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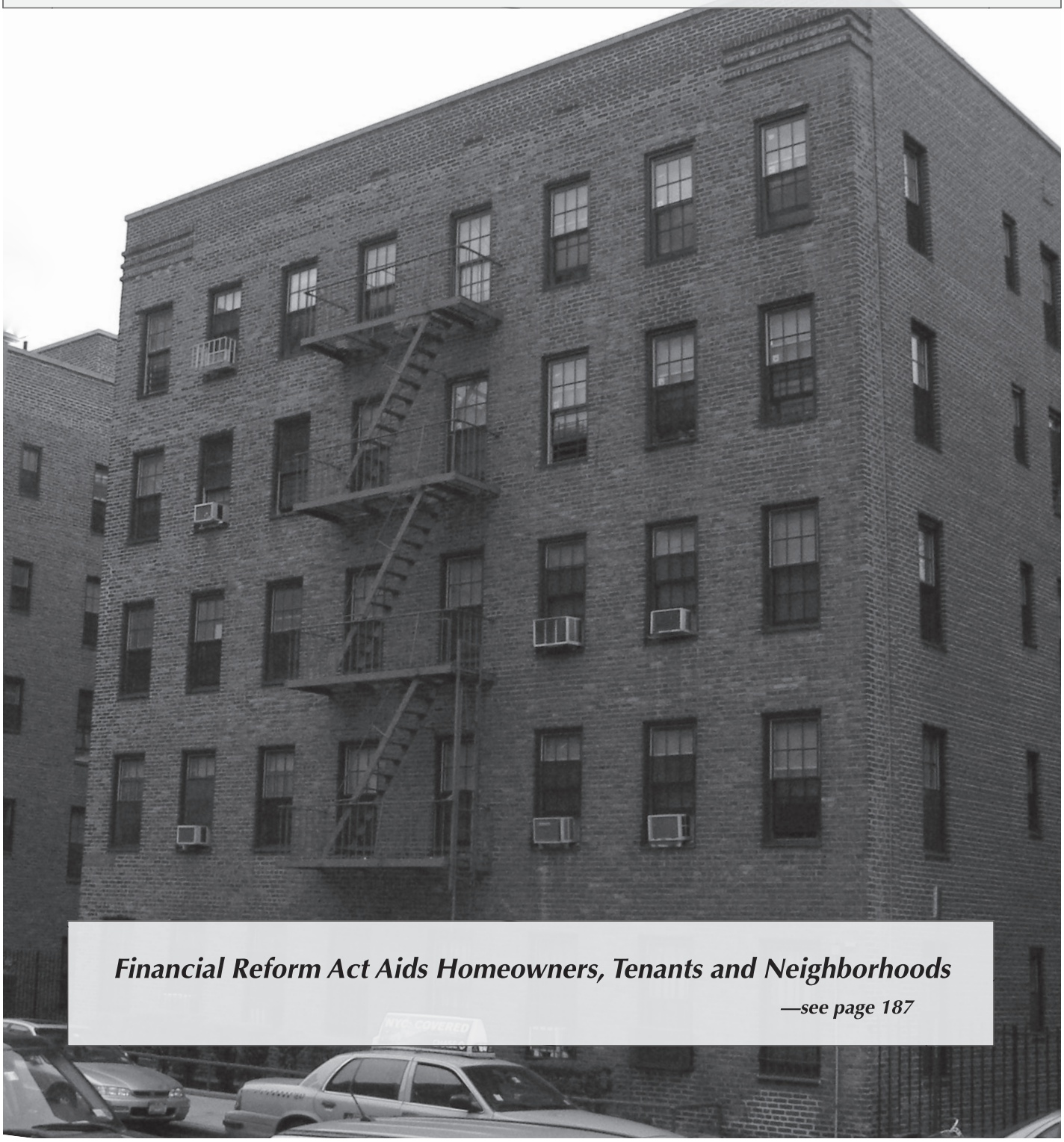

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Cover: First Houses on East 3rd St., New York, the first public housing in New York City and the first in the nation. The building is on the National Register of Historic Places. Photo by Americasroof.

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Financial Reform Act Seeks to Protect Homeowners, Tenants and Their Neighborhoods*

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173).[1] The Act is an ambitious attempt to overhaul the financial regulatory system and is the product of nearly a year of legislative negotiation and extensive lobbying. Its architects hail it as a bill "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[2]

Among those "other purposes" are several provisions that are of importance to housing advocates. In response to the continuing foreclosure crisis, the Act revives a long-dormant Department of Housing and Urban Development (HUD) foreclosure prevention program, the Emergency Homeowners' Relief Fund.[3] The Act extends the Protecting Tenants at Foreclosure Act,[4] clarifies its language, and creates a program to protect multifamily properties that are at risk of foreclosure.[5]

The Act also lends support to communities hardest hit by the foreclosure crisis. The Act pledges an additional $1 billion for a third round of funding for the Neighborhood Stabilization Program (NSP).[6] It also amends NSP program rules to increase flexibility for grantees and creates a grant program for foreclosure-related legal assistance.[7]

Emergency Mortgage Relief for Struggling Homeowners

In the first half of 2010, more than 500,000 homes have been foreclosed upon nationwide.[8] While the initial wave of foreclosures was caused in part by subprime mortgage lending practices, the causes of foreclosure are now increasingly based on unemployment and underemployment.[9] In

*The author of this article is Christian Kurpiewski, a J.D. candidate at the University of California, Los Angeles, and a summer intern at the National Housing Law Project.

[1]Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

[2]124 Stat. at 1376.

[3]Pub. L. No. 111-203, tit. 14, subtit. H, § 1496.

[4]§ 1484.

[5]§ 1481.

[6]§ 1497.

[7]§ 1498.

[8]Alex Veiga, *Foreclosures Could Claim More than 1 Million Homes in 2010*, USA Today, July 15, 2010, http://www.usatoday.com/money/economy/housing/2010-07-15-foreclosures_N.htm.

[9]Press Release, NeighborWorks America, More than Half of Families Facing Foreclosure Affected by Job Loss, According to New NeighborWorks America Report (May 28, 2010), http://www.nw.org/network/newsroom/pressReleases/2010/netNews052710.asp.

response, the Act reactivates the Emergency Homeowners' Relief Fund, a long-dormant HUD foreclosure prevention program created by the Emergency Housing Act of 1975, which was never funded.[10] The Act supplies the Secretary of HUD with $1 billion to be allocated to homeowners through loans, advances and emergency mortgage relief payments.[11] The funding supplements a $2 billion fund being administered by the Treasury Department to struggling homeowners in the hardest hit states.[12] A number of statutory changes have been made to the program using a successful state program as a model. The new program will resemble Pennsylvania's Homeowners Emergency Mortgage Assistance Program, which has provided 41,500 homeowners with $433 million in assistance since 1984, with 90% avoiding foreclosure.[13]

The Act reactivates the Emergency Homeowners' Relief Fund, a long-dormant HUD foreclosure prevention program created by the Emergency Housing Act of 1975, which was never funded.

The program directs the Secretary of HUD to provide assistance that is "reasonably necessary to supplement" what homeowners are able to contribute on their own. The maximum assistance is $50,000 per homeowner.[14] The loans and advances made under this program will have fixed interest rates and can be paid off in advance without penalty at any time.[15] The funds are available for homeowners who have become unemployed or have had their income reduced due to adverse economic conditions or medical conditions.[16] To qualify, homeowners must be at least three months behind in their mortgage payments and have received some notice of the mortgage holder's intention to foreclose.[17] Grants will be made to defray mortgage expenses only on a homeowner's principal residence.[18] The Secretary is directed to establish guidelines for the allocation of funds "based on the likelihood that a mortgagor will be able to resume mortgage payments" on her own.[19] Emergency mortgage relief payments can be made for a period of 12 months and, upon approval, can be extended for an additional 12 months.[20] No payments can be made beyond September 30, 2011.[21] States that have substantially similar programs will be allowed to administer funds through them.[22]

Protecting Tenants at Foreclosure Act: Clarification and Extension

One of the strongest tools for stopping the evictions of tenants living in foreclosed properties has been the Protecting Tenants at Foreclosure Act (PTFA). Originally passed in May 2009, the PTFA provides tenants the right to a 90-day notice to vacate at foreclosure.[23] Tenants who have more than 90 days left on their leases may continue to occupy the unit until the end of the lease, provided they entered into the lease before the "notice of foreclosure."[24] However, the language of the original act created some confusion as to the definition of "notice of foreclosure." Tenants' advocates argued that Congress intended "notice of foreclosure" to mean transfer of title by foreclosure.[25] However, many banks and eviction attorneys argued that "notice of foreclosure" takes place much earlier, such as an initial notice of default. The case law on the topic was mixed.[26]

The Act *clarifies* the meaning of "notice of foreclosure" and declares that the effective date is "the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed."[27] Because the title of the provision refers to this new language as a "clarification" of the PTFA, it should apply retroactively to all pending eviction cases and current tenancies.[28] Section 1484 of the Act also extends the sunset date of the PTFA from December 2012 to December 2014.[29]

[10]Mindy La Branche, National Council of State Housing Agencies, House and Senate Conferees Agree on Financial Reform Bill (June 28, 2010), http://www.ncsha.org/blog/house-and-senate-conferees-agree-financial-reform-bill.
[11]Pub. L. No. 111-203, § 1496, pursuant to the Emergency Housing Act of 1975, 12 U.S.C. § 2706.
[12]Kathleen Pender, *Feds Put Up $1 Billion More for Mortgage Relief*, S.F. Chron., July 29, 2010, at D-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/07/28/BUP21EL5T4.DTL.
[13]Annie Lowery, *Passage of FinReg Means $1 Billion for Unemployed Homeowners*, Washington Independent, July, 16, 2010, http://washingtonindependent.com/91791/passage-of-finreg-means-1-billion-for-unemployed-homeowners.
[14]Pub. L. No. 111-203, § 1496, 123 Stat. at 2208.
[15]§ 1496.
[16]§ 1496 (amending 12 U.S.C. § 2702).
[17]12 U.S.C. § 2702 (2010).
[18]12 U.S.C. § 2702
[19]Pub. L. No. 111-203, § 1496, 123 Stat. at 2208.
[20]12 U.S.C. § 2703 (2010).
[21]Pub. L. No. 111-203, § 1496, 123 Stat. at 2209 (amending 12 U.S.C. § 2708).
[22]§ 1496
[23]Pub. L. No. 111-22, tit. VII, § 702, 123 Stat. 1632, 1660-61 (2009).
[24]§ 702, 123 Stat. at 1660-61
[25]Kent Qian, *President Obama Extends and Clarifies the Protecting Tenants at Foreclosure Act*, Rents & Rants, The Official Blog of Tenants Together, July 27, 2010, http://rentsandrants.blogspot.com/2010/07/president-obama-extends-and-clarifies.html.
[26]*Id*. For additional information regarding PTFA case law and litigation, see page 190 of this issue of the *Bulletin*.
[27]Pub. L. No. 111-203, § 1484, 123 Stat. at 2204.
[28]ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000) ("[W]hen an amendment is deemed clarifying rather than substantive, it is applied retroactively.").
[29]§ 1484.

Protections for Multifamily Properties

The tenuous future of multifamily developments across the country threatens the continued availability of affordable housing. Due to spiraling mortgage costs, declining rents and financially distressed tenants, a growing number of multifamily buildings are facing foreclosure.[30] Many of these properties are simply overleveraged and cannot withstand the increasing fiscal crunch. In response, the Act directs the Secretary of HUD to develop a program that will provide a lifeline for at-risk multifamily properties and protect both current and future tenants of these buildings.[31]

The Act lays out a series of strategies that the "Multifamily Mortgage Resolution Program" will deploy in protecting multifamily properties. The program will focus on creating sustainable financing for the developments, taking into consideration the rental income that is generated from the properties and ensuring the preservation of adequate operating reserves.[32] The program will also work to maintain the level of subsidy funding that is currently flowing through the federal, state and local levels, while also providing additional funds for rehabilitation projects.[33] If the goals of the program cannot be met with the current ownership, HUD is urged to facilitate the transfer of these properties to new, responsible owners who will ensure continued affordability.[34] The Act encourages HUD to coordinate with other federal agencies.[35] HUD will provide progress reports to committees in both the House and Senate.[36]

Additional Funding for the Neighborhood Stabilization Program

The Neighborhood Stabilization Program (NSP) provides financial assistance to states and local governments to acquire and redevelop foreclosed, vacant and abandoned properties.[37] The Act provides a third round of funding for NSP, bringing total funding to $7 billion.[38] Representative Maxine Waters praised the inclusion of this additional NSP funding, stating that it "will help address the enormous supply of foreclosed properties plaguing nearly every corner of our country."[39]

The funds must be allocated by a formula in accordance with the provisions of the Housing and Economic Recovery Act of 2008.[40] Unlike the first round of NSP funding, there is no 18-month expenditure requirement, and the new funds will be available until they are expended.[41] The Secretary of HUD may use up to 2% of the funds for technical assistance purposes.[42] The Act also establishes a minimum of $1 million in grants for local governmental units and requires that each state receive a minimum grant of $5 million.[43] The bill expands the definition of "state" to include all instrumentalities of the United States, Puerto Rico, and the District of Columbia.[44] It also clarifies the term "notice of foreclosure," as discussed above.[45]

The Act also amends one of the restrictions regarding the NSP program's low-income set-aside requirement. At least 25% of all NSP funds must be used to house families at or below 50% of area median income. The Act provides that jurisdictions may purchase and redevelop *vacant* properties to meet the low-income set-aside. Vacant properties previously could not be used to satisfy the set-aside. According to the National Foreclosure Prevention and Neighborhood Stabilization Task Force, "This change will make it easier to leverage NSP funds with private dollars, reduce the per-unit cost to rehabilitate and sell low-income homes, and return more vacant properties to productive neighborhood assets."[46] The amendment will apply retroactively to all unexpended or unobligated funds, including recaptured and reallocated funds.[47] The Act also requires all grantees to develop a preference system for the inclusion of affordable rental housing units in properties assisted with the funds.[48] As with the first two rounds of NSP funding, all grantees must make a strong commitment to hire workers in the areas where projects take place and contract with small businesses owned and operated by those persons to the greatest extent feasible.[49]

Grant Program for Foreclosure-Related Legal Assistance

The Act establishes a program to provide grants to state and local legal services organizations through a competitive bid process to be carried out by the Secretary of

[30]Press Release, National Low Income Housing Coalition, Dodd-Frank Reform Bill Includes Extension of Protecting Tenants at Foreclosure Act, Additional Housing Provisions (July 19, 2010), http://www.nlihc.org/detail/article.cfm?article_id=7206.
[31]§ 1481.
[32]§ 1481.
[33]§ 1481.
[34]§ 1481.
[35]§ 1481.
[36]§ 1481.
[37]Press Release, National Housing Conference & Center for Housing Policy, Foreclosure Task Force Hails Bill Signing—$1 Billion In Funding Secured To Help Stabilize Communities Nationwide (July 21, 2010), http://www.nhc.org/media/NSP-WSR-Media-Release.html.
[38]*Id*.
[39]*Id*.
[40]§ 1497.
[41]Enterprise Community Partners, Legislative Summary, Summary of the Third Round of the Neighborhood Stabilization Program Dodd-Frank Wall Street Reform and Consumer Protection Act H.R. 4173 (July 21, 2010), http://www.enterprisecommunity.org/public_policy/foreclosure_prevention/documents/nsp3_summary.pdf.
[42]§ 1497, 123 Stat. at 2210.
[43]§ 1497, 123 Stat. at 2209.
[44]§ 1497, 123 Stat. at 2210 (referencing the Housing and Community Development Act of 1974, 42 U.S.C. § 5302).
[45]§ 1497, 123 Stat. at 2211.
[46]§ 1497, 123 Stat. at 2211.
[47]§ 1497, 123 Stat. at 2210.
[48]§ 1497, 123 Stat. at 2209-10.
[49]§ 1497, 123 Stat. at 2210.

HUD.[50] To be eligible for this funding, the legal assistance provided must be connected to mortgage-related default, eviction or foreclosure proceedings.[51] The organizations' primary mission must be providing legal assistance. All assistance under these grants must be provided to homeowners or to tenants in foreclosed properties.[52] The bill directs the Secretary of HUD to establish a priority for legal organizations operating in the 125 metropolitan areas with the highest foreclosure rates.[53] While the Act authorizes $35 million for the program for fiscal years 2011 and 2012, no funding will materialize until Congress appropriates it.[54] According to the National Legal Aid and Defender Association, advocacy efforts will now shift to securing funding for the new program in the remaining term of this Congress.

Conclusion

The Dodd-Frank Act is ambitious in its scope, seeking to provide aid to the homeowners, tenants and neighborhoods hardest hit by the foreclosure crisis. It extends the provisions of the PTFA to maintain protections for tenants in foreclosed properties. It also seeks to stabilize multifamily properties, which threaten to be a significant part of the next wave of foreclosures, and creates the foundation for foreclosure-related legal assistance grants. While its impact on the foreclosure crisis remains to be seen, the Act does provide an opportunity for advocates to apply additional resources, tools and strategies in serving homeowners, tenants and communities. ■

[50]§ 1498, 123 Stat. at 2211-12.
[51]§ 1498, 123 Stat. at 2211.
[52]§ 1498, 123 Stat. at 2211.
[53]§ 1498, 123 Stat. at 2211.
[54]§ 1498, 123 Stat. at 2212.

Interpreting the Protecting Tenants at Foreclosure Act: Case Law and Future Litigation*

Across the United States, the mortgage foreclosure crisis threatens low-income tenants. Once a bank forecloses on a building, it usually seeks to evict the tenants, preferring to market the property vacant. Nationwide, approximately 40% of the households facing eviction due to foreclosure are renters.[1] Post-foreclosure tenants are often unaware that they may be hastily forced from their homes through no fault of their own.

On May 20, 2009, the Protecting Tenants at Foreclosure Act (PTFA) went into effect as part of the broader Helping Families Save Their Homes Act of 2009.[2] Its provisions regarding ongoing leases and its notice requirements provide tenants with the tools to fight abrupt and unexpected evictions at the hands of banks and other post-foreclosure buyers. In the year since the passage of the PTFA, legal aid lawyers and other attorneys have pushed to undergird its provisions with strong case law supporting the rights of tenants. The results have been mixed. While some courts have been receptive to the PTFA's protections, others are resistant to reading the Act with any but the narrowest possible interpretation. This article provides an overview of the written decisions that have been issued regarding the PTFA and suggests avenues for improving the body of case law to strengthen the rights of post-foreclosure tenants.

A Brief Overview of the PTFA

Under Section 702 of the PTFA, the immediate successor in interest after a foreclosure takes the property subject to the rights of bona fide tenants.[3] A bona fide tenant who occupies the foreclosed property subject to a lease may continue to do so until the termination of that lease.[4] A

*The authors of this article are Ilana Gelfman, Skadden Fellow at Greater Boston Legal Services, and Kent Qian, Skadden Fellow at the National Housing Law Project. Please update the authors if you receive or learn of new PTFA decisions by emailing IGelfman@gbls.org and kqian@nhlp.org.

[1]Danilo Pelletiere, *Renters in Foreclosure: Defining the Problem, Identifying Solutions*, National Low Income Housing Coalition, January 2009, http://www2398.ssldomain.com/nlihc/doc/renters-in-foreclosure.pdf.

[2]For background information on the PTFA, see NHLP, *Obama Signs Law Protecting Renters in Foreclosed Properties*, 39 Hous. L. Bull. 133, 133 (June 2009); NHLP, *Foreclosure and Section 8 Tenancy: Federal Legislative Developments*, 39 Hous. L. Bull. 193, 193 (Aug. 2009).

[3]Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, § 702, 123 Stat. 1632, 1660-61 (2009) [hereinafter PTFA § 702].

[4]PTFA § 702. This is subject to two exceptions: (1) a lease may be terminated with a 90-day notice if the property is sold to a purchaser who intends to occupy the unit as a primary residence; and (2) a lease may be terminated on a 90-day notice if the lease is terminable at will under state law. *See* Joel v. HSBC Bank USA Nat'l. Assoc., No. 10-732 (N.D. Ga. June 7, 2010) (only a 90-day notice is required under the PTFA to terminate a five-year lease that is terminable on 30 days' notice by either party).

bona fide tenant with fewer than 90 days left on her lease or with a month-to-month tenancy must receive a 90-day notice before the new owner can commence eviction proceedings.[5]

Under Section 703 of the PTFA, the immediate successor in interest after a foreclosure takes the property subject to the rights of tenants with Section 8 vouchers. Furthermore, the "other good cause" required to terminate a Section 8 tenancy pursuant to 42 U.S.C. § 1437f(o)(7) is redefined to explicitly exclude the successor in interest's wish to vacate the property prior to sale.[6]

To What Properties Does the PTFA Apply?

Section 702

Section 702 of the PTFA applies "in the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title."[7] The plain language of the statute indicates that the PTFA therefore applies to (a) any foreclosure based on a federally related mortgage loan[8] if the eviction notice is issued after May 20, 2009; or (b) any foreclosure on any dwelling or residential property occurring after May 20, 2009. However, this reading was ruled unconstitutional in the New York decision *Collado v. Boklari*.

In *Collado*, Judge Hackeling of the Suffolk County District Court examined the PTFA under the Taxing and Spending Clause. He concluded that "absent a federal subsidy, Congress has no authority to regulate the private relationship of a landlord/tenant which is the province of state law."[9] Judge Hackeling rewrote the PTFA to limit its scope to only "foreclosure[s] on a federally related mortgage loan on any dwelling or residential real property after the date of enactment of this title."[10] He employed this rewording again in *GMAC Mortgage, LLC v. Taylor*, citing *Collado*.[11]

The *Collado* ruling was criticized in *Bank of America v. Owens*, another New York trial court decision. Judge Yacknin noted that the *Collado* reading conflicts with HUD's, and that neither the state of New York nor the United States Attorney General was given an opportunity to brief the issue.[12] Had the issue been fully briefed, the court likely would have addressed the Commerce Clause. Should the constitutionality of the PTFA be challenged again, advocates should argue that the Act—and its application to non-federally related mortgages—is authorized by the Commerce Clause, which allows Congress to regulate landlord-tenant relations even absent a federal subsidy.[13]

Section 703

Section 702's limitation of the PTFA's application to foreclosures on federally related loans or on residential real property after May 20, 2009, does not apply to Section 8 voucher holders. Section 703 of the PTFA applies to Section 8 tenants "in the case of any foreclosure on any federally-related mortgage loan … or on any residential real property in which a recipient of assistance under this subsection resides."[14] The latter category should include any foreclosed property occupied by a Section 8 tenant.

To Which Tenants Does the PTFA Apply?

Section 702

Under Section 702, the PTFA applies only to bona fide leases or tenancies. A lease or tenancy is bona fide under the PTFA only if: (a) the tenant is not the mortgagor or the mortgagor's child, spouse, or parent; (b) the lease was the result of an arm's-length transaction; and (c) the rent is not substantially less than fair market rent, unless the reduction is due to a federal, state or local subsidy.

Until recently, advocates were unsure which party has the burden of proving whether a tenant is a bona fide tenant under the PTFA. Two decisions, one from New York and the other from Ohio, clarified that tenants are not required to prove that they are bona fide tenants under the PTFA to receive its protections. In *Bank of America v. Owens*, the plaintiff argued that tenants are not protected by the PTFA unless they provide information demonstrating their bona fide tenancies. Judge Yacknin of the Rochester City Court rejected this argument, and went even further to state that "the successor owner carries the burden of demonstrating that a resident of a foreclosed property is not a bona fide tenant in order to permit the successor owner to short-circuit the PTFA's ninety

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[5]PTFA § 702.

[6]Protecting Tenants at Foreclosure Act § 703, 123 Stat. at 1661-62 [hereinafter PTFA § 703]. The new owner may, however, evict the tenant after a 90-day notice if the new owner will occupy the unit as a primary residence.

[7]PTFA § 702, *supra* note 3.

[8]The definition of a federally related mortgage loan is located in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2602(1). To be a federally related mortgage loan, a loan must: (1) be secured by a one- to four-unit residential property; and (2) be (a) federally insured or regulated; (b) federally insured, guaranteed, or assisted; (c) intended to be sold to Fannie Mae, Freddie Mac, or Ginnie Mae; or (d) made by a lender who makes more than $1 million of residential real estate loans per year. 12 U.S.C. § 2602; 24 C.F.R. § 3500.2. Virtually all loans secured by one- to four-unit residential properties are federally related.

[9]Collado v. Boklari, 892 N.Y.S.2d 731, 735 (Suffolk Dist. Ct. 2009).

[10]*Id.* at 736 (emphasis removed).

[11]GMAC Mortgage, LLC v. Taylor, 899 N.Y.S.2d 802, 805 (Suffolk Dist. Ct. 2009).

[12]Bank of America v. Owens, 28 Misc.3d 328, 330 n.4 (Rochester City Ct. May 5, 2010).

[13]For example, courts have repeatedly upheld the Fair Housing Act against challenges that raised similar constitutional issues. *See, e.g.*, Groome Resources Ltd. v. Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000); Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996); Morgan v. Sec'y of HUD, 985 F.2d 1451 (10th Cir. 1993); Seniors Civ. Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992).

[14]PTFA § 703, *supra* note 6.

days notice requirement."[15] In *Federal National Mortgage Association v. Dobson*, the plaintiff attempted to deny tenants' bona fide status without any supporting testimony. Magistrate Veljkovic rebuffed this attempt, explaining that "Plaintiff has the burden of proving that the defendant is not a bona fide tenant."[16] The decision was affirmed by Judge Pianka of the Cleveland Municipal Court.[17]

Congress clarified that the date of the "notice of foreclosure" means the date that complete title is transferred through foreclosure, ensuring that tenants may remain until the end of any lease entered into when the original landlord still owned the property.

Of the PTFA's three bona fide tenant criteria, owners most frequently contest the requirement that the rent is not substantially less than fair market rent. Only two decisions have addressed what "substantially less" means under the PTFA. In *RMS Residential Props., LLC v. Naaze*, the plaintiff argued that the tenant's rent of $900 per month under her lease was substantially below fair market rent.[18] Finding that the fair market rent for the property was $1,550 per month, Judge Fairgrieve of the Nassau County District Court of New York held that the tenant's rent, 42% less than the fair market rent, was a substantial enough discount to preclude the tenant from being a bona fide tenant under the PTFA.[19] Similarly in *JP Morgan Chase v. Harper*, a Georgia state court found that rent of $1,600 per month under a lease was substantially less than the fair market rent of $2,300, as determined from expert testimony.[20] The decision was later affirmed by the Georgia Court of Appeals.[21]

All bona fide tenants are entitled to a 90-day notice under the PTFA. However, to remain until the end of a longer-term lease, a leaseholder must have entered into the lease before the "notice of foreclosure." Initially, the term "notice of foreclosure" was not defined in the PTFA. The Federal Reserve and the National Credit Union Administration interpreted it to mean the date of the foreclosure sale,[22] and these interpretations were supported by Senator Dodd's and Senator Kerry's floor statements that under the PTFA, tenants "are allowed to remain in place for the remainder of any leases entered into prior to the transfer of title by foreclosure."[23] However, case law was more mixed.[24] In response to conflicting interpretations of "notice of foreclosure," Congress recently amended the PTFA to clarify that the date of the "notice of foreclosure" means the date that complete title to a property is transferred through foreclosure.[25] This amendment ensures that bona fide tenants may remain until the end of any lease entered into when the original landlord still owned the property.

Section 703

Under Section 703, there is no requirement of a bona fide tenancy or of a lease that was entered into before the "notice of foreclosure."[26] This means that a Section 8 voucher holder should not be affected by the case law regarding these criteria (although it is unlikely that a lease entered into after the foreclosure sale would be honored even for a Section 8 tenant).[27] However, in *Deutsche Bank National Trust Co. v. Tulloch*, Judge Fairgrieve applied these criteria to a Section 8 voucher holder. Judge Fairgrieve held that the Section 8 tenant was not protected

[15] *Owens*, 28 Misc.3d at 334.
[16] Fed. Nat'l Mortgage Assoc. v. Dobson, No. 10-CVG-02140, at *2 (Cleveland Mun. Ct. Magis. Decision Mar. 1, 2010), *available at* http://nhlp.org/node/1360.
[17] *Id.*
[18] RMS Residential Props., LLC v. Naaze, 2010 NY Slip Op. 20233, at *2 (Nassau Dist. Ct. June 16, 2010).
[19] *Id.* at *5.
[20] JP Morgan Chase v. Harper, No. 09D35758 (Ga. State Ct. Jan. 25, 2010).
[21] Harper v. JP Morgan Chase Bank Nat'l, Ass'n., 2010 Ga. App. LEXIS 747, 2010 WL 3038154 (Ga. Ct. App. Aug. 5, 2010).
[22] A Federal Reserve letter states that the PTFA does not cover "tenants who enter in lease agreements after a foreclosure sale." *See* Letter from Board of Governors of the Federal Reserve System to the Officers and Managers in Charge of Consumer Affairs (July 30, 2009), http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm. National Credit Union Administration Regulatory Alert No. 09-RA-08 states the same. *See* http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2009/09-RA-08.pdf.
[23] 155 Cong. Rec. S8978 (daily ed. Aug 6, 2009) (statements of Sens. Kerry and Dodd).
[24] The case law on this issue reflects the lack of clarity in the PTFA as it was enacted. In *JP Morgan Chase v. Doe*, the San Diego Superior Court held that the PTFA's protections applied when the tenant's lease was executed after the notice of default but before the notice of trustee's sale. The notice of trustee's sale was likely considered to be the "notice of foreclosure." JP Morgan Chase v. Doe (San Diego Super. Ct. Jan. 28, 2010) (on file with NHLP). However, in *Bank of America v. Joyner*, a different judge in the San Diego Superior Court held that the notice of default is the "notice of foreclosure." Bank of America v. Joyner, No. 37-2009-00032784-CL-UD-SC (San Diego Super. Ct. Feb. 5, 2010). On similar lines, in *US Bank v. Hurtado, Deutsche Bank National Trust Co. v. Tulloch*, and *RMS Residential Props., LLC v. Naaze*, Judge Fairgrieve of the Nassau County District Court of New York held that in New York, the "notice of foreclosure" is the notice of pendency, which is filed when the judicial foreclosure action is first commenced. U.S. Bank v. Hurtado, 899 N.Y.S.2d 806 (Nassau Dist. Ct. Apr. 12, 2010); Deutsche Bank Nat'l Trust Co. v. Tulloch, 900 N.Y.S.2d 837 (Nassau Dist. Ct. 2010); RMS Residential Props., LLC v. Naaze, 2010 NY Slip Op. 20233 (Nassau Dist. Ct. June 16, 2010).
[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1484 (2010). The Act also extended the PTFA's sunset date from 2012 to 2014. For more information regarding the Act, see page 187 of this issue of the *Bulletin*.
[26] *See* Protecting Tenants at Foreclosure, 74 Fed. Reg. 30,106, 30,108 (June 24, 2009) ("[T]he section 8 tenant's lease is, in effect, a bona fide lease.").
[27] *But see* Comfed. Sav. Bank v. Doucette, No. 89-8671 (R.I. Dist. Ct. filed Jan. 11, 1990) (Clearinghouse No. 45,589) (good cause is required to terminate a Section 8 lease, even if it was entered into with a person who no longer owned the property when he signed the lease).

under the PTFA because the tenant did not pay rent, and the lease was not entered into before the notice of foreclosure.[28] *Tulloch* can be distinguished from the typical Section 8 case because the tenant's Section 8 lease had already expired by the time the notice to quit was filed, and arguably only the Section 702 provisions applied. It is important for advocates to distinguish between the provisions of Sections 702 and 703 to ensure that judges understand that more lenient requirements apply to Section 8 tenants.

Federal Courts and Private Right of Action

The PTFA is generally invoked as a defense in state court eviction cases. However, parties have raised the PTFA in other contexts, including affirmative litigation and as a basis for removal to federal court.

In *U.S. National Bank Association v. Garcia*, Judge Matz of the Central District of California rejected a tenant's attempt to remove his eviction case to federal court. The court ruled that reference to the PTFA in an eviction complaint is insufficient to establish federal question jurisdiction.[29] In *U.S. Bank National Association v. Lasoff*, Judge Morrow of the Central District of California ruled in a case with a similar posture that the PTFA is a defense and unnecessary on the face of a well-pleaded eviction complaint. Therefore it is insufficient for federal question jurisdiction.[30] In Massachusetts, tenants are on the opposite side of the debate. In a federal case where a bank is seeking a declaratory judgment that the tenants are not protected by the PTFA, tenant advocates are arguing that the PTFA is insufficient to establish federal question jurisdiction for the bank's suit.[31]

Tenants have also attempted to bring affirmative cases based on the PTFA in federal court. In two California cases, tenant-plaintiffs have argued that the PTFA creates a private right of action for tenants. In *Logan v. U.S. Bank National Association*, a pro se tenant sued for damages and injunctive relief after receiving only a three-day notice (instead of the 90-day notice to which she was entitled under the PTFA). After concluding that the *Younger* abstention doctrine required the dismissal of the injunctive relief claim, Judge Morrow dismissed the damages claim on the ground that the PTFA did not create a private right of action for damages.[32] In *Nativi v. Deutsche Bank National Trust Co.*, Magistrate Judge Trumbull of the Northern District of California came to a similar conclusion, finding that no implied private right of action exists for injunctive relief under the PTFA.[33]

Future Litigation

Litigation is ongoing concerning federal question jurisdiction and private right of action under the PTFA. Future areas of litigation will likely include the "arm's-length transaction" bona fide tenancy requirement[34] and the PTFA's limited "other good cause" definition for terminating Section 8 self-renewing leases.

Advocates are working to maximize the PTFA's impact so that it applies to as many tenants as possible. Because there is little or no precedent in most jurisdictions, advocates should take a nationwide perspective in constructing a body of case law around the PTFA.[35] Together, advocates can advance tenant-friendly interpretations of the law, so that the Act can provide the strongest possible protections to renters after foreclosure. ■

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[28]*Tulloch*, 900 N.Y.S.2d at 837.

[29]United States Nat'l Bank Ass'n v. Garcia, 2009 U.S. Dist. LEXIS 112825, 2009 WL 4048851 (C.D. Cal. Nov. 20, 2009).

[30]U.S. Bank Nat'l Ass'n v. Lasoff, 2010 U.S. Dist. LEXIS 21981, 2010 WL 669239 (C.D. Cal. Feb. 23, 2010); *see also* Fannie Mae v. Lee, 2010 WL 3025533 (N.D. Tex. July 30, 2010); Onewest Bank FSB v. Ignacio, 2010 U.S. Dist. LEXIS 67012, 2010 WL 2696702 (E.D. Cal. July 6, 2010; Fannie Mae v. Lemere, 2010 U.S. Dist. LEXIS 67005, 2010 WL 2696697 (E.D. Cal. July 6, 2010); Aurora Loan Services, LLC., v. Gullatt, 2010 U.S. Dist. LEXIS 70362, 2010 WL 2574031 (E.D. Cal. June 24, 2010); Claremont 1st Street Investors v. Espinoza, 2010 WL 2486804 (C.D. Cal. June 15, 2010); Aurora Loan Servs. v. Martinez, 2010 U.S. Dist. LEXIS 29761, 2010 WL 126687 (N.D. Cal. Mar. 29, 2010).

[31]More than one case on the issue is pending. The cases are being litigated by Judith Liben of the Massachusetts Law Reform Institute and Paul Collier, a Cambridge lawyer who works with clients fighting foreclosure.

[32]Logan v. U.S. Bank Nat'l Ass'n, 2010 U.S. Dist. LEXIS 46314, 2010 WL 1444878 (C.D. Cal. Apr. 12, 2010), *appeal docketed*, No. 10-55671 (9th Cir. Apr. 29, 2010).

[33]Nativi v. Deutsche Bank Nat'l Trust Co., 2010 U.S. Dist. LEXIS 51697, 2010 WL 2179885 (N.D. Cal. May 24, 2010).

[34]Only two decisions have addressed this issue. One case concluded that the renting from a close relative does not, by itself, mean that the tenancy not the result of an arms-length transaction. *St. Clair v. Fronteras*, No. S-1500-CL-249191 (Cal. Kern County Super. Ct. Aug. 2, 2010). Another case appeared to equate the "arms length transaction" prong with the requirement that the rent under the lease or tenancy not be substantially less than fair market rent. JP Morgan Chase v. Weathers, No. 70376/09 (N.Y. Queens Civ. Ct. May 6, 2010) ("respondent has established that she is a 'bona fide' (arms length) tenant of the prior owner by providing a copy of the last written lease she had with the prior owner at a rent of $1316 per month").

[35]Sample pleadings are available for Housing Justice Network members at http://nhlp.org/node/1311.

HUD Continues Efforts to Prevent Discrimination Based on Sexual Orientation and Gender Identity*

In October 2009, Department of Housing and Urban Development (HUD) Secretary Shaun Donovan announced that HUD would enact measures to ensure that its programs are open to lesbian, gay, bisexual or transgender (LGBT) individuals.[1] Secretary Donovan pledged to make these efforts a priority, stating "President Obama and I are determined that a qualified individual and family will not be denied housing choice based on sexual orientation or gender identity."[2]

While there are no national assessments of LGBT housing discrimination, previous studies have indicated a bias against LGBT individuals and families seeking housing. For example, a 2007 Michigan study found that 30% of same-sex couples were treated differently from heterosexual couples when attempting to buy or rent a home.[3] Bearing in mind such discrimination, HUD has taken several steps toward the goal of preventing discrimination against LGBT individuals, especially in HUD housing, and plans to commence others in the near future.

Recent Measures

HUD Issues Guidance on LGBT Discrimination Complaints

On July 1, 2010, during its Pride Month Celebration, HUD issued guidance[4] clarifying housing protections for LGBT individuals. Although the Fair Housing Act (FHA) does not explicitly prohibit housing discrimination based on sexual orientation or gender identity,[5] the FHA's provisions may nonetheless protect individuals in these categories. The guidance explains that discrimination based on gender identity, which is often experienced by transgender individuals, constitutes impermissible sex discrimination under the FHA. This interpretation uses the existing framework of the FHA to include people with nontraditional gender roles. Further, discrimination against LGBT individuals may violate other provisions of the FHA. For example, discrimination against a gay man due to fear he will infect other tenants with HIV or AIDS may constitute illegal discrimination on the basis of a perceived disability. While this guidance will not cover all instances of discrimination against LGBT individuals, it ensures that HUD will enforce the existing anti-discrimination law that protects these families.

Additionally, HUD staff will refer complaints to state and local governments that have enacted additional legal protections against discrimination based on sexual orientation or gender identity.[6] The guidance lists approximately 20 states that prohibit discrimination against LGBT individuals,[7] and notes that the District of Columbia and approximately 60 cities, towns and counties do so as well. Where appropriate, HUD will retain jurisdiction over complaints filed by LGBT individuals or families, and may conduct joint investigations with these state and local governments. While these measures do not cover all instances of discrimination against LGBT families, they will enhance enforcement of currently applicable rules.

Grant Applicants Must Comply with Anti-Discrimination Laws

HUD published a Notice of Funding Availability (NOFA) for Fiscal Year 2011[8] on June 11, 2010, which for the first time requires applicants for competitive programs to comply with state and local antidiscrimination laws protecting LGBT individuals.[9] According to the NOFA, any sub-recipients of competitive grants are also required to comply with these antidiscrimination laws. Furthermore, to have their submissions considered for competitive funding, applicants now must demonstrate that they have not been charged with a systematic violation of state or local law proscribing discrimination in housing based on sexual orientation or gender identity. As noted above, this will affect approximately 20 states and 60 localities.

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[1]Press Release, HUD, No. 09-206, Obama Administration to Ensure Inclusion of the LGBT Community in HUD Programs (October 21, 2009), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-206.

[2]*Id*.

[3]Michigan Fair Housing Centers, Sexual Orientation and Housing Discrimination in Michigan (2007), *available at* www.fhcmichigan.org/images/Arcus_web1.pdf.

[4]Guidance, United States Department of Housing and Urban Development, Housing Discrimination against Lesbian, Gay, Bisexual, and Transgender Individuals and Families (July 1, 2010), http://portal.hud.gov/portal/page/portal/HUD/program_offices/fair_housing_equal_opp/LGBT%20Housing%20Discrimination.

[5]The FHA prohibits discrimination in rental, sales and lending on the basis of race, color, national origin, religion, gender, disability and familial status.

[6]Press Release, HUD, No. 10-139, HUD Issues Guidance on LGBT Housing Discrimination Complaints (July 1, 2010), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-139.

[7]According to HUD, states offering at least some housing protections for individuals on the basis of sexual orientation or gender identity include California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Washington, Vermont and Wisconsin.

[8]Notice of HUD's Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD's FY 2010 NOFAs for Discretionary Programs, FR-5415-N-01 (June 11, 2010).

[9]The NOFA general section also requires applicants to comply with state and local laws prohibiting discrimination on the basis of source of income, such as a housing choice voucher.

To better enforce its new requirements, HUD will provide enhanced customer services to individuals who complain of discrimination based on LGBT status.[10] In places where state or local laws prohibit such discrimination, intake staff in HUD's Office of Fair Housing and Equal Opportunity will ensure these complaints are brought to the attention of the appropriate state and local antidiscrimination offices. HUD intake staff will also be trained to identify any allegations over which HUD has existing authority under the Fair Housing Act.

Ongoing Efforts

In addition to the July guidance and the June NOFA, HUD plans to undertake further measures to combat housing discrimination on the basis of gender identification or sexual orientation. While the only way to prohibit LGBT discrimination in all types of housing is to amend the FHA, HUD can prohibit discrimination in all of its housing programs. To that end, HUD has stated its intent to propose a new regulation clarifying that the term "family," as it is used to describe eligible beneficiaries, includes LGBT individuals and couples. Such a redefinition would help ensure that LGBT families can access HUD-assisted housing. Secretary Donovan articulated this commitment in his October 2009 announcement,[11] and it has been reinforced in subsequent press releases.[12] HUD's semiannual regulatory agenda also states that HUD intends to release a proposed rule regarding nondiscrimination against LGBT individuals in HUD-assisted housing. As the proposed definition becomes public, it will be vital for advocates to engage in the process to guarantee that all LGBT families and individuals are covered.

Further, the Federal Housing Administration (FHA) will instruct its lending institutions that FHA-insured mortgages must be based on the credit worthiness of borrowers, and not on unrelated factors such as sexual orientation or gender identity.[13]

Finally, HUD has commissioned a national study of discrimination against LGBT people in the rental and sale of homes. In March of 2010, HUD launched a website[14] soliciting public comments on its LGBT housing discrimination study, the first of its kind. HUD also held town hall meetings in the cities of Chicago, San Francisco and New York to gather feedback on how to design and implement the study. Such a study will help illuminate the extent of discrimination against the LGBT community.

Conclusion

Although less protective than comprehensive legislative or executive action covering all states, HUD's recent steps to address discrimination against LGBT individuals are promising. The June NOFA is a positive step toward ensuring compliance with existing state and local laws. The July guidance will allow HUD to fight discrimination based on gender identity using the Fair Housing Act as it is currently written. Moreover, a HUD-issued regulation clarifying the definition of family would be a significant step toward preventing LGBT discrimination in HUD-assisted housing. Members of Congress should be encouraged to follow HUD in working to extend basic housing protections to LGBT individuals and families. ■

[10]Press Release, HUD, No. 10-119, HUD Adds Important Civil Rights Protections to its Grant Programs (June 7, 2010), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-119.
[11]HUD, *supra* note 1.
[12]*See, e.g.*, HUD, *supra* note 6.
[13]*See, e.g.*, HUD, *supra* note 1.
[14]HUD, LGBT Discrimination Study, http://portal.hud.gov/portal/page/portal/HUD/LGBT_Discrimination_Study.

HUD Releases Further Details on Choice Neighborhoods Initiative*

On May 28, 2010, the Department of Housing and Urban Development (HUD) released a Notice outlining the competition process for its Choice Neighborhoods Initiative (CNI).[1] The 2010 Consolidated Appropriations Act[2] authorized HUD to use $65 million for a CNI demonstration. The CNI Notice of Funding Availability (NOFA), which has not yet been posted by HUD, will contain the grantee selection criteria and the requirements that will apply to grantees.

Background

CNI focuses on the "spatial concentration of poverty."[3] HUD views the HOPE VI program as a successful first step in transforming impoverished neighborhoods into revitalized, mixed-income neighborhoods. By building upon the HOPE VI experience, HUD believes that CNI will provide mixed-income neighborhoods with economic opportunities by revitalizing housing, leveraging investments, and offering education programs, public transportation and access to jobs. The three main goals of CNI are to transform distressed public and assisted housing into energy-efficient, mixed-income housing that is financially viable; support positive outcomes for families who live in the target development and the surrounding neighborhood; and transform impoverished neighborhoods into viable, mixed-income neighborhoods with access to services.[4]

These core goals are to be established in a neighborhood transformation plan that addresses the following key neighborhood assets:

- developmental assets that allow residents to attain skills needed to be successful in all aspects of daily life (e.g. educational institutions, early learning centers and health resources);
- commercial assets that are related to production, employment, transactions and sales (e.g., labor force and retail establishments);
- recreational assets that create value in a neighborhood beyond work and education (e.g., parks, open space, arts organizations, restaurants, movie theaters and athletics);
- physical assets that are associated with the built environment and physical infrastructure (e.g., housing, commercial buildings and roads); and
- social/intangible assets that establish well-functioning social interactions (e.g., public safety and community engagement).[5]

CNI grants will primarily fund the improvement of public and HUD-assisted housing through preservation, rehabilitation, management improvements, demolition and new construction.[6] HUD has proposed to limit the funding that can be used to improve the surrounding community, public services, facilities, assets and supportive services.[7] Under HUD's proposal, successful transformation plans would be required to leverage at least 5% matching funds from sources such as Community Development Block Grants (CDBG), Section 108 Loan Guarantee programs, and other federal, state, local and private programs. Transformation plans must also integrate CNI with various other federal place-based programs.[8]

Eligible Applicants and Neighborhoods

Applicants

Eligible applicants include "local governments, public housing authorities, non-profits, and for-profit developers who apply jointly with a public entity."[9] The term "local governments" means "any city, county, town, township, parish, village, or other general purpose political subdivision of a State."[10] This term also includes a state or a local public body or agency, community association, or other entity, which is approved by the Secretary of HUD for the purpose of providing public facilities or services to a new community.[11] The term "public housing authorities" means "[a]ny State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in

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[1]HUD, Choice Neighborhoods FY 2010 NOFA Pre-Notice, http://www.hud.gov/offices/pih/programs/ph/cn/docs/2010-pre-notice.pdf [hereinafter Pre-Notice]. For background information on the Choice Neighborhoods Initiative, see NHLP, *Choice Neighborhoods Initiative: A Work in Progress*, 40 Hous. L. Bull. 1, 1-4 (Jan. 2010).

[2]H.R. 3288, § 2, div. A, tit. II, 3288-48 (Dec. 16, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf.

[3]Pre-Notice, *supra* note 1, at 1.

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

[5]*Id*. at 2. *See also* Choice Neighborhoods Initiative Draft Bill, § 6(b)(1)-(10), http://www.nlihc.org/doc/HUD-choice-neighs-bill.pdf.

[6]*Id*.

[7]*Id*. at 2, 4. The Notice caps funds for supportive services and non-housing revitalization activities at 15% of the grant amount for each. Choice Neighborhoods Initiative Draft Bill § 6(d)(1)(iii), at 7, http://www.nlihc.org/doc/HUD-choice-neighs-bill.pdf. The 2010 Consolidated Appropriations Act did not contain these limitations. *See* H.R. 3288, *supra* note 2.

[8]*Id*.

[9]Pre-Notice, *supra* note 1, at 2-3; *see also* H.R. 3288, *supra* note 2.

[10]Pre-Notice, *supra* note 1, at 2. This is the same definition of "unit of general local government" as provided in Section 102(a) of the Housing and Community Development Act of 1974. *See* 42 U.S.C. § 5302.

[11]Pre-Notice, *supra* note 1, at 2.

the development or operation of public housing."[12] Eligible nonprofits must be § 501(c)[13] corporations and have housing development experience.[14] For-profit developer applicants must provide a memorandum of understanding between the developer and a public entity to demonstrate a joint-applicant partnership.[15]

Neighborhoods

A qualifying neighborhood "is the geographic area within which the activities of the Transformation Plan focus."[16] Neighborhoods are not limited to statistical boundaries or census tracts. Rather, the applicant will be responsible for identifying the target neighborhood boundaries that are "generally accepted as a neighborhood."[17] Typically, neighborhood boundaries are delineated by major streets or physical topography. The neighborhood must be larger than the distressed or public or HUD-assisted housing in the area, and HUD reserves the right to request evidence to support an applicant's neighborhood boundaries. Requested evidence could include planning, community development or zoning maps.

Determinations of neighborhood eligibility will be objective, uniform and transparent. To achieve this, HUD will determine funding eligibility by overlaying locally defined neighborhood boundaries with the smallest available statistical boundaries associated with the area to determine the area's poverty rate, extremely low-income rate, vacancy rate and other measures of distress using a proportional allocation methodology.[18] Through the HUD website, potential applicants will be able to draw their neighborhood boundaries on a map for submission.

Eligible neighborhoods for a Fiscal Year 2010 CNI grant include neighborhoods with both:

1. At least 20% of the residents estimated to be in poverty or who are extremely low-income and are experiencing distress related to:
   a. Violent crime (1.5 times the city or county average);
   b. A high rate of vacant or substandard homes (1.5 times the city or county average); or
   c. A low-performing public school (where at least 20 children or 20% of the children from the target assisted housing attend any elementary school or secondary school that fails, for two consecutive years, to make "adequate yearly progress");[19]
2. Severely distressed public and/or HUD-assisted housing. This includes housing that requires major reconstruction; is a significant contributing factor to the economic decline of the neighborhood; is occupied by very low-income families dependent on public assistance; has high rates of criminal activity, or is lacking sufficient transportation and services; and cannot be revitalized under other programs.[20]

HUD will calculate the poverty rate, extremely low-income rate, and residential vacancy rate for an applicant's target area. The applicant will have to provide data on substandard housing (such as code enforcement actions), crime and schools for the neighborhoods and city or county as a whole.[21]

Competition and Framework

CNI offers two types of funding: planning grants and implementation grants.[22] HUD intends to award approximately $3 million for planning grants. These funds will enable communities to create a rigorous development plan which fosters the local commitments necessary to make transformation possible.[23] The remaining $62 million will be awarded for implementation grants. These funds will support communities that have undertaken a comprehensive plan, and they will provide support for devising a transformation plan to redevelop the neighborhood.[24] The competition will be conducted in two rounds. Applicants may submit either a planning or an implementation grant request. In round I, planning grant recipients will be selected and 10 implementation grant finalists will be chosen. In round II, depending on the requested grant size, two or three finalists will be selected as implementation grant recipients.[25] Implementation grant applicants should be able to demonstrate strong community partnerships such as through a memorandum of understanding between the applicant and principal team members.[26]

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[12] *Id*. at 3. This is the same definition as "public housing agency" as provided in Section 3(b)(6) of the United States Housing Act of 1937. *See* 42 U.S.C. § 1437a.
[13] 26 U.S.C. § 501(c).
[14] Pre-Notice, *supra* note 1, at 3. The definition of "housing development experience" is unclear.
[15] *Id*. at 3.
[16] *Id*.
[17] *Id*.
[18] *Id*. For example, if a neighborhood is located partially within two census tracts, the poverty rate would be calculated based on the portion of the neighborhood housing units (at the block level) located in each tract. If 80% of the housing units in the locally defined neighborhood are in a tract with a poverty rate of 40% and 20% of the units are in a tract with a poverty rate of 10%, the neighborhood "poverty rate" would be: (80% x 40%) + (20% x 10%) = 34%.
[19] *Id*. at 4. This definition of low-performing public schools is the same as Title I schools in corrective action or restructuring in the state, as determined under Section 1116(b)(1)(A) of the Elementary and Secondary Education Act (ESEA), Pub. L. 89-10. "Adequate yearly progress" is defined by Section 1111(b)(2)(A)(i)-(iii) of ESEA, and is based on a state accountability system that creates academic standards and assessments, and includes sanctions and rewards to hold public elementary and secondary schools accountable for student achievement.
[20] *Id*. at 4. This is the same definition as provided by 42 U.S.C. § 1437v (j)(2)(A)(i)-(v).
[21] *Id*. at 4.
[22] *Id*. at 7.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 8.

Moving Forward

HUD's Notice emphasizes the importance of cooperation through community partnerships. Not only does HUD highlight the importance of physical assets such as affordable housing and infrastructure, but also the need for individual success and commercial, recreational and social improvements. The ultimate goal is long-term economic viability through community collaboration. Successful applicants will be those that can demonstrate this sort of integration.

This demonstration provides a unique opportunity for housing advocates to engage in the transformation of neighborhoods. Although this demonstration contains some areas of concern,[27] it ultimately provides a chance to influence future neighborhood revitalization efforts. An entirely new funding stream is now available for organizations that traditionally apply for federal community development funds, such as CDBG, and such new funding could allow for large-scale revitalization efforts. Additionally, local nonprofits and community development corporations will have the opportunity to partner with for-profit and other entities to create substantial neighborhood improvements.

Housing advocates could reach out to nonprofits and housing authorities to improve target neighborhoods. Advocates can make a substantial impact by educating residents about the potential to transform their housing and their communities, assisting residents in partnering with applicant entities, representing and engaging tenants whose housing will be affected and potentially demolished by the transformation, and protecting tenants' rights throughout the process.

Although the future of CNI is unknown,[28] it is one of HUD's many recent attempts to create collaborative initiatives among government, nonprofit and for-profit stakeholders. It is through these initiatives that local housing advocates can support the engagement of low-income residents. ■

[27] *See* NHLP, *supra* note 1, at 2.

[28] The House of Representatives subcommittee on Transportation, Housing and Urban Development, and Related Agencies recently passed the Fiscal Year (FY) 2011 appropriations bill. This bill does not include funding for CNI. Rather, it funds HOPE VI at $200 million, $65 million more than in FY 2010. Transportation, Housing and Urban Development, and Related Agencies Appropriations Summary – FY 2011, http://appropriations.house.gov/images/stories/pdf/tranurb/FY2011_THUD_SubC_Summary_Table.pdf.

HUD Sustainable Communities Initiative Presents Advocacy Opportunities

As part of its "transformational initiatives," the Department of Housing and Urban Development (HUD) has embarked on the Sustainable Communities program,[1] which offers assisted housing residents and their advocates a rare opportunity to be intimately involved in shaping the future, with the goal of building healthy, productive and diverse communities.

The Mission

HUD's Office of Sustainable Housing and Communities is charged with creating strong, sustainable communities by connecting housing to jobs, fostering local innovation and helping to build a clean energy economy. The office plans to coordinate federal housing and transportation investments with local land-use decisions to reduce transportation costs for families, improve housing affordability, save energy, increase access to housing and increase access to employment opportunities. The objective is to stimulate more integrated and sophisticated regional planning and to foster zoning and land-use reforms.

Getting to the Goal

To advance this objective, the office has crafted four main tasks. First, HUD, the Department of Transportation (DOT) and the Environmental Protection Agency (EPA) are offering Planning Grants. The purpose of these grants is to catalyze integrated metropolitan transportation, housing, land-use and energy planning, economic and workforce development, and infrastructure investment supported by the best available data and analytic tools. These grants are intended to assist jurisdictions in addressing the interdependent challenges of the following:

- economic competitiveness and revitalization;
- social equity, inclusion, and access to opportunity;
- energy use and climate change; and
- public health and environmental impact.

Second, HUD is funding Challenge Grants to help merge local and regional plans with transportation planning funded through DOT's National Infrastructure Investments Grants. HUD's Community Challenge grants

[1] *See* HUD, Sustainable Housing and Communities, http://portal.hud.gov/portal/page/portal/HUD/program_offices/sustainable_housing_communities.

were noticed jointly with DOT's notice of funding availability (NOFA) on Transportation Planning Grants, supported by $40 million from HUD and $35 million from DOT.[2] HUD will fund, evaluate and support integrated regional planning for sustainable development and invest in sustainable housing and community development. DOT will build the capacity of transportation agencies to integrate their planning and investments into broader plans and actions that promote sustainable development and invest in transportation infrastructure that directly supports sustainable development and livable communities. EPA will provide technical assistance to communities and states to help them implement sustainable community strategies and develop environmental sustainability metrics and practices. The three agencies will coordinate activities, integrate funding requirements and adopt a common set of performance metrics for use by grantees. The maximum grant size will be $3 million. All awarded funds must be obligated by September 30, 2012, and spent within 36 months after being obligated.

Third, HUD intends to support capacity-building and a clearinghouse for grant recipients and others interested in implementing sustainable community strategies.

Finally, HUD, DOT and EPA will fund a joint research effort to advance transportation and housing linkages. This will include developing strategies to reduce energy consumption in public and assisted housing by identifying incentives, increasing capacity, and lowering barriers to implementing energy efficiency programs and installing clean energy systems in these properties.[3]

Legislative Mandate

In Fiscal Year (FY) 2010,[4] Congress appropriated $150 million to support the Sustainable Communities Initiative. Of that, $100 million is for Planning Grants, of which not less than $25 million is to be awarded to metropolitan areas with populations of less than 500,000, and $40 million is for Challenge Grants. HUD and DOT must consult in evaluating the grant proposals. The funding cannot be released until HUD and DOT submit a coordinated plan to House and Senate appropriations and authorizations committees establishing grant criteria and performance measures by which to judge grantees' success. Up to $10 million was appropriated for a joint HUD-DOT research effort, which includes evaluation of the planning grants programs. The Rural Innovation Fund is to receive $25 million for grants to Indian tribes, state housing finance agencies, state community and/or economic development agencies, local rural nonprofits, and community development corporations to address the problems of concentrated rural housing distress and community poverty. At least $5 million of this $25 million must promote economic development and entrepreneurship for federally recognized Indian tribes. Finally, $25 million is for grants pursuant to Section 107 of the Housing and Community Development Act of 1974, which authorizes technical assistance grants for the Community Development Block Grant program.[5]

For FY 2011, the House passed and sent to the Senate its Transportation, Housing and Urban Development, and Related Agencies Appropriations Act.[6] The House Committee Report, which explains the reasons for the recommended appropriations, states,

> "Thus far, the Partnership has resulted in an unprecedented amount of cooperation among Federal partners, including inter-agency review teams for Notices of Funding Availability. The Committee is pleased that the fiscal year 2011 budget includes funding for livability proposals from the Department of Transportation and looks forward to continued cooperation amongst these agencies, and others, as appropriate. Therefore, the Committee includes…$150,000,000 for sustainability programs within HUD."[7]

The companion Senate bill does not include this new House language, but does include the proviso that "[HUD] shall publish a notice of funding availability for the Rural Innovation Fund within 120 days of the enactment of this Act." [8] In this mid-term election year, it is impossible to predict whether a reconciled appropriations bill will pass both houses or whether Congress will simply adopt a continuing resolution to run the government until after the electoral dust settles.

Eligible Applicants

Under the FY 2010 appropriations, state and local governments, including U.S. territories, tribal governments, transit agencies, port authorities, metropolitan planning organizations, other political subdivisions of state or local

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[2]For related DOT grants, see the TIGER II Discretionary Grant NOFA, published on June 1, 2010. Notice of Funding Availability for the Department of Transportation's National Infrastructure Investments Under the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for 2010, 75 Fed. Reg. 30,460 (June 1, 2010).

[3]*See* HUD, *supra* note 1.

[4]The fiscal year ending September 30, 2010.

[5]The Consolidated Appropriations Act of 2010, Pub. L. No 111-117, div. A., tit. II, 123 Stat. 3034, 3084 (Dec 16, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ117.111.pdf. Section 107 is codified at 42 U.S.C. § 5307.

[6]H.R. 5850, 111th Cong. (passed by the House on July 27, 2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5850pcs.txt.pdf.

[7]H. Rep. No. 111-564, Departments of Transportation, and Housing and Urban Development, and Related Agencies Appropriations Bill, 2011, *available at* http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1%28hr564%29.

[8]Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2011, S. 3644, 111th Cong. (placed on Senate calendar on August 2, 2010), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.3644.

governments, and multistate or multijurisdictional groupings may all apply for sustainable communities grants.

For FY 2011, the House, without explanation in either the appropriations bill or the report, inserted new language requiring that "grants under [the Sustainable Communities Initiative] may only be made to metropolitan planning organizations (MPOs), rural planning organizations, States or other units of general local government, and housing and transportation related nonprofit organizations."[9]

Timeline

On June 24, 2010, HUD and DOT issued a joint NOFA for the HUD Community Challenge Planning Grants and DOT's TIGER II Planning Grants (collectively called "Challenge Grants").[10] Pre-applications were due by July 26, 2010, and applications were due August 23, 2010. Awards will not be made until after September 15, 2010.

On June 29, 2010, HUD issued the NOFA for its Fiscal Year 2010 Sustainable Communities Regional Planning Grants.[11] Applications were due August 23, 2010.

Resident, Advocate and Attorney Participation

Importantly, applicants are "specifically directed to increase participation and decision-making in developing and implementing a plan, code, development strategy, or project by populations traditionally marginalized in public planning processes."[12] This presents an opportunity for low-income residents to be involved in the development and implementation of the Sustainable Communities program. Advocates can find their local lead agency, usually a metropolitan planning organization, on DOT's website.[13] Advocates should discuss these opportunities with community and resident leaders. Potential areas of work include:

- influencing where affordable housing will be located;
- advocating for more affordable housing near jobs and public transportation;
- seeking light rail stations in clients' neighborhoods;
- designing development plans to attract new employment opportunities;
- ensuring that brownfields are developed for proper uses;
- requiring that new developments are energy efficient and environmentally safe; and
- ensuring the jobs and economic opportunities generated by the expenditure of federal funds are targeted to Section 3 residents and businesses.

Additionally, all applicants for Sustainable Communities grants are subject to the requirement to affirmatively further fair housing and must show how their proposals are consistent with the jurisdiction's analysis of impediments to fair housing choice. This provides an opportunity for advocates to ensure that jurisdictions incorporate equity and fair housing analysis into regional planning.

Congress has demonstrated its intention to continue funding these planning and development efforts for the foreseeable future. Fortunately, with the assistance of housing advocates and legal services attorneys, traditionally marginalized populations have an opportunity to participate in the development of sustainable communities. ■

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[9]H.R. 5850.

[10]Notice of Funding Availability for the Department of Housing and Urban Development's Community Challenge Planning Grants and the Department of Transportation's (DOT's) TIGER II Planning Grants, 75 Fed. Reg. 36,246 (June 24, 2010).

[11]Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program, 75 Fed. Reg. 37,458 (June 29, 2010).

[12]Notice of Funding Availability, *supra* note 10, at 36,250.

[13]http://www.planning.dot.gov/features.asp.

Appellate Court: HUD May Condition Prepayment of Federally Insured Mortgages*

A federal appeals court recently held that the Department of Housing and Urban Development (HUD) can legally require its approval for prepayment of a mortgage at inception and may condition that approval on the parties' agreement to maintain the property as an affordable housing project.[1] After examining the mortgage note and regulations, the Court of Appeals for the District of Columbia Circuit found that the note unambiguously requires HUD approval and that regulations[2] do not preclude such a condition on prepayment.[3]

Background

The current owners purchased Castleton Park Apartments in 1974 with a noninsured mortgage loan made by the New York State Housing Finance Agency.[4] The 454-unit Staten Island complex was developed under New York State's Mitchell-Lama program, which is intended to encourage the development of affordable housing for low-income people.[5] In 1977, the mortgage was refinanced and divided into a HUD-insured senior mortgage and a noninsured junior mortgage, under the authority of Section 207 of the National Housing Act.[6] In May 2006, the current owners entered into a contract with prospective buyers, whereby the current owners agreed to sell their interest in Castleton Park and all the outstanding stock in the company.[7] The contract was drafted to allow the withdrawal from the Mitchell-Lama Program, which includes extinguishing any government-subsidized or assisted mortgage debts and dissolving the housing company that owns the development.[8] Seeking to prepay the project's federally insured mortgage in full, thereby terminating the property's affordability restrictions, the current owners and prospective buyers notified HUD, with multiple letters, of their intentions to prepay the mortgage.[9]

The Castleton Park mortgage gave the borrower at least a qualified right to prepay the mortgage. The prepayment clause of the mortgage note stated, "Privilege is reserved to pay the debt in whole or in an amount equal to one or more monthly payments on principle next due, on the first day of any month prior to maturity upon at least (3) days' prior written notice to the holder."[10] A footnote following the clause provided, "Subject to the prior approval of the Secretary of Housing and Urban Development."[11] After notification of the owners and prospective purchasers' intention to prepay the mortgage, HUD conditioned its approval on the parties' agreement to maintain the property as an affordable housing complex.[12] The National Housing Act (NHA)[13] authorizes HUD to insure and subsidize mortgages to encourage the development of affordable housing.[14]

In their suit,[15] the owners and prospective buyers sought a declaratory judgment, injunctive relief and an order of mandamus under the Administrative Procedure Act (APA).[16] They argued that at the time of the execution of the mortgage, HUD regulations barred prepayment conditions and, therefore, any preapproval by the Secretary of HUD.[17] HUD sought dismissal of the complaint for failure to state a claim under the APA and countered that the regulation limits only a lender's right to refuse payment.[18] The district court found that because the regulation (24 C.F.R. § 207.14(a)) is silent as to whether HUD may condition prepayment upon its prior approval, the footnote in the mortgage note requiring HUD approval was valid.[19] The court dismissed the case, and the plaintiffs appealed.[20]

The Appellate Court's Analysis

On appeal, the owners and prospective purchasers advanced two arguments. They asserted that if a borrower must seek approval to prepay the mortgage and is later denied that right by HUD, the owner has been denied the right to prepay the mortgage as allowed by the regulation.[21] In the alternative, they argued that the court should interpret the mortgage to require HUD approval only for partial payments because the footnote requiring HUD

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[1]St. Marks Place Housing Co. v. HUD, __F.3d __, 2010 WL 2540439 (D.C. Cir. June 25, 2010).

[2]24 C.F.R. § 207 (1977).

[3]*St. Marks*, 2010 WL 2540439, at *6.

[4]St. Marks Place Housing Co. v. HUD, 2009 WL 1543688, at *1 (D.D.C. June 3, 2009) [hereinafter June 2009 Order].

[5]*St. Marks*, 2010 WL 2540439, at *1.

[6]June 2009 Order at *1.

[7]*Id*.

[8]*Id*.

[9]*Id*.

[10]*Id*.

[11]*Id*.

[12]*Id*. at *2.

[13]12 U.S.C. §§ 1701 *et seq*.

[14]*St. Marks*, 2010 WL 2540439, at *1.

[15]June 2009 Order.

[16]*Id*.; 5 U.S.C. §§ 701-706 (2006).

[17]*St. Marks*, 2010 WL 2540439, at *2.

[18]*Id*.

[19]June 2009 Order at *6-7 (citing Christensen v. Harris County, 529 U.S. 576, 588 (2000)) (since the statute was silent on the issue and entirely compatible with the statute and regulation, defendants did not violate the statute or regulation)).

[20]*Id*. at *7-8.

[21]*St. Marks*, 2010 WL 2540439, at *5. The regulation states, "The mortgage shall contain a provision permitting the mortgagor to prepay the mortgage in whole or in part upon any interest payment date after giving to the mortgagee 30 days' notice in writing in advance of its intention to so prepay." 24 C.F.R. § 207.14(a) (1977).

approval only applied to the clause that stated, "or in an amount equal to one or more monthly payments on principal next due."[22] In opposition, HUD argued that the regulation applied only to the rights and obligations between the owner and the lender, and is silent as to nonparties, such as the Secretary of HUD. Therefore, the regulation permits HUD to condition prepayment.[23]

In its analysis, the appellate court gave substantial deference to HUD's interpretation of its own regulations.[24] Additionally, the court looked to other subsections of the regulation for interpretive guidance. In 24 C.F.R § 207.14(b) and (c), the language focuses on the financial terms between the lender and the borrower by referring to prepayment permission and the collection of late charges from the lender.[25] With these subsections in mind, the court found it reasonable for HUD to have interpreted the regulation as barring lenders from refusing prepayments, while remaining silent as to whether HUD has the right to condition such prepayments.[26] Furthermore, the court reviewed the language and footnote of the mortgage note, finding that the footnote modified the entire prepayment clause to include both full and partial payments.[27]

Conclusion

By giving substantial weight to HUD's interpretation of its own regulation, the court confirmed HUD's authority to impose conditions on prepayment at the inception of the mortgage, including HUD approval. By upholding HUD's authority to impose conditions as part of its approval process, the decision confirms an essential linchpin for preserving the affordability of those developments financed with mortgages containing HUD approval requirements.[28] HUD and Congress should maximize the impact of this ruling by implementing and strengthening preservation policies governing properties with such mortgages. ■

[22] *St. Marks*, 2010 WL 2540439, at *7.
[23] *Id.*
[24] *Id.* at * 6 (citing Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994)).
[25] *Id.* at * 6.
[26] *Id.*
[27] *Id.* at *7
[28] Such HUD approvals are subject to Section 250 of the National Housing Act, 12 U.S.C. § 1715z-15, which requires a showing of no need for the affordable housing, along with other criteria. For further background, *see* NHLP, *Recapitalizing the HUD-Assisted Housing Stock: Part One*, 40 Hous. L. Bull. 6-12 (Jan. 2010); NHLP, *House Considers Long-Awaited Multifamily Preservation Legislation*, 40 Hous. L. Bull. 159, 159 (July 2010).

Recent Cases

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

Public Housing: Termination for Guest's Criminal Activity

Stevens v. Hous. Auth. of S. Bend, __ F. Supp. 2d __, 2010 WL 2560431 (N.D. Ind. June 23, 2010). In December 2007, the father of the plaintiff-tenant's sons was involved in a shooting outside the tenant's unit on housing authority property. The housing authority issued a termination notice to the tenant for her connection to the shooting. The tenant filed suit for breach of contract, arguing that she was a third-party beneficiary to the assistance contract between the housing authority and the Department of Housing and Urban Development. As such, pursuant to 24 C.F.R. § 966.4, the housing authority was required to consider all of the circumstances and to exclude only culpable household members before terminating her tenancy. Although the tenant sufficiently established that she was a third-party beneficiary of a HUD contract, the court found that she failed to show that the housing authority breached the terms of its contract with HUD. The court found that under 24 C.F.R. § 966.4, housing authorities may consider mitigating circumstances, but are not required to do so. The court therefore dismissed the tenant's third-party beneficiary claim. Citing *HUD v. Rucker*, the court also dismissed the tenant's due process claim. The court determined that the tenant's son, a household member under the lease, invited his father, who was involved in the shooting, onto the premises. Because the father was a guest of the household at the time of the shooting, the court found that the housing authority had good cause for the termination.

Public Housing: Relocation Assistance After Demolition

Haynes v. Dayton Metro. Hous. Auth., 2010 WL 2499989, slip op. (Ohio Ct. App. June 18, 2010). A former tenant of a public housing development that was demolished filed suit against the Dayton Metropolitan Housing Authority (DMHA) and its director for failing to comply with the Ohio Relocation Assistance Act (ORAA). The Act requires an agency displacing tenants to provide up to $5,200 in

[1] scholar.google.com.

relocation assistance as well as a relocation advisory program to enable tenants to find comparable housing. The trial court granted DMHA's motion to dismiss for failure to state a claim for declaratory relief, and the tenant appealed. The trial court found that the federal statute governing public housing demolition, 42 U.S.C. § 1437p, preempted the state laws governing the displacement of public housing tenants. The lower court based its ruling on the express provision in § 1437p that states the federal Uniform Relocation and Real Property Acquisition Act of 1970 shall not apply. That statute makes relocation benefits available to those displaced by federal agencies but also requires states to enact similar statutes in order to qualify for federal aid. ORAA was the state statute enacted to meet this federal mandate. The Court of Appeals ruled that there was no clear preemption of state laws enacted to meet the requirements of the federal relocation assistance act. The court further denied DMHA's claims of field preemption because the federal relocation assistance act could have served as a floor, rather than a ceiling, for benefits that accrue to displaced tenants.

Public Housing: Pleading Standard for Housing Authority Liability

Morton v. District of Columbia Housing Authority, __ F. Supp. 2d __, 2010 WL 2628649 (D.D.C. July 1, 2010). A public housing tenant filed suit against the District of Columbia Housing Authority (DCHA), its executive director, and one of its employees on behalf of herself and four children. The tenant alleged that DCHA violated her rights under the Rehabilitation Act, the Fair Housing Act, and the Americans with Disabilities Act. The tenant also brought a tort claim for intentional infliction of emotional distress and sought punitive damages. The tenant alleged that DCHA's failure to provide a heat-controlled and rodent-free unit exacerbated her son's physical disabilities, resulting in seizure-like symptoms and inability to use his gastric feeding tube since the rodents chewed through the tubes. The tenant requested an emergency extermination and a transfer to another apartment, but DCHA failed to act. After the tenant contacted the media, DCHA conducted an emergency extermination of the unit and relocated the family to a new apartment. DCHA sought to dismiss the tenant's intentional infliction of emotional distress claim. In determining whether the complaint satisfied Federal Rule of Civil Procedure 12(b)(6), the court cited *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). According to *Iqbal*, to survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim that is facially plausible and to allow the court draw a reasonable inference that the defendants were liable for the alleged conduct. The court dismissed the allegations against the executive director due to the tenant's failure to allege specific information to show that the executive director engaged in conduct that rose to the required level of recklessness or intent. However, the court found that a reasonable juror could find that the conduct of the housing authority and one of its employees was outrageous and reckless. The court also denied DCHA's motion to dismiss the tenant's claim for punitive damages, finding that DCHA was not entitled to governmental immunity.

Housing Choice Voucher Program: Pleading Standard for Housing Authority Liability

Swift v. McKeesport Hous. Auth., 2010 WL 2572794 (W.D. Penn. June 22, 2010). A tenant's voucher was terminated after he failed to recertify in a timely manner. The tenant brought suit against the housing authority and alleged that his termination violated his First Amendment rights because he was being retaliated against for requesting a different inspection official. He further alleged that one of the housing authority officials made derogatory remarks based on his disabilities and that he was extensively questioned about those disabilities in the grievance hearing. The court concluded that the tenant sufficiently pleaded the elements of a First Amendment retaliation claim, but he failed to include factual allegations sufficient to implicate that a violation was "pursuant to a policy or custom of MHA." The court found the amended complaint failed to meet the plausibility standard laid out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and later refined in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). As to the disability discrimination claim, the court found the allegations laid out by the plaintiff failed to "[rise] above the speculative level" demanded by the Supreme Court in *Twombly*. Both of these claims were dismissed without prejudice. The tenant also alleged due process violations under the 14th Amendment. The tenant alleged that inadequate notice was given for the recertification procedures, that his Section 8 benefits were terminated much sooner than allowed by the housing authority's own written protocol, and that the grievance procedures did not include an impartial hearing officer and did not allow him to present evidence on his own behalf. However, the court concluded that the tenant failed to allege policymaking authority or a custom or practice sufficient to prove municipal liability.

Housing Choice Voucher Program: Section 1983 Action Against Housing Authority

Lopez v. Johnson, 2010 WL 2557451, slip op. (E.D. Cal. June 21, 2010). A tenant's Section 8 voucher was terminated because she failed to report her income accurately. She requested an informal review. Prior to the hearing, her representative requested a recording of the recertification appointment that was the basis of her denial. She was given the documents only minutes before the hearing and alleged that the hearing officer then halted the meeting

prematurely. The tenant contended that these actions constituted a denial of due process and filed a 42 U.S.C. § 1983 action against the hearing officer and a housing authority employee. The court dismissed the claim against the hearing officer, reasoning that the presiding officer at an informal hearing is acting in a quasi-judicial fashion and is therefore entitled to absolute immunity from suit. However, the court found that the tenant stated a claim against the housing authority employee who failed to provide her with the requested documents. The court cited 24 C.F.R. § 982.555(e)(2)(i) in establishing that the tenant had a right to inspect relevant documents before the hearing. By failing to afford the tenant that right, the employee violated her due process rights. The court granted the tenant leave to amend the complaint in order to present allegations that would give rise to a claim of governmental liability against the housing authority.

Housing Choice Voucher Program: Rent Calculation

Booker v. Johnson, 2010 WL 2572044, slip op. (S.D. Ohio June 22, 2010). A voucher tenant alleged that the housing authority violated 42 U.S.C. § 1437a and 42 U.S.C. § 1437f when it recalculated her rent to include the Social Security payments of two children who were on the lease and resided with her at least half of the time. The representative payee for the children's benefits was the children's father, who did not reside in the household but was designated as the residential parent of the children. The tenant did not know about the payments prior to the housing authority's notice and had no access to them. In deciding a motion for a preliminary injunction, the federal district court analyzed the suit's likelihood of success on the merits. The court looked at the language of 42 U.S.C. § 1437a(b)(4), which defined income as "income from all sources of each member of the household…except that any amounts not actually received…may not be considered as income." The housing authority urged the court to rely on HUD's income regulations at 24 C.F.R. § 5.609(a)(1). The court found the regulation impermissibly expanded the otherwise unambiguous language in § 1437a(b)(4) in two ways: (1) it added the income from "any other family member" without requiring that member to reside in the household; and (2) it failed to restrict income to income that is "actually received." The court concluded that there was a strong likelihood that the tenant would succeed on the merits and that HUD's regulation was "manifestly contrary to the statute." The court therefore granted the preliminary injunction.

Housing Choice Voucher Program: Denial Notice and Hearing Decision Requirements

Bratcher v. Hous. Auth. of Milwaukee, 2010 WL 2265634, slip. op. (Wis. Ct. App. June 8, 2010). A Section 8 applicant received a letter from the housing authority informing her that she had been rejected from the program because a background check indicated she had been arrested for battery and, in a separate incident, found guilty of disorderly conduct. The notice provided no details about the arrest or civil citation and did not explain what program rules, regulations or published standards the incidents violated. The denial indicated that the applicant was entitled to an informal review of the decision, but stated that she was not allowed to contact the housing authority to discuss the denial prior to the hearing. The applicant requested and was granted a hearing. After the hearing, the housing authority issued a two-page decision upholding the denial. The decision described the applicant's alleged actions leading up to the disorderly conduct citation and stated, "This is the type of behavior that the Rent Assistance Program tries to screen out." The circuit court granted the applicant certiorari review and held that a new hearing was necessary because the housing authority did not provide the applicant with adequate notice prior to the hearing or adequate explanation after the hearing. The housing authority appealed. The appellate court affirmed the circuit court's holding, finding that both the notice and the decision fell "appallingly short of the mark." The court remarked that the written notice provided no details about the arrest and conviction and no explanation of the legal significance of those events to a rental assistance application. The court also noted that, although the written decision contained more factual details, it did not explain their relationship to the denial of rental assistance. The court declined to decide whether a written notice or written decision must identify the precise regulation on which an applicant is rejected, but maintained that established case law requires a housing authority to at least explain its rationale.

Housing Choice Voucher Program: Termination Due to Unauthorized Occupant

Pittman v. Dakota County Cmty. Dev. Agency, 2010 WL 2362527 (Minn. Ct. App. June 15, 2010) (unpublished). The Dakota County Community Development Agency (CDA) terminated a Section 8 program participant's housing assistance and ordered her to repay $10,943 in benefits after discovering that she had allowed her boyfriend to live in her unit unreported. The court upheld the termination of the participant's Section 8 benefits, concluding that substantial evidence supported the CDA's finding that she permitted her boyfriend to stay in her unit beyond the allowed 10-day period. This substantial evidence included a police report stating that the participant's boyfriend was present in the participant's home when they executed a search warrant at the CDA's request and entries in a diary the police seized from the participant's home. The

court noted that the general rule is that an administrative agency cannot rest its findings of fact solely upon hearsay evidence that would not be admissible in judicial proceedings. However, the court held that, while the police report was hearsay, the CDA was not required to strictly comply with the rules of evidence and that a court should only intervene in instances where a housing agency clearly abused its discretion. The court held that the diary entries were not hearsay because they constituted admissions by a party opponent. However, the court found that the CDA did not provide sufficient evidence to discredit the participant's testimony that her boyfriend had stayed with her only intermittently during other periods, and therefore could not require her to pay back several months' worth of benefits. For this reason the court ordered the CDA to recalculate the participant's repayment amount based on the single, proven violation.

Project-Based Section 8: Federal Jurisdiction and Pleading Standards

Elliott v. Plaza Props., Inc., 2010 WL 2541020, slip. op. (S.D. Ohio June 18, 2010). Plaza Properties requested that a tenant, Sterling Elliott, vacate a Section 8 property it owned and operated. Elliott agreed to leave after Plaza threatened to file a formal eviction action against him. However, before moving out, Elliott allegedly threatened another tenant, William Galentine. After this incident, Plaza sent Elliott an eviction letter. A third tenant, Jonathan Hall, sent Elliott a letter expressing his belief that Elliott, who is black, was being discriminated against on the basis of race. Hall derived this conclusion from a conversation he allegedly overheard between Galentine and another tenant wherein they made racist comments about Elliott. Elliott sued Plaza in federal court, claiming that his eviction was improper under Section 8 regulations and was racially motivated in violation of the Fair Housing Act. Plaza filed a motion to dismiss. Elliott made two arguments in his response. First, Elliott argued that Plaza failed to give notice specifying grounds for terminating the tenancy and that such notice is required under Section 8 regulations. Although the court acknowledged the existence of such a notice requirement, it found that federal courts do not have jurisdiction to review the propriety of eviction actions by Section 8 landlords. Second, Elliot argued that his eviction was motivated by race-based discrimination. The court rejected this claim, holding that Elliott did not plead facts sufficient to meet the plausibility standard the Supreme Court set forth in *Bell Atlantic Corp. v. Twombly*, 540 U.S. 544 (2007), and clarified in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Noting that there was nothing to indicate that Plaza was aware of Galentine's alleged statements, the court held that the Galentine's statements could not form the basis of a discrimination claim against Plaza. Since Elliot alleged no other facts in support of his discrimination claim and since conclusions without any factual support are insufficient to satisfy the pleadings standards of *Twombly* and *Iqbal*, the court dismissed Elliott's complaint for failure to state a claim.

Fair Housing Act: Ripeness and Res Judicata Defenses

United States v. Town of Garner, 2010 WL 2541094 (E.D.N.C. June 22, 2010). A nonprofit corporation that chartered residential group homes for persons recovering from alcoholism and drug addiction established a group home in Garner, North Carolina. The town of Garner notified the nonprofit that the group home was in violation of zoning regulations set forth in a Unified Development Ordinance because it was operating as a family care home without a zoning permit. The nonprofit requested a reasonable accommodation in a number of letters to the town. After the town failed to adequately respond, the nonprofit filed a complaint with the Department of Housing and Urban Development (HUD) and appealed the town's decision to its Board of Adjustment. The Board determined that the group home neither qualified as a family nor a group care home, and that the Board had no authority to grant a reasonable accommodation through a use variance. The Department of Justice, in response to the complaint filed with HUD, initiated a Fair Housing Act action against the Town of Garner. The court rejected the Town's argument that the case was not ripe, finding that the nonprofit attempted to pursue all available avenues to receive a reasonable accommodation. In response to the Town's res judicata and collateral estoppel defenses, the court noted that the United States was not a party to the action before the Board, nor was it in privity with the nonprofit, and therefore, it could not be precluded from bringing its claims. Moreover, the government's suit was not barred by collateral estoppel because it did not have a full and fair opportunity to litigate the issues in the earlier action.

Fair Housing Act: Discrimination in the Provision of Services

Haynes v. Wilder Corp., 2010 WL 2557684 (M.D. Fla. June 22, 2010). An RV park tenant filed suit against the owner for damages and injunctive relief under the Fair Housing Act (FHA). The tenant used a wheelchair due to back pain. The tenant claimed that she was discriminated against based on her disability at the neighborhood association's social events and when paying rent at the leasing office. Specifically, the tenant alleged that the neighborhood association excluded her from bingo nights and pool tournaments. She also alleged that an employee refused to open the park's office door for her and told her to walk into the office because he did not believe she was disabled.

After these incidents, the tenant requested accommodations in the form of electric doors at certain locations and equal access and participation in all community events. In analyzing whether the RV park owner was vicariously liable for the neighborhood association's alleged discrimination, the court determined that the owner was vicariously liable for the discrimination only if both parties consented to the agency. The court reasoned that a mere association was insufficient to create an agency relationship, and therefore, the association was not an agent of the owner. Further, the court found that the social events were not considered "services" under the FHA's prohibition of discrimination in the provision of services or facilities. Accordingly, the court granted the owner's motion for summary judgment with respect to the tenant's claims arising from the community events. However, the court denied the owner's motion for summary judgment regarding the park employee's alleged statements about the tenant's disability. The court found that a reasonable juror could conclude that the employee indicated a preference against handicapped tenants.

Housing Discrimination: Burden of Proof

Bailey v. Stonecrest Condo. Ass'n, __ S.E.2d __, 2010 WL 2472501 (Ga. Ct. App. 2010). The owner of two condominiums brought suit against her condominium association and its board of directors for racial discrimination that violated the Georgia Fair Housing Act. The owner used one unit as her primary residence and purchased another unit as a rental property. According to the owner, when she informed the condo association that she intended to rent the unit to an African-American woman, the president of the board of directors told her that the lease could be "a problem" because of the other residents' reactions. Shortly thereafter, a neighboring resident allegedly called the owner and, using racial epithets, told her that the other owners did not want "that kind of person" living there. The owner also alleged that the board president told her that because of her decision to rent to an African American, other owners were considering an amendment to the bylaws restricting the leasing of units. The amendment was eventually proposed and passed. The owner appealed the trial court's grant of summary judgment for the defendants. The court of appeals found that the owner's evidence did not constitute "direct evidence" of discriminatory intent but was sufficient as circumstantial evidence to establish a prima facie case. With the burden then shifted to the defendants to establish a legitimate and non-discriminatory reason for the adoption of the amendments, they contended that the changes were proposed and accepted based on a desire to maintain the owner-occupied character of the community. The court found that although this non-discriminatory explanation satisfied the defendants' burden of production and removed the presumption of discrimination, the owner's evidence could establish by a preponderance of the evidence that the reasons given by the defendants were pretextual. Because a genuine issue of material fact existed as to whether the defendants' explanation actually motivated the amendments' adoption, the court vacated the summary judgment ruling.

Americans with Disabilities Act: Standing of Testers

Norkunas v. Seahorse NB, LLC, 2010 WL 2431874, slip op. (M.D. Fla. June 16, 2010). A guest sued the operators of the Seahorse Hotel for failure to comply with the Americans with Disabilities Act (ADA). The guest, who had limited mobility, alleged that the Seahorse contained architectural barriers that hindered his experience and endangered his safety. Contending that the guest lacked standing, the Seahorse brought a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The Seahorse argued that the guest lacked standing because he was a tester whose sole purpose was to initiate litigation, and he could not prove any legitimate, concrete plans to return. The court rejected this argument, noting that numerous courts in the Middle District of Florida had interpreted 11th Circuit precedent to confer testers with standing to pursue lawsuits under the ADA. The court also held that concrete plans are not required to demonstrate "specific intent to return" to a hotel, and it was sufficient that the guest frequently visited the hotel and expressed an intent to return once the hotel became ADA compliant. Second, the Seahorse argued that the guest lacked standing to challenge any alleged barriers of which he was unaware when he filed the complaint and that he only had standing to challenge barriers that existed with regard to his own disability. The court accepted this argument, noting that the 11th Circuit has required plaintiffs to show actual knowledge of particular barriers in order to have standing to challenge those barriers. Based on a desk clerk's testimony, the court found that the guest had not requested one of the Seahorse's accessible rooms on the night he stayed in the hotel and therefore did not have standing to complain of noncompliance in the rooms. However, the court held the guest had standing to challenge all barriers he personally encountered with regard to his disability, including parking, entering the lobby, accessing the ice machines, accessing outdoor facilities, using the public restrooms and traveling the grounds.

Source of Income Discrimination: Disparate Impact and Reasonable Accommodation Claims

Bell v. Tower Mgmt. Servs., LP, 2010 WL 2346651 (N.J. Super A.D. June 11, 2010) (unpublished). The recipient of a state rental subsidy for disabled individuals sued Tower Management Services after the company refused to rent her an apartment because she did not meet their minimum

income requirement of $28,000 per year. The subsidy recipient alleged housing discrimination based on source of income and disability in violation of the New Jersey Law Against Discrimination (LAD). After a trial court dismissed the complaint on the pleadings, the subsidy recipient appealed. The appellate court held that the subsidy recipient stated a cause of action for the source of income discrimination claim under a disparate impact theory. The court noted that disparate impact theory is well-recognized under the LAD, as well as under federal anti-discrimination law, and the subsidy recipient alleged facts sufficient to support such a claim. It was only necessary for the subsidy recipient to allege that Tower Management's income policy had a discriminatory impact on persons who paid their rent using government subsidies and that Tower Management's policy was not justified by business necessity. The court also held that the subsidy recipient pleaded facts sufficient to state a claim that Tower Management discriminated against her on the basis of disability by failing to make a reasonable accommodation. The recipient alleged that since she was financially able to pay the rent, Tower Management could accommodate her disability by waiving the income limitations without experiencing undue hardship. Since the subsidy recipient had satisfied the pleading standards, the court reversed the trial court's ruling and remanded to permit discovery.

Fair Housing Act: Claim Barred by Rooker-Feldman and Res Judicata

Allen v. Irmco Mgmt. Co., 2010 WL 2491151, slip. op. (N.D. Ill. June 15, 2010). Irmco Management Company evicted a tenant with a mental health condition that affected her memory and reasoning skills for failure to pay rent. After attempting to prevent the tenant from entering her apartment by changing the digital keys and physically blocking the door, Irmco filed an eviction action in state court. The state court found that the tenant had failed to pay rent and that Irmco had properly terminated her tenancy. The tenant's lawyer then filed a motion to quash service of process, which the state circuit court denied. The state appellate court and the state supreme court both denied the tenant's petition for appeal. The tenant then filed a Fair Housing Act (FHA) complaint in federal court, and Irmco moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure (FRCP) 12(b)(1) and failure to state a claim under FRCP 12(b)(6). The court held that the former tenant's complaint was barred by the Rooker-Feldman doctrine, which precludes lower federal courts from reviewing claims raised in and "inextricably intertwined" with state court decisions. The court held that because the plaintiff sought a declaration that her eviction violated the FHA, she was essentially asking the federal court to review and reject the state court's eviction ruling. The court also held that the former tenant's claim was barred by res judicata, which prohibits parties from relitigating issues that were decided in previous lawsuits or could have been decided in prior lawsuits. The court held that res judicata disallowed the federal claim because the state case constituted a final judgment on the merits by a court of competent jurisdiction; the federal case and the state eviction case involved an identity of parties; and the two cases arose out of the same group of operative facts. ■

Recent Housing-Related Regulations and Notices

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

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

HUD Proposed Rules

Fed. Reg. 35,901-35,918 (June 23, 2010)
On-Site Completion of Construction of Manufactured Homes

***Summary*:** This proposed rule would establish a procedure whereby construction of new manufactured housing can be completed at the installation site, rather than in the factory. Under current HUD regulations, a manufacturer must obtain HUD approval for on-site completion of each of its designs. This rule would simplify the process, by establishing uniform procedures by which manufacturers could complete construction of their homes at

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

the installation site without obtaining advance approval from HUD. This rule would apply only to the completion of homes subject to the Manufactured Home Construction and Safety Standards, not to the installation of homes subject to the Model Manufactured Home Installation Standards. Additionally, the proposed rule would not apply when a major section of a manufactured home is to be constructed on-site.

***Comments Due Date*:** August 23, 2010.

HUD Federal Register Notices

Fed. Reg. 39,561-39,573 (July 9, 2010)
Administrative Guidelines; Subsidy Layering Reviews for Proposed Section 8 Project-Based Voucher Housing Assistance Payments Contracts

Summary: This document provides Administrative Guidelines that qualified Housing Credit Agencies (HCAs) as defined under Section 42 of the Internal Revenue Code of 1986 (IRC) must follow in implementing subsidy layering reviews in accordance with the requirements of the Housing and Economic Recovery Act of 2008 (HERA). The requirements in this Notice do not supersede the subsidy layering requirements of other federal programs. The HUD Reform Act was enacted to ensure that housing projects receiving HUD assistance do not receive excessive compensation by combining various forms of HUD program assistance with assistance from other federal, state or local agencies. HERA provides that for project-based voucher housing assistance payment contracts for existing housing, a subsidy layering review in accordance with Section 102(d) of the HUD Reform Act shall not be required. Under HERA, when project-based voucher assistance is proposed for newly constructed and rehabilitated structures, subsidy layering reviews may be satisfied if the applicable state or local agency has conducted such a review. HUD has defined these agencies to be qualified HCAs, which may include state housing finance agencies, participating jurisdictions under the HOME program, or other state housing agencies that meet the definition of an HCA as defined under Section 42 of the IRC. This Notice sets forth the guidelines HCAs must use in conducting subsidy layering reviews for newly constructed and rehabilitated structures combining other forms of government assistance, and Section 8 project-based voucher assistance.

***Dated*:** July 2, 2010.

Fed. Reg. 37,827-37,837 (June 30, 2010)
Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2010

***Summary*:** Section 106 of the Department of Housing and Urban Development Reform Act of 1989 requires HUD to publish quarterly Federal Register notices of all regulatory waivers that HUD has approved. This Notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2010, and ending on March 31, 2010.

***Dated*:** June 24, 2010.

Fed. Reg. 37,458 (June 29, 2010)
Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Sustainable Communities Regional Planning Grant Program

***Summary*:** Through this Notice, HUD announces the availability of the application information, submission deadlines, funding criteria and other requirements for the Fiscal Year 2010 NOFA for the Sustainable Communities Regional Planning Grant. This NOFA makes approximately $98 million in assistance available to support metropolitan and multijurisdictional planning efforts that integrate housing, land use, economic and workforce development, transportation and infrastructure investments in a manner that empowers jurisdictions to consider the interdependent challenges of: economic competitiveness and revitalization; social equity, inclusion, and access to opportunity; energy use and climate change; and public health and environmental impact.

***Dated*:** June 23, 2010.

Fed. Reg. 36,246 (June 24, 2010)
Notice of Funding Availability for HUD's Community Challenge Planning Grants and the Department of Transportation's TIGER II Planning Grants

Summary: This Notice announces the availability of funding and requests proposals for HUD's Community Challenge Planning Grants in conjunction with a portion of the Department of Transportation's (DOT) National Infrastructure Investments Grants that can be used for transportation planning grants. On December 16, 2009, the President signed the Consolidated Appropriations Act, 2010 (Pub. L. 111-117) that provided $40 million for HUD's Community Challenge Planning Grants and up to $35 million for DOT's transportation planning grants to be awarded as part of the National Infrastructure Investments program. HUD's $40 million Community Challenge Planning Grant Program will foster reform and reduce barriers to achieving affordable, economically vital and sustainable communities. Such efforts may include amending or replacing local master plans, zoning codes, and building codes, either on a jurisdiction-wide basis or in a specific neighborhood, district, corridor, or sector to promote mixed-use development, affordable housing, the reuse of older buildings and structures for new purposes, and similar activities with the goal of promoting sustainability at the local or neighborhood level. HUD's Community Challenge Planning Grant Program also supports the development of affordable housing through the development and adoption of inclusionary zoning ordinances and other activities such as acquisition of land for affordable housing projects.

***Dated*:** June 18, 2010.

Fed. Reg. 33,323-33,324 (June 11, 2010)
Notice of HUD's Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY 2010 NOFAs for Discretionary Programs

***Summary*:** Through this Notice, HUD announces the availability on its website of its FY 2010 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD's FY 2010 NOFAs for Discretionary Programs. The General Section provides prospective applicants for HUD's FY 2010 competitive funding the opportunity to become familiar with the policies and requirements applicable to all of the NOFAs that HUD will publish in FY 2010. The General Section also describes HUD's FY 2010 policy priorities, which are based on its new Strategic Plan for FY 2010-2015, and support: job creation/employment; sustainability; affirmatively furthering fair housing; capacity building and knowledge sharing; using housing as a platform for improving other outcomes; and expanding cross-cutting policy knowledge.

***Dated*:** June 4, 2010.

Rural Housing Service Federal Register Notices

Fed. Reg. 34,421 (June 17, 2010)
Notice of Funds Availability for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year (FY) 2010

***Summary*:** This Notice announces the timeframe to submit pre-applications for Section 514 Farm Labor Housing (FLH) loans and Section 516 FLH grants for the construction of new off-farm FLH units and related facilities for domestic farm laborers. The intended purpose of these loans and grants is to increase the number of available housing units for domestic farm laborers. This Notice describes the method used to distribute funds, the application process and submission requirements.

***Dated*:** June 11, 2010.

Federal Housing Finance Agency Proposed Rules

Fed. Reg. 39,462-39,472 (July 9, 2010)
Conservatorship and Receivership

***Summary*:** The Federal Housing Finance Agency (FHFA) is proposing a regulation to establish a framework for conservatorship and receivership operations for the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks, as contemplated by the Housing and Economic Recovery Act of 2008 (HERA). HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 by adding, among other provisions, Section 1367, Authority Over Critically Undercapitalized Regulated Entities. The proposed rule will implement this provision. As proposed, the rule seeks to protect the public interest in the transparency of conservatorship and receivership operations.

***Comments Due Date*:** September 7, 2010.

HUD Notices

Notice H 2010-10 (July 1, 2010)
Enterprise Income Verification (EIV) System

***Summary*:** The purpose of this Notice is to provide updated instructions for using EIV now that use of the EIV system by owners and management agents (O/As) is mandatory. Effective January 31, 2010, O/As must use HUD's EIV system in its entirety: (1) as a third party source to verify tenant employment and income information during mandatory recertifications of family composition and income, in accordance with § 5.236, and administrative guidance issued by HUD; and (2) to reduce administrative and subsidy payment errors in accordance with HUD administrative guidance. In addition to the mandatory use by O/As, EIV must also be used by contract administrators for monitoring the O/A's compliance with obtaining access to and using the EIV system. This Notice applies to project-based Section 8; Section 101 Rent Supplement; Section 202/162 Project Assistance Contract; Section 202 Project Rental Assistance Contract (PRAC); Section 811 PRAC; Section 236; Section 236 Rental Assistance Payments; and Section 221(d)(3) Below Market Interest Rate.

Notice PIH 2010-23 (HA) (June 25, 2010)
Project-Basing HUD-Veterans Affairs Supportive Housing Vouchers

***Summary*:** The purpose of this Notice is to reinstate Notice PIH 2009-11 on the same subject with significant revisions. Section J of the Implementation of the HUD-Veterans Affairs Supportive Housing (HUD-VASH) Program published in the Federal Register on May 6, 2008, states that HUD will consider, on a case-by-case basis, requests from a public housing agency (PHA) to project-base HUD-VASH vouchers in accordance with 24 C.F.R. part 983. This Notice provides continued guidance to those PHAs that have been awarded HUD-VASH vouchers that are interested in project-basing a portion of these vouchers. HUD and the Department of Veterans Affairs have determined that no more than 50% of a PHA's allocation of HUD-VASH vouchers may be project-based. This number must be within the 20% maximum budget authority that may be allocated to project-based voucher (PBV) assistance in accordance with 24 C.F.R. § 983.5(a). All types of PBV proposals will be considered: existing units, newly constructed units and substantially rehabilitated units. Requests will not be considered unless the Veteran's Affairs Medical Center is in support of this project.

Notice PIH 2010-22 (HA) (June 17, 2010)
Consolidated Guidance on Disaster Housing Assistance Program

***Summary*:** This Notice reinstates both Notices PIH

2008-38 (HA) and PIH 2008-45 (HA), which have expired. This Notice also sets forth the Extension Operating Requirements, which establish the policies and procedures for the Disaster Housing Assistance Program-Ike (DHAP-Ike) Extension. DHAP-Ike is a HUD-FEMA initiative to provide monthly rental assistance, service connections, security deposit and utility deposit assistance for certain families displaced from their homes by Hurricanes Ike or Gustav. The DHAP-Ike Extension has been modeled after the current Disaster Housing Assistance Program for families displaced by Hurricanes Ike and Gustav, which is administered by HUD's network of public housing agencies (PHAs). PHAs that agree to administer the DHAP-Ike Extension must do so in accordance with these Extension Operating Requirements, the original DHAP-Ike Operating Requirements (originally established with Notice PIH 2008-38), and any subsequent HUD directives and guidance for the program. ■

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