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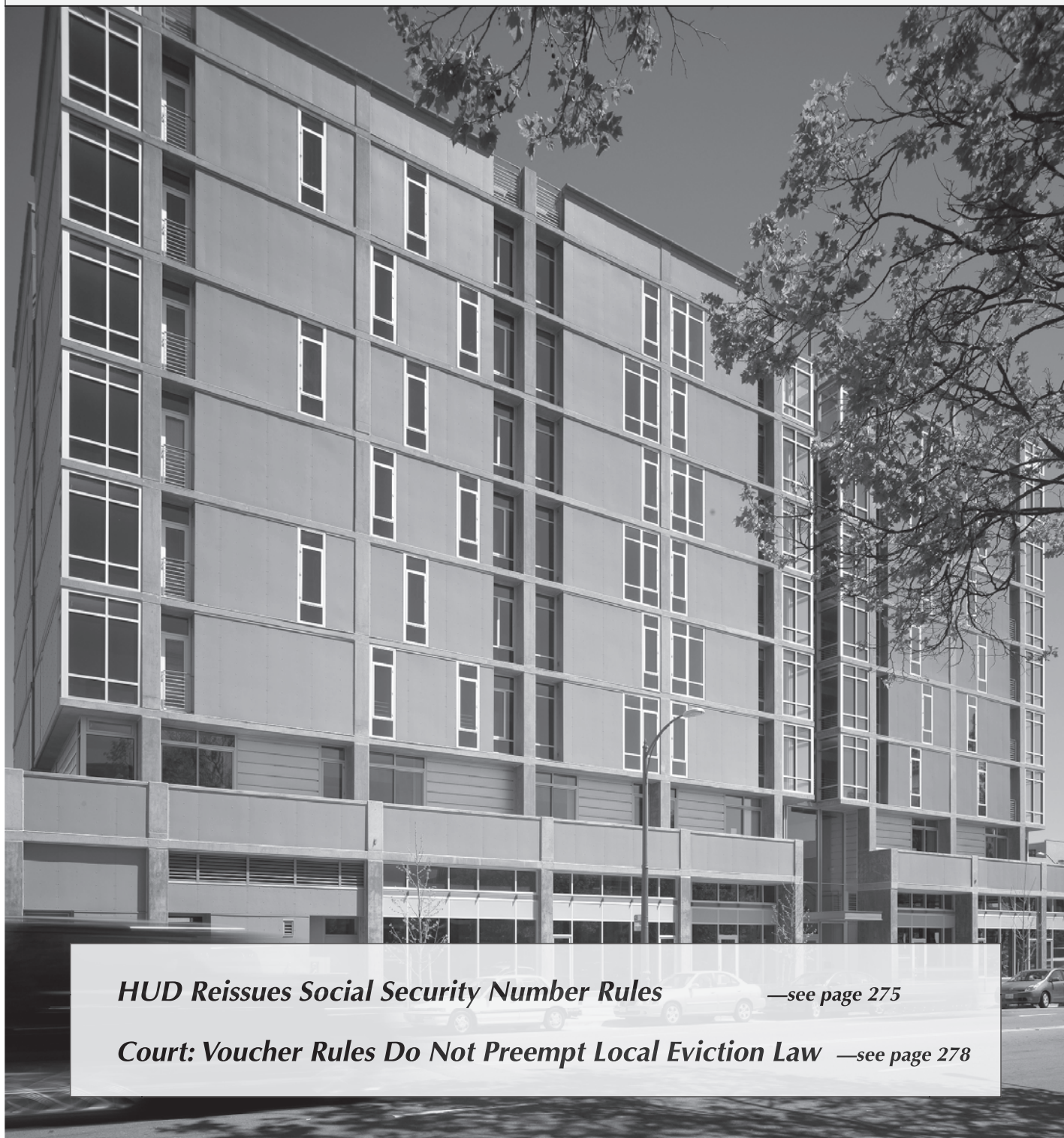


advancing housing justice

Housing Law Bulletin

Volume 39 • November-December 2009

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HUD Reissues Social Security Number Rules —see page 275

Court: Voucher Rules Do Not Preempt Local Eviction Law —see page 278

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See pages 305–306 for more information and a registration form.

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Cover: Developed by nonprofit Affordable Housing Associates, Madison at 14th Street Apartments in Oakland, CA provides 79 units of affordable housing, with 20 of the units reserved for youth exiting the foster care system.

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HUD Reissues Social Security Number Rules

On October 15, 2009, the Department of Housing and Urban Development (HUD) published a proposed rule designed to obtain Social Security Numbers (SSNs) from residents of federally assisted housing.¹ The proposed rule would dramatically alter 24 C.F.R. part 5, subpart B to require SSNs and other documents from assisted housing applicants and participants. This could threaten housing security for many, including eligible individuals who are homeless, elderly, victims of domestic violence, persons with disabilities and children.

Background

The proposed rule is the result of nearly nine months of review by HUD of the final rule it published on January 27, 2009.² The review was prompted in part by public comments submitted by an array of resident, advocacy, policy and civil rights organizations.³ These entities were concerned that the January 27 final rule would result in denial of participation to significant numbers of eligible applicants and residents unable to produce the demanded documentation. Partly in response to these concerns, on August 28, 2009, HUD issued a Notice delaying the effective date of the January 27 final rule until January 31, 2010.⁴

The October 15 proposed rule would apply to virtually all federally assisted permanent housing.⁵ The stated purpose of the proposed rule is the “full implementation of the Enterprise Income Verification [EIV] system.”⁶ EIV is a system designed to provide a single source of income-related data to public housing agencies (PHAs), owners and managers for use in verifying the income reported by tenants.⁷ The EIV’s purpose, according to the proposed rule, is to “help identify and cure inaccuracies in public

¹Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification, Proposed Rule, 74 Fed. Reg. 52,931 (Oct. 15, 2009) (to be codified at 24 C.F.R. pt. 5) [hereinafter October 15 Proposed Rule].

²Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification, Proposed Rule, 74 Fed. Reg. 4,832 (Jan. 27, 2009) (to be codified at 24 C.F.R. pt. 5) [hereinafter January 27 Final Rule].

³For more information regarding the rule’s history, see NHLP, *Delayed HUD Rule Would Alter Social Security Number Requirements*, 39 Hous. L. Bull. 80 (Mar. 2009).

⁴Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Delay of Effective Date, 74 Fed. Reg. 44,285 (Aug. 28, 2009).

⁵See 24 C.F.R. § 5.214 (2009).

⁶October 15 Proposed Rule, 74 Fed. Reg. at 52,931.

⁷See: HUD, OFFICE OF PUBLIC AND INDIAN HOUSING: ENTERPRISE INCOME VERIFICATION SYSTEM (EIV), SECURITY PROCEDURES FOR UPFRONT INCOME VERIFICATION (UIV) DATA (Version 1.4, Nov. 2005), <http://www.hud.gov/offices/pih/programs/ph/rhiip/docs/eivsecguidepha.pdf>.

and assisted housing subsidy determinations.”⁸ The January 27 rule, which the proposed rule would replace, put it more bluntly. Noting that 1.3% of individuals may not have an accurate and complete SSN, the January 27 rule stated that “[t]o prevent fraud and abuse . . . HUD is seeking to terminate assistance to those individuals who have not disclosed a valid Social Security Number.”⁹

Importantly, the SSN disclosure requirements set forth in the October 15 proposed rule are not applicable to “individuals who do not contend eligible immigration status.”

Exceptions to SSN Disclosure Requirements

There are several exceptions to the proposed rule’s SSN disclosure requirements. The first exempts current participants who are or will be age 62 or older as of January 31, 2010, and whose initial determination of eligibility for federally assisted housing was initiated before January 31, 2010.¹⁰ This represents a positive response to advocates’ comments by recognizing “the burden that such a disclosure requirement might impose on elderly residents.”¹¹ Why this rationale does not support exemption of seniors after January 31, 2010, is not explained in the October 15 notice. Additionally, the requirement that seniors applying after January 31, 2010, produce the identification appears to go beyond HUD’s statutory authority, since persons 62 years of age and older are statutorily entitled to self-certify as to eligibility.¹²

Second, participants who have previously submitted SSNs are exempt unless an SSN has been determined to be invalid, or the participant has obtained a new SSN.¹³ This is described in the October 15 notice as a means to avoid administrative burden and to “enhance privacy protections for individuals and households who have already disclosed valid SSNs.”¹⁴ This appears to be a reasoned approach to this category of participants.

Third, under the Section 8 homeownership program, members of the individual owner applicant’s household who will not be obligated to pay the debt evidenced by the mortgage or loan documents need not produce

SSNs.¹⁵ This continues the current requirement,¹⁶ which is unchanged in the January 27 final rule.¹⁷

Existing regulations provide that applicants who have not been issued an SSN may file a certification to that effect, but they must disclose an SSN if assigned thereafter. The January 27 and October 15 rules eliminate this certification process. They allow the application process to continue pending disclosure and documentation of SSNs, but preclude an applicant from moving from a waiting list to participant status without full disclosure and documentation.¹⁸

While somewhat unclear in its drafting, the proposed rule appears to state that if SSNs are not available for children under age 6, the children would be counted as members of the household during a 90-day period, and under certain circumstances, an additional 90 days, to give the family the opportunity to obtain the SSN and supporting documentation.¹⁹ Similarly, because of difficulties experienced by people who are homeless, applicants may be admitted to the Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program during a 90-day period and additional 90-day discretionary extension.²⁰

Treatment of Mixed Households Deferred for Later Reconsideration

Importantly, the SSN disclosure requirements set forth in Section 5.216 of the October 15 proposed rule are not applicable to “individuals who do not contend eligible immigration status.”²¹ This language is apparently intended to clarify an ambiguity in Section 5.508 of the January 27 rule,²² which suggested that housing providers must verify the citizenship status of every household member by requiring “presentation of a U.S. passport, U.S. birth certificate, Employment Authorization card, Temporary Resident card, or other appropriate documentation, as provided by section 214.”²³ Non-citizens would have been required to produce “adequate evidence consist[ing] of: (i) A signed declaration of eligible immigration status; and (ii) One of the Section 214 documents listed in [24 C.F.R.] § 5.508(b)(1) and referred to in [24 C.F.R.] § 5.510.” The final rule, therefore, would have made verification of immigration

¹⁵*Id.* at 52,935 (to be codified at 24 C.F.R. § 5.216 (c)).

¹⁶24 C.F.R. § 5.216 (2009).

¹⁷January 27 Final Rule, 74 Fed. Reg. at 4,840.

¹⁸October 15 Proposed Rule, 74 Fed. Reg. at 52,933 (to be codified at 24 C.F.R. § 5.216(h)); January 27 Final Rule, 74 Fed. Reg. at 4,840 (to be codified at 24 C.F.R. § 5.216(h)).

¹⁹October 15 Proposed Rule, 74 Fed. Reg. at 52,936 (to be codified at 24 C.F.R. § 5.216(e)(2)(ii)).

²⁰*Id.* (to be codified at 24 C.F.R. § 5.216(h)(2)).

²¹*Id.* at 52,935 (to be codified at 24 C.F.R. § 5.216(a)).

²²*See* 24 C.F.R. § 5.501 *et seq.* Advocates argued that the January 27 final rule would have excluded mixed eligibility households from any assistance and contravened statutory and Constitutional protections for mixed eligibility households.

²³This is a reference to Section 214 of the Housing and Community Development Act of 1980, codified at 52 U.S.C. § 1436a.

⁸October 15 Proposed Rule, 74 Fed. Reg. at 52,932.

⁹January 27 Final Rule, 74 Fed. Reg. at 4,834.

¹⁰October 15 Proposed Rule, 74 Fed. Reg. at 52,933, 52,935 (to be codified at 24 C.F.R. § 5.216 (e)).

¹¹*Id.* at 52,933.

¹²42 U.S.C. § 1436a(d)(1)-(2).

¹³October 15 Proposed Rule, 74 Fed. Reg. at 52,933.

¹⁴*Id.*

status mandatory for all household members, including those not claiming eligible immigration status, and would have required all household members to produce certain types of documentation.

The October 15 rule's clarification of the inapplicability of these documentation requirements is a reflection of HUD's decision to advance this process in smaller steps. The October 15 notice states that "[g]iven the significance of the issues involved, HUD believes that any changes deemed necessary to the noncitizens requirements would more appropriately be the subject of a separate rulemaking."²⁴

Changes in Definition of Annual Income Deferred

The January 27 rule contains dramatic changes in the definition and calculation of participants' income set out at 24 C.F.R. § 5.609. It eliminates detailed descriptions of amounts includable in and excludable from income, many of which are statutory. More importantly, it gives processing entities the discretion to disregard income reports and documentation from families that report little or no income, or fluctuating income.²⁵ Processing entities will be allowed to average actual income received or earned within the last 12 months to calculate annual income.²⁶ However, the October 15 notice states that HUD is "deferring changes to the definition of annual income to separate rulemaking that may address broader rent and income reforms."²⁷ The decision to revisit this issue at a later date is presumably in part a response to comments submitted in March by the Center on Budget and Policy Priorities.

Does the Proposed Rule Simplify Disclosure and Verification?

Finally, the October 15 notice states that the proposed rule is intended to "simplify[] SSN disclosure and verification processes, to the extent feasible, and consistent with maintaining confidentiality of these processes."²⁸

Currently, 24 C.F.R. § 5.216 provides that citizenship may be verified by submission of a valid SSN card issued by the Social Security Administration (SSA), or such other evidence of the SSN as HUD and, where applicable, the PHA may prescribe in administrative instructions. Section 5.216 of the January 27 rule is nearly identical to the existing regulation, requiring a valid SSN card issued by the SSA, or such other evidence of the SSN as HUD may prescribe in administrative instructions. The October 15 rule would require:

- (i) A valid SSN card issued by the SSA; (ii) An original document issued by a federal or state government agency, which contains the name of the individual and the SSN of the individual, along with other identifying information of the individual; or (ii) Such other evidence of the SSN as HUD may prescribe in administrative instructions.²⁹

HUD states that this proposal to authorize reliance on the SSN documentation provided by other government agencies will address concerns raised about the difficulties experienced in obtaining SSNs and reduce the administrative burden on processing entities.³⁰ This is true to some degree, but it does not address all of the issues raised in the comments. The proposed rule retains HUD's right to prescribe alternative documentation criteria, thereby allowing for flexibility, hopefully based on analysis of future experience with the reliability of various verification regimes.

Next Steps

HUD accepted comments on the October 15 proposed rule through November 16, 2009. According to the October 15 notice, HUD will consider these public comments in developing a final rule that likely will supersede the January 27 rule, which would otherwise take effect on January 31, 2010.³¹

The October 15 proposed rule does not include any language removing the provisions regarding assistance to noncitizens and family income from the January 27 rule. To prevent those portions of the January 27 final rule from becoming effective, HUD must provide notice and an opportunity to comment on new proposed rules and publish a new final rule, or it must officially withdraw those provisions of the January 27 final rule prior to January 31, 2010. ■

²⁹*Id.* at 52,936 (to be codified at 24 C.F.R. § 5.216(g)(1).

³⁰*Id.* at 52,933.

³¹*Id.*

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²⁴October 15 Proposed Rule, 74 Fed. Reg. at 52,933.

²⁵The implication of this rule is that such families are suspected of fraudulently failing to report or hiding actual income.

²⁶January 27 Final Rule, 74 Fed. Reg. at 4,842.

²⁷October 15 Proposed Rule, 74 Fed. Reg. at 52,932.

²⁸*Id.*

Ninth Circuit: HUD Voucher Regulations Do Not Preempt Local Eviction Controls*

On October 9, 2009, the United States Court of Appeals for the Ninth Circuit issued a lengthy opinion affirming the lower court's judgment that federal voucher eviction regulations do not preempt eviction protections provided under local law.¹ In *Barrientos v. 1801-1825 Morton LLC*, the court found no conflict between federal regulations defining "other good cause" for eviction of voucher tenants and the good cause eviction protections of the Los Angeles Rent Stabilization Ordinance (LARSO). The court also upheld the award of substantial attorney's fees to the tenants as prevailing parties under their leases. This decision, along with a recent HUD policy clarification, should reassure standard Section 8 voucher holders nationwide that they will receive protections equivalent to their unassisted neighbors.

Factual and Procedural History

Morton Gardens is a 66-unit apartment complex in Los Angeles developed through a federally insured loan under Section 236 of the National Housing Act.² When the property's prior owner prepaid the Section 236 loan in 1998, the tenants became eligible to receive enhanced vouchers.³ The purpose of the enhanced voucher program is to enable tenants to remain in their homes after prepayment or opt-out.⁴ The vouchers resemble those issued under the "standard" tenant-based Housing Choice Voucher (HCV) program, with two important distinctions: the subsidy levels for enhanced vouchers can be higher to cover the new market rent,⁵ and enhanced voucher holders have a federal statutory right to remain in their homes.⁶ Subsequent to Morton Gardens' prepayment, tenants with standard vouchers moved

into the complex as well. The plaintiffs in *Barrientos* were 16 enhanced and six standard voucher holders.

In June 2006, a new owner (Morton LLC) served on each of the 22 voucher tenants a "Ninety Day Notice to Terminate Tenancy" based on its desire to raise rents.⁷ Pursuant to federal law, during the lease term an owner participating in the HCV program "shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause...."⁸ Examples of "other good cause...may include...a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental)."⁹ The LARSO, which extends to voucher units in the City of Los Angeles, does not recognize a landlord's desire to raise the rent as permissible grounds for eviction.¹⁰ The case therefore presented the question of whether the owner could evict the tenants for reasons unrecognized by local law.

In September 2007, a federal district court granted a permanent injunction allowing the tenants to remain in their apartments and entered summary judgment for the tenants on two grounds.¹¹ On the enhanced voucher claim brought by 16 tenants, the court found that applicable statutory provisions "unambiguously provide enhanced voucher tenants a right to remain in tenancy when the rent is raised."¹² Therefore, HUD's voucher regulations allowing for evictions based on the "desire to lease the unit at a higher rental" do not apply to enhanced voucher tenants.¹³ On the local law claim brought by all tenants, the court granted summary judgment based on an actual conflict between the LARSO's eviction controls and HUD regulations, finding that HUD had exceeded its statutory authority by defining "other good cause" to include the desire to raise rent.¹⁴ The court enjoined the owner from evicting the tenants without complying with the LARSO and also awarded the tenants attorney's fees.¹⁵

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¹*Barrientos v. 1801-1825 Morton LLC*, __ F.3d __, 2009 WL 3260544 (9th Cir. 2009). The National Housing Law Project, the Legal Aid Foundation of Los Angeles, and Munger, Tolles & Olson LLP served as counsel to tenant Plaintiffs-Appellees.

²Order re Plaintiff's Motion for Summary Judgment, *Barrientos v. 1801-1825 Morton LLC*, No. 06-6437, slip. op. at 3 (C.D. Cal. Sept. 11, 2007) [hereinafter Sept. 2007 Order].

³Pursuant to annual appropriations acts passed during the late 1990s and permanent legislation passed in 1999, enhanced vouchers become available to tenants residing in buildings when owners prepay certain HUD-subsidized mortgages, or when project-based Section 8 contracts are not renewed. Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act, codified at 42 U.S.C. § 1437f(t)).

⁴*Barrientos*, 2009 WL 3260544, at *2.

⁵See generally NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 15.4.2.4 (3d ed. 2004).

⁶See 42 U.S.C.A. § 1437f(t)(1)(B) (Westlaw Oct. 23, 2009).

⁷Sept. 2007 order at 5. The notice also cited the owner's desire to opt out of the Section 8 voucher program. Because Morton LLC did not raise this issue on appeal, the Ninth Circuit assumed that the desire to raise rents constituted the owner's only motive for eviction. *Barrientos*, 2009 WL 3260544, at *6 n.4.

⁸42 U.S.C.A. § 1437f(o)(7)(C) (Westlaw Oct. 23, 2009) (emphasis added). Though the general provisions of Section 1437f(o) apply to enhanced voucher tenants as well, HUD has not issued regulations defining "other good cause" as it pertains to the enhanced voucher program.

⁹24 C.F.R. § 982.310(d)(1)(iv), (d)(2) (2009).

¹⁰See Los Angeles Municipal Code § 151.01 *et seq.*

¹¹Sept. 2007 Order at 44. For more information on the district court decision, see NHLP, *Local Eviction Controls and Enhanced Voucher Statute Protect Voucher Holders*, 37 HOUS. L. BULL. 180 (Oct. 2007).

¹²*Id.* at 17 (analyzing the language and history of 42 U.S.C. § 1437f(t)).

¹³*Id.* at 19 (citing 24 C.F.R. § 982.310(d)(iv)).

¹⁴*Id.* at 41. On motion for reconsideration, the district court clarified that owner desire to opt out of the Section 8 program could not constitute "good cause" for eviction, an issue not raised on appeal. Order re Def.'s Mot. to Recons. & Amend the Ct.'s Sept. 12, 2007 Order, *Barrientos v. 1801-1825 Morton, LLC*, No. 06-6437, 18 (C.D. Cal. Oct. 24, 2007).

¹⁵*Barrientos*, 2009 WL 3260544, at *14.

Morton LLC appealed to the Ninth Circuit in November 2007.¹⁶ Following oral argument in March 2009, the court solicited HUD's views, asking whether local eviction controls like the LARSO posed an obstacle to the accomplishment of federal objectives underlying HUD's good cause regulation.¹⁷ The U.S. Department of Justice, appearing on behalf of HUD, filed an amicus brief in June 2009, explaining that HUD regulations do not preempt local eviction controls and supporting affirmance of the district court decision.¹⁸ HUD also issued a Notice clarifying that local eviction protections are not preempted by federal law.¹⁹

The Court's Analysis

The LARSO Not Preempted by HUD Regulations

Writing for the court, Circuit Judge Kim Wardlaw examined whether HUD's "good cause" regulations preempt the LARSO's prohibition on evictions based on a desire to raise rents. After an extensive examination of the history behind both the HCV and enhanced voucher programs, the court held that HUD regulations did not preempt the more protective LARSO for two main reasons. First, HUD did not intend to preempt local eviction protections. Second, in a departure from the reasoning of the district court, the Ninth Circuit held that the HUD regulation and the LARSO do not actually conflict.

In finding that HUD did not intend to preempt the LARSO or other similar local laws, the court turned to the history behind the creation of the "other good cause" provision, exploring both its statutory and regulatory roots in the late 1970s and early 1980s. During that period, HUD had taken a number of steps toward minimizing the procedures and burdens of the HCV program in order "to mirror the private rental market so as to encourage owner participation."²⁰ The court noted also that, over the lifespan of the requirement, HUD has refused to create one overarching definition of "other good cause" because such analysis was best left to the courts to determine on a case-by-case basis.²¹ When it eventually did issue the "other good cause" examples found in the current regulations, it did so using the permissive "may include" as opposed

to a mandatory "shall" or "will."²² Taken together, HUD's statements and actions weighed strongly against an inference that HUD intended this regulation to preempt local protections. The court finally observed that allowing for the preemption of local eviction controls "would lead to [the] absurd result..." that federally assisted tenants would become "special victims of eviction" who had less protections than those tenants not receiving government housing assistance.²³ "Congress and HUD," the court declared, "intended to provide assisted tenants with *more* protections than unassisted tenants, not less."²⁴

The court also grounded its finding of non-preemption in the absence of actual conflict between the federal regulations and the LARSO.²⁵ Though this departed from the district court's reasoning, the appellate court exercised its power to affirm a lower court judgment "on any ground supported by the record."²⁶ Two reasons supported the finding of no conflict. First, the court found that the federal "other good cause" regulation did not grant owners participating in the voucher program a "right" to evict tenants based on a desire to increase rents.²⁷ Second, no actual conflict existed where the LARSO did not present an obstacle to the accomplishment of the HCV regulation's objectives. The court cited other statutes and regulations illustrating that Congress and HUD explicitly recognized that in some jurisdictions local law would provide additional protections for voucher tenants.²⁸ With respect to the good cause requirement at issue here, the court noted that both HUD and the legislature "desired to maintain a uniform federal floor below which protections for tenants could not drop, not a ceiling above which they could not rise."²⁹

Finally, the court cited HUD's position as expressed through the June 2009 United States amicus brief and through HUD guidance published at the same time. In its brief, the federal government took the position that HUD voucher regulations do not preempt local ordinances such as the LARSO, noting the LARSO's compatibility with HUD objectives and the permissive use of "may include" in the "other good cause" definition.³⁰ This position was echoed by HUD guidance released three days later.³¹ Notice PIH 2009-18 specifically states that the federal regulation permitting landlords to terminate voucher leases

¹⁶Appellees' Brief, *Barrientos v. 1801-1825 Morton, LLC*, No. 07-56697, at 1 (9th Cir. Sept. 5, 2008).

¹⁷Letter from Molly C. Dwyer, Clerk of the Ninth Circuit, to Honorable Eric Holder, Attorney General (Apr. 17, 2009).

¹⁸Brief for the United States as *Amicus Curiae* Supporting Affirmance of the District Court's Judgment, *Barrientos v. 1801-1825 Morton LLC*, No. 07-56697 (9th Cir. June 19, 2009). For a more detailed discussion of the United States brief, see NHLP, *United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls*, 39 HOUS. L. BULL. 201 (Aug. 2009).

¹⁹HUD, *State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program*, Notice PIH 2009-18 (June 22, 2009).

²⁰*Barrientos*, 2009 WL 3260544, at *8 (citing Sept. 2007 order).

²¹*Id.*

²²*Id.*

²³*Id.* at *9.

²⁴*Id.* at *10 (emphasis added).

²⁵*Id.* at *9.

²⁶*Id.* at *14 (citing *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1190 (9th Cir. 1998)).

²⁷*Id.* at *9.

²⁸*Id.* at *10 (citing 42 U.S.C. § 1437f(o)(7)(D)(vi) (preserving state and local protections for victims of domestic violence); 24 C.F.R. § 982.53(d) (preserving nondiscrimination protections for voucher holders)).

²⁹*Id.*

³⁰*Barrientos*, 2009 WL 3260544, at *12.

³¹See *State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program*, PIH 2009-18 (June 22, 2009).

because of a desire to raise rents does not preempt any local ordinances prohibiting such lease termination. The court viewed HUD's position in light of the Supreme Court's recent *Wyeth* decision that the interpretation of a federal regulation by its responsible federal agency "is entitled to deference" because these agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed decisions" regarding how state or local law will impact the agency's regulations.³²

The Ninth Circuit's decision, along with HUD's amicus brief and new voucher guidance, sends an important message that tenants in federally assisted housing are entitled to, at minimum, the same protections granted unassisted tenants.

Attorney's Fees

Over Morton LLC's vigorous objections, the court also affirmed the award of roughly \$180,000 in attorney's fees to plaintiffs for their work in the trial court.³³ The court found no issue with the slight discrepancy between certain of the plaintiffs' lease fee provisions; nor would it fail to award fees where five of the plaintiffs had no lease copies at all, in the absence of evidence that these leases materially differed from those of the other plaintiffs and where the tenants in question no longer had their copies and Morton LLC refused to provide the originals.³⁴ The court's rejection of Morton LLC's other arguments centered on interpretation of California law and Morton LLC's failure to raise certain objections before the district court.³⁵

Enhanced Voucher Issues Remain Unresolved

Despite this favorable decision, the court did not explicitly hold that the federal enhanced voucher statute (42 U.S.C. §1437f(t)) also protected the 16 enhanced voucher tenants against eviction where they had not breached their leases.³⁶ The district court had held that the federal statutory right to remain specifically exempted enhanced voucher holders from eviction based on landlord desire to raise rents. Although stating that "we agree that the eviction violated the Enhanced Voucher Tenants' right

to remain",³⁷ the appellate court found it unnecessary to reach the enhanced voucher issue once it had determined that the LARSO protections applied. Although three other federal courts have held that the enhanced voucher statute establishes a right to remain,³⁸ the Ninth Circuit's refusal to so hold leaves vulnerable those enhanced voucher holders residing in cities without protective eviction controls, at least within the Ninth Circuit's jurisdiction.

Conclusion

The Ninth Circuit's decision, along with HUD's amicus brief and new voucher guidance, sends an important message that tenants in federally assisted housing are entitled to, at minimum, the same protections granted unassisted tenants. The award of attorney's fees should also serve to deter owners who might mistakenly believe that voucher tenants with contractual fee provisions in their leases can be denied local and federal eviction protections with little risk.³⁹ However, the court's refusal to rule explicitly on the rights of enhanced voucher holders will require further litigation or policy reform by HUD or Congress for tenants to remain secure in their homes. ■

³²*Barrientos*, 2009 WL 3260544, at *13 (citing *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009)).

³³*Id.* at *16.

³⁴*Id.* at *15.

³⁵*Id.* at *15-16.

³⁶*Id.* at *6 n.3. While Judge Wardlaw would affirm the district court's holding, Judges O'Scannlain and Rymer did not join her in providing this added protection to enhanced voucher holders.

³⁷*Id.*

³⁸*See* *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008); *Estevez v. Cosmopolitan Assocs. L.L.C.*, 2005 U.S. Dist. LEXIS 29844 (E.D.N.Y. Nov. 28, 2005); *Jeanty v. Shore Terrace Realty Ass'n*, 2004 LEXIS 15773 (S.D.N.Y. Aug. 10, 2004).

³⁹*See Barrientos*, 2009 WL 3260544, at *14-15.

The Section 8 Voucher Reform Act: Comparing the 2007 and 2009 Versions*

The Section 8 Voucher Reform Act of 2009 (H.R. 3045, or SEVRA 2009) passed out of the full Financial Services Committee of the House of Representatives by a vote of 41-24 and was sent to the House floor on September 30, 2009, to be scheduled for a full House vote.¹ This action is the latest of several attempts to institute the first comprehensive reforms to the system of HUD-assisted housing since 1998.² In 2007, a prior version of SEVRA (H.R. 1851, or SEVRA 2007) passed by a 333-83 vote in the House,³ but the Senate version (S. 2684), introduced in March 2008, never made it out of committee and died with the expiration of the 110th Congress.⁴ SEVRA 2009 appears likely to pass the House, but there is no indication that the Senate has taken action to introduce a SEVRA bill this session.⁵ This article will briefly describe the background and purpose of SEVRA, delineate some of the key differences between SEVRA 2007 and SEVRA 2009, describe the import of the changes, and suggest possible revisions to the bill when it goes to the House floor for a vote and makes its way to the Senate.

Background⁶

In many ways, the 2009 version of SEVRA is similar to the version that the House passed in 2007, and its rationale for modifying the voucher program and several low-income housing programs remains the same. While the Section 8 voucher program serves over 2 million families, it has been hampered by inadequate funding formulas, numerous complicated and inefficient provisions that impair effective operation, and a lack of sufficient tenant protection provisions. In response, SEVRA 2007 included a number of significant changes to the current system. In

general, it aimed to provide a more stable funding mechanism, streamline the rent determination system for several low-income housing programs, provide more flexibility to public housing agencies (PHAs), and expand the Moving to Work (MTW) program for a selected number of PHAs.

2009 Changes to SEVRA

While SEVRA 2009 contains many of the same provisions found in SEVRA 2007, there are differences in almost every section of the bill, some of which could create significant improvements, and some of which could prove detrimental to federally assisted tenants.⁷ To begin, SEVRA 2007 would have authorized funding for an additional 20,000 new vouchers each year for five years,⁸ while SEVRA 2009 would provide for an increase of 150,000 new vouchers for the first fiscal year following the bill's enactment.⁹ While this would be a good start in creating more housing opportunities for low-income families, it could be a barrier to Senate action on the bill because of its immediate fiscal impact and its attendant political sensitivities. This concern is more tactical than real, because any action by the authorizers is always subject to appropriations.

Voucher Funding Formula

One of the most prominent and pressing problems with the voucher program has been the lack of an adequate and permanent funding formula, which has resulted in underfunding of some PHAs, surpluses for others and a lack of flexibility for many. Between 2004 and 2007, the voucher renewal funding was based on costs and the number of authorized vouchers in use from May-July 2004, plus an inflation factor. This formula created an inconsistent and confusing funding structure, which led to the disuse of approximately 150,000 vouchers.¹⁰ In subsequent years, the formula was substantially improved but remained subject to change on an annual basis.

SEVRA 2007 addressed the flawed formula for PHA funding and adopted the formula that was included in appropriation acts beginning in 2007. Instead of basing funding on an arbitrary snapshot in time, SEVRA 2007 would have renewed funding "based on leasing and cost data from the preceding calendar year, as adjusted by an annual adjustment factor to be established by the Secretary,

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¹H.R. 3045, 111th Cong., 1st Sess. (2009) (reported in House Sept. 30, 2009).

²Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276 (1998) (codified primarily throughout 42 U.S.C. § 1437).

³H.R. 1851, 110th Cong., 1st Sess. (2007).

⁴S. 2684, 110th Cong., 2d Sess. (2008).

⁵This article uses the version of H.R. 3045 as reported on September 30, 2009. Since H.R. 1851 passed the House in 2007, the language of the bill has been revised a number of times. A discussion draft of SEVRA of 2009 was first circulated on April 28, 2009, a revised version was introduced on July 25, 2009, and various changes were made during markup, either through the standard amendment process or through manager's amendments. It is also possible that the bill will undergo changes when it is sent to the floor for a full House vote.

⁶For a summary of earlier versions of SEVRA, see NHLP, *Proposed Congressional Reforms to the Section 8 Voucher Program*, 37 HOUS. L. BULL. 169-172 (Oct. 2007).

⁷For a side-by-side comparison of current law and SEVRA 2009, see Ctr. on Budget & Policy Priorities, *Comparison of Major Provisions of House Section 8 Voucher Reform Bill and Current Law* (Oct. 26, 2009), <http://www.cbpp.org/files/9-22-09hous-appendix.pdf>.

⁸H.R. 1851 § 20.

⁹H.R. 3045 § 18.

¹⁰Ctr. on Budget & Policy Priorities, "SEVRA" *Housing Voucher Reform Bill Would Update and Streamline Program* (Sept. 22, 2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2929>. The prevalence of the use of vouchers remains well below its apex in 2004, although the revised HUD determinations of renewal funding have resulted in a restoration of approximately one-third of the vouchers lost between 2004 and 2007.

which shall be established using the smallest geographical areas for which data on changes in rental costs are annually available.”¹¹ This provision is essential to ensure that voucher funding is based upon the most recently available use and cost data, thereby setting the stage for congressional action to provide sufficient funding. The actual amount allocated based upon the formula would have been determined by congressional appropriations.

The Section 8 voucher, public housing and project-based Section 8 programs have suffered from overly complex rent-setting procedures for families, which have resulted in inconsistencies, errors and unfairness.

SEVRA 2009 incorporates the revised funding formula of SEVRA 2007¹² and would authorize voucher funding for two new categories of vouchers: (1) vouchers used for the preservation of public housing units not included in the operating formula under Section 9(e)(2) of the United States Housing Act of 1937;¹³ and (2) tenant protection vouchers in connection with the foreclosure or disposition of multifamily housing subject to a mortgage insured and subsidized under the National Housing Act.¹⁴ Significantly, SEVRA 2009 also retains the provision that the Secretary shall provide vouchers, subject only to sufficient funding, in connection with certain units that cease to be available due to events such as a public housing demolition or disposition, HOPE VI actions or eminent domain. This provision would reverse the policy of the prior administration to provide vouchers only for those units that are occupied.¹⁵

SEVRA 2009 also revises the language regarding recapture of unused funds available to PHAs. PHAs would be able to retain a reserve of 6%, and amounts in excess would be reallocated.¹⁶ Such reallocation would be based not only on PHA performance, but the Department of Housing and Urban Development (HUD) must also take into consideration the relative need for additional voucher assistance to increase leasing rates.¹⁷ The reallocation date would be April 1 or 75 days after the enactment of a relevant appropriations act, whichever is later.¹⁸ Finally, SEVRA 2009 retains the provisions of SEVRA 2007 that

permit overleasing and that base subsequent funding on that overleasing, provided that the overleasing does not exceed 103% of the prior years’ use.¹⁹

Rent Reform and Income Reviews

The Section 8 voucher, public housing and project-based Section 8 programs have suffered from overly complex rent-setting procedures for families, which have resulted in inconsistencies, errors and unfairness. This, coupled with often-unnecessary income reviews, has caused large administrative burdens for PHAs and owners. SEVRA proposes to address these issues for all HUD income-based rent programs, i.e., public housing, vouchers and project-based Section 8.

SEVRA 2007 contained many provisions intended to ensure that rent setting was more efficient and fairer for tenants.²⁰ To encourage employment and self-sufficiency and to improve accuracy, rent calculations would have been made based on prior-year income instead of current-year income.²¹ A 10% disregard of income earned up to \$10,000 would have been available to all tenants and program participants.²² The standard deduction for disabled and elderly tenants would have been increased from \$400 to \$725,²³ and the standard deduction for dependents increased from \$480 to \$500. To alleviate administrative burdens, income recertifications for families on fixed incomes would only have been required once every three years. In addition, PHAs would have been permitted to rely on income determinations by other means-tested public assistance programs in lieu of conducting recertifications on an annual basis for families not on a fixed income.²⁴

In SEVRA 2009, the prior-year income rent calculation provision is retained, except for the initial income determination when a family begins to receive assistance. The initial determination would continue to utilize a family’s current year income.²⁵ When a family’s income drops more than \$1,200 annually, the family may request an interim recertification, while a recertification is required if the income increases by more than \$1,200.²⁶ This amount is a decrease from the \$1,500 allowed in SEVRA 2007.²⁷ To further eliminate employment disincentives, SEVRA 2009 would permit a deduction of 10% of the first \$9,000 in earned income and a childcare deduction of costs exceeding 10% of earned income.²⁸ In addition, deferred Veterans

¹⁹§ 6(a).

²⁰H.R. 1851 § 3.

²¹§ 3(a)(1).

²²§ 3(a)(1).

²³§ 3(b)(2).

²⁴§ 3(a)(1).

²⁵H.R. 3045 § 3(a)(1).

²⁶§ 3(a)(1).

²⁷H.R. 1851 § 3(a)(1).

²⁸H.R. 3045 § 3(b). SEVRA 2009 reduced the amount of income that the 10% disregard would be applicable to by \$1,000 and added the deduction for childcare payments that exceed 10% of income.

¹¹H.R. 1851 § 6.

¹²H.R. 3045 § 6.

¹³42 U.S.C.A. § 1437g(e)(2) (Westlaw Oct. 17, 2009).

¹⁴H.R. 3045 § 6(a).

¹⁵§ 6(a); see Joe Akman, *New Relocation and Replacement Voucher Policy for Public Housing Demolition and Disposition*, 37 HOUS. L. BULL. 77 (Apr./May 2007) (discussing the prior administration’s harmful policy).

¹⁶§ 6(a).

¹⁷§ 6(a).

¹⁸§ 6(a).

Affairs disability benefits would not be included in the definition of income for the purposes of rent setting.²⁹

Alternative Rent Structures

While SEVRA generally improves and simplifies rent-setting procedures for the voucher, public housing and project-based Section 8 programs, a provision permitting PHAs to set up alternative rent structures may add complexity and confusion, which is contrary to the goals of Section 8 reform. SEVRA 2007 would have revised a PHA's ability to set rent for all PHA-administered housing programs by allowing a PHA to create a rent structure alternative to the standard 30% of adjusted income. Alternatives include rent ceilings, income tiers or a lower percentage of income, provided the new structure does not create higher rents.³⁰ SEVRA 2009 would limit use of the alternative rent scheme to public housing and would clarify that the alternative rent structures must comply with the requirement that a tenant's rent must not be more than 30% of his or her adjusted income.³¹

Eligibility for Assistance Based on Assets and Income

There are currently no asset limits for families living in public housing or receiving Section 8 assistance. SEVRA 2007 would have made ineligible for assistance all families with assets over \$100,000 or who had a present ownership interest in, and a legal right to reside in, real property suitable for residency, unless the family was making a good faith effort to sell the residence.³² A PHA or owner could delay an eviction for six months based on asset or income ineligibility.³³

SEVRA 2009 would require that a family have an ownership interest in, a legal right to reside in, *and the effective legal authority to sell* a residence in order to be ineligible for assistance. It would also eliminate the requirement that the family make a good faith effort to sell the residence to be eligible for assistance. Instead, a family would merely need to offer such property for sale.³⁴ Additionally, owners and PHAs would be granted authority not to enforce asset limitations in the case of elderly and disabled families.³⁵

Screening of Applicants

Current protections regarding the screening and due process rights of voucher applicants are only required by regulation. An important aspect of SEVRA 2007 was the inclusion of statutory provisions that would have limited PHAs' elective eligibility criteria to factors "directly

related to an applicant's ability to fulfill the obligations of an assisted lease."³⁶ It also would have required PHAs to take into account mitigating factors and to provide an applicant notice of denial and the opportunity for an informal hearing.³⁷

SEVRA 2009 would clarify that in the voucher program, criminal background *may* be considered as it relates to safety and security.³⁸ It would also amend Section 576 of the Quality Housing and Work Responsibility Act, which applies to applicants to federally assisted housing, including public housing, project-based Section 8, and Sections 515 and 514 rural housing.³⁹ SEVRA 2009 would require "documented evidence that is credible and objective."⁴⁰ Denials for drug-related or violent criminal activity would be limited to conduct that occurred in the past five years. SEVRA 2009 would limit reliance upon misdemeanor charges and convictions to certain situations, including a pattern of activity, any offense against a child, or violent criminal activity that affects the health and safety or right to peaceful enjoyment.⁴¹ SEVRA 2009 would also provide that families eligible for enhanced vouchers shall not be subject to elective rescreening by the PHA.⁴²

Rent Burdens

As the Section 8 program is currently regulated, PHAs do not have adequate flexibility to adjust rent burdens, which can result in tenants paying well over 30% of their income in markets where rents are generally high, and the supply of rental housing is tight.⁴³ SEVRA 2007 would have permitted PHAs to raise the payment standard to 120% of fair market rent without HUD approval. It also would have required HUD to report to Congress the number of families paying more than 30% and 40% of their income, as well as the relationship between higher poverty areas and voucher concentration as it relates to payment standards.⁴⁴ SEVRA 2009, incorporating the language from S. 2684, would require that HUD provide race and ethnicity data along with the analysis of geographic poverty concentration.⁴⁵

SEVRA 2007 would have required PHAs to increase their payment standards or explain why they were not doing so where a significant number of families (a number to be determined by HUD) were paying more than 40% of their income for rent.⁴⁶ SEVRA 2009, again borrowing from

²⁹§ 3(b). This disregard is consistent with the current regulatory provision which is available to recipients of deferred lump sum payments of Social Security benefits and Supplemental Security income. 24 C.F.R. § 5.609(c)(14) (2009).

³⁰H.R. 1851 § 3(a).

³¹H.R. 3045 § 3(a)(1).

³²H.R. 1851 § 4(a).

³³§ 4(a).

³⁴H.R. 3045 § 4(a).

³⁵§ 4(a).

³⁶H.R. 1851 § 14.

³⁷§ 14.

³⁸H.R. 3045 § 14(a)(4).

³⁹42 U.S.C. § 13661 (Westlaw Nov. 10, 2009).

⁴⁰H.R. 3045 § 14(c)(1)(B)(i).

⁴¹§ 14(c)(2)(D).

⁴²§ 14(a)(5); § 16(a)(1).

⁴³Testimony of Will Fischer, Senior Policy Analyst, Ctr. on Budget & Policy Priorities, House Financial Services Subcommittee on Housing and Community Opportunity (June 4, 2009), *available at* <http://www.cbpp.org/files/6-4-09housing-testimony.pdf>.

⁴⁴H.R. 1851 § 12(a).

⁴⁵H.R. 3045 § 12(a); S. 2684 § 12(a).

⁴⁶H.R. 1851 § 12(a).

S. 2684, would mandate that PHAs increase their payment standards or explain why they are not doing so where there is a high concentration of voucher holders in higher poverty, lower rent areas. Similar to SEVRA 2007, PHAs would be required to do the same if more than a certain percent of families (to be determined by HUD) pay more than 40% of their income for rent.⁴⁷

Establishment of Fair Market Rents

Another issue related to unavailability of rental units and high rents in certain markets is HUD's process for determining Fair Market Rents (FMRs), which in some areas can result in the same FMR for millions of people over several local jurisdictions. This often results in artificially low FMRs because poorer urban areas can be included with suburbs that are more affluent.⁴⁸ SEVRA 2007 sought to improve housing choice by requiring, at a minimum, that HUD establish separate FMRs for any city with more than 40,000 rental units, as well as for every metropolitan county.⁴⁹ The bill also would have established procedures for a PHA to request a separate market area based on several criteria, provided that a payment standard would not be reduced as a result of recalculation.⁵⁰

SEVRA 2009 significantly revises this section by eliminating any specific procedures HUD must follow in defining market areas and requiring HUD to define areas "sufficiently distinct as necessary" to establish FMRs that "accurately reflect typical rental costs," and to avoid concentration of voucher holders.⁵¹ HUD would be directed to consider the efficient administration by PHAs, availability of data sufficient to create smaller market areas and the ability of PHAs to adjust the rent burden accordingly.⁵² SEVRA 2009 would also give HUD discretion in creating criteria for a PHA to request a smaller market area⁵³ and would require HUD to phase in large increases in the FMR by not more than 5% per year.⁵⁴ Finally, no PHA would be required to reduce the payment standard due to a change in the FMR for a family that has not changed its rental unit.

Project-Based Voucher Assistance

To combat shortages in rental housing and to ensure more housing opportunities for disabled, elderly and formerly homeless families, SEVRA 2007 would have provided PHAs more flexibility in project-basing vouchers.⁵⁵ SEVRA 2007 would have permitted PHAs to use 25%

(instead of the current 20%) of voucher funds for project-based vouchers, with an additional 5% for formerly homeless families.⁵⁶ Instead of limiting project-based units to 25% of all units in a particular project, SEVRA 2007 would have permitted PHAs to fund up to 25% of a project's units or 25 units in a particular project, whichever is greater.⁵⁷ It also would have permitted owners to maintain site-specific waiting lists (subject to PHA oversight)⁵⁸ and would have protected tenants displaced by project rehabilitation.⁵⁹

SEVRA 2009, with provisions similar to S. 2684,⁶⁰ would make modifications to the project-based voucher reform proposed in 2007. SEVRA 2009 would provide that an additional 5% of voucher funding may be used for project-based vouchers not just for formerly homeless families, but also for disabled persons and jurisdictions where vouchers are difficult to use.⁶¹ SEVRA 2009 would permit PHAs to use project-based vouchers without following a competitive process for PHA-owned units.⁶² It would also allow rents to be below 90% of FMR where units are receiving funds under the Housing Trust Fund or Capital Magnet Fund in order to foster more unit production.⁶³ In addition, SEVRA 2009 would allow PHAs to transfer vouchers and budget authority to PHAs in the same or adjacent metropolitan areas.⁶⁴ SEVRA 2009 would also provide an additional exception to the rules regarding the number of units in a building that may be project-based. Up to 50% of the units may be project-based, if the development is located in an area with 20% or less poverty.⁶⁵

Enhanced Vouchers

SEVRA 2007 confronted the dilemma of what happens when project-based Section 8 rental subsidies (not vouchers) end and family size changes, creating a situation where the tenant could be "overhoused" under the PHA's occupancy standards for the replacement enhanced voucher program. SEVRA 2007 would permit a family to remain in their current development, provided the family moves to a unit of appropriate size in the property, if such unit is available.⁶⁶ SEVRA 2009 includes this provision.⁶⁷ In a further attempt to protect families facing conversion actions, SEVRA 2009 would expand the use of enhanced vouchers for families who are facing an increase of rent because of the expiration of the 40-year term of a subsidized mortgage or termination of other affordability

⁴⁷H.R. 3045 § 12(a).

⁴⁸Testimony of Will Fischer, *supra* note 43.

⁴⁹H.R. 1851 § 13(a).

⁵⁰§ 13(a).

⁵¹H.R. 3045 § 13(a)(3).

⁵²§ 13(a)(3).

⁵³§ 13(a)(3).

⁵⁴§ 13(a)(3).

⁵⁵H.R. 1851 § 11.

⁵⁶§ 11(1).

⁵⁷§ 11(2).

⁵⁸§ 11(7)(A).

⁵⁹§ 11(7)(B).

⁶⁰S. 2684 § 11.

⁶¹H.R. 3045 § 11(1).

⁶²§ 11(4).

⁶³§ 11(4).

⁶⁴§ 11(4).

⁶⁵§ 11(2).

⁶⁶H.R. 1851 § 15(a).

⁶⁷H.R. 3045 § 16(b).

restrictions.⁶⁸ Additionally, SEVRA 2009 incorporates provisions of S. 2684 stating that families already receiving assistance would not be required to requalify for a subsidy under a PHA's tenant selection standards.⁶⁹ Also, it would clarify that an owner would be required to accept the enhanced voucher after conversion, and terminate the tenancy only for serious or repeated lease violations.⁷⁰

*SEVRA 2009 would improve the
inspection provisions by adding
more tenant protections.*

Portability

SEVRA 2007 attempted to address the problems of providing housing choice for families with vouchers by making it easier for a family to move from the jurisdiction of one PHA to another. SEVRA 2007 would have accomplished this by requiring HUD to provide funding for a PHA to absorb transfer costs, instead of depending upon two PHAs to coordinate a billing system.⁷¹ SEVRA 2009 does not state how this absorption process will occur. However, it would expand the provision regarding portability by requiring HUD to propose a rule in six months and finalize regulations in 12 months that would "eliminate, or minimize to the greatest extent feasible consistent with available funding, billing between agencies and administrative barriers to families' choices of where to reside."⁷²

Inspection of Dwelling Units

SEVRA 2007 would have reduced the number of required housing quality standards (HQS) inspections, from annually to every two years.⁷³ It also would have permitted housing assistance payments to be made for one month for new units that fail inspection for non-life-threatening conditions.⁷⁴ Additionally, SEVRA 2007 would have allowed a family to occupy a unit if it was inspected under another federal housing program within the previous year.⁷⁵ In lieu of HQS procedures, it would have permitted inspections under both federal and non-federal programs with standards equal to or exceeding the voucher program standards.⁷⁶ This was intended to streamline the inspection process, thereby encouraging more private landlords to participate in the voucher

program. SEVRA 2007 also would have codified regulations regarding time periods for landlords to cure defects and given PHAs the authority to withhold payments until the defects were fixed.⁷⁷ In addition, if the landlord failed to make repairs during the prescribed time periods, PHAs would have been permitted to abate payments entirely and use the funds to complete necessary repairs on the unit.⁷⁸ Tenants would have been explicitly protected from eviction in the event a PHA withheld or abated payments to a noncompliant owner.⁷⁹

SEVRA 2009 would improve the inspection provisions by adding more tenant protections. The changes would require tenant notification that an owner is not in compliance with HQS.⁸⁰ In the event repairs are not made and payments are abated, a PHA would be able to use the abated payments for relocation expenses, including moving expenses and security deposits.⁸¹ These provisions are significant because they would provide more options, time and financial resources to tenants faced with involuntary displacement resulting from an owner's failure to repair.

Performance Assessments

SEVRA 2007 would have required performance assessments for PHAs in their administration of tenant-based rental assistance, taking into account a number of factors, which generally track the current regulatory provisions.⁸² SEVRA 2009 would add several new categories, including a PHA's efforts to reduce racial segregation, improve accuracy in calculating utility allowances, and increase compliance with targeting requirements.⁸³ Additionally, SEVRA 2009 would permit HUD to establish new categories to include in a performance assessment.⁸⁴ SEVRA 2009 would also require a performance assessment of each PHA within the first two years of enactment of the bill and every two years thereafter.⁸⁵

Homeownership

SEVRA 2007 would have permitted a PHA to provide downpayment assistance of up to \$10,000 or one year of rental assistance, whichever is less, to families who had received rental assistance for at least one year.⁸⁶ SEVRA 2009 would add a provision that permits PHAs to mandate "prepurchase housing counseling or participation in a self-sufficiency program as a condition of receiving downpayment assistance."⁸⁷

⁶⁸§ 16(b).

⁶⁹§ 16(a)(1); S. 2684 § 14(a)(1).

⁷⁰H.R. 3045 § 16(a)(2); S. 2684 § 14(a)(2).

⁷¹H.R. 1851 § 6(b).

⁷²H.R. 3045 § 6(b).

⁷³H.R. 1851 § 2(a)(2).

⁷⁴§ 2(a)(1).

⁷⁵§ 2(a)(1).

⁷⁶§ 2(a)(2).

⁷⁷§ 2(a)(4).

⁷⁸§ 2(a)(4).

⁷⁹§ 2(a)(4).

⁸⁰H.R. 3045 § 2(3).

⁸¹§ 2(3). Congress enacted similar provisions in the 2009 American Recovery and Reinvestment Act.

⁸²H.R. 1851 § 10.

⁸³§ 10.

⁸⁴H.R. 3045 § 10

⁸⁵§ 10.

⁸⁶H.R. 1851 § 8.

⁸⁷H.R. 3045 § 8(a).

Moving to Work

SEVRA 2007 contained a troublesome expansion of the MTW program (renamed Housing Innovation Program (HIP)).⁸⁸ The current MTW program allows selected PHAs to waive most statutory requirements, including tenant protections, and HIP would expand the number of participating PHAs to 60, including the more than 30 existing MTW agencies.⁸⁹ In selecting the new participating agencies, HUD would have been required to consider a number of criteria, including the extent to which the HIP proposal identified existing requirements that impede achievement of the proposal's goals, an explanation of why participation in HIP is necessary to achieve such goals, the extent of local government and nonprofit support and financing, whether the PHA has a positive history of implementing policies similar to those proposed, and the extent to which the proposal is consistent with two priority strategies.⁹⁰ These priority strategies are: (1) increasing housing opportunities; and (2) enacting alternative policies leading to positive rent reforms and furtherance of family self-sufficiency.⁹¹ Several tenant protection requirements would have been retained, including those regarding income targeting, demolition and disposition, lease requirements and eviction protections.⁹² To increase transparency, HUD would have been required to report to Congress on various PHA performance measures.⁹³ Additionally, H.R. 1851 would have created a "HIP-Lite" program for up to 20 PHAs.⁹⁴ HIP-Lite would have allowed fungibility of funds between the public housing and voucher programs, and only limited statutory provisions would be waivable. HIP-Lite would have maintained current rent structure and income targeting.

SEVRA 2009 contains many of the same provisions as SEVRA 2007, despite attempts to modify HIP before the bill's passage by the Financial Services Committee.⁹⁵ Significantly, SEVRA 2009 would add cost-effectiveness as a priority strategy.⁹⁶ The new HIP section of the bill would place an increased emphasis on cost savings in general, including savings through energy efficiency.⁹⁷ SEVRA 2009 would require HUD to admit more PHAs into HIP when the number falls below the number initially selected by the Secretary, which may not exceed 60,⁹⁸ whereas SEVRA 2007 would require this if the number of participating agencies fell below 40.⁹⁹ Additionally, as a condition of participation, a current MTW PHA that HUD's Inspector General has found to be noncompliant with rules would

be required to correct these deficiencies before becoming a HIP participant.¹⁰⁰ SEVRA 2009 would add funding of family self-sufficiency activities as a permitted use of program funds.¹⁰¹ It would also add a caveat that if a PHA uses voucher program funds for anything other than the delineated voucher activities, it may not terminate any family's assistance on the basis of inadequate funding.¹⁰² HUD would also have authority to approve PHA requests to waive compliance with other regulations.¹⁰³

Perhaps one of the most damaging provisions in SEVRA 2009 is an acknowledgment that HIP PHAs may establish time limits on residency and employment requirements for tenants.¹⁰⁴ However, this authority would be tempered with requirements that residency time limits cannot be less than five years and must be suspended when unemployment for the area exceeds 10%. Further, SEVRA 2009 would mandate that work requirements be consistent with Temporary Assistance for Needy Families, be subject to a hardship exemption and be suspended when unemployment for the area exceeds 10%.¹⁰⁵ On the upside, HIP agencies would be subject to the requirements regarding resident councils and jurisdiction-wide resident organizations.¹⁰⁶ Additionally, SEVRA 2009 would place more stringent requirements on PHA performance evaluation, requiring use of "rigorous research methodology" covering seven categories.¹⁰⁷ Another beneficial aspect of the new HIP provisions is that they would permit HUD to modify PHA policies if there is a demonstrated harm to tenants, although a PHA is given an opportunity to contest a HUD determination.¹⁰⁸ Taken as a whole, these improvements do not counterbalance the potential harm of the expansion of MTW/HIP and PHA autonomy. HUD's lack of capacity to oversee participating PHAs is also a severe problem.

Identical Provisions in SEVRA 2007 and 2009

Identification Requirements

Under both versions of SEVRA, no individual in a household would be eligible to receive any form of assistance or to live in public housing unless all adult members of the household have a REAL ID Act identification,¹⁰⁹ a Social Security card accompanied by a federal or state photo identification, a passport or a U.S. Citizenship and Immigration Services identification card (i.e. one issued by the Secretary of Homeland Security).¹¹⁰ This is

⁸⁸H.R. 1851 § 16(a).

⁸⁹§ 16(a).

⁹⁰§ 16(a).

⁹¹§ 16(a).

⁹²§ 16(a).

⁹³§ 16(a).

⁹⁴§ 16(a).

⁹⁵Ctr. on Budget & Policy Priorities, *supra* note 10.

⁹⁶H.R. 3045 § 26(a).

⁹⁷§ 26(a).

⁹⁸§ 26(a).

⁹⁹H.R. 1851 § 16(a).

¹⁰⁰H.R. 3045 § 26(a).

¹⁰¹§ 26(a).

¹⁰²§ 26(a).

¹⁰³§ 26(a).

¹⁰⁴§ 26(a).

¹⁰⁵§ 26(a).

¹⁰⁶§ 26(a).

¹⁰⁷§ 26(a).

¹⁰⁸§ 26(a).

¹⁰⁹REAL ID Act of 2005, Pub. L. No. 109-13 (2005).

¹¹⁰H.R. 1851 § 21; H.R. 3045 § 28.

a very stringent requirement and could have significant detrimental impacts on federally subsidized housing applicants and tenants. The identification requirements are intended to prevent undocumented immigrants from receiving federal housing assistance. However, undocumented immigrants are already ineligible for assistance.¹¹¹ Further, a large percentage of extremely low-income elderly individuals do not have Social Security cards and photo identification. Individuals who have mental disabilities, are homeless or are victims of domestic violence may have substantial problems collecting the necessary information. Thus, an unintended consequence of the identification requirements is that vulnerable populations would be most heavily impacted.¹¹²

Family Self-Sufficiency Administrative Fees

The enrollment in PHA Family Self-Sufficiency (FSS) programs has declined in recent years, largely due to inadequate funding.¹¹³ Both versions of SEVRA would provide more funding for FSS coordinators and costs related to FSS savings accounts, with distribution of fees incentivized by high performance.¹¹⁴ FSS programs would be subject to random evaluations, and HUD would be required to report to Congress regarding FSS within four years, with a final report on FSS due within eight years of enactment of the bill.¹¹⁵ These changes should improve enrollment in and efficiency of FSS programs.

Targeting Requirements

Both SEVRA bills would follow current law requiring 75% of voucher applicants and 40% of public housing and project-based Section 8 applicants to have incomes at or below 30% of area median income (AMI), except that the targeting would now apply to the higher of 30% of AMI or the federal poverty line.¹¹⁶ This would allow a larger number of poorer families in some jurisdictions to receive assistance based on more realistic income targets.

PHA Reporting of Rent Payments to Credit Agencies

Both versions of SEVRA contain a provision that would permit PHAs to report rent payments to credit agencies with the consent of the tenant to help the tenant establish a positive credit history.¹¹⁷

New Provisions

There are a number of provisions in SEVRA 2009 that were not included in SEVRA 2007, some of which were introduced as amendments during the committee markup, and some of which were taken from S. 2684.

¹¹¹42 U.S.C.A § 1436a (West 2003).

¹¹²Center on Budget & Policy Priorities, *supra* note 10.

¹¹³*Id.*

¹¹⁴H.R. 1851 § 7(b); H.R. 3045 § 7(b).

¹¹⁵H.R. 1851 § 7(b); H.R. 3045 § 7(b).

¹¹⁶H.R. 1851 § 5; H.R. 3045 § 5.

¹¹⁷H.R. 1851 § 9; H.R. 3045 § 9.

Firearms Restrictions

Through an amendment during markup, SEVRA 2009 prohibits HUD, PHAs and owners from prohibiting or restricting the lawful possession of firearms in federally assisted housing.¹¹⁸

Project-Based Preservation Vouchers

To encourage preservation of affordable units, SEVRA 2009 would permit project-based vouchers in lieu of enhanced vouchers for projects facing termination, opt-out or prepayment of mortgages.¹¹⁹ At an owner's request, the PHA is to provide a housing assistance payments contract, and the contract would cover all units receiving enhanced vouchers.¹²⁰ The owner may also request that additional units in the project not previously covered by assistance payments or subject to affordability restrictions be covered by a new project-based contract.¹²¹ For a contract to be entered into the project must be, among other things, economically viable. There must also be a demand for the housing, and the continued affordability of the project must be an important asset to the community.¹²² These "preservation vouchers" would not count toward a PHA's project-based voucher percentage limitations, nor would income-mixing percentage limitations be applicable to projects receiving these vouchers.¹²³

Utilities

Consistent with S. 2684, SEVRA 2009 would authorize PHAs to make utility payments that the owner is obligated to make, if the owner fails to do so, in lieu of assistance payments.¹²⁴ A PHA must notify an owner of its intent to make utility payments. Notification may be made within a reasonable amount of time if the unit has been rendered uninhabitable by termination or threat of termination of utility service.¹²⁵ In addition, HUD would be required to publish data regarding consumption and costs of utilities in local areas to help establish utility allowances for tenant-paid utilities.¹²⁶ The use of this data must not unnecessarily increase PHA administrative burdens and must protect families from high rent and utility cost burdens relative to income.¹²⁷

Effect of Foreclosure on Section 8 Tenancies

SEVRA 2009 would expand the protections set forth in the Protecting Tenants at Foreclosure Act¹²⁸ by permitting

¹¹⁸H.R. 3045 § 15.

¹¹⁹§ 21(b).

¹²⁰§ 21(b).

¹²¹§ 21(b).

¹²²§ 21(b).

¹²³§ 21(b).

¹²⁴§ 19; S. 2684 § 19.

¹²⁵H.R. 3045 § 19; S. 2684 § 19.

¹²⁶H.R. 3045 § 20.

¹²⁷§ 20.

¹²⁸Helping Families Save Their Homes Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009). Sections 701-704 are referred to as "The

Housing Justice Network Members Receive Accolades

Steve Fredrickson and Ann Lever, both members of the National Housing Law Project's Housing Justice Network, were recently selected for prestigious awards recognizing their efforts to serve the equal justice needs of low-income persons.

Steve Fredrickson is the 2010 recipient of the Charles A. Goldmark Distinguished Service Award. The Goldmark Award recognizes exceptional efforts in assuring equal access to justice. In assessing candidates, the Legal Foundation of Washington looks for outstanding work that has a recognizable, positive impact on low-income residents of Washington State. Steve, a member of NHLP's Council of Advisors, is nearing his 40th year in legal services. He is currently a statewide advocacy coordinator at the Northwest Justice Project.

In his first year of practice, Steve argued and won *Foisy v. Wyman* before the Washington State Supreme Court. *Foisy* established that landlords have a duty to provide decent, habitable rental units, and failure to comply with this duty is a defense to eviction. Since then, Steve has successfully litigated several other housing cases involving a variety of issues, including due process rights of subsidized tenants, fair housing and relocation assistance. He has also been involved in a number of legislative efforts to expand and preserve tenants' rights and low-income housing in Washington, including drafting Washington's Residential Landlord-Tenant Act.

Ann Lever is the 2009 recipient of the National Legal Aid & Defender Association's Reginald Heber Smith Award. The Award recognizes the dedicated service and outstanding achievements of civil legal aid attorneys. Ann recently retired from Legal Services of Eastern Missouri after 30 years of service.

Ann's litigation on behalf of tenants resulted in the first federal appellate decision holding that the demolition of federally assisted housing constituted disparate impact race discrimination in violation of the Fair Housing Act (FHA). In *Charleston Housing Authority v. USDA*, the Eighth Circuit held that the housing authority's plan to vacate and demolish a development that was occupied primarily by African-American residents violated the FHA. Ann has also been at the forefront in preserving low-income housing, challenging ordinances against group homes for people with mental disabilities, and helping clients gain access to health care, education, public benefits and immigration benefits.

PHAs to make utility payments on behalf of tenants if the successor in interest due to foreclosure rejects PHA assistance payments or fails to maintain the property.¹²⁹ In this circumstance, the PHA may also fund a family's moving costs, including security deposits.¹³⁰

Studies

SEVRA 2009 would mandate that three Government Accountability Office studies be conducted: (1) a study to identify obstacles to using vouchers in federally subsidized housing projects (which was included in S. 2684),¹³¹ (2) a study on the effects of the Section 8 program on HUD's budget and programs;¹³² and (3) a study on the use of income databases to reduce subsidy errors.¹³³

Next Steps

As the House SEVRA bill is prepared for floor introduction and the Senate bill is being developed, there are several areas of concern for advocates. The unnecessarily strict identification requirement for all adult members of an assisted household is one of the more troubling aspects of SEVRA. While the requirement is intended to restrict access to federal assistance to undocumented immigrants, the provision is most likely to affect disproportionately the elderly, disabled, minorities and those who have the greatest barriers to obtaining stable housing. Additionally, some advocates and many PHAs have raised concerns regarding the prohibition of firearms restrictions for all federally assisted housing. Further, the expansion of MTW/HIP in SEVRA 2009 continues to have potentially negative impacts for tenants in participating jurisdictions. Advocates will attempt to limit the expansion and impact of MTW/HIP in the next phases of the legislative process.

Altogether, the identification requirement, prohibition of firearms restrictions and MTW reform are central to shaping the final version of SEVRA, and concerned parties are working toward a solution. Of additional concern is the fact that SEVRA 2009, as reported, does not contain any Limited English Proficiency provisions, as did SEVRA 2007 and S. 2684.¹³⁴ It is anticipated that this language will be reinserted into the bill at a later stage and without controversy. Nevertheless this issue should be monitored closely. Despite its shortcomings, SEVRA would make significant strides toward reducing some of the more unfair and inefficient aspects of the voucher program and other HUD-assisted housing programs. ■

Protecting Tenants at Foreclosure Act."

¹²⁹H.R. 3045 § 22(a)(1).

¹³⁰§ 22(a)(1).

¹³¹§ 23; S. 2684 § 17.

¹³²H.R. 3045 § 25.

¹³³§ 27.

¹³⁴H.R. 1851 § 18; S. 2684 § 20.

Recent Developments Show Promise for Enforcing Section 3*

Several notable developments in the use, enforcement and implementation of the Department of Housing and Urban Development (HUD) Section 3 program show promise. This article summarizes three of these developments. First, HUD has begun to aggressively enforce the use of form HUD-60002, which requires public housing agencies (PHAs) and other recipients of HUD funds to report annually on their compliance with Section 3 requirements. Second, HUD recently found that Saint Paul, Minnesota, has not complied with several provisions of Section 3, including obligatory reporting via form HUD-60002. Third, in an innovative move, the Connecticut Housing Finance Authority has decided to offer Low-Income Housing Tax Credit (LIHTC) points to proposed projects that demonstrate that they will comply with Section 3.

Overview of the Section 3 Program

Section 3 is a job training and economic development program geared toward very low-income residents and Section 3 businesses to guarantee low-income residents a chance to work on HUD-funded projects. There are three categories of Section 3 businesses: (1) businesses that are majority owned by Section 3 residents; (2) businesses that employ Section 3 residents for at least 30% of their full-time, permanent staff; and (3) businesses that subcontract to Section 3 businesses 25% or more of the dollar amount of a contract.¹ Section 3 requires recipients of certain types of HUD funding to ensure to the "greatest extent feasible" that a certain percentage of the job training, employment and contracting opportunities that arise from the expenditure of the funds benefit low- and very low-income individuals and such individuals who live in the area where the funds are expended.²

Section 3 applies to all public housing funding. Section 3 also applies to grantees who receive \$200,000 or more in other HUD funding. Additionally, Section 3 applies to contractors receiving \$100,000 or more for projects arising in connection with housing construction, demolition, rehabilitation or other public construction.³ Section 3 applies if these thresholds are met, regardless of the actual amount that is spent on each individual unit or property.⁴

Section 3 covers a multitude of HUD programs, including public housing operating, capital and modernization

funds, HOPE VI, Community Development Block Grants (CDBG), HOME Investment Partnerships, Disaster Recovery Assistance and Housing Opportunities for Persons with AIDS. Importantly, Section 3 applies to several stimulus programs, including the Neighborhood Stabilization Program (NSP). NSP funds have been given out in two rounds for the purpose of stabilizing communities that have concentrations of foreclosed and abandoned homes.⁵ Nearly \$4 billion in NSP1 funds were announced in 2008 for all states and selected local governments⁶ and distributed in March 2009. Nearly \$2 billion in NSP2 funds were appropriated as part of the American Recovery and Reinvestment Act (ARRA), and grantees will be announced by late 2009.

Section 3 applies to a number of other ARRA appropriations, including \$4 billion in public housing capital funds, \$1 billion in CDBG funds, \$510 million in Native American Housing Block Grants, \$250 million for Assisted Housing Energy and Green Retrofits, and \$78 million for lead hazard control.⁷ HUD announced the last round of awards in September 2009.⁸ Since ARRA funding is specifically intended to create jobs and other economic opportunities for those most impacted by the recession, it is especially critical for ARRA grantees to comply with Section 3.

HUD Renews Efforts to Enforce Section 3 Reporting

In October 2009, HUD sent letters to PHAs and other agencies nationwide to inform them of noncompliance with Section 3 reporting requirements, namely the filing of form HUD-60002.⁹ Since at least August 1994, HUD has required agencies to file annual reports using form HUD-60002.¹⁰ However, little emphasis has been placed on enforcing this requirement. Now, HUD is directing state and local governments and PHAs to file form HUD-60002

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

¹12 U.S.C.A. § 1701u(c)-(d) (West 2008).

²§ 1701u(b).

³§ 1701u(b); 24 C.F.R. § 135.

⁴*Id.*

⁵The Applicability of Section 3 of the Housing and Urban Development Act of 1968 to Neighborhood Stabilization Program Funding, <http://www.hud.gov/offices/fheo/section3/HUD-NSP-sec3-Guidance.doc>.

⁶Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008, 73 Fed. Reg. 58,330, 58,334-49 (Oct. 6, 2008).

⁷HUD Economic Stimulus Funding and the Creation of Jobs, Training, and Contracting Opportunities, <http://www.hud.gov/offices/fheo/section3/Econ-Stimulus-sec3-final.pdf>.

⁸*See, e.g.*, Press Release, HUD, HUD Announces \$95 Million in Recovery Act Grants to Improve Public Housing for Seniors, Persons with Disabilities (Sept. 24, 2009); Press Release, HUD, HUD Announces \$300 Million in Recovery Act Grants to Create Green Public Housing (Sept. 18, 2009), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories.

⁹Press Release, HUD, HUD Takes Action to Expand Jobs and Training Opportunities for Low-Income Residents (Oct. 20, 2009), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-200.

¹⁰Early versions of the form are dated August 1994. *See also* 24 C.F.R. § 135.90 (2009).

promptly or risk being debarred, suspended or denied participation in HUD programs.¹¹ According to a HUD press release, this action is “one of the first in a series of steps to more aggressively enforce Section 3 hiring and contracting requirements and assist state and local governments and housing authorities to identify, train, and promote job opportunities for low-income individuals and public housing residents and companies employing them.”¹²

HUD is directing state and local governments and PHAs to file form HUD-60002 promptly or risk being debarred, suspended or denied participation in HUD programs.

Form HUD-60002 asks fund recipients to list the number of individuals newly hired with Section 3 funds, including all new hires that are Section 3 residents.¹³ The form asks for the percentage of total hours worked that were allocated to Section 3 employees and trainees, the total number of Section 3 businesses receiving construction and non-construction contracts, and the total dollar amount awarded to Section 3 businesses via these contracts. PHAs and other fund recipients are required to indicate the efforts they have made to direct employment and other economic opportunities generated by HUD financial assistance toward low-income persons, particularly those who live in government assisted housing. Recipients are required to submit the form to the Office of Fair Housing and Equal Opportunity annually. Those that receive more than one type of covered financial assistance are required to submit a separate report for each funding source.

Though monitoring the use of form HUD-60002 is an important step toward more aggressively enforcing Section 3 hiring and contracting requirements, advocates have critiqued the structure and substance of the form, pushing HUD to request further information to ensure Section 3 compliance. The National Housing Law Project (NHLP) and other organizations have pressed HUD to ask PHAs to report the total number of jobs generated with HUD revenue in addition to the total amount of new hires to deter contractors who may attempt to circumvent the statute by categorizing new employees as old hires.¹⁴ Advocates have also urged HUD to require PHAs to

report the number of Section 3 applicants not hired, and the total dollar amount of contracts awarded to Section 3 businesses owned by public housing residents to ensure that PHAs are contracting with these business concerns to the greatest extent feasible.¹⁵

While the form remains imperfect, the transparency engendered by its use is vital in monitoring effective compliance with the provisions of Section 3. HUD has taken an important step toward realizing the goals and implementing the requirements of the Section 3 program by reminding agencies of their Section 3 obligations, requiring the use of form HUD-60002 and providing a deadline for compliance.

Saint Paul Out of Compliance with Section 3

HUD recently found that Saint Paul, Minnesota, has not complied with several Section 3 requirements in its use and administration of CDBG and HOME funds. In mid-2008, in response to administrative complaints filed with HUD regarding Saint Paul and the Saint Paul Housing and Redevelopment Authority (HRA), HUD began a formal investigation to determine whether, and to what extent, Saint Paul administered its HUD-funded programs in compliance with Section 3's contracting requirements. These administrative complaints followed unsuccessful litigation against Saint Paul claiming similar violations of Section 3.¹⁶ Because the court ruled that the plaintiffs lacked standing and did not have a private right of action, the administrative forum was the only option for addressing the alleged Section 3 violations.

Background

Saint Paul receives both CDBG and HOME program funds. Between 2006 and 2008, the city received more than \$24 million in CDBG funds and more than \$6.5 million in HOME funds. In addition, the city received more than \$4.3 million in NSP funds. As a recipient of these HUD funds, the city was required to comply with Section 3.¹⁷

In June 2008, a local business owner filed a complaint alleging that Saint Paul did not comply with Section 3 by (1) failing to award a sufficient percentage of contracts to Section 3 businesses; (2) failing to seek out and identify Section 3 businesses for contracting opportunities; (3) failing to exercise oversight over contractors hired with Section 3 funds to assure that contractors provided training, employment and sub-contracting opportunities to Section 3 persons and businesses; (4) failing to meet Section 3's reporting requirements; and (5) failing to file form HUD-60002.

¹¹Letter from John Trasviña & Mercedes Márquez, HUD, to recipients of HUD Community Planning and Development Assistance (Oct. 9, 2009); Letter from John Trasviña & Sandra B. Henriquez, HUD, to Public Housing Authority Executive Director (Oct. 9, 2009).

¹²See Press Release, HUD, *supra* note 9.

¹³Form HUD-60002, Section 3 Summary Report (6/2001).

¹⁴Letter from Richard Glassman, Western Massachusetts Legal Services, to Valerie Hayes, HUD (Apr. 29, 2001) (on file with NHLP).

¹⁵Letter from Catherine Bishop, NHLP, to Linda Thompson, HUD (July 31, 2003) (on file with NHLP).

¹⁶*Nails Constr. Co. v. City of Saint Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007).

¹⁷Letter from Barbara M. Knox, HUD Office of Fair Housing & Equal Opportunity, to Chris Coleman, Mayor of Saint Paul 2 (Aug. 25, 2009).

Investigation

During the course of its investigation, HUD conducted interviews to determine the working knowledge Saint Paul city staff had of Section 3. The interviews revealed that staff had very little understanding of Section 3 and the city's programmatic obligations. City staff often confused indispensable elements of Section 3 with the city's own efforts to increase participation by minority and women-owned businesses in city contracts. Staff in Saint Paul's Department of Planning and Economic Development testified that potential contractors were not notified of their Section 3 obligations, nor were Section 3 requirements included in pre-bid and pre-construction conferences. Further, the city employed no mechanism by which it could independently evaluate a sub-recipient's assertion of a business's Section 3 status.

Additionally, Saint Paul failed to annually submit form HUD-60002. City employees testified that they were not aware of this reporting requirement and that, to their knowledge, the city had never submitted a Section 3 annual report to HUD. While the city did submit an annual contract and subcontract activity report pursuant to Executive Order 2516, this filing did not obviate its obligation to file form HUD-60002. Nor did the HUD Office of Community Planning and Development (CPD) annual review of Saint Paul's activities preclude the need for self-reporting via form HUD-60002, as Section 3 compliance is not part of a CPD annual review.

Findings

On August 25, 2009, HUD formally found that the city and its HRA were not in compliance with Section 3. The city failed to implement any of the activities required as part of receipt of HOME and CDBG funds. Saint Paul had no procedures in place to: (1) notify Section 3 residents or businesses about training and employment opportunities generated by Section 3 funds; (2) notify potential contractors about the Section 3 requirements and ensure contractor and sub-contractor compliance; (3) incorporate the Section 3 clause in all solicitations and contracts; (4) facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 business concerns; or (5) document actions taken to comply with Section 3 requirements and the results of those actions.

Next Steps

As a result of the finding, HUD and Saint Paul have entered into a voluntary resolution process to bring the city into Section 3 compliance as quickly as possible. As of this time, the outline of the compliance requirements is unknown. Possible enforcement strategies could include creating a community oversight committee to make sure that the city is complying with Section 3, asking HUD to require the city to report compliance more frequently than yearly for a period of time so that the oversight committee has more

information and can closely track the city's progress, conditioning future disbursement of HOME, CDBG and NSP funds on full resolution of any Section 3 compliance issues, and providing specific guidelines that Saint Paul must follow to meet Section 3 requirements. HUD may also require Saint Paul to develop a Section 3 plan to be included and revised in its Five-Year and Annual Consolidated Plans.¹⁸ The city could also designate a staff person responsible for Section 3 compliance.

Greater transparency will be a vital part of future compliance. Any standard or special reports that the city provides to HUD should immediately be made available to the public. In addition, any major steps taken to correct the noncompliance should be announced via the city's website, other media outlets and in any relevant public meetings.

It appears that HUD has taken decisive action in a relatively short period of time in responding to administrative complaints regarding noncompliance by Saint Paul. Prompt action is particularly important because of the inherent tenuous nature of small Section 3 businesses and the lack of other effective remedies. Without a judicial remedy, any resolution to Section 3 violations will necessarily depend on administrative action. Advocates, Section 3 businesses and Section 3 individuals faced with similar situations should consider filing administrative complaints to address Section 3 noncompliance.¹⁹

Connecticut Qualified Allocation Plan

In its draft 2010 Qualified Allocation Plan (QAP), the Connecticut Housing Finance Authority (CHFA) has allocated up to 10 points for projects that will subcontract with a HUD Section 3 business concern and/or create new jobs for Section 3 residents. This action was taken in response to comments submitted to CHFA by NHLP and Connecticut Legal Services.²⁰

Qualified Allocation Plans and LIHTC

The LIHTC program provides tax incentives, written into the Internal Revenue Code, for private developers to create affordable housing. Although these tax credits are federal, each state has an independent agency (such as the CHFA) that decides how to allocate their share of federal housing tax credits via a Qualified Application Plan (QAP). The annual QAP informs developers and advocates of the criteria the state will use to select the projects to which it will award coveted tax credits.

¹⁸24 C.F.R. Part 91, subparts D & E (2009).

¹⁹For more information about other administrative complaints, see <http://nhlp.org/resourcecenter?tid=115>.

²⁰Memorandum from Catherine Bishop, National Housing Law Project to Executive Director, State Housing Credit Agency (May 22, 2009).

NHLP Welcomes Law Fellows

The National Housing Law Project is pleased to announce two recent additions to its staff, Soros Justice Fellow Catherine McKee and Skadden Fellow Kent Qian.

The focus of Catherine's work is access to federally assisted housing for people with criminal records, including individuals leaving correctional facilities. Catherine will partner with community organizations to encourage public housing authorities and private owners of federally assisted housing to adopt more flexible admission policies for people with criminal records and to set aside units for individuals returning to the community.

Catherine is available to provide technical assistance and training to advocates trying to help individuals with criminal records secure housing. She would like to organize a working group and regular conference calls so that advocates can share problems, strategies and successes. Please feel free to contact Catherine by email at cmckee@nhlp.org or phone at (510) 251-9400 ext. 3109 with any input or requests.

The focus of Kent's work is protections for tenants in foreclosure. He will also be working on ensuring that communities use funding from the Neighborhood Stabilization Program (NSP) to develop long-term affordable housing that serves low-income families.

Kent will provide technical assistance and training to advocates for tenants facing evictions due to foreclosure. Many of these trainings will center on the implementation of the federal Protecting Tenants at Foreclosure Act (PTFA). He is also available to help legislative advocates who are pushing for additional local and state protections for these tenants. He would also like to hear your observations of how the PTFA has been implemented in your communities.

Additionally, Kent hopes to partner with non-profit agencies, community development officials and housing advocates to ensure that local governments use NSP resources to develop long-term affordable housing. He is interested in hearing from advocates who have been monitoring NSP implementation in their communities. Please feel free to contact Kent by email at kqian@nhlp.org or phone at (510) 251-9400 ext. 3112 with questions and comments.

Connecticut's Qualified Allocation Plan

Connecticut's 2010 draft QAP states that applications will be rated and ranked on the degree to which the development is consistent with enriching the housing and community environment.²¹ As part of this preference category, CHFA will give five points to projects that will subcontract with a Section 3 business concern and an additional five points for providing employment for Section 3 residents. A developer must present evidence of intent to subcontract or evidence of a commitment from an employer which is not a member of the development team to create new jobs for Section 3 residents. Incentivizing developers to subcontract with low-income business and hire Section 3 residents via QAP point allocation will ensure that tax credit projects will benefit local communities on several levels by providing affordable housing as well as employment and skill-building.

CHFA anticipates approving a final version of the QAP with the Section 3 LIHTC point allocation by the end of 2009. This QAP is the first in the nation to include such a provision. The significance is particularly impressive because CHFA is not obligated to require LIHTC recipients to comply with Section 3. CHFA's action was motivated by a desire to create more jobs in the community. Though CHFA attempted to have a job creation provision in its 2009 QAP, the results were less than successful. Because definitions of who did and did not qualify for the LIHTC points were vague, the provision did not achieve its intended goal and few, if any, new Section 3 local jobs were created. In 2010, CHFA decided to turn to Section 3 to encourage job creation and support of the local economy. Because Section 3 has long-established and well-delineated definitions, CHFA is optimistic that the 2010 QAP will effectively incentivize builders to employ local Section 3 businesses and individuals. ■

²¹Connecticut Housing Finance Authority, Low-Income Housing Tax Credit Qualified Allocation Plan (2010), <http://www.chfa.org/TaxCredits/DRAFT2010QAP.pdf>.

Court Upholds Rent Control on Thousands of Units at Massive NYC Complex

In a stunning victory for tenants of Manhattan's largest apartment complex, New York's highest court held that the owners of Peter Cooper Village and Stuyvesant Town wrongfully raised rents and deregulated thousands of units. In *Roberts v. Tishman Speyer Properties, L.P.*,¹ the Court of Appeals of New York held that owners who receive tax abatements under New York City's J-51 program must extend rent stabilization protections to all tenants for as long as the owners receive the abatements. While the court's ruling leaves many questions unanswered, including whether the tenants are entitled to repayment of millions of dollars in rent overcharges, the decision ensures that rent protections will remain intact for thousands of tenants.

Background

The Peter Cooper Village and Stuyvesant Town complex was developed in the 1940s by MetLife.² It consists of 110 buildings occupying roughly 80 acres.³ The complex became rent stabilized in 1974.⁴ In 1992, MetLife began receiving property tax abatements under the city's J-51 program, which provided incentives for owners to rehabilitate their properties.⁵ Under the J-51 program, rent deregulation of residential units in buildings receiving tax abatements was prohibited.

In January 2007, nine tenants sued MetLife and Tishman Speyer, which purchased the complex from MetLife in 2006 for approximately \$5.4 billion.⁶ Since its purchase of the complex, Tishman Speyer has sought to convert as many of the units as possible. The tenants alleged that more than 25% of the complex's units, or an estimated 3,000 units, were illegally deregulated.⁷ The tenants asserted that deregulation is prohibited during the period in which an owner is receiving J-51 tax benefits. The tenants sought recovery of rent overcharges and a declaratory judgment that their apartments were subject to the Rent Stabilization Law and would continue to be subject to the law for as long as Tishman Speyer received J-51 tax benefits.

¹*Roberts v. Tishman Speyer Props., LLC*, __ N.E.2d __, 2009 WL 3378513, 2009 N.Y. Slip. Op. 7480 (Oct. 22, 2009) (per curiam). The Legal Aid Society and Urban Justice Center were among several organizations that submitted amicus curiae briefs on behalf of the tenants.

²*Id.* at 3.

³*Id.* at 1.

⁴*Id.* at 3.

⁵*Id.*

⁶*Id.* at 5.

⁷*Roberts v. Tishman Speyer Props., LLC*, 874 N.Y.S.2d 97, 100 (N.Y. App. Div. 2009).

Applicable Law

At issue are the so-called luxury decontrol provisions of the Rent Stabilization Law. These provisions exclude units from rent stabilization when either (1) the legal regulated rent is \$2,000 or more and the tenants' combined household income exceeds \$175,000 for two consecutive years;⁸ or (2) the tenant vacates the apartment and the legal regulated rent is \$2,000 or more.⁹ However, the luxury decontrol provisions *cannot* be applied to units that "became or become" subject to rent stabilization "by virtue of receiving tax benefits" pursuant to the J-51 program.¹⁰

In a 1996 opinion letter, the New York Division of Housing and Community Renewal (DHCR) issued an interpretation of the "by virtue of receiving tax benefits" language.¹¹ DHCR opined that an owner is precluded from seeking luxury decontrol of units receiving J-51 abatements only where receipt of the abatement is "the sole reason" for the units being subject to rent stabilization.¹² In other words, DHCR's position was that owners receiving J-51 tax abatements could still deregulate rent-controlled units pursuant to the luxury decontrol provisions if the units were already rent stabilized *before* the owner applied for a J-51 abatement, as was the case at Stuyvesant Town and Peter Cooper Village.

A Manhattan Supreme Court justice relied on DHCR's interpretation in dismissing the tenants' suit.¹³ However, a New York appellate division court rejected DHCR's interpretation and unanimously held that apartments at the complex must remain rent-regulated for as long as Tishman Speyer receives J-51 abatements.¹⁴ Tishman Speyer then filed an appeal with the state's highest court.

The Court's Analysis

The Court of Appeals of New York affirmed the appellate division's decision, finding that the statute's language and legislative history failed to support Tishman Speyer's reading of the Rent Stabilization Law. The court found that Tishman Speyer's interpretation of the words "by virtue of receiving tax benefits" conflicted with the most natural reading of the statute.¹⁵ As explained by the

⁸N.Y. RENT STABILIZATION L. § 26-504.1 (2008).

⁹§§ 26-504.2, 26-511[c][5-a].

¹⁰§§ 26-504.1, 25-504.2.

¹¹In 1983, the legislature vested DHCR with the responsibility of administering the New York City Rent Stabilization Law.

¹²*Roberts v. Tishman Speyer Props., LLC*, __ N.E.2d __, 2009 WL 3378513, 2009 N.Y. Slip. Op. 7480, at 4 (Oct. 22, 2009) (per curiam).

¹³*Roberts v. Tishman Speyer Props., LLC*, 2007 WL 2815093 (N.Y. Sup. Ct. Aug. 16, 2007).

¹⁴*Roberts v. Tishman Speyer Props., LLC*, 874 N.Y.S.2d 97, 99 (N.Y. App. Div. 2009); see also NHLP, *Court: Owner of Massive NYC Complex Wrongfully Raised Rents for Thousands of Tenants*, 39 HOUS. L. BULL. 87 (Mar. 2009).

¹⁵*Roberts v. Tishman Speyer Props., LLC*, __ N.E.2d __, 2009 WL 3378513, 2009 N.Y. Slip. Op. 7480, at 11 (Oct. 22, 2009) (per curiam).

court, Tishman Speyer read these words as designating two categories of J-51 buildings—those, like Stuyvesant Town and Peter Cooper Village, that were rent-stabilized prior to receiving J-51 benefits and those that only became rent-stabilized as a condition of receiving J-51 benefits.¹⁶ The court found no language in the statute delineating these two categories and no indication that the legislature intended such a distinction.¹⁷ The court noted that the statute's sponsor stated that luxury decontrol was unavailable to owners who enjoyed a "system of general public assistance" such as J-51 benefits.¹⁸

The court acknowledged that Tishman Speyer predicted dire financial consequences for the New York City real estate industry if the appellate division's ruling were affirmed. However, the court found that these predictions depended upon several issues that must be decided by the trial court, including retroactivity, class certification, the statute of limitations and other potential defenses.¹⁹ The court concluded by noting that "[i]f the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief."²⁰

Conclusion

Although the *Roberts* decision is a major victory for tenants, it leaves many questions unanswered, especially because the Court of Appeals' ruling did not specify a remedy. Attorneys from both sides have indicated that it could take years to resolve several key issues, including whether Tishman Speyer and MetLife must repay rent overcharges, whether the decision applies prospectively only, whether triple damages are owed, and how the tenants' reduced rent will be calculated.²¹ In fact, tenants have been advised to continue paying their full market rent "until the case has had a chance to work its way through the initial judicial administrative process."²² The tenants' attorney, Alexander H. Schmidt, plans to ask the trial court to certify as a class as many as 7,000 current and former tenants of Stuyvesant Town and Peter Cooper Village.²³ Schmidt also plans to seek repayment of rent overcharges dating back to 2003, which could amount to an estimated \$200 million.²⁴

Beyond Stuyvesant Town and Peter Cooper Village, *Roberts'* potential impact on other apartment complexes remains unclear. In most instances, luxury deregulation is

permissible only where the rent for a unit reaches \$2,000 a month, which is much less likely to occur outside of Manhattan. Additionally, only 22,000 units in Manhattan receive J-51 benefits.²⁵ Regardless of the number of units impacted, it is now clear that owners are not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law while simultaneously receiving J-51 tax benefits. ■

¹⁶*Id.* at 11-12.

¹⁷*Id.* at 12.

¹⁸*Id.*

¹⁹*Id.* at 14.

²⁰*Id.*

²¹Charles Bagli, *Impact of Ruling in Stuyvesant Town Case Could Take Years to Determine*, N.Y. TIMES, Oct. 24, 2009.

²²Stuyvesant Town-Peter Cooper Village Tenants Association, *Roberts is Upheld 4-2, Tenants Win Big, Next Steps Update #3*, http://www.stpcvta.org/j51_final_win_update_3.html.

²³*Id.*

²⁴*Id.*

²⁵Theresa Agovino & Amanda Fung, *Landlords Will Survive Stuy Town Verdict*, CRAIN'S N.Y. BUS., Oct. 25, 2009.

HUD Enjoined From Relocating Tenants and Emptying Building*

In an unusual ruling, a federal district court in Michigan has found a likelihood that the Department of Housing and Urban Development (HUD) acted arbitrarily or capriciously by failing to have good reasons for not pursuing its statutory disposition duties. Accordingly, the court in *Cheatham v. Donovan*¹ granted a preliminary injunction against relocation and failure to comply with the law.

HUD sought to dispose of the Parkview Apartments, an Ypsilanti, Michigan property, through foreclosure with inadequate protections to preserve the property and protect tenants. The HUD-subsidized property's tenants and tenant association brought suit to enjoin HUD from relocating tenants and to require compliance with governing legal requirements. In September 2009, the court granted the tenants a requested preliminary injunction based on HUD's continued efforts to relocate tenants and its persistent failure to rent vacant units—duties first established back in 1978, and revised in 1988 and 1994.² This ruling should once again encourage advocates to examine closely the rationale behind HUD's actions, and hopefully encourage the new HUD Administration to act more carefully in managing and disposing of troubled properties.

Background and Procedural History

Parkview Apartments was developed in the 1970s with the assistance of a HUD-insured mortgage subsidized under the Section 236 program.³ Due to budget-based rent levels that must include both subsidized debt service and operating costs, tenant rents are often sufficiently high that additional assistance under the Section 8 project-based or voucher programs is required to make them affordable. Parkview consists of 19 buildings containing 144 units, 20 of which receive project-based Section 8.⁴

Under Section 236, upon a mortgage default, the private lender usually assigns the mortgage to HUD in exchange for the insurance proceeds. If no plan can be arranged to cure the default, HUD may then foreclose upon the mortgage and sell the property to satisfy the debt. In the interim, in cases of prolonged and serious

default, HUD may displace the owner by taking mortgage-in-possession (MIP) status under the mortgage and regulatory agreement, assuming the duties of ownership and management. This can often be an important step in stabilizing a property.

In the case of Parkview, HUD assumed MIP status in July 2006, approximately 30 months after mortgage assignment, after the owner failed to pay water bills and maintain the property in accordance with housing codes.⁵ Prior to HUD's takeover, conditions at the complex included a backlog of 400 work orders and hundreds of housing violations.⁶ Conditions improved notably after HUD became MIP. The agency invested nearly \$4 million in property maintenance and rehabilitation.⁷ Strangely, at the same time that it invested these funds, HUD allowed building occupancy to slide by not re-renting units upon turnover. When HUD took over as MIP in 2006, 75 of the units were occupied. By September 2009 that number had decreased by roughly half.⁸

The tenants believed that this attrition was part of HUD's overall plan to empty the property so that it might more easily foreclose and sell Parkview.⁹ Following a series of tentative foreclosure sales, in July 2007 the tenants and their tenant association filed suit seeking declaratory and injunctive relief. Among other claims, the tenants opposed a then-pending sale because it did not include the issuance of Section 8 vouchers to assist all tenants with relocation.¹⁰ Though HUD later cancelled that particular sale, it continued to issue relocation notices to tenants.¹¹

In spring 2008, HUD issued notices informing Parkview tenants that the property would be closed due to substandard conditions, offering some limited relocation assistance to those who would move.¹² For those tenants residing in the project-based Section 8 units, HUD stated that it would offer Section 8 vouchers to those who relocated. Those who remained would lose all Section 8 assistance.¹³ No mention was made of possible assistance for non-Section 8 tenants, whether they moved or stayed.¹⁴

The tenants' July 2007 complaint raised several causes of action. Of these, the district court focused on alleged violations of the Administrative Procedure Act (APA),¹⁵ which provides a cause of action against federal agencies for actions that are arbitrary, capricious, an abuse of

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¹Order Granting Pl.'s Mot. for Prelim. Inj., *Cheatham v. Donovan*, 2009 WL 2922150, No. 07-13168, slip op. at 1-2 (E.D. Mich. Sept. 9, 2009) [hereinafter Sept. 2009 Order].

²12 U.S.C.A. § 1701z-11, as amended (Westlaw Oct. 4, 2009).

³12 U.S.C.A. § 1715z-1 (Westlaw Oct. 4, 2009).

⁴Sept. 2009 Order at 1-2.

⁵*Id.*

⁶*Id.* at 16.

⁷*Id.* at 11, 16.

⁸*Id.* at 2.

⁹*Id.*

¹⁰Compl. for Declaratory & Inj. Relief, *Cheatham v. Jackson*, No. 07-13168, at 1 (E.D. Mich. July 30, 2007).

¹¹Sept. 2009 Order at 3.

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵U.S.C.A. § 706(2)(A) (Westlaw Oct. 4, 2009).

discretion or not in accordance with law.¹⁶ The tenants alleged that HUD violated the APA in four ways: (1) by failing to maintain Parkview in good physical condition and at full occupancy; (2) by refusing to provide Section 8 vouchers to all tenants; (3) by making the decision to relocate Parkview tenants and canceling Section 8 assistance for those who did not relocate; and (4) by implementing its disposition plan without notice to or a hearing opportunity for the tenants.¹⁷

In September 2008, the tenants responded to HUD's relocation notice by filing a motion for preliminary injunction.¹⁸ The motion sought to block further relocation of tenants and to stop HUD from emptying the property by attrition, effectively requiring HUD to re-rent vacant units on turnover.

Legal Standards

The tenants' APA claims were primarily grounded upon HUD's alleged violations of the requirements of the Multifamily Housing Property Disposition Reform Act (the "disposition statute"), which governs HUD's management and disposition of federally supported multifamily properties that are or were HUD-insured, HUD-subsidized or assisted.¹⁹ Of particular relevance to this case is the disposition statute's direction that HUD, where it owns or acts as MIP of a multifamily property, "shall... to the greatest extent possible, maintain full occupancy in all such projects."²⁰ The statute also mandates that HUD "will... preserv[e] certain housing so that it can remain available to and affordable by low-income persons [and] maintain...existing housing stock in a decent, safe, and sanitary condition."²¹

In analyzing the tenants' motion for preliminary injunction, the court applied the four-part balancing test generally employed by federal courts: (1) the likelihood of success on the merits; (2) any irreparable harm the plaintiff would suffer in the absence of the injunction; (3) the risk of substantial harm to others if the injunction is granted; and (4) the public interest.²²

In APA cases, a court may find that the defendant agency failed to take an action required by federal law.²³

¹⁶*Id.* at 4-5. Other causes of action not considered in this order included misapplication of the Deficit Reduction Act of 2005, First Amendment retaliation, Fifth Amendment violation, and state law claims for the breach of statutory duty to repair.

¹⁷*Id.* at 4.

¹⁸Pls.' Mot. & Brief for TRO & Prelim. Inj., *Cheatham v. Preston*, No. 07-13168 (E.D. Mich. Sept. 18, 2008). The court found the request for a temporary restraining order to be inapplicable, as the plaintiffs had fully briefed their motion, and oral arguments were held in August 2009. Sept. 2009 Order at 5.

¹⁹Sept. 2009 Order at 6.

²⁰12 U.S.C.A. § 1701z-11(d)(2)(B) (Westlaw Oct. 4, 2009).

²¹§ 1701z-11(a)(3)(A), (C).

²²Sept. 2009 Order at 5.

²³*Id.* at 7 (citing 5 U.S.C. § 706(1); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)).

Alternatively, the court may find that the agency's actions are "arbitrary, capricious, or an abuse of discretion."²⁴ The latter is usually a more difficult challenge, especially in the context of securing preliminary relief where the court has a limited record and seeks to balance other factors.

The Court's Analysis

The court's analysis followed the four-part framework of the preliminary injunction balancing test. In evaluating the first and most weighty factor here, the court found that the tenants would likely succeed on the merits of their claims that HUD violated the disposition statute and acted arbitrarily or capriciously in proposing to relocate the tenants.²⁵

Violations of the disposition statute centered on HUD's failure to maintain full occupancy at the premises. As the court noted, although HUD's duty is not absolute,²⁶ the disposition statute's obligations are "not couched in aspirational terms" but instead mandate that HUD "shall...to the greatest extent possible, maintain full occupancy" in the multifamily projects for which HUD is owner or MIP.²⁷ In finding that the tenants were likely to succeed on this claim, the court cited an affidavit by a legal services attorney reciting a conversation with Parkview's property manager in which the manager stated that she received "strict orders" from HUD not to admit new tenants.²⁸

HUD advanced two arguments in support of its decision not to maintain full occupancy at the property. First, HUD cited Section 207(k) of the National Housing Act, arguing that because it does not own Parkview, its ability to spend funds on Parkview to bring vacant units up to code and rent them was restricted by Section 207(k)'s authorization for HUD to spend "such sums as may be necessary to preserve or protect the lien" of a mortgage assigned to HUD.²⁹ Finding no authority for HUD's position, the court found that the plain meaning of both statutes imposes no limitation on HUD's ability to comply with the disposition statute.³⁰

HUD also argued that the disposition statute leaves to its sound discretion the decision to maintain a particular multifamily property, given that the statute's multiple goals include protecting the government's financial interests.³¹ The court could not credit this argument where HUD failed to show a "rational connection" between these financial interests and its decision not to preserve

²⁴5 U.S.C.A. § 706(2)(A) (Westlaw Oct. 4, 2009). The challenged agency must show that its decision was "based upon a consideration of the relevant factors," and that it reflects a "rational connection between the facts found and the choice made." Sept. 2009 Order at 12 (citing cases).

²⁵Sept. 2009 Order at 8.

²⁶*Id.* at 7.

²⁷*Id.* at 9 (citing § 1701z-11(d)(2)).

²⁸*Id.* at 10.

²⁹*Id.* at 10-11 (citing 12 U.S.C. § 1713(k)).

³⁰*Id.* at 11-12.

³¹*Id.* at 12.

Parkview.³² Significantly, the court found that HUD must weigh equally the disposition statute's goals to preserve and develop decent and affordable housing, revitalize neighborhoods and minimize tenant displacement with that of protecting the financial interests of the government.³³ The court found "unconvincing" HUD's efforts to demonstrate consideration of these other factors, creating a high likelihood that the tenants' APA claim for violation of the federal disposition statute would succeed.

The court found that the existing health and safety risks failed to justify HUD's drastic decision to relocate all residents. Rather, the evidence of improved conditions supported the tenants' claim that HUD acted in an arbitrary or capricious manner.

The court also found a likelihood of success on the tenants' claim that the decision to relocate tenants was arbitrary or capricious under the APA. HUD cited the deteriorating health and safety conditions of Parkview as its "primary motivation" for tenant relocation.³⁴ This contention blatantly contradicted the evidence presented—in the form of housing inspector and police chief affidavits, as well as "general consensus"—attesting to the improved condition of the complex since HUD's takeover.³⁵ The court found that the existing health and safety risks failed to justify HUD's drastic decision to relocate all residents. Rather, the evidence of improved conditions supported the tenants' claim that HUD acted in an arbitrary or capricious manner.

In evaluating the second preliminary injunction factor, the court found that the tenants would suffer irreparable harm without the injunction.³⁶ Particularly in light of the absence of alternative affordable housing, the court stated that "[c]ompelling residents to leave their long-time homes . . . can constitute irreparable harm."³⁷ The court also credited the tenants' argument that the relocation would moot their pending claims against HUD for violations of the disposition statute. Forcing the tenants to relocate prior to resolution of their claim would "depriv[e] them of the opportunity to pursue relief to which they may be entitled."³⁸ Such deprivation, the court stated, also constitutes irreparable harm.³⁹

Third, prompted by the agency, the court evaluated whether granting the injunction would cause irreparable harm to HUD. HUD presented the generalized argument that hampering government officials from performing their duties inherently causes harm.⁴⁰ While the court conceded the unavailability of some minimal injury to the agency, it found this factor did not weigh heavily given the far greater harm the tenants would suffer by forcible relocation from their homes.⁴¹

Finally, the court considered harm to the public interest if the preliminary injunction were granted. HUD argued that relocating tenants from a troubled property would protect the health and safety of the public at large. The agency further contended that the public interest in prudent distribution of government funds weighed against spending money on a partially occupied, dilapidated property. While the court did not disagree with the basic premise of these arguments, it found that they did not apply in Parkview's case. Parkview, it found, "is not yet a failed project" and so the public interest was not implicated in the manner HUD argued. To the contrary, "[t]he public has a continuing interest in affordable housing" that militated in favor of preserving the complex and issuing the preliminary injunction.

In its opposition to the motion, HUD advanced a number of well-worn arguments, often advanced in similar cases, that the court discredited. Most obviously, HUD's investment of over \$4 million in Parkview's rehabilitation and maintenance conflicted with its legal arguments that other federal statutes limited its ability to spend funds to repair property it does not own. If that were the case, HUD would have spent \$4 million illegally.⁴² Alternatively, if HUD is now relocating tenants from uninhabitable property, it would have wasted a significant amount of public funds.⁴³ HUD also attempted to justify its displacement proposal by asserting that tenants had ample alternative "affordable" housing options near Parkview, but none had similar rents.⁴⁴ Thus, the court found an "apparent dearth of low-income housing [that] argues in favor of preserving Parkview."⁴⁵ Finally, the court expressed concern with HUD's failure to draw a rational connection between tenant relocation and any pending disposition. Rather than speeding up the foreclosure sale process, the court noted that HUD's emptying of the building without a pending sale would more likely accelerate deterioration, leaving demolition as the only option.⁴⁶

³²*Id.* (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

³³*Id.* at 12.

³⁴*Id.* at 14-15.

³⁵*Id.* at 15-16.

³⁶*Id.* at 18.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* at 19.

⁴¹*Id.*

⁴²*Id.* at 11-12.

⁴³*Id.* at 14.

⁴⁴*Id.* at 13.

⁴⁵*Id.*

⁴⁶*Id.* at 14.

Conclusion

Presented with a more compelling version of the facts and the governing law, the federal court in *Cheatham* dissected HUD's legal arguments, as well as its disingenuous justifications for tenant relocation. The court's application of the APA's arbitrary or capricious standard is particularly notable given the deference normally accorded to agency action. The Parkview decision follows closely on the heels of a similar case in Florida, where a district court cited due process protections in granting a preliminary injunction prohibiting HUD from terminating a project-based Section 8 contract on a substandard property.⁴⁷ Advocates now look forward to the Administration's reform of HUD's policies for preserving troubled properties, with due regard for the non-financial goals articulated by Congress many years ago. ■

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 Unwarranted Where Tenant Failed to Recertify Due to Incarceration

Gist v. Mulligan, __ N.Y.S.2d __, 2009 WL 3048404 (N.Y. App. Div. 2009). The court held that a Section 8 voucher tenant's failure to complete her annual recertification form, to appear for her recertification appointment, and to notify the county that she vacated her apartment did not warrant termination of her voucher. The court held that the penalty imposed was so disproportionate to the offenses committed as to be shocking to one's sense of fairness. The tenant did not recertify because she was incarcerated for a misdemeanor at the time of her recertification appointment. Although the tenant's mother was able to reschedule the tenant's recertification appointment on two occasions, she remained incarcerated on both dates with no money to post bail or buy stamps. Further, the tenant's failure to notify the county that she had vacated the apartment was not a willful violation of the voucher program rules.

Public Housing: Eviction for Drug-Related Criminal Activity

Boston Hous. Auth. v. Crump, 2009 WL 3064714 (Mass. App. Ct. Sept. 28, 2009) (unreported). The court affirmed an eviction based on drug-related criminal activity even though the public housing tenant asserted that she did not have knowledge of the activity. The court ruled that the housing authority did not abuse its discretion in disbelieving the tenant's testimony and in pursuing an eviction remedy. The court further found no disability discrimination, as the tenant did not make a timely accommodation request even though she was invited twice to make such a request. Additionally, the court found no due process violation. While the housing court judge did not inform the tenant of her right to cross-examine defense witnesses, the testimony of those witnesses consisted of uncontroverted information, and the tenant's brief did not identify any harm resulting from omitted cross-examination.

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>.

⁴⁷*Roundtree v. HUD*, No. 09-234 (M.D. Fla. Aug. 28, 2009), available at <http://nhlp.org/node/1172>. See NHLP, *Court Blocks HUD Contract Termination for Due Process Violations*, 38 HOUS. L. BULL. 262 (Oct. 2009).

Public Housing: Breach of Zero-Tolerance Drug Policy Insufficient to Justify Eviction

Minn. Pub. Hous. Auth. v. Vann, No. 27-CV-HC-08-10954, slip op. (Minn. Dist. Ct. Sept. 23, 2009) (unreported). A public housing tenant was evicted because he possessed a small amount of marijuana outside the public housing premises. The court held that the housing authority's zero-tolerance drug policy, as applied to the tenant, was not justified under 42 U.S.C. § 1437d(l)(6), which allows evictions based on "drug-related criminal activity" on or off public housing premises. The statute refers to "illegal" possession of a controlled substance in its definition of "drug-related criminal activity," but it does not define "illegal." Hence, the court decided to give some weight to the tenant's argument that his conduct did not satisfy the statute because possession of a small amount of marijuana is not a crime, but a petty misdemeanor in Minnesota. The court also found that the zero-tolerance policy was inconsistent with the legislative history, which showed Congress' intent that each eviction case be judged on individual merits in the exercise of humane judgment.

Public Housing: Housing Authority Employees Not State Actors Subject to the Fourth Amendment

State v. Brittingham, __P.3d__, 2009 WL 3489407 (Kan. Ct. App. 2009). A public housing tenant appealed his criminal convictions for drug possession, alleging that housing authority employees are state actors subject to the Fourth Amendment. A housing authority maintenance worker used a passkey to enter the tenant's unit to check for damage after a sewer problem was reported at the complex. The worker found the tenant unresponsive. Subsequently, another housing authority employee entered the unit to help the tenant and called 911. In response to the call, law enforcement entered the tenant's home and found drugs and drug paraphernalia in plain view. The tenant sought to suppress this evidence, alleging that the housing authority employees were government actors and subject to the Fourth Amendment prohibitions against warrantless searches. The court rejected this argument, finding that the housing authority employees were not state actors because their entry into the defendant's unit was not done at the direction of, or in participation with, law enforcement and was not done in furtherance of the government's objectives.

Public Housing: No Sovereign Immunity in Lead Exposure Case

Bozeman v. Cleveland Metro. Hous. Auth., 2009 WL 3321402 (Ohio Ct. App. 2009) (unreported). A mother and her minor child sued for various torts based on the child's

exposure to lead paint while living in public housing. The court affirmed the lower court's denial of the housing authority's motion for judgment on the pleadings, which relied on sovereign immunity arguments. Under Ohio law, a housing authority is a political subdivision and performs a governmental function for purposes of sovereign immunity. However, there is an exception to this immunity when the injury is caused by the negligence of the political subdivision's employees and is due to physical defects within buildings that are used in connection with the performance of a governmental function. Thus, the court found that the housing authority could be found liable for injuries caused by its employees' negligence due to a physical defect within one of its buildings. The court further found that Ohio's sovereign immunity law does not apply to contract claims. Thus, the housing authority's claim of sovereign immunity could not dispose of the tenants' breach of contract claims.

Public Housing: Right to Succession

Oglesby v. N.Y. City Hous. Auth., __ N.Y.S.2d __, 2009 WL 3381700 (N.Y. App. Div. 2009). The court held that the housing authority had substantial evidence to support its decision that the plaintiff was not a remaining family member entitled to succeed the lease on the public housing unit of her brother. At a grievance hearing, evidence was introduced that the housing authority had no record of written permission for the plaintiff to reside in the unit, nor did its management know she was living there. The court also noted that the plaintiff's testimony demonstrated that she occupied the unit for less than one year prior to her brother's death.

HUD-Subsidized Housing: Failure to Demonstrate Substantial or Repeated Lease Violations

Millennium Hills Hous. Dev. Fund Corp. v. Patterson, 2009 WL 3321432 (N.Y. Dist. Ct. Oct. 16, 2009) (unreported). The owner of a HUD-subsidized development sought to evict a tenant for several lease violations, including damage to the garage door, soiled carpets, markings on the walls, and failure to maintain utility payments, all of which the tenant cured. The owner also alleged that the tenant's son used foul language and pushed another tenant. The court dismissed the landlord's petition seeking a warrant of eviction. The court found that the tenant did not commit substantial or repeated minor lease violations that disrupted the livability, health, or safety of the development. The court noted that "an exhaustive review of relevant case law reveals no instance where termination was upheld for messy housekeeping which was cured, minor damage to the outside of a building which could have been done by anyone; or a few days termination of electrical services for inability to pay." The court further found that the son's conduct was not

grounds for eviction, but noted that the landlord could seek future relief if the situation deteriorated to the point of actual violence or multiple acts endangering the safety of other residents.

Due Process: No Cognizable Property Right Found Where Housing Authority Dramatically Increased Rents

Lowe v. S. Delta Reg'l Hous. Auth., 2009 WL 3297186 (N.D. Miss. Oct. 9, 2009). After having the same rents for 10 years, the South Delta Regional Housing Authority (SDRHA) more than doubled rents on all of its non-HUD properties. SDRHA held mandatory tenant meetings where tenants were informed that their rents would increase, but they were not told the amount of the proposed increase. There was no board approval of the rent increase as the rates remained below the published HUD rates. The tenants filed a 42 U.S.C. § 1983 action against SDRHA, alleging that the housing authority violated their due process rights. The court denied the tenants' motion for preliminary injunction, finding no cognizable property right under state law. The court held that the Mississippi statutes governing housing authorities did not support a claim of entitlement sufficient to trigger procedural due process protections.

Fair Housing Act: Summary Judgment Upheld Where Tenant Failed to Establish Disability

Hawn v. Shoreline Towers Phase 1 Condo. Ass'n, Inc., 2009 WL 3004036 (11th Cir. Sept. 22, 2009) (per curiam) (unreported). A tenant sued his condominium association for violation of the Fair Housing Act for refusing to allow him to have a service dog in his unit. The court upheld summary judgment in favor of the association because the tenant did not respond to the association's request for additional information, including further documentation to support the tenant's claim that he had a disability. Although a state agency found cause to believe that the association failed to reasonably accommodate the tenant's disability, the court found summary judgment appropriate because the only evidence establishing the disability was generic medical certification forms and the tenant's own inconsistent statements.

Fair Housing Act: Challenge to Curfew Provisions in Leases Dismissed

City of Kansas City v. Yarco Co., 2009 WL 3379096 (W.D. Mo. Oct. 19, 2009). Citing the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, the court dismissed the city's claim that the defendant apartment owners discriminated against all families with children under the age of 18. The owners

used lease agreements that included language that "curfew time for everyone under the age of 18 will be 8:30 p.m. nightly." The court held that the city did not plead facts sufficient to demonstrate a plausible entitlement to relief because the defendant could have a non-discriminatory reason for adopting the curfew provision, such as a desire to reduce juvenile crime and protect children. The city's motion for leave to amend was denied for being futile, as the proposed amendment did not provide additional facts.

Fair Housing Act: Administrative Remedies Need Not Be Exhausted

Carter v. Hamilton Affordable Hous., LLC, 2009 WL 3245483 (D.N. J. Oct. 6, 2009) (unreported). A tenant filed suit under the Fair Housing Act (FHA), Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act, alleging that the defendants discriminated against her by refusing to let her out of her lease after she reported that her apartment was uninhabitable. The defendants filed a motion to dismiss, which the court denied in part. The court rejected the defendants' argument that the tenant was required to exhaust her administrative remedies, ruling that an aggrieved person is barred from initiating a private FHA suit only if administrative enforcement has been activated and has led to a hearing. The court also found that the tenant set forth sufficient facts for her FHA and Title VI claims to satisfy her pleading burden. Specifically, the tenant alleged that white tenants were treated differently with respect to requests for repairs and lease terminations, and that defendants' staff made racially discriminatory remarks. The court found that the tenant did not allege facts justifying a claim under the Rehabilitation Act, as she did not claim that she was disabled or excluded from a program or service solely by reason of a disability.

Fair Housing Act: Applicability to Older Multifamily Units Undergoing Renovations

Reyes v. Fairfield Props., ___ F. Supp. 2d ___, 2009 WL 3063082 (E.D.N.Y. 2009). The court granted in part and denied in part the defendant-owner's motion to dismiss the tenants' Fair Housing Act claims and state law claims, which included breach of contract, breach of implied duty of good faith and fair dealing, and unlawful eviction. The tenants, an African-American mother and her disabled daughter, asserted that the owner failed to maintain its driveways and parking lot and refused to widen doorways and build a ramp, even though the building was undergoing construction. The tenants also alleged that the owner initiated retaliatory eviction proceedings. The court upheld the tenants' disability discrimination claims insofar as they were based on the owner's alleged practice of keeping the driveways and parking lot in a state of disrepair.

However, the court found that the owner had no obligation to install ramps or widen the doors of the pre-March 13, 1991, building, even though the building had undergone renovation. With regard to the state law claims, the court found that the tenants' unlawful eviction claim was barred by res judicata because the tenants agreed to settle the state court eviction action. However, the court found that the tenants' claims of breach of contract, breach of implied duty of good faith and fair dealing, and retaliation were not barred by the Rooker-Feldman doctrine, collateral estoppel, or res judicata.

Foreclosure: Court Invalidates Foreclosures Based on Post-Sale Assignments

U.S. Bank Nat'l Ass'n v. Ibanez, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009) (unreported). The Massachusetts Land Court reaffirmed its opinion invalidating foreclosure sales conducted before the assignments of the foreclosed mortgages to the foreclosing creditors were executed. The plaintiff foreclosing parties sought a declaratory judgment that they held title to the foreclosed-upon properties. The court denied relief, finding that because the mortgage assignments only occurred after the foreclosure sale, the plaintiffs had not been the "present holders" of the mortgages at the time of notice and sale. The court concluded that retroactive assignments of the mortgages could not cure the defects, leaving the plaintiffs with no power to foreclose. In reaffirming its holding, the court concluded that because mortgages are conveyances of land under Massachusetts law, valid written assignments are required to transfer them, and neither assignments in blank nor agreements to assign mortgages effect a transfer. Further, the court observed that though the plaintiffs held notes to the properties, this only gave them the right to obtain an assignment, rather than an actual assignment itself. As there was no valid assignment of the mortgages, they remained with the original mortgagees and the foreclosure sales by the plaintiffs were invalid.

Foreclosure: Court Finds No Property Interest in Loan Modifications

Williams v. Geithner, 2009 WL 3757380 (D. Minn. Nov. 9, 2009). Homeowners filed a class-action lawsuit seeking to halt foreclosures on properties where a homeowner is eligible for a loan modification under the Home Affordable Modification Program (HAMP). The complaint named as defendants the government agencies responsible for implementing HAMP, including the U.S. Department of the Treasury, the Federal Housing Finance Agency, Fannie Mae and Freddie Mac. It also named loan servicers who have elected to participate in HAMP. The plaintiffs alleged that the defendants' failure to provide homeowners with notice that their modification request had

been denied or an opportunity to appeal their rejection violated constitutional procedural due process standards. The court denied the plaintiffs' motion for a preliminary injunction, finding that they did not have a protected property interest in loan modifications under HAMP. The court noted that the relevant statute did not create an absolute duty on the part of the secretary of the treasury to consent to loan modifications. Instead, the statute provided that loans may be modified "where appropriate." Because the plaintiffs' motion for preliminary injunction sought solely injunctive relief based on procedural due process violations, the court dismissed the complaint.

Takings: Mobile Home Rent Control Ordinance Held a Compensable Taking

Guggenheim v. City of Goleta, __ F.3d __, 2009 WL 306815 (9th Cir. 2009). Mobile home park owners brought a facial takings challenge to Goleta, California's mobile home Rent Control Ordinance (RCO). The RCO restricted rental increases in mobile home parks to 75% of the Consumer Price Index on an annual basis. The court held that the owners had standing, even though they purchased the mobile home park long after it was subject to the RCO, because all Article III requirements had been satisfied. The court also held that the case was ripe, meeting the requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), that a property owner receive a "final decision" from a regulatory entity as to how the challenged law will be applied to the property at issue. The court found that the *Williamson* requirements were prudential rather than jurisdictional, and were not required where, as here, the case had gone through three previous litigation rounds and the city failed to ever raise the ripeness claim. Next, the court concluded that the owners had suffered a compensable regulatory taking. First, the court found that the RCO caused the owners significant economic loss via a transfer of nearly 90% of the property value from the owners to the tenants. Second, though the owners got exactly what they bargained for when they bought the park subject to the RCO, they nonetheless had a right to challenge an unreasonable limitation on the use and value of the land. Third, the RCO's wealth transfer from one identifiable class to another was more like a "classic taking" than a mere shifting of regulatory burdens. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Federal Register Notices

74 Fed Reg. 57,696-57,698 (Nov. 9, 2009)

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

Summary: This Notice supplements four earlier Notices published in the Federal Register that provided guidance to public housing agencies (PHAs) on implementing the authority provided to HUD by Section 901 of the "Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006" (Pub. L. 109-148, December 30, 2005) to allow PHAs in the most heavily impacted areas of Louisiana and Mississippi affected by Hurricanes Katrina and Rita to combine Housing Choice Voucher and public housing operating and capital funds to assist families who were receiving housing assistance under the U.S. Housing Act of 1937 immediately prior to Hurricanes Katrina or Rita and were displaced. Section 901 assists PHAs to flexibly and efficiently facilitate disaster recovery in those areas to benefit the formerly assisted and displaced families. Such authority was initially provided for calendar years 2006 and 2007, and later extended through calendar years 2008 and 2009 by Section 11003 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. 110-329). On December 17, 2008, HUD published a Federal Register Notice advising eligible

PHAs to submit Fungibility Plans for CY 2008 Section 901 fungibility no later than January 31, 2009. Eligible PHAs that are interested in using authority provided under the extended Section 901 authority must submit a 2009 Notice of Intent and Fungibility Plan in accordance with the July 28, 2006, October 30, 2006, and August 6, 2007 Federal Register notices.

Dates: PHAs must submit their Calendar Year 2009 Notices of Intent and Fungibility Plans no later than November 30, 2009.

74 Fed Reg. 56,571-56,572 (Nov. 2, 2009)

Notice of Funding Availability for Refinance Assistance Under the American Recovery and Reinvestment Act of 2009—Section 502 Guaranteed Loan Program

Summary: This Notice announces the Agency intent to prioritize \$400 million in funding that was previously made available in the Federal Register on July 23, 2009, for the refinance program to achieve the maximum amount of debt relief to existing borrowers and keep the borrowers in their homes, thereby achieving long-term financial stability consistent with the goals of the Recovery Act. Additional requirements for such refinancing will ensure that existing borrowers are achieving measureable financial savings in refinancing and that Recovery Act funds are spent wisely and have transparent results.

Dated: October 20, 2009.

74 Fed Reg. 56,206-56,508 (Oct. 30, 2009)

Reconsideration of Waivers Granted to and Alternative Requirements for the State of Mississippi Under Public Laws 109-148 and 109-234

Summary: This Notice describes the statutorily required reconsideration of additional waivers and alternative requirements applicable to the Community Development Block Grant (CDBG) disaster recovery grant provided to the State of Mississippi under the subject appropriations acts.

Effective Date: November 4, 2009.

74 Fed Reg. 55,849-55,850 (Oct. 29, 2009)

Public Housing Operating Subsidy-Stop-Loss and Appeals

Summary: To stop the phase-in of the reduction in the amount of subsidy a PHA receives under the new operating fund formula, PHAs submit a "stop-loss" package to HUD demonstrating conversion to asset management. To appeal the amount of subsidy on any one of the permitted bases of appeal, PHAs submit an appeal request to HUD.

Comments Due Date: November 30, 2009.

74 Fed Reg. 55,248-55,249 (Oct. 27, 2009)

Community Development Block Grant Recovery (CDBG-R) Program

Summary: For the Community Development Block Grant Recovery (CDBG-R) Program, grantees are required to keep records of activities, which include total amount of

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>.

CDBG-R funds received that was expended or obligated, estimate of the number of jobs created/retained by activities assisted with CDBG-R funds, certifications of activities/plans and other items. This paperwork submission addresses the record keeping and reporting requirements for the CDBG-R program.

Comments Due Date: November 27, 2009.

74 Fed Reg. 54,377-54,381 (Oct. 21, 2009)

Buy American Exception Under the American Recovery and Reinvestment Act of 2009

Summary: In accordance with the American Recovery and Reinvestment Act of 2009 and implementing guidance of the Office of Management and Budget, this Notice advises that national exceptions to the Buy American requirements of the Recovery Act have been determined applicable for projects using Community Development Block Grant-Recovery funds and Neighborhood Stabilization Program 2 funds.

Dated: October 14, 2009.

74 Fed Reg. 52,931-52,937 (Oct. 15, 2009)

Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Implementation of Enterprise Income Verification

A detailed review of this Notice appears on page 275 of this issue of the *Bulletin*.

74 Fed Reg. 51,304-51,316 (Oct. 6, 2009)

Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for 2010

Summary: This document designates "Difficult Development Areas" (DDAs) and "Qualified Census Tracts" (QCTs) for purposes of the Low-Income Housing Tax Credit under Section 42 of the Internal Revenue Code of 1986. HUD makes new DDA designations annually and is making new designation of QCTs at this time on the basis of revised metropolitan statistical area definitions published by the Office of Management and Budget.

Dated: September 25, 2009.

74 Fed Reg. 51,304 (Oct. 6, 2009)

Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2009 Family Unification Program (FUP)

Summary: HUD announces the availability on its website of the applicant information, deadline information and other requirements for the Family Unification Program (FUP) NOFA for FY 2009. Approximately \$14.6 million is made available through this NOFA, through the Omnibus Appropriations Act, 2009. The FY 2009 FUP NOFA that provides this information is available on the Grants.gov website at http://apply07.grants.gov/apply/forms_app_idx.html. A link to Grants.gov is also available on the HUD website at <http://www.hud.gov/offices/adm/grants/fundsavail.cfm>.

Dated: September 23, 2009.

74 Fed Reg. 50,982-50,983 (Oct. 2, 2009)

Notice of Proposed Information Collection for Public Comment Enterprise Income Verification (EIV) System—Debts Owed to Public Housing Agencies & Terminations

Summary: Within the scope of this new collection of information, HUD seeks to collect from all PHAs the following information: (1) amount of debt owed by a former tenant to a PHA; (2) if applicable, indication of executed repayment agreement; (3) if applicable, indication of bankruptcy filing; and (4) if applicable, the reason for any adverse termination of the family from a federally assisted housing program. This information will be collected electronically from PHAs via HUD's EIV system. This information will be used by HUD to create a national repository of families that owe a debt to a PHA and/or have been terminated from a federally assisted housing program. This national repository will be available within the EIV system for all PHAs to access during the time of application for rental assistance.

Comments Due Date: December 1, 2009.

Department of Veterans Affairs Notices

74 Fed Reg. 51,103-51,111 (Oct. 5, 2009)

Loan Guaranty: Assistance to Eligible Individuals in Acquiring Specially Adapted Housing

Summary: This document proposes to amend the Department of Veterans Affairs' (VA) Loan Guaranty regulations concerning assistance to eligible individuals in acquiring specially adapted housing. These proposed changes would improve the readability of the regulations, provide further detail about program policies, and incorporate legislation, policy changes, and a VA Office of the General Counsel legal opinion.

Comments Due Date: December 4, 2009.

HUD Notices

CPD-09-05 (Oct. 7, 2009)

CPD Implementation Guidance for the Buy American Requirement of the American Recovery and Reinvestment Act of 2009 Including the Exception Process

Summary: This Notice provides implementation guidance, including the exception process, for the Buy American requirement imposed by Section 1605 of Title XVI of the American Recovery and Reinvestment Act of 2009. The Notice offers initial guidance on the application of the Buy American requirement to Recovery Act programs administered by the Office of Community Planning and Development (CPD Recovery Act programs). This CPD implementation guidance for the Buy American requirement summarizes the applicable requirements, identifies the covered CPD Recovery Act programs, and specifies the requirements for obtaining exception relief. The addendums include sample language for agreements

and contracts, a checklist of information required for exceptions, and answers to frequently asked questions.

H 09-18 (Oct. 19, 2009)

Policy and Procedures on Multifamily Mortgage Insurance Applications Involving Master Lease Structuring to Facilitate the Use of Tax Credits

Summary: In March 2008, the department continued its effort to facilitate the use of FHA-insured loans with tax credits, by issuing a draft set of policies and procedures for processing applications involving the use of Master Leases. This Mortgagee Letter represents the department's policy for such applications, after considering the input received from HUD field offices and the industry with respect to the draft policies and procedures.

H 09-17 (Oct. 8, 2009)

Closing Costs Paid by the Department of Housing and Urban Development

Summary: This Notice supersedes Notice H 2009-04, which was issued on June 9, 2009. This Notice revises certain provisions related to closing costs allowable in the closing of FHA 203(k) rehabilitation loans. This Notice identifies allowable closing costs paid in connection with the sale of HUD-owned single family properties and will be in effect for sales contracts executed on or after the effective date of this Notice.

H 09-16 (Oct. 2, 2009)

Exclusion from Annual Income of Temporary Employment from the U.S. Census Bureau

Summary: This Notice provides for the exclusion of temporary employment payments received from the U.S. Census Bureau from annual income.

H 09-15 (Oct. 1, 2009)

Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005

Summary: The purpose of this Notice is to provide guidance to owners and management agents (O/As) administering one of Multifamily Housing's project-based Section 8 programs on the implementation of the Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Public Law 109-162, hereafter referred to as VAWA. This Notice transmits the Certification of Domestic Violence, Dating Violence or Stalking, Form HUD-91066. VAWA provides that O/As may request a tenant to certify that he/she is a victim of domestic violence, dating violence or stalking and that the incidence(s) of threatened or actual abuse are bona fide in determining whether the protections afforded under the VAWA are applicable. This Notice also transmits the HUD-approved Lease Addendum (Form HUD-91067) for use with the applicable HUD model lease for the covered project-based Section 8 program. This addendum revises the lease to reflect the statutory requirements of the VAWA.

PIH 2009-45 (HA) (Nov. 6, 2009)

Submission of Calendar Year 2009 Notices of Intent and Fungibility Plans by PHAs in Hurricane Katrina and Rita Disaster Areas

Summary: This Notice provides detailed instructions to public housing agencies (PHAs) in Louisiana and Mississippi that are eligible to combine Housing Choice Voucher and public housing operating and capital funds under Section 901 of 2006 emergency supplemental appropriations, on how to submit calendar year (CY) 2009 Notices of Intent and Fungibility Plans. New for 2009 are additional submission requirements for plans that include new housing development activities.

PIH 2009-44 (HA) (Oct. 23, 2009)

Cost-Savings Measures in the Housing Choice Voucher (HCV) Program

Summary: This Notice provides guidance on actions public housing agencies (PHAs) may take to address financial shortfalls by reducing costs in the HCV program. This Notice also provides information on the circumstances under which a PHA may deny a move under 24 CFR 982.314(e)(1) or terminate a housing assistance payments contract under 24 CFR 982.454 as a result of insufficient funding.

PIH 2009-43 (HA) (Oct. 16, 2009)

Renewable Energy and Green Construction Practices in Public Housing

Summary: This Notice strongly encourages public housing agencies to use solar, wind, geothermal/ground coupled heat pumps and other renewable energy sources, and other "green" construction and rehab techniques whenever they procure for maintenance, construction or modernization. This Notice defines green building principles for construction practices in public housing, identifies benefits of green construction and rehabilitation practices and products, and identifies expertise available to provide valuable assistance for implementing such practices.

PIH 2009-42 (HA) (Oct. 13, 2009)

Extension—Cost-Test and Market Analyses Guidelines for the Voluntary Conversion of Public Housing Units Pursuant to 24 CFR Part 972

Summary: This Notice extends Notice PIH 2008-35 (PHA), same subject, which expired on August 31, 2009, for another year until October 31, 2010. The purpose of this Notice is to provide guidance to PHAs on preparing the market analyses for public housing property required as part of a voluntary conversion assessment under 24 C.F.R. § 972.218(b) of the voluntary conversion rule. These market analyses will assist PHAs in evaluating their recapitalization options, including how rehabilitation and the proposed use of the property (as public, assisted or market-rate housing) may affect a property's value. ■

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Event Basics

Fees

Fees include materials, lunch each day, and refreshments.

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

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

CANCELLATION/REFUND POLICY

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

Registration

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

FAX (CREDIT CARD ONLY)

510.451.2300

MAIL

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

Questions

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

HOUSING JUSTICE NETWORK NATIONAL MEETING

Advancing Housing Justice: Registration

PLEASE PRINT CLEARLY

1

PERSONAL INFORMATION

NAME _____ NAME ON BADGE (IF DIFFERENT) _____

ORGANIZATION _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

EMAIL _____ ORGANIZATION'S WEB SITE _____

Housing Experience: years. What issues have you worked on? _____

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

Do you require special arrangements? (Please attach a description)

☐ access ☐ visual ☐ audio ☐ vegetarian ☐ other dietary

2

FEEES

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

3

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

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Housing Law Bulletin (10-issue subscription)

**Welfare and Housing—How Can the Housing Assistance Programs
Help Welfare Recipients? (2000)**

Housing for All: Keeping the Promise (1995)

The Family Self-Sufficiency Program: An Advocate's Guide (1994)

**A Passage from Poverty: Self-Sufficiency Policies and the
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**An Affordable Home On Reentry: Federally Assisted Housing and
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