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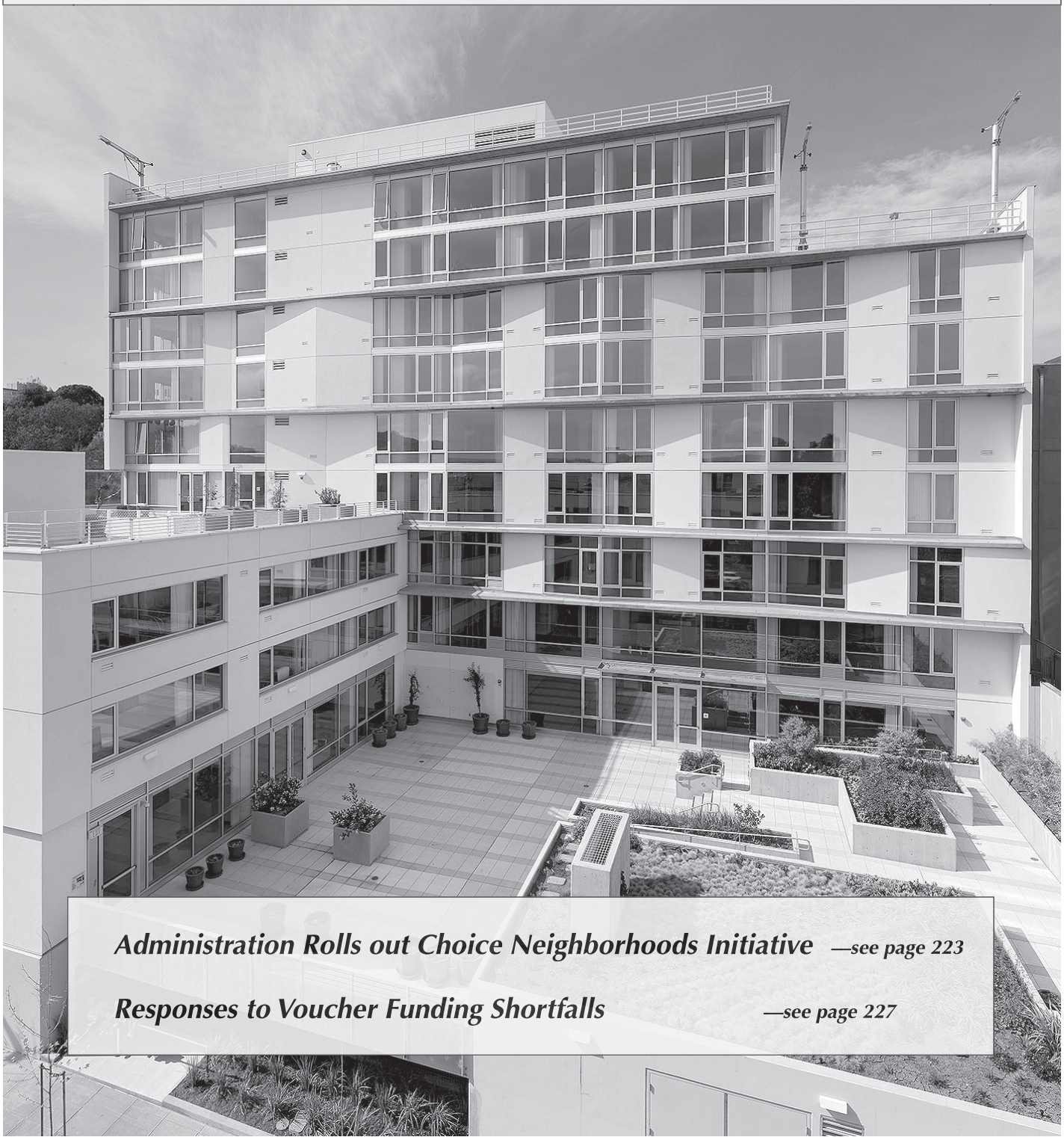

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Obama Administration Rolls Out Choice Neighborhoods Initiative

The Choice Neighborhoods Initiative is the Obama Administration's vision of a successor to the seventeen-year-old HOPE VI program.[1] The initiative proposes to bring together diverse resources to build sustainable neighborhoods in which people will choose to live because they offer a better quality of life than the surrounding community. This article discusses the challenges and opportunities that the initiative presents to the advocacy community.

Overview of the Initiative

In its Fiscal Year (FY) 2010 Budget, introduced on February 25, 2009, the Administration requested $250 million for the initiative. The goal is "to transform neighborhoods of extreme poverty into functioning, sustainable mixed-income neighborhoods by linking housing improvements with appropriate services, schools, public assets, transportation, and access to jobs."[2] According to the Administration, the initiative will build on the lessons from HOPE VI in awarding competitive grants "for the transformation and preservation of public and assisted housing, as well as affordable housing and community development in surrounding neighborhoods."[3]

The Department of Housing and Urban Development (HUD) organized focus groups to seek feedback on the proposal. Sandra Henriquez, Assistant Secretary for Public and Indian Housing, and Carol Galante, Deputy Assistant Secretary for Multifamily Housing Programs, co-chaired meetings on July 8 with residents, resident advocates and public housing professionals, and on July 9 with housing industry representatives. They asked attendees to identify the successes and failures of HOPE VI, and discuss how the Choice Neighborhoods Initiative could learn from this history to build truly sustainable neighborhoods. The July 8 participants suggested that applicants for the initiative should employ a diverse array of funding and operational capacities to address the unique vulnerabilities of their target communities and to work toward a sustainable whole. This is consistent with the Administration's proposed budget, which directs HUD

[1]HOPE VI was created by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 (Pub. L. 102-389), approved on Oct. 6, 1992. *See* 42 U.S.C.A. § 1437v (Westlaw Aug. 21, 2009); HUD, About Hope VI, http://www.hud.gov/offices/pih/programs/ph/hope6/about/.
[2]*See* Office of Management and Budget, The President's Budget for Fiscal Year 2010, Department of Housing and Urban Development, http://www.whitehouse.gov/omb/budget/fy2010/assets/hud.pdf.
[3]*Id.*

to work with other agencies, such as the Departments of Education, Transportation, Health and Human Services, and the Environmental Protection Agency, to leverage additional resources.[4]

The Administration's proposed budget also states that the initiative will implement rent and work incentives to help subsidized tenants access jobs and move to self-sufficiency.[5] These incentives, which are reminiscent of objectives underlying HUD's Moving to Work (MTW) demonstration program,[6] were not addressed by advocates at the July 8 meeting. Rather, the July 8 attendees promoted rent and work issues in the context of Section 3 training and employment,[7] understanding that no community can sustain itself without opportunities for its residents to hold living-wage jobs.

The Senate Appropriations Committee report stated that if Choice Neighborhoods is "approved by the relevant authorizing committees before the fiscal year 2010 budget is enacted, the Committee will adjust accordingly."

On July 14, HUD Secretary Shaun Donovan and former Secretary Henry Cisneros presented a comprehensive discussion of HOPE VI and the Choice Neighborhoods Initiative at the National Press Club. While Cisneros discussed the lessons of HOPE VI, Secretary Donovan used the occasion to promote the initiative. Donovan traced the history of public housing from New York City's tenement houses, to the New Deal's Wagner-Steagall Act, which "effectively launch[ed] public housing in America"[8] through the urban renewal movement. The Secretary said that the initiative would augment the legacy of HOPE VI by "expanding the range of activities eligible for funding and capitalize on the full range of stakeholders we know are needed and want to be involved—from local governments and non-profits to private firms and public housing agencies."[9] When asked how Choice Neighborhoods would be different from Lyndon Johnson's Model Cities Program,[10] Secretary Donovan said that he envisions bringing a broader set of resources to the problem and making connections across and between programs and departments. "We want to do it better," he said.[11]

Congressional Engagement

Nine days after the Secretary's public pronouncement, the House approved its FY 2010 HUD appropriations bill, which funded HOPE VI at $250 million, exactly the amount the Administration requested for Choice Neighborhoods, and $130 million more than the FY 2009 HOPE VI appropriation.[12] The House Appropriations Committee Report made clear that it was funding HOPE VI, and not Choice Neighborhoods, because HOPE VI has already been authorized and has ongoing projects to be funded. The report stated that if Choice Neighborhoods is "approved by the relevant authorizing committees before the fiscal year 2010 budget is enacted, the Committee will adjust accordingly."[13]

Meanwhile, the budget report that the Senate Appropriations Committee unanimously adopted on July 30 contained no FY 2010 funding for HOPE VI, but included $250 million for Choice Neighborhoods.[14] Noting that there are more than 140 HOPE VI projects funded with FY 2009 funds, and perhaps more grants to be awarded, the Committee directed the Secretary to actively pursue those projects with FY 2009 funds. The report described the Choice Neighborhoods Initiative as transforming poverty-stricken neighborhoods "into functioning, sustainable mixed-income neighborhoods with co-location of appropriate services, schools, public assets, transportation options, and access to jobs or job training."[15] Further, the report reiterated the initiative's goal of demonstrating that "concentrated and coordinated neighborhood investments from multiple sources can transform a distressed neighborhood and improve the quality of life of current and future residents."[16] Emphasizing the link between decent housing and quality schools as building blocks for choice, the Senate Report emphasized coordination with other agencies and stated that "where possible, the program will be coordinated with the Department of Education's Promise Neighborhoods proposal."[17]

[4] *Id.*
[5] *Id.*
[6] MTW has drawn criticism from advocates because it has exempted certain public housing authorities from existing public housing and Housing Choice Voucher rules in ways that can adversely affect residents. Despite this, MTW has never been subject to the data collection or analysis necessary to make it a true demonstration program that documents its effects or impacts.
[7] *See* Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C.A. § 1701u (Westlaw Aug. 21, 2009).
[8] Shaun Donovan, Secretary of the Department of Housing and Urban Development, Remarks at the Brookings Institution Metropolitan Policy Program's Discussion "From Despair to Hope: Two HUD Secretaries on Urban Revitalization and Opportunity" (July 14, 2009), http://www.hud.gov/news/speeches/2009-07-14.cfm.
[9] *Id.*
[10] Model Cities, an element of President Lyndon Johnson's War on Poverty, was an ambitious federal urban aid program passed by Congress in 1966 but terminated in 1974.
[11] Donovan, *supra* note 8.
[12] H. Rept. 111-219 on H.R. 3288 Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010 (Engrossed as Agreed to or Passed by House), http://thomas.loc.gov/home/approp/app10.html.
[13] *Id.* at 154.
[14] S. Rept. No. 111-69 (2009).
[15] *Id.* at 127.
[16] *Id.*
[17] *Id.*

The Challenge

The Administration's attempt to reinvent the government's approach to neighborhood-building is evolving in the context of ongoing advocacy by residents and organizers. These advocates are determined that whatever happens, Choice Neighborhoods must accomplish what HOPE VI did not: it must sustain and increase the supply of affordable housing, and ensure that current residents can access the benefits of revitalization.

In its entire history, conventional public housing has produced just under 1.4 million dwelling units.[18] The National Low Income Housing Coalition found that in 2007, there was a shortage of 2.8 million homes affordable to households with incomes below 30% of area medium income.[19] Study after study has confirmed that shelters and other short-term housing options are neither cost-effective nor capable of providing the stability necessary for job retention, educational development, consistent and dependable access to healthcare, or the development of the other social support systems.[20]

The Legacy of HOPE VI

The need to build upon the HOPE VI experience in a way that learns from both the successes and mistakes of the past is supported by many residents and advocates who hope that the Choice Neighborhoods Initiative will address the shortcomings of HOPE VI redevelopment.[21]

Between 1998 and 2008, almost 100,000 units of public housing were demolished or sold under HOPE VI, while less than 40,000 units were replaced with new or renovated public housing units.[22] By summer 2008, applications to demolish or dispose of an additional 16,672 public housing units were pending with HUD.[23] The HOPE VI developments that rose in the place of demolished communities were almost always dramatically less dense than the previous public housing and often were mixed-income. These two elements, along with the strict rescreening criteria put in place by many private management companies, deprived many of the former residents the opportunity to return.[24] Without other mobility supports or source of income protections requiring landlords to accept the vouchers provided to these displaced families, many were driven back into areas of poverty concentration without access to the benefits of renovated or newly constructed homes, or revitalized neighborhoods and services.

Ongoing Concerns Regarding Demolition and Disposition

Of particular concern to advocates is whether the Choice Neighborhoods Initiative will incorporate remedies for HOPE VI's shortfalls. Residents and advocates have consistently pursued key changes in federal policy regarding demolition and disposition of public housing. In September 2008, the House Financial Services Committee invited the Housing Justice Network, the National Low Income Housing Coalition and the National Training and Information Center to submit proposed statutory language to amend Section 18 of the United States Housing Act of 1937,[25] which governs the demolition and disposition of public housing. Their proposals included one-for-one replacement of public housing units; up-front disclosure by authorities of any plans to replace hard public housing units with project-based voucher assistance; and a guaranteed right of return for residents without additional screening.

Almost identical concerns were raised by advocates at the July 8 meeting hosted by Assistant Secretary Hernandez and Deputy Assistant Secretary Galante. Further, the Preservation Working Group (PWG)[26] raised some of these issues in a July 24, 2009, letter to members of the House Financial Services Committee, the Senate Banking, Housing and Urban Affairs Committee, and the Senate and House appropriations committees. In applauding the Choice Neighborhood Initiative, PWG urged the committee members to fully replace all affordable units, support resident participation and ensure residents' right to return.

Beyond these issues, many advocates continue to challenge policymakers to affirmatively further fair housing by transforming public housing developments that have become poor and racially segregated enclaves into economically and racially integrated communities,[27] and by providing housing opportunities in neighborhoods richer in education and social services.

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[18]NHLP, HUD Housing Programs: Tenants' Rights 1/23 (3d ed. 2004).

[19]National Low Income Housing Coalition, *Out of Reach* (Apr. 2009), http://www.nlihc.org/oor/oor2009/. This does not account for the 672,000 individuals who are homeless in the United States on any given night.

[20]National Alliance to End Homelessness, 2009 Policy Guide, http://www.endhomelessness.org/content/article/detail/2462/.

[21]*See* NHLP, *Congress Grapples with HOPE VI Reauthorization*, 38 Hous. L. Bull. 49-52 (2008); NHLP, False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program (2002).

[22]Fact Sheet: Proposed Section 18 Legislation (on file with NHLP).

[23]*Id*.

[24]*Id*.

[25]42 U.S.C. § 1437p.

[26]PWG is a coalition of nonprofit organizations supporting high-quality rental housing for low-income households. Since 1991, PWG has worked to promote the preservation of quality affordable rental housing through sharing best practices and developing and advocating improvements in public policy.

[27]Indeed, the July 30, 2009, Senate Appropriations Committee Report stated its belief that Choice Neighborhoods would "build[ ] on the successes of…HOPE-VI *with a broader approach to concentrated poverty*." S. Rept. 111-69 (2009), on H.R. 3288 Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010 (emphasis added), http://thomas.loc.gov/home/approp/app10.html.

HOPE VI as a Foundation

In his July 14, 2009, speech, Secretary Donovan frankly addressed the challenges presented by the HOPE VI model. He acknowledged, for instance, that "we lost desperately needed hard units that were affordable to the poorest families."[28] However, he also spoke of the foundation upon which Choice Neighborhoods will build. He noted that as a result of HOPE VI development, thousands of low-income housing tax credit and market rate units have been built, "as well as community centers, parks and trails, grocery stores, Boys and Girls Clubs, and Head Start facilities."[29] According to Donovan, the $6 billion HUD invested in HOPE VI "has leveraged almost three times that amount in additional development capital—$17.5 billion, providing a very good return for the taxpayer, indeed."[30] The Secretary asserted that, in the end, "the majority of families reached by HOPE-VI live in safer, healthier neighborhoods today" and emphasized the importance of using the Choice Neighborhoods Initiative to replicate the successes of the HOPE VI program.

Conclusion

The Administration's vision of the Choice Neighborhoods Initiative rightly recognizes that healthy, sustainable neighborhoods require balanced and integrated development of transportation, housing, schools, healthcare services, businesses and other services vital to a healthy social fabric. Additionally, in building for the next generation, energy efficiency and environmental sustainability must be first-level priorities. An initiative of the scope envisioned by the Obama Administration will require contributions from a panoply of departments, agencies, local government and private sources that extend well beyond the currently identified $250 million. Advocates must engage the Administration and Congress to commit sufficient capital, initiative and imagination to "do [decent, safe, and sustainable housing] better this time." This requires replacing affordable units on a one-for-one basis, redesigning housing as an integral component of neighborhoods in which people of all incomes will choose to live, developing a housing strategy capable of providing hundreds of thousands of additional housing units affordable to low-income families, and ensuring that current residents have fair access to revitalization benefits. The Choice Neighborhoods Initiative is a work in progress. It is advocates' job to make it work. ■

[28]Donovan, *supra* note 8.
[29]*Id.*
[30]Donovan, *supra* note 8.

HUD Delays Effective Date of Social Security Number Rule

The Department of Housing and Urban Development (HUD) has published a Notice[1] delaying the effective date of a rule[2] that would alter Social Security Number (SSN) requirements for federally assisted housing applicants and participants. The effective date of the rule, which was published January 27, 2009, has been delayed until January 31, 2010. The rule would dramatically alter existing HUD regulations at 24 C.F.R. part 5 to require SSNs and other documents from all applicants for and occupants of federally assisted housing. This requirement would threaten housing security for many, including eligible applicants and occupants who are homeless, elderly, victims of domestic violence, persons with disabilities, and children. It would also contravene the current statutory and constitutional protection of mixed eligibility households.

HUD's stated reason for the rule was the elimination of inaccurate (fraudulent) income data from applicants and participants. Advocates submitted comments questioning the efficacy of the proposed rule. In the notice, HUD acknowledged that it had received fifty timely comments on the original rule.[3] The Housing Justice Network, National Housing Law Project (NHLP), National Immigration Law Center, California Rural Legal Assistance, and the Sargent Shriver National Center on Poverty Law filed consolidated comments co-signed by twenty-four national and local advocacy organizations.

The effective date of the rule has already been delayed once, from March 30, 2009, until September 30, 2009. This delay came after NHLP, the Center on Budget and Policy Priorities, and others alerted the presidential transition team that the rule's publication violated a White House prohibition against publishing rules that had not been reviewed by a department or agency head appointed or designated by President Obama.[4]

If changes are made to the rule, it will be reopened for public comment. ■

[1]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Delay of Effective Date, 74 Fed. Reg. 44,285 (Aug. 28, 2009).
[2]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs, Final Rule, 74 Fed. Reg. 4832 (Jan. 27, 2009) (to be codified at 24 C.F.R. pt. 5, pt. 92 and pt. 908); *see also* NHLP, *Delayed HUD Rule Would Alter Social Security Number Requirements*, 39 Hous. L. Bull. 80 (2009).
[3]The electronic docket for the rule indicates that eighty-one submissions were received. *See* Docket Folder Summary, FR-4998-N-03 Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date, http://www.regulations.gov/search/Regs/home.html#docketDetail?R=HUD-2009-0032.
[4]*See* Memorandum for the Heads of Executive Departments and Agencies from Rahm Emanuel, Assistant to the President and Chief of Staff (Jan. 20, 2009), http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf.

HUD, PHAs and Advocates Respond to Voucher Funding Shortfalls

A significant percentage of public housing agencies (PHAs) nationwide are confronting serious problems because of funding shortfalls in the Housing Choice Voucher Program.[1] It is estimated that between 300 and 400 PHAs nationwide are confronting significant funding shortfalls.[2] Overall, the Department of Housing and Urban Development (HUD) estimates that 15% of all PHAs are affected.[3] The shortfalls are due to a variety of factors, including:

- Congress underfunded voucher renewals for 2009 by $250 million;[4]
- the final FY 2009 appropriations bill was delayed from October 2008 to March 2009,[5] and PHAs did not learn from HUD of their funding levels until May 2009;[6]
- Congress continued the "Reserve Offset" policy, and some PHAs' reserves were lower than the levels HUD had anticipated;[7]
- families have lost jobs and income due to the current economic crisis, which has increased the costs of the voucher program;[8]
- rents continue to increase, thereby increasing the required amount of subsidies;
- the data on which HUD based the individual funding levels for some PHAs for Fiscal Year (FY) 2009 was not accurate; and
- due to the recession, families are not leaving the voucher program as rapidly as in prior years, and PHAs have less flexibility to respond to funding shortfalls.

HUD's Response

In response to the funding shortfall, HUD has engaged in a variety of efforts. It is working with individual PHAs and has held a web-based training to provide suggestions on how to address funding shortages.[9] On July 31, 2009, Sandra Henriquez, Assistant Secretary for Public and Indian Housing, sent a letter to all PHA executive directors informing them of the steps HUD is taking to prevent terminations of voucher families.[10] That same day, HUD issued a press release setting forth its plan to lessen the impact of the shortfalls.[11] Further, it awarded PHAs $100 million from its set-aside fund, which Congress appropriated to give additional support to PHAs in certain situations, such as increased leasing or unforeseen circumstances.[12] A list of the PHAs that received money from the set-aside fund is available online.[13]

Concern About Voucher Terminations

HUD appears to be concerned about preventing terminations of families. In its letter to PHA executive directors, it identified $30 million in extraordinary administrative fees which it will use to prevent terminations.[14] The letter also stated that HUD is "exploring all options under its current authorities" and "will work with Congress on legislative changes to minimize adverse consequences to families and to the other PHAs that are not experiencing shortfalls."[15] Importantly, HUD also instructed all PHAs to notify it no later than August 14, 2009, if they believe that families will be terminated from the voucher program due to insufficient funding prior to the end of the calendar year.[16] Asking PHAs to contact HUD headquarters appears to be a change from the position it took in its June 30, 2009, training, when it stated that PHAs should notify the HUD

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[1]Press Release, United States Department of Housing and Urban Development, HUD Makes Funds Available to Housing Agencies with Section 8 Difficulties (July 31, 2009), http://www.hud.gov/news/release.cfm?content=pr09-143.cfm&CFID=11063322&CFTOKEN=12272784.

[2]*Id.* The identity of these PHAs has not been revealed in any national list.

[3]*Id.*

[4]The Center on Budget and Policy Priorities (CBPP) has estimated that the shortfall is equivalent to twelve months of funding for approximately 30,000 vouchers.

[5]Omnibus Appropriations Act, 2009, Pub. L. No. 111-108 (Mar. 10, 2009); *see also* NHLP, *HUD Appropriations for FY 2009*, 39 Hous. L. Bull. 75 (Mar. 2009).

[6]Omnibus Appropriations Act, 2009, Pub. L. No. 111-108 (Mar. 10, 2009) (requiring HUD to "notify PHAs of their annual budget not later than 60 days after enactment of [the] Act"); *see also* Implementation of the Fiscal Year 2009 Funding Provisions for the Housing Choice Voucher Program, PIH 2009-13 (HA) (May 6, 2009) [hereinafter Notice PIH 2009-13].

[7]Omnibus Appropriations Act, 2009, Pub. L. No. 111-108, § 232 (Mar. 10, 2009); Notice PIH 2009-13, *supra* note 6, ¶ 3.G; *see also* John Hinton, *Section 8 Runs Short on Money*, Winston-Salem (NC) J., Aug. 1, 2009 (reporting that HUD calculated that the PHA had about $6 million in reserve, but the agency said it had $3.2 million); Ann McIntire, *More to Have Housing Vouchers Pulled*, WOWT, July 29, 2009 (reporting that over a two-year period, HUD took $5.6 million out of the Omaha Housing Authority's $6 million in reserves).

[8]*See, e.g.*, Leslie Griffy, *New Section 8 Contracts in Monterey County Suspended*, The Californian, June 23, 2009; Jeremy Gray, *Birmingham Housing Authority Voids Vouchers for Some Section 8 Renters*, Birmingham News, July 20, 2009.

[9]See Department of Housing and Urban Development, Housing Choice Voucher Program: Voucher Management System Financial Management for CY 2009, June 30, 2009, http://www.hud.gov/offices/pih/programs/hcv/webcasts/finman2009jun30.pdf [hereinafter HUD Training].

[10]Letter from Sandra Henriquez, Assistant Secretary for Public and Indian Housing, to Public Housing Agency Executive Directors (July 31, 2009), http://www.nlihc.org/doc/Section-8-Shortfall-letter7-31.pdf.

[11]Press Release, *supra* note 1.

[12]Omnibus Appropriations Act, 2009, Pub. L. No. 111-108 (Mar. 10, 2009).

[13]*See* http://www.hud.gov/offices/pih/programs/hcv/hap09.cfm.

[14]Letter from Sandra Henriquez, *supra* note 10.

[15]*Id.*

[16]*Id.*

field office prior to notifying families of the potential termination of housing assistance.[17] HUD also suggested that PHAs should modify their Section 8 administrative plans prior to terminating families if the plans do not currently state which Housing Assistance Payment contracts (and, therefore, families) will be terminated first. The administrative plan also should contain policies regarding resumption of assistance, if funds become available.

Advocates should contact HUD directly if their local PHA did not contact HUD by the August 14 deadline or if it appears that the local PHA has underestimated the funding shortage. Some PHAs may be reluctant to contact HUD because they are concerned about local political ramifications, they may not be aware that they were required to contact HUD, or they may have an unrealistic view of their ability to respond to the problem.

There have been many reports of PHAs terminating vouchers or considering such action.[18] Some of these agencies have had a reprieve because they received emergency assistance from the set-aside fund. But many say that the funding was inadequate, and that terminations will be inevitable unless there is additional funding.[19] Others are effectively terminating families by refusing to reissue vouchers for families that were unwittingly approved for a move and the HAP contract has since been canceled.

Use of Local Funds and Cost-Cutting Policies

HUD has suggested several strategies that PHAs may adopt to address the funding shortfall, including the use of program and administrative fee reserves, the use of non-voucher funds, and the adoption of policies to cut costs. For example, many PHAs plan to use all or nearly all of their program and administrative reserves to cover funding shortfalls.[20] Some have been successful in obtaining non-voucher funds to address the problem.[21]

Additionally, HUD has urged PHAs to adopt a variety of cost-cutting policies. Most of these policy changes may have a substantial impact on residents and are of varying degrees of effectiveness with respect to cutting costs. The strategies suggested are similar to those applied during the 2005 voucher funding crisis.[22] For instance, HUD has urged the affected PHAs to reduce the payment standard. PHAs have the authority to set the payment standard between 90% and 110% of Fair Market Rent (FMR).[23] If there is an increase in the payment standard, the increase in rent that a tenant must pay may vary dramatically due to the local rental market. For example, the FY 2009 FMR for a two-bedroom unit in Monterey, California, is $1125, as compared to $698 in Birmingham, Alabama. Changes in the payment standard for these two jurisdictions may result in rent increases of as much as $140 to $225 per month.[24] If the PHA reduces the payment standard and seeks to implement the reduced standard immediately, the PHA must seek and obtain a waiver from HUD of the rule that states that a decrease in the payment standard is effective on the date of the family's second regular reexamination.[25] HUD has recently reminded PHAs of this obligation and provided instructions to PHAs regarding waiver requests.[26]

Additionally, HUD has suggested that PHAs review their utility allowances to determine whether they are too high, and that changes to the allowances may be implemented immediately. HUD also noted that PHAs could request a waiver of their obligation to adjust utility allowances when local utility rates increase by 10% or more.[27] With respect to portability, HUD has suggested that PHAs deny portability moves and voluntary moves within their jurisdiction if the move is to a higher-cost unit or a higher-cost area.[28] No mention is made regarding the fair housing implications of denying these moves, such as when a tenant is seeking to move to an area that is not racially impacted or is moving due to job opportunities and better schools. In addition, some PHAs have determined that they will not absorb any families that are moving into the jurisdiction (also known as port-ins).

HUD has also encouraged strict enforcement of rent reasonableness standards, to ensure that participating landlords are charging rents that reflect the true market value. HUD reminded PHAs that they do not have to wait for the anniversary date of the Housing Assistance Payment contract to make these adjustments[29] and noted that landlords could be asked to voluntarily reduce the rent.[30] Additionally, HUD encouraged PHAs to consider refraining from reissuing new vouchers and pulling back

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[17]HUD Training, supra note 9, slide 35.

[18]*See, e.g.*, Julia Lyon, *125 Utah County Families to Lose Section 8 Subsidy*, Salt Lake Trib., July 31, 2009; Gray, *supra* note 8. A PHA may terminate a HAP contract if "funding under the consolidated [Annual Contributions Contract] is insufficient to support continued assistance for families in the program" 24 C.F.R. § 982.454.

[19]*Section 8 Support Ends for Douglas County H.A. Recipients: 51 Residents to Lose Funds By Aug. 31*, KETV, Aug. 7, 2009.

[20]HUD Training, supra note 9, slide 36 (suggesting using administrative reserves, HOME funds and using vacant public housing units); *see also* Lyon, *supra* note 18 (discussing the use of Homelessness Prevention and Rapid Rehousing Program funds to support the voucher program).

[21]*Id.*

[22]For an extensive list of the strategies that a PHA may adopt, see CBPP and NHLP, Possible PHA Strategies to Respond to a Funding Shortfall in 2005.

[23]24 C.F.R. § 982.503(b) (2008); McIntire, *supra* note 7 (reporting that PHA is proposing to cut the payment standard to 90% of FMR); Gray, *supra* note 8 (reporting that PHA board approved reducing the payment standard from 110% of FMR to 90%).

[24]Final Fair Market Rents for Fiscal Year 2009 for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program, 73 Fed. Reg. 56,638 (Sept. 29, 2008).

[25]§ 982.505(c)(3).

[26]HUD Training, supra note 9, slide 25.

[27]*Id.* slide 26; § 982.517(c).

[28]HUD Training, supra note 9, slide 27.

[29]*Id.* slide 28; § 982.507(a)(3).

[30]During the 2004 and 2005 voucher funding crisis, some PHAs reported that landlords offered to reduce the rent.

vouchers for applicants who are searching for housing but who have not yet leased a unit.[31]

HUD has also urged strict enforcement of bedroom-size provisions, noting that two persons per bedroom is acceptable, as is an efficiency unit instead of a one-bedroom subsidy for a single person.[32] Under such policies, a three-person family is eligible only for a two-bedroom subsidy, regardless of their family composition. Another strategy that HUD encourages is to increase the minimum rent for program participants to the maximum of $50.[33] Such a policy, of course, would most severely impact the lowest-income families. HUD additionally suggested that PHAs accelerate family income verification and other anti-fraud efforts and conduct interim rent adjustments when family income increases.[34]

Advocates' Response

Local advocates may take a variety of actions to address voucher funding shortages in their communities, including:

- working with their PHAs and HUD to try to understand the scope of the problem;
- supporting PHAs' efforts to obtain funding from other sources;
- urging PHAs to take steps that will have the least adverse impact upon tenants, such as rigorous rent reasonableness determinations and voluntary reductions in rent;
- urging PHAs to be open and forthright with voucher program participants and the public regarding the financial situation so that there can continue to be broad support for the program; and
- meeting with congressional members and staff to explain the problem.

Future action by advocates at the national level may include:

- supporting HUD's efforts to request additional funds for the voucher program from Congress;
- asking HUD to take steps to restore confidence in the voucher program; and
- urging HUD to discourage PHAs from implementing policies that undercut the voucher program, such as adopting inadequate payment standards, restricting portability, declining to reissue vouchers when families leave the program, and terminating tenants for minor or correctable violations.

Conclusion

Termination of families due to the voucher funding shortfall is not an acceptable solution and must be taken only if all alternatives have been exhausted. HUD appears to agree with this position, as noted in its July 31 letter and press release. However, in the event that litigation is required to protect current voucher participants, there are successful models from the 2005 voucher funding crisis.[35] In addition to litigation, advocates should continue to work with PHAs and HUD, engage the media, and educate congressional representatives of the problems and consequences of underfunding the voucher program. ■

[31] *See, e.g.*, Griffy, *supra* note 8 (reporting that fifty-four Monterey County families will have to put their housing searches on hold).
[32] HUD Training, supra note 9, slide 30; § 982.401(d)(2)(ii).
[33] § 5.630(a)(2).
[34] Policies that rapidly adjust the rent based on increases in income, especially increases that are due to employment-related income, may have a tendency to discourage families from working.
[35] In 2005, advocates filed complaints on behalf of voucher participants threatened with eviction due to a funding shortfall. Copies of those complaints and the motions for temporary restraining orders and preliminary injunctions are available at www.nhlp.org.

Home Affordable Modification Program: Help for Homeowners or Another Dead End?*

A class-action lawsuit recently filed in federal district court in Minnesota seeks to halt foreclosures on properties where a homeowner is eligible for a loan modification under the Home Affordable Modification Program (HAMP). In *Williams v. Geithner*,[1] the plaintiffs allege that HAMP's failure to provide homeowners with notice that their modification request has been denied or an opportunity to appeal their rejection violates constitutional procedural due process standards. The complaint names as defendants the government agencies responsible for implementing the HAMP program, including the U.S. Department of the Treasury, the Federal Housing Finance Agency, Fannie Mae and Freddie Mac. It also names loan servicers who have elected to participate in the HAMP program, including Ocwen Loan Servicing and Homecomings Financial. The plaintiff-homeowners are represented by the Foreclosure Relief Law Project, a program of the St. Paul-based Housing Preservation Project.

This article describes the difficulties homeowners have faced in seeking HAMP modifications and provides background information on the program. It then discusses the constitutional theories and precedent on which the *Williams* action is based.

Understanding the Problem

Williams highlights the plight of thousands of homeowners nationwide. As an example, class member Carey Koppenberg and her husband were able to comfortably make their monthly mortgage payments on their modest rural Minnesota home. When Mr. Koppenberg passed away, Ms. Koppenberg was left to pay the mortgage on her salary alone. She even took on a second part-time job to generate more income to make her mortgage payments, but she soon fell behind.

Ms. Koppenberg's mortgage is owned by Fannie Mae, a proponent of and participant in HAMP. At the request of her housing counselor, Ms. Koppenberg applied for a HAMP loan modification, noting that she easily met the eligibility requirements set out by Fannie Mae. Ms. Koppenberg filled out and sent in the necessary paperwork and documentation to her loan servicer. She even called the servicer to confirm that it received her application.

Ms. Koppenberg then waited to hear from the servicer about her admittance into the program. Although Ms. Koppenberg's application was submitted, her house sold at a sheriff's sale—in direct contradiction to the HAMP guidelines. The guidelines state that as long as a homeowner has submitted an application for HAMP, the foreclosure sale is to be put on hold until eligibility can be determined.[2]

Ms. Koppenberg has no idea why she was denied by the program, as she was an ideal candidate. Ms. Koppenberg received neither a notice of her denial nor an opportunity to appeal the decision. Her case illustrates some of the many difficulties homeowners throughout the country have encountered in attempting to apply for a HAMP loan modification.

Congressional Authority for HAMP

HAMP is a direct mandate from Congress to help modify the loans of people who can no longer afford them due to a recent financial hardship. Congress passed the Emergency Economic Stabilization Act of 2008 (EESA) on October 3, 2008.[3] The purpose of EESA was to grant the Secretary of the Treasury the authority to restore liquidity and stability to the financial system and ensure that such authority was used, in part, to "preserve homeownership."[4] In addition to allocating $700 billion to the United States Department of the Treasury, the Act also specifically granted the Secretary of the Treasury the authority to establish the Troubled Asset Relief Program (TARP).[5]

In exercising its authority to administer TARP, Congress mandated that the Secretary "shall" take into consideration the "need to help families keep their homes and to stabilize communities."[6] To that end, Congress created two specific sections within Title I of EESA related to homeowners.[7] Section 109 is entitled "Foreclosure Mitigation Efforts," and specifically states that the Secretary "shall" implement a plan to "maximize assistance for homeowners."[8] These efforts are to be coordinated with other federal agencies, including the Federal Housing Finance Agency (FHFA), which is the conservator for Fannie Mae and Freddie Mac.[9]

Implementation of HAMP

Pursuant to the authority granted by Congress, the Treasury Secretary and the Director of the FHFA announced the creation of the Making Home Affordable program on February 18, 2009. Making Home Affordable

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*The authors of this article are Jane Bowman and Mark Ireland of the Housing Preservation Project (HPP). Ms. Bowman and Mr. Ireland are attorneys with the Foreclosure Relief Law Project, a program of HPP.

[1]Complaint, Williams v. Geithner, No. 09-CV-1959 (D. Minn. July 28, 2009), *available at* http://www.hppinc.org/projects/index.php?strWebAction=resource_detail&intResourceID=112.

[2]*See* Fannie Mae, Announcement 09-05R.

[3]H.R. 1424, 110th Cong. (2008).

[4]*Id*. § 2.

[5]12 U.S.C. §§ 5211, 5225 (2008).

[6]12 U.S.C. § 5213(3) (2008).

[7]*See* § 5313(3).

[8]§ 5219(a).

[9]§ 5219(a).

consists of two programs: (1) HAMP and (2) the Home Affordable Refinance Program (HARP), which assists homeowners in refinancing into more affordable loans.[10] The Treasury Department has allocated at least $50 billion of its TARP money and $25 billion in non-TARP money to fund the refinance and modification programs.

Participation in HAMP is mandatory for servicers of loans owned or guaranteed by government sponsored enterprises (GSEs) Fannie Mae and Freddie Mac. HAMP participation is voluntary for servicers of non-GSE loans, but there are financial incentives for servicers who opt into the program. If a servicer agrees to participate in HAMP, all of its loans must be considered for eligibility for the program. HAMP's scope is broad: approximately 85% of U.S. homeowners are eligible for the program.

Homeowners who meet the government's criteria and standards for the program are entitled to a loan modification pursuant to the terms of HAMP. Thus, a servicer implementing HAMP does not have discretion to deny access to the program to homeowners who satisfy the criteria.

By statute, the Treasury Department, Fannie Mae and Freddie Mac must jointly develop the policies and procedures for HAMP. Fannie Mae is also the federal government's fiscal agent for HAMP. Freddie Mac is responsible for compliance, meaning auditing servicers for compliance with program rules and protocols.

Steps for Modification

HAMP is premised on the idea that getting a homeowner's monthly payment to 31% of the homeowner's gross monthly income will be a sustainable loan modification.[11] Prior to any foreclosure, servicers are required to follow three basic steps for all distressed homeowners with the goal of reaching a monthly mortgage payment of 31% of the homeowner's gross monthly income.[12]

The first step is to identify the homeowner's income. Initially, the income may be unverified, and then the mortgage loan servicer must create a three-month trial period while it verifies income. The second step is to calculate the "target payment," which is 31% of the homeowner's gross monthly income.

The third step is to implement the "loss mitigation waterfall." The servicer is required to apply each loss mitigation tool within the waterfall, in the correct order, until the servicer reaches the target payment. There are four loss mitigation tools in the waterfall, which must be applied in the following order. First, the servicer must capitalize arrearages, meaning that accrued interest, funds advanced by the servicer, and appropriate foreclosure expenses incurred by the servicer are added to the existing principal balance of the mortgage loan. Second, the servicer must reduce the interest in increments of .125% until the target payment is reached, or the servicer reaches a 2% floor. Third, the servicer must extend the term of the loan or amortization period by one-month increments until the target payment is reached. The loan schedule cannot exceed forty years from the date of the loan modification. Fourth, the servicer must forbear a part of the principal balance, meaning that the principal amount of the loan will be reduced in $100 increments until the target payment is reached. The reduction, however, is not forgiven. It is simply a balloon payment that must be paid at the end of the loan term. The principal balance forbearance does not accrue interest or amortize. It is also not included in calculating a monthly payment.

Lack of Procedural Requirements for Denying HAMP Modifications

There is no requirement that homeowners receive an explanation of the specific reasons for the denial of a HAMP modification, and, in fact, the government requires no notice at all. The government has not developed a model letter for denying a HAMP modification. Further, there is no requirement that servicers disclose the manner in which they applied the loss mitigation waterfall. Even if a homeowner is notified as to why she was denied entrance into HAMP, there is no opportunity for her to appeal the decision or correct inaccurate information used to make the denial decision.

Similarly, there are no procedures to provide relief for homeowners who have been wrongfully foreclosed upon prior to evaluation for eligibility in the program. Specifically, if the servicer failed to comply with the loss mitigation waterfall or otherwise violated the homeowner's due process rights, there is no appeal procedure, much less any protections ensuring that appeals will be properly considered and impartially decided. Even if it was determined that a homeowner was wrongly foreclosed upon, there are no procedures in place to set aside the sheriff's sale and reinstate the mortgage with its terms modified pursuant to HAMP.

The *Williams* Lawsuit

The *Williams* action was filed in July 2009. The suit seeks class action status, aiming to help all Minnesota homeowners with a HAMP-eligible loan. The proposed class is comprised of borrowers who are: (1) Minnesota homeowners who have a mortgage loan owned by Fannie Mae or Freddie Mac or that is serviced by a mortgage loan servicer who has volunteered to participate in HAMP; (2) who currently occupy the mortgaged property as their primary residence; and (3) have been or will be denied

[10]HARP is not at issue in the *Williams* case.

[11]See U.S. Department of Treasury, Making Home Affordable: Summary of Guidelines (Mar. 4, 2009), http://www.ustreas.gov/press/releases/reports/guidelines_summary.pdf.

[12]*See* Fannie Mae, Announcement 09-05R; Freddie Mac, Single Family Servicer Guide C65.1; Treasury Department, Supplemental Directive 09-01.

a loan modification through HAMP without receiving a notice of the reason for the denial or an opportunity to appeal.

There are two subclasses: (1) homeowners with mortgages that are currently in pre-foreclosure proceedings or at risk of being foreclosed upon, although a sheriff's sale has not yet occurred; and (2) homeowners whose homes have been sold at a sheriff's sale after March 4, 2009.

As a first step, the homeowners have asked the court to halt all foreclosure proceedings on HAMP-eligible loans while those loans are being evaluated for a modification.

Due Process and HAMP

The Fifth Amendment to the U.S. Constitution commands that "[n]o person shall…be deprived of life, liberty, or property, without due process of law…."[13] Procedural due process requires meaningful notice of the specific reason why a person has been denied admission into an entitlement program and an opportunity to correct mistakes or appeal an adverse decision as well as notice of such an opportunity.

Government entities that administer entitlement programs are constitutionally obligated to provide program regulations, guidelines or rules that comport with procedural due process. HAMP is one of the government's largest entitlement programs, budgeting $75 billion toward restructuring homeowners' mortgages to make them more affordable.

Because HAMP has no denial safeguards and no appeals process, the counts in the complaint are simple. The complaint alleges that the defendant federal agencies failed to promulgate rules requiring servicers to provide homeowners with notice when their HAMP modifications have been denied, and they did not require servicers to provide a mechanism for appealing such denials.

The Plaintiffs' First Step: Preliminary Injunction

On October 1, 2009, District Judge Ann Montgomery will hear oral arguments on the homeowners' motion for a preliminary injunction,[14] which seeks to halt foreclosures until HAMP is constitutionally sound. According to HAMP guidelines, a foreclosure sale is not to proceed while a homeowner's HAMP application is being evaluated.[15] Despite this, servicers continue to pursue foreclosures, while homeowners are told simply to wait to hear about their HAMP loan modification. Oftentimes, homeowners are essentially left in a state of limbo, where they have submitted all required documents and must simply wait while their foreclosure sale marches forward. Any notice of denial from HAMP usually comes in the form of a sheriff's sale.

As a first step, the homeowners have asked the court to halt all foreclosure proceedings on HAMP-eligible loans while those loans are being evaluated for a modification. If the homeowners' motion is granted, the U.S. Treasury, Fannie Mae, Freddie Mac and HAMP-participating servicers will have an opportunity to review their procedures and guidelines to make sure they pass constitutional muster.

Relevant Precedent

The homeowners' motion for preliminary injunction relies upon a factually similar series of cases in the Eighth Circuit Court of Appeals related to the government's loss mitigation and foreclosure prevention programs during the foreclosure farm crisis in the early 1980s.[16] Although some of the individual claims raised in these cases differ from the *Williams* complaint, the types of class plaintiffs and the procedural posture are analogous. In these cases, the plaintiffs either had a loan owned by the Farmers Home Administration (FmHA) or were eligible to obtain a special loan from FmHA that would prevent foreclosure of their farms.[17] In each case, the court issued a preliminary injunction of foreclosure proceedings, in essence a foreclosure moratorium, until the government promulgated proper procedures making the government's foreclosure prevention program constitutionally sound.[18]

In *Allison v. Block*, a farmer sought to enjoin the federal government from foreclosing on his property.[19] The Allisons alleged that the failure of the Secretary of the Department of Agriculture to promulgate adequate procedural and substantive regulations to prevent foreclosure amounted to a denial of equal protection and due process, and constituted an abuse of administrative discretion.[20] The district court agreed, and enjoined the foreclosure until the Secretary promulgated the necessary regulations.[21]

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[13]U.S. CONST. amend. V.

[14]Complaint, Williams v. Geithner, No. 09-CV-1959 (July 28, 2009).

[15]*See supra* note 12.

[16]*See* Johnson v. U.S. Dep't of Agric., 734 F.2d 774 (11th Cir. 1984); Allison v. Block, 723 F.2d 631, 636-37 (8th Cir. 1983); Gamradt v. Block, 581 F. Supp. 122 (D. Minn. 1983); Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983); *see also Shick v. Farmers Home Admin. of the U.S Dep't of Agric*., 748 F.2d 35, 41 (1st Cir. 1984) (granting injunction of foreclosures on due process grounds).

[17]*See Johnson*, 734 F.2d at 774; *Allison*, 723 F.2d at 636-37; *Gamradt*, 581 F. Supp. at 122; *Coleman*, 562 F. Supp. at 1353.

[18]*Id.*

[19]*Allison*, 723 F.2d at 633.

[20]*Id.*

[21]*Id.*

In *Gamradt v. Block*, a class of farmers argued that they were eligible for a statutory deferral program that would help many of them avoid foreclosure.[22] The farmers' major contention was that they were entitled to notice and an opportunity to participate in the deferral program, and many of them were not provided this opportunity.[23] The farmers asked the court to enjoin the government from accelerating indebtedness, foreclosing or liquidating their property until it promulgated regulations that "satisfy due process," including adequate notice, hearing and appeals procedures, and an opportunity to exhaust their rights.[24] The district court granted the preliminary injunction, enjoining foreclosures until the government satisfied procedural due process, including providing a written decision showing the proper application of the program's standards prior to any adverse action.[25]

Similarly, in *Coleman v. Block,* the court granted the requested preliminary injunction.[26] The court found that, although the farmers were not expressly granted the right to notice in the statute, "this still does not take away from the presumption that the Congress acts consistently with the notions of basic fairness."[27] Therefore, the court found that the farmers were entitled to an injunction against the government or a foreclosure moratorium until the government provided a "written decision specifying in some detail why the loan deferral was not granted." The court found that such a decision was necessary "both to insure that the Secretary gives full consideration to the borrower's request and to give the borrower a basis on which to review the decision."[28]

Finally, in *Johnson v. U.S. Department of Agriculture*, a class of farmers whose properties had already been foreclosed upon sought an injunction related to the liquidation or transfer of their property because of procedural due process issues related to FmHA's foreclosure mitigation programs.[29] Although the farmers were found to have had notice, there was not a meaningful opportunity to appeal a decision of denial to a neutral party.[30]

As in *Allison*, *Gamradt*, *Coleman* and *Johnson*, the government agencies named in *Williams* have created a program to prevent foreclosure. Much like the plaintiffs in *Allison*, *Gamradt*, *Coleman* and *Johnson*, the *Williams* homeowners have been foreclosed upon or are at imminent risk of foreclosure. Similar to the loss mitigation programs at issue in *Allison*, *Gamradt*, *Coleman* and *Johnson*, access to HAMP could prevent foreclosure, but the government has failed to promulgate rules that require written notification of any adverse decision and an opportunity to appeal to a neutral party. Accordingly, the outcome of the *Williams* motion for preliminary injunction may depend on the court's willingness to apply reasoning similar to that used in these cases.

HAMP Litigation: Impact Beyond Minnesota

One of the major goals of the *Williams* litigation is to halt foreclosures in Minnesota until HAMP can be properly applied to the loans of all homeowners who are eligible for the program. However, the litigation has the potential to affect homeowners throughout the country. Should the homeowners' motion for a preliminary injunction be granted, any HAMP guidelines issued as a result of the litigation could and should be used in other states. Advocates interested in the potential impact of the *Williams* litigation should contact the Housing Preservation Project at (651) 642-0102 or visit www.hppinc.org. ■

NHLP Launches Redesigned and Expanded Website

The National Housing Law Project (NHLP) is extremely pleased to announce the launch of our new website, accessible at http://nhlp.org.

Our new website offers much more than an updated look. We have planned its structure to streamline access to information. Breaking news in the housing community and NHLP's latest activities are prominently featured, and will be continually updated, on our home page. Our Attorney/Advocate Resource Center provides access to the latest information on all of NHLP's initiatives. Within each initiative are cases, articles and materials, regulations and statutes, and helpful links. Housing Justice Network members have additional access to resource materials specifically designed for advocates.

NHLP's look has changed, but our goal remains the same: to support our allies in the fight for housing justice with the best assistance and resources that we can offer. If, while visiting our site, you think of improvements to help us do that more effectively, please let us know at nhlpweb@nhlp.org.

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[22] *Gamradt*, 581 F. Supp. at 125.
[23] *Id.*
[24] *Id.* at 124.
[25] *Id.*
[26] *Coleman*, 562 F.Supp. at 1362.
[27] *Id.*
[28] *Id.*
[29] *Johnson*, 734 F.2d at 775.
[30] *Id.*

California Cities Take Steps to Protect Tenants in Foreclosed Properties*

In two important developments involving the rights of tenants in foreclosed properties, Richmond, California, has enacted an ordinance affording additional protections to these tenants, while the City of Oakland has settled its case against a bank that sought to evict these tenants illegally. In Richmond, the city council unanimously enacted a just cause eviction ordinance for tenants living in foreclosed properties.[1] Landlords may evict these tenants only for twelve specified reasons, such as failing to pay rent, violating the lease, damaging the rental unit or using the unit for illegal activity.[2] A landlord seeking to evict a tenant from a foreclosed property must serve upon the tenant a notice that sets forth the reasons for the termination.[3] Landlords are prohibited from decreasing services, increasing rent or otherwise retaliating against tenants who exercise their rights under the ordinance.[4] The ordinance also provides that landlords must pay relocation fees to tenants in four of the twelve circumstances in which eviction is allowed following foreclosure, such as cases where the landlord seeks to permanently remove the unit from the rental market or substantially rehabilitate the unit.[5] While several California cities have enacted just cause ordinances, Richmond and Los Angeles are the state's only municipalities with laws specifically enacted to prohibit the eviction of tenants in foreclosed properties. Key supporters of Richmond's measure included tenants' rights groups, ACORN and faith-based organizations.

In Oakland, the city attorney has agreed to a settlement with JP Morgan Chase in its lawsuit against the bank for violating the city's just cause eviction ordinance.[6] In February and March, the city filed complaints against several banks, their subsidiaries and local real estate agents for allegedly violating the ordinance by issuing eviction notices to tenants in foreclosed properties.[7] Foreclosure of a rental property is not good cause for eviction under the ordinance.

Under the agreement, JP Morgan Chase will pay the city $35,000 in attorney's fees and damages.[8] However, some tenants' rights organizations have been critical of the agreement because it does not include any admission of liability and does not provide stipulated damages for future violations.[9] The agreement incorporates a sample notice[10] that JP Morgan Chase may use to notify tenants that a property was sold in foreclosure.[11] The sample notice informs tenants that the property was recently sold in foreclosure, that JP Morgan Chase is the agent for the new owner, and that the new owner intends to re-sell the property. The notice clearly states that it is not an eviction notice, and it directs tenants to contact the city attorney's office or legal services if they have any questions regarding their rights and obligations. The notice also directs tenants to call the servicing agent if they have questions concerning the property. Finally, the notice also informs tenants that the new owner may be willing to compensate them if they agree to move out within a specified period of time.

Two local real estate agents named in the suits have also entered into settlement agreements, including one of the local agents named in the JP Morgan Chase complaint. The agents paid the city $3000 and $2500, respectively, in attorney's fees, and agreed to pay the city $5000 for each future violation of the just cause ordinance.[12] One of the agreements requires that the agent refrain from withholding the property owner's name or contact information, engaging in harassing or intimidating behavior towards tenants, terminating utility services to occupied dwellings or changing locks at dwellings without proper notice to occupants.[13] According to the city attorney, settlement negotiations with the other defendants named in the complaints are ongoing.[14] ■

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

[1]Richmond, Cal., Ordinance 16-09, ch. 7.105 (June 16, 2009), http://www.ci.richmond.ca.us/archives/66/16-09%20Enacting%20local%20eviction%20control%20on%20forclosed%20property%20-%20conformed%201.pdf. The ordinance has been enacted but not yet codified.

[2]§ 7.105.020.

[3]§ 7.105.040.

[4]§ 7.105.050.

[5]§ 7.105.030.

[6]Press Release, City of Oakland, Office of the City Attorney, Oakland Reaches Settlement with JP Morgan Chase on Eviction Lawsuit (Mar. 11, 2009), http://www.oaklandcityattorney.org/PDFS/News%20Release/chase%20final%207%202%2009.pdf?f=/c/a/2008/06/05/EDJI113CTT.DTL.

[7]*See, e.g.*, Compl., State v. McNulty, No. 09440648 (Cal. Super. Ct. filed Mar. 11, 2009). For more information on the just cause litigation, see NHLP, *Oakland Alleges that Post-Foreclosure Evictions Violated Just Cause Ordinance*, 39 Hous. L. Bull. 170 (July 2009).

[8]Compromise and Settlement Agreement and Release, between JPMorgan Chase, N.A., Chase Home Fin., LLC, and EMC Mortgage Corp., and the State of California and the City of Oakland, Case No. RG09-440648, at 2 (Cal. Super. Ct. filed Mar. 11, 2009), http://www.tenantstogether.org/downloads/JPMORGAN%20CHASE_SIGNED%20SETTLEMENT%20AGREEMENT.pdf [hereinafter JP Morgan Settlement].

[9]Tenants Together, Rents & Rants, City Attorney Lets Banks Off Easy in Oakland Eviction Case, http://rentsandrants.blogspot.com/2009/07/city-attorney-lets-bank-off-easy-in.html.

[10]JP Morgan Settlement, *supra* note 8, at Ex. A.

[11]*Id.* at 2.

[12]Compromise and Settlement Agreement and Release, between Joseph McNulty and Belle Rose Properties, Inc., and the State of California and the City of Oakland, pursuant to State v. McNulty, No. 09440648, at 3 (Cal. Super. Ct. filed Mar. 11, 2009), http://www.tenantstogether.org/downloads/McNulty%20settlement.pdf; Compromise and Settlement Agreement and Release, between Percy Cheung and dba Smart Choice Realty, and the State of California and the City of Oakland, pursuant to State v. Cheung, No. 09-436902, at 3 (Cal. Super. Ct. filed Feb. 19, 2009), http://www.tenantstogether.org/downloads/Oakland%20Eviction%20Settlement.pdf.

[13]Settlement Agreement pursuant to State v. McNulty, No. 09440648, at 2.

[14]Press Release, *supra* note 6.

Cities' Suits Seek Foreclosure-Related Damages*

Last year, the cities of Baltimore and Cleveland filed groundbreaking litigation against banks to seek redress for damages caused by the foreclosure crisis. Both cities have experienced massive waves of foreclosures in recent years. In Cleveland, the number of foreclosures "increased from the low triple digits to more than 7,500" between 2002 and 2007, with the great majority of foreclosures involving subprime mortgages.[1] Baltimore's numbers are similarly staggering: since 2000, more than 33,000 homes in the city have been subject to foreclosure filings.[2] The cities filed separate suits against banks in January 2008, resulting in different outcomes at the motion to dismiss stage. While a federal district court dismissed Cleveland's case in May 2009, Baltimore's federal claim survived a motion to dismiss shortly after. This article examines the differences between the two cases, and attempts to distill why Baltimore's case survived a motion to dismiss and Cleveland's did not. Given the heightened pleading standards recently set forth in the Supreme Court's decision in *Ashcroft v. Iqbal*,[3] the decisions in the Baltimore and Cleveland cases provide critical cues for parties considering similar litigation.

Background and Procedural History

Baltimore filed its complaint in federal district court in January 2008.[4] The city sued Wells Fargo under the Fair Housing Act (FHA), alleging that the bank engaged in reverse redlining by targeting predominantly African-American neighborhoods for subprime mortgages.[5] Baltimore stated no direct FHA claim against Wells Fargo. Instead, the city claimed that it suffered damages as a result of Wells Fargo's discriminatory practices, which allegedly led to increased rates of foreclosures in targeted neighborhoods.[6] According to the city, these damages included lost property tax revenue, police and fire protection costs, and the costs of managing the foreclosed properties.[7] Wells Fargo filed a motion to dismiss, challenging the city's standing and arguing that the complaint failed to state a cognizable FHA claim.[8] Prior to deciding the motion, the court ordered limited discovery and set a hearing to "test[] the threshold sufficiency" of the city's factual support.[9] Based on affidavits by former Wells Fargo employees regarding the bank's practices, the court found the city alleged sufficient facts for the case to proceed under both disparate treatment and disparate impact theories and denied the motion to dismiss.[10]

Cleveland also filed its complaint in January 2008. The city originally filed suit in state court, and the defendant banks subsequently removed the action to federal court. The city asserted a public nuisance claim alleging that twenty-one banks that had securitized subprime loans contributed to the city's foreclosure crisis.[11] Like Baltimore, Cleveland alleged damages in the form of monitoring, maintenance and demolition costs, as well as decreased property tax revenues associated with the foreclosures.[12] In August 2008 a federal district court denied Cleveland's motions to remand the case to state court, and in May 2009 it granted the banks' motions to dismiss. The court cited four reasons for the dismissal: state law preemption, the economic loss doctrine, failure to establish unreasonable interference with a public right and insufficient proximate cause.[13]

Baltimore: Affidavits Key to City's Case

In response to the standing challenge in Wells Fargo's motion to dismiss, the federal district court in Baltimore's case focused on the sufficiency of the evidence in the complaint. In a rather sparse decision, the court stated that it would allow the claim to proceed because of the new affidavits of two former Wells Fargo employees, Elizabeth Jacobson and Tony Paschal.[14] The allegations in the affidavits painted a disturbing picture of pervasive and condoned discriminatory practices. Jacobson, a Wells Fargo subprime loan officer for nine years, described in detail the variety of strategies the lender allegedly used to target Baltimore's African-American population. These included "wealth building" seminars designed to market subprime loans to predominantly African-American audiences.[15]

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

[1]Second Amended Complaint at 4, City of Cleveland v. Ameriquest Mortgage Secs., Inc., __F. Supp. 2d __, 2009 WL 1373141 (N.D. Ohio May 15, 2009) (No. 08-139) [hereinafter Cleveland Complaint].

[2]First Amended Complaint for Declaratory and Injunctive Relief and Damages at 1, Mayor and City Council of Baltimore v. Wells Fargo Bank, __ F. Supp. 2d __, 2009 WL 1916240 (D. Md. 2009) (No. 08-062) [hereinafter Baltimore Complaint].

[3]*See* 129 S. Ct. 1937 (2009). For more information regarding the impact of the *Iqbal* decision on federal pleading requirements, see Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. Times, July 20, 2009, http://www.nytimes.com/2009/07/21/us/21bar.html?_r=2&ref=us.

[4]Mayor and City Council of Baltimore v. Wells Fargo Bank, __ F. Supp. 2d __, 2009 WL 1916240, at *1 (D. Md. 2009).

[5]Baltimore Complaint, *supra* note 2 at 2-3, 12.

[6]*Baltimore*, 2009 WL 1916240, at *1.

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.* at *1-2.

[11]City of Cleveland v. Ameriquest Mortgage Secs., Inc., __F. Supp. 2d __, 2009 WL 1373141 at *1 (N.D. Ohio 2009).

[12]*Cleveland*, 2009 WL 1373141, at *1.

[13]*Id.*

[14]*Baltimore*, 2009 WL 1916240, at *2.

[15]Attachment M, Declaration of Elizabeth M. Jacobson at 10-11, Mayor and City Council of Baltimore v. Wells Fargo Bank, __ F. Supp. 2d __, 2009 WL 1916240 (D. Md. 2009) (No. 08-062) (hereinafter "Jacobson Declaration").

Jacobson's affidavit also stated that the lender conducted presentations at churches ("code for African-American or black churches") because "Wells Fargo believed that African American church leaders had a lot of influence over their ministry."[16] Jacobson's affidavit further states that similar activities did not take place in predominantly white communities, and that she herself was barred from participating in the presentations because she was "too white."[17] Paschal was a Wells Fargo loan officer for eight years,[18] and his affidavit contains allegations similar to those in Jacobson's affidavit. According to Paschal, Wells Fargo employees told minority loan applicants that interest rates were "locked" when they were not, the bank hired African-American loan officers specifically to market subprime loans to African-American churches and individuals, and Wells Fargo targeted its marketing to zip codes with predominantly minority populations.[19] Paschal's declaration includes a screen shot of a Wells Fargo database displaying an option for an employee to print subprime marketing materials in the "language" of "African American."[20] Paschal also stated that Wells Fargo discriminated against minority loan applicants by forcing them into subprime loans when they qualified for traditional, lower-interest loans.[21] On the basis of these affidavits, the court allowed Baltimore's FHA claim to move forward.[22]

Cleveland: Public Nuisance Claims Unsuccessful

Cleveland's complaint asserted common law public nuisance claims and therefore presented arguments that substantially differed from Baltimore's complaint. In contrast to the evidentiary issues that were the centerpiece of the Baltimore decision, the federal district court's decision in Cleveland's case focused on the merits of the nuisance claims. The court first held that Ohio Revised Code Section 1.63 preempted the public nuisance claim.[23] This section states that the code preempts any "action by a municipal corporation . . . to regulate, directly or indirectly, the origination, granting, servicing, or collection of loans."[24] The court found that the city's public nuisance action constituted an attempt by a municipal corporation to regulate the origination and granting of mortgage loans and was therefore expressly preempted by Section 1.63.[25] Because the code makes no distinction between litigation brought in a proprietary capacity or governmental capacity, and because a public nuisance claim by definition seeks to vindicate a public right, Cleveland could not argue that it was acting as a private litigant rather than a municipal corporation.[26]

Though this holding was sufficient to grant the motion to dismiss, the court went to great lengths to explain three additional reasons why Cleveland's complaint failed to state a claim for relief. First, the court held that the claim was barred by the economic loss doctrine, which bars recovery in tort for economic losses not arising in connection with physical injury to person or property.[27] The court rejected the city's arguments that the doctrine was inapplicable, including its argument that the damages were not exclusively economic because they were related to property damage.[28]

Second, the court found that the city's complaint failed to establish unreasonable interference with a public right.[29] For a public nuisance claim to succeed, the conduct creating the nuisance must not be authorized by statute or regulation.[30] The court found that mortgage lending was heavily regulated by state and federal law and therefore could not be the basis of a cognizable public nuisance claim, despite the city's allegations that the lenders' securitizing activities were negligently performed.[31] The court reasoned that if the underlying mortgage lending activities were sanctioned by statute and regulation, the facilitation of these activities by securitizing and funding subprime loans was also exempt from public nuisance claims.[32]

Finally, the court found that Cleveland's complaint failed due to the remoteness of the alleged harm.[33] Applying the reasoning of the Supreme Court's decision in *Holmes v. Securities Investor Protection Corporation*,[34] the district court found no "direct relationship between the injury asserted and the injurious conduct alleged."[35] According to the court, it would be "tremendously difficult" to determine which of the city's damages were attributable to the banks' securitizing activities, rather than to the potentially "incalculable" number of intervening acts of absent third parties.[36] Further, the court found that subprime borrowers and mortgage-backed securities investors would have been more directly harmed by the alleged misconduct and thus in a better position than the city to vindicate their rights through their own suits.[37] Because Cleveland's action relied upon the harms suffered by these unnamed

[16] *Id.*
[17] *Id.* at 11.
[18] Attachment N, Declaration of Tony Paschal at 1, Mayor and City Council of Baltimore v. Wells Fargo Bank, __ F. Supp. 2d __, 2009 WL 1916240 (D. Md. 2009) (No. 08-062) (hereinafter "Paschal Declaration").
[19] *Id.* at 2, 5.
[20] *Id.* at Exhibit A.
[21] *Id.* at 6.
[22] *Baltimore*, 2009 WL 1916240, at *2.
[23] *Cleveland*, 2009 WL 1373141, at *5.
[24] Ohio Rev. Code § 1.63(B) (Westlaw July 22, 2009).
[25] *Cleveland*, 2009 WL 1373141, at *4.
[26] *Id.* at *4-5.
[27] *Id.* at *9.
[28] *Id.* at *7-9.
[29] *Id.* at *14.
[30] *Id.* at *10.
[31] *Id.* at *11-12.
[32] *Id.* at *14.
[33] *Id.* at *19.
[34] 503 U.S. 258 (1992).
[35] *Cleveland*, 2009 WL 1373141, at *16 (quoting *Holmes*, 503 U.S. at 268).
[36] *Id.* at *16.
[37] *Id.*

parties, the court found that the city's derivative claim failed as a matter of law.[38] For all of the above reasons, the court granted the banks' motions to dismiss.

Did Different Strategies Create Different Outcomes?

The different outcomes in the Baltimore and Cleveland cases can possibly be explained by basic differences in the cities' respective complaints. Baltimore's complaint, grounded in allegations of reverse redlining prohibited by the FHA, outlines specific discriminatory practices of a singular defendant, Wells Fargo. In its amended complaint appending the Jacobson and Paschal affidavits, the city alleges in great detail particular practices of discrimination within an overarching system designed to funnel borrowers into subprime loans. Cleveland's complaint is far more nebulous. Aimed at twenty-one defendant corporations, the complaint describes securitization practices in general but focuses on no one bank's practices in particular.[39] Further, because of its reliance on common law public nuisance doctrine, Cleveland's claim failed for reasons not implicated by Baltimore's FHA claim, such as state law preemption and the economic loss doctrine.

On the other hand, the decisions did raise several issues that were common to both cities' claims. Undoubtedly, for municipalities considering similar litigation in the future, one of the most difficult obstacles to overcome will be standing. Baltimore overcame Wells Fargo's standing arguments based on the sufficiency of the evidence contained within the amended complaint.[40] In Cleveland's case, however, the court found that the city lacked standing due to the remoteness of its injury. Finding that Cleveland's claim was "purely contingent upon harm first visited upon absent third-parties," the court held that the city had no standing to pursue a public nuisance cause of action.[41] The court in Baltimore's case could have used similar logic to dismiss the action, since Baltimore had no direct FHA claim against Wells Fargo.[42] The court did not do so, however, perhaps due to the more direct link that Baltimore alleged between the FHA violation and the damages it sought.

As the outcome of the Cleveland case indicates, claimants in similar cases need to establish a strong connection between a defendant's actions and the damages incurred. Cleveland's decision to sue the subprime securitizers, rather than the lenders themselves, may have proved fatal to its claim. The court repeatedly stated that it was "very important[]" that the defendants were not the parties who had foreclosed on the properties.[43] The nature of Cleveland's public nuisance claim also removed the city from the epicenter of the harm. Cleveland relied on an argument that its economic situation, "distinctive and unique" from the rest of the country, made a foreclosure epidemic a foreseeable result of securitizing activities.[44] In other words, the securitizing, in combination with Cleveland's troubled economy, created a citywide foreclosure crisis for which it sought damages. The court dismissed the action in part because of its concern that the city's damages could be attributed to intervening conduct or events outside of the banks' control.[45] In contrast, Baltimore's FHA claim shortened the chain of events between the defendant's conduct and the city's harm. Baltimore alleged that Wells Fargo engaged in illegal lending practices that created a foreclosure epidemic in targeted minority neighborhoods. The city sought damages from Wells Fargo for the costs associated with foreclosures in those neighborhoods only, rather than on a citywide basis.

Status of Similar Litigation

Several other cases across the country have raised similar claims for damages stemming from the foreclosure crisis. In 2008, the City of Minneapolis prevailed in a suit against a developer whose housing inflation scheme resulted in numerous foreclosures.[46] The city sued under Minnesota's Tenant Remedies Act for control of 141 of the developer's properties and won a court order assigning possession of the properties to a third-party receiver.[47] The NAACP has filed a class action against many of the same banks named in the Cleveland complaint, alleging that their practices of steering minority loan borrowers into subprime mortgages violated the FHA, the Equal Credit Opportunity Act, and the Civil Rights Act.[48] In January 2009, a federal district court denied the banks' motion to dismiss that case.[49] In Buffalo, the city has sued thirty-nine lenders for violating state and local public nuisance laws and the state property maintenance code.[50] The suit seeks damages for the cost of demolishing homes that the banks abandoned, and the city is also pursuing a separate case in housing court to compel banks to maintain their foreclosed properties.[51]

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[38] *Id*. at *18.
[39] Cleveland Complaint, *supra* note 1, at 9-14.
[40] Though initially the "purpose of the hearing was not to decide the standing issue definitively," the court stated at the end of its decision that the question of standing was not fatal to the City's claim at that point in the litigation. *Baltimore*, 2009 WL 1916240, at *1-2.
[41] *Cleveland*, 2009 WL 1373141, at *18.
[42] *Baltimore*, 2009 WL 1916240, at *1.
[43] *Cleveland*, 2009 WL 1373141, at *17, 18.
[44] Cleveland Complaint, *supra* note 1, at 2-3.
[45] *Cleveland*, 2009 WL 1373141, at *17.
[46] Steve Brandt, *Minneapolis Takes Charge of T.J. Waconia Homes in Fraud Case*, Star Trib., Apr. 16, 2008, http://www.startribune.com/local/17818994.html.
[47] *Id*.
[48] NAACP v. Ameriquest Mortgage Co., 2009 WL 2031671 (C.D. Cal. Jan. 12, 2009) (unreported).
[49] *Id*. at *1.
[50] *Backgrounder: Cities Try to Recoup Foreclosure Costs from Lenders/Developers*, 2009 Emerging Issues 3756 (June 11, 2009).
[51] *Id*.

Conclusion

Though it is too early to assess the full impact of the Baltimore and Cleveland cases, there are lessons to be learned from the initial decisions. The result in Baltimore serves as a reminder of the importance of including specific, fact-based allegations in federal complaints, particularly in light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*.[52] The outcome in Cleveland suggests that parties should be wary of relying solely upon common law nuisance doctrine. The court's extensive decision, which devoted nearly twenty pages to striking down the state law claim, indicates the extent to which the court found this cause of action inappropriate for recovering damages stemming from the foreclosure crisis. Discovery costs may also sway courts in a certain direction. Particularly in cases naming multiple large corporate defendants, courts may be leery of the discovery costs inevitable if the claim proceeds.[53] Finally, the issue of standing will be ever critical. The closer the connection between the defendant's actions and the claimant's damages, the greater an action's chance of surviving a motion to dismiss. It may also prove helpful to explain why a municipality is the most appropriate plaintiff to seek relief for a lender's misconduct, and to explain why the municipality's damages differ from those suffered by a borrower or investor. The court in Cleveland proved unwilling to entertain an action where it determined that "directly injured victims exist and have more 'straightforward' legal remedies available to them." [54]

While these cases are notable for their attempts to forge new solutions to foreclosure recovery, it remains to be seen whether they will result in any financial relief for cities saddled with foreclosure-related costs. Cleveland has filed an appeal with the Sixth Circuit,[55] and the parties in the Baltimore case are proceeding to discovery. At a minimum, though, the cases have publicized the impact that predatory and deceptive lending practices have had upon communities, and they may ultimately serve to deter similar practices in the future. ■

[52]*See* 129 S. Ct. 1937 (2009).

[53]Discovery costs were influential even in the ultimately favorable Baltimore decision. The court mandated a "threshold sufficiency" hearing because of its concern that the discovery costs on the merits of this case would be particularly high. Further, in denying the motion to dismiss, the court suggested several ways in which it wanted the city to minimize discovery costs. *Baltimore*, 2009 WL 1916240 at *1-2.

[54]*Cleveland*, 2009 WL 1373141, at *18 (quoting Anza v. Ideal Steel Supply Co., 547 U.S. 451, 460 (2006)).

[55]Amended Notice of Appeal, City of Cleveland v. Ameriquest Mortgage Secs., Inc., __F. Supp. 2d __, 2009 WL 1373141 (N.D. Ohio May 19, 2009) (No. 08-139).

Recent Cases

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

Public Housing: Right to Succession

Detres v. N.Y. City Hous. Auth., __ N.Y.S.2d __, 2009 WL 2431977 (N.Y. App. Div. 2009). After a grievance hearing, the housing authority denied the plaintiff's request to remain in the public housing unit she had occupied with her mother for at least one year before her mother's death. The court remanded the matter to the housing authority for further proceedings. The court found that further consideration was warranted because the plaintiff underwent major brain surgery shortly before the hearing and had exhibited some confusion at the hearing. The court further found that the plaintiff was not afforded a full opportunity to be heard as a result of the hearing officer's failure to question her.

Public Housing: Tenant's Allegations that She Had Been Denied a Hearing and a Hardship Exemption Were Insufficient to State a Claim

Williams v. Hernandez, 2009 WL 2252103 (S.D.N.Y. July 28, 2009). Citing the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, 120 S. Ct. 1937 (2009), the court dismissed a public housing tenant's claims that the housing authority denied her a grievance hearing and a hardship exemption in violation of federal law. The court found that the tenant's allegations that she had been denied a hearing on several occasions and that her request for a hardship exemption was denied one day after it had been made failed to establish more than a "sheer possibility" of unlawful action. The court also dismissed as unripe the tenant's FHA claims alleging discrimination on the basis of race. The court found that the tenant had suffered no actual harm because the housing authority's proceedings against her had not reached the point where she faced "an actual threat of eviction."

[1]http://www.westlaw.com.

[2]http://www.lexis.com.

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

Public Housing: No Federal Cause of Action to Address Habitability Complaints

Brown v. Bennettsville Hous. Auth., 2009 WL 2229620 (D.S.C. July 23, 2009). A public housing tenant filed an action in federal court after being denied a housing choice voucher because the waiting list was closed. The tenant alleged that her public housing unit was uninhabitable due to gas leaks. The court adopted the magistrate judge's recommendation to dismiss the complaint. The magistrate judge found that the tenant did not have a federal private right of action under the United States Housing Act to address her habitability complaints.

Public Housing: Tenants Entitled to Review Relevant Information in Housing Authority Employee's Personnel File

Rogers v. Hous. Auth. of Stratford, 2009 WL 2382653 (D. Conn. July 30, 2009). The plaintiffs alleged that after they filed a fair housing complaint against the housing authority, it retaliated against them by auditing the last five years of their tenant file. Although the housing authority claimed that the plaintiffs had under-reported their income and owed back rent, the plaintiffs asserted that a housing authority employee failed to properly record their income. In discovery, the plaintiffs sought information about the employee's job performance record, but the housing authority objected on privacy grounds and filed a motion to quash. After an in camera review of the file, the court denied the motion to quash, finding that some of the information regarding the employee was relevant to the plaintiffs' claims and could be released to the plaintiffs subject to a protective order.

Housing Choice Voucher Program: Termination for Unauthorized Occupant

Jones v. Dakota County Cmty. Dev. Agency, 2009 WL 2151158 (Minn. Ct. App. July 21, 2009) (unreported). A voucher tenant's subsidy was terminated after she failed to report to the housing authority that another adult was staying in her unit. The court found that substantial evidence, including the statements by the tenant, the unauthorized occupant and his grandmother, and the presence of the occupant's clothing and toiletries in the unit, supported the termination. The court also rejected the tenant's argument that she needed the occupant to live with her and take care of her children as a reasonable accommodation. The court found that the tenant failed to submit sufficient evidence establishing that she had a physical or mental impairment that substantially limited a major life activity. The court therefore upheld the termination.

Housing Choice Voucher Program: Private Landlord Was Not a State Actor

Visintini v. Hayward, 2009 WL 2413356 (N.D. Cal. Aug. 5, 2009). The plaintiff filed a 42 U.S.C. § 1983 action against a private landlord for allegedly refusing to accept the plaintiff as a voucher tenant, even though the landlord had rented to other voucher tenants. The court dismissed the plaintiff's action, finding that she had failed to satisfy § 1983's state actor requirement. The court found that the mere fact that the landlord received Section 8 housing assistance payments was insufficient to constitute governmental action for purposes of a § 1983 claim.

Source of Income Discrimination: New York City Landlords Required to Accept Vouchers from Existing Tenants

Tapia v. Successful Mgmt. Corp., 2009 WL 2163595 (N.Y. Sup. Ct.) (July 20, 2009) (unreported). The court found that landlords must accept housing choice vouchers from current tenants under New York City's J-51 Law and Local Law 10. The case was filed by forty-seven tenants whose landlords refused to allow them to use their vouchers at their existing housing. The landlords argued that the laws protected prospective tenants, but not current tenants with whom the landlords did not have preexisting agreements to accept vouchers. The court rejected this argument, finding that the antidiscrimination clause of the J-51 Law required landlords who received tax benefits under the law to accept vouchers from current tenants. The court further found that Local Law 10, which applies to all rent-stabilized tenants, also requires landlords to accept vouchers from current tenants.

HOPWA: Case Found Moot Where City Voluntarily Rescinded Rent Increase

Rivers v. Doar, __ F. Supp. 2d __, 2009 WL 2253193 (E.D.N.Y. July 29, 2009). In 2006, New York City tenants participating in the Housing Opportunities for People with AIDS (HOPWA) program received letters stating that they would be required to contribute all of their income, save $330 per month, toward their rent. Shortly before the new policy was set to take effect, the tenants filed suit to enforce HOPWA regulations stating that rent under the program is limited to 30% of the tenant's monthly income. The court granted the plaintiffs' motion to preliminarily enjoin the city from implementing the rent increase. The city later rescinded the planned rent increase and filed a motion to dismiss the case for mootness. Over the plaintiffs' objections, the court granted the motion, finding that the city had voluntarily ceased efforts to implement the rent increase. Further, the court found no evidence suggesting that the city intended to reinstate the rent increase.

Fair Housing Act: Conclusory Allegations of Sex Discrimination Insufficient to State a Claim

Willis v. Buckner, 2009 WL 2382771 (E.D. Mo. July 31, 2009). Citing the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, 120 S. Ct. 1937 (2009), the court dismissed the plaintiff's Fair Housing Act claim, which alleged that his landlord discriminated against him "because of sex differences." The court found that the complaint contained no non-conclusory allegations that would show that the landlord ordered the plaintiff to leave his apartment because of his sex. Further, the plaintiff's allegation that the landlord discriminated against him because of his sex was not plausible in light of the fact that the landlord rented the apartment to him for at least nine years.

Fair Housing Act and Uniform Relocation Act: Application to Emergency Shelter

Community House v. City of Boise, 2009 WL 2382428 (D. Idaho July 29, 2009). The plaintiffs alleged that they had been excluded and displaced from a homeless shelter in violation of the FHA and the Uniform Relocation Act (URA), and the city sought summary judgment on these claims. The court first rejected the city's argument that the FHA does not apply to emergency shelters. The court found that the shelter constituted a dwelling for purposes of the FHA because the facility provided more than transient overnight housing and generated up to $125,000 per year in rent. The court next found that the plaintiffs made out a prima facie case of discrimination on the basis of sex and familial status under the FHA. The shelter temporarily closed, and when it reopened, its new operators admitted only single men. The court rejected the city's argument that this policy responded to safety concerns, because the evidence regarding safety issues was disputed. The court dismissed the plaintiffs' claim under the URA, as no federal financial assistance was used in closing or reopening the shelter.

Fair Housing Act: Statute of Limitations

N.D. Dep't of Labor v. Matrix Props. Corp., __ N.W.2d __, 2009 WL 2168747 (N.D. 2009). The state alleged that a development's design and construction violated the accessibility requirements of the FHA and the North Dakota Housing Discrimination Act. The court found that these claims were barred by both laws' two-year statute of limitations. The court found that the statutory period begins to run when a building receives its certificate of occupancy, rather than when a unit in the building becomes available to persons with disabilities.

Fair Housing Act: Vicarious Liability

United States v. Rathbone Retirement Cmty. Inc., 2009 WL 2147878 (S.D. Ind. July 15, 2009). The Department of Justice alleged that the owners of an assisted living facility discriminated on the basis of disability in violation of the FHA by adopting a policy of restricting the use of motorized wheelchairs and scooters. The government alleged that tenants received a written notice from the facility administrator prohibiting the use of motorized wheelchairs and scooters in all residents' apartments and in the dining room. The owners filed a motion for judgment on the pleadings on the grounds that the complaint failed to demonstrate an agency relationship under traditional vicarious liability rules. The court granted the motion, finding that the government failed to allege that the owners controlled or consented to the facility administrator's actions.

Forcible Eviction: Jury Properly Considered Circumstances as Part of Compensatory Damage Award

Johns v. Stillwell, 2009 WL 2390991 (W.D. Va. Aug. 4, 2009). A jury awarded a husband and wife $50,000 in punitive damages and $100,000 apiece in compensatory damages after their landlord forcibly evicted them and burned their possessions. The landlord filed a motion for remittitur, arguing that the jury's damages verdict was excessive. The court denied the motion, finding that the evidence at trial supported a substantial award of damages for the tenants' trespass to chattels and conversion claims. The court also noted that other courts in the state had upheld far more substantial compensatory damages awards for arguably less egregious conduct.

Inclusionary Zoning: State Law Preempts City's Affordable Housing Requirements

Palmer/Sixth St. Props., L.P. v. City of Los Angeles, 96 Cal. Rptr. 3d 875 (Cal. Ct. App. 2009). The court held that the city violated state law when it required a developer either to include a specified percentage of affordable units within his proposed housing project or pay an in-lieu fee. Under the city's Specific Plan, developers of multifamily residential or mixed-use projects were required to either set aside at least 15% of the dwelling units for low-income families or pay in-lieu fees of almost $100,000 per unit. The court found that the Plan conflicted with and was preempted by California's Costa-Hawkins Act, which specifies that residential landlords may "establish the initial rental rate for a dwelling or unit." The court rejected the city's argument that the in-lieu fee did not interfere with the landlord's ability to establish the initial rental rate. According to the court, this provision was "inextricably intertwined with the invalid portion of the Plan's affordable housing requirements." ■

Recent Housing-Related Regulations and Notices

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

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's website,[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 Final Rules

74 Fed. Reg 44,284-44,285 (Aug. 28 2009)
Use of Project Labor Agreements for Federal Construction Projects

Summary: This final rule removes a HUD regulation that prohibits the use of project labor agreements in HUD-assisted construction contracts. Executive Order 13502, entitled "Use of Project Labor Agreements for Federal Construction Projects," and signed by President Obama on February 6, 2009, revoked Executive Order 13202, which had prohibited federal agencies from requiring or prohibiting project labor agreements as a condition for award of any federally funded contract or subcontract for construction. Executive Order 13502, which applies to direct federal procurement of construction, encourages federal agencies to consider requiring the use of project labor agreements in connection with federally procured large-scale construction projects. The Executive Order also allows the use of project labor agreements in circumstances not covered by the Order, including projects receiving federal financial assistance. With the revocation of Executive Order 13202, there is no longer a legal basis for HUD's regulation that implemented that executive order with respect to HUD-assisted projects. Therefore, this rule removes the regulation from the Code of Federal Regulations.

Effective Date: September 28, 2009.

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

HUD Proposed Rules

74 Fed. Reg. 38,715-38,828 (Aug. 4, 2009)
Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2010

Summary: This Notice proposes FMRs for FY 2010 to be used: to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, and to determine initial rents for housing assistance payment (HAP) contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes. The proposed FY 2010 FMR areas are based on current Office of Management and Budget (OMB) metropolitan area definitions and include HUD modifications that were first used in the determination of FY 2006 FMR areas. OMB changes to the metropolitan area definitions through November 2008 are incorporated. Proposed FY 2010 FMRs are based on 2000 Census data updated with more current survey data. HUD is considering reforms and several changes to the methodology for calculating FMRs that are not reflected in these proposed FMRs. HUD will publish a separate Federal Register notice describing and depicting examples of the effects of a number of reforms and improvements to the methodology for estimating Fair Market Rents and requesting public comment. In this Notice, HUD is seeking public comments suggesting items for consideration in the subsequent Notice.

Comment Due Date: September 2, 2009.

HUD Federal Register Notices

74 Fed. Reg 44,285-44,286 (Aug. 28 2009)
Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Delay of Effective Date

Summary: HUD is delaying the effective date of the rule entitled "Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs" published in the Federal Register on January 27, 2009 (74 Fed. Reg. 4832). The January 27, 2009, final rule, which was scheduled to become effective on September 30, 2009, will become effective on January 31, 2010. Today's action will provide the Department with the necessary additional time to review the subject matter of the January 27, 2009, final rule and to consider the public comments on HUD's February 11, 2009, Federal Register notice that solicited public comments on the regulatory amendments made by the January 27, 2009 final rule. See article on page 226 for further information.

Effective Date: The effective date of the final rule, which was published on January 27, and delayed March 27, 2009 (74 Fed. Reg. 13,339), is further delayed until January 31, 2010.

74 Fed. Reg. 39,091-39,092 (Aug. 5, 2009)
Announcement of Funding Awards for the Rental Assistance for Non-Elderly Persons With Disabilities in Support of Designated Housing Plans for Fiscal Year 2008

Summary: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by HUD's Notice of Funding Availability (NOFA) for the Rental Assistance for Non-Elderly Persons with Disabilities in Support of Designated Housing Plans program funding for Fiscal Year 2008. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on guidelines established in the NOFA.

Dated: July 29, 2009.

74 Fed. Reg 39,967 (Aug. 10, 2009)
Notice of Proposed Information Collection for Public Comment; Public Housing Mortgage Program

***Summary*:** The proposed information collection requirement will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal. Description of the need for the information and proposed use: Public Housing Agencies (PHAs) must provide information to HUD for approval to allow PHAs to grant a mortgage in public housing real estate or a security interest in some tangible form of personal property owned by the PHA for the purposes of securing loans or other financing for modernization or development of low-income housing.

Comments Due Date: October 9, 2009.

74 Fed. Reg 40,216 (Aug. 11, 2009)
Accountability in the Provision of HUD Assistance—"Applicant/Recipient Disclosure/Update"

Summary: HUD has submitted to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to Section 102 of the Department of Housing and Urban Development Reform Act of 1989 which requires applicants for HUD assistance for certain projects to disclose information, which will include other government assistance being requested, names, and financial interests of all interested parties, and a report of expected sources and uses of funds. A $200,000 threshold applies to this disclosure requirement.

Comments Due Date: September 10, 2009.

74 Fed. Reg 40,218 (Aug. 11, 2009)
Application for HUD/FHA Insured Mortgage "Hope for Homeowners"

Summary: HUD has submitted to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to information collected on new mortgages offered by FHA approved mortgagees to mortgagors who are at risk of losing their homes to foreclosure. The new FHA insured mortgages refinance the borrowers' existing mortgage at a significant write-down. Under the program the mortgagors share the new equity and future appreciation with FHA.

Comments Due Date: September 10, 2009.

74 Fed. Reg 40,606 (Aug. 12, 2009)
Notice of Proposed Information Collection: Comment Request; Debt Resolution Program

Summary: HUD will submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the requirement that HUD collect debt owed to the agency. As part of the collection process, demand for repayment is made on the debtor(s). In response, debtors opt to ignore the debt, pay the debt or dispute the debt. Disputes and offers to repay the debt result in information collections. Borrowers who wish to pay less than the full amount due must submit a Personal Financial Statement and Settlement Offer. HUD uses the information to analyze debtors' financial positions and then approve settlements, repayment agreements, and pre-authorized electronic payments to HUD. Borrowers who wish to dispute must provide information to support their position.

Comments Due Date: October 13, 2009.

74 Fed. Reg 41,146-41,156 (Aug. 14, 2009)
Additional Allocations and Waivers Granted to and Alternative Requirements for 2008 Community Development Block Grant (CDBG) Disaster Recovery Grantees

Summary: This Notice advises the public of the second allocation for grant funds for CDBG disaster recovery grants for the purpose of assisting in the recovery in areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) as a result of recent natural disasters. HUD is authorized by statute and regulations to waive statutory and regulatory requirements and specify alternative requirements for this purpose, upon the request of the state grantees. This Notice also describes: (1) How the allocatees may implement the common application, eligibility, and administrative waivers and the common alternative and statutory requirements for the grants; and (2) additional waivers and alternative requirements for certain earlier grants.

Effective Date: August 19, 2009.

74 Fed. Reg 41,452 (Aug. 17, 2009)
Notice of Proposed Information Collection for Public Comment; Public Housing Operating Fund Program: Operating Budget and Related Form

Summary: HUD will submit to the OMB for review an information collection requirement about which it is

soliciting public comments. The information collected relates to the Public Housing operating budget and a related form, which are submitted by PHAs for the low-income housing program. The operating budget provides a summary of proposed budget receipts and expenditures by major category, as well as blocks for indicating approval of budget receipts and expenditures by the PHA and HUD. The related form provides a record of PHA Board approval of how the amounts shown on the operating budget were arrived at, as well as justification of certain specified amounts. The information is reviewed by HUD to determine if the plan of operation adopted by the PHA and amounts included therein are reasonable for the efficient and economical operation of the development(s), and the PHA is in compliance with HUD procedures to assure that sound management practices will be followed in the operation of the development. A small number of PHAs (200) are still required to submit their operating budget packages to HUD, namely those that are troubled, those that are recently out of troubled status or at risk of becoming troubled, or those that are at risk of fiscal insolvency. PHAs are still required to prepare their operating budgets and submit them to their Board for approval prior to their operating subsidy being approved by HUD. The operating budgets must be kept on file for review, if requested.

Comments Due Date: October 16, 2009.

74 Fed. Reg 41,735-41,737 (Aug. 18, 2009)
Privacy Act; Notification of Intent to Establish a New Privacy Act System of Records; Disaster Information System (DIS)

Summary: HUD proposes to establish a new record system to add to its inventory of systems of records subject to the Privacy Act of 1974 (5U.S.C. 552a), as amended. The proposed new system of records is Disaster Information System (DIS). DIS will contain information on families who apply for and are determined by FEMA to be eligible to receive disaster housing assistance after a presidentially declared disaster. This record system will support the Disaster Housing Assistance Program (DHAP), which is a temporary rental housing assistance program established by an Interagency Agreement (IAA) between HUD, the U.S. Department of Homeland Security, and the Federal Emergency Management Agency (FEMA). DHAP will provide rent subsidies for HUD assisted individuals and families displaced by a presidentially declared disaster.

Effective Date: September 17, 2009, unless comments are received that would result in a contrary determination.

Comments Due Date: September 17, 2009.

74 Fed. Reg 41,924-41,925 (Aug. 19, 2009)
Notice of Submission of Proposed Information Collection to OMB; Comment Request; Notice of Tax Credit Assistance Program (TCAP) Allocation and Requirements for the Letter of Intent To Participate in TCAP

Summary: HUD has submitted to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to Tax Credit Assistance Program (TCAP), which is authorized under the American Recovery and Reinvestment Act (ARRA) of 2009. This new program provides $2.25 billion of grant funding for capital investment in Low-Income Housing Tax Credit projects, which cannot move forward because the current economic crisis has reduced the private capital available to them. HUD will administer these funds as TCAP. TCAP grant amounts will be determined by a formula established in ARRA and will be awarded by HUD to the housing credit allocating agencies of each state, the District of Columbia and the Commonwealth of Puerto Rico. This is a revision of a previously approved information collection.

Comments Due Date: October 19, 2009

74 Fed. Reg 42,319-42,320 (Aug. 21, 2009)
Notice of HUD-Held Noncompetitive Sales of Assets

Summary: This Notice announces HUD's intention to sell certain subsidized and nonsubsidized multifamily and healthcare mortgage loans in noncompetitive sales to units of state and local government.

Dates: Effective on acceptance of pricing and closing of the sale of each of the assets.

HUD Notices

PIH 2009-26 (HA) (Aug. 4, 2009)
Implementation of the Federal Fiscal Year 2009 Funding Provisions for the Housing Choice Voucher Program—Award of Remaining Set-Aside Funds

Summary: This Notice announces the process that HUD will utilize to award funds from the FY 2009 Housing Assistance Payments (HAP) set-aside that have not been awarded under the procedures previously set forth in Notice PIH 2009-13. The set-aside funds are provided in the "Omnibus Appropriations Act, 2009." The 2009 Act establishes a $100 million dollar set-aside from the HAP renewal account for specific purposes.

PIH 2009- 28 (HA)(Aug. 14, 2009)
Guidance on Requirement for PHAs to Record Current Declaration of Trusts (DOTs) Against All Public Housing Property and Guidance on Adding and Removing Public Housing Units and Other Property from the Annual Contributions Contract (ACC)

Summary: This Notice serves to: (1) remind PHAs of their continuing legal responsibility to ensure that a current DOT is recorded against all of their public housing

property; (2) require PHAs to be in full compliance with DOT requirements within twelve months of the date of PHAs' next fiscal year beginning with PHAs with fiscal years commencing on October 1, 2009; and (3) provide guidance on adding and removing public housing units and other property from the ACC. For purposes of this notice, all public housing projects, Asset Management Projects and other property that has been acquired, developed, maintained, or assisted with Act funds is referred to as "public housing property."

PIH 2009-29 (HA) (Aug. 19, 2009)
Request for Applications Under the Moving to Work Demonstration Program

Summary: This Notice offers eligible public housing agencies (PHAs) the opportunity to apply for admission to the Moving to Work (MTW) demonstration program. MTW allows PHAs to design and test innovative, locally designed housing and self-sufficiency strategies for low-income families by permitting PHAs to combine assistance received under Sections 8 and 9 of the United States Housing Act of 1937 into a single agency-wide funding source and by allowing exemptions from existing public housing and Housing Choice Voucher rules, as approved by HUD.

PIH 2009-31 (HA) (Aug. 21, 2009)
PIH Implementation Guidance for the Buy American Requirement of the American Recovery and Reinvestment Act of 2009 including Process for Applying Exceptions

Summary: This Notice provides implementation guidance, including the process for applying exceptions, for the Buy American requirement imposed by Section 1605 of Title XVI of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) for the Public Housing Capital Fund Recovery Formula and Competition Grant Programs within the Office of Public and Indian Housing (PIH). This Notice is referred to as PIH Implementation Guidance for the Buy American Requirement.

PIH 2009-32 (HA) (Aug. 26, 2009)
Operating Fund Program: Guidance on Demonstration of Successful Conversion to Asset Management to Discontinue the Reduction of Operating Subsidy, Year 4 Applications

Summary: This Notice provides information for public housing agencies (PHAs) that wish to submit documentation of successful conversion to asset management in order to discontinue their reduction in operating subsidy under the Operating Fund Program regulations (24 CFR part 990), commonly referred to as the "stop-loss" provision. This notice applies only to PHAs that: (1) lose funding under the new formula; and (2) wish to submit documentation in accordance with the requirements for Year 4.

Federal Housing Finance Agency Final Rule

74 Fed. Reg. 39,873-39,900 (Aug. 10, 2009)
2009 Enterprise Transition Affordable Housing Goals

***Summary*:** Section 1128(b) of the Housing and Economic Recovery Act of 2008 (HERA) transferred the authority to establish, monitor and enforce the affordable housing goals for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises) from HUD to the Federal Housing Finance Agency (FHFA). Section 1128(b) further provides that the annual housing goals in effect for 2008 as established by HUD shall remain in effect for 2009, except that the Director of FHFA shall review such goals to determine their feasibility given current market conditions, and make appropriate adjustments consistent with such market conditions. Pursuant to this directive, FHFA has analyzed current market conditions and is adopting a final rule that adjusts the housing goal, home purchase sub goal and special affordable multifamily housing sub goal levels for the Enterprises for 2009. The final rule also permits loans owned or guaranteed by an Enterprise that are modified in accordance with the Administration's Making Home Affordable Program (also known as the Homeowner Affordability and Stability Plan) announced on March 4, 2009, to be treated as mortgage purchases and count for purposes of the housing goals. In addition, the final rule excludes purchases of jumbo conforming loans from counting towards the 2009 housing goals.

Effective Date: August 10, 2009.

Federal Housing Finance Agency Interim Final Rule

74 Fed. Reg. 38,514-38,522 (Aug. 4, 2009)
Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority

Summary: Section 1218 of the Housing and Economic Recovery Act of 2008 (HERA) requires the Federal Housing Finance Agency (FHFA) to permit the Federal Home Loan Banks (Banks) until July 30, 2010, to use Affordable Housing Program (AHP) homeownership set-aside funds to refinance low- or moderate-income households' mortgage loans. On October 17, 2008, FHFA amended its AHP regulation to authorize the Banks to provide AHP direct subsidies under their homeownership set-aside programs to low- or moderate-income households who qualify for refinancing assistance under the Hope for Homeowners Program established by the Federal Housing Administration (FHA) under Title IV of HERA. Based on the comments received on the amendments and continuing adverse conditions of the mortgage market, FHFA has determined that in order for the AHP set-aside refinancing program to be implemented successfully for the ben-

efit of the intended households, the scope of the program authority should be broadened and the Banks should have greater flexibility in implementing the program. Accordingly, FHFA is issuing and seeking comment on an interim final rule that authorizes the Banks to provide AHP subsidy through their members to assist in the refinancing of eligible households' mortgages under eligible federal, state and local programs for targeted refinancing in addition to the Hope for Homeowners Program. These programs would include the Administration's Making Home Affordable Refinancing program. The interim final rule permits the Banks to provide AHP direct subsidy to members and to use the subsidy for principal reduction and for loan closing costs, and requires that households obtain counseling for qualification for refinancing and foreclosure mitigation. In addition, the interim final rule enhances the ability of the Banks to respond to the mortgage crisis by providing greater flexibility to accelerate their future annual statutory AHP contributions for use in their AHP homeownership set-aside programs in the current year. The interim final rule also permits the Banks to adopt multiple housing needs under their Second District Priority scoring criterion under the AHP competitive application program.

***Effective Dates*:** August 4, 2009. FHFA will accept written comments on the interim final rule on or before October 5, 2009.

Federal Housing Finance Agency Federal Register Notices

74 Fed. Reg. 38,572-38,576 (Aug. 4, 2009)
Duty to Serve Underserved Markets for Enterprises

Summary: Section 1129 of the Housing and Economic Recovery Act of 2008 (HERA) establishes a duty for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises) to serve three underserved markets—manufactured housing, affordable housing preservation, and rural areas—in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing in those markets. Section 1335 of the Safety and Soundness Act, as amended, requires the Federal Housing Finance Agency (FHFA), beginning in 2010, to establish a manner for: evaluating whether and to what extent the Enterprises have complied with the duty to serve underserved markets; and rating the extent of compliance. To assist FHFA in rulemaking to implement the duty to serve underserved markets, FHFA seeks comment on the characteristics and types of Enterprise transactions and activities that should be considered and how such transactions and activities should be evaluated and rated, for purposes of determining the Enterprises' performance of the duty to serve underserved markets.

Comment Due Dates: September 18, 2009.

74 Fed. Reg. 38,618-38,626 (Aug. 4, 2009)
Federal Home Loan Bank Collateral for Advances and Interagency Guidance on Nontraditional Mortgage Products

Summary: Section 1217 of the Housing and Economic Recovery Act of 2008 (HERA) requires the Director of the Federal Housing Finance Agency (FHFA) to conduct a study on the extent to which loans and securities used as collateral to support Federal Home Loan Bank (FHL Bank) advances are consistent with the interagency guidance on nontraditional mortgage products. The study must be submitted to the Committee on Banking, Housing and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives no later than July 30, 2009, one year after the date of the HERA enactment. Further, the study must consider and recommend any additional regulations, guidance, advisory bulletins, or other administrative actions necessary to ensure that the FHL Banks are not supporting loans with predatory characteristics. Section 1217 of HERA also requires that the public have an opportunity to comment on any recommendations made as a result of the study. This Notice is intended to inform the public about the study and provide the public with the requisite opportunity to comment.

***Comment Due Date*:** October 2, 2009.

74 Fed. Reg 41,700-41,701 (Aug. 18, 2009)
ACTION: 30-day Notice of Submission of Information Collection for Approval from the Office of Management and Budget

Summary: In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Agency (FHFA) is seeking public comments concerning a currently approved information collection known as "Community Support Requirements," which has been assigned control number 2590-0005 by the Office of Management and Budget (OMB). Today FHFA will submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on September 30, 2009.

Comments Due Date: September 17, 2009. ■

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