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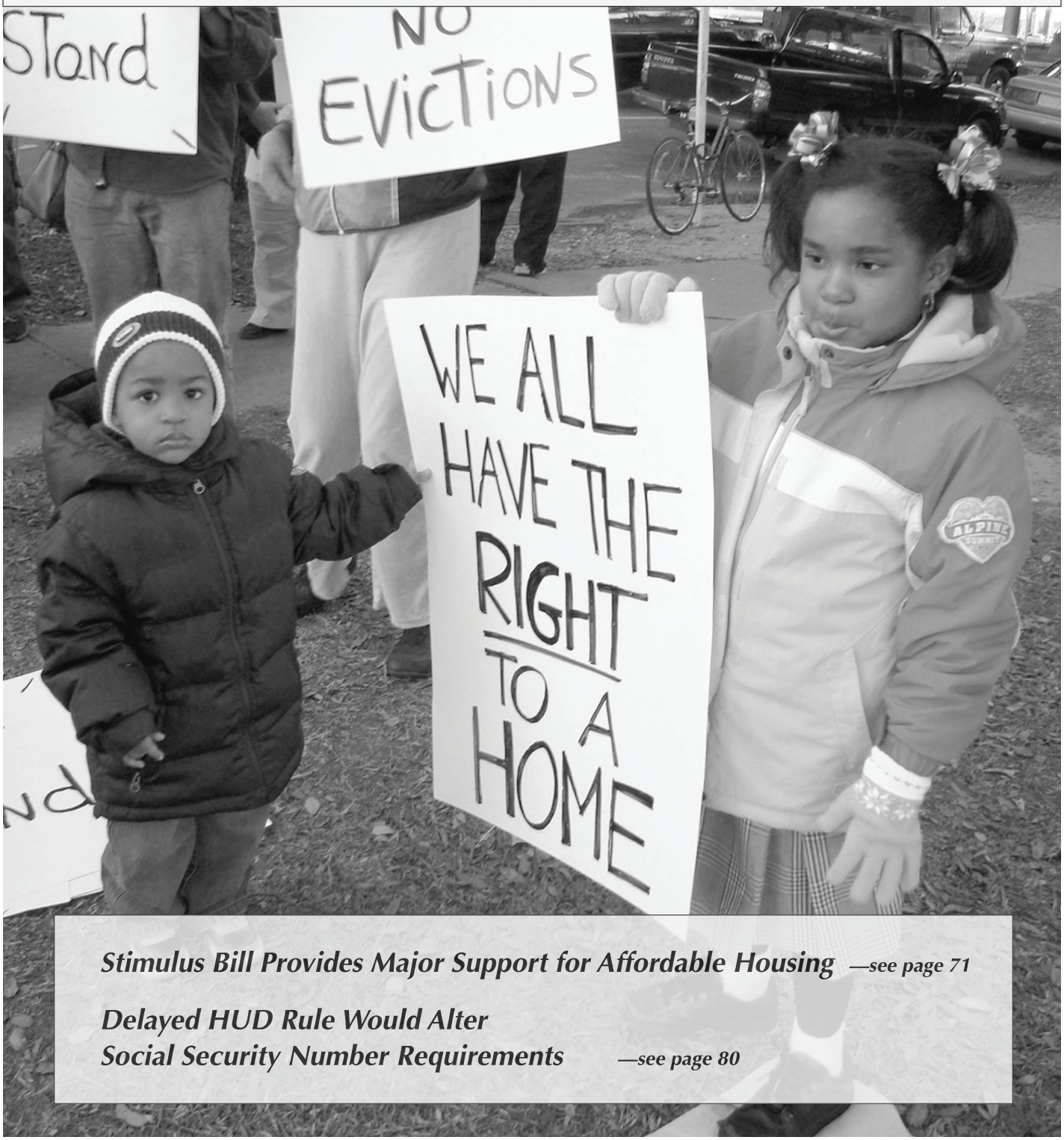

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727 Fifteenth Street, N.W., 6th Fl. • Washington, D.C. 20005

www.nhlp.org • nhlp@nhlp.org

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Cover: Children protesting efforts to close down ninety units of recently rehabilitated public housing at the Lafitte development in New Orleans. Photo courtesy of May Day New Orleans.

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

Obama Signs Stimulus Bill Providing Major Support for Affordable Housing*

On February 17, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), the long-anticipated stimulus package intended to provide relief to those hardest hit by the recession and to steer the country back on a path toward economic recovery. As reported in the February 2009 issue of the *Bulletin*,[1] the final conference report emerged from a House and Senate conference convened to resolve significant differences between their respective bills. The bill signed into law by the President reflected the compromise reached by the two houses and contained a number of significant appropriations related to affordable housing, many of them representing important victories for advocates.[2]

Key among the affordable housing-related provisions set forth in the final bill were appropriations made to resolve the long-standing project-based Section 8 funding shortfall, infuse capital funds into public housing, provide for energy retrofitting and green investments in the stock assisted by the Department of Housing and Urban Development (HUD), and jumpstart stalled low-income housing tax-credit projects. A wide range of other programs also received support, as ARRA included funding for the Neighborhood Stabilization Program, Homeless Assistance Grants, Community Development Block Grants, Native American Housing Block Grants and the Lead Hazard Reduction Program. Excluded from the bill, however, was any funding for the National Housing Trust Fund or for new Section 8 Housing Choice Vouchers as had been urged by advocates.

The remainder of this article examines more closely the affordable housing-related provisions of ARRA.

Project-Based Section 8 Shortfall Funding – $2 Billion

As has been extensively reported in previous issues of the *Bulletin*,[3] inadequate budget requests from the prior

*The author of this article is Brandon Weiss, a Skadden Fellow with Public Counsel's Community Development Project in Los Angeles, CA, who is concentrating on affordable housing preservation issues.

[1]NHLP, *Congress Considers Affordable Housing Funding in Stimulus Package*, 39 Hous. L. Bull. 47 (Feb. 2009).

[2]*See* American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

[3]*See, e.g.*, NHLP, *Congress Acts to Address Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 213 (Oct. 2008); NHLP, *Congress Considers Solutions for the Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 87 (Apr.-May 2008); NHLP, *Growing Reports of a Project-Based Section 8 Funding Crisis as FY 2007 Closes*, 37 Hous. L. Bull. 149 (Sept. 2007).

Administration had resulted in a serious shortfall in the funds available to fully back one-year renewals of project-based Section 8 contracts. Rather than requesting the funds necessary to pay owners for a full year, the Administration had instituted a change to longstanding policy by requesting appropriations only sufficient to support contracts through the end of the current fiscal year. This practice resulted in a significant gap in funds necessary to ensure that all owners would receive timely payments for the entire contract term, threatening serious erosion of confidence in the program. At the strong urging of advocates, Congress provided an emergency short-term solution last September by passing a Continuing Resolution, a stop-gap measure authorizing the HUD Secretary to expend funds necessary to renew all contracts expiring up until March 6, 2009. It remained unclear, however, what would happen once the term of the Continuing Resolution ran out.

ARRA addressed this uncertainty through the appropriation of $2 billion to make up for the shortfall, thus plugging the gap in the FY 2008 appropriations. The text of the conference report states that the additional funding is for "payments to owners for 12-month periods." This represents a critical victory in a hard-fought campaign by housing advocates seeking to ensure the continued viability of the project-based Section 8 program. At the same time, challenges loom ahead—among them, the $6 billion shortfall in funding accounts for longer-term contracts not yet at their initial expiration date, as reportedly identified by HUD.

Public Housing Capital Fund – $4 Billion

The stimulus bill likewise provided significant funding to the Public Housing Capital Fund to be used for authorized fund purposes, which include such activities as development and modernization of public housing units, demolition and replacement, addressing deferred maintenance and making capital expenditures. While the original House and Senate bills both allocated $5 billion to this purpose, this figure was reduced to $4 billion in the final compromise. The first $3 billion is required to be allocated according to current 2008 levels and must be obligated by HUD within thirty days. The remaining $1 billion is to be allocated to public housing agencies by September 30, 2009, based on a competitive bidding process that favors "energy conservation retrofit investments" and investments that leverage private sector funding.

ARRA requires that public housing agencies give priority to projects that: (i) can award contracts within 120 days of the funds becoming available, (ii) involve rehabilitation of vacant rental units, and (iii) are already underway or are included in a housing agency's five-year capital fund plan. The bill also establishes a specific timeline for use of the funds by public housing agencies: 100% of funds must be *obligated* within one year of the funds becoming available to the agency, 60% must be *expended* within two years of that date, and 100% must be *expended* within three years. Funds may not be used for operating expenses or to provide rental assistance, though 0.5% of the total appropriated funds may be used for staffing, training, technical assistance, enforcement and other such activities.

HUD-Assisted Multifamily Housing Energy Retrofit and Green Investment – $250 Million

In addition to the $2 billion provided to cover the project-based Section 8 shortfall, ARRA also appropriated $250 million for grants or loans to be used for "energy retrofit and green investments" in projects receiving project-based Section 8, Section 202 or Section 811 assistance. These funds, to be administered by HUD's Office of Affordable Housing Preservation, will cover much-needed deferred rehabilitation of eligible properties, including improvements that will reduce escalating utility costs. They are to be awarded to eligible owners who: (i) have no less than a satisfactory management review rating, (ii) are in compliance with applicable performance standards and legal requirements and (iii) commit to an additional period of affordability of at least fifteen years. HUD is charged with undertaking the appropriate underwriting and oversight of these transactions and is allowed to set aside 5% of the total appropriation for such purposes.

The Section 8 funding represents a critical victory in a hard-fought campaign by housing advocates seeking to ensure the continued viability of the project-based Section 8 program.

ARRA sets forth a number of other provisions governing the use of these funds. Chief among them are requirements that they be expended by project owners within two years of receipt and that all grants or loans include both a financial assessment and a physical inspection of the property. HUD is also authorized to waive certain statutory or regulatory provisions that would impede the expeditious use of the funds and it is entitled to share in a portion of utility savings that result from the program. The bill also explicitly requires that all projects receiving assistance comply with federal Davis-Bacon wage rate requirements.

Low-Income Housing Tax Credit Provisions

In the lead up to the enactment of ARRA, Congress considered a number of creative proposals for jumpstarting stalled low-income housing tax credit (LIHTC) projects and reinvigorating the severely softened market for tax

credits.[4] The final bill left out the oft-suggested proposal to allow investors to carry back credits against past profits, but it included two other significant LIHTC provisions.

HOME Apportioned Gap Financing – $2.25 Billion

The first of these consisted of appropriating $2.25 billion for capital investments in LIHTC projects to be apportioned to states according to the HOME program percentages of FY 2008. These funds will be allocated by state housing finance agencies according to their qualified allocation plans to projects that either simultaneously receive tax credits or had previously received them in fiscal years 2007, 2008 or 2009. State housing finance agencies are required to commit 75% of their funds within one year of the enactment of ARRA, and must show that project owners have spent 75% of funds made available within two years and 100% within three years. Funding received under this program will not reduce a project's eligible basis and priority is given to projects that will be *completed* within three years.

Tax Credit Exchange Program

In addition to appropriating additional funds to help with gap financing, Congress also acted to directly address the lower demand for tax credits caused by the recession's special impact on the financial sector, which was a primary purchaser of credits. ARRA allows a state to elect to exchange up to 100% of unused 2008 credits and credits returned in 2009, along with 40% of its 2009 allocation, for what is the funding equivalent to 85 cents on the dollar. The exchange results in a direct up-front grant to the state housing finance agency from the Treasury Department to be used to make "subawards" to qualified low-income housing buildings whether or not they have otherwise received tax credits. One factor making the exchange program politically popular was the estimate that it will only have cost the federal government $69 million by 2019, while having a significant and immediate stimulative impact.[5] Unfortunately, the exchange provision covers only 9% credits, not the 4% credits often used to rehabilitate and preserve existing affordable housing properties.

Other Related Appropriations

In addition to the foregoing provisions, ARRA includes a number of other appropriations that also support affordable housing activities.

[4]The price of low-income housing tax credits has precipitously dropped from above 90 cents per dollar of credit to 70 cents and lower. *See* Will Fischer, Ctr. on Budget & Policy Priorities, Exchange Plan in House Recovery Bill Offers Best Fix for Low-Income Housing Tax Credit 2 (2009), http://www.cbpp.org/2-2-09hous.pdf.

[5]*Id*.

Washington Post Praises Legal Services Funding, Calls for Removal of Restrictions

The Washington Post wrote in support of legal services in its editorial "Unshackling Legal Aid" on March 14, 2009. The editorial is reprinted here in its entirety.

"Never has the Legal Services Corp. been more essential. With unemployment on the rise and foreclosures surging, the group provides wide-ranging civil legal assistance to the growing ranks of those in need: representation in eviction or foreclosure proceedings, assistance in securing food stamps or unemployment benefits, guidance on insurance or medical services. But as demand for the group's services grows, its funding sources are dwindling . . . . According to the Legal Services' officials, the group routinely turns away roughly half of all low-income people who seek its help. So it was welcome news that the federal government, which remains the most important backer of the nonprofit corporation, is stepping up its assistance. The omnibus appropriations bill signed this week by President Obama set aside $390 million for the group—up $40 million, or 11 percent, over last year's funding level . . . . Lawmakers should go a step further and unshackle Legal Services from congressionally imposed restrictions that have kept it from working more efficiently and broadly. For example, unlike most others who represent plaintiffs, Legal Services lawyers who prevail in a civil case are prohibited from seeking legal fees from an opponent. This makes no sense, especially because any recovery of fees could supplement the group's funding. Legal Services is also barred from using public or private funds to engage in a range of activities, including all class-action lawsuits, any representation of immigrants who are in the country illegally and all litigation involving abortion-related matters. While some limits on the use of taxpayer dollars may be appropriate, none should limit what local legal-aid clinics can do with money they raise privately. Sen. Tom Harkin (D-Iowa) is spearheading an effort to address many of these issues and may unveil legislation as soon as next week. Such reforms are long overdue."

Neighborhood Stabilization Program – $2 Billion

Congress provided $2 billion more for the redevelopment of abandoned and foreclosed homes as authorized under the Neighborhood Stabilization Program (NSP) originally created in last year's Housing and Economic Recovery Act of 2008.[6] Unlike the original NSP funds, the stimulus bill requires that funds be awarded on a competitive basis to the following categories of eligible grantees: states, cities, nonprofits and consortia of nonprofits. HUD is charged with ensuring that grantees are in the areas with "the greatest number and percentage of foreclosures" and are capable of spending 50% of the funds within two years of receipt and 100% within three years. HUD is also authorized to use up to 10% of the $2 billion for "the provision of capacity building of and support for local communities" receiving NSP funds.

Congress provided $2 billion more for the redevelopment of abandoned and foreclosed homes as authorized under the Neighborhood Stabilization Program.

The NSP provisions of ARRA also included a number of specific protections for renters in buildings assisted by these funds. Among these protections are requirements that the initial successor in interest at foreclosure of a property acquired with NSP assistance must give at least ninety days' notice to terminate any *bona fide* tenancy.[7] Except where the initial successor intends to use a foreclosed unit as a primary residence,[8] *bona fide* tenants who entered leases prior to the foreclosure are entitled to continued occupancy for the remainder of the lease term. Furthermore, as of bill enactment, the initial successor and any recipients of NSP funds are prohibited from refusing to lease an apartment based on a prospective tenant's status as a Section 8 voucher holder, and such owners must continue to honor the voucher of any tenant residing in the building at the time of foreclosure. Public housing authorities are also authorized, under limited circumstances, to use funds that would have been paid as rent to the subsequent owner to instead pay for utility bills, where the tenant stays but the landlord fails to maintain utility service, or for moving expenses, where the unit violates program quality standards.

In all instances, state and local laws providing longer time periods or additional protections remain enforceable and are specifically not preempted.

Homelessness Prevention Fund – $1.5 Billion

The bill included $1.5 billion for homelessness prevention and rapid re-housing activities. The funds, to be allocated using HUD's Emergency Shelter Grant formula, may be used for the provision of short-term or medium-term rental assistance, housing relocation and stabilization services (including "housing search, mediation or outreach to property owners, credit repair, security or utility deposits, utility payments, rental assistance for a final month at a location, moving cost assistance, and case management") or other appropriate activities. HUD must publish a notice thirty days from enactment of the bill establishing other necessary requirements.

Community Development Block Grants – $1 Billion

Among the other programs receiving ARRA appropriations, the Community Development Block Grant (CDBG) program garnered $1 billion in funds to be distributed according to the usual CDBG formula. Recipients of funds are required to give priority to projects able to award contracts within 120 days of the funds being made available. HUD is instructed to establish requirements to expedite the use of funds and likewise may waive certain statutory or regulatory provisions where necessary to expedite the process.

Native American Housing Block Grants – $510 Million

The AARA provides $510 million for Native American Housing Block Grants as authorized under Title I of the Native American Housing Assistance and Self-Determination Act of 1996.[9] Of the total, $255 million will be distributed to Tribes or designees according to the FY 2008 formula and used for new construction, acquisition, rehabilitation and infrastructure development of housing on Tribal lands or areas. The other half of the funds is to be awarded on a competitive basis to projects that will promote construction and rehabilitation and that will create job opportunities for the low-income and unemployed.

Lead Hazard Reduction Program – $100 Million

An additional $100 million was appropriated to the Lead Hazard Reduction Program to facilitate grants for lead reduction and abatement. Priority is given to applicants who applied in FY 2008 and were denied due to funding limitations but otherwise qualified to receive an award. Recipients must spend 50% of funds within two years of receipt and 100% within three years.

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[6]Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as amended in scattered sections).

[7]*Bona fide* tenancies are defined in the bill as those where the lease resulted from an arms-length transaction with rents not substantially less than fair market and where the mortgagor is not also the tenant.

[8]Note that even in these cases of intended owner occupancy, at least ninety days' notice is required to terminate a *bona fide* tenancy.

[9]Pub. L. No. 104-330, 110 Stat. 4016 (1996) (codified as amended at 25 U.S.C. §§ 4101-4243 (2006)).

Conclusion

On February 25, 2009, HUD issued a press release stating that it had already allocated nearly 75%, or $10.1 billion, of the funds made available to it through ARRA.[10] While such a significant investment in affordable housing will no doubt provide relief to many hit hard by the recession, President Obama has signaled that a second stimulus package has not been ruled out if necessary.[11] Since affordable housing programs have received far less than needed to maintain current services for many years, and affordable housing funding provides especially effective economic stimulus, another substantial infusion of federal funding in the near future would be welcome. ■

[10] *See* Press Release, U.S. Department of Housing & Urban Development, HUD Allocates More Than $10 Billion of Recovery Act Funding One Week after Bill Signing (Feb. 25, 2009), *available at* http://www.hud.gov/recovery/ 2009/02/25/comms/pr09-014.cfm?CFID=17122744&CFTOKEN=24218341.

[11] *See* Sheryl Gay Stolberg, *Signing Stimulus, Obama Doesn't Rule Out More*, N.Y. Times, Feb 18, 2009.

HUD Appropriations for FY 2009

After much delay,[1] the Senate passed the Fiscal Year 2009 Appropriations Act on March 10, 2009, and President Obama then signed the bill into law.[2] The bill appropriates funds for the fiscal year that began on October 1, 2008. The budget increases funding on the whole, but some programs continue to be underfunded. Overall, the budget for the Department of Housing and Urban Development (HUD) increased from $37.6 billion to $41.5 billion. See the National Low Income Housing Coalition charts for Fiscal Year (FY) 2009 and FY 2010 on pages 78-79.

Voucher Program

The final spending bill for 2009 provides $16.8 billion for total voucher funding, a $426 million increase over the FY 2008 funding level. Of the total voucher funding, approximately $15 billion is allocated for voucher renewals. However, according to Center on Budget and Policy Priority estimates, the amount allocated for vouchers may lead to a funding shortfall of over $400 million.[3] The estimated shortfall could lead to a situation in which 37,000 vouchers used during FY 2008, and approximately 25,000 vouchers in use at the end of 2008, would not receive renewal funding in 2009.[4] Importantly, the voucher shortfall could be ameliorated by both HUD, through the use of rollover funds from 2008, and local public housing authorities (PHAs), through the use of each PHA's voucher funding reserves.[5] While both pools of money may be small, they could help avoid the loss of thousands of vouchers. The funding for each PHA will be allocated based on the prior year's leasing and cost data, with a HUD-established cost adjustment factor for 2009.[6] As in prior years, no PHA can fund more vouchers than authorized by HUD.[7] Moving to Work agencies will be funded pursuant to their Moving to Work agreements.

The omnibus bill funds approximately 13,000 incremental vouchers through the allocation of $125 million. The funding for the vouchers includes $20 million for the

[1] *See, e.g.*., David M. Herszenhorn, Republicans Block Spending Bill, New York Times, March 6, 2009, available at http://www.nytimes.com/2009/03/06/us/politics/06spend.html?_r=1&scp=1&sq=omnibus%20spending%20bill&st=cse (explaining Republican opposition to earmarks in spending bill).

[2] The full title of the bill is the "Omnibus Appropriations Act, 2009," Pub. L. No. 111-008 (March 10, 2009) (formerly H.R. 1105), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ008.111.pdf.

[3] Center On Budget And Policy Priorities, Preliminary Analysis of The HUD Provisions of the Omnibus Appropriations Bill for FY 2009, 2 (2009), http://www.cbpp.org/files/3-13-09housprac.pdf.

[4] *Id.* at 2.

[5] *Id.*

[6] Pub. L. No. 111-008, Tenant-Based Rental Assistance.

[7] *Id.*

Family Unification Program,[8] $75 million for HUD-VASH vouchers,[9] and $30 million for new vouchers for non-elderly people with disabilities. This is the second consecutive year that incremental vouchers have been funded. Prior to 2008, no incremental vouchers had been funded since 2002.

The omnibus bill allocates 2009 renewal funding based on agencies' actual leasing and costs during FY 2008, using the same formula in place since FY 2007. The bill allocates administrative fees based on vouchers in use, not on the prior year's fee allocation. Because Congress has continued the policy of setting funding levels based on vouchers in use times actual cost, advocates should encourage housing agencies to fully use their maximum number of authorized vouchers. This need is compounded by the fact that the bill once again requires HUD to reduce renewal funding eligibility—in the total amount of $750 million—for housing agencies with "excess" reserve balances.[10] HUD has flexibility in determining how to reduce the allocations, with conference report guidance that special attention should be paid to "unusable" reserve balances.[11] Thus, PHAs should continue to attempt to lease up their maximum allotment of vouchers.

In addition to incremental and renewal vouchers, the bill appropriates $150 million for tenant protection vouchers and requires HUD to issue them "for all units that were occupied within the previous 24 months that cease to be available as assisted housing, subject only to the availability of funds."[12] This is a significant departure from HUD's former policy of restricting replacement vouchers to units occupied at the time of a PHA's application for such vouchers and provides greater protection to tenants living in property that is no longer affordable.[13]

Vouchers previously allocated to a PHA to serve non-elderly disabled families and for the Family Unification Program must remain available to these populations, to the extent feasible.[14]

Finally, the bill extends the existing rule making certain college students ineligible for Section 8 rental assistance.[15] Exceptions to the rule include students who are: 1) over 24 years of age; 2) veterans; 3) married; 4) parents or legal guardians of a dependent child; or 5) persons with a disability.[16]

Project-Based Section 8

The stability of the project-based Section 8 program has been precarious in recent years.[17] Funding shortfalls have caused concern that projects could not be funded for a full twelve months, reducing incentive for owners to remain in the program. The FY 2009 appropriations funds project-based Section 8 contract renewals at $7.5 billion, $1.12 billion above the FY 2008 level.[18] Additionally, the American Recovery and Reinvestment Act of 2009 (ARRA) allocated an additional $2 billion to the project-based Section 8 program.[19] Thus, for the first time since 2007, HUD will be able to provide a full twelve months of funding for renewal of expiring project-based Section 8 contracts, bringing much-needed stability to the program.

Public Housing

Congress increased funding for the public housing operating fund by $225 million above the FY 2008 level for a total of $4.46 billion. The funding level increase is estimated to provide PHAs with only 87% of the operating subsidy formula need.[20] This continues the trend in recent years of significantly underfunding the public housing operating fund—2009 was the seventh straight year that the federal government failed to provide the full amount for which PHAs were eligible under the operating fund formula.[21]

Funding for the public housing capital fund hovered at $2.45 billion, a small increase from FY 2008, which allocated $2.44 billion to the capital fund.[22] The capital fund provides money for repair and rehabilitation of public housing units and projects. In addition to the appropriation in this spending bill, ARRA allocated $4 billion for the public housing capital fund.[23] Thus, while the 2009 appropriation will not be enough to fully address the substantial backlog of repairs for public housing, it will, in conjunction with the ARRA provision for capital fund money, help meet some of the dire capital repair needs.[24]

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[8] *Id.*; The Family Unification Program provides rental assistance for reunifying families with children in foster care or to prevent children from entering foster care.

[9] *Id.* The HUD-VASH vouchers are for low-income veterans with mental health or substance abuse problems. The program combines rental assistance from HUD with supportive services funded by the Department of Veterans Affairs.

[10] *Id.*

[11] CBPP, *supra* note 3, at 2.

[12] Pub. L. No. 111-008, Tenant-Based Rental Assistance.

[13] For more discussion of HUD's policies regarding tenant protection vouchers, *see* Joe Akman, *New HUD Relocation and Replacement Voucher Policy for Public Housing Demolition and Disposition*, 37 Hous. L. Bull. 77 (Apr.-May 2007).

[14] Pub. L. No. 111-008, Tenant-Based Rental Assistance.

[15] Pub. L. No. 111-008, § 216. For more discussion of student eligibility for Section 8 rental assistance, *see* Georgia Garthwaite, *New Section 8 Restrictions for Students*, 36 Hous. L. Bull. 115 (May 2006).

[16] *Id.*

[17] *See, e.g.*, NHLP, *Congress Acts to Address Project-Based Section 8 Funding Crisis*, 38 Hous. L. Bull. 213 (Oct. 2008).

[18] Pub. L. No. 111-008, Project-Based Rental Assistance.

[19] American Recovery and Reinvestment Act, Pub. Law 111-005 (Feb. 17, 2009).

[20] CBPP, *supra* note 3, at 4.

[21] *Id.*

[22] Pub. L. No. 111-008, Public Housing Capital Fund.

[23] American Recovery and Reinvestment Act, *supra* note 18.

[24] CBPP, *supra* note 3, at 4; *see c.f.*, Manny Fernandez and Ray Rivera, *Elevator Accidents in Public Housing Are Frequent, and Costly*, New York Times, March 17, 2009.

The bill also requires HUD to increase the number of Moving to Work agencies by three. HUD may choose from any agency that is considered high performing under the Public Housing Assessment System and is a HOPE VI agency, so long as it does not administer more than 5000 combined voucher and public housing units.[25]

HOME, Community Development Block Grant (CDBG) and HOPE VI

The omnibus bill funds HOME formula grants at $1.81 billion, restoring some of the cuts in funding that occurred in FY 2008.[26] The omnibus bill provides $3.649 billion for CDBG formula grants, also an increase from FY 2008.[27] The bill also funds HOPE VI program at $120 million, $20 million more than in FY 2008.[28]

Housing for the Elderly and People with Disabilities

Supportive housing for the elderly (Section 202) and people with disabilities (Section 811) are funded at $765 million[29] and $237 million[30] respectively. Both programs were funded slightly above FY 2008 levels. The bill also includes a provision that will allow owners of Section 202 housing to refinance the properties, even where it does not lower debt service, in order to provide capital for repair needs.[31] The refinancing provisions require that HUD assess the costs and benefits of refinancing, with concern given to the effect on tenants. However, these refinancing provisions may provide inadequate protections to maintain the future affordability of a project, depending upon how the guidelines are developed and implemented.

Fair Housing

The omnibus bill provides $53.5 million for fair housing activities. Of that funding, $427.5 million will be used to carry out activities under Section 561 of the Housing and Community Development Act, such as the Fair Housing Initiatives Program. The amount also includes $2 million for "authorized activities to protect the public from mortgage rescue scams."[32] Finally, of the total allocation, $500,000 may be used for the translation of materials to assist persons with limited English proficiency in utilizing HUD services.[33] This is a sorely needed allocation, as HUD has long stalled in translating vital documents and remains behind major federal agencies in providing meaningful language access.

Other Programs

Homeless assistance is funded at $1.68 billion. This assistance funds programs such as Emergency Shelter Grant, Shelter Plus Care, and Section 8 Moderate Rehabilitation Single Room Occupancy. Of that amount, $10 million must be used for a demonstration program on the prevention of homelessness among U.S. veterans. Housing Opportunities for Persons with AIDS receives $310 million, an increase of $10 million as compared to FY 2008.

The FY 2009 appropriations bill provides $58 million for Policy Development and Research. Of that amount, at least $1 million must be used to conduct a comprehensive study regarding the administrative costs necessary to carry out the tenant-based voucher program.

Looking Forward

President Obama released his proposed FY 2010 budget request on February 26, 2009.[34] His proposal provides a more optimistic outlook for federal housing programs than that of recent years. Moreover, the House Committee on Financial Services has released its budget outlook as well.[35] The President's budget request considers $47.5 billion for HUD funding, a 14.45% increase from FY 2009. While the request does not include many details, it does request $1 billion to help capitalize the National Housing Trust Fund. The request would also increase voucher funding and public housing funding. The House Committee on Financial Services' adopted views on HUD budget issues also prove promising—it agrees to the $1 billion injection into the National Housing Trust Fund and to providing new incremental vouchers to be used as project-based vouchers. Thus, the current outlook for HUD's 2010 budget suggests a strong likelihood that underfunded programs, such as the public housing operating fund, may receive more adequate funding in the coming years. ■

[25]Pub. L. No. 111-008, § 236.
[26]Pub. L. No. 111-008, Home Investment Partnerships Program.
[27]Pub. L. No. 111-008, Community Development Fund.
[28]Pub. L. No. 111-008, Revitalization of Severely Distressed Housing (HOPE VI).
[29]Pub. L. No. 111-008, Housing for the Elderly.
[30]Pub. L. No. 111-008, Housing for Persons with Disabilities.
[31]Pub. L. No. 111-008, § 234.
[32]Pub. L. No. 111-008, Fair Housing and Equal Opportunity.
[33]Pub. L. No. 111-008, Policy Development and Research.

[34]*See* National Low Income Housing Coalition, President Outlines FY10 Budget Request, Memo to Members (Feb. 27, 2009).
[35]*See* National Low Income Housing Coalition, House Committee Adopts Budget Views, Memo to Members (March 13, 2009).

FY 09 Budget Chart for Selected Programs (in millions)

HUD Program (set asides indented)	FY 04 Enacted	FY 05 Enacted	FY 06 Enacted[1]	FY 07 Enacted	FY 08 Enacted	FY 09 Request	House THUD Subcomm. FY 09 6/20/08	Senate Approps. FY 09 7/14/08	FY 09 Omnibus Spending Bill
Tenant Based Rental Assistance	14,186	14,766	15,417	15,920	16,391	15,881	16,571	16,703	16,817
Tenant Protection Vouchers	205	163	178	149	200	150		200	150
Administrative Fees	1,235	1,200	1,238	1,281	1,351	1,400		1,500	1,450
Family Self Sufficiency Coordinators	48	46	47	47	49	48		50	50
Family Unification Vouchers					20	0		20	20
Veterans Supportive Housing Vouchers					75	75		75	75
Nonelderly Disabled Vouchers					30			0	30
Disaster Housing Assistance Vouchers						39		39	
Contract Renewals	12,893	13,463	13,949	14,436	14,666	14,760		14,860	15,034
Project Based Rental Assistance	4,792	5,298	5,037	5,976	6,382	7,000	7,300	6,700	7,100
Advanced Appropriation for Contract Renewals						400		1,750	400
Public Housing Capital Fund	2,695	2,579	2,439	2,439	2,439	2,024	2,500	2,444	2,450
Emergency/Disaster Grants	50	30	17	17	19	0		20	10
Resident Opportunities and Supportive Services	55	52.5	38	38	40	37.6		40	40
Public Housing Operating Fund	3,579	2,438	3,564	3,864	4,200	4,300	4,500	4,400	4,455
HOPE VI	149	143	99	99	100	0	120	100	120
Native American Housing Block Grants	650	621	624	624	630	627		650	645
Native Hawaiian Housing Block Grants	9	9	9	9	9	6		10	10
Housing Opportunities for Persons with AIDS	295	282	286	286	300	300	300	315	310
Community Development Fund	4,921	4,671	4,178	3,772	3,866	3,000	4,000	3,889	3,900
CDBG Formula Grants	4,331	4,110	3,711	3,711	3,593	2,934		3,593	3,642
Self-Help Homeownership Opportunity Program	27	25	20	20	60	40	60	66	64
Economic Development Initiative Grants	276	262	307	0	180	0		201	165
Brownfields Redevelopment	25	24	10	10	10	0	10	0	10
HOME Investment Partnership Program	2,006	1,900	1,733	1,733	1,704	1,917	1,654	1,967	1,825
HOME Formula Grants	1,859	1,789	1,690	1,690	1,629	1,853			
American Dream Downpayment Initiative	87	50	25	25	10	50		10	0
Housing Counseling Assistance	40	42	42	42	50	65	65	65	65
Foreclosure Counseling					180				
Homeless Assistance Grants	1,260	1,241	1,327	1,442	1,586	1,680	1,692	1,667	1,677
Samaritan Initiative	--	--	--	0	0	50		0	
Rural Housing and Economic Development	25	24	17	17	17	0		30	26
Housing for the Elderly (Section 202)	774	741	735	735	735	540	765	765	765
Housing for Persons with Disabilities (Section 811)	249	238	237	237	237	160	250	250	250
Fair Housing and Equal Opportunity	48	46	46	46	50	51		56	54
Fair Housing Assistance	28	26	26	26	26	25		27	26
Fair Housing Initiatives	20	20	20	20	24	26		29	28
Lead-Based Paint Hazard Reduction Program	174	167	152	152	145	116		145	140
Salaries and Expenses	1,116	1,030	1,141	1,141	1,212	1,206			
Policy Development and Research, excluding grants to academic institutions	47	45	36	36	28				35
Total Outlays	31,200	32,040	34,270	33,650	37,600				41,500

[1]FY06 numbers reflect at 1% cut across the board.

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

FY 10 Budget Chart for Selected Programs (in millions)

HUD Program (set asides indented)	**FY 04 Enacted**	**FY 05 Enacted**	**FY 06 Enacted**	**FY 07 Enacted**	**FY 08 Enacted**	**FY 09 Enacted**	**President's FY 10 Request 2/26/09**
Tenant Based Rental Assistance	14,186	14,766	15,417	15,920	16,391	16,817	
Contract Renewals	12,893	13,463	13,949	14,436	14,666	15,034	
Tenant Protection Vouchers	205	163	178	149	200	150	
Administrative Fees	1,235	1,200	1,238	1,281	1,351	1,450	
Family Self Sufficiency Coordinators	48	46	47	47	49	50	
Family Unification Vouchers					20	20	
Veterans Supportive Housing Vouchers					75	75	
Nonelderly Disabled Vouchers					30	30	
Disaster Housing Assistance Vouchers							
Project Based Rental Assistance	4,792	5,298	5,037	5,976	6,382	7,100	
Advanced appropriation for contract renewals						400	
Public Housing Capital Fund	2,695	2,579	2,439	2,439	2,439	2,450	
Emergency/Disaster Grants	50	30	17	17	19	20	
Resident Opportunities and Supportive Services	55	52.5	38	38	40	40	
Public Housing Operating Fund	3,579	2,438	3,564	3,864	4,200	4,455	
HOPE VI	149	143	99	99	100	120	
Native American Housing Block Grants	650	621	624	624	630	645	
Native Hawaiian Housing Block Grants	9	9	9	9	9	10	
Housing Opportunities for Persons with AIDS	295	282	286	286	300	310	
Community Development Fund	4,921	4,671	4,178	3,772	3,866	3,900	
CDBG Formula Grants	4,331	4,110	3,711	3,711	3,593	3,642	4,500
Self-Help Homeownership Opportunity Program	27	25	20	20	60	64	
Economic Development Initiative Grants	276	262	307	0	180	165	
Brownfields Redevelopment	25	24	10	10	10	10	
HOME Investment Partnership Program	2,006	1,900	1,733	1,733	1,704	1,825	
HOME Formula Grants	1,859	1,789	1,690	1,690	1,629	1,821	
American Dream Downpayment Initiative	87	50	25	25	10	0	0
Housing Counseling Assistance	40	42	42	42	50	65	
Foreclosure Counseling					180		
Homeless Assistance Grants	1,260	1,241	1,327	1,442	1,586	1,677	
Samaritan Initiative	--	--	--	0	0		
Rural Housing and Economic Development	25	24	17	17	17	26	
Housing for the Elderly (Section 202)	774	741	735	735	735	765	
Housing for Persons with Disabilities (Section 811)	249	238	237	237	237	250	
Fair Housing and Equal Opportunity	48	46	46	46	50	54	
Fair Housing Assistance Program	28	26	26	26	26	26	
Fair Housing Initiatives Program	20	20	20	20	24	28	
Lead-Based Paint Hazard Reduction Program	174	167	152	152	145	140	
Policy Development & Research (excluding grants to academic institutions)	47	45	36	36	28	35	
Total Budget Authority	31,200	32,040	34,270	33,650	37,600	41,500	47,500

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Delayed HUD Rule Would Alter Social Security Number Requirements

On January 27, 2009, the Department of Housing and Urban Development (HUD) published in the Federal Register a final rule which purports to further HUD's Rental Housing Integrity Improvement Project (RHIIP) initiative, which is designed to reduce errors in HUD's rental assistance programs.[1] The January 27 final rule would have four major effects. First, it would require every member of every household in HUD assisted housing to submit and verify Social Security Numbers (SSNs).[2] Second, it would require housing providers to use HUD's Enterprise Income Verification (EIV) system to verify incomes of participants.[3] Third, it would make changes in the provision and continuation of assistance to persons of particular immigrant statuses independent of the impact of the SSN requirements on these individuals and families.[4] Finally, it would change annual income calculation for public housing, voucher, and HOME assisted programs.[5] HUD's stated purpose for creating the revised regulations is to identify and prevent various types of fraud and abuse in rental determinations.[6]

The possible implementation of the January 27 final rule raises a number of concerns. It could make it very difficult if not impossible for many eligible persons to receive assistance because, for various reasons, they lack either an SSN or access to documents verifying their SSN or their eligible status. Further, the use of the EIV may itself result in errors in income verification. Finally, the income calculation changes raise barriers to reduction of family rent share in response to interim decreases in family income.

In their original form, these regulatory changes were published as proposed rules on June 19, 2007.[7] Resident and immigrant advocates filed lengthy comments to the proposed rules on August 20, 2007.

Delay in Effective Date

By memorandum of January 20, 2009, White House Chief of Staff Rahm Emanuel informed all executive departments and agencies that "no proposed or final regulation should be sent to the Office of the Federal Register (the "OFR") for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President" and that departments and agencies should "[w]ithdraw from the OFR all proposed or final regulations that have not been published in the *Federal Register*" pending such review and approval.[8] Believing that publication of the final rule regarding SSNs and income verification violated this presidential directive, numerous resident and immigrant advocacy organizations and individuals requested that the rule be withdrawn. On February 11, 2009, HUD published a notice of the proposed delay in the effective date, soliciting comments on both the delay and the rule.[9] By March 13, 2009, advocacy and policy organizations filed several sets of comments on the proposed delay, carrying the signatures of over forty organizations and individuals.

On March 27, 2009, HUD announced that it was delaying the effective date of the subject rule until September 30, 2009.[10] It is important to note that HUD has not rescinded the rules. The final rule of March 27 states only that:

> A delay until September 30, 2009 will provide HUD with additional time to review the public comments received in response to the February 11, 2009, notice, respond to those comments in a subsequent publication, and consider whether additional regulations or changes to the regulations in the January 27, 2009, final rule are necessary or appropriate.[11]

Additionally, the March 27 final rule states that:

> Since September 30, 2009, is the date in the January 27, 2009, final rule for multifamily housing owners and management agents to implement the use of EIV, the Department has determined not to provide additional delay in implementation in the use of EIV for multifamily housing owners and management agents as provided in the January 27, 2009, final rule.[12]

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[1]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).
[2]*Id.* at 4839, 4841.
[3]*Id.* at 4841.
[4]*Id.* at 4841.
[5]*Id.* at 4841-2.
[6]*Id.* at 4832-3.
[7]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs, Final Rule, 72 Fed. Reg. 33,844 (June 19, 2007) (to be codified at 24 C.F.R. pt. 5, pt. 92 and pt. 908).
[8]Memorandum For the Heads of Executive Departments and Agencies, from Rahm Emanuel, Assistant to the President and Chief of Staff (Jan. 20, 2009); Executive Office of the President, The White House Office, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435-4436 (Jan. 26, 2009).
[9]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date, Notice of Proposed Delay of Effective Date, 74 Fed. Reg. 6839, 6840 (Feb. 11, 2009).
[10]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Delay of Effective Date, Final rule; Delay of effective date, 74 Fed. Reg. 13339 (March 27, 2009).
[11]*Id.* at 13,340.
[12]*Id.*

SSN Disclosure Rule and Proposed Changes[13]

The January 27 final rule requiring that applicants and participants provide complete and accurate SSNs, with documentation and verification thereof, governs the following: supportive housing for the elderly[14] and persons with disabilities;[15] Section 8 housing,[16] public housing,[17] Section 221(d)(3) housing,[18] Section 236 housing[19] and rent supplement Section 101 programs.[20] This plan would be implemented through a number of specific changes that fit into a larger system. Only by comparing the current and January 27 final rule as parts of this larger system can the import of these proposed changes be understood.

The rule regulating the disclosure and verification of SSNs[21] was significantly amended. The current regulation requires SSNs only from applicant or household members six years of age or older.[22] The January 27 final rule would require SSNs from persons of any age.[23]

The rule eliminates the provision, woven throughout § 5.216, that allows applicants and participants to submit "a certification executed by [or for, in the case of an individual less than 18 year of age][24] the individual involved"[25] and replaces it with the requirement that, in addition to submission of "[t]he complete and accurate SSN" for each household member, "a valid SSN card . . . or other evidence of the SSN as HUD may prescribe . . . ."[26] must also be provided.

The current regulation requires SSN disclosure for participants only at regularly scheduled income reexamination.[27] The January 27 final rule would require all participants who have an initial determination of eligibility before March 30, 2009, to provide and verify their SSNs at interim income reexaminations, all reexaminations of family composition and other certifications.[28] Thereafter, all new household members would have to follow the new rules.[29]

Currently, applicants and participants who disclose SSNs but cannot meet the documentation requirements must submit an SSN and a certification that while the SSN has been assigned, they cannot yet provide acceptable verifying documentation.[30] In such cases, the processing entity will continue processing the application or, in the case of a participant, allow the participant to continue in the program. Participants or applicants will have sixty calendar days from the date of the certification to provide the required documentation.[31] At the discretion of the processing entity, this period may be extended for an additional sixty days for participants sixty-two years of age or older.[32] Under the January 27 final rule, since certifications are eliminated completely, applicants can remain on waiting lists indefinitely, but cannot become participants until they provide an accurate SSN for each household member and either a valid SSN card or "such other evidence as HUD may prescribe."[33] There is an exception for applicants to the Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) program for homeless individuals.[34] Such individuals must be given ninety days to provide the required documentation and, at the discretion of the processing entity, an additional ninety days.[35]

Section 5.218 continues to require that assistance or tenancy must be denied if the applicant or participant does not meet the SSN disclosure, documentation and verification requirements.

The sole change in the January 27 final rule is the deletion of the reference to the certification process, which would no longer exist.[36]

Also unchanged are the provisions of §§ 5.230 and 5.232 requiring applicants and participants to execute consent forms allowing the processing entity to verify information through third parties and requiring denial or termination of assistance for failure to provide such consents.[37]

The January 27 final rule contains a wholly new § 5.233 which requires processing entities to use HUD's EIV system "as a third-party source to verify tenant employment and income information during mandatory reexamination or recertification of family composition and income."[38]

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[13]For an overview of the use of Social Security numbers in public and assisted housing *see* NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS (3d ed.) 3/61 (2004).
[14]Commonly called Section 202 housing, codified at 12 U.S.C. § 1701q and regulated by 24 C.F.R. § 891 (2007).
[15]Commonly called Section 811 housing, codified at 42 U.S.C. § 8013 and regulated by 24 C.F.R. § 891 (2007).
[16]*See* 42 U.S.C. § 1437f, regulated by 24 C.F.R. §§ 880, 881, 882, 883, 884, 886, 982, 983 (2007).
[17]*See* 42 U.S.C. § 1437, regulated by 24 C.F.R. § 964 (2007).
[18]*See* 12 U.S.C. § 1715(d)(3).
[19]*See* 12 U.S.C. § 1715z-1.
[20]*See* 12 U.S.C. § 1715s.
[21]24 C.F.R. § 5.216 (2007).
[22]24 C.F.R. § 5.216(a)(1)(i) (2007). Throughout, references to regulations as they now exist are cited as herein, while references to regulations published on January 27, 2009 (*see* note 1 *supra*) are cited as "Suspended".
[23]Suspended 24 C.F.R. § 5.216 (a)(1).
[24]24 C.F.R. § 5.216(j) (2007).
[25]24 C.F.R. § 5.216(a)(2),(b)(2),(d)(2)(i)(B) (2007).
[26]Suspended 24 C.F.R. § 5.216(a)(2), (b)(2), (d)(2)(i)(B); *see also* suspended 5.216(f)(2009).
[27]24 C.F.R. § 5.216(d)(1) (2007).
[28]Suspended 24 C.F.R. § 5.216 (d)(1).
[29]*Id.* at (d)(2).
[30]24 C.F.R. § 5.216(g) (2007). Acceptable verifying documentation is described in § 5.216(f).
[31]*Id.* at (g)(4) & (5).
[32]*Id.*
[33]Suspended 24 C.F.R. § 5.216 (g)(1).
[34]24 C.F.R. § 882 Subpart H.
[35]Suspended 24 C.F.R. § 5.216 (g)(2).
[36]24 C.F.R. § 5.218 (2007) and Suspended 24 C.F.R. § 5.218.
[37]24 C.F.R. § 5.230 and § 5.232 (2007) and Suspended 24 C.F.R. §§ 5.230 and 5.323.
[38]Suspended 24 C.F.R. § 5.233.

Assistance to Immigrant Family Rule and Proposed Changes[39]

The January 27 final rule would also amend sections[40] that are intended to implement Section 214 of the Housing and Community Development Act of 1980 (Section 214), which restricts housing assistance to citizens and certain categories of non-citizen immigrants.[41] These sections apply only to applicants to and participants in the Section 235 program,[42] Section 236 program,[43] rent supplement programs,[44] public housing,[45] the Section 8 program,[46] and Housing Development Grant Programs.[47]

The January 27 final rule would make certain changes in the process for determining eligibility for rental assistance. Under current regulations, the responsible entity is permitted to request verification of U.S. citizenship or nationality from each family member.[48] However, the January 27 final rule makes verification of each family member's status mandatory.[49]

For citizens and nationals, the current regulation defers to unspecified HUD guidance to define appropriate documentation.[50] The January 27 final rule specifies that such verification must consist of "a U.S. passport, U.S. birth certificate, Employment Authorization card, Temporary Resident card, or . . . documentation, as provided by section 214."[51]

For noncitizens, both the current and the January 27 final rule provide for documentation of status under Section 214 depending upon the particular status claimed by the applicant or participant. The current regulations provide that noncitizens who were sixty-two years of age or older and applied for assistance on or after September 30, 1996, may be deemed eligible after submitting a signed declaration of eligible immigrant status and a proof of age document. All other noncitizens must file the declaration of eligible status, one of a number of designated Immigration and Naturalization System documents, and a signed verification consent form.[52] The January 27 final rule would eliminate the sixty-two years of age or over distinction. All noncitizens would have to meet the latter requirements.[53]

There is no proposed alteration of regulations governing "Documents of eligible immigration status,"[54] "Verification of eligible immigration status"[55] or "Delay, denial, reduction or termination of assistance."[56]

Currently, both families having no members with eligible immigrant or citizenship status and "mixed families," those including members who are citizens or of eligible immigrant status and members without citizenship or eligible immigrant status, may be entitled to remain in assisted housing for repeated six-month deferral periods, under specific conditions, if the family was receiving assistance as of June 19, 1995.[57] Under the January 27 final rule, these rules would be narrowed. The January 27 final rule[58] makes deferral available to families receiving assistance on or before June 19, 1995, only if the family includes a person who is a refugee or asylee under federal immigration law.[59]

More importantly, there is no proposed change to the provisions governing proration of assistance.[60] The regulations continue to provide that "[a]n eligible mixed family who requests prorated assistance must be provided prorated assistance."[61]

Issues Raised by Rule Changes

Apparently in response to comments submitted by advocates asserting that the January 27 final rules related to submission of SSNs[62] and to mixed families[63] appear to be in conflict, the Proposed Delay of Effective Date of the proposed regulations states that:

> these requirements are not intended to apply to individuals, in mixed families, who do not contend eligible immigration status under HUD's noncitizens regulations, nor does it [*sic*] interfere with existing requirements relative to proration of assistance or screening for such families, or authorize their eviction or denial of admission on the basis of the new requirements pertaining to obtaining social security numbers.[64]

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[39]For an overview of the use of citizenship and immigration status in public and assisted housing, see National Housing Law Project, HUD Housing Programs: Tenants' Rights (3d ed.) 2/18 (2004).
[40]24 C.F.R. §§ 5.516 and 5.518.
[41]42 U.S.C. § 1436a.
[42]12 U.S.C. § 1715z.
[43]12 U.S.C. § 1715z-1 (tenants paying below market rent only).
[44]12 U.S.C. § 1701s.
[45]42 U.S.C. § 1437.
[46]42 U.S.C. § 1437f.
[47]42 U.S.C. § 1437 (low-income units only). For further description see 24 C.F.R. §§ 5.500 and 5.504.
[48]24 C.F.R. § 5.508(b)(1) (2007).
[49]24 C.F.R. § 5.508(b)(1) (2007).
[50]*Id.* The current regulation does not reference or specify a particular guidance.
[51]Suspended 24 C.F.R. § 5.508(b)(1).
[52]24 C.F.R. § 5.508(b)(2) (2007); *see also* 42 U.S.C. § 1436a(d) and 24 C.F.R. § 5.510.
[53]Suspended 24 C.F.R. § 5.508(b)(2).
[54]24 C.F.R. § 5.510 (2007).
[55]24 C.F.R. § 5.512 (2007).
[56]24 C.F.R. § 5.514 (2007).
[57]24 C.F.R. § 5.516 (c) (2007) and § 5.518(b)(1) and (2).
[58]24 C.F.R. § 5.516 (c) and § 5.518(b)(1) and (2) (2007).
[59]8 U.S.C. §§ 1157-8 (2007).
[60]24 C.F.R. § 5.520 (2007).
[61]*Id.* at (a). The methods of prorating the assistance for the various subsidy programs is set out in detail in § 5.520.
[62]Suspended 24 C.F.R. § 5.216 et seq.
[63]Suspended 24 C.F.R. § 5.508 et seq.
[64]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date, Notice of Proposed Delay of Effective Date, 74 Fed. Reg. 6839, 6840 (Feb. 11, 2009).

Subpart B (§ 5.210 et seq.) and subpart E (§ 5.500 et seq.) govern virtually the same assisted housing.[65] However, while under the January 27 final rule, sections 24 C.F.R. § 5.216 and 5.218 every participant in the housing assistance program must submit an SSN or suffer termination of assistance and eviction, under 24 C.F.R. §§ 5.516, 5.518(b), and 5.520, certain mixed families[66] may receive either continuing assistance,[67] temporary deferral of termination of assistance,[68] or prorated assistance.[69]

The absolute requirement of submission, documentation, and verification for all assisted persons seriously threatens access to housing for both citizens and eligible non-citizens.

It is unclear how it is possible for persons who do not assert eligible immigration status to receive assistance under § 5.516 *et seq.* when, under § 5.210 *et seq.*: 1) the January 27 final rule requires each applicant to submit a complete and accurate SSN and supporting documentation which is then verified;[70] 2) with the exception of certain homeless individuals entering SRO programs, an applicant may remain on a waiting list but never become a participant without providing the SSN and supporting documentation which is then verified;[71] and 3) the processing entity is required to terminate assistance or tenancy or both in the absence of an SSN, documentation and verification.[72]

Additionally, some persons who are not citizens or do not have eligible immigrant status, as well as persons who do have eligible immigrant status, do not have and are lawfully prohibited from obtaining SSNs. The January 27 final rule does not resolve how such persons may both occupy assisted housing as members of mixed families and be subject to termination of assistance and eviction for not submitting an SSN and supporting documentation.

Does HUD intend that persons who do not contend eligible status may remain, and/or in the future become, members of mixed families while not being considered "participants"? May such persons be members of waiting list families that will be provided housing assistance when the family reaches the top of the list, while the persons not claiming eligibility will not themselves be considered "participants"? How can proration be the intended result when the penalty is termination of assistance and tenancy?

If proration is HUD's intent, then it should rewrite the rule. To fail to do so invites the conclusion that §§ 5.216 and 5.218 do not allow for proration and promotes confusion among housing providers. Indeed, on January 29, 2009, HUD published on its Multifamily Housing Rental Housing Integrity Improvement Project Listserv a notification to subscribers that stated, regarding these regulations:

> The final rule requires **all** individuals applying for or participating in HUD's rental assistance programs to have a valid social security number. *All* social security numbers for an applicant's *household* must be verified using appropriate documentation before the *household* may be admitted into the project. For current *tenants*, all social security numbers must be provided and verified at the next interim or regularly scheduled recertif ication. [**emphasis** in original] [*emphasis* added].[73]

This admonition by HUD appears to leave no room for any member of an assisted household or any person considered a tenant to reside in the assisted unit without having provided a valid SSN.

Beyond the question of persons not contending eligible immigrant status, the absolute requirement of submission, documentation, and verification for all assisted persons seriously threatens access to housing for both citizens and eligible non-citizens who do not have, or cannot access their SSN, an SSN card, and supporting verifiable documentation. These include victims of domestic violence, seniors (particularly if born in rural areas or in the southern United States),[74] persons with disabilities, children, homeless persons, and citizens born outside of the United States. While many programs give waiting list preference to several of these categories, these are the people most likely to face barriers to submission of the required information and documentation.

There are also non-citizens who are eligible for housing assistance who are not eligible for SSNs, and not exempted from the requirement, including victims of trafficking, individuals granted withholding of removal/deportation, and individuals granted parole by the Attorney General.[75]

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[65]Both subparts cover public housing (42 U.S.C. § 1437), project based and housing choice Section 8 (42 U.S.C. § 1437f), Section 221, 235 and 236 of the National Housing Act (12 U.S.C. §§ 17151, 1715z and 1715z-1 respectively). Each subpart also governs one or more types of assisted housing that the other does not.

[66]24 C.F.R. § 5.504 (2007).

[67]24 C.F.R. § 5.516(a)(i) and § 5.518(a) (2007).

[68]24 C.F.R. § 5.516(a)(ii) and § 5.518(b) (2007).

[69]24 C.F.R. § 5.516(a)(iii) and § 5.520 (2007).

[70]Suspended 24 C.F.R. § 5.216.

[71]Suspended 24 C.F.R. § 5.216 (g).

[72]Suspended 24 C.F.R. § 5.218 (c).

[73]HUD RHIIP Listserv Posting #135, The Refinement of Income and Rent Determination Requirements in Public and Assisted Housing, Programs Final Rule Published (Jan. 29, 2009) (RHIIP stands for Rental Housing Integrity Improvement Project).

[74]*See, e.g.*, Ku and Broaddus, *New Requirement for Birth Certificates or Passports Could Threaten Medicaid Coverage for Vulnerable Beneficiaries: A State by State Analysis*, Center on Budget and Policy Priorities (Feb. 2006) http://www.cbpp.org/1-5-06health.htm.

[75]42 U.S.C. § 1436a (2007).

Many of the persons described above are also most likely to be thwarted by what is to them an insurmountable financial cost of obtaining the required SSN and documentation.

If HUD is going to require housing providers to obtain SSNs, it must provide resources to applicants and providers, mandate that providers assist applicants in obtaining both SSNs and supporting documentation, and remove barriers to admission and continuing assistance pending compliance with the SSN requirements.

Beyond this apparently direct conflict is the question raised in HUD's comments published with the purportedly final rule on January 27, 2009, concerning mismatches between participants' disclosed SSNs and the Social Security database.[76] The available data allow for a variety of explanations for such mismatches, well beyond HUD's suggestion that "individuals . . . have not disclosed a valid Social Security Number."[77]

Annual Income Rule and Proposed Changes for Section 8 and Public Housing

HUD apparently believes that changes in income determination regulations are necessary to "minimize possible errors in the reexamination/recertification system."[78] The rules governing annual income of families who apply for or receive assistance in the Section 8 (tenant-based and project-based) and public housing programs would also undergo significant changes. Under the current rule, annual income is either "(1) money or other amounts which go to any family member or (2) "are anticipated to be received . . . during the 12-month period following" the effective date of any admission or annual reexamination, including amounts derived from assets accessible by any family member.[79] This base rule is followed by a long list of examples of amounts included and a list of those specifically excluded.[80] The current rule then gives the housing provider discretion to annualize income anticipated for a shorter period (subject to redetermination at the end of such period) if it is not feasible to anticipate a twelve-month period or if the authority believes that past income is the best indicator.[81]

The lengthy exemplary list of inclusions and specific exclusions would be discarded in the January 27 final rule. The inclusion of income derived from assets and the discretionary authority to annualize from a shorter test period would be retained.[82]

The January 27 final rule would allow income to be determined in either of two ways. First, the housing provider could project forward for twelve months the "[a]ctual income being received" at the time of the certification. Second, if "(A) [t]he family reports little or no income; and (B) [t]he processing entity cannot determine annual income due to fluctuations in income," then the determination may be based upon "[p]ast actual income received or earned within the last 12 months."[83] If the processing entity were to use this last method, it could average actual income from the past twelve months and could request from the family, and use in its determination, income documentation from the period of sixty days before the determination or sixty days after such request.[84] The processing entity would have sole discretion to accept or reject income documentation based upon HUD administrative instructions.[85]

The discretion housing providers would have to both project income based upon prior income when the family's income fluctuates, drops, or ends, and to accept or reject documentation thereof, raises serious questions of how providers will respond to participants' requests for interim reexamination and recalculation of the family rent share. While the changes do not directly affect the interim reexamination rules and HUD's comments confirm that owners and agents of privately owned or operated housing must continue to follow existing interim recertification policies,[86] the possibility exists that reported decreases in participant income will not result in reduction of family rent obligations and will lead to families paying more rent than statutorily allowed,[87] ultimately causing unjustified evictions for inability of the family to pay its share of rent. The consequences of such actions would fall hardest on those least able to meet such rent demands and most vulnerable to the dire consequences of homelessness.

Annual Income Rule and Proposed Changes for HOME-Assisted Projects[88]

The income determination change for HOME-assisted projects, as with public housing and Section 8, is related to the time period from which the income data is obtained. The current rule requires the participating jurisdiction to "calculate the annual income of the family projecting the prevailing rate of income of the family" at the time of the determination.[89] The January 27 final rule would calculate the income "based on the actual income being

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[76]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs, Final Rule, 74 Fed. Reg. 4832, 4833 (Jan. 27, 2009) (to be codified at 24 C.F.R. pt. 5, pt. 92 and pt. 908).
[77]*Id.*
[78]*Id.* at 4836.
[79]24 C.F.R. § 5.609 (a) (2007).
[80]*Id.* at (b)-(c).
[81]*Id.* at (d).
[82]Suspended 24 C.F.R. § 5.609 (b), (a)(4) and (d).
[83]*Id.* at § 5.609(a)(2).
[84]*Id.* at (b).
[85]*Id.* at (c).
[86]Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs, Final Rule, 74 Fed. Reg. 4832, 4837 (Jan. 27, 2009) (to be codified at 24 C.F.R. pt. 5, pt. 92 and pt. 908).
[87]42 U.S.C. § 1437aa.
[88]42 U.S.C. § 3535(d), 12701-839.
[89]24 C.F.R. § 92.203(d)(1) (2007).

received" at that time and "projecting forward for the 12-month period."[90] Just as with housing authorities and Section 8 providers who are unable to determine income because the family reports little or no income, or because the income fluctuates, the January 27 final rule would allow the participating jurisdiction the option to average income from the past twelve months and request documentation from sixty days back and forward.[91] Note that unlike the possible changes for public housing and Section 8, the HOME-assisted regulations would not alter the existing requirements for inclusion or exclusion of money or other benefits from income calculation.[92]

These changes in HOME-assisted project rules would raise the same questions regarding interim reexamination as posed by the January 27 changes in public housing and Section 8 programs.

Electronic Transmission of Family Data

The January 27, change governs electronic data submissions from public housing, Section 8 certificate and voucher, and moderate rehabilitation programs. The data is required for HUD forms HUD-50058, Family Report and HUD-50058-FSS, Family Self-Sufficiency Addendum. Except for updating the regulation to insert a reference to housing choice vouchers, the change would add a requirement that programs retain form HUD-50058, at least electronically, for at least three years after submission "to support billings to HUD and to permit an effective audit."[93]

Conclusion

Eighteen months after receiving comments on January 27 final rule governing eligibility for assisted housing, and after replacement of the administration and department head who oversaw the drafting and comment review, HUD published its purportedly "Final Rule" exactly one week after the incoming administration had notified all departments and agencies that "no . . . final regulations should be sent to the Office of the Federal Register" and that they should "[w]ithdraw. . . all . . . final regulations that have not been published . . ." pending such review and approval.[94] After swift reaction from the policy and advocacy community, HUD agreed to consider a sixty-day delay and solicited comments on both the delay and the rule but did not publish a withdrawal of its instructions to providers of their new obligations.[95]

Advocacy organizations from across the country, representing residents, immigrants and victims of domestic violence, as well as civil rights and policy groups, have filed comments requesting that these January 27, final regulations be withdrawn or dramatically altered.

In response, HUD has delayed the implementation of the January 27 final rule until September 30, 2009, pending further comment and review. Many providers may be taking steps to implement the January 27 final rules, with significant consequences to applicants and residents of assisted housing. If the rules are withdrawn, advocates must insist that providers behave accordingly. If the rules are eventually implemented, as published or in some amended form, advocates must be prepared to properly advise and represent clients. ■

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[90]Suspended 24 C.F.R. § 92.203(d)(1).

[91]*Id*.

[92]24 C.F.R. § 92.203(a) through (c) (2007) would remain unchanged.

[93]24 C.F.R. § 908.101 (2007).

[94]Memorandum For the Heads of Executive Departments and Agencies, from Rahm Emanuel, Assistant to the President and Chief of Staff (Jan. 20, 2009), Executive Office of the President, The White House Office, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435-4436 (Jan. 26, 2009).

[95]HUD RHIIP Listserv Posting #135, The Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs, Final Rule Published (Jan. 29, 2009) (RHIIP stands for Rental Housing Integrity Improvement Project).

Settlement Upholds Tenant's Right to Operate Child Care Facility in Her Apartment*

Child care and housing advocates recently won an important victory on behalf of a tenant who sought to open a licensed family child care home in a multifamily complex. In *Morrison v. Vineyard Creek, L.P.*,[1] tenant Sarah Morrison was threatened with eviction and retaliation after she informed her property management company of her plans to open a licensed family child care home. Morrison settled her case and is now allowed to operate her business without fear of retaliation, eviction, discrimination, or harassment. This result affirms the rights of thousands of California child care providers who live in multiunit dwellings and the families they serve. Morrison was represented by Child Care Law Center, Western Center on Law and Poverty, Heller Ehrman and a private housing attorney, Nancy Palandati.

Factual Background

Morrison moved into Vineyard Creek Apartments in Sonoma County, California in January 2007. She planned on opening a small licensed family child care home and, as required by law, notified the onsite property manager.[2] The next day, Morrison received a letter from an attorney for Vineyard Creek stating that she was not allowed to operate her business. The letter made it clear that the property management company did not believe that the statutory tenant protections in the California Health and Safety Code for licensed family child care homes applied to tenants in multiunit dwellings. The letter stated that the property management company would sue Morrison if she opened her family child care home. Morrison feared she would lose both her livelihood and her home.

Applicable Law and Legal Argument

Health and Safety Code

The California Health and Safety Code regulates licensed family child care homes.[3] Family child care homes are operations where children are cared for in the provider's home. Residential tenants who provide child care often face challenges, including landlords who, given a choice, would not rent to prospective tenants who provide child care or would prevent current tenants from operating licensed family child care homes. To help alleviate these challenges, legislation was enacted in the early 1980s giving child care providers who live in residential property statutory protections.[4] These laws protect tenants from lease conditions and other verbal or written restrictions imposed on their family child care homes by landlords.[5]

California Health and Safety Code Section 1597.40 has four subsections, and Vineyard Creek argued that a reference in subsection (a) to single family residences limited the use of the term "real property" in the subsequent sections.[6] This reading would mean that a licensed family child care provider renting an apartment in a multiunit dwelling would not have the same protections afforded to a provider renting a single family house. This interpretation would allow landlords to discriminate against or even evict tenants in multiunit dwellings who choose to operate a family child care home.

There is little case law interpreting Section 1597.40. As a case of first impression, Morrison responded that the statutory language, legislative history, and public policy considerations all favored a reading that extended the protections to tenants in multiunit dwellings.

Fair Employment and Housing Act

California's Fair Housing and Employment Act (FEHA)[7] was also at issue in Morrison's case. FEHA makes it illegal for the owner of any housing accommodation[8] to discriminate or harass any person because of the race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability of that person.[9]

Ms. Morrison asserted that she was discriminated against on the basis of her "source of income," which is defined as "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant."[10] Licensed family child care is a lawful "source of income," because it is paid directly to the child care provider in exchange for her care of children. FEHA protects applicants as well as current tenants who are discriminated against by property owners or their agents.

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*The author of this article is Claire Ramsey, staff attorney at the Child Care Law Center, San Francisco, California. For more information regarding the rights of licensed family child care providers, please contact the Child Care Law Center at (415) 394-7144 or cramsey@childcarelaw.org.

[1]Morrison v. Vineyard Creek, L.P. et al., (Calif. Superior Crt. Sonoma Cnty., complaint, No. SCV 240627 (2007)) and *Id*. (Settlement (June 19, 2008)).

[2]Cal. Health & Safety Code § 1597.40(d) (West 2009).

[3]§ 1597.30 et seq.

[4]§ 1597.30 et seq.

[5]§ 1597.40.

[6]*Id*.

[7]Cal. Gov't Code § 12955 (West 2008).

[8]"Housing accommodation" means any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families and any vacant land that is offered for sale or lease for the construction thereon of any building, structure, or portion thereof intended to be so occupied. § 12927(d).

[9]§ 12955.

[10]§ 12955(p)(1).

Retaliatory Eviction

In addition to FEHA, California tenants are also protected by a retaliatory eviction statute.[11] One section of the statute makes it unlawful for a lessor to "bring an action to recover possession, or threaten to do any of these acts, for the purpose of retaliating against the lessee because he or she has … lawfully and peaceably exercised any rights under the law."[12] This section protects tenants whose landlords have taken or threatened to take legal action against them for exercising their legal rights. Morrison argued that Vineyard Creek's action was retaliatory. Morrison asserted that Vineyard Creek threatened to initiate litigation against her because she lawfully and peaceably exercised her legal right to begin the process of operating a licensed family child care home in her apartment.

Conclusion

After a year of litigation, Morrison obtained a favorable settlement allowing her to operate her licensed family child care home in her rental unit. The settlement explicitly stated that Vineyard Creek is required to follow all fair housing laws. It also barred Vineyard Creek from evicting, retaliating against, or harassing Morrison. Additionally, Morrison received a monetary settlement. This settlement serves as a cautionary tale to landlords who illegally prohibit tenants from opening licensed family child care homes, and it confirms the legal protections available to licensed family child care providers throughout California. ■

[11] CAL. CIV. CODE § 1942.5 (West 2008).
[12] § 1942.5(c).

Court: Owner of Massive NYC Complex Wrongfully Raised Rents for Thousands of Tenants

A New York appellate division court unanimously held that the owners of Manhattan's largest apartment complex improperly raised rents and deregulated thousands of units after receiving millions of dollars in tax breaks. In *Roberts v. Tishman Speyer Properties, L.P.*,[1] the appellate division held that apartments at the sprawling Stuyvesant Town/Peter Cooper Village complex must remain rent-regulated for as long as the building's owners receive tax abatements under the city's J-51 program. The court's decision was at odds with guidance promulgated by the New York Division of Housing and Community Renewal, which stated as early as 1996 that certain owners receiving J-51 tax breaks could deregulate rent-controlled units. If the decision stands, it could protect thousands of rent-controlled units citywide from deregulation.

Background

The Peter Cooper Village/Stuyvesant Town complex was developed in the 1940s by MetLife to provide affordable housing for working class families.[2] The massive complex is the largest of its kind in New York City and covers approximately eighty acres, or ten city blocks.[3] It consists of 110 buildings comprising 11,200 units inhabited by at least 20,000 people.[4]

To finance the development of the complex, MetLife entered into an agreement with the city pursuant to the New York Redevelopment Companies Law.[5] The agreement provided MetLife with assistance in land acquisition and financing, as well as a real estate tax exemption for twenty-five years.[6] In 1974, the state legislature enacted an amendment providing that upon expiration of the twenty-five-year tax exemption, property taxes on the complex would be phased in over a ten-year period, and the complex's units would become subject to the New York City Rent Stabilization Law.[7]

In 1992, MetLife began receiving property tax abatements under the city's J-51 program, which provided incentives for owners to rehabilitate their properties.[8]

[1] __ N.Y.S.2d __, 2009 WL 540709 (N.Y. App. Div. Mar. 5, 2009). The tenants were represented by Wolf Haldenstein Adler Freeman & Herz. Amici curiae briefs were filed on behalf of the tenants by the Legal Aid Society of New York and the Office of the Manhattan Borough President.
[2] *Id.* at *1.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

Under the J-51 program, rent deregulation of residential units in buildings receiving tax abatements was prohibited.[9] MetLife and successor owners of the complex have received $24.5 million in tax breaks since entering the program, and are scheduled to remain in the program until 2017.[10]

In January 2007, a class comprising current and former tenants of the complex sued MetLife and Tishman Speyer, which purchased the complex from MetLife in 2006 for approximately $5.4 billion.[11] Since its purchase of the complex, Tishman Speyer has made a concerted effort to convert as many of the units as possible to market rate in order to pay off its debt on the building. The tenants alleged that more than 25% of the complex's units, or an estimated 3000 units, were illegally deregulated.[12] The tenants asserted that deregulation is prohibited during the period in which an owner is receiving J-51 tax benefits.[13] The tenants sought recovery of rent overcharges, attorney's fees, and a declaratory judgment that their apartments were subject to the Rent Stabilization Law and would continue to be subject to the law for the duration of the time in which the complex's owners received J-51 tax benefits.[14]

Applicable Law

At issue in the case were the so-called luxury decontrol provisions of the Rent Stabilization Law. Under these provisions, units are excluded from the Rent Stabilization Law when either (1) the legal regulated rent is $2,000 or more and the tenants' combined household income exceeds $175,000 for two consecutive years;[15] or (2) the tenant vacates the apartment and the legal regulated rent is $2000 or more.[16] However, the luxury decontrol provisions cannot be applied to units which became subject to the Rent Stabilization Law "by virtue of receiving tax benefits" pursuant to the J-51 program.[17]

In a 1996 opinion letter, the New York Division of Housing and Community Renewal (DHCR) issued an interpretation of the "by virtue of receiving tax benefits" language.[18] DHCR opined that an owner is precluded from seeking luxury decontrol of units receiving J-51 tax abatements only where receipt of the J-51 abatement is "the sole reason" for the units being subject to the Rent Stabilization Law.[19] In other words, DHCR's position was that owners receiving J-51 tax abatements could still deregulate rent-controlled units pursuant to the luxury decontrol provisions if the units were already subject to the Rent Stabilization Law *before* the owner applied for a J-51 abatement. This is the situation that existed at Stuyvesant Town and Peter Cooper Village. Additionally, DHCR adopted regulations stating that an owner receiving J-51 tax abatements is prohibited from using the luxury decontrol provisions only where the apartments became subject to the Rent Stabilization Law "solely by virtue of" the receipt of J-51 tax benefits.[20]

A Manhattan Supreme Court justice relied on DHCR's interpretation in dismissing the tenants' suit.[21] The trial court noted that the complex became subject to rent stabilization in 1974, eighteen years before the owners applied for J-51 tax benefits. The court therefore concluded that the owners did not become subject to rent stabilization "by virtue of receiving tax benefits" pursuant to the J-51 program. Accordingly, the court found that the owners permissibly deregulated units using the luxury decontrol provisions. The tenants appealed the dismissal.

The Court's Analysis

The appellate court first examined the amount of deference owed to DHCR's interpretation of the words "by virtue of receiving tax benefits." The court found that the question at issue was one of pure statutory interpretation, and that DHCR's opinion was therefore not entitled to deference.[22] Accordingly, the court rejected Tishman Speyer's reliance on DHCR's opinion letter and regulations.

The court then looked to the plain meaning of the language of the Rent Stabilization Law and rejected Tishman Speyer's arguments that they were permitted to deregulate units using the luxury decontrol provisions. The court noted that the parties agreed that the phrase "by virtue of" means "because of" or "by reason of."[23] The court found that the phrase does not ordinarily mean that only a single cause or reason exists. It then cited several other statutes where the legislature used the phrases "only by virtue of" or "solely by virtue of" when it intended to restrict a provision to a single cause. Further, the court found that Tishman Speyer's interpretation invited absurd results. The court found no reason "to endorse the motion court's counterintuitive outcome of allowing landlords to be exempt from rent stabilization obligations in certain building units even though they continue to receive J-51 tax abatements originally provided to the owner on the condition that the owner guaranteed its housing stock would be rent stabilized throughout the J-51 period."[24] Accordingly, the court reversed the dismissal of the complaint and ordered it to be reinstated.

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at *2.
[13] *Id.*
[14] *Id.*
[15] N.Y. Rent Stabilization L. § 26-504.1 (2008).
[16] §§ 26-504.2, 26-511[c][5-a].
[17] §§ 26-504.1, 25-504.2.
[18] In 1983, the legislature vested DHCR with the responsibility of administering the New York City Rent Stabilization Law.
[19] Roberts v. Tishman Speyer Props., LLC, __ N.Y.S.2d __, 2009 WL 540709 at * 5 (N.Y. App. Div. Mar. 5, 2009).
[20] 9 NYCRR §§ 2520.11[r][5][e], [s][2][i] (2008).
[21] Roberts v. Tishman Speyer Props., LLC, 2007 WL 2815093 (N.Y. Sup. Ct. Aug. 16, 2007).
[22] *Roberts*, 2009 WL 540709 at *6.
[23] *Id.*
[24] *Id.* at *7.

Conclusion

Tishman Speyer has filed a motion seeking leave from the Appellate Division to file an appeal with the state's highest court. Pending its decision on this motion, the Appellate Division granted a stay of its ruling on the merits.[25] The court ordered Tishman Speyer to deposit into an interest-bearing escrow account the difference between the rent it charged for the affected units and the rent it would have charged if the units remained regulated.

If upheld, the ruling could ultimately cost Tishman Speyer $200 million if they are required to repay the residents for improper rent increases.[26] Community leaders, such as Manhattan Borough President Scott M. Stringer, have urged Tishman Speyer "to sit down with residents of the complex to resolve this dispute over rent overcharges in a fair and equitable manner."[27]

Additionally, if the decision stands, landlords throughout the city could face similar suits for reimbursement to tenants living in formerly rent-stabilized units. DHCR has advised any tenant who believes that he or she is affected by the decision to file a rent overcharge complaint.[28] As noted by tenants' attorney Alexander H. Schmidt, "This is an important victory, not only for our clients but for tenants throughout the City who are being overcharged by landlords who have been misinterpreting the rent stabilization statutes in the same fashion that Tishman Speyer and the other defendants did here."[29] While it is unclear how many buildings could be affected by the decision, the city's Finance Department has stated that more than 14,000 buildings are receiving J-51 tax abatements.[30] Industry officials state that as many as 80,000 units could be affected.[31] In any event, the case may discourage other owners from following Tishman Speyer's business plan, which presumed that the company could increase profits by replacing rent-stabilized residents with higher-paying tenants after renovating and deregulating the apartments. ■

[25]Roberts v. Tishman Speyer Props., LLC, No. 100956/07 (N.Y. App. Div. Mar. 13, 2009) (order granting stay).

[26]Charles V. Bagli, *Big Landlord Found to Have Wrongly Raised Rents*, N.Y. Times, Mar. 6, 2009.

[27]Statement by Borough President Scott M. Stringer on Court Ruling in Favor on Rent Stabilized Tenants at Stuyvesant Town and Peter Cooper Village, Mar. 6, 2009, http://www.mbpo.org/newsroom_details.asp?id=1212&page=1.

[28]Div. of Hous. & Cmty. Renewal, UPDATED: Roberts v. Tishman Speyer Properties, L.P. (Mar. 16, 2009), http://www.dhcr.state.ny.us/PressRoom/news090312.htm. These complaints will be held pending a final outcome in the *Roberts* case.

[29]Press Release, Wolf Haldenstein Obtains Landmark Ruling on Behalf of New York Rent Stabilized Tenants (Mar. 5, 2009), http://www.whafh.com/modules/press_release/?action=view&id=112.

[30]Erin Einhorn, *Court Ruling on Building Owners' Tax Breaks Big Win for Rent Stabilized Tenants*, N.Y. Daily News, Mar. 6, 2009.

[31]Charles V. Bagli, *New York Landlords Fight as Rent Refunds Loom*, N.Y. Times, Mar. 15, 2009.

San Francisco and Oakland Issue Declarations Protecting Tenants from Utility Shutoffs*

The cities of Oakland and San Francisco, California have recently issued declarations, precipitated by the increase in foreclosures, which will help renters keep their water, gas and electrical service functioning should their landlords stop paying the bills. These declarations will allow tenants whose landlords are responsible for utility payments to locate and inform the building owner of his or her obligation to continue making payments.

Effects of the Foreclosure Crisis on Bay Area Tenants

Like many cities across the nation, San Francisco and Oakland continue to be affected by the ongoing foreclosure crisis. In the third quarter of 2008 alone there were 15,000 foreclosure filings in Oakland.[1] These foreclosures have had detrimental consequences on not only homeowners, but tenants as well. Renters in foreclosed properties are feeling the impact as they receive unlawful eviction notices[2] or lose their utilities without notice. In San Francisco, some tenant advocacy organizations are seeing an average of one case per day concerning utility shutoffs for tenants living in foreclosed buildings.[3]

When a property is foreclosed, it often takes tenants several months to determine new ownership of the property and even more time for the new owner to assume responsibility for utilities. This leaves renters in the position of living for months in hazardous and unhealthy conditions or taking on the responsibility of paying the utility bills, which amounts to an illegal rent increase.[4] Low-

*The author of this article is Julieanna Vinogradsky, a J.D. candidate at the University of California, Hastings, School of Law and a fall intern at the National Housing Law Project.

[1]City of Oakland, City of Oakland Public Health & Safety Declaration for Utilities 1 (2008), *at* http://www.oaklandcityattorney.org/PDFS/Oakland%20Public%20Health%20and%20Safety%20Declaration%20re%20Termination%20of%20Utilities.pdf.

[2]Tenants living in units subject to Oakland and San Francisco's rent control ordinances can only be evicted for a handful of enumerated reasons. As a result, a tenant cannot be evicted as a result of a default by the landlord on a loan secured by a mortgage or deed of trust. Gross v. Super. Ct., 171 Cal. App. 3d 265 (1985).

[3]San Francisco Citizen, Dennis Herrera Acts to Protect Tenants If Landlord Fails to Pay Utilities (Feb. 25, 2009), http://sfcitizen.com/blog/2009/02/25/dennis-herrera-triggers-acts-to-protect-tenants-if-landlord-fails-to-pay-utilities.

[4]San Francisco and Oakland are both rent-controlled jurisdictions, and tenants in covered units are protected from rent increases. For tenants statewide, California law requires a sixty-day notice for longer-term tenants before the rent can be increased by more than 10%. A thirty-day notice is required for other tenants. Cal. Civ. Code § 827 (WEST Westlaw, Current with urgency legislation through Ch. 1 of the 2009 Reg. Sess., Ch. 12 of the 2009-2010 2nd Ex. Sess., and Ch. 20 of the 2009-2010 3rd Ex. Sess.).

income tenants are particularly vulnerable in this situation. They often lack the means to pay security deposits for utilities. Further, they may be unable to assume the responsibility for the utilities if they previously had utility service and are delinquent on that account. In the case of a multifamily building, it may be impossible for a low-income tenant to assume the responsibility of making payments for a collective group of tenants.

California Law on Utility Shutoffs

Under California law, if a private utility or utility district provides residential service to a master meter multiunit building, and the owner or manager is responsible for the bill, service cannot be terminated where a public health or building officer certifies that the termination would result in a significant threat to health or safety.[5] Additionally, the district or corporation must make a good faith effort to notify the residential occupants if the utility payments become overdue.[6] This notice must be posted on the door of each residential unit at least fifteen days prior to termination of services. The notice must state that service will terminate on a specified date. It must inform the residents that they have the right to become customers, without being required to pay any amount due on the owner's delinquent account.[7]

City of Oakland Public Health and Safety Declaration for Utilities

Adopted on December 16, 2008, Oakland's declaration recognizes the inherent health hazard created when tenants' utility services are discontinued.[8] It provides that the termination of utilities will automatically be deemed a significant threat to health or safety. The declaration gives tenants 120 days after the above-mentioned notice of utility shutoff to locate their new landlord, assume payment of their utilities, or make other arrangements. During this 120-day period, East Bay Municipal Utility District (EBMUD) and Pacific Gas and Electric Company (PG&E) are prohibited from terminating utility service to tenant-occupied foreclosed properties where the former owner was responsible for utility payments. The declaration applies to any property that has been foreclosed upon and will remain in effect until December 31, 2010.

San Francisco's Protective Declaration

Issued by the City Attorney's Office and the Department of Building Inspection (DBI) on February 25, 2009, the San Francisco declaration states that no utilities shall be terminated in master-metered multiunit residential buildings, irrespective of foreclosure status.[9] This declaration will remain in effect until December 31, 2010. DBI director Vivian Day stated that in her experience, interruption of utility service can force residents to use illegal generators or other unauthorized heating devices, posing significant health risks to themselves and their neighbors.[10] Thus, the declaration deems these shutoffs automatic risks to public health and safety.

Impact of the Declarations on Utility Providers

The declarations do not address how utilities can recoup payments in cases where they are required to maintain utility service even though the owner's account is delinquent. California law does not allow a utility district to seek reimbursement of delinquent utility fees via a judicial lien against residential property.[11] Nevertheless, San Francisco's Public Utility Commission (SFPUC), which operates the city's publicly owned water and wastewater utilities, is empowered via city regulations to initiate lien proceedings against San Francisco landlords.[12] However, even if SFPUC initiates lien proceedings, the utility likely will be unable to recover payments if the mortgage debt exceeds the value of the property.[13] Advocates should be aware that utility providers that lack the authority to initiate lien proceedings may oppose utility shutoff protections due to their inability to recoup fees and charges from owners during a period of nonpayment.

Protection for Renters in Other California Jurisdictions

Even in jurisdictions that have not enacted special utility protections for tenants, these tenants may still be protected from shutoffs by their jurisdiction's rent control laws. If the owner fails to pay for utilities and service is terminated, tenants in rent-controlled jurisdictions may be able to file a rent board petition for a decrease in rent due to a decrease in services. Tenants in both rent-controlled and non-rent-controlled jurisdictions may also

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[5]Cal. Pub. Util. Code §§ 777.1, 12822.1 (West, WESTLAW through Ch. 765 of the 2008 Reg. Sess., Ch. 1 of the 2007-2008 1st Ex. Sess., Ch. 1 of the 2007-2008 2nd Ex. Sess., Ch. 7 of the 2007-2008 3rd Ex. Sess., and all propositions on 2008 ballots).

[6]§§ 777.1, 12822.1.

[7]§§ 777.1, 12822.1; *see also* Memorandum from Dennis J. Herrera, City Attorney to Vivian Day, Acting Director, Dept. of Building Inspection, Jan. 16, 2009, at 2, available at http://www.sfgov.org/site/cityattorney_index.asp.

[8]City of Oakland, City of Oakland Public Health & Safety Declaration for Utilities 1 (2008), http://www.oaklandcityattorney.org/PDFS/Oakland%20Public%20Health%20and%20Safety%20Declaration%20re%20Termination%20of%20Utilities.pdf.

[9]City and County of San Francisco, Declaration by City and County of San Francisco about Continuation of Utilities at Master Metered Multiunit Residential Buildings, Feb. 25, 2009, http://www.sfgov.org/site/uploadedfiles/dbi/media_info/press_kit/DBICityAttyFeb2509SignedDecl.pdf.

[10]San Francisco Citizen, *supra* note 3.

[11]Cal. Pub. Util. Code § 12811.1 (West, WESTLAW through Ch. 765 of the 2008 Reg. Sess., Ch. 1 of the 2007-2008 1st Ex. Sess., Ch. 1 of the 2007-2008 2nd Ex. Sess., Ch. 7 of the 2007-2008 3rd Ex. Sess., and all propositions on 2008 ballots).

[12]Memorandum from Dennis J. Herrera, *supra* note 7.

[13]*Id*. at 3.

withhold a portion of their rent reflecting the amount paid for utilities.[14] These tenants may also ask their local department of building inspection to use its enforcement tools—notices of violation, orders of abatements, and citations—to ensure the provision of heat, electricity or water.[15]

Conclusion

Advocates should note that in both Oakland and San Francisco, the local department of building inspection and the city attorney's office played vital roles in the issuance of protections for tenants in foreclosed properties. While local governments may be apprised of growing blight within their jurisdictions due to foreclosures, they may not be aware of the problems faced by tenants who are forced to live in these blighted buildings. Building departments and city attorney's offices must be informed of the insidious effect of utility shutoffs on tenants' wellbeing, that these shutoffs are occurring at an alarming rate, and that they hold the power to ensure that foreclosed rental properties remain habitable. Swift action on the part of local government can generate positive press about the need to protect the rights of tenants in foreclosed properties.

Advocates in neighboring jurisdictions should consider launching coordinated campaigns to prohibit utility shutoffs in foreclosed rental properties. If neighboring localities, like Oakland and San Francisco, assert utility shutoff declarations concurrently, decision makers may view these actions as less of a political risk. Furthermore, there may be a greater chance of compliance on the part of the utilities if there is a coordinated movement of advocates and local government entities asserting protections on behalf of tenants. ■

[14]Cal. Pub. Util. Code § 10009.1(d) (West, WESTLAW through Ch. 1 of the 2009 Reg. Sess., Ch. 12 of the 2009-2010 2nd Ex. Sess., and Ch. 18 of the 2009-2010 3rd Ex. Sess.).
[15]Memorandum from Dennis J. Herrera, *supra* note 7.

Recent Cases

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

Housing Choice Voucher Program: Missing Appointment Does Not Constitute *Per Se* Failure to Cooperate

Ali v. Dakota County Cmty. Dev. Agency, 2009 WL 511158 (Minn. Ct. App. Mar. 3, 2009) (unreported). A voucher tenant missed her recertification appointment due to illness. The housing authority asserted that it sent the tenant a letter rescheduling the appointment. The tenant alleged that she did not receive this letter and therefore missed the rescheduled appointment. The housing authority initiated termination proceedings, and the hearing officer upheld the termination on the grounds that the tenant failed to attend her recertification appointment. The court reversed, finding that missing a recertification appointment is not a *per se* failure to cooperate in providing required information. Further, the hearing officer did not consider the tenant's testimony that she received no notice of the rescheduled appointment, and his finding that all other housing authority correspondence reached the tenant was unsupported.

Public Housing: Evidence of Disability Should be Accepted Until Date of Trial

Lebanon County Hous. Auth. v. Landeck, __ A.2d __, 2009 WL 489611 (Pa. Super. Ct. 2009). A public housing tenant failed her inspection due to poor housekeeping resulting in a fire hazard. The housing authority served her with a notice to quit, and at the informal hearing the tenant stated that she suffered from depression. At the hearing officer's request, the housing authority scheduled a second inspection. When the tenant again failed, the housing authority initiated eviction proceedings. Prior to trial, the tenant requested a reasonable accommodation from the housing authority in the form of a stay in the eviction process while she received assistance in resolving the housekeeping issues. The trial court refused to consider evidence of the tenant's request for a reasonable

[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.

accommodation. The appellate court found that the trial court should have accepted evidence of the tenant's disability up until the date of trial. It remanded the case to permit the tenant to present evidence that she was unable to satisfy the terms of the lease because of her depression.

Housing Choice Voucher Program: Increase in Tenant's Share of Utilities Not a Rent Increase

Winterfield Properties LLC v. Wood, 2009 WL 467071 (Wis. Ct. App. Feb. 26, 2009). A voucher tenant's lease provided that she was responsible for one-third of the water bill. At the expiration of the lease, the landlord offered the tenant a new lease that raised her share of the water bill to 50%, but the tenant refused to sign it. The landlord then served a twenty-eight-day notice on the tenant, but she did not vacate the unit or pay her share of the rent. At the eviction proceeding, the tenant argued that the eviction was unlawful because the utility increase amounted to a rent increase requiring sixty days' notice under the Section 8 lease addendum. The appellate court upheld the tenant's eviction, finding that the sixty-day notice requirement applies only to rent increases, not to increases in a tenant's share of the utilities.

Housing Choice Voucher Program: Termination Decision Must Be Supported By Substantial Evidence

Hassan v. Dakota County Cmty. Dev. Agency, 2009 WL 437775 (Minn. Ct. App. Feb. 24, 2009) (unreported). The housing authority terminated voucher benefits for tenant's failure to provide proper tax documents and failure to report that her husband had moved into the unit. The appellate court reversed because the hearing officer's decision was not supported by substantial evidence. The housing authority produced no evidence demonstrating that the husband was actually living in the unit, and the tenant made two attempts to submit her tax information. The hearing officer also failed to consider the tenant's poor English proficiency and the effect that the termination would have on her five children.

Housing Choice Voucher Program: Termination for Failure to Report Income

Sandstrom v. Dakota County Cmty. Dev. Agency, 2009 WL 437785 (Minn. Ct. App. Feb. 24, 2009) (unreported). The housing authority terminated a voucher tenant's assistance for failure to report three separate jobs in a one-year period. The court upheld the termination, even though the tenant had signed and cooperated with a repayment agreement. The court also rejected the tenant's argument that the violation was not serious given that it resulted in an overpayment of only $24.

False Claims Act: Failure to Analyze Impediments to Fair Housing

United States v. Westchester County, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009). The Anti-Discrimination Center (ADC) filed suit against Westchester County, New York, alleging that the county violated the False Claims Act through certifications made to the Department of Housing and Urban Development (HUD) to obtain $52 million in federal funding for housing and community development. The court previously denied the County's motion to dismiss, rejecting its contention that it had no obligation to consider race when it analyzed impediments to fair housing in connection with its certifications. ADC subsequently brought a motion for partial summary judgment on the grounds that the County knowingly submitted false certifications that it would affirmatively further fair housing by, *inter alia*, failing to analyze impediments to fair housing choice in terms of race. The court ruled that the County put forth no evidence that it conducted the required analysis of race-based impediments, and concluded that the County did not comply with its obligation to take appropriate steps to overcome impediments to fair housing choice. According to the court, the County's analysis of impediments during the period at issue "utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race." Further, the court rejected the County's "fallback argument" that income could be used as a proxy for race. However, the court found that the County presented sufficient evidence to raise issues of fact as to whether it knowingly submitted false certifications to HUD.

Project-Based Section 8: Eviction Reversed for Failure to Provide Evidence of Proper Termination Notice

Timber Ridge v. Caldwell, 672 S.E.2d 735 (N.C. Ct. App. 2009). A project-based Section 8 tenant was ordered to surrender possession of her unit after she was cited for possession of drug paraphernalia. On appeal, the tenant argued that the trial court erred by failing to require the landlord to prove that she was provided adequate termination notice as required by 24 C.F.R. § 247.4. Specifically, the tenant argued the notice of lease termination did not provide her with sufficient detail to enable her to prepare a defense. Because there was no evidence in the record that the landlord complied with 24 C.F.R. § 247.4 by providing a proper termination notice, the court reversed the eviction.

Housing Choice Voucher Program: New York City Laws Require Landlords to Accept Vouchers from Existing Tenants

Timkovsky v. 56 Bennett, LLC, __ N.Y.S.2d __, 2009 WL 445097 (N.Y. Sup. Ct. 2009). The New York City Administrative Code (§ 11-243(k)) prohibits any owner who receives a J-51 tax benefit from denying housing "or any of the privileges or services incident to occupancy" to any person who participates in or is eligible for the housing choice voucher program. Another provision of the Administrative Code (Local Law 10) provides that an owner may not "refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group such a housing accommodation" or discriminate against any person because of any lawful source of income. The plaintiffs were voucher holders who asked their current landlords, all of whom received J-51 tax abatements, to accept their vouchers. The landlords argued that Local Law 10 and the J-51 Law do not apply to tenants already in residence if the landlord had not previously agreed to accept Section 8 from that tenant. The court rejected this argument, concluding that both laws apply to current tenants and are violated when a landlord refuses to accept a Section 8 voucher. The court also rejected the landlords' argument that the J-51 Law was preempted by federal law.

Fair Housing Act: Discriminatory Enforcement of Rental Ordinance

Raab Family P'ship v. Borough of Magnolia, 2009 WL 361135 (D.N.J. Feb. 13, 2009). The plaintiffs owned two apartment complexes in the Borough of Magnolia. The borough created a requirement that landlords obtain certificates of occupancy for rental properties, charging $200 per rental unit per year. The borough also enacted an ordinance imposing liability on landlords for the conduct of "any person and/or animal" on their premises. The owners alleged that they were subjected to overzealous enforcement of the borough's rental ordinance because they rented to nonwhite tenants. The owners alleged that during a meeting with the borough's mayor, she stated that her primary concern with the complexes was that she did not want "the trash from Lindenwold moving to Magnolia." According to the owners, in light of the well-known demographic history of Lindenwold, this statement was direct evidence that the borough's motive in enacting the ordinance and in issuing false citations to the owners was based in part on racial animus. Based on the likelihood that the owners could demonstrate a Fair Housing Act violation, the court entered a preliminary injunction enjoining the borough from enforcing the ordinance against the owners. The court found that the mayor's statement supported a finding that the borough's intent in enacting the landlord responsibility ordinance, and in issuing citations to the owners for nonexistent violations, was motivated in part by an intent to discriminate.

Fair Housing Act: Preliminary Injunction Denied for Failure to Establish *Prima Facie* Case of Disparate Impact

Mt. Holly Citizens in Action, Inc. v. Twp. of Mt. Holly, 2009 WL 387753 (D.N.J. Feb. 13, 2009). Low-income residents of the Mount Holly Gardens neighborhood alleged that the Township of Mount Holly's redevelopment plan would have a disparate impact because it would drive out minority residents and would be targeted at a predominantly minority area. The residents filed a motion for a preliminary injunction to block the redevelopment plan. The court found that the residents failed to establish a *prima facie* case of disparate impact. The court found that the plan affected the residents in the same manner regardless of whether they were minorities or nonminorities. The court also found that the reduction of low-income housing, standing alone, is not a violation of the Fair Housing Act. The court further concluded that even if the plaintiffs had established a *prima facie* case, they failed to rebut the township's legitimate interest in redevelopment, and they did not demonstrate the existence of an alternative course of action that would have a lesser impact. Additionally, the court noted that even if plaintiffs had demonstrated a successful FHA claim, a preliminary injunction was not warranted because monetary compensation would redress their harm.

Housing Choice Voucher Program: Termination Upheld Where Tenant Waived Right to Cross-Examine Landlord

Williams v. Hous. Auth. of Raleigh, 2009 WL 321628 (4th Cir. Feb. 10, 2009) (per curiam) (unreported). A voucher tenant alleged that she was denied due process because during her termination hearing, the hearing officer considered evidence in her tenant file and evidence outside the record. She also claimed she was denied due process because she was not able to cross-examine her landlord because he did not appear. The appellate court found that the hearing officer's consideration of evidence contained in the tenant file and evidence outside the record was harmless, as the termination decision was supported by the evidence in the officer's decision letter. The court further found that the tenant waived her due process right to cross-examination because she failed to request a continuance for the purpose of examining her landlord, even though she was given the opportunity to do so.

Reasonable Accommodation: University Not Required to Grant Waiver to Campus Housing Policy

Fialka-Feldman v. Oakland Univ. Bd. of Trs., 2009 WL 275652 (E.D. Mich. Feb. 5, 2009). A student with cognitive impairments was enrolled in a continuing education program at a university. The student sought an exception to a university policy restricting on-campus housing to students in programs leading to a degree. The student sought a preliminary injunction, arguing that the university's refusal to modify or waive its policy constituted a refusal to make a reasonable accommodation to his disability in violation of the Fair Housing Act. The court denied the student's motion for a preliminary injunction, finding that the suit was barred by the Eleventh Amendment since the university is a state agency. The court further found that the student's requested accommodation was not necessary to afford him an equal opportunity to use and enjoy campus housing because all students not enrolled in a degree program, regardless of disability, were ineligible for the housing. According to the court, "Plaintiff's request that Defendant grant him a waiver to its housing policy would elevate the rights of a handicapped, non-degree seeking student over the rights of other non-degree seeking students."

Housing Choice Voucher Program: Inadequate Notice and Improper Reliance on Hearsay Evidence

Loving v. Brainerd Hous. & Redev. Auth., 2009 WL 294289 (D. Minn. Feb. 5, 2009). Two voucher tenants received notices from the housing authority stating that their assistance would be terminated because "you have . . . [e]ngaged in drug related or violent criminal activity." At hearings for each tenant, the housing authority's only witness was the assistant director, who had no direct knowledge of the alleged criminal activities. Hearing officers upheld the terminations of both tenants on the grounds that they participated in criminal drug activities or allowed their units to be used for such activities. The tenants filed suit claiming due process violations based on inadequate notice, the hearing officers' reliance on hearsay, and factual determinations that were not based on a preponderance of the evidence. The court found that the housing authority's notice was inadequate because it failed to inform the tenants of the reason for the termination or to give them adequate information to prepare a defense. The court also found that the tenants stated a claim that the hearing officers improperly relied on hearsay evidence, because they did not have an opportunity to confront and cross-examine witnesses, and the record did not contain the documents the hearing officers relied upon in reaching their decisions. Additionally, the court found that the tenants stated a claim that the hearing officers improperly relied upon information obtained from HUD officials after the hearing. Finally, the court found that the tenants stated a claim that the hearing officers' decisions were not supported by adequate evidence, because the record did not include the evidence presented at the tenants' hearings.

Housing Choice Voucher Program: Inadequacy of Termination Notice and Hearing Officer's Written Decision

Brantley v. W. Valley City Hous. Auth., 2009 WL 301820 (D. Utah Feb. 4, 2009). A seventy-one-year-old voucher tenant accidentally fired a gun while he was being threatened by an intoxicated neighbor. He was charged with two felony counts of aggravated assault, but pled to a misdemeanor because the incident was a case of self-defense. The housing authority sent the tenant a notice of termination based on criminal activity. A hearing officer upheld the termination based on the felony charge. The hearing officer's decision contained no discussion of evidence or law. The tenant filed suit against the housing authority for due process violations. The housing authority moved to dismiss, arguing that it terminated assistance because the tenant violated an ordinance by discharging the gun. However, no termination notice stated this charge. Instead, the notice stated that the tenant was being terminated because he was charged with aggravated assault. The court denied the motion to dismiss. It found that the tenant presented a defense against the assault charge, and that due process prohibited the housing authority from changing its basis for termination without notice. The court also noted that the hearing officer's decision did not include the evidence that was the basis for her decision.

Public Housing: Housing Authority's Duty to Provide Safe Premises

Giggers v. Memphis Hous. Auth., __ S.W.3d __, 2009 WL 249742 (Tenn. 2009). Family members of a public housing tenant shot and killed by another tenant filed suit against the housing authority, alleging negligence and breach of contract for failure to provide safe premises. The trial court granted summary judgment in favor of the housing authority, and the appellate court affirmed. The state Supreme Court granted review to determine whether the housing authority owed a duty of care under the theory of negligence. The court found that the potential for violence in the housing project was reasonably foreseeable given that the shooter had previously stabbed another tenant. The court also found that the gravity of the harm outweighed the burden on the housing authority to have taken reasonable protective measures, such as evicting tenants following violent confrontations. Accordingly, the Supreme Court remanded the negligence claim to the trial court for further proceedings. ■

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 Board, Federal Emergency Management Agency (FEMA), the Veterans Administration and the Department of Defense issued in February 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 Rules

74 Fed. Reg. 6839 (Feb. 11, 2009)
Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs: Proposed Delay of Effective Date

Summary: HUD is seeking public comment on a contemplated delay of sixty days in 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). This final rule revises HUD's public and assisted housing program regulations to implement the upfront income verification process for program participants and to require the use of HUD's Enterprise Income Verification (EIV) system by public housing agencies and owners and management agents. The delay in the effective date is intended to allow HUD officials the opportunity for further review and consideration of the new regulations. In addition, HUD takes this opportunity to address questions received subsequent to publication of the January 27, 2009, final rule pertaining to the provisions requiring the use of Social Security numbers for determining program eligibility. HUD wishes to clarify that these requirements are not intended to apply to individuals, in mixed families, who do not contend eligible immigration status under HUD's non-citizens regulations, nor does it interfere with existing requirements relative to proration of assistance or screening for such families, or authorize their eviction or denial of admission on the basis of the new requirements pertaining to obtaining Social Security numbers. HUD solicits comments specifically on the contemplated delay in effective date, but also generally on the rule.

Comment Due Date: March 13, 2009.

HUD Federal Register Notices

74 Fed. Reg. 6048 (Feb. 4, 2009)
Multifamily Housing Procedures for Projects Affected by Presidentially-Declared Disasters

Summary: The Department of Housing and Urban Development (HUD) is proposing to submit to the Office of Management and Budget (OMB) for review an information collection requirement about which it is soliciting public comments. The information collected relates to information submitted to HUD for review to ensure that owners of multi-family housing in presidentially-declared disaster areas are following HUD procedures regarding recovery efforts after a presidentially-declared disaster.

Comment Due Date: March 6, 2009.

74 Fed. Reg. 6049 (Feb. 4, 2009)
Telecommunications Services in Multifamily Housing Projects

Summary: HUD is proposing to submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to HUD ensuring that owners/agents and telecommunications service providers comply with HUD requirements when providing telecommunications services to tenants in multifamily housing projects.

Comment Due Dates: March 6, 2009.

74 Fed. Reg. 6916 (Feb. 11, 2009)
HECM Counseling Client Survey

Summary: HUD is proposing to submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the HECM Counseling Client Survey which is used by HUD to obtain information directly from counseling recipients. This form is sent to the clients of a counseling agency as part of HUD's performance review of the agency.

Comment Due Date: March 13, 2009.

74 Fed. Reg. 7047 (Feb. 13, 2009)
Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for Community Development Block Grant (CDBG) Disaster Recovery Grantees Under 2008 Supplemental CDBG Appropriations

Summary: This Notice advises the public of the initial allocation of grant funds for CDBG disaster recovery

[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.

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 natural disasters that occurred in 2008. As described in the Supplementary Information, 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 the common application, eligibility, and administrative waivers and the common alternative and statutory requirements for the grants. This Notice also grants to additional state allocatees the waivers included in 73 Fed. Reg. 52,870 (Sept. 11, 2008).

Effective Date: February 18, 2009.

74 Fed. Reg. 7466 (Feb. 17, 2009)
Announcement of Funding Awards for the Section 4 Capacity Building for Community Development and Affordable Housing Program; Fiscal Year 2008

Summary: This announcement notifies the public of funding decisions made by HUD in a competition for funding for the Section 4 Capacity Building for Community Development and Affordable Housing grants program. This announcement contains the names of the awardees and the amounts of the awards made available by HUD.

74 Fed. Reg. 7912 (Feb. 20, 2009)
Community Development Grant (CDBG) Entitlement Program

Summary: HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the Community Development Block Grant (CDBG) Program, which requires that entitlement communities to keep records of activities. These records include definitions of conditions, certifications of activities/plans and other items. This paperwork submission addresses the record keeping and reporting requirements for the CDBG program.

Comments Due Date: March 23, 2009.

74 Fed. Reg. 7912 (Feb. 20, 2009)
State Community Development Block Grant (CDBG) Program

Summary: HUD is proposing to submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to state recipient submission of an annual report and maintenance of records related to the CDBG Program. These records include definitions of conditions, certifications of activities/plans, slum/blight activities, business assistance and community revitalization strategies, and other items.

Comments Due Date: March 23, 2009.

74 Fed. Reg. 8979 (Feb. 27, 2009)
Privacy Act of 1974; Notice of a Computer Matching Program Between HUD and the Department of Justice (DOJ)

Summary: HUD proposes to issue public notice of its intent to conduct a new computer matching program using data from DOJ's systems of records. The matching program will involve the utilization of a computer information system of HUD, the Credit Alert Interactive Verification Reporting System (CAIVRS), which will include DOJ's debtor files. The CAIVRS database includes delinquent debt information from the Departments of Agriculture, Education, Veterans Affairs and the Small Business Administration. Also, judgment lien data is included from the Department of Justice.

Comments Due Date: March 30, 2009.

Effective Date: The matching program shall begin March 30, 2009, or at least forty days from the date copies of the signed (by both agencies' Data Integrity Boards (DIBs)) computer matching agreement are sent to the Office of Management and Budget (OMB) and both Houses of Congress, whichever is later, providing no comments are received which would result in a contrary determination.

Rural Development/RHS Rules

74 Fed. Reg. 7047 (Feb. 13, 2009)
Rural Development Guaranteed Loans

Summary: This document seeks public comment on a proposal to delay for 104 days the effective date of the interim rule for Rural Development Guaranteed Loans, which was published on December 17, 2008. The interim rule establishes a unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs—Community Facility; Water and Waste Disposal; Business and Industry; and Rural Energy for America Program, formerly known as Renewable Energy Systems and Energy Efficiency Improvement Projects. The department seeks comments on whether or not it should delay the effective date of the interim rule until June 1, 2009, in order to provide the Agency sufficient time to implement certain administrative aspects associated with the interim rule. For that reason, the department is seeking comments on the merits of extending the effective date of the interim rule to June 1, 2009. In order to allow sufficient time for public comment on the Agency's proposal to further extend the effective date until June 1, 2009, this document extends the current effective date from February 17, 2009, to March 9, 2009, pursuant to the "good cause" clause under the Administrative Procedures Act (5 U.S.C. 553(b)(3)(B)).

Comment Due Date: February 20, 2009.

Rural Development/RHS Notice

74 Fed. Reg. 8563 (Feb. 25, 2009)
Housing Counseling Program

Summary: HUD is proposing to submit to the OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to HUD contracts with organizations that provide tenant and homeowner counseling. Counseling aids tenants and homeowners in improving their housing conditions and in meeting the responsibilities of tenancy and homeownership. HUD-approved agencies can compete for program funds.

Comment Due Date: March 27, 2009.

Department of Defense Federal Register Notices

74 Fed. Reg. 8068 (Feb. 23, 2009)
Publication of Housing Price Inflation Adjustment Under 50 U.S.C. App. 531

Summary: The Service Members Civil Relief Act, 50 U.S.C. App. 531, prohibits a landlord from evicting a Service member (or the Service member's family) from a residence during a period of military service except by court order. The law as originally passed by Congress applied to dwellings with monthly rents of $2400 or less. The law requires the Department of Defense to adjust this amount annually to reflect inflation, and to publish the new amount in the Federal Register. We have applied the inflation index required by the statute. The maximum monthly rental amount as of January 1, 2009, will be $2,932.31.

Effective Date: January 1, 2009.

Federal Housing Finance Agency Federal Register Notice

74 Fed. Reg. 8955 (Feb. 27, 2009)
FHFA Study of Securitization of Acquired Member Assets

Summary: The Housing and Economic Recovery Act of 2008 (HERA) requires the Federal Housing Finance Agency (FHFA) to conduct a study on the securitization of home mortgage loans purchased or to be purchased from Federal Home Loan Bank System member financial institutions under the Acquired Member Assets (AMA) programs. FHFA is seeking public comment and hopes that the responses to this request for comments will constitute an important source of information that will assist it in its preparation of the study. FHFA urges commenters to analyze, in light of current market conditions, the benefits and risks associated with securitization, the potential impact of securitization upon liquidity and competitiveness in the mortgage and broader credit markets, the ability of the banks to manage the risks associated with a securitization program, and the effect of a securitization program on the banks' existing activities, as well as on the joint and several liability of the banks and the cooperative structure of the Bank System. This release in no way alters current requirements, restrictions or prohibitions on the banks with respect to the purchase or sale of mortgages or to the AMA programs.

Comment Due Date: April 28, 2009. ■

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