lease.²⁵ The notice must also provide contact information for the "person authorized to sell the property" and must indicate the tenant's right to "review the file in the office of the clerk of the circuit court."²⁶ The notice must be addressed to "all occupants."²⁷

Nevada

Nevada requires that a pre-foreclosure notice be "served upon any tenant or subtenant, other than the judgment debtor" who occupies the property.²⁸ The statutory scheme requires notice to be posted in three separate public places and published for three successive weeks.²⁹ Willfully removing or defacing a posted notice of sale is unlawful.³⁰

¹⁸§ 244.265.

¹⁹See FLORIDA SENATE JUDICIARY COMMITTEE, INTERIM REPORT, 2010-124, 7 (Oct. 2009), available at http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-124ju.pdf.

²⁰N.Y. REAL PROP. ACTS. § 1303 (enacted Dec. 15, 2009).

²¹NHLP, HUD, *States Take Additional Steps to Protect Tenants in Foreclosed Properties*, 40 HOUS. L. BULL. 43, 45 (Feb. 2010).

²²N.C. GEN. STAT. ANN. § 45-21.17(1) (Westlaw Feb. 5, 2010).

²³§ 45-21.17(4) (effective Oct. 1, 2007).

²⁴MD. REAL PROPERTY CODE ANN. § 7-105.9 (effective May 19, 2009).

²⁵§ 7-105.9.

²⁶§ 7-105.9.

²⁷§ 7-105.9.

²⁸NEV. REV. STAT. ANN. § 21-130 (effective Oct. 1, 2009, as revised by Assembly Bill 140).

²⁹§ 21-130 (effective Oct. 1, 2009, as revised by Assembly Bill 140).

³⁰§ 21-140 (effective Oct. 1, 2009, as revised by Assembly Bill 140).

Washington

Washington requires pre-foreclosure notices to be "posted in a conspicuous place on the property" or "served upon any occupant of the property."³¹ Additionally, Washington requires that an additional pre-foreclosure notice be mailed to the resident of property subject to foreclosure sale.³² The additional notice must contain the following text: "The foreclosure process has begun on this property, which may affect your right to continue to live in this property. Ninety days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new rental agreement or provide you with a sixty-day notice to vacate the property. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have."³³

Wisconsin

Wisconsin, like New York, requires a foreclosure plaintiff to provide notice to tenants at the start of the foreclosure proceeding.³⁴ Notice must also be provided to tenants no later than five days after judgment of foreclosure is entered.³⁵ Notice is to be served either by personal service or certified mail.³⁶

Post-Foreclosure Eviction Notice Requirements

State and local governments are supplementing the PTFA's provisions regarding post-foreclosure evictions to address gaps left unaddressed by the federal law. Some of these efforts include increasing notice periods, placing duties upon new owners of foreclosed properties to identify tenants, and extending the notice period for post-foreclosure evictions to include properties transferred through short sales and deeds-in-lieu of foreclosure.

Illinois

Illinois law provides that within 21 days of confirmation of sale, the new owner, receiver or mortgagee in possession after foreclosure must make a good faith effort to identify tenants, and must also post a written notice on the primary entrance of each dwelling unit indicating that the unit has been foreclosed upon.³⁷ The February issue of the *Bulletin* provides an in-depth discussion of recent developments in Illinois law.³⁸

New Jersey

Like Illinois, New Jersey also requires a new owner after foreclosure to make a good faith effort to identify

³¹WASH. REV. CODE ANN. § 61.24.040(1)(e) (Westlaw Feb. 4, 2010), available at <http://apps.leg.wa.gov/Rcw/default.aspx?cite=61.24.040>.

³²WASH. REV. CODE § 61.24.143 (effective July 26, 2009).

³³§ 61.24.143.

³⁴WIS. STAT. § 846.35 (effective Mar. 6, 2009).

³⁵§ 846.35.

³⁶§ 846.35.

³⁷735 ILL. COMP. STAT. § 5/15-1508.5 (effective Oct. 29, 2009).

³⁸NHLP, *supra* note 21, at 45-46.

tenants living on the property.³⁹ Within 10 business days of obtaining title, the new owner must post a written notice prominently on the door of each unit and send the notice to each tenant by regular and certified mail.⁴⁰ The notice must be in English and Spanish and must inform the tenant that he has a right to remain after foreclosure, even if the tenant does not have a written lease.⁴¹ In a property with more than 10 residential units, the notice must also be conspicuously displayed in a common area in each building of the property.⁴² A person who violates the statute is liable to the tenant for \$2,000 per violation, plus attorney's fees and costs.⁴³

New York

New York has recently enacted many changes to its foreclosure law, some of which mirror the PTFA, and some of which extend beyond the PTFA's protections.⁴⁴ The February issue of the *Bulletin* discusses these developments in detail.⁴⁵

Disclosure of Foreclosure to Prospective Tenants

Many renters who are victims of the foreclosure crisis began renting only shortly before foreclosure.⁴⁶ This sometimes happens when a homeowner who is in default and thinks that renting out the home will generate enough income to stave off foreclosure.⁴⁷ But during the rental process, the fact that the home is in foreclosure is often not disclosed to the tenant.⁴⁸ In response, states have enacted laws to mandate that a landlord disclose to prospective tenants if the property is in foreclosure.

Chicago, Illinois

Chicago's Residential Landlord and Tenant Ordinance requires a landlord of a property undergoing foreclosure to provide written notification to prospective tenants that the landlord is named in a foreclosure complaint.⁴⁹ If the owner fails to comply, the tenant may terminate the rental agreement with a 30-day notice.⁵⁰

³⁹2009 N.J. Laws 296 (enacted Jan. 17, 2010).

⁴⁰*Id.*

⁴¹*Id.* New Jersey's Anti-Eviction Act prevents evictions due to foreclosure. *Chase Manhattan Bank v. Josephson*, 638 A.2d 1301 (N.J. 1994).

⁴²2009 N.J. Laws 296.

⁴³*Id.*

⁴⁴2009 N.Y. Laws 507 (enacted Dec. 15, 2009).

⁴⁵NHLP, *supra* note 21, at 45.

⁴⁶See Kelly Noble, "Something Wicked This Way Comes": Revising Rhode Island Law to Require Notice to Tenants in Foreclosure, 14 ROGER WILLIAMS U. L. REV. 328, 330 (2009); Been & Glashauser, *supra* note 6.

⁴⁷See Lynn Arditi, *Borrowing Trouble: Foreclosure Fallout*, PROVIDENCE J. BULL. (R.I.), Jan. 6, 2008, (Sunday Extra), at D1 (describing one family's experience renting a property already in foreclosure and discussing the problem more generally).

⁴⁸*Id.*

⁴⁹CHICAGO, ILL., MUN. CODE § 5-12-95 (enacted Oct. 8, 2008), available at http://www.chicityclerk.com/tenantsVRSlandlords.php#5_12_095.

⁵⁰§ 5-12-95.

Minnesota

Once a landlord has received a contract for deed of cancellation or notice of a mortgage foreclosure sale, the landlord may not enter into a periodic lease of more than two months or for a term that extends beyond the redemption period.⁵¹ If the landlord enters into a periodic or short-term lease, then the landlord is required to provide written notice to the prospective tenant of when the mortgagor's redemption period ends.⁵²

Nevada

Assembly Bill 140 adds a new section to Nevada's statutes that requires a landlord to provide written disclosure to a prospective tenant if the property to be leased or rented is the subject of any foreclosure proceedings.⁵³ A willful violation constitutes a deceptive trade practice under Nevada law.⁵⁴

Tenant Protections: Utility Shutoffs

Frequently tenants live in buildings where the utilities are paid by the landlord. When a landlord stops paying the mortgage and a building undergoes foreclosure, the landlord often ceases paying the utility bills. To help tenants facing utility shutoffs, California, Minnesota and a number of cities in these states have taken steps to ensure that tenants are aware that utilities will be turned off due to nonpayment by the landlord. The state laws also provide a mechanism for tenants to put utility accounts in their own names to prevent shutoffs.

California

California Public Utilities Code sections 777, 777.1,⁵⁵ 10009, and 10009.1⁵⁶ were originally enacted decades before the current foreclosure crisis. These sections provide that utilities must give notice to non-subscriber residential users of electrical, water, heat and/or gas in individually metered⁵⁷ and master-metered⁵⁸ units of multifamily buildings prior to extinguishing those utility services. Occupants are allowed to become customers of the utility corporation or public utility and allocate rent payments to maintain services.⁵⁹ Starting January 1, 2010,⁶⁰ Senate Bill 120 extends similar protections to tenants in single-family

⁵¹MINN. STAT. ANN. § 504B.151 (effective Aug. 1, 2009).

⁵²§ 504B.151.

⁵³NEV. REV. STAT. ANN. § 107.084 (effective Oct. 1, 2009, as revised by Assembly Bill 140), available at http://leg.state.nv.us/75th2009/Bills/AB/AB140_EN.pdf.

⁵⁴§ 107.084 (effective Oct. 1, 2009, as revised by Assembly Bill 140).

⁵⁵CAL. PUB. UTIL. CODE §§ 777 & 777.1 (Westlaw Feb. 23, 2010) (governing "electrical, gas, heat, or water corporation[s]").

⁵⁶§§ 10009 & 10009.1 (Westlaw Feb. 23, 2010) (governing public utilities).

⁵⁷§§ 777 & 10009 (Westlaw Feb. 5, 2010).

⁵⁸§§ 777.1 & 10009.1.

⁵⁹§§ 777-777.1, 10009-10009.1.

⁶⁰These requirements will not apply to investor-owned utilities servicing single-family homes until July 1, 2010. 2009 Cal. Legis. Serv. 560 (Westlaw 2009).

homes and requires the notice to be in writing and translated into six different languages.⁶¹

City of Oakland, California

The Oakland city attorney declared in December 2008 that termination of utilities will automatically be deemed a significant threat to health or safety in tenant-occupied foreclosed properties where the former owner was responsible for utility payments.⁶² The city attorney's declaration grants tenants 120 days after the notice of utility shutoff to locate their new landlord, assume payment, or make other arrangements.⁶³ The declaration is effective until the end of 2010.⁶⁴

San Francisco, California

Following the City of Oakland's lead in February 2009, the San Francisco City Attorney, in conjunction with the Department of Building Inspection, issued a protective declaration that provides that no utilities shall be terminated in master-metered multiunit residential buildings, irrespective of foreclosure status.⁶⁵ The San Francisco Declaration does not specify a time limit on tenants' receipt of services before the termination.⁶⁶ This declaration expires on December 31, 2010.⁶⁷

Minnesota

For master-metered buildings in Minnesota, utility companies must post notice before shutting off utilities for nonpayment.⁶⁸ Tenants are allowed to continue service by paying current charges, but they are not required to pay for any arrearages incurred by the landlord.⁶⁹ In buildings with fewer than five units, tenants have the right to put the utility accounts in their own names.⁷⁰

Minneapolis, Minnesota

In Minneapolis, a local ordinance provides that tenants in a building may pay any rents owing to the owner or operator of the building directly to the utility company. The utility company must make available to any requesting tenant or tenant's representative the utility account of

the multiple dwelling or duplex housing facing a shutoff.⁷¹ Any such payment shall be considered a reduction of rent owed by the tenant and a reduction of the utility bill owed by the owner or operator of the building.⁷²

Security Deposits

When tenants are evicted after foreclosure, the bank or the new post-foreclosure owner often refuses to return the security deposit that the tenant paid to the former landlord. Even if the successor-in-interest never received the security deposit from the former landlord, the law in many states requires the successor to return the security deposit to the tenant. Tenants in these states are forced to gamble on the uncertain prospect of asking a bank or a new owner for the return of the deposit. To partially address this issue, a few states now allow tenants in properties facing foreclosure to apply security deposits to their rental obligation.

Oregon

Oregon law now allows tenants in properties undergoing foreclosure to apply their security deposit toward their rental obligation.⁷³ To take advantage of this law, the tenant must provide prior written notice to the landlord of the tenant's intent to do so.⁷⁴

Minnesota

Minnesota's statutory scheme allows tenants to apply their security deposit to rent during the redemption period following a foreclosure sale.⁷⁵ The tenant's withholding of any rent for the last payment period of the residential rental agreement creates a rebuttable presumption that the tenant intended the deposit to serve as payment for the rent.⁷⁶ When the landlord's interest in the property ends (for example, because of death, foreclosure or contract for deed cancellation), the security deposit must be transferred to either the new owner or the tenant.⁷⁷ This transfer must take place within 60 days after the current landlord's interest in the property ends or when the new landlord is required to return the security deposit.⁷⁸

⁶¹§§ 777-777.1, 10009-10009.1.

⁶²CITY OF OAKLAND PUBLIC HEALTH & SAFETY DECLARATION FOR UTILITIES, available at <http://www.oaklandcityattorney.org/PDFS/Oakland%20Public%20Health%20and%20Safety%20Declaration%20re%20Termination%20of%20Utilities.pdf>; NHLP, *San Francisco and Oakland Issue Declarations Protecting Tenants from Utility Shutoffs*, 39 HOUS. L. BULL. 89, 90 (Mar. 2009).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Press Release, San Francisco Office of the City Attorney, Declaration Triggers State Laws to Protect S.F. Tenants from Utility Shutoffs (Feb. 25, 2009), available at <http://www.sfcityattorney.org/index.aspx?page=56>; NHLP, *supra* note 62.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸MINN. STAT. § 504B.215 (enacted May 15, 2008).

⁶⁹§ 504B.215.

⁷⁰§ 504B.215.

⁷¹MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.590 (amended Nov. 2006), available at <http://www.ci.minneapolis.mn.us/government/ordinances.asp>.

⁷²§ 244.590.

⁷³OR. REV. STAT. ANN. § 86.745 (effective Aug. 23, 2009).

⁷⁴§ 86.745.

⁷⁵MINN. STAT. ANN. § 504B.178 (effective to protect tenants specifically in the context of mortgage foreclosure redemption period Aug. 1, 2008; effective to protect tenants specifically in the context of foreclosure by action Aug. 1, 2009).

⁷⁶§ 504B.178.

⁷⁷§ 504B.178.

⁷⁸§ 504B.178.

Wisconsin

In Wisconsin, a tenant can choose to apply the security deposit to his or her last month's rent, even if the tenant retains possession after the sale of the property is confirmed.⁷⁹

Record Sealing of Post-Foreclosure Evictions

Landlords often check a prospective tenant's eviction history before they agree to rent an apartment and will frequently blacklist a tenant who has been named in an eviction action.⁸⁰ Some states have decided that tenants should not be denied future rental opportunities merely because they were unaware that their possessory rights had been terminated by the foreclosure process or they were unable to move out of the premises prior to post-foreclosure eviction proceedings. To protect these tenants, states have enacted laws to seal the eviction records of tenants who are evicted due to a foreclosure.

Illinois

Illinois employs the "but for" test with respect to eviction records.⁸¹ Eviction records of occupants "who would have lawful possession of the premises but for the foreclosure of a mortgage on the property" are sealed.⁸²

Minnesota

Minnesota's statutory protection is not as tenant-friendly as the Illinois statute, but it still provides that eviction records shall be expunged if a tenant in a foreclosed property did not receive a proper eviction notice.⁸³

Fraudulent Rent Collection

Colorado

Sometimes landlords continue to collect rent even after title to the property has transferred through foreclosure. Colorado appears to protect tenants from these situations through the imposition of a criminal penalty. It has expanded its statutory definition of "equity skimming" to include the act of continuing to collect rent after a foreclosure and sale.⁸⁴

Cash for Keys

Connecticut

Real estate agents often make cash-for-keys or relocation assistance offers to tenants as an incentive for tenants to vacate quickly, but many times the compensation falls far short of the cost of moving to a new home. Many cash-for-keys agreements also require tenants to waive all claims against the bank or the new owner.⁸⁵ Connecticut has tried to address these problems by enacting a law providing that no mortgagee, lienholder or successor in interest can require a tenant to waive any legal rights or remedies in exchange for accepting an incentive to vacate the foreclosed property, with the exception of "the right to bring an action to reclaim a security deposit."⁸⁶ Incentives must be at least equal to the tenant's security deposit plus interest, or, if no record of the amount of the security deposit exists (or if the tenant did not pay a security deposit), the tenant is entitled to two months' rent, or \$2,000, whichever is greater.⁸⁷

Conclusion

State and local governments have begun to respond to the impact of the foreclosure crisis on tenants with a variety of approaches. Most responses have focused on defining what proper notice is, how it should be effectuated, and at what point in the process it should be given. Many of these protections are still quite new, and it remains to be seen how other states and localities will augment the federal legislation. The National Housing Law Project will continue to track state and local legislative developments in the coming months. ■

⁷⁹WIS. STAT. ANN. § 846.35(2)(a) (effective Jul. 1, 2009).

⁸⁰Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1363-64 (2007); Motoko Rich, *A Blacklist for Renters*, N.Y. TIMES, Apr. 8, 2004, at F1.

⁸¹735 ILL. COMP. STAT. ANN. § 5/15-1701(h)(5) (effective Aug. 26, 2008).

⁸²§ 5/15-1701(h)(5).

⁸³MINN. STAT. ANN. § 484.014 (enacted Apr. 4, 2008).

⁸⁴COLO. REV. STAT. ANN. § 18-5-802 (effective Aug. 5, 2009). Equity skimming can also occur when an owner in default on a loan, mortgage or deed of trust fails to put all of a tenant's rent toward paying off the default or when a person acquires an interest in property that is encumbered by a loan, or secured by a mortgage or a deed of trust that is in arrears, or defaults within 18 months of taking interest.

⁸⁵David Lazarus, *Shadow Victims of the Mortgage Crisis: Renters*, L.A. TIMES, Feb. 13, 2008, at A1.

⁸⁶CONN. GEN. STAT. ANN. § 47a-20f (effective Nov. 25, 2008).

⁸⁷§ 47a-20f.

Public Housing Disposition Case Settled with Substantial Tenant Protections

Arroyo Vista Tenants Association v. City of Dublin,¹ filed in October 2007, challenged the proposed disposition and redevelopment of a 150-unit public housing development in California.² The tenants' claims included that the public housing agency (PHA) violated federal public housing and fair housing laws and state relocation and redevelopment statutes. During the litigation, the Department of Housing and Urban Development (HUD) approved the PHA's disposition application. Prior to amending their complaint to challenge HUD's May 2009 approval, the tenants commenced settlement negotiations with the PHA and developers in June 2009. A settlement agreement was approved by all parties and HUD (as a potential party) in December 2009.

The settlement permits redevelopment of Arroyo Vista to go forward, but with significant modifications to the affordability, accessibility and unit sizes of the new rental development. It also calls for a detailed rehousing policy that would enable Arroyo Vista residents to return to the new development without arbitrary screening; an amended relocation plan that would provide for actual relocation expenses, increased notice and advisory services; an extended period for completion of relocation through June 2010; and a goal of making the rental units available for occupancy by the summers of 2013 and 2014.

Key provisions of the agreement, as measured against the proposed disposition, are discussed below.

Affordability

The new rental development will include 178 units, of which at least 81 will be affordable to the lowest-income families. There will be 49 one-bedroom senior units and 129 family units. All of the senior units and 25% of the family units (32) will be subject to a Section 8 project-based contract with Alameda County Housing Authority for the longest term permitted by HUD (currently 15 years plus an option to renew for 15 years as long as the developer is in compliance with its project-based contract). The developer

also will be subject to recorded affordability covenants for 55 years requiring it to accept Section 8 vouchers (or any successor tenant-based subsidy) for all non-project-based units. As a result of project-basing and the requirement to accept Section 8 vouchers, a majority of new rental units will be affordable to the lowest-income seniors and families at 30% of their household income. Previously, the proposed "mixed income" rental development would have resulted in only three "family" units that would have been affordable to extremely low-income families.

Accessibility

Three of the senior units and eight of the family units will be developed as fully accessible units. Another 92 units (46 senior units and 46 family units) will be adaptable, and the developer, at its expense, will make the adaptable units fully accessible to accommodate persons with disabilities as needed. As originally proposed, redevelopment of Arroyo Vista did not address accessibility of units even though 30% of Arroyo Vista's households included members with disabilities.

Unit Size

All of the senior units will be one-bedroom units. The family units will include a range of bedroom sizes that address the housing needs of both Arroyo Vista residents and families on the public housing waiting list. The agreement provides that there will be 12 one-bedroom, 66 two-bedroom, 36 three-bedroom and 16 four-bedroom units. The settlement agreement increased the number of three- and four-bedroom units, and a rehousing policy incorporated into the settlement agreement provides for remedies in the event of a "shortfall" of appropriately sized family units for returning Arroyo Vista residents.

Rehousing Policy

All Arroyo Vista residents will have a first preference for the new units, subject only to household needs with respect to unit size and accessibility. Returning residents and/or new family members may be subject only to certain criminal background checks not already performed by the PHA. They will not be subject to arbitrary and vague eligibility and tenant selection criteria imposed by the developer such as "behavioral standards expected in the private rental market," as the proposed disposition would have permitted.

The original disposition agreement was silent as to any policy or procedure for implementing residents' "right to return." The settlement agreement contains a detailed plan to implement the rehousing policy, including that the PHA will maintain and update a contact list of all residents. The PHA will also provide the following: periodic status reports to tenants and their counsel as the development proceeds; advance notice of at least six

¹No. 07cv5794 (N.D. Cal. filed Nov. 14, 2007). The tenants are represented by Lisa Greif and Naomi Young of Bay Area Legal Aid and Deborah Collins, Michael Rawson and Craig Castellanet of the Public Interest Law Project.

²For additional background information on this case, see NHLP, *Arroyo Vista Tenants Continue Challenge to Proposed Public Housing Disposition*, 39 HOUS. LAW BULL. (Jan. 2009) and NHLP, *Tenants Can Sue for Violation of Public Housing Demolition Law*, 38 HOUS. LAW BULL. (June 2008). Pleadings and other documents from the case are available to Housing Justice Network members at <http://nhlp.org/resourcecenter?tid=38>.

months before units become available; an advance opportunity to apply for the new units and assistance in the application process; and the right to turn down a unit up to three times and remain on the Arroyo Vista “first preference” waiting list for the next available unit that meets the household’s needs. Residents on the current public housing waiting list will be given second preference for the new rental units.

Arroyo Vista residents also will receive advance notice and will have a preference for 14 “moderate-income” “for-sale” units that will be included in the redevelopment. In addition, the city will provide funds of up to \$40,000 for any necessary features to make these units fully accessible for eligible Arroyo Vista residents with disabilities.

Relocation

The PHA amended its relocation plan as part of the settlement agreement to provide for all necessary relocation assistance and benefits for tenants. This assistance includes referrals to Section 8 units located in Dublin and the neighboring area; increased assistance with security deposits, credit check fees, pet deposits and accessibility costs as necessary to assist residents in relocating; a relocation claims and grievance procedure; and a series of informational, eligibility, relocation and determination notices in addition to the single 90-day notice of displacement provided for in the disposition application and pursuant to Section 18, the public housing disposition and demolition statute.³

Timeline for Relocation and Redevelopment

Although originally notified that they were required to relocate by November 2008, Arroyo Vista residents will have until June 30, 2010, to relocate. The affordable rental development will proceed in advance of or on the same timeline as the market rate development, with a goal of producing the new family units by summer 2013 and the new senior units by summer 2014.

The court retains jurisdiction to enforce the terms of the settlement agreement.

Conclusion

This case is representative of the diligence that is necessary to obtain a favorable result in cases proposing to demolish or dispose of public housing. It also demonstrates that it is possible to obtain a result that provides meaningful assistance to residents who are required to relocate, and that something closer to a one-for-one replacement is possible. Unfortunately, drawn-out litigation was required to obtain the results in *Arroyo Vista*, even though the elements of the settlement were all offered early on in writing and at meetings with the parties. Perhaps some

of the initial foot-dragging may be attributed to a prior Administration that was not committed to the preservation of public housing.

For other developments facing demolition and disposition, it is critical for the current Administration to stop, or at least slow down, the process so that similar agreements can be reached. In June 2009, congressional leaders Maxine Waters (D-CA) and Barney Frank (D-MA) renewed a request for a moratorium on all demolition and disposition applications. HUD Secretary Shaun Donovan rejected the request, stating that any changes may put at risk redevelopment opportunities that are already underway, that there are some residents living in public housing that is no longer physically viable, and that HUD does not want to jeopardize any opportunity to create affordable housing built to today’s building and quality standards.

The Secretary also stated the following:

[D]iscussions are already underway within Public and Indian Housing to review more closely the decisions that will be made regarding the approval of any demolition or disposition. Specifically, we believe that such activities need to be viewed through the lens of the number, location, and affordability of units returning to the inventory. No approvals will be forthcoming without such a close review. This approach is being taken because we acknowledge both the unintended consequences demolition and disposition may have had on the lives of public housing residents in the past, as well as a decrease in the number of long-term affordable units that has resulted in some cases.

There are many unanswered questions regarding HUD’s commitment to more closely review demolition and disposition applications. Advocates await answers to the following questions:

- What new guidance is HUD providing to PHAs that are seeking to dispose of or demolish public housing?
- What kind of data is HUD requesting from PHAs regarding the impact on residents? What information is HUD seeking from PHAs regarding the condition of the existing units?
- What kind of input is the Administration requesting from residents? What substantive information is HUD seeking or reviewing regarding PHAs’ consultations with residents?
- What kind of data is HUD requesting from PHAs regarding the impact on the number of long-term affordable units in the community?
- Is HUD conditioning any approvals? If so, what is the nature of those conditions?

³42 U.S.C. § 1437p(a)(4) (West 2003).

- Is HUD demanding that any replacement units have project-based vouchers attached and that housing choice vouchers be accepted for any units that do not receive other rental assistance?
- What long-term preservation policies are requested for any replacement units?
- What kind of best practices is HUD highlighting regarding demolition and disposition applications?
- What steps is HUD taking to ensure that disposition or demolition does not proceed prior to actual HUD approval, including preventing the relocation of residents prior to HUD approval? ■

The Impact of *Ashcroft v. Iqbal* on Housing Cases*

Decided May 18, 2009, *Ashcroft v. Iqbal*¹ is the most recent decision from the United States Supreme Court on the pleading standards under Rule 8 of the Federal Rules of Civil Procedure (FRCP 8). This article briefly summarizes the *Iqbal* decision and then examines several housing-related cases in which courts have applied *Iqbal*. Because *Iqbal* was decided less than a year ago, it is difficult to make generalizations regarding its impact upon housing cases. However, even at this early stage it appears that courts have been inconsistent in their application of *Iqbal*.

Background

Javaid Iqbal, a Pakistani Muslim, was arrested and detained in the wake of September 11, 2001. He claimed that former Attorney General John Ashcroft and FBI Director Robert Mueller adopted an unconstitutional policy that subjected him to harsh conditions of confinement on account of his race, religion or national origin. The issue before the Court was whether Iqbal pleaded facts sufficient to state a claim for purposeful and unlawful discrimination. Under FRCP 8, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Citing its recent opinion in *Bell Atlantic Corp. v. Twombly*,² the Supreme Court identified two working principles underlying the pleading standards under FRCP 8:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.³

Applying this two-pronged approach, the Court held that *Iqbal* failed to plead facts sufficient to state a claim for purposeful and unlawful discrimination.

Iqbal has been widely criticized for fundamentally changing the pleading standards by erecting new barriers for plaintiffs during the initial stages of

*The author of this article is Heejin Yi, a graduate of Boston College Law School and a volunteer with the National Housing Law Project.

¹ ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

²550 U.S. 544 (2007).

³*Iqbal*, 129 S. Ct. at 1949-50 (citations omitted).

litigation.⁴ Critics have argued that “meritorious cases have been thrown out of federal court under the new pleading standards because claimants were unable to identify nonpublic facts in their initial pleadings, such as the precise time, place and manner of the alleged misconduct.”⁵ *Iqbal* also has been criticized for licensing highly subjective judgments, because it requires a reviewing court to draw on its own experience and common sense to determine whether a claim is plausible.⁶ This criticism has already spawned bills in the Senate⁷ and the House⁸ to overturn *Iqbal* and return to the pleading standards set forth in *Conley v. Gibson*.⁹

Post-*Iqbal* Housing Decisions

In an effort to understand the impact of *Iqbal* on housing cases, this article will examine seven cases in which the court applied *Iqbal* to evaluate the sufficiency of a housing-related claim. Of the seven cases, five were dismissed because the claims at issue did not satisfy the pleading standards established in *Iqbal*. Alarming, the courts in *Maldonado v. Fontanes*,¹⁰ *Williams v. 2000 Homes Inc.*¹¹ and *City of Kansas City v. Yarco Co.*¹² came close to requiring the plaintiffs to establish prima facie cases, signaling a stricter approach to pleading requirements. However, in two cases, the courts held that the plaintiffs alleged sufficient facts to survive a motion to dismiss. In both *Reyes v. Fairfield Properties*¹³ and *Carter v. Hamilton Affordable Housing*,¹⁴ the courts appeared to apply notice pleading, suggesting no change in the pleading standards.

First Circuit Dismisses Public Housing Tenants’ Substantive Due Process Claim

In *Maldonado v. Fontanes*,¹⁵ the First Circuit dismissed a substantive due process claim brought by public housing tenants against the mayor of Barceloneta, Puerto Rico. The municipality issued notices that it would enforce the mayor’s pet policy prohibiting cats and dogs in public housing complexes. A few days later, municipal employees and a private contractor seized and killed the plaintiffs’ pets in two successive raids.

⁴See, e.g., Letter from American Association for Justice et al. to Representative Nadler, Oct. 26, 2009, available at http://www.antitrustinstitute.org/archives/files/House%20Letter%2010-26-09_110220091857.pdf (urging support of legislation to overturn *Iqbal*); Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, Jul. 20, 2009.

⁵Letter from American Association for Justice, *supra* note 4.

⁶Liptak, *supra* note 4.

⁷Notice Pleading Restoration Act, S. 1504, 111th Cong., 1st Sess. (2009).

⁸Open Access to Courts Act of 2009, H.R. 4115, 111th Cong., 1st Sess. (2009).

⁹355 U.S. 41, 45 (1957).

¹⁰568 F.3d 263 (1st Cir. 2009).

¹¹2009 WL 2252103 (S.D.N.Y. July 29, 2009).

¹²2009 WL 3379096 (W.D. Mo. Oct. 19, 2009).

¹³___ F. Supp. 2d ___, 2009 WL 3063082 (E.D.N.Y. Sept. 24, 2009).

¹⁴2009 WL 3245483 (D.N.J. Oct. 6, 2009).

¹⁵568 F.3d 263 (1st Cir. 2009).

In evaluating the sufficiency of the substantive due process claim, the court interpreted *Iqbal* as heightening the pleading standards under Rule 8. The court noted that substantive due process claims often turn on whether the alleged misconduct shocks the conscience. The court then concluded that the plaintiffs failed to state the elements of a substantive due process claim because they did not allege “a sufficient connection” between the mayor and alleged conscience-shocking conduct—the killing of the seized pets.¹⁶

First, the court found that the mayor’s policy itself did not shock the conscience, because the policy was silent as to the manner in which the pets were to be collected and disposed of. Second, the court found that the complaint did not allege sufficient facts to support the claim that the mayor was personally involved in any conscience-shocking conduct during the raids. The court noted that while the complaint did allege that the mayor was present at the first raid and snatched pets from owners, it did not allege that he participated in the killing of any pet or directed the services of the private contractor. The complaint stated that the mayor planned, personally participated in, and executed the raids in concert with others, but the court disregarded this statement for being conclusory. As a result, the court held that the complaint “stop[ped] short of the line between possibility and plausibility of entitlement to relief”¹⁷ on the substantive due process claim. Finally, the court found that the complaint failed to plead sufficient facts to support supervisory liability. The mayor’s pet policy, coupled with his “mere” presence at one of the raids, was held insufficient to establish the “affirmative link” necessary for a finding of supervisory liability.¹⁸ According to the reasoning of the court, a “sufficient connection” is the kind of connection required to establish a prima facie case for a substantive due process violation.

Missouri Court Dismisses Familial Status Discrimination Claim

In *City of Kansas City v. Yarco Co.*,¹⁹ a Missouri federal district court dismissed the city’s familial status discrimination claim under the Fair Housing Act (FHA) against the owner and manager of several apartment buildings.²⁰ In the complaint, the city alleged that the defendants’ lease agreement contained a curfew provision reading, “CURFEW time for everyone under the age of 18 will be

¹⁶*Id.* at 273.

¹⁷*Id.* at 274 (quoting *Iqbal*, 129 S.Ct at 1960).

¹⁸*Id.* at 274.

¹⁹2009 WL 3379096 (W.D. Mo. Oct. 19, 2009).

²⁰The city argued that it had standing under the FHA because the Department of Housing and Urban Development (HUD) referred the matter to it. However, the city did not state it was suing on behalf of HUD in its complaint. The court appeared skeptical of the city’s argument but avoided ruling on the standing issue.

8:30 p.m. nightly.” The complaint also alleged that the curfew provision “discriminate[d] against families with children in access to the complex facilities and limited the use of complex facilities by children tenants” in violation of local and federal law.²¹

The court seemed to construe *Iqbal* as requiring the plaintiff to establish a prima facie case for discrimination at the pleading stage. First, the allegations regarding the curfew policy, taken as true, were insufficient to demonstrate discriminatory intent because there could be a non-discriminatory reason for adopting the policy, such as a legitimate desire to reduce juvenile crime and protect children. The court therefore held that without further factual support, the city’s claim of discriminatory intent “stop[ped] short of the line between possibility and plausibility of entitlement to relief.”²² Concluding that the allegations amounted to a mere legal conclusion that the court need not accept as true, the court granted the defendants’ motion to dismiss.

The city sought to amend the complaint to include the allegation that the defendants “intended to and did use the curfew to treat residents of 18 years of age and younger, families with children and children under the age of 18 years of age different than those 18 years of age or older.”²³ However, reasoning that this allegation was also a legal conclusion, the court held that it would be futile for the city to file an amended complaint.

New York Court Dismisses Homeowner’s Reverse Redlining Claim

In *Williams v. 2000 Homes Inc.*,²⁴ a New York federal district court dismissed a homeowner’s claim that the defendants violated the FHA by targeting him for a predatory home sale and financing transaction that constituted reverse redlining. A realtor introduced the plaintiff-homeowner to a mortgage broker. In the mortgage application, the broker substantially inflated the plaintiff’s income. The plaintiff obtained two mortgages that required him to pay \$4,000 per month, far more than he could afford given his annual income of between \$23,000 and \$26,000. The homeowner filed suit against the realtor, mortgage broker and other parties involved in the transaction. The issuer, servicer and nominee of the mortgages filed a motion to dismiss.

In applying the two-pronged approach set forth in *Iqbal*, the court seemed to impose on the homeowner the burden of pleading facts that satisfy the elements of a prima facie case for discrimination. To establish a reverse redlining claim, a plaintiff must demonstrate that the transaction was discriminatory.²⁵ The homeowner alleged

disparate treatment discrimination by stating that “he was induced to sign loan documents providing for loans that are unnecessarily expensive and which were made on less favorable terms than loans defendants brokered or made to Caucasian individuals.”²⁶ However, the court held that this allegation was merely a “formulaic recitation of the elements of a specific claim, and is therefore not entitled to the assumption of truth.”²⁷ The court also noted that the complaint failed to allege that the homeowner and the “Caucasian individuals” were otherwise similarly situated. In addition, the court found that the homeowner failed to adequately plead discriminatory intent because he did not allege that his race influenced the terms of the loans.

Missouri Court Dismisses Tenant’s Sex Discrimination Claims

In another FHA case, a Missouri federal district court dismissed a sex discrimination claim brought by a male tenant against his landlord. In *Willis v. Buckner*,²⁸ the tenant alleged that shortly after he complained to the landlord about several habitability issues, the landlord ordered him to move out of the apartment. The tenant alleged that the landlord discriminated against him “because of sex differences” and also alleged that other tenants in the building had not been ordered to move.

Citing *Iqbal*, the court characterized the tenant’s allegations as “nothing more than a threadbare recital of a cause of action’s elements” and found that the allegation was “not entitled to an assumption of truth.”²⁹ In addition, the court noted that discrimination was not the most plausible conclusion in light of the fact that the landlord initially rented the apartment to the tenant for nine years. Accordingly, the court dismissed the action as well as the tenant’s motion to proceed in forma pauperis.

New York Court Dismisses Public Housing Tenant’s Claims

In *Williams v. Hernandez*,³⁰ a New York federal district court dismissed a public housing tenant’s claims that the public housing authority (PHA) and its employees unlawfully denied her request for a grievance hearing and hardship exemption. The PHA informed the tenant that her lease was being considered for termination for chronic rent delinquency. The tenant claimed that the PHA had unlawfully and repeatedly denied her request for a grievance hearing. The tenant also alleged that she applied for a hardship exemption, and the PHA denied the request one day later.

²¹*Id.* at *2.

²²*Id.* at *3 (citing *Iqbal*) (internal quotation marks omitted).

²³*Id.*

²⁴2009 WL 2252528 (E.D.N.Y. July 28, 2009).

²⁵2000 *Homes Inc.*, at *5.

²⁶*Id.*

²⁷*Id.* (quoting *Iqbal*, 129 S. Ct at 1949).

²⁸2009 WL 2382771 (E.D. Mo. Jul. 31, 2009).

²⁹*Id.* at *2 (citing *Iqbal*, 129 S. Ct. at 1949).

³⁰2009 WL 2252103 (S.D.N.Y. July 29, 2009).

The court held that, taking these allegations as true, nothing pleaded in the complaint suggested that the denial of the grievance hearing or hardship exemption was unlawful. Citing *Iqbal*, the court found that the tenant's allegations "failed to establish more than sheer possibility of unlawful action by the defendant."³¹ The court further noted that even though the tenant's factual allegations were consistent with her legal claims against the PHA, this alone did not satisfy the "plausibility standard" set forth in *Iqbal*.³² Because the tenant's claims contained "no more than [legal] conclusions unsupported by factual allegations," the court dismissed them.³³

The housing cases that have been decided under Iqbal thus far do not unequivocally support the proposition that post-Iqbal plaintiffs are held to stricter pleading standards.

New York Tenants' Retaliation Claim Satisfies *Iqbal* Standard

Not all courts have interpreted *Iqbal* as heightening federal court pleading standards. In *Reyes v. Fairfield Properties*,³⁴ the court analyzed the plaintiffs' FHA retaliation claim under *Iqbal* and denied the defendants' motion to dismiss. The plaintiffs, a mother and daughter, lived in a building managed by the defendant property management agency. The daughter used a wheelchair and could not access the parking lot through the rear corridor of the building. When the defendants failed to make a reasonable accommodation for her disability, the tenants filed a charge of discrimination with the New York Division of Human Rights (NYDHR). The defendants then instituted an eviction proceeding against the tenants.

In contrast to the other cases discussed earlier in this article, the court noted that the tenants did not have to allege specific evidence that satisfies the elements of a prima facie case of retaliation at the pleading stage. The court interpreted *Iqbal* as merely providing a new framework in which to analyze the existing pleading standards, rather than imposing an entirely new standard. According to the court, "all that is relevant on a motion to dismiss in a discrimination case is whether plaintiffs have provided adequate notice of the claim under Rule 8, with some factual allegations that satisfy the plausibility stan-

dard set forth by *Twombly* and *Iqbal*."³⁵

The court rejected the defendants' argument that the complaint should establish a causal link between the protected activity and adverse action. The court found that even if allegations specifically supporting the causal connection were required at the pleading stage, such connection was "indirectly established by showing that the protected activity was closely followed in time by the adverse action."³⁶

New Jersey Tenant's Race Discrimination Claim Survives Motion to Dismiss

In *Carter v. Hamilton Affordable Housing*,³⁷ the plaintiff-tenant, an African-American woman, claimed that the defendant-landlord engaged in racial discrimination by denying her request to terminate her lease. The tenant's apartment needed repairs to the tub, toilet and kitchen sink. When the tenant complained about the conditions to the landlord's employee, the employee commented about not wanting to rent to blacks. The landlord failed to make repairs for a substantial period, and the tenant asked to terminate the lease because the unit was uninhabitable. The landlord denied the request.

As in *Reyes*, the court did not view *Iqbal* as requiring a stricter approach to pleading standards. In her complaint, the tenant broadly alleged that the landlord discriminated against her based on her race by denying her request "while white tenants have been allowed to terminate their leases on lesser grounds."³⁸ The court did not find this allegation conclusory and thus assumed the veracity of the allegation. The court further held that the tenant's claim that she was treated differently than white tenants, coupled with the allegation of the racially discriminatory remark by the employee, was sufficient to place the landlord on notice of the FHA claim, implying that notice pleading remains intact.

Conclusion

The housing cases that have been decided under *Iqbal* thus far do not unequivocally support the proposition that post-*Iqbal* plaintiffs are held to stricter pleading standards. Instead, they show that courts are inconsistent in their application of the Supreme Court's decision. Some courts seem to require plaintiffs to allege facts sufficient to satisfy the elements of a prima facie case. The *Maldo-nado* court appeared to require a prima facie case for a substantive due process claim when it required a "sufficient connection" between the defendant and the alleged conscience-shocking conduct. Similarly, in *2000 Homes Inc.* and *Yarco Co.*, the courts seemed to impose on the

³¹*Id.* at *5 (citing *Iqbal*, 129 S. Ct. at 1949).

³²*Id.*

³³*Id.*

³⁴ ___ F. Supp. 2d ___, 2009 WL 3063082 (E.D.N.Y. Sep. 24, 2009).

³⁵*Id.* at *10 (citing *Iqbal*, 129 S. Ct. at 1953).

³⁶*Id.* at *10.

³⁷2009 WL 3245483 (D.N.J. Oct. 6, 2009).

³⁸*Id.* at *5.

plaintiffs a heavy burden of pleading a prima facie case for discrimination without discovery. On the other hand, the courts in *Reyes* and *Carter* viewed *Iqbal* as merely providing a framework to analyze the pleading standards, as opposed to providing an entirely new standard.

It is the subjective nature of the pleading analysis under *Iqbal* that allowed each court to apply the standards in a different manner. Classifying key allegations as conclusory is often dispositive in ruling on a motion to dismiss for failure to state a claim. Yet, the distinction between legal conclusions and factual allegations is not clear. In both *2000 Homes* and *Reyes*, the plaintiffs presented broad allegations of disparate treatment, but the court in *2000 Homes* found the allegations conclusory, while the court in *Reyes* did not.

Iqbal's plausibility test is also subjective. With respect to a retaliation claim, the *Carter* court held that to satisfy the plausibility test, it was sufficient for the complaint to allege that the protected activity was closely followed in time by the adverse action. On the other hand, the *Maldonado* court did not find the plaintiffs' factual allegations plausible because of the failure to establish a direct link between the defendant and the conscience-shocking conduct. Similarly, in *Yarco Co.*, the court did not find the plaintiffs' factual allegations plausible because the court could think of other legitimate purposes for imposing the curfew. In sum, *Iqbal* has injected greater uncertainty into the pleading analysis under Rule 8. ■

Recent Cases

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

Housing Choice Voucher Program: Termination of Housing Assistance Payments Contract and Eviction

1212 Grand Concourse LLC v. Ynguil, __N.Y.S.2d__, 2010 WL 183762, slip op. (N.Y. City Civ. Ct. Jan. 8, 2010). Six voucher tenants lived in apartments that all failed Housing Quality Standards inspections. The housing authority suspended payments under the Housing Assistance Payments (HAP) contracts and eventually terminated the HAP contracts. In accordance with a clause in the HAP contract, termination of the contract had the effect of terminating the tenants' leases. Throughout this time, the tenants paid their portion of the rent only. After the termination of the HAP contract and leases, the landlords commenced holdover proceedings. The court found it significant that the terminations of both the HAP contracts and the leases were a product of the landlords' willful violations of the contracts, and that the landlords' actions were ultimately the cause of the terminations. Viewed in this light, ultimately it was the landlords who terminated the leases. The court held that under federal law and the HAP contract, the landlords' attempts to evict the tenants without good cause were unlawful.

Housing Choice Voucher Program: Failure to Demonstrate that Landlord Acted Under Color of State Law

Shell v. Foulkes, 2010 WL 165172, slip op. (11th Cir. Jan. 19, 2010). A voucher tenant alleged that a landlord deprived him of a property interest by terminating his lease without good cause, and appealed the district court's order dismissing his 42 U.S.C. § 1983 civil rights complaint. The landlord notified the tenant by letter that his lease would not be renewed and gave the tenant 60 days to vacate the unit. After the tenant failed to vacate, the landlord gave him a three-day notice to either pay rent or vacate the premises. The tenant failed to pay rent and did not vacate,

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

and an eviction judgment was entered against him. The tenant argued that the landlord's three-day notice nullified the earlier 60-day notice, and that he was actually evicted for non-payment of rent, which was not "good cause" under the lease. The Eleventh Circuit upheld the district court's dismissal of the tenant's § 1983 claims, finding that the tenant failed to allege how landlord had acted under color of state law.

Public Housing: Crime Committed by Individual on the Lease but Not Residing at the Unit Constitutes Breach of Lease

Bishop v. Hous. Auth. of S. Bend, __N.E.2d__, 2010 WL 343362 (Ind. Ct. App. 2010). The PHA instituted an eviction action against a public housing tenant based on her son's commission of an armed robbery. The son was allegedly not living in the unit at the time of the crime but was still listed as a tenant on the lease. The tenant gave no notification that her son was no longer living with her and thus, by the clear terms of the lease, her son's criminal activity constituted a breach of the lease. The court held that the relevant lease provisions were neither illegal nor unconscionable because they complied with federal regulations, and the tenant never claimed that she did not read or understand the provisions. The court rejected the contention that it was a reversible error for the trial court not to call the tenant's son as a witness from prison because his testimony regarding his residence at the time of commission of the crime was not relevant to the determination of breach of the lease.

Public Housing: Seizure of Pets Without a Pre-Deprivation Hearing Violated Tenants' Constitutional Rights

Maldonado v. Municipality of Barceloneta, __F. Supp. 2d__, 2010 WL 184247 (D.P.R. Jan. 19, 2010). Residents of three public housing complexes brought civil rights actions against the city and its mayor, among others, alleging that the defendants' seizure and killings of their pet cats and dogs violated their Fourth and Fourteenth Amendment rights. The magistrate judge recommended that the defendants' motion for summary judgment on the residents' Fourth Amendment claim be denied. According to the magistrate judge, the residents' pets were protected from unreasonable search and seizure and the killing of a pet without the owner's consent is a seizure for purposes of the Fourth Amendment. Further, the magistrate judge found that there were genuine material issues in dispute, including whether the residents voluntarily delivered their animals to the defendants; whether the defendants engaged in a consensual conversation with plaintiffs; whether the defendants intruded into areas where

residents had a reasonable expectation of privacy; and whether some of the animals were dangerous or strays. The district court adopted the magistrate judge's recommendation in part, finding that a pre-deprivation hearing was required prior to removing and destroying any pets from housing complexes. The district court also found that fact issues precluded summary judgment as to the Fourth Amendment claims.

Project-Based Section 8: Termination of Tenancy for Menacing Behavior Upheld

New Greenwich Gardens Assoc. LLC v. Gonzalez, 2010 WL 286685 (N.Y. Dist. Ct. Jan. 26, 2010) (unreported). A tenant in a project-based Section 8 unit was evicted because he acted in a menacing and unstable manner to other tenants and caused tenants to become so fearful that they were forced to move from the building. The tenant challenged the landlord's petition to the court on the grounds that it did not properly plead the tenant's Section 8 status and that the landlord's notice to the tenant lacked specificity or failed to set forth the reasons for termination of the tenancy. The court held that the incorporation of references to the HUD Section 8 Handbook into the petition to the court constituted adequate pleading of Section 8 tenancy and that the notice contained sufficient allegations for the tenant to prepare a defense. Finally, the court refuted the claim that the tenant's actions were "minor violations" because his behavior had caused property damage, the police had to be summoned and other tenants vacated the property as a direct result of the tenant.

Rural Housing: Section 515 Prepayment Must Be Permitted Pursuant to Final Administrative Judgment

Schroeder v. United States, 2010 WL 256503, slip op. (D. Or. Jan. 21, 2010). The owner of a Section 515 property applied to prepay the mortgage at the end of the restrictive-use period, and the Rural Housing Service (RHS) denied her claim based on the determination that prepayment would have an adverse impact on minorities and that there was an inadequate supply of decent, safe and sanitary affordable rental housing. The owner filed an administrative appeal with the National Appeals Division (NAD), which found that RHS was incorrect in its denial of prepayment. NAD held that RHS' Civil Rights Impact Analysis (CRIA) was flawed because no current tenants were minorities and because RHS failed to take account of outlying areas in the same market and did not show that the other available units were not decent, safe and sanitary. NAD ordered RHS to permit prepayment, but RHS failed to comply. RHS also failed to request director review within the required 15 days of the NAD determination. RHS

subsequently claimed that it complied with the order because it informed the owner that a second CRIA was needed. The court held that this was an arbitrary and capricious interpretation of the NAD decision because the decision stated in clear terms what RHS must do, and the decision was final because RHS failed to request further review. RHS requested another hearing and set forth additional arguments why prepayment should not be allowed, and the NAD director ruled in favor of RHS. However, the court determined that this second round of NAD hearings was irrelevant because the determination had already been finalized, and RHS was restricted to the administrative record in disputing the first NAD hearing. The court ordered RHS to comply with the original NAD decision to permit prepayment.

Preservation: State Housing Finance Authority Did Not Breach Contract by Refusing to Authorize Prepayment

Woodrow Wilson of Middletown, LLC v. Conn. Hous. Finance Auth., 986 A.2d 271 (Conn. 2010). The mortgagor brought a breach of contract action against the Connecticut Housing Finance Agency (CHFA) based on its refusal to consent to the prepayment of the mortgage. The mortgagor purchased the building from CHFA and agreed to an affordability restriction and a regulatory agreement. The trial court held that CHFA was not required to consent to the prepayment because the requirement for prepayment set forth in Connecticut law, that the need for low- and moderate-income housing in the area concerned is no longer acute, was not met. The dispute centered on the meaning of “the area concerned,” and the mortgagor claimed that CHFA improperly defined the area as the Hartford metropolitan statistical area instead of Middlesex County, where the property was located. The court held that due to the purpose of the state law in question and the broad delegation of authority to CHFA, CHFA was entitled to a degree of deference in interpreting the statute. The court also noted that CHFA utilized the Hartford metropolitan statistical area in performing other calculations, that the mortgagor’s property was located in the Hartford labor market, and that the mortgagor advertised the relevant property in Hartford newspapers. Accordingly, the court upheld the CHFA definition of “area concerned” in the statute and refused to consent to the prepayment.

Fair Housing Act: Attorney’s Fees Are Appropriate Based on the Issuance of a Preliminary Injunction

Tri-City Cmty. Action Program, Inc. v. City of Malden, ___F. Supp. 2d___, 2010 WL 271430 (D. Mass. 2010). A nonprofit organization, Tri-CAP, filed an action against the city for failure to issue a building permit for Americans with Dis-

abilities Act retrofits that would make the building suitable for four disabled homeless individuals. The court held that the city had previously withheld, in violation of the Fair Housing Act (FHA), a building permit due to complaints by neighbors that a rooming house would be a threat to the peace and safety of neighborhood children. The court issued a preliminary injunction enjoining the city from preventing Tri-CAP from carrying out the modifications, and the city eventually issued the permit. The FHA violation became moot with the issuance of the permit and the completion of construction. As such, the court did not decide the case on the merits, yet held that Tri-CAP was entitled to attorney’s fees because it fit the definition of a “prevailing party” under the FHA because the injunction had a judicial imprimatur and the order caused a material change in the relationship between the parties. In terms of the amount of attorney’s fees to be awarded, the court held that the overall amount was excessive and divided the work of the attorneys into three phases. The court granted all fees prior to the granting of the injunction, half of the fees in the period between the grant of the injunction (“just in case” work), and no fees for the period after the completion of the renovations, aside from the costs associated with preparing the petition for attorney’s fees. The total fee award was \$48,994.

Fair Housing Act: Landlord’s Statements and Policies Constituted Familial Status Discrimination

United States v. Fair Housing Council of Or., 2010 WL 331772 (D. Or. Jan. 27, 2010). The Fair Housing Council of Oregon (FHCO) sued the landlord under the Fair Housing Act and filed for summary judgment. The court found that the landlord made discriminatory statements to potential renters, testers and investigators. She also stated at her deposition that she would not rent to families. Besides discriminatory statements, the court found that she engaged in steering by stating that the units would not be appropriate for children because of the size of the unit or because of the heavy traffic near the unit. The landlord claimed that she never meant to be discriminatory. However, the court held that facially discriminatory statements are to be judged on an objective standard. The court also held that FHCO had standing to sue because its organizational mission was frustrated and its resources were diverted to combat the particular discrimination, specifically by the use of testers to monitor the landlord’s practices. Because there was no dispute as to the facts the court found the landlord to be in violation of FHA and granted summary judgment in favor of FHCO.

Fair Housing Act: Waiver of Fair Housing Rights

Atl. Hous. Partners, LLLP v. City of Oviedo, 2010 WL 326165, slip op. (M.D. Fla. Jan. 21, 2010). A developer alleged that

the city engaged in discrimination by passing a resolution restricting the units in a proposed project to townhouses, condominiums or other owner-occupied housing, rather than rental property. The developer alleged that the resolution resulted in housing discrimination against potential minority tenants. The developer asserted violations of federal and state fair housing laws. The city sought summary judgment. The court noted that fair housing rights can be waived. The court found that the developer waived its right to challenge the restriction on rental housing by executing a development agreement. The agreement expressly incorporated by reference the terms of the resolution. Further, the agreement repeatedly referred to the planned residential units as “townhomes” rather than apartments or rental units. The court granted the city’s motion for summary judgment.

Fair Housing Act: No Violation of FHA Found under Disparate Impact Theory

Ungar v. N.Y. City Hous. Auth., 2010 WL 276735, slip op. (2d Cir. Jan. 27, 2010). The plaintiffs were a group of Hasidic Jews who claimed that they were being discriminated against under the New York City Housing Authority’s (NYCHA) Tenant Selection and Assignment Plan (TSAP) because, as they claimed, only 2.4% of families moving into the Williamsburg public housing development in the past 10 years were Hasidic. NYCHA claimed that the number was closer to 4% or 5%, but the court found that this number itself was inconsequential without statistical context and that it would need to know the percentage of the applicant pool that was Hasidic. The plaintiffs contended that even if NYCHA was correct, this would represent a sharp decline in the number of Hasidic Jews in the Williamsburg development. The court held that statistical evidence was also needed to support this claim and that even if there was a decline, this would not be dispositive due to NYCHA’s previous settlement of a case in which it was accused of discriminating in favor of Hasidic Jews at Williamsburg. The court rejected the plaintiffs’ claim that their Free Exercise of Religion rights were being violated, finding that the TSAP was facially neutral and generally applicable to all applicants.

Disaster Relief Funds: Lack of Standing to Challenge Diversion of Funds

Miss. State Conference NAACP v. HUD, ___F. Supp. 2d___, 2010 WL 60952 (D.D.C. 2010). Two organizations and four individuals brought this action against HUD, alleging that it had unlawfully approved of Mississippi’s diversion of \$570 million in federal relief funds, which were originally intended for low-income housing. When Mississippi discovered that it had overestimated the number of homeowners who would be eligible for its Homeowners

Assistance Program, a program which HUD had already approved, it proposed to instead divert the funds toward a high-end port expansion project. The plaintiffs sought declaratory and injunctive relief to prohibit HUD from releasing the funds. HUD moved to dismiss for lack of standing. The court found that the plaintiffs failed to demonstrate an injury in fact, as none of the individuals were eligible to receive the relief funds under the Homeowners Assistance Program, nor had the organizations illustrated that any of its members were eligible to receive relief funds. The court therefore found that the plaintiffs lacked Article III standing and granted HUD’s motion to dismiss. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Federal Register Notices

Fed. Reg. 6,689-6,693 (Feb. 10, 2010) **Sustainable Communities Planning Grant Program** **Advance Notice and Request for Comment**

Summary: This Notice announces HUD's intention to offer funding through a competition made available as a Notice of Funding Availability under its Sustainable Communities Planning Grant Program. HUD is seeking comments on the program through this advance Notice. Feedback received through this process will permit HUD and its partners to better understand how this program can support cooperative regional planning efforts that integrate housing, transportation, environmental impact and economic development. HUD is seeking input from state and local governments, regional bodies, community development entities, and a broad range of other stakeholders on how the program should be structured in order to have the most meaningful impact on regional planning for sustainable development.

Comments Due Date: March 12, 2010.

Fed. Reg. 6,688-6,689 (Feb. 10, 2010) **Section 8 Housing Assistance Payments Program—** **Renewal Funding**

Summary: HUD's Office of Public and Indian Housing must provide renewal funding for each PHA based on Voucher Management System leasing and cost data for the most recent federal fiscal year and by applying the most

recent Annual Adjustment Factors (AAFs) as established by the Secretary. This Notice announces Renewal Funding AAFs. These factors are based on a formula using residential rent and utility cost changes.

Effective Date: February 10, 2010.

Fed. Reg. 6,685-6,688 (Feb. 10, 2010) **Section 8 Housing Assistance Payments Program—** **Contract Rent Annual Adjustment Factors (AAFs),** **Fiscal Year 2010**

Summary: The United States Housing Act of 1937 requires that assistance contracts signed by owners participating in the Section 8 housing assistance payment programs provide annual adjustment to monthly rentals for units covered by the contract. This Notice announces AAFs for adjustment of contract rents on assistance contract anniversaries. The factors are based on a formula using residential rent and utility cost changes from the most current annual Bureau of Labor Statistics Consumer Price Index survey. These factors are applied at Housing Assistance Payment contract anniversaries for those calendar months commencing after the effective date of this Notice.

Effective Date: February 10, 2010.

Fed. Reg. 6,047-6,056 (Feb. 5, 2010) **Announcement of Funding Awards for Fiscal Year 2009** **for the Housing Choice Voucher Program**

Summary: This document notifies the public of funding awards for Fiscal Year (FY) 2009 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this Notice is to publish the names, addresses, and the amount of the awards to HAs for noncompetitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements and HOPE VI voucher awards.

Dated: January 20, 2010.

Fed. Reg. 4,100 (Jan. 26, 2010) **Affirmative Fair Housing, Marketing Plan (AFHMP)-** **Multifamily Housing, AFHMP-Single Family Housing and** **AFHMP-Cooperatives/Condominiums**

Summary: Developers of new multifamily housing (MFH) projects, single-family housing with HUD mortgage insurance, and condominium and cooperative housing with HUD mortgage insurance will use these forms to describe their intent for marketing to ensure that they meet the fair housing guidelines concerning the manner in which their units are marketed to the public. In addition, owners and managers of MFH developments must update their AFHMP whenever justified by changing conditions and/or review the form for needed updates at least every five years. The MFH form has been totally revised in order to provide clarity to MFH developers regarding their responsibilities. Minor edits and revisions were

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

made to the Single Family Housing and Condominium/Cooperative Housing forms to provide greater clarity to the respondents.

Comments Due: February 25, 2010.

Fed. Reg. 3,543-3,591 (Jan. 21, 2010)
HUD Multifamily Rental Project Closing Documents: Proposed Revisions and Updates and Notice of Information Collection; Notice

Summary: HUD is issuing for public comment a comprehensive set of revised closing documents for use in Federal Housing Administration multifamily rental projects. In revising these forms, HUD identified language and policies that were outdated and needed to be changed to be consistent with modern real estate and mortgage lending laws and practices. By reflecting current terminology and current lending laws and practices, updated multifamily rental project closing documents will better protect and benefit all parties involved in these transactions. The multifamily closing documents are posted on HUD's website at <http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm>.

Comments Due: March 22, 2010.

Rural Housing Service Notices

Fed. Reg. 3,892-3,893 (Jan. 25, 2010)
USDA Section 538 Guaranteed Rural Rental Housing Program; 2010 Industry Forums—Open Teleconference and/or Web Conference Meetings

Summary: This Notice announces a series of teleconference and/or web conference meetings regarding the USDA Section 538 Guaranteed Rural Rental Housing Program, which are scheduled to occur during the months of April, July and October in 2010. This Notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or web conference meetings.

Dated: January 25, 2010.

Fed. Reg. 4,707-4,710 (Jan. 29, 2010)
Continuous Construction-Permanent Loan Guarantees Under the Section 538 Guaranteed Rural Rental Housing Program

Summary: RHS is proposing an additional form of guarantee under the Guaranteed Rural Rental Housing Program regulation. Under this proposed rule, the agency proposes to provide a single, continuous guarantee during the construction phase for construction advances and the permanent financing phase of the project. This guarantee is being proposed in response to input from stakeholders who believe that this option will allow the program to serve more borrowers, thus making affordable housing available for more low- to moderate-income families.

Comments Due: March 30, 2010.

Fed. Reg. 5,281 (Feb. 2, 2010)
Notice of Intent To Hold Public Forums To Solicit Feedback From the Public Regarding the Section 523 Mutual Self-Help Housing Program

Summary: The Rural Housing Service intends to hold public forums to solicit feedback from the public on whether the current method of delivering the self-help program is the most efficient and cost effective in terms of cost and program delivery. All information relative to these forums will be taped, transcribed, and posted to the agency website. Public forums are scheduled through June 2010. The public forums will be held in selected states and the Washington, DC area.

Comments Due: June 30, 2010.

HUD Notices

PIH 2010-5 (HA) (Feb. 16, 2010)
Implementation of the Federal Fiscal Year 2010 Funding Provisions for the Housing Choice Voucher Program

Summary: This Notice implements the Housing Choice Voucher (HCV) Program funding provisions of the 2010 Consolidated Appropriations Act. The Act establishes the allocation methodology for calculating housing assistance payments renewal funds, new incremental vouchers and administrative fees. This Notice provides detailed instructions on how HUD calculates funding for every public housing agency's (PHA's) HCV program. In addition, each PHA will receive an individual funding letter with the PHA's funding calculations attached.

PIH 2010-3 (HA) (Jan. 20, 2010)
Guidance - Verification of Social Security Numbers (SSNs), Social Security (SS) and Supplemental Security Income (SSI) Benefits

Summary: This Notice explains the procedures public housing agencies are required to use for verifying Social Security numbers, Social Security benefits of applicants, participants and household members at the time of application for rental assistance programs and during mandatory reexamination of household income. ■



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

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

RETURN SERVICE REQUESTED