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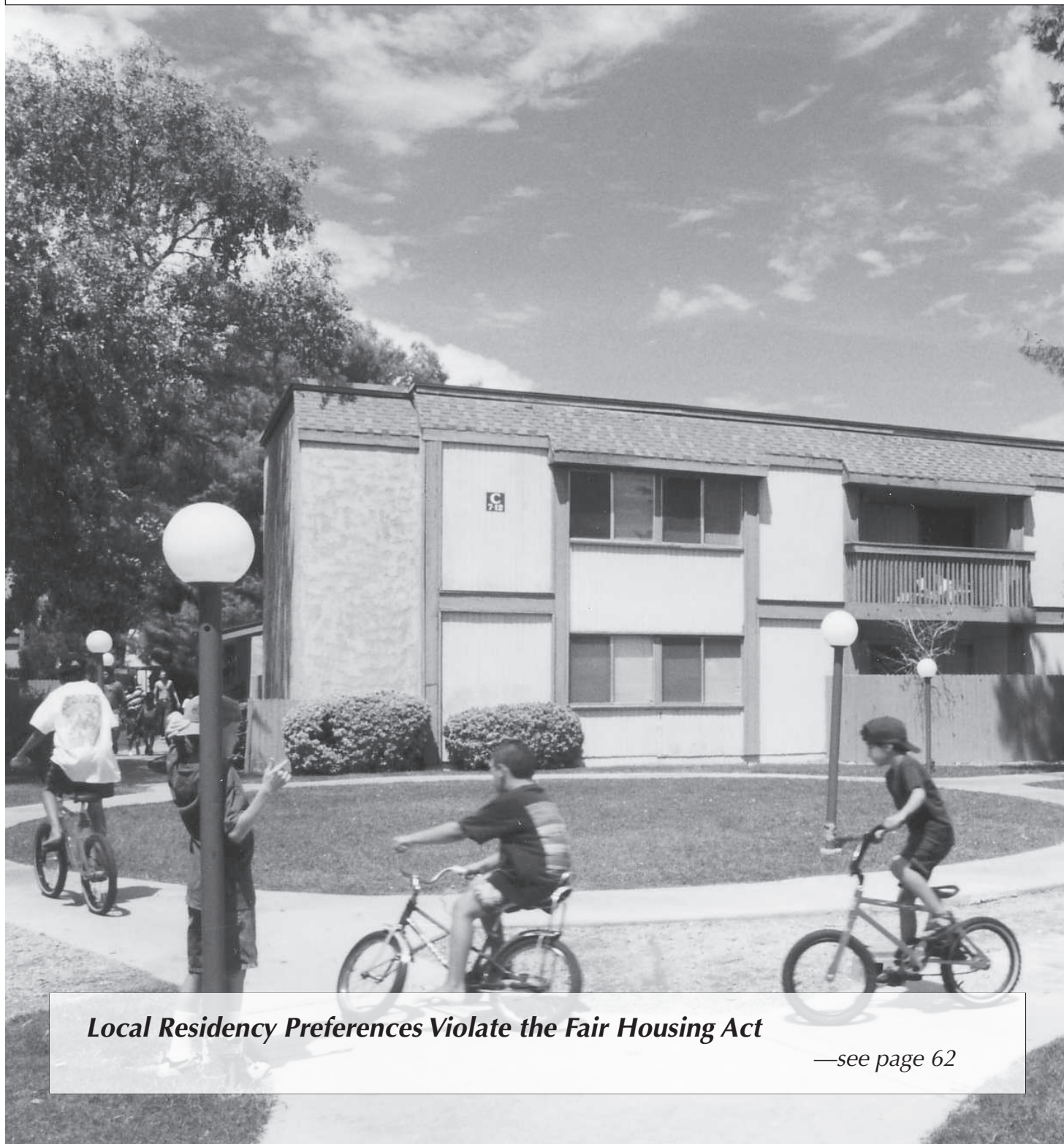


advancing housing justice

Housing Law Bulletin

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Local Residency Preferences Violate the Fair Housing Act

—see page 62

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Cover photo: Wishing Well II, a 108-unit family housing development in Tolleson, Arizona. It is owned by Mercy Housing SouthWest, a regional development division of Mercy Housing System. It is managed by Mercy Services Corporation, also a division of Mercy Housing System. Wishing Well II was financed with 501(c)(3) bonds.

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Administration's FY 2004 Budget Poses Major Risks for Federal Housing Programs

The Bush Administration's Fiscal Year (FY) 2004 budget, released in early February,¹ contains meager funding levels insufficient to sustain federal housing programs at current services levels. As if that were not bad enough, the budget and related Administrative initiatives propose additional policies that threaten extremely low-income tenants or the continued viability of the federal housing programs themselves. Prior *Bulletin* articles have reviewed many of the main points;² this article provides more detail on seven major proposals for the public housing, voucher, and HOPE VI programs and their impact on extremely low-income households.

Increasing Minimum Rents

Historically, rent for most federal low-income housing programs has been set as a percentage of tenant income, usually no more than 30 percent. In 1998, Congress authorized minimum rents, established without regard to tenant income. These minimum rents encroached upon this core protection, but gave public housing agencies (PHAs) discretion whether to impose them while also requiring a mandatory hardship exemption. Currently for public housing and the voucher program, each PHA determines the amount of the minimum rent, which may be set between \$0 to \$50, after consultation with the tenants and the general public in the PHA's annual planning process. For tenants residing in developments receiving project-based Section 8 assistance, HUD set the minimum rent at \$25.

The Administration now proposes to completely erode the principle that rent should be based upon income for the very lowest-income families. The FY 2004 HUD budget eliminates PHA discretion and proposes a minimum rent of at least \$50.³ The proposal would apparently apply to all of the major federal housing programs serving extremely low-income families—public housing, the voucher program, and project-based Section 8 as well. A local PHA could set a minimum monthly rent of \$100, \$150 or more, without HUD approval. While elderly and disabled families would be exempt, others would have to obtain hardship exemptions from the HUD Secretary. The stated purpose of the mandatory minimum

¹The complete budget submission with supporting documents (hereafter "FY 2004 Budget") is available from the Office of Management and Budget's Web site at www.whitehouse.gov/omb/budget/fy2004/index.html.

²See *Federal Housing Budget Braces for Approaching Storm*, 33 HOUS. L. BULL. 1 (Jan. 2003); *While Bush Issues FY 2004 Budget, Congress Finally Enacts FY 2003 Appropriations*, 33 HOUS. L. BULL. 31 (Feb. 2003).

³FY 2004 Budget, Administrative Provisions, §201, p. 520. In an Associated Press story released on March 10, the Administration claimed that its proposal to increase the minimum rents beyond \$50 was a "technical error" and that it only intended to require that the minimum rent for all residents be set at \$50. Purportedly, the error will be corrected in budget revisions that are sent to Congress at some future time.

rent is to “promote work and increase equity in the treatment of . . . [families] with similar needs.” But its actual effect will be to eliminate local discretion to charge no minimum rent and to harm those residents—by definition the very lowest-income—currently paying less than the new minimum-rent levels. Hardship in purchasing other life necessities and evictions will result, all in pursuit of an insignificant amount of money.

In a February 15 editorial, the *New York Times* lashed out at this proposal by stating

The poor will not be able to seek an exemption from local authorities as they now can when threatened with illness, job loss or eviction. Instead, in an outrageous case of federalization by an administration that preaches the virtues of state control, the poor could seek a hardship exemption only by appealing to the secretary of housing and urban development.

Other national and local papers contained similar swift and negative reactions. Likely prompted by such unfavorable reception, the Administration reportedly may revise the proposal to delete the authority of a PHA to establish a minimum rent higher than \$50, and just mandate that level as the minimum for all tenants except for senior households and those with disabilities. To date, we have not seen this rumored revision. In any event, even with it, this is still a bad idea, albeit with a smaller impact.

Inadequate Public Housing Operating Subsidies

The federal government provides PHAs with operating subsidies to cover maintenance, security and other operating costs because tenant rents are generally insufficient to cover them. In recent years, the Administration has requested inadequate funding for these operating subsidies. The Administration also has sought to eliminate separate funding for public housing security (Public Housing Drug Elimination), which was funded at \$310 million in both FYs 2000 and 2001.

The Administration’s inadequate funding requests have been compounded by HUD’s own errors. Because HUD miscalculated the amount of subsidy needed in FY 2002 by at least \$250 million, HUD informed all PHAs on January 9 that they will temporarily receive only 70 percent of their operating subsidies for FY 2003. It later revised that “estimate” by stating that PHAs would ultimately receive up to 90 percent of their operating subsidies and that these funds may be forthcoming by the summer. Interestingly, HUD has not even requested more funds from Congress to solve the problem or to provide full funding. Notwithstanding the shortfall problem, since when is it acceptable to provide only 90 percent of what is required to operate one of the most important housing programs for those most in need?

For its part, Congress has not provided more money, and just recently (via the FY 2003 omnibus appropriations) authorized HUD to use FY 2003 funds to cover the FY 2002 shortfall. While this help furthers equitable treatment of

PHAs for FY 2002, it still leaves a hole of \$250 million for FY 2003. HUD’s FY 2004 budget not only contains no recognition of this problem, but it continues the financial squeeze by underestimating operating cost needs with no adjustments for inflation and the rising cost of utilities and insurance. Industry groups estimate that \$4.1 billion is needed to make up the shortfall and fund current (FY 2004) needs, but the Administration’s budget requests only a net level of \$3.56 billion. That is a substantial gap by anyone’s fuzzy math.

Inadequate operating subsidies ensure that PHAs will be unable to provide current services to residents and developments, and that physical conditions in public housing will deteriorate. Either this is a stealth demolition strategy or a precursor toward shifting more of the funding responsibility to tenants or local governments, neither of which can or should bear it. Either way, it’s more bad policy.

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Inadequate Public Housing Capital Funding

PHAs also receive capital funds for rehabilitation and management improvement needs. Here too, the Administration underestimates both needs and funding requirements. PHAs estimate the FY 2004 need at \$3.5 billion, and the backlog of unaddressed needs at many billions more. Prior appropriations were \$2.9 billion for FY 2000, \$3 billion for FY 2001, and \$2.843 billion for FY 2002. The Administration’s FY 2004 request is only for \$2.64 billion, of which \$2.3 billion is for annual needs, while the rest is for various earmarks. This FY 2004 budget request is wholly inadequate and will only exacerbate problems by accelerating the abandonment of public housing by forcing PHAs to further delay necessary capital and management improvements.

Permitting Private Financing for Public Housing Capital Needs

To address some of the capital funding shortfall, the Administration is again proposing to allow PHAs to convert public housing units to project-based Section 8 units — an unadopted proposal resurrected from last year.⁴ This proposal would ostensibly facilitate the private financing of capital improvements, foster development-based financial

⁴FY 2004 Budget, Administrative Provisions, §208, p. 521.

management and provide residents with the ability to move out of the housing with a voucher. Public housing now theoretically operates on a cost-recovery basis, with capital costs for development already retired and tenant rents and operating subsidies covering operating costs. Subsidies to increase a development's income potential sufficient to permit private financing of capital needs would come from "project-based vouchers," at some unknown cost. The FY 2004 budget also earmarks up to \$131 million of the capital fund for partial loan guarantees for this initiative. Beyond cost, the proposal raises critical issues such as the threatened loss of units from inadequate use restrictions and subsidies, PHA financial or maintenance defaults, PHA authorization to convert units to market rate, and PHAs' ability to leverage other funds, a problem that was identified by the General Accounting Office in connection with its recent report evaluating PHAs' development of HOPE VI projects.

Defunding HOPE VI Without Restoring Funds for Rehabilitation

Over the past decade, the controversial federal HOPE VI program has provided substantial funds to revitalize public housing developments. While providing some substantial improvements in physical conditions, the program has resulted in a net loss of public housing units affordable to extremely low-income residents and widespread displacement from their neighborhoods.⁵ The program received \$574 million in FY 2003. But rather than address these deficiencies, the Administration proposes no funds for the HOPE VI program in FY 2004, and does not seek to add the money back into the general PHA Capital Fund. If enacted, this will effectively shut down the development of any new public housing units, and deprive the stock of an important source of rehabilitation funding.

Superwaivers

Existing federal protections for public housing residents and homeless assistance recipients are also at risk this year. Although not technically part of the Administration's FY 2004 housing budget, the proposed *Personal Responsibility, Work, and Family Promotion Act of 2003* (H.R. 4) will authorize state level demonstration projects focused on coordinating public assistance, workforce development and other programs supporting employed people. The stated goal is to encourage creativity and effectiveness in programs helping individuals and families become independent of public assistance. Passage of this proposal is a top priority this year.

One of the most critical provisions in the legislation is the so-called "superwaiver," which would permit federal statutory and regulatory protections to be overridden by federal agency fiat. Participating demonstration projects could consist of two or more "qualified" programs, administered by a state or an authorized entity, and could include public

housing and certain homeless assistance programs, but not Section 8. Upon request, each federal agency administering a qualified program involved in a demonstration could grant waivers of otherwise mandatory statutory and regulatory requirements, subject to certain procedural requirements.⁶ Waivers could not be granted for such laws as those pertaining to civil rights, discrimination, health and safety, or program purposes or goals.

Though such a waiver could theoretically result in improved programs for low-income residents, an equally likely result is the diminution of protections and services for this target population. We have already witnessed such erosion in HUD's Moving to Work program, where some PHAs have imposed time limits on housing benefits.⁷

The Administration's FY 2004 budget proposes to convert the housing voucher program into a block grant to the states, entitled "Housing Assistance for Needy Families" (HANF), in FY 2005.

Block Grants for the Housing Voucher Program

The Administration's FY 2004 budget proposes to convert the housing voucher program into a block grant to the states, entitled "Housing Assistance for Needy Families" (HANF), in FY 2005. Through this block grant, funding would go to the states rather than to the 2,600 state and local agencies that currently administer the program. This HANF block grant poses serious risks of diminished resources to provide voucher assistance over time, and consequent pressure on states to shift available resources away from families most in need.

Generally block grant funding for assistance to low-income families has historically failed to keep pace with inflation. Although HUD officials have indicated that funding under the housing voucher block grant would be adjusted for inflation, this would not keep pace with local housing costs. Between 1998 and 2003, when the overall Consumer Price Index increased 12 percent, the "fair market rents" that determine voucher subsidies rose by 25 percent. In contrast,

⁶For example, the PHAs would have to describe their program in detail, along with any required waivers, in their annual PHA plan, and forward to the federal agency any local Resident Advisory Board recommendations on the proposal. *Personal Responsibility, Work, and Family Promotion Act of 2003*, H.R. 4, 108th Cong. §601(c) (2003).

⁷See Leonard N. Fleming, *PHA Will Limit Section 8 Aid*, Philadelphia Inquirer (Feb. 14, 2003), at www.philly.com/mld/inquirer/news/local/states/pennsylvania/cities_neighborhoods/philadelphia/5177670.htm.

⁵See generally *False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program*, 32 HOUS. L. BULL. 119 (May/June 2002).

the current system reimburses local agencies for actual program costs, based largely on local rents, which change at rates different from general inflation and vary substantially around the country.

As the block grant detaches federal voucher funding from local housing costs, cuts in assistance are inevitable. While the Administration's proposal does not allow states to reduce the number of households served under the block grant, states would be forced to cut costs by reducing benefit levels in one of two ways: serving higher-income families that cost less in subsidy, or shifting rent burdens to voucher recipients by increasing their contributions or capping subsidy levels.

The Center on Budget and Policy Priorities, as usual, has prepared excellent summaries of the block grant proposal and its impacts.⁸ ■

National Housing Trust Fund Bill Reintroduced

Three Congressmembers breathed new life into the battle for affordable housing production with the introduction of the *National Affordable Housing Trust Fund Act of 2003*, H.R. 1102,¹ on March 5. The current bill, very similar to prior versions in the 107th Congress, was introduced by Reps. Bernie Sanders (I-VT), Barbara Lee (D-CA) and Robert Simmons (R-CT) and has the co-sponsorship of 172 Representatives, including at least seven Republicans.² While 280 localities and 36 states have housing trust funds in place, the current bill would bring the trust concept to the national stage, potentially providing federal funds to any eligible state or local jurisdiction that provides matching funds for the production and preservation of affordable housing.

Previous efforts by Reps. Sanders, Lee, and John McHugh (R-NY) to pass a similar housing trust bill ("2002 bill") were stymied by the Banking Committee at the end of the 107th Congress. The 2002 bill had been introduced as an amendment to Rep. Roukema's (R-NJ) omnibus housing bill (H.R. 3995, 107th Cong.). After initial passage, the amendment was defeated on

⁸*Block Granting the Housing Voucher Program Would Reduce its Capacity to Help Low-Income Families and Undermine Housing Choice* (March 3, 2003); *Funding Adjustments under a Housing Voucher Block Grant Would Be Unlikely to Keep Pace with Program Needs* (March 3, 2003), available at www.cbpp.org/pubs/housing.htm.

¹See www.access.gpo.gov/congress/billsindex.html#108_bills for the bill's language. The bill would add a subtitle to Title II of 1990's *Cranston-Gonzalez National Affordable Housing Act*, 42 U.S.C. § 12721 *et seq.*

²At press time, the six other Republican co-sponsors included Reps. Phil English (R-PA), James Greenwood (R-PA), John McHugh (R-NY), Todd Russell Platts (R-PA), Jack Quinn (R-NY), and Christopher Shays (R-CT).

reconsideration by a committee vote, and the Roukema omnibus housing bill never received floor consideration.³

The current bill, which seeks to produce, rehabilitate and preserve at least 1.5 million units of affordable housing in the next decade, faces many of the same obstacles encountered in prior legislative skirmishes, as it proposes a dramatic step towards alleviating the national low-income housing crisis by committing substantial federal funding. While the \$750 million federal commitment represents but a fraction of last year's original trust fund proposal by Rep. Sanders, it still represents a significant financial commitment at a time when budget cuts and deficits seem inevitable. The bill's future likely hinges upon whether votes continue to divide along party lines, as they did in regard to the 2002 bill. Expanded Republican support in turn will depend upon the extent to which state and local governments, community organizations, constituents and other political interest groups make their voices heard. Prospects look good: the current bill has three times as many original co-sponsors as the 2002 bill and is the result of the tremendous momentum created by the National Housing Trust Fund Campaign, now in its third year.⁴

Source of Funds

As in previous versions, the current bill proposes to establish a trust funded through monies derived from two sources: (1) funds allocated to the Federal Housing Administration's (FHA) Mutual Mortgage Insurance Fund (MMIF) in excess of the amount necessary to maintain a capital ratio of 2 percent, and (2) revenues generated by the Government National Mortgage Association (GNMA) beyond that necessary to ensure its safety and soundness.⁵

Eligible Uses

Section 294(f)(2) of the bill requires trust fund resources and state and local matching funds to be used for development of affordable housing projects in which at least 50 percent of units qualify as affordable housing. Possible uses include:

- construction of new housing;
- acquisition of real property;
- site preparation and improvement, including demolition;
- substantial rehabilitation of existing housing;⁶

³See H.R. 3995: *National Housing Trust Fund Spoiled*, 32 HOUS. L. BULL. 186 (Aug. 2002). For more on H.R. 3995, see also *Omnibus Housing Bill Introduced in the House*, 32 HOUS. L. BULL. 98 (Apr. 2002).

⁴See www.nhtf.org for a detailed outline of the Campaign's proposals, a complete list of the bill's endorsers, meeting minutes, and other Campaign activities.

⁵*Id.* at Sec. 292(b).

⁶A prior housing trust bill introduced in the Senate, S. 1248, 107th Cong. (2002), did not include the preservation of housing as an existing use, although the House's 2002 bill did.

- provision of rental assistance under a continued assistance rental subsidy program; and
- provision of incentives to maintain existing housing as affordable housing and to establish or extend any low-income affordability restrictions for such housing, including covering capital expenditures and operating costs.⁷

HUD is required to set a limit, on a per-unit basis, on the amount of a trust fund grant that may be used for eligible activities.⁸ The per-unit limit may be adjusted to reflect the amount by which the costs of the activity exceed the national average for such costs, and is to be set so as to facilitate the use of funds for mixed-income housing.⁹ Trust fund monies are to be coordinated with other housing assistance, including housing credits, HOME or CDBG funds, private activity bonds, public housing capital or operating funds, vouchers, and USDA rural housing funds.¹⁰

Distribution and Allocation of Funds

The bill requires the HUD Secretary to allocate 40 percent of the funds to states,¹¹ with at least 1 percent of those funds to be made available for each eligible state.¹² Thus, even rural states with small populations would benefit. The remaining 60 percent would be allocated to participating local jurisdictions, which can include neighboring localities joined together as one entity for purposes of the grant.¹³

The bill would distribute the funding under these allocations in the form of capital grants, guarantees, loans with no- or low-interest rates or with deferred payments, or any other form as determined by HUD.¹⁴ Funding would be determined by a formula, identical to that included in the 2002 bill, that considers for each eligible local jurisdiction or state:

- the percentage of families living in substandard housing;
- the percentage of families paying more than 50 percent of their annual income for housing;
- the percentage of persons having an income at or below the poverty level;
- the cost of developing or carrying out substantial rehabilitation of housing;

- the percentage of the population living in counties that have extremely low vacancy rates; and
- the percentage of housing that is extremely old (45 years old or older).¹⁵

Eligible jurisdictions would not necessarily receive their full formula allocations. The bill establishes the formula allocation as an upper limit, with the exact amount received by any specific jurisdiction dependent on the amount of matching funds provided.¹⁶

Matching

For most jurisdictions to receive trust funds, they would have to provide housing funds from “nonfederal” sources for eligible uses. With a maximum grant set at the formula allocation, this bill would provide an eligible recipient with \$1 in trust funds for every \$0.25 of “nonfederal” funds provided by the recipient, thus a four-to-one match. The bill broadens the definition of “nonfederal” sources to include 50 percent of all funds derived from:

- low-income housing tax credits;
- funds from mortgage revenue bonds;
- proceeds from tax-exempt bonds;
- CDBG block grants or HOME program funds;
- project-based voucher assistance; and
- RHS Rural Housing funds.¹⁷

In addition, a participating jurisdiction may count as “nonfederal” the entire amount of TANF funds (federal, state or local) or any other state or local revenue not derived from federal sources.¹⁸ All of these “nonfederal” funds, however, must be devoted to specified eligible uses under the trust fund.

States or local jurisdictions certified as operating under fiscal distress benefit from a provision doubling their available “nonfederal funds” earmarked for eligible trust activities for purposes of applying the matching formula.¹⁹ Entities certifying their severe financial distress would be excused completely from devoting available nonfederal resources to the specified trust fund activities in order to have such funds counted under the matching formula.²⁰

Additional provisions of the proposed bill are designed to allow for the awarding of the maximum available funds each year. For example, where funds have been distributed

⁷H.R. 1102, Sec. 296(2).

⁸*Id.* at Sec. 295(c).

⁹*Id.* (referring to standards contained in the *Cranston-Gonzalez National Affordable Housing Act* at 42 U.S.C. 12742(e)).

¹⁰*Id.* at Sec. 295(g).

¹¹*Id.* at Sec. 293(a).

¹²*Id.* at Sec. 294(c)(1).

¹³*Id.* at Sec. 293(a)-(b).

¹⁴*Id.* at Sec. 295(f).

¹⁵*Id.* at Sec. 294(a).

¹⁶*Id.* at Sec. 294(d).

¹⁷*Id.* at Sec. 294(e)(1).

¹⁸*Id.*

¹⁹*Id.* at Sec. 294(e)(4).

²⁰*Id.*

in the form of a loan, repayments to the trust are to be redistributed upon receipt by HUD.²¹ In addition, a state or local jurisdiction which has been allocated funds may decline to apply for assistance, or may subsequently be deemed ineligible to receive the funds for failure to comply with allocation plan requirements. Those allocated but undelivered funds would then be made available for awards to other applicants in the jurisdiction.²² Alternatively, a recipient who is eligible to receive trust fund money may fail to raise enough matching funds to qualify for a grant at the maximum amount available under the allocation formula. The unused portion—the difference between the formula allocation and the amount granted by virtue of matching—would also remain available for grants.²³ In reallocating these funds, HUD must give priority to other entities within the same state or jurisdiction as the original allocation, so that each state receives as close to the maximum allocated award as possible.²⁴

Targeting

In order to ensure that trust funds meet urgent housing needs, the bill establishes additional restrictions on how funds are used by recipient state or local jurisdictions:

- at least 45 percent of the grant amounts for housing families with incomes less than 30 percent of the area median income (AMI) or state median income, whichever is higher;
- at least 30 percent for housing families with incomes which do not exceed the amount earned by one individual working full-time at the state or federal minimum wage, whichever is higher;
- not more than 25 percent of the funds can be used for rental housing or homeownership assistance for families with higher incomes, between these other targeted levels and 80 percent of the AMI or state median income, whichever is higher;
- not more than 5 percent of funds can also be used to offset the operating costs of nonprofit organizations that develop, rehabilitate or preserve affordable rental housing.²⁵

Project Requirements

The bill defines “affordable housing” as rental housing with restricted rents that do not exceed the HUD-established Fair Market Rents (FMRs) used by public housing agencies (PHAs) to operate the voucher program or the applicable payment standard (whichever is greater), but may not exceed 30 percent of the adjusted income of a family at 65 percent of

the AMI, with allowance for exceptional rents to be established by HUD in certain areas.²⁶ In addition, the bill limits the actual tenant contribution to rent to no more than 30 percent of the family’s adjusted income.²⁷ This means that trust fund properties must also secure additional rent subsidies for those units serving families with very low or extremely low incomes, which will be a significant part of the income mix due to the bill’s targeting provisions. Such subsidies could be funded through the Housing Certificate Fund in the form of either Thrifty Vouchers or project-based vouchers. The bill also requires the housing provider to set aside units for tenant- or project-based vouchers proportionate to the level of trust fund assistance used in the project and prohibits discrimination against voucher holders.²⁸

Selection Criteria

The bill requires recipient states or local jurisdictions to develop annual plans (with public input) for the allocation of trust money, which must include a list of factors and preferences for distributing funds to subrecipient localities and entities carrying out specific local programs or as owners of specific developments. The allocation plan requirement can be satisfied by including the required information in the jurisdiction’s Consolidated Plan.

Potential recipients of trust funds under this bill are subject to more extensive obligations than in the 2002 bill. Like the bill’s predecessor, for each project funded, the ultimate recipient must certify that the tenant contribution will not exceed 30 percent of income. However, while the 2002 bill required only a 40-year use restriction, under the new bill, projects must remain affordable for 50 years.²⁹ Further, the recipients must comply with income-mixing requirements (*see infra*), and assume a duty to affirmatively further fair housing.³⁰ In addition, recipients must comply with the federal labor standards for affordable housing construction.³¹

The allocation plan must express a preference for applicants based on several factors, including the amount of funds leveraged by the applicant from private and “nonfederal” sources, and the extent to which the affordable housing will be accessible to persons with disabilities and is in proximity to public transportation, job opportunities, child care and community revitalization projects. One such mentioned source is Section 8 assistance, apparently an exception to the “nonfederal” label.

The plan also requires that recipients comply with income-mixing requirements. Previous House and Senate trust fund bills had addressed income-mixing only at the neighborhood

²⁶*Id.* at Sec. 296(1)(A).

²⁷*Id.* at Sec. 296(1)(B).

²⁸*Id.* at Sec. 296(1)(C).

²⁹*Id.* at Sec. 295(e)(3)(A)(ii).

³⁰*Id.* at Sec. 295(e)(3)(A).

³¹*Id.* at Sec. 295(j) (referring to standards contained in the *Cranston-Gonzalez National Affordable Housing Act*).

²¹*Id.* at Sec. 295(f)(2).

²²*Id.* at Sec. 294(g)(1).

²³*Id.*

²⁴*Id.* at Sec. 294(g)(4).

²⁵*Id.* at Sec. 295(a).

level, and these factors are included again in the current bill by requiring that the allocation plan express a preference for projects depending upon:

- the extent to which the potential applicant has addressed or ameliorated issues of exclusionary zoning or other barriers to development of affordable housing;
- the extent to which the percentage of extremely old housing exceeds 35 percent of total available housing; and
- the extent to which the housing will be located in census tracts in which the number of families having incomes below the poverty line is less than 20 percent.³²

In a significant addition, the current bill also requires income-mixing at the project level, mandating that not more than 50 percent of a particular project's assisted units be used to house families with extremely low incomes, with exceptions for small projects, rural areas and elderly/disabled housing.³³

The 2002 bill had contained a "continued assistance rental subsidy program" as an eligible use of trust funds, defining that term as one that provides project-based rental assistance for a maximum of three years and, after three years, requires families to receive Section 8 project-based voucher rental assistance.³⁴ The current bill does not include that program, and instead provides that project-based rental assistance is an eligible use of trust funds for not more than 12 months for a unit.³⁵ The new bill also authorizes Section 8 project-based voucher appropriations in such amounts as are needed to provide rental assistance³⁶ to comply with the trust fund's targeting requirements and various unit and tenant rent limitations.

The Bill's Future

H.R. 1102 has been referred to the House Financial Services Committee but hearings are unlikely until the Committee leadership decides to move forward on the bill or some kind of production program. While the passage of a major housing production bill at this time faces an uphill battle, the sustained efforts of housing advocates continue to bring this critical issue to the legislative table. In addition to the moral imperative of housing the nation's poor, the National Housing Trust Fund Campaign points out that production of affordable housing would stimulate the economy by creating 1.8 million new jobs and \$50 billion in wages.³⁷ The bill continues to gain co-sponsors, and the number of

organizations endorsing the National Housing Trust Fund Campaign has surpassed 4,000. The United Way recently placed an ad in *Roll Call* naming the National Housing Trust Fund as one of several legislative priorities. It has been introduced in the Senate through a provision in the *Leave No Child Behind Act*, S. 448 (see box below). With continued pressure on both houses of Congress to meet growing local affordable housing needs, the potential of this important piece of legislation may yet be realized. ■

Housing Provisions Included in *Leave No Child Behind* Legislation

The *Act to Leave No Child Behind* was introduced in both the House and the Senate, S. 448/H.R. 936, by Senator Christopher Dodd (D-CT) and Rep. George Miller (D-CA) on February 26. Not to be confused with the Bush administration's ill-funded single-issue education bill, *No Child Left Behind Act of 2001*, Pub. L. 107-110 (2001), this proposed statute is a comprehensive proposal addressing a range of issues important to child well-being. The legislation was spearheaded by a steering committee composed of several progressive national organizations, including the Children's Defense Fund, the Center for Community Change, and the National Conference of Black Mayors.

The bills address health care, child care, education, income supports, nutrition, foster care and juvenile justice, and contain a separate housing component. The Act would provide 1 million new Section 8 vouchers over the next decade and establishes a voucher success program to address utilization problems. In addition, the Act reiterates the plan proposed in the *Housing Preservation Matching Grant Act of 2003*, H.R. 445, 107th Cong. (2003) to promote preservation of affordable housing units by providing matching grants to states that have developed and funded programs for preservation of privately owned housing that is affordable to low-income families. Finally, the Act calls for the creation of a National Affordable Housing Trust Fund, funded identically as in H.R. 1102 and incorporating many of the provisions of the Senate's 2002 National Housing Trust Bill, S.1248, 107th Cong. (2001) (see accompanying article).

The bills have currently been referred to committees in both the House and Senate.

³²*Id.* at Sec. 295(e)(3)(B).

³³*Id.* at Sec. 296(1)(E).

³⁴H.R. 2349, Section 6(2)-(3) (2002).

³⁵H.R. 1102, Section 296(2)(E).

³⁶*Id.* at Sec. 297.

³⁷*National Housing Trust Fund Should Be a National Priority* (National Housing Trust Fund Campaign 2002), citing *Home Sweet Home: Why America Needs a Housing Trust Fund* (Center for Community Change, 2002).

Local Residency Preferences for Section 8 Vouchers Violate the *Fair Housing Act*

Introduction

In *Langlois v. Abington*, a Massachusetts federal court recently determined that the selection criteria used by several local public housing authorities (PHAs), which gave preferences to voucher applicants already residing in the PHAs' jurisdictions, violated the federal *Fair Housing Act*.¹ Acting on remand from an earlier decision of the First Circuit, the trial court granted summary judgment in favor of a plaintiff class represented by four lower-income women of color, and a fellow organizational plaintiff, the Massachusetts Coalition for the Homeless. The defendants included eight Massachusetts PHAs in suburban towns with low numbers of racial minority residents and lower poverty rates than nearby urban areas. The heart of the complaint included *Fair Housing Act* claims that the tenant selection system containing the residency preference was racially discriminatory and failed to affirmatively further fair housing. In the course of the litigation over the past four years, the plaintiffs had been successful in obtaining injunctive relief to prevent the PHAs from implementing a preference to vault local residents to the top of the waiting list for Section 8 vouchers. However, for a variety of reasons, the court rejected similar challenges to the logistics of the PHAs' application processes.

The court's lengthy opinion is notable in several respects:

- **It states explicitly that PHAs do not have unfettered discretion to implement local preferences**, as they must fit into a statutory framework which prohibits race discrimination and requires affirmative steps to further fair housing. While the decision does not completely close the door on preferences for local residents, it untangles the First Circuit's approach which had improperly conflated the *Quality Housing and Work Responsibility Act* (QHWRA) statutory term "local preferences" with the PHAs' selection criterion of "preferences for local residents."
- **It holds that the *Fair Housing Act*, and other statutes and regulations, create rights enforceable under Section 1983.** The court strongly emphasizes the *Fair Housing Act*'s stature as a civil rights statute which courts are particularly well-suited to enforce, linking the *Fair Housing Act* and other fair housing laws to the jurisprudence of the *Civil Rights Act of 1964* and other anti-discrimination statutes which involve nondiscretionary prohibitions on discrimination. This view strengthens the ability of the *Fair Housing Act*'s anti-discrimination provisions, at least, to

withstand the recent judicial trend limiting enforceable rights under Section 1983, by distinguishing its heritage from other statutes premised on Congress' spending power which frequently now face greater difficulty in enforcement. In the current judicial climate where such rights are very narrowly constructed, this is a great victory for housing advocates.

- **It finds that HUD's requirement that PHAs certify that their programs serve to affirmatively further fair housing was judicially enforceable**, although not by these plaintiffs in this particular case.
- **It rules that the *Fair Housing Act* requires PHAs to maintain and analyze statistics** to carry out their duty to affirmatively further fair housing. Under this interpretation, PHAs cannot successfully use ignorance of the racial consequences of their activities and programs to defend charges of discrimination involving disparate impact. These disparate impact claims often require expert opinion to provide courts with reliable methods to analyze the impact of PHA actions. If PHAs fail to support their policy decisions with data, they cannot contend that any unintentionally discriminatory results were unforeseeable. Placing the burden on PHAs to validate their program choices requires PHAs to make thoughtful and informed policy decisions guided by civil rights principles.

The *Langlois* decision provides important support for the ability to scrutinize local discretionary decisions made by PHAs in the PHA plan process under other statutory requirements, such as fair housing and civil rights laws. A key area of PHA discretion in the process concerns admissions practices and procedures—who will receive public housing and Section 8 benefits? Although Congress and HUD have prescribed some statutory and regulatory criteria, the administration of so-called "local preferences" offers significant potential for abuse. Earlier, another federal court had preliminarily enjoined a PHA's adopting of a preference for "working families" that perpetuated segregation in violation of the *Fair Housing Act*, although this ruling was later vacated.² *Langlois* recognizes that local residency preferences may also be similarly illegal.

Background and Procedural History of the Case

The background of the case has previously been detailed more fully.³ Briefly stated, the case arose in 1998 when eight

¹234 F. Supp. 2d 33 (D. Mass. 2002)(hereinafter *Langlois*). The *Fair Housing Act* is Title VIII of the *Civil Rights Act of 1968*, 42 U.S.C. §§3601 *et seq.*

²*Davis v. New York City Hous. Auth.*, Nos. 90 Civ. 628 (RWS), 92 Civ. 4873 (RWS), 1997 WL 407250 (S.D.N.Y. 1997), amended, 1997 WL 711360, vacated and remanded 166 F.3d 432 (2d Cir. 1999) (First Circuit vacated preliminary injunction due to insufficient factual findings that a working family preference would perpetuate racial segregation).

³*Preliminary Injunction Against Local Residency Preferences Temporarily Upheld by First Circuit*, 30 HOUS. L. BULL. 48 (Mar./Apr. 2000); *Eight Massachusetts Housing Authorities Preliminarily Enjoined from Applying Local Preferences to Certificate and Voucher Programs*, 29 HOUS. L. BULL. 9 (Jan. 1999).

towns near Boston on the south shore of Massachusetts announced that, in opening up their separate wait lists for Section 8 vouchers, preference would be given to families currently residing within each jurisdiction.⁴ Some of the defendant PHAs had maintained a residency preference since the 1970s, while other towns were implementing it for the first time in 1998. Applications for placement on the wait lists were made available from each of the eight towns on two days only, and only in person at the PHA offices or by phone. Low-income residents of other jurisdictions and their advocates reported difficulty in reaching the PHAs by phone to obtain applications and found it nearly impossible to visit all eight PHAs during the two-day window. After the application date closed, each town was to conduct a lottery in which individual applicants were randomly selected to be on the wait list, then the list was ordered according to the local residency preference.

Applications for placement on the wait lists were made available from each of the eight towns on two days only, and only in person at the PHA offices or by phone.

After the application dates passed, but prior to the lotteries, a putative class of low-income racial minority nonresidents sued the eight PHAs under QHWRA, the *Fair Housing Act*, and regulations implementing these statutes, as well as under several executive orders. Federal Judge Nancy Gertner granted a temporary restraining order allowing the lotteries to take place but forbidding the PHAs from applying the residency preference to the list. A motion for preliminary injunction followed, which the court granted based on the plaintiffs' likelihood of success on the merits under the so-called "75 percent rule" (QHWRA's requirement that 75 percent of a PHA's Section 8 voucher program be provided to extremely low-income families) and the nondiscrimination provisions of the *Fair Housing Act*, under a theory of disparate impact.

On the PHA's first appeal of the preliminary injunction, the First Circuit affirmed under both the 75 percent rule and the *Fair Housing Act*.⁵ However, it held that a finding of disparate impact served only to satisfy a *prima facie* case of discrimination under the *Fair Housing Act*, remanding for additional fact-finding and analysis of the PHAs' justification for their actions, and of their compliance with their duty to affirmatively further fair housing.

⁴The original defendants were PHAs located in Abington, Avon, Bridgewater, Halifax, Holbrook, Middleborough, Pembroke and Rockland. Subsequently, Abington, Halifax and Holbrook ceased administration of Section 8 programs.

⁵207 F.3d 43 (1st Cir. 2000).

On remand, the trial court heard the parties' cross-motions for summary judgment and requested further briefing on the use of Section 1983 to enforce federal statutory rights. The court's newest decision grants summary judgment to the plaintiffs on their claims under the 75 percent rule, and on their *Fair Housing Act* claims of disparate racial impact and violation of the duty to affirmatively further fair housing.

Enforceability of Plaintiffs' Federal Rights

Just because Congress passes laws or HUD adopts regulations, it does not mean that such norms are enforceable by parties harmed by their violation. Federal courts in particular have used a variety of doctrines to bar judicial enforcement to aggrieved persons, including concepts such as implied right of action and enforcement through Section 1983 for actions taken under color of state law (e.g., PHA or state housing agency decisions). A struggle is currently being waged in federal jurisprudence regarding the enforceability of certain federal statutes through private rights of action under Section 1983 and the implied right doctrine. While *Maine v. Thiboutot* long ago held that Section 1983 may be used to enforce *any* federal statute, and subsequent cases extended that ruling to properly promulgated federal regulations that have the force and effect of law, later cases foreclosed suits to enforce statutes which contained comprehensive enforcement schemes ostensibly precluding a judicial remedy under Section 1983.⁶ The availability of Section 1983 was further narrowed by the *Pennhurst* decision that, in order to create a private right of action, a statute must confer a specific *individual* right upon the law's beneficiaries.⁷ Subsequent cases have further limited the utility of Section 1983 as an enforcement vehicle.

In the context of the ever-narrowing availability of Section 1983 to enforce federal statutes, the *Langlois* decision is a major victory for the beneficiaries of these federal housing laws. Notable are the court's own words framing its view:

Of all the cases in which § 1983 has been used to enforce state statutes and regulations, few come closer to the statute's purpose and history since its enactment post Civil War than cases like the instant one—cases that seek to enforce antidiscrimination laws in general, and fair housing provisions in particular.⁸

The court proceeded to find that the plaintiffs had enforceable rights under QHWRA's 75 percent rule, 42 U.S.C. §1437n(b)(1);⁹ the *Fair Housing Act*'s nondiscrimination provision, 42 U.S.C. §3604;¹⁰ the *Fair Housing Act*'s statutory

⁶*Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

⁷*Pennhurst State School v. Halderman*, 454 U.S. 808, 102 S.Ct. 82 (Mem), 70 L.Ed.2d 78 (1981); *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992).

⁸*Langlois*, at 37.

⁹*Id.* at 54.

¹⁰*Id.* at 56-7.

provision articulating a duty to affirmatively further fair housing, 42 U.S.C. §3608(e)(5);¹¹ Executive Orders 11063 and 12892 prohibiting housing discrimination in federal executive action;¹² and the *Fair Housing Act's* prohibition of racially discriminatory advertising, 42 U.S.C. §3604(c).¹³

The Blessing test asks whether the plaintiff has shown that s/he is the intended beneficiary of a sufficiently specific right articulated in a statute, regulation or executive order which the state actor is obliged to respect.

Using the *Blessing* Test to Determine Whether Plaintiffs Have Enforceable Rights

The *Langlois* court analyzed the relevant laws claimed violated under the test articulated in *Blessing v. Freestone*, a 1997 Supreme Court case concerning Section 1983 enforcement.¹⁴ This test asks whether the plaintiff has shown that s/he is the intended beneficiary of a sufficiently specific right articulated in a statute, regulation or executive order which the state actor is obliged to respect. Once the plaintiff has met this standard, the burden shifts to the defendants to show that Congress foreclosed a right of action under Section 1983, either overtly or implicitly (as through the existence of a comprehensive enforcement scheme). The *Langlois* court noted that this test does not require plaintiffs to show that Congress had specifically intended that such a right be enforceable under Section 1983, as federal legislation is presumed to arise “against the background of Section 1983.”¹⁵

The court distinguished *Blessing's* Section 1983 test from that more recently undertaken in *Alexander v. Sandoval*, a 2001 Supreme Court implied right of action case. There, the Court analyzed whether a judicial right of action may be implied directly from a federal statute, not through Section 1983, in order to enforce a regulation prohibiting methods that created disparate racial impact, concluding that no such implied right existed. In *Langlois*, Judge Gertner drew a distinction between the *Sandoval* plaintiff on the one hand, who asked the court to imply a right of action flowing from the statute, and the *Langlois* plaintiffs on the other, who sued

under Section 1983 to enforce federal statutory provisions focused on individual rights.¹⁶ The judge commented that the former situation implicated separation of powers problems by allowing courts to find a cause of action in a statute for which Congress provided no explicit remedies, while the separation of powers concern is not implicated by the use of the congressionally created remedy provided by Section 1983 to enforce other rights created through the legislative process.¹⁷

Logical as it may seem, this distinction may stand on uncertain ground, as the Supreme Court continues to erode access to judicial remedies. In *Gonzaga Univ. v. Doe*, a June 2002 decision analyzing enforcement of federal rights through Section 1983, the Supreme Court wrote:

We further reject the notion that our implied right of action cases are separate and distinct from our §1983 cases. To the contrary, our implied right of action cases should guide the determination for whether a statute confers rights enforceable under §1983.¹⁸

Still unknown is the ultimate effect of *Gonzaga's* pronouncement. Will the Supreme Court's desire to merge the determinations of which statutory and regulatory rights are enforceable under both doctrines be used to obliterate any distinctions between judicially created rights and remedies (“implied rights of action”) and the already legislated remedy provided by Section 1983 to enforce otherwise cognizable federal rights? For anyone who has witnessed the legislative process from close up, where such enforcement nuances have rarely been the subject of legislative attention for most of the 20th century, or for anyone seeking to enforce federal laws adopted pursuant to the federal commerce or spending powers, this is a scary prospect indeed.

At least for the time being, *Langlois* demonstrates that a line may still be drawn between these two types of cases: a plaintiff suing under an implied right of action must show that the statute “manifests an intent ‘to create not just a private right but also a private remedy,’”¹⁹ whereas a plaintiff suing under Section 1983 must, under *Gonzaga*, similarly show such a right but can use Section 1983 itself as the remedy.

Enforceability of Regulations

The *Langlois* court fortunately took a broad view of the enforceability of regulations under Section 1983, based on *Wright v. City of Roanoke Housing & Redevel. Auth.*, the Court's 1987 decision finding that tenants could use Section 1983 to enforce HUD's public housing utility allowance regulations against a PHA.²⁰ Here, the court allowed the enforcement of HUD regulations requiring PHA certification of conformity with civil rights statutes and outlining specific PHA

¹¹*Id.* at 71-6.

¹²*Id.* at 76-7.

¹³*Id.* at 78-9.

¹⁴520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997).

¹⁵*Langlois*, at 48.

¹⁶*Id.* at 11; *Sandoval*, 523 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

¹⁷*Id.*

¹⁸*Gonzaga Univ. v. Doe*, 536 U.S. 273, ___, 122 S. Ct. 2268, 2274, 153 L. Ed. 2d 309 (2002).

¹⁹*Id.*, 536 U.S. at ___, 122 S.Ct. at 2276.

²⁰479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987)

fair housing obligations, 24 C.F.R. §§ 982.53(b)-(c) and 903.7(o).²¹ This finding was based on the regulations' relationship to rights-creating statutes and on the court's view that regulations met the *Blessing* test. The court also found unnecessary any separate analysis of the enforceability of regulatory rights where such rights were coextensive with statutory rights. In such cases, the court found that the regulations were enforceable either as stand-alone rights-creating instruments, empowered by validly delegated authority from Congress to a federal agency, or as providing an interpretation of the rights granted by the statute.²²

In contrast, the court found that the QHWRA regulations requiring PHAs to implement administrative plans and Section 8 waiting lists according to HUD regulations (24 C.F.R. §§982.54 and 982.204(a)-(b)), did not create rights enforceable through Section 1983 by these plaintiffs under the *Blessing* test.²³

Analysis of Specific Violations

The 75 Percent Rule

QHWRA requires that 75 percent of families served by the Section 8 voucher program be extremely low-income (at or under 30 percent of the area median income).²⁴ At the preliminary injunction stage, the court analyzed the proposed local residency preferences against the PHAs' requirement to abide by the 75 percent rule using data provided by the defendants regarding the income levels of the families on the waiting lists. The court compared the position of extremely low-income families on the list both with and without application of the local residency preference, finding it likely that implementation of the preference would cause two of the towns, Abington and Rockland, to be in violation of the 75 percent rule. These towns were instructed to submit to the court an amended plan for creating and administering a Section 8 wait list.²⁵

Prior to the summary judgment decision, the town of Abington ended its administration of Section 8 vouchers completely.²⁶ The remaining town submitted a Section 8 plan amendment that merely stated that its administration of the residency preference would be "subordinated" to the 75 percent rule.²⁷ In its summary judgment opinion, the court (somewhat grudgingly) accepted the town's assurances and lifted the preliminary injunction to the extent it was based on violation of the 75 percent rule, though it left open the door for the plaintiffs to argue in the future that the town failed to properly subordinate the preference.²⁸

²¹*Langlois* at 75.

²²*Id.* at 53.

²³*Id.* at 79.

²⁴42 U.S.C. §1437n(b)(1).

²⁵*Langlois* at 45-6.

²⁶*Id.* at 55.

²⁷*Id.*

²⁸*Id.*

Disparate Racial Impact of Preferences for Local Residents under the *Fair Housing Act's* Non-Discrimination Statute and Implementing Regulations

Plaintiffs' Burden: Evidence of "Substantial Disparate Impact"

In the appeal from the preliminary injunction, the First Circuit joined several other circuits in allowing evidence of disparate racial impact to sufficiently establish a prima facie case of racial discrimination under the *Fair Housing Act*. In particular, the plaintiffs' burden required a showing of "substantial" disparate impact, at which point the burden shifted to the defendants to provide a "substantial and legitimate justification" for their plans.²⁹

At summary judgment, the district court's discussion began and ended with a common-sense analysis of the plaintiffs' disparate impact theory: that is, that a town with relatively low numbers of minorities that preferred its own residents would necessarily disproportionately favor white applicants.³⁰ To determine whether the impact would be "substantial," the court assessed the results of six tests proposed by the plaintiffs, using various sets of data regarding racial makeup of the applicant pool and of current and projected voucher holders. Not only did the plaintiffs submit expert evaluation in support of several of its many proposed tests, but the defendants provided no expert evidence in rebuttal nor proposed alternative tests.

The defendant PHAs each failed at least one test, and five of the seven towns remaining at the summary judgment stage failed three or more. While the court articulated various problems with the tests, it found that, taken as a whole, the tests sufficiently demonstrated that racial minorities suffered or would suffer a substantial disparate impact because of the local residency preference. Judge Gertner defused defendants' criticism of the data analyses by pointing out that the defendants submitted no proof that the tests wrongly skewed results in favor of the plaintiff class and that, if anything, the application procedures likely skewed the statistics in favor of defendants.³¹

The court also rejected the defendants' argument that they were being punished for the imbalance of racial groups that exists between their towns and other Massachusetts communities or as compared to statewide racial statistics. They contended that under the court's analysis, *all* residency preferences would be deemed invalid as having a disparate impact unless the town's composition exactly mirrored that of the other communities or of the state to which it was to be compared. The court rejected the argument by stating that the required finding of a "significant" disparate impact safeguards against use of statistics showing only minimal racial disparities and/or minimal racial impact.

²⁹*Langlois v. Abington*, 207 F.3d 43, 50-51 (1st Cir. 2000).

³⁰*Langlois*, at 56-7.

³¹The plaintiffs provided census statistics showing that Section 8 applicants were disproportionately members of racial minority groups, so to the extent that potential applicants were discouraged from applying, the number of minority applicants was reduced.

Defendant's Burden: A "Legitimate and Substantial Goal" and No Less Discriminatory Alternatives

Having found that the statistics showed the plan disparately impacted racial minorities, the district court's summary judgment opinion then moved on to examine defendants' evidence that their plan had a "legitimate and substantial goal."

The First Circuit, anticipating the analysis of defendants' goals under the burden-shifting regime upon remand, expressed a preliminary approval of a preference for local residents:

[B]y the 1998 amendment [to the *Fair Housing Act* through QHWRA] Congress itself endorsed the use of locally determined preferences in distributing section 8 vouchers. It is hard not to treat Congress' own enactment as justification enough to satisfy a statutory impact discrimination claim of the kind before us.

We thus conclude that (absent intentional discrimination), the residency preference does not violate the 'because of race' provision of the *Fair Housing Act* standing alone.³²

The district court revisited that conclusion with a close examination of the legislative history behind the permission for local preferences. Judge Gertner found that Congress intended to allow PHAs to give attention to local needs and preferences, but not for local residency preferences. Indeed, she found significant the fact that there was no Congressional commentary in QHWRA's legislative history supporting local residency preferences. She found that Congress thoroughly articulated the goal of deconcentrating very low-income families, but "no concern that the previous system [requiring the application of federal preferences] disadvantaged local residents, or any desire that the new system should afford them greater priority."³³ She pointed out that the only basis for local residential preferences exists in regulations, which contain an admonishment that a residential preference must not discriminate and must not delay or deny admission to a program based on race.³⁴

The First Circuit had also taken Judge Gertner to task for arbitrarily balancing civil rights goals against the PHAs' concern for local needs, which was sanctioned by QHWRA. In the opinion, she responded that allowing local needs to be elevated over civil rights goals constitutes equally impermissible balancing. Instead, she sought to harmonize the Congressional goals and restrictions in QHWRA and elsewhere and concluded that the civil rights goals were preeminent. Thus, she concluded that to the extent that a PHA's justification for local residency preferences is in tension with its other statutory obligations, that goal cannot be considered "legitimate."

The district court found inadequate the defendants' statement that "preferences for local residents is allowed" and the generic justifications proffered, including community morale and protection of each town's administrative fees. Returning to the statutory purpose of allowing preferences to flow from local conditions and needs, the court held that the defendants could meet their burden only by offering a record of local conditions and needs that explained why the residency preferences were necessary. Judge Gertner suggested in a footnote that relevant local conditions could be physical or economic and could range from a fire leaving multiple residents homeless to a plant closing.³⁵ Because the defendants provided no justifications based on localized factors, they failed to meet their burden.

Judge Gertner found that Congress intended to allow PHAs to give attention to local needs and preferences, but not for local residency preferences. Indeed, she found that there was no Congressional commentary supporting local residency preferences.

Even assuming that the defendants had been able to meet the burden of showing a "legitimate and substantial goal" to justify a disparate racial impact, the court found that defendants had also failed to show that no less discriminatory alternative was available to meet their desired result. The plaintiffs suggested that residency preferences might be less discriminatory when a predominantly white town was paired with a nearby urban center, allowing residents of both to receive preference on both lists. Such a plan would allow residents to stay in their general geographic area but would allow for entry of new minority applicants into towns with low numbers of racial minorities, thereby minimizing any disparate impact. The defendants did not argue that no less discriminatory means were available nor did they comment on plaintiffs' proposal. Given the defendants' failure to provide evidence of a legitimate and substantial justification for the residency preferences creating a substantial disparate racial impact, summary judgment was granted to the plaintiffs on this issue.

Disparate Racial Impact of Section 8 Application Procedures under the *Fair Housing Act's* Non-Discrimination Statute and Implementing Regulations

The plaintiffs moved for summary judgment regarding the disparate impact visited upon racial minorities by the

³²*Langlois v. Abington Housing Authority*, 207 F.3d at 51 (footnotes and internal citations omitted). Note that the precedent relied upon by the First Circuit involved preferences for local residents in allocated parking permits.

³³*Langlois* at 41.

³⁴24 C.F.R. §982.207(b).

³⁵*Langlois* at 70, n.41.

PHAs' application process. They presented census evidence that racial minorities have reduced access to cars and telephones, making it more difficult for them to obtain and submit applications than it was for similarly located whites. In addition, the plaintiffs offered evidence showing that non-resident applicants were discouraged from applying because of the towns' announced intention to give local residency preferences. Based on the demographics of neighboring towns, which had higher proportions of minority residents, they argued that the application process had a significant disparate impact on minority applications.

While the judge indicated certainty that the circumstances surrounding the creation of the wait lists created a disparate impact on minorities, her inability to quantify the impact made it impossible to determine if it was significant. She declined, therefore, to grant plaintiffs the relief that they sought with respect to the application procedure. In any event, she found the issue moot because the application procedure violated the PHAs' duty to affirmatively further fair housing, enabling her to grant relief against the application process on other grounds.

Duty to Affirmatively Further Fair Housing under the Fair Housing Act, Implementing Regulations and Executive Orders

Enforceability of the Duty

The plaintiffs argued that two statutory provisions support their claims that the PHAs had an affirmative duty to further fair housing: the *Fair Housing Act*, which imposes a duty on the Secretary of HUD to administer programs in such a way as to affirmatively further fair housing,³⁶ and QHWRA, which requires each PHA to certify in its administrative plans that it will affirmatively further fair housing in its programs.³⁷ Judge Gertner held that the statutory civil rights certification requirement found in QHWRA was not enforceable by these plaintiffs because it did not become effective until after the PHA conducted the lotteries at issue in the case.³⁸ However, Judge Gertner observed that the statutory certification provision confirmed what other courts have held, namely, that the Secretary's mandatory obligation to affirmatively further fair housing under the *Fair Housing Act* extended to PHAs and could be enforced against them.

The court found that the obligation to further fair housing meets the *Blessing* criteria and because the plaintiffs, low-income minority individuals, were clearly the intended beneficiaries of the civil rights law, they were entitled to enforce it. The court found support for its conclusion in HUD

regulations implementing the *Fair Housing Act*, which impose specific affirmative duties on PHAs.³⁹

In addition to the *Fair Housing Act*, the Court agreed with the plaintiffs that two Executive Orders created independent enforceable rights against the PHAs. The executive orders require federal executive agencies to prevent discrimination in housing⁴⁰ and to affirmatively further fair housing.⁴¹ Congress expressly incorporated these orders into the *Fair Housing Act* when it required the Secretary of HUD to make annual reports on HUD's compliance with various laws, including the two executive orders.⁴²

The court found that the duty to affirmatively further fair housing requires more than simply refraining from discrimination and that courts are uniquely qualified to review compliance with the affirmative furtherance requirement.

Evidence of PHAs' Violation of the Duty to Affirmatively Further Fair Housing

The court found that the duty to affirmatively further fair housing requires something more than simply refraining from discrimination and that courts are uniquely qualified to review compliance with the affirmative furtherance requirement. To give specific content to the requirement, the court looked to HUD regulations which specify actions that PHAs must take to assure compliance with the *Fair Housing Act*. At a minimum, the court found that the PHAs were obliged to identify and address impediments to fair housing in a reasonable fashion and maintain records of these efforts.⁴³ The defendants submitted no evidence that they had in fact gone through these steps and, in depositions, their directors could not even articulate how precisely they affirmatively furthered fair housing. Consequently, the court concluded that their certifications of compliance were naked of any meaning and that the housing authorities were in abrogation of their duty to discover, consider and address fair housing problems within their programs.

³⁶42 U.S.C. §3608(e)(5).

³⁷42 U.S.C. §1437c-1(d)(15).

³⁸The QHWRA provision requiring civil rights certification became effective beginning October 1, 1999. Because the defendants' plan to use local residency preferences was announced in October 1998 and the subsequent lotteries occurred in December of that year, plaintiffs could not use this certification requirement as part of their claim that the PHAs failed to affirmatively further fair housing in this lottery.

³⁹24 C.F.R. §903.7(o)(3), requires participating entities to identify and reasonably address impediments to fair housing in its programs, and to work with jurisdiction in implementing the jurisdiction's initiatives, and to maintain records. The court indicated that this regulation which gives content to the obligation to affirmatively further fair housing also creates enforceable rights on its own.

⁴⁰Executive Order 11063, §101, 27 Fed. Reg. 11,527 (Nov. 20, 1962).

⁴¹Executive Order 12892, §2, 59 Fed. Reg. 2,939 (Jan. 17, 1994).

⁴²42 U.S.C. § 3608.

⁴³24 C.F.R. § 903.7(o)(3).

Violation of the Fair Housing Act's Non-Discrimination in Advertising Statute and QHWRRA's Requirement that PHAs Comply with their Administrative Plans

The *Fair Housing Act* forbids the use of advertising to indicate a race-based preference or to discriminate based on race in the sale or rental of housing.⁴⁴ The plaintiffs contended that the announcement of the local residency preference by the eight defendant PHAs communicated a discriminatory racial preference, and submitted affidavits that notice of the preference discouraged potential applicants and advocates.

The judge rejected this argument under the standard that, to violate the statute, an ad must suggest “to an ordinary reader that a particular race is preferred or dispreferred for the housing in question.”⁴⁵ The court read the face of the announcement to communicate only the towns’ intention to benefit local residents, and not a race-based preference. The court did not conduct a disparate impact analysis under this statute to penetrate the resident/nonresident distinction. Finding no evidence of violation, summary judgment was therefore granted to the defendants on this count.

HUD regulations require that each PHA maintain administrative plans in accordance with HUD requirements, and that each PHA comply with its own plan.⁴⁶ Another provision governs the organization of waiting lists and requires PHAs to follow their administrative plan in awarding vouchers to participants on the waiting list.⁴⁷ The court found that these regulations failed to create enforceable rights under *Blessing*, and therefore failed as the basis for a cause of action under Section 1983. Summary judgment on this issue was therefore granted to the defendants.

Conclusion

This opinion represents the result of years of dedicated strategizing and advocacy by community organizations serving low-income participants in the Section 8 program. Because many of the issues addressed by this opinion are hotly contested at all levels of the federal judiciary—the enforceability of federal fair housing rights, the burden of proof in disparate impact cases under the *Fair Housing Act*, the question of who bears the duty to affirmatively further fair housing—advocates should not hesitate to use the district court opinions to further their argument. ■

⁴⁴42 U.S.C. §3604(c).

⁴⁵*Langlois* at 79, quoting *Ragin v. N.Y. Times Co.*, 983 F.2d 995, 999 (2d Cir. 1991).

⁴⁶24 C.F.R. § 982.54.

⁴⁷24 C.F.R. § 982.204(a).

Federal Anti-Predatory Lending Bill Introduced

Rep. Bob Ney (R-OH) most recently gained notoriety for ordering the House of Representatives’ cafeteria to change its menu from offering French fries to “freedom fries” in order to register his displeasure with France’s stance on the war with Iraq. Less well-publicized is the fact that Rep. Ney, the new Chair of the House Financial Services Subcommittee on Housing and Economic Opportunity, has also introduced federal anti-predatory lending legislation which, though nominally proposed to protect borrowers in the subprime market, could roll back gains made at the local and state levels.

Rep. Ney’s proposed House Resolution 833 is, on its face, at odds with the Republican party’s preference for state control rather than federal oversight. The Ney bill, co-sponsored by Ken Lucas (D-NY), would amend the *Truth in Lending Act* and the *Home Ownership Equity Protection Act* (HOEPA) in substantive areas of coverage and disclosure requirements, though many changes have little practical effect for low-income borrowers. For example, the bill would lower the points and fees triggers for HOEPA protection from 8 percent to 6 percent for loans over \$30,000; however, the bill would essentially permit lenders the benefit of charging up to 2 points in fees without any requirement that the lender lower the interest rate on the loan. Penalties for prepayment would be limited to the first four years of the loan, rather than the present five, but there would be no ceiling as to the penalty amount. The bill requires disclosure of balloon payment provisions and of the borrowers’ option not to finance points and fees, though it does not prohibit this common predatory practice. Lenders are required to consider a person’s ability to repay, but potential borrowers are adjudged able to handle the loan if they have a debt-to-income ratio of up to 53 percent (a dangerously high ratio that the secondary market finds unacceptable except on a few limited loan products). The bill also creates federal licensing standards for mortgage brokers and a HUD-administered “consumer protection board” to maintain a national database of mortgage brokers and to support consumer education, but consumer advocates fear it would be packed with industry insiders.

The bill, strongly supported by the mortgage brokers’ trade association, has been roundly criticized for addressing the problem of predatory lending and high-cost loans more narrowly than already-existing state and local legislation. For example, Rep. Ney’s bill would apply to loans in which fees comprise more than 8 percent of the loan amount, while New York State’s law covers loans with fees above 5 percent of the loan. The federal bill’s calculation of loans to trigger coverage excludes potentially large fees such as yield-spread premiums (essentially broker kickbacks), prepayment penalties, and fees paid to third parties. The bill prohibits single-premium credit insurance, yet fails to restrict use of abusive debt-cancellation and debt-suspension agreements, which serve the same predatory purpose. In addition, while

Georgia's state legislation allows borrowers to sue any eventual owner of the loan, the proposed federal bill removes most assignee liability. The federal bill grants lenders safe harbor for underwriting errors, allowing unscrupulous practices to continue by providing lenders protection from liability so long as violations are eventually cured. Mandatory arbitration further serves to limit borrowers' remedies for predatory practices.

Perhaps most significantly, the Ney bill explicitly preempts state and local mortgage regulating legislation, regardless of whether such laws offer additional protections.

According to the Center for Responsible Lending, the Ney bill would actually weaken current federal standards in several respects. The bill would overturn a recent regulation promulgated by the Office of Thrift Supervision that prevented unsupervised lenders from avoiding state consumer protection laws. It would also prevent borrowers from asserting claims for violations of federal protections during the foreclosure process, the time in which most violations are discovered.

Perhaps most significantly, the Ney bill explicitly preempts state and local mortgage regulating legislation, regardless of whether such laws offer additional protections. This provision would wipe out all gains made at the state and local level, many of which were the product of successful grassroots organizing by low-income communities most clearly impacted by high-cost loans.

Interestingly, the negative effect of preemption of strong local laws has already been felt in Rep. Ney's home state of Ohio. Local grassroots activity resulted in strong local predatory lending ordinances being enacted in Dayton and Cleveland, and Toledo's local government is poised to do the same. A state statute passed in response to the cities' enactments essentially mirrors existing HOEPA standards and explicitly forbids cities from enacting their own ordinances. Litigation has commenced in Dayton and Cleveland to determine whether such preemption is constitutional, and a lively coalition, including the Ohio Coalition for Responsible Lending and the Coalition on Homelessness and Housing of Ohio, is supporting the cities' right to enact protective ordinances. A separate Ohio predatory lending statute requires that all mortgage brokers, including nonbank brokers, be licensed by the state, but otherwise falls far short of the protections offered by the city ordinances. Several other proposed state statutes requiring greater lender disclosure died in committee. Rep. Ney's proposed federal legislation would

preempt even the thin protections offered by the Ohio state statutes, and would leave his constituents more vulnerable to predatory mortgage practices than under current law.

While the U.S. Senate has introduced no comparable bill, reports indicate that House Democrats are preparing to introduce their own predatory-lending legislation, spearheaded by Rep. Ney's Democratic colleague from Ohio, Rep. Stephanie Tubbs Jones. ■

The National Housing Law Project gratefully acknowledges the assistance of the Center for Responsible Lending for materials used in preparing this article.

Federal Agencies Try to Corner the Market in Mortgage Regulation

Recent activity from the U.S. Office of the Comptroller of the Currency (OCC) is adding to federal efforts to soften consumer protections against predatory lending practices. Guidelines issued by the OCC in late February regulate lending practices by nationally chartered banks, and would preempt all state predatory-lending protections with regard to those banks. The new regulations were reportedly prompted by a request from an Ohio mortgage company in connection with Georgia's predatory lending laws, seen as the most stringent in the nation. The OCC seeks to set a uniform standard regarding high-cost mortgage lending practices for nationally chartered banks, and is seeking public comment until March 23 on whether the Georgia law should be preempted. Attorneys general from five states with strong predatory lending laws met with the OCC to alert the Comptroller to the negative effects of the regulations' preemption but were told that OCC believes it has total authority in this arena. Another federal agency, the Office of Thrift Supervision, which regulates savings and loans, has also declared that its chartered members do not have to abide by New York's and Georgia's predatory lending laws. ■

Do Alternatives to Traditional Title Insurance Help Low-Income Homebuyers?

The time is drawing near for California State Insurance Commissioner John Garamendi to make a decision regarding a newcomer that has threatened to take a significant share of the title industry's business via a product that is marketed as mortgage guaranty insurance. The product is called Lien Protection, and the issuing company is Radian Guaranty Corporation, a subsidiary of Pennsylvania-based Radian Group, Inc., one of the nation's three largest mortgage insurance companies.¹ This product, available online, supposedly at up to 50 percent of the cost of traditional title insurance,² is currently not available in any state as a result of efforts to bar its sale in California. Spearheading the charge against this product is the title insurance industry.

In January 2003, an administrative law judge affirmed a June 2002 administrative ruling by the California Department of Insurance (CDI) that resulted in a Cease and Desist Order to Radian Guaranty Inc, Amerin Guaranty Corp., and RadianExpress.Com, Inc. The order required the companies to stop marketing, soliciting and selling insurance policies for coverage of undisclosed property liens. In addition, the judge issued a Notice of Right to Hearing and Notice of Fine, notifying Radian that it could incur up to \$5,000 per day in fines if it were to violate the order. Contrary to Radian's claim that its lien protection program constitutes an alternative to title insurance, the CDI found it to be, in fact, a form of title insurance, as defined in California Insurance Code Section 12340.1. As a consequence, Radian Guaranty Inc., Amerin and Radian Express must first obtain proper licenses from the CDI in order to engage in the title insurance business in California. Radian has been licensed in California since 1978 and Amerin since 1980 to provide mortgage guaranty insurance only. Amerin and Radian merged in 1999, and RadianExpress is not licensed to do insurance business in California.³

The key provision in contention is a state code provision defining title insurance as:

... insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of:

(a) Liens or encumbrances on, or defects in the title to said property;

(b) Invalidity or unenforceability of any liens or encumbrances thereon; or

(c) Incorrectness of searches relating to the title to real or personal property.⁴

California's Insurance Commissioner must decide on Radian's appeal in March of 2003.

Most lending institutions will not offer a first mortgage on a home unless the buyer has some form of insurance in place that assures that there are no unknown holders of an interest in the property. Unfortunately, it can take weeks for a traditional title insurance policy to be issued, and, even more importantly, the cost of such insurance can be significant. Fannie Mae and Freddie Mac, the top two players in the secondary mortgage market, have voiced concern over the cost of traditional title insurance products.⁵ Unlike most other developed countries in which the government assures the validity of title, individual Americans bear that burden via the purchase of title insurance policies. The cost of that burden is estimated to have reached \$11 billion in 2002.⁶ Obviously, these costs have a more significant impact on low-income homebuyers. Ironically, while claiming that Radian Lien Protection is a form of title insurance, and, therefore, Radian is not licensed to sell it, title insurance industry opponents of Radian's product point out the various ways in which it is not title insurance and thus does not protect consumers adequately. The California Land Title Association, an industry group, praised the administrative bar of Radian Lien Protection as protecting consumers from a risky and phony product.⁷

The nature of the protection the Radian product truly provides buyers is not to be dismissed lightly. A thorough research of the title by a traditional title insurer may be the better choice on older properties that may have changed hands repeatedly. By the same token, what Radian's or any other similar product⁸ highlights is that there are deep concerns over pricing in this fairly closed industry, and those concerns appear to be deserved. Details on Radian's product are not currently on its Web site. However, the type of policy that California's title insurance industry challenged was a \$325 policy for borrowers who were refinancing or taking out a second mortgage. Radian would not conduct a

⁴Cal. Ins. Code, §12340.1(a)-(c) (Deerings, 2003).

⁵Kenneth R. Harney, *Fannie, Freddie Exploring Cost-Cutting Plans For Title Coverage In Mortgage Refinancings*, (2002) Realty Times, available at http://realtimes.lycos.com/renews/20020318_costcut.htm.

⁶Ruth Simon, *Refinancing Boom Pressures the Obscure Title Insurance Industry*, the Wall Street Journal Online, Dec. 18, 2002, at <http://webprints.djreprints.com/651940986903.html>.

⁷*Administrative Law Judge Ruling Protects Consumers. California Department of Insurance Cease-and-Desist Order Affirmed*, CLTA News Express Bulletin 02/03-74 (Jan. 7, 2003).

⁸Radian is not the only company to have attempted to provide a lower-cost alternative to traditional title insurance. Norwest Corporation did so in the 1990s until the title insurance industry made similar challenges based on whether the corporation was licensed to sell title insurance.

¹See *Radian Group Annual Report* (1999), available at www.radiangroupinc.com/pdf/Radian99AR.pdf.

²See *Radian Group Annual Report* (2001), available at www.radiangroupinc.com/pdf/Radian01AR.pdf.

³See *Order to Cease and Desist and Notice of Right to Hearing*, State of California Insurance Commissioner, (Jun. 20, 2002), available at www.insurance.ca.gov/docs/FS-WhatsNew.htm.

full title search or solve existing title problems. "Instead... Radian would pull a copy of the last mortgage deed and three credit reports, and then ask a borrower to sign an affidavit stating that there are no other liens on the property. Radian would protect the lender from undisclosed liens if the borrower defaulted..."⁹

NCRC estimates that the savings to consumers with a product such as Radian's would be tremendous—nearly \$400 million per year in California alone.

Traditional title insurance pricing is based on a percentage of the cost of the home. In regions with high home prices, that will result in a significant cost burden. In addition, a flat pricing system that bears no relationship to the amount of work actually performed is particularly irksome in this day and age of automation and Web-based access to documentation. What used to take hours can now takes minutes to research. Whether most title insurance companies have adjusted their pricing downward to account for the reduced amount of work is a significant question.

States that have stopped Radian from selling its lien protection product on the same grounds that it lacks proper licensing to sell title insurance include Florida, Texas, Pennsylvania and Connecticut.¹⁰ Radian has appealed California's decision, which has a broad-ranging impact insofar as California prohibits title and mortgage insurance companies from selling any other kind of insurance anywhere else in the country. In other words, as long as Radian is deemed in California to be selling title insurance, it may not engage in that business in the state while selling private mortgage insurance elsewhere in the country. Radian will not offer the product nationally if it cannot offer it in California.¹¹ In the interests of consumer protection, the National Community Reinvestment Coalition (NCRC) filed an amicus brief in the case, asking the court to overturn the order. NCRC estimates that the savings to consumers with a product such as Radian's would be tremendous—nearly \$400 million per year in California alone.¹² ■

⁹*Id.*

¹⁰Holden Lewis, *Title insurance alternative offers savings, controversy*, Bankrate.com, (May, 2002).

¹¹Kenneth R. Harney, *National Consumer Lobby Enters Fight Over Discount Price Title Insurance*, RealtyTimes (Nov. 18, 2002), at http://realtytimes.com/rtnews/rtpages/20021125_titleinsurance.htm.

¹²*Id.*

9th Circuit Stays Order Allowing Section 515 Landlord to Prepay Loan

In December of 2002, the Idaho District Court granted a quiet title judgment to a Rural Housing Service (RHS) Section 515 owner after the owner tendered to RHS the balance due on the loan and RHS, in accordance with the prepayment restrictions imposed by the *Emergency Low Income Housing Preservation Act of 1987* (ELIHPA), refused to accept the payment. The District Court held that it did not need to consider ELIHPA because it was not a sovereign act, that RHS' refusal of the payment was wrongful under Idaho law and that, as a result, the owner was entitled to quiet title to the property. In the same order the District Court also denied two residents of the development the right to intervene in the litigation on the ground that they did not have standing because the injuries that they alleged had not occurred and were speculative.¹

The tenants filed a notice to appeal the district court decision and so did RHS. Before the residents' appeal brief was due, however, they learned that RHS decided to settle the case and that it had released its deed of trust on the property and accepted the owner's final payment. In response, the residents filed an emergency motion for a stay of the district court order with the United States Court of Appeals for the Ninth Circuit. In their motion, the residents contended that they were irreparably injured by the district court decision because their rights as residents of RHS housing had been terminated, that they were threatened with future displacement, that the denial of their right to intervene was improper and that the district court's substantive decision was also wrong. On March 25, Judge Canby issued an emergency order staying the district court order, enjoining the owners of the Section 515 development from selling it and prohibiting the owners from terminating any of the residents' Section 515 rights pending a further order from the circuit court.

The parties are now briefing the residents' stay motion and their appeal. Further developments in the case are not expected until late April or May. The residents are represented by Idaho Legal Services, the National Housing Law Project and Heller Ehrman, a San Francisco firm. ■

¹*Kimberly Associates v. United States*, No. CV 98-0083-S-LMB (Dec. 12, 2002). See, *RHS Owners Allowed to Quiet Title to Their Property in Derogation of ELIHPA*, 32 HOUS. L. BULL. 258 (Nov./Dec. 2002) for a more complete discussion and criticism of the decision.

NATIONAL HOUSING LAW PROJECT FACT SHEET:

Public Housing Facing Threat of Big Cuts in Operating Subsidies

This fact sheet was created as a handout for residents and advocates who are concerned about public housing operating subsidies. Please feel free to copy and distribute the fact sheet to residents, resident organizations and other housing advocates.

The federal government provides federally funded public housing authorities (PHAs) with operating subsidies to cover maintenance, security and the management of public housing. Operating subsidies are needed because residents' rents are not enough to cover these expenses and to preserve income-based rents for public housing residents.

What is the problem?

On January 9, 2003, HUD informed all PHAs that they will "temporarily" receive only 70 percent of their operating subsidies from money for Fiscal Year (FY) 2003, which runs from October 1, 2002, to September 30, 2003. Eight days later, on January 15th, after much protest from PHAs nationally, HUD told PHAs that the funding level for operating subsidies for the year would probably be 90 percent. But, HUD said it will not make the adjustment to the higher percentage until sometime this summer.

What caused the problem?

HUD miscalculated by at least \$250 million the amount of money that PHAs needed in the prior federal fiscal year (FY 2002), which ran from October 1, 2001, to September 30, 2002.

How much money is needed to fund operating subsidies fully for FY 2002 and FY 2003?

- For FY 2002, an additional \$250 million is needed.
- For FY 2003, \$3.9 billion is needed to fund operating subsidy needs.
- The combined total for FY 2002 and 2003 is \$4.1 billion.

How have Congress and the Administration responded to the problem to date?

- HUD has not asked Congress for more money to solve this problem.
- Congress has agreed that HUD may use FY 2003 money to pay off the FY 2002 shortfall. This pushes the shortfall into FY 2003.
- Congress has only provided \$3.6 billion for FY 2003, which does not meet the need.
- The HUD budget for FY 2004 is for \$3.564 billion, which will not meet the need.

There are no current plans to make up the \$250 million shortfall. More troubling, there are no assurances that the same shortfall will not occur again in FY 2003 or FY 2004.

How does this problem affect you and your PHA?

The short answer is that all PHAs are now under great pressure to spend less money and to trim budgets that are already very tight. PHAs cannot handle these cuts without severe decreases in services. If the operating subsidies are not fully funded, maintenance and management suffer. Badly needed units may not be rented for lack of funds to repair them. Funding for security will also be impacted especially because these cuts come on top of the loss of the Public Housing Drug Elimination Program (PHDEP) funds in FY 2002.

The more complex answer to the question depends upon the fiscal year of your PHA. PHAs have different fiscal years. Your PHA's fiscal year begins on either January 1, April 1, July 1, or October 1. January 1 PHAs are the first to receive funds from HUD each year and the October 1 PHAs are last. Initially, the October 1 PHAs were threatened with cuts equal to the full amount of the FY 2002 shortfall of \$250 million. That problem has been addressed, because HUD can borrow from FY 2003 funds to pay the \$250 million shortfall. PHAs with fiscal years beginning on January 1 and April 1

continued next page

have been told that they will be funded at the 70 percent level and that if there is an adjustment, it will not happen until summer. Thus the January 1 and April 1 PHAs, if they are cautious, may take steps to reduce spending to the 70 percent level. By the summer, PHAs with fiscal years of July 1 and October 1 may know their funding levels with more certainty. But these PHAs may also begin now to look for ways to cut costs or raise funds from other sources. Attached is a chart showing how PHAs with different fiscal years may be affected.

What needs to happen?

PHAs need to get full funding for operating subsidies to make up the shortfall between rents and what it costs to operate public housing.

How do the cuts in operating subsidies affect the \$25/unit/year funding for resident participation?

To the extent that a PHA does not receive 100 percent of the operating subsidies that it is entitled to, the funding for resident participation will be cut. The cut is pro-rata. Thus if a PHA receives only 70 percent of its operating subsidy funds (i.e., a 30 percent cut), the resident participation money will also be cut by the same 30 percent.

What can you do?

- ✓ Meet with your PHA staff and commissioners to find out what they are planning to do and how they are planning to adjust their budgets.
- ✓ In the short term, PHAs can put off some maintenance. They also have other funds that they can use for operating expenses such as funds in their reserve accounts and the capital fund. Ask to be involved in the decisions as to which other funds could be used and what services or projects may be deferred, reduced or cut.
- ✓ Work together (residents, resident councils and PHAs) to determine if there are other sources of funds at the state or local level which can be used to assist the PHA.
- ✓ Offer to support the PHA in its efforts to obtain full funding for operating subsidies.
- ✓ Talk to residents and resident council members about the problem and inform members of the local community to get them involved in possible solutions.
- ✓ Stay informed and check the Web sites of the organizations listed below for updates on the operating subsidy issue.

For more information

- The HUD Notice announcing the 70 percent cut in operating subsidies can be found at www.hudclips.org, PIH 2003_1 (HA) Subject: Federal Fiscal Year (FFY) 2003 Guidance on Determination of Operating Subsidy Eligibility, Schedule for the Submission of Operating Subsidy Calculations, Issuance of Proration Factor and Approval of Calculations (Jan. 6, 2003).
- The announcement that the cut may be 90 percent was in a letter sent to all PHAs and in a press release dated January 15, 2003, from the HUD Office of Congressional and Intergovernmental Relations 202-708-0380. The letter is available at www.hud.gov/news/releasedocs/phaletter.cfm and the press release at www.hud.gov/news/release.cfm?content=pr03_006.cfm
- Public Law 108-7 Omnibus Appropriations (2/20/03) (H.J.RES.2 Consolidated Appropriations Resolution, for FY 2003) http://thomas.loc.gov/cgi_bin/query/z?c108:H.J.RES.2.ENR:
- HUD FY 2004 Budget www.whitehouse.gov/omb/budget/fy2004/app_down.html

Organizations that have additional information regarding operating subsidy funding

- Center for Community Change, www.communitychange.org/default.asp
- ENPHRONT (Everywhere and Now Public Housing Residents Organizing Nationally Together), Ed Williams, President, at (718) 634-0824
- National Housing Law Project, www.nhlp.org
- National Low Income Housing Coalition, www.nlihc.org
- Council of Large Public Housing Authorities (CLPHA) www.clpha.org

Examples of What the OPERATING SUBSIDY CUT Would Look Like Using FY 2002 Funding Information*

Name of PHA	FY	FY 2002 Operating Subsidy levels	What Operating Subsidies would have been if funded at 70%	What Operating Subsidies would have been if funded at 90%
Peoria, IL	Jan. 1	\$4,732,493	\$3,312,745 <i>(\$1,419,348 less than FY 02)</i>	\$4,259,244 <i>(\$473,249 less than FY 02)</i>
St. Louis, MO**	Oct. 1	\$14,865,816	\$10,406,071 <i>(\$4,459,745 less than FY 02)</i>	\$13,379,234 <i>(\$1,486,582 less than FY 02)</i>
Austin, TX	Apr. 1	\$5,181,976	\$3,627,383 <i>(\$1,554,593 less than FY 02)</i>	\$4,663,778 <i>(\$518,198 less than FY 02)</i>
Ft. Worth, TX	Jan. 1	\$3,250,478	\$2,275,335 <i>(\$975,143 less than FY 02)</i>	\$2,925,430 <i>(\$325,048 less than FY 02)</i>
Morristown, TN	Jan. 1	\$1,012,931	\$709,052 <i>(\$303,879 less than FY 02)</i>	\$911,638 <i>(\$101,293 less than FY 02)</i>
Bristol, TN	Oct. 1	\$439,115	\$307,381 <i>(\$131,734 less than FY 02)</i>	\$395,204 <i>(\$43,911 less than FY 02)</i>
Huntingdon, TN***	Oct. 1	\$197,837	\$138,486 <i>(\$59,351 less than FY 02)</i>	\$178,053 <i>(\$19,784 less than FY 02)</i>

* The cuts in operating subsidy funds will apply to FY 2003 funding levels. The funding information for each PHA is not readily available for FY 2003. Thus, the figures for FY 2002 are used. Except as noted, all information is taken from PHA annual plans for FY 2002.

** 99.5% of need.

*** Information from PHA plan for FY 2000.

Recent Housing Cases

The following are brief summaries of recently reported federal housing 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 Web site.³ Copies of the cases are not available from NHLP.

Riverview Towers Assoc. v. Bateman, and *Riverview Towers Assoc. v. Jones*, (consolidated), 2003 WL 55385 (N.J. Sup. Ct. App. Div., Feb. 28, 2003). A state appellate court reversed an award of possession to the landlord-owner based on the landlord's failure to comply with HUD lease termination notice requirements. The two defendants in the consolidated action were tenants in elderly and disabled housing subsidized under the Section 236 Rental Assistance Program. At trial, the tenants moved to dismiss, arguing that the court lacked jurisdiction because the landlord failed to give the tenants sufficient notice of termination. The trial court denied the motion, holding that the filing of a complaint was sufficient under federal law to confer jurisdiction upon the state court to hear a summary eviction case.

The appellate court reversed, relying on prior New Jersey case law holding that the notice requirements contained in federal regulations governing the Section 236 program were jurisdictional prerequisites to an eviction action, even in state court. The leases themselves also mandated that termination of tenancy be carried out pursuant to the relevant HUD regulations. In this case, the landlord of the units had given the defendants a "standard notice" after the tenants allegedly failed to pay rent, which the defendants claimed failed to satisfy the mandate of 24 C.F.R. § 247.4(e) (2003) (requiring that a termination notice based on nonpayment of rent include a statement of the amount due and the date of the computation). The landlord did not include the eviction in the complaint. On appeal, the tenants provided the reviewing court with a copy of the landlord's "standard notice" and requested that the court, in order to avoid further litigation, rule on its failure to satisfy the HUD regulations. The court refused the tenants' invitation, limiting its holding to a finding that the landlord failed to provide the court with sufficient evidence that the notice requirements were met to confer jurisdiction for the summary eviction action under federal law.

Wood Ridge Homes, Inc. v. DeRosa, 782 N.E.2d 1123 (Mass. App. 2003). The Massachusetts Appeals Court upheld the dismissal of an eviction action based on a tenant's

refusal to provide personal financial information. The tenant resided in a project-based Section 8 housing development and paid the maximum HUD-approved contract rent for the unit. The landlord's contract with the state housing finance agency required that all tenants living in the housing development who were potentially eligible for assistance be income certified. Based on this contractual obligation, the landlord demanded that the tenant participate in the certification process and sought to evict her for noncompliance. Relying on HUD Handbook 4350.3 (Occupancy Requirements of Subsidized Multifamily Housing Programs), both the trial and appellate courts agreed with the tenant's contention that she was not an "assisted tenant" in receipt of a Section 8 subsidy and was therefore not subject to the financial disclosure requirements. The landlord did not argue, and the court did not address, whether the requirements contained in the landlord's contract with the state housing finance agency bound the tenant.

Wisdom v. Philadelphia Housing Authority, 2003 WL 303945 (E.D. Pa. Feb. 12, 2003). The Philadelphia Housing Authority (PHA) moved to disqualify Michael Pileggi, a former PHA attorney, from representing Plaintiff Judith Wisdom in her Section 1983 claim alleging that the PHA violated her due process rights by denying her an administrative hearing after the PHA terminated her Section 8 housing benefits. The motion, which was denied by the court, was based on defendant's argument that Pileggi, who served as counsel to PHA for nearly 12 years prior to his termination, may have acquired confidential information during his representation of PHA that is relevant to the Wisdom litigation and detrimental to the PHA if revealed during the course of litigation.

The rule that the defendant sought to enforce against Wisdom, Pennsylvania Rule of Professional Conduct 1.9, seeks to prevent the possible disclosure of confidential information obtained through representation of past clients by prohibiting an attorney from accepting subsequent representation where there may be the appearance of a possible violation of confidences even though this may not be true in fact. The court applied a three-prong test to analyze whether a violation of Rule 1.9 occurred: (1) whether the prior and present matters are substantially related; (2) whether the clients have materially adverse interests; and (3) whether the clients consent after consultation to prevent disqualification. The weight of proof is on the party asserting that the three-prong test is met.

The court concluded that PHA did not satisfy the burden of demonstrating that Pileggi may have acquired relevant confidential information during his employment at PHA to the extent necessary to prevent him from representing Wisdom against PHA. The court determined it remained unclear what confidential information was acquired relevant to the Wisdom litigation. Furthermore, PHA did not allege that Pileggi was personally involved with or supervised any attorney on the Wisdom case while employed at PHA. Lastly, it found that while Pileggi may have information of PHA's general approach to landlord-tenant litigation matters (as alleged by PHA), this involves only factual issues.

¹www.westlaw.com.

²www.lexis.com.

³For a list of courts that are accessible through the World Wide Web, see www.uscourts.gov/links.html (federal courts) and www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also www.courts.net

The court warned Pileggi to take precautionary measures to avoid any potential Rule 1.9 violations and compelled him to seek permission from the court to introduce any evidence that is questionably within the prohibition.

Philadelphia Housing Authority v. Snyder, __ A.2d __, 2002 WL 31973712 (Pa. Cmwlth., Feb. 5, 2003). A Pennsylvania appeals court vacated a trial court order and remanded the case for further proceedings in a public housing eviction action based on drug activity of the defendant-tenant's son. The tenant lived in the public housing unit with four grandchildren. Police made controlled drug buys inside the unit and subsequently arrested the tenant's non-resident son, who was found with drugs on his person. At the time of the son's arrest, police also confiscated drugs from a bedroom in the unit, wherein they found a neighbor youth making a phone call.

The housing authority sought an order evicting the tenant and an immediate award of possession of the property. The request for injunctive relief was based on Pennsylvania's *Expedited Eviction of Drug Traffickers Act*, which empowers a court to order eviction based on a showing that, *inter alia*, drug-related criminal activity has occurred on or within the unit; the unit was used to further the drug activity; or that drug-related crimes were committed by the tenant, household members or any guest on or in the immediate vicinity of the unit. The Act also provides an affirmative defense for innocent tenants without knowledge of the drug activity. The court heard evidence from a police officer, who testified as to the criminal activity, and from the tenant, who testified that she knew of no drug activity on or around the premises. The trial court declined to order the eviction of the tenant, finding that remedy too harsh based on, at most, the possible acquiescence of the tenant to the drug activity conducted by her guests. The court instead issued a stay-away order excluding the son and prohibiting the tenant from allowing neighbors to use her telephone. The housing authority appealed the court's order, arguing that it had adequately shown the existence of drug-related criminal activity in the unit, and that the tenant failed to show her lack of knowledge. On appeal, the reviewing court vacated the order, holding that the trial court had not explicitly found that the tenant had met her burden of proof on the affirmative defense, and thus, the tenant might yet be subject to eviction under the Pennsylvania statute. As there was conflicting evidence requiring a determination of credibility as to the tenant's story, the case was remanded to the trial court for further findings.

Neal v. Martinez, 2003 WL 260524 (S.D.N.Y. Feb. 5, 2003). Tenants in three federally subsidized buildings brought suit in federal court on their own behalf and in their capacities as officers of their respective buildings' tenants' associations, alleging racially discriminatory treatment in the maintenance and conditions of their buildings, with primarily African-American and Latino tenants, as compared to buildings with primarily Caucasian residents. Claims against HUD and Secretary Mel Martinez were voluntarily dismissed. The remaining defendants, the buildings' owners and manage-

ment company, moved to dismiss for failure to state a claim upon which relief could be granted.

The court dismissed the plaintiffs' first claim, brought under 42 U.S.C. § 1983, for failure to show a sufficiently close nexus between the allegedly discriminatory conduct and any state action. The tenants supported their state action argument by pointing to the allegations that the defendants were recipients of federal funds which were used to manage and maintain the properties, and that the properties were subject to HUD regulations. The court rejected this argument, finding that funding and regulatory control was insufficient evidence of government participation in the private defendants' allegedly discriminatory activities. The court also found the complaint failed to allege the discriminatory conduct was carried out with the requisite animus or intent.

The plaintiffs' second claim was brought under 42 U.S.C. § 2000, which prohibits racial discrimination in programs receiving federal financial assistance. Relying on federal case law, the court held that provision applied only to agencies that receive and redistribute federal funds. Because the defendants were primarily in the business of owning and managing property in the context of for-profit partnerships, and not in distributing federal funds, the plaintiffs' allegations failed to state a valid claim.

Having disposed of the two federal claims, the court denied the plaintiffs leave to amend their complaint and dismissed their pendent state claims.

Alich v. Dakota Cty. Comm. Dev. Auth., 2003 WL 230726 (Minn. App. Feb. 4, 2003) (unpublished). A decision by the Dakota County Community Development Authority to terminate a Section 8 voucher was found to be arbitrary and capricious and was reversed on direct appeal by the Minnesota Appeals Court. The plaintiff, a Section 8 participant, informed the Development Authority that she would not participate in the recertification process because she would no longer require housing assistance after her upcoming marriage. The participant then called back less than a week later to ask if she could remain in the program because her marriage was called off. Her voucher was, however, terminated that day. The court examined the Development Authority's decision to terminate the voucher in light of the discretion vested in it by 24 C.F.R. § 982.552(c)(1) (stating the PHA "may consider all relevant circumstances"). The court considered the plaintiffs' historical compliance with program requirements and found no evidence that her need or eligibility for housing assistance had changed. The court also found no evidence that the Development Authority detrimentally relied on her initial call by, for example, canceling the contract with her landlord, or awarding her voucher to another participant. The court held that, given the facts presented to the hearing officer, the termination of the tenant's voucher evidenced an apparent failure to consider all the relevant and mitigating circumstances, and was therefore arbitrary and capricious. The termination decision was reversed and plaintiff's housing assistance was reinstated. ■

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) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in February of 2003. 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 Web site on the World Wide Web,¹ (2) bound volumes of the *Federal Register*, (3) HUD Clips,² (4) HUD,³ and (5) USDA's/Rural Development Web page.⁴ Citations are included with each document to help you secure copies.

HUD Proposed Rules

68 Fed. Reg. 6,262 (Feb. 6, 2003)

Changes to the Public Housing Assessment System (PHAS)

Summary: This proposed rule would amend the Public Housing Assessment System (PHAS) regulation at 24 C.F.R. part 902 to provide additional information, revise certain procedures and establish others for the assessment of the physical condition, financial condition, management operations, and resident services and satisfaction with services provided to public housing residents. This proposed rule takes into consideration additional examination of the PHAS by HUD, as well as comments and suggestions on the PHAS provided through research conducted with representatives of public housing agencies (PHAs) and public housing residents. The purpose of the PHAS is to function as a management tool that effectively and fairly measures a PHA's performance based on standards that are uniform and verifiable.

Comment Due Date: April 7, 2003.

68 Fed. Reg. 6,385 (Feb. 7, 2003)

Real Estate Settlement Procedures Act (RESPA); Rule on Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers: Target Publication Date of Final Rule

Summary: On July 29, 2002, HUD published its proposed rule on "RESPA; Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers" (RESPA rule). This notice advises the public the HUD anticipates publishing the final rule in the spring of 2003.

¹At www.access.gpo.gov/su_docs.

²At www.hudclips.org/cgi/index.cgi.

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

⁴At www.rdinit.usda.gov/regs.

HUD Notices

68 Fed. Reg. 5,909 (Feb. 5, 2003)

Order of Succession for the Office of Housing

Summary: In this notice, the Assistant Secretary for Housing designates the Order of Succession for the Office of Housing. This Order of Succession supersedes the Order of Succession for the Assistant Secretary for Housing, published on August 22, 2000 (65 Fed. Reg. 51,015).

Effective Date: January 27, 2003.

68 Fed. Reg. 5,910 (Feb. 5, 2003)

Redelegation of Authority to the Deputy Assistant Secretary for Public Housing Investments

Summary: In this notice, the Assistant Secretary for Public and Indian Housing redelegates to the Deputy Assistant Secretary for the Office of Public Housing Investments authority to monitor and enforce implementation by public housing agencies (PHAs) of Section 33 of the *United States Housing Act of 1937*, with respect to the review of their inventory of public housing units. The purpose of the review is to identify developments (or parts of developments) that must be removed from the stock of public housing operated under Annual Contributions Contracts (ACC) with HUD, and to carry out plans to convert the developments identified into tenant-based assistance or other forms of housing assistance. Authority also is hereby redelegated to the Deputy Assistant Secretary for the Office of Public Housing Investments to review and approve or disapprove plans submitted by PHAs to HUD for the voluntary conversion of public housing units into tenant-based (or other) housing assistance under Section 22 of the *United States Housing Act of 1937*. The review process also will determine whether the plans are consistent with assessments PHAs are required to make for public housing general occupancy developments and with other data available to the Secretary, and whether the plans meet the requirements under 24 C.F.R. 972.230.

Effective Date: January 23, 2003.

68 Fed. Reg. 6,178 (Feb. 6, 2003)

Notice of Submission of Proposed Information Collection to OMB: Data Collection Techniques for Identifying the Housing Subsidy Status of Survey Respondents

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the *Paperwork Reduction Act*. The Department is soliciting public comments on the subject proposal. This collection will test new questions to identify respondents' housing subsidy status for the American Housing Survey.

Comments Due Date: March 10, 2003.

68 Fed. Reg. 6,754 (Feb. 10, 2003)

Notice of Submission of Proposed Information Collection to OMB: HOPE VI—In-Depth Assessment of Family and Neighborhood Outcomes—Wave Two and Three of Panel Study

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the *Paperwork Reduction Act*. The Department is soliciting public comments on the proposal by which HUD intends to learn how housing choices and outcomes for original residents are affected by revitalization efforts at selected HOPE VI sites.

Comments Due Date: March 12, 2003.

68 Fed. Reg. 8,301 (Feb. 20, 2003)

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Fair Housing Initiatives Program Application

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the *Paperwork Reduction Act*. The Department is soliciting public comments on the proposed modification to the information collected in connection with the selection of applicants for the Fair Housing Initiatives Program (PHIP).

Comments Due Date: March 6, 2003.

68 Fed. Reg. 9,704 (Feb. 28, 2003)

Announcement of Funding Awards for Fiscal Year 2002; Research and Technology Unsolicited Proposals

Summary: In accordance with Section 102(a)(4)(C) of the *Department of Housing and Urban Development Reform Act of 1989*, this document notifies the public of funding awards for Fiscal Year 2002 Research and Technology unsolicited proposals. The purpose of this document is to announce the names and addresses of the organizations that have been awarded cooperative agreements based on their submission of unsolicited proposals for research funding.

RHS Administrative Notices

RD-AN 3824 (1965-E)(Feb. 21, 2003)

Designated State Multi-Family Housing Preservation Contact

Summary: This notice requires each Rural Development State Director to appoint a person working in the Multi-Family Housing (MFH) program to serve as the MFH Preservation Contact (MPC). The intent of this designation is to help assure that the preservation requirements of the *Housing Act of 1949* are properly understood and consistently implemented nationwide.

RHS Administrative Letters

Increasing Minority Homeownership in Rural America (Feb. 4, 2003)

Summary: This administrative letter sets out the steps that Rural Development staff must undertake to reach Secretary Veneman's goal of increasing minority participation in USDA's homeownership programs by 10 percent by the end of the decade. ■

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