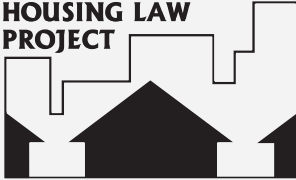


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Housing Law Bulletin

Volume 35 • July/August 2005

Published by the National Housing Law Project



***Housing Authority Ordered to Pay
Porting Tenant's Voucher Assistance***

—see page 179

Does Your Client Have an RHS Guaranteed Home Loan?

—see page 174



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Cover: Children from public housing owned by the Oakland Housing Authority enjoying a weekly kayaking camp held at the Jack London Square (Oakland) Aquatic Center. Photo courtesy of Oakland Housing Authority and Jack London Center.

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Supreme Court Upholds City's Condemnation Action Under Takings Clause

In a 5-4 decision in the case of *Kelo v. City of New London*, the Supreme Court held that a city's condemnation of private homes to serve economic revitalization plans falls under the Public Use Clause of the Fifth Amendment and is constitutional.¹ As a result, the City of New London will be permitted to proceed with its redevelopment plans over the objections of homeowners.²

The case presented the following question to the Court: "What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic development' that will perhaps increase tax revenues and improve the local economy?"³ The majority's inquiry turned, in particular, on whether the city's development plan serves a "public purpose."⁴

Background

In 2000, New London approved a development plan that, according to the Supreme Court of Connecticut, sought to create over 1,000 jobs, increase taxes and revenues, and revitalize the economically distressed city.⁵ In 1998, prior to passage of the plan, the city contracted with a recently reactivated private nonprofit organization and issued bonds to create a Fort Trumbull State Park in one area of the city.⁶ One month after the bond issuance, Pfizer, Incorporated announced that it planned to build a \$300 million research facility adjacent to Fort Trumbull.⁷ Months later, the developer submitted its redevelopment plans for state review and obtained state-level approval. The plan focused on Fort Trumbull, an area with approximately 115 privately owned properties, as well as thirty-two acres of land formerly occupied by a naval facility.⁸

¹*Kelo v. City of New London*, 2005 WL 1469529, at *8 (June 23, 2005) (Justice Stevens wrote for the majority with Souter, Ginsburg, Bryer and Kennedy, who also wrote a separate concurrence. O'Connor filed the dissent with Rehnquist and Thomas, who also filed a separate dissenting opinion). See also NHLP, *Supreme Court Agrees to Hear Oil Industry's Rent Control Case*, 34 HOUS. L. BULL. 232, 235 (2004) (briefly discussing *Kelo*). According to the respondents, owners were offered "just compensation" for their property. 2005 WL 1469529, at *4.

²*Id.*

³NHLP, *Supreme Court Agrees to Hear Oil Industry's Rent Control Case*, 34 HOUS. L. BULL. 232, 235 (2004).

⁴2005 WL 1469529, at *6.

⁵*Id.* at *2.

⁶*Id.* at *3.

⁷*Id.*

⁸*Id.*

In addition to the Pfizer facility, plans for the seven parcels of land included a hotel, shopping area, recreational facilities, a pedestrian “riverwalk,” eighty new residences, a state park, a museum, office and retail space, and parking or retail services.⁹ The developer depended upon the Pfizer facility to attract new commerce to the area.¹⁰

The city council authorized the developer to purchase or otherwise acquire the private properties through eminent domain.¹¹ Of the 115 properties in the Fort Trumbull area, owners of 100 accepted the developer’s offers and sold their properties.¹² The other owners, whose properties are known to be in good condition, became the subject of condemnation proceedings.¹³

New London’s “Public Purpose” = Public Use

In rejecting the challenge to the city’s plan, the Supreme Court first made clear what the case was *not* about. The Court stated that the case was not one about a plan that conferred a private benefit to a particular private party.¹⁴ Similarly, it also stated that the issues in the case did not turn on whether the city’s plan served as a pretextual public purpose in order to confer a private benefit.¹⁵

The Court turned to the plaintiffs’ two main arguments, both of which it rejected. In responding to the argument that using eminent domain for *economic* development impermissibly blurs the boundary between permissible public and prohibited private takings, the Court relied on its decision in *Berman v. Parker*, 348 U.S. 26 (1954).¹⁶ In *Berman*, an owner of a department store in a blighted area of Washington, D.C. argued, unsuccessfully, that the leasing or selling of the owner’s land to a private redeveloper constituted a taking from one businessman for the benefit of another.¹⁷ The Court found *Berman* supportive of New London’s use of private industry, by way of its contractual arrangement with the development firm, to carry out public functions such as community redevelopment.¹⁸

The Plaintiffs’ second argument, calling for a bright-line rule to curtail a city from transferring property for the sole purpose of putting it to a more productive use that garners more taxes, failed as well.¹⁹ Although the Court

agreed that such an instance would naturally raise suspicion, it did not see the “hypothetical” relevant in the instant matter since it found no such transfer of property under the facts of the case.²⁰

In rejecting the challenge to the city’s plan, the Supreme Court first made clear what the case was not about. The Court stated that the case was not one about a plan that conferred a private benefit to a particular private party.

The Court also dispensed with plaintiffs’ alternative argument that plans that involve the taking of private property are only permissible where there is a “‘reasonable certainty’ that the expected public benefits will actually accrue.”²¹ After having addressed a similar issue in the regulatory takings case, *Lingle v. Chevron*, only one week prior,²² the Court quickly rejected the proposed standard, citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).²³ According to the Court, *Midkiff* made it clear that “the State’s purpose of eliminating the ‘social and economic evils of a land oligopoly’ qualified as a valid public use.”²⁴ It reasoned that a constitutional rule that would first require a showing of the likelihood of success of a development plan would significantly impede the successful consummation of the plan.²⁵ Therefore, the Court declined to second-guess the city’s determinations about what property it needed to acquire in order to effectuate its plans, and reiterated that such decisions should be left to the legislative branch.²⁶

Notably, a number of amici curiae made additional arguments against the taking of property for economic development purposes.²⁷ The NAACP, AARP, South Jersey

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* at *4.

¹²*Id.*

¹³*Id.* One of the private owners includes a woman who was born on her property in 1918 and has lived there her entire life. *Id.*

¹⁴*Id.* at *5.

¹⁵*Id.* The Court also made it clear that its review would focus on the city’s plan as a whole and would not consider each parcel of property one-by-one. *Id.* at *8.

¹⁶*Id.* at *8.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at *9.

²⁰*Id.*

²¹*Id.*

²²See NHLP, *Supreme Court Strikes Down Takings Test Used in Oil Industry Rent Control Case*, 35 HOUS. L. BULL. 157, 160 (2004).

²³“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socio-economic legislation—are not to be carried out in the federal courts.” *Kelo*, 2005 WL 1469529, at *9 (citing *Midkiff*). *Midkiff* concerned a statute that transferred title from lessors to lessees for just compensation in order to reduce the concentration of land ownership. *Kelo*, 2005 WL 1469529, at *7.

²⁴*Id.*

²⁵*Id.* at *9.

²⁶*Id.*

²⁷See Brief of Amici Curiae National Association for the Advancement of Colored People (NAACP), AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057 (Dec. 3, 2004) [hereinafter Brief of Amici Curiae].

Legal Services and other civil rights organizations complained that the permissive taking of private property for purely economic development purposes will breed disproportionate harm to racial and ethnic minorities, the elderly and the economically underprivileged.²⁸ The amici stated that expanding the scope of the public use doctrine to include the potential for economic development, “would leave this important fundamental right subject to the unrestrained will of the majority. Absence of judicial protection from majoritarian impulses is especially troubling”²⁹

Before holding that the city’s plans constituted a public use, the Court clarified the limits of its decision.³⁰ It noted that states remained free to place further restrictions on its exercise of the takings power by the passage of state constitutional provisions or statutes that limit the grounds upon which takings may be exercised, thereby imposing stricter definitions of “public use” than federal jurisprudence requires.³¹ Justice Kennedy’s concurrence pointed out that, although he agreed that there should be a presumption of validity of redevelopment plans, a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings (i.e. private transfers where there exists a risk of undetected and impermissible favoritism). *Kelo*, 2005 WL 1469529, at *12. The Court concluded by dismissing the plaintiffs’ constitutional claim and affirming the Connecticut Supreme Court’s decision.³²

Dissenting Opinion

With a dissenting opinion longer than the majority’s, Justice Sandra Day O’Connor stated that the Court significantly expanded the meaning of “public use.”³³ O’Connor distinguished *Berman* and *Midkiff* from the instant case by pointing out that the elimination of those respective properties sought to remedy harms (blight and the concentration of landownership in the hands a few, respectively).³⁴ Therefore, the dissent reasoned that the fact that the properties were conveyed to private parties did not matter in those cases because the elimination of the harm achieved a public benefit.³⁵ In contrast, the New London plaintiffs’ properties had not been found to be sources of harm.³⁶

²⁸*Id.* at *3.

²⁹*Id.* at *6-7 (footnote omitted).

³⁰*Kelo*, 2005 WL 1469529, at *10.

³¹*Id.* Citing *City of Wayne v. Michigan*, 684 N.W. 2d 765 (Mich. 2004), the NAACP *et al.* pointed out that the Michigan Supreme Court, under its state constitution, recently disqualified economic development as a public use. Brief of Amici Curiae, *supra* note 27, at *21.

³²*Kelo*, 2005 WL 1469529, at *12.

³³*Id.* at *17.

³⁴*Id.* at *16.

³⁵*Id.*

³⁶*Id.*

The dissent’s primary problems with the majority had to do with: (1) the lack of detail in the opinion about how courts should conduct inquiries into takings whose sole purpose is to convey benefits to private transferees³⁷ and (2) the fact that the decision may only be used to “upgrade” instead of “downgrade” property.³⁸ The later point, in the dissent’s view, made the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action.³⁹

The conservative property rights organizations behind the Kelo litigation effort have begun to regroup.

Lastly, the dissenting opinion noted that while the majority based its decision upon a carefully deliberated and elaborate plan, other governmental bodies may pass legislation with less care but still be able to draw upon the Court’s opinion for its authority.⁴⁰ The dissent concluded that the majority left nearly all real property susceptible to condemnation.⁴¹

Conclusion

The reach of the Court’s decision remains to be seen. In the meantime, the conservative property rights organizations behind the *Kelo* litigation effort⁴² have begun to regroup. In June, the Institute for Justice, a “libertarian public interest law firm” that represented plaintiff Susette Kelo before the Supreme Court, launched and committed \$3 million to a “Hands Off My Home” campaign against the use of eminent domain powers by state and local governments.⁴³ Federal legislation that would limit such powers also has recently been introduced.⁴⁴ ■

³⁷*Id.* at *17.

³⁸*Id.* at *18.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²See Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005 (describing, *inter alia*, the place of the *Kelo* litigation in the Constitution in Exile Movement).

⁴³Press Release, Institute for Justice, IJ’s \$3 Million National Campaign Tells Lawmakers: “Hands Off My Home” (June 29, 2005), available at http://www.ij.org/private_property/castle/6_29_05pr.html.

⁴⁴Responses from United States congressional members have included a resolution (H. Res. 340) and proposed prohibitions on the use of federal funds to transfer private property for purposes of “economic development” without owner consent (e.g., S. 1313; H.R. 3087). See National Low Income Housing Coalition, *Bills Filed to Limit the Power of Eminent Domain*, 10 MEMO TO MEMBERS 26 (July 1, 2005), at http://www.nlihc.org/mtm/mtm10_26.html.

Does Your Client Have an RHS Guaranteed Home Loan?

Most attorneys or housing counselors representing or advising a Rural Housing Service (RHS)¹ Guaranteed Single Family Home Loan borrower do not know that their client has an RHS guaranteed Section 502 loan. This is because the client-homeowners are not likely to know it and none of the documents that the clients typically bring with them when they are facing defaults or foreclosure discloses that RHS guaranteed their home loan. As a result, neither the attorney or any other advocate is likely to seek any relief that the homeowner may be entitled to if the borrower is facing foreclosure.

The Section 502 Guaranteed Loan Program is authorized by Section 502(h) of the Housing Act of 1949.² The program, which is similar to the Federal Housing Administration (FHA) Section 203³ single family home loan program, was designed to encourage private mortgage lenders to make single family home loans to eligible low- and moderate-income rural households. The primary incentives offered to the lenders are the authority to use their conventional loan mortgage instruments and a 90% guarantee against losses in the event the borrower defaults on the loan and the lender is forced to foreclose.⁴

The Section 502 guaranteed loan program has been in existence since 1991. Since that time more than 185,000 loans have been made under the program in rural areas throughout the United States. While the program started with relatively modest annual appropriations, in recent years annual appropriations for the program have grown to over \$3.3 billion. The program's growth has come primarily as a result of the current Administration's promotion of homeownership and the Administration's and Congress' efforts to shift emphasis from the Section 502 direct loan program to the guaranteed loan program. This is because the direct loan program, with its deep interest subsidies, serves lower-income households and is, therefore, substantially more expensive than the guaranteed loan program. Since the Administration and Congress are increasingly concerned about the budget impacts of various programs, particularly when they are serving the poor, they have tended to shift emphasis from more expensive

to less expensive programs without fully acknowledging the programmatic impacts of such shifts.

Section 502 Guaranteed loan borrowers are typically only advised that their loan is guaranteed at, or prior to, the initial loan closing. At that time they are asked to execute a request for a loan guarantee⁵ that informs them that RHS will be asked to guarantee their home loan and advises them of the consequence of a default that results in a loss to RHS. Borrowers are also alerted to the fact that they have an RHS guaranteed loan in the loan closing documents, which show the charges assessed to the borrower. These include a guarantee fee charged to the lender by RHS that is passed on to the borrower. The borrower is otherwise not advised of the RHS guarantee.

Most attorneys or housing counselors representing or advising a Rural Housing Service Guaranteed Single Family Home Loan borrower do not know that their client has an RHS guaranteed Section 502 loan.

Most significantly, when a borrower defaults on his or her loan, nothing in the default notice or in any other communication from the lender advises the borrower that the loan is guaranteed or that the borrower may have any foreclosure avoidance or due process protections under the program. Thus, attorneys or other advocates that review the default notice, the promissory note or even the deed of trust will not discover that the loan is RHS guaranteed.

There are three forms of assistance that borrowers may have under the RHS guaranteed loan program. First, they may be eligible for moratorium relief, a program that allows them to defer their mortgage payments for up to two years if they are unable to continue to make their mortgage payments for reasons beyond their control, such as loss of income or increased expenses. Second, they may be entitled to have their guaranteed loans refinanced under the Section 502 direct loan program, which would make them eligible for interest subsidy payments that substantially reduce their monthly mortgage payments. Third, they may be entitled to an appeal hearing under the RHS appeals procedure to contest the lender's decision to foreclose or RHS' failure to extend a moratorium or other assistance.⁶

¹RHS, which guarantees the Section 502(h) loans, is an agency within the Department of Agriculture, which has its national office in the District of Columbia. Its programs are administered in the various states by the Rural Development (RD) division of the department. In this article, references to the program and its administration will be solely to RHS since the issues and decisions discussed in this article were all made by RHS or its predecessor agency the Farmers Home Administration (FmHA).

²42 U.S.C.A. § 1472 (h) (West 2003).

³12 U.S.C.A. § 1709 (West 2001).

⁴42 U.S.C.A. § 1472(h)(1) (West 2003).

⁵RD Form 1980-21 (Rev. 1-03).

⁶Indeed, if guaranteed loan borrowers are entitled to an appeal hearing, they are also entitled to notice of the fact that their loan is guaranteed by RHS and that they have a right to appeal adverse decisions. See *United States v. White*, 429 F. Supp. 1245 (N.D. Miss. 1977).

Guaranteed loan borrowers have all of these rights by virtue of the fact that their loans are authorized and guaranteed under Title V of the Housing Act of 1949,⁷ which authorizes RHS to make both direct and guaranteed loans. Section 505⁸ of that act authorizes RHS to extend moratorium relief to Section 502 loan borrowers and does not distinguish between direct and guaranteed borrowers. Section 502⁹ of the act authorizes RHS to refinance the loans of all borrowers and Section 521¹⁰ authorizes the extension of interest subsidies. Lastly, Section 510(g)¹¹ of the act requires RHS to provide persons who are denied assistance under the act, or whose assistance is terminated, an opportunity to appeal the adverse decision to a person who has authority to reverse it.

Unfortunately, RHS has not extended any of these statutory rights to guaranteed loan borrowers. When it adopted the guaranteed loan regulations in 1991, it took the position that the statutes authorizing these forms of

agency. Ideally, the plaintiffs would be guaranteed loan borrowers who have defaulted or are about to default on their loans for reasons beyond their control and are likely to face foreclosure unless they are extended assistance by RHS. Advocates who represent such borrowers should contact Gideon Anders at the National Housing Law Project to discuss their clients' circumstances and options.¹⁴

The question remains, how does an advocate determine whether a client is a 502 guaranteed loan borrower? The process is actually relatively simple. All an advocate needs to do is to call the lender that is identified on the loan documents and ask whether the loan is RHS guaranteed. To assist in the process and avoid having to call every lender, advocates can get a list of guaranteed lenders in their state from their state Rural Development office. The information is also available by state on the RD Web site.¹⁵

Advocates and counselors are urged to determine whether their clients' loans are guaranteed by RHS in order to assist them in securing foreclosure relief and in avoiding potential malpractice claims. ■

The National Housing Law Project is considering challenging RHS' failure to extend moratorium relief, refinancing and appeal rights to guaranteed loan borrowers and is looking for possible plaintiffs in a case against the agency.

assistance do not mandate their extension to guaranteed loan borrowers.¹² More recently, when a guaranteed loan borrower requested both forms of assistance, the agency responded that its regulations preclude guaranteed borrowers from receiving moratorium relief and maintained that they are not entitled to an appeal hearing because the decision to foreclose their loan is made by the lender and not RHS.¹³ The RHS letter carefully avoided the underlying statutory arguments by simply not addressing them.

The National Housing Law Project is considering challenging RHS' failure to extend moratorium relief, refinancing and appeal rights to guaranteed loan borrowers and is looking for possible plaintiffs in a case against the

⁷42 U.S.C.A. §§ 1472 *et seq.* (West 2003).

⁸*Id.* § 1475.

⁹*Id.* § 1472.

¹⁰*Id.* § 1490a(1).

¹¹*Id.* § 1480(g).

¹²Rural Housing Loans, 56 Fed. Reg. 15,748, 15,752 (April 17, 1991) (7 C.F.R. pt. 1980).

¹³Letter from Russell Davis, RHS Administrator, to Mark D. Esterle, Kentucky Legal Aid (July 18, 2005).

¹⁴Mr. Anders can be reached by phone at 510-251-9400 or by e-mail at ganders@nhlp.org.

¹⁵*See, e.g.*, <http://www.rurdev.usda.gov/ca/pdf%20files%20and%20documents/GRH%20Participating%20Lender%20List%20March2005.pdf> (California lenders participating in the guaranteed loan program). RD state offices have their own Web sites. They can be accessed from the national RD Web site at http://www.rurdev.usda.gov/recd_map.html. Typically, the list of lenders participating in the guaranteed home loan program may be found under the single family housing program link on each state's RD homepage.

District Court Dismisses and Remands Section 515 Residents' Claims Against USDA

On December 19, 2003, elderly and low-income Oregon residents of several Section 515 Rural Rental Housing (RRH) projects¹ filed an Administrative Procedures Act (APA) statewide class action suit against the United States Department of Agriculture (USDA).² Faced with imminent rent increases and threatened displacement from two of the projects, because Rural Housing Service (RHS, a division of the USDA) accepted mortgage prepayments in violation of the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), the residents also sued the private owners involved.³ By filing, residents sought to overturn the prepayment of loans for two projects and enjoin the prepayment of an additional four loans on other projects.⁴ The extent of the threatened loss of housing included forty-four units in the prepaid projects and 151 units in the projects with noncompliant loan prepayment approvals.

However, on May 25, 2005, the United States District Court for the District of Oregon dismissed the residents' federal claims against the federal defendants and owners of the properties.⁵ Concurrently, the court granted the defendants' motions for summary judgment and remanded the plaintiffs' state claims to state court.⁶

Background

ELIHPA

The owners of the six projects received RHS loans prior to either the passage of ELIHPA, or ELIHPA's extension to projects financed between 1979 and 1989.⁷ They executed loan documents that allowed them to prepay their loans at any time or after an initial use-restricted period. In 1988, Congress passed ELIHPA because of its concern that a large portion of the Section 515 housing stock was vulnerable to mortgage prepayments and conversion to uses other than low-income housing—actions that displace large numbers of residents and thwart the basic purpose

of the Section 515 program.⁸ ELIHPA applied to all Section 515 projects financed before December 21, 1979, and subsequent legislation extended its application to projects that were financed between December 21, 1979, and December 15, 1989.⁹

ELIHPA precludes RHS from approving or accepting a Section 515 prepayment until certain requirements have been met. One such requirement includes an effort by RHS to enter into an agreement with the owner that would keep the project in the program for an additional twenty years.¹⁰ In seeking an agreement and attempting to keep the owner in the program, RHS must offer approved incentives to the owner.¹¹ If an incentive offer is rejected and the owner refuses to enter into an agreement, the owner must offer to sell the project to a qualified nonprofit organization or public agency at fair market value.¹² This mandatory offer of sale is subject to certain exceptions, including the determination that prepayment would not materially affect minority housing opportunities and that there is an inadequate supply of safe, decent and affordable housing within the market area.¹³ In certain instances, where residents will be displaced but there is no effect on minority housing opportunities, owners may prepay while agreeing to keep units affordable for current residents.¹⁴ If 180 days of the mandatory offer of sale period expires without a bona fide purchase offer, RHS may accept the owner's prepayment request.¹⁵

Events Prior to the Noncompliant Prepayment Approvals and Acceptances

The Oregon owners, while believing that the ELIHPA restrictions illegally violated their contractual rights, filed a lawsuit in 1998 against RHS challenging its refusal to accept prepayment of their loans. Captioned as *DBSI/TRI IV Limited Partnership v. USA*, the lawsuit was one of three filed by a set of related owners.¹⁶ The other two lawsuits involved eighteen Section 515 projects in Idaho.¹⁷ In all three lawsuits, the owners claimed that RHS' failure to

⁸42 U.S.C.A. §§ 1472(c) *et seq.*

⁹*Id.* § 1472(c)(1)(A)-(B).

¹⁰*Id.* § 1472(c)(4)(A); 7 C.F.R. § 3560.655 (2004).

¹¹42 U.S.C.A. § 1472(c)(4)(B)-(C) (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05); 7 C.F.R. § 3560.656 (2004).

¹²42 U.S.C.A. § 1472(c)(5)(A) (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05); 7 C.F.R. § 3560.658(b) (2004).

¹³42 U.S.C.A. § 1472(c)(5)(G) (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05); 7 C.F.R. § 3560.658(b) (2004).

¹⁴7 C.F.R. § 3560.658(b)(2) (2004).

¹⁵42 U.S.C.A. § 1472(c)(5)(A)(ii) (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05); 7 C.F.R. § 3560.659 (2004).

¹⁶*DBSI/TRI IV Limited Partnership v. USA*, No. 98-1325 (D. Or. filed Oct. 27, 1998).

¹⁷*Kimberly Assocs. v. USA*, No. 98-83-S-LMB (D. Idaho filed Feb. 25, 1998) (affecting one project); *Atwood-Leisman v. USA*, No. 98-416-S-BLW (D. Idaho filed Oct. 26, 1998) (affecting 17 projects). *See also*, *NHLP, RHS Owners Allowed to Quiet Title to Their Property in Derogation of ELIHPA*,

¹Section 515 housing is financed under Section 515 of the Housing Act of 1949. 42 U.S.C.A. § 1485 *et seq.* (as amended) (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05).

²*Goldammer v. Veneman*, No. 03-CV-1749-BR (D. Or. filed Dec. 19, 2003).

³42 U.S.C.A. §§ 1472(c) *et seq.* (West, WESTLAW current through P.L. 109-18 (end) approved 6-29-05).

⁴Since RHS entered into an agreement with the owners giving them the option of prepaying—effectively approving prepayment—residents of the remaining four projects were not free from harm because their possible displacement could also occur.

⁵*Goldammer*, No. CV 03-1749-BR, slip op. (D. Or. May 25, 2005).

⁶*Id.* at 3.

⁷The owners constitute related limited partnerships.

accept the prepayments was wrongful and entitled them to quiet title under state law. One of the Idaho law suits, *Kimberly Associates v. United States (Kimberly)*,¹⁸ was the first to proceed. Parties to the other suits agreed to hold their cases in administrative abeyance until resolution of the *Kimberly* case.

The Idaho District Court dismissed *Kimberly*, holding that the *unmistakability doctrine*¹⁹ precluded the owners from securing relief.²⁰ The owners appealed the decision to the Ninth Circuit. The Ninth Circuit then reversed on that issue and suggested, in *dicta*, that the owners might be entitled to relief under Idaho state quiet title law.²¹ Upon remand, the district court (*Kimberly II*) issued an unprecedented decision that provided the owners the relief they sought—namely the right to quiet title without regard to ELIHPA.²² The *Kimberly II* district court also denied residents of the Idaho project the right to intervene and challenge the proposed prepayment under the APA.²³ The second Idaho case, *Atwood-Leisman v. USA (Atwood-Leisman)*, followed *Kimberly II* and granted the owners the relief they sought, but on different grounds.²⁴

One of the *Kimberly* residents sought to appeal the adverse decision to the Ninth Circuit. The agency chose not to appeal the substantive matter.²⁵ RHS, instead, entered into an agreement in principle with the owners under which it and the owners would make efforts to transfer the Oregon and *Atwood-Leisman* projects to nonprofit or public entities that would keep the projects in the RHS program.²⁶

32 HOUS. L. BULL. 258 (2002) (discussing the *Kimberly* and *Atwood-Leisman* decisions).

¹⁸*Kimberly Assocs.*, No. 98-83-S-LMB (D. Idaho filed Feb. 25, 1998).

¹⁹The unmistakability doctrine is a contract defense available to government entities. See generally *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion); Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contract Law?*, 26 PUB. CONT. L.J. 481, 485 (1997).

²⁰*Kimberly Assocs.*, No. 98-83-S-LMB, slip op. (D. Idaho Jan. 25, 1999).

²¹*Kimberly Assocs.*, 261 F.3d 864 (9th Cir. 2001); see also, NHLP, *Ninth Circuit Authorizes Circumvention of RHS Section 515 Preservation Statute Through a Quiet Title Action*, 31 HOUS. L. BULL. 216 (2001). A Ninth Circuit Court of Appeals decision remains non-binding outside of the states covered by the western circuit's jurisdiction.

²²*Kimberly Assocs.*, No. 98-83-S-LMB, slip op. (D. Idaho Dec. 12, 2002).

²³*Id.* The *Kimberly* residents were unaware of the case at the time the district court issued its initial decision.

²⁴*Atwood-Leisman*, No. 98-416-S-BLW, slip op. (D. Idaho Nov. 18, 2002), repealed by No. 98-416-S-BLW, slip op. (D. Idaho July 7, 2004) (ordering dismissal of matter with prejudice following parties' Stipulation for Dismissal with Prejudice).

²⁵Pending resident Jane Doe's appeal of the case on the merits and the district court's intervention denial, the Ninth Circuit stayed the quiet title order and enjoined subsequent conveyance. See also NHLP, *Ninth Circuit Stays Order Allowing Section 515 Landlord to Prepay Loan*, 33 HOUS. L. BULL. 55, 71 (2003).

²⁶The agreement did not apply to the *Kimberly* project or a seventh Oregon project, both of which had Section 8 project-based subsidies, which at least temporarily protected the residents from displacement.

In the event that the parties could not accomplish the transfer, the agreement authorized the owners to prepay the loans and committed RHS to accept the prepayments. None of the residents in any of the Idaho or Oregon projects were advised of the agreement or negotiations between RHS and the owners. Subsequently, the Ninth Circuit dismissed the Idaho resident's motion to intervene and conditional appeal as moot because of the parties' agreement and allowed the *Kimberly II* decision to stand.²⁷

Noncompliance in Oregon

While the Oregon owners entered into negotiations with local nonprofit and public housing agencies to purchase all of the projects, negotiations between RHS and the owners fell apart with respect to the six Oregon projects. The issue that appears to have broken the negotiations was the appraised value of the projects. RHS and the owners disagreed about the values of the properties, or more specifically, the cash that the owners would receive from the sale of the properties to the intended nonprofit and public entity buyers. Pursuant to their agreement with RHS, the owners chose to prepay their loans on two of the projects, and RHS accepted the prepayments in or about December 2003.

In turn, the owners filed a motion on December 17, 2003, in the Oregon District Court to enforce the settlement agreement and quiet title on the two prepaid properties. The court issued the two quiet title orders on December 19, 2003, and the owners then purportedly transferred the projects to a nonprofit Idaho corporation, which promptly notified the residents that their rents would be increased because the RHS rental subsidies had been terminated by the prepayment.²⁸ It was not until then that the residents of the projects became aware of (1) the agreement between RHS and the owners, (2) the prepayments and (3) the subsequent sale to the nonprofit organization, an entity which had not, at the time of transfer, received RHS' approval as a qualified purchaser.

Oregon Litigation Efforts

In response to rent-increase notices and following resident meetings and correspondence with the USDA and owners, residents of the two prepaid projects realized that the prepayment threatened immediate rent increases and possible displacement. This forced them to file, with the assistance of the Oregon Law Center, an application for a temporary restraining order seeking to maintain current rent levels and tenant protections.²⁹

The residents filed their complaint against the then USDA Secretary and Administrator, the Director of the

²⁷*Kimberly Assocs.*, 2004 WL 1663523 (9th Cir. July 22, 2004) (unreported opinion).

²⁸*DBSI/TRI IV Limited Partnership v. USA*, No. 98-1325-JE (D. Or. Dec. 19, 2003) (Docket Nos. 42-43).

²⁹*Goldammer*, No. 03-CV-1749-BR (D. Or. filed Dec. 19, 2003).

USDA's Oregon Rural Development office, DBSI/TRI IV, DBSI Realty Corporation (the former limited partner owner) and Northwest Real Estate Capital Corporation (the new owner of one of the prepaid projects).³⁰ Their complaint raised a due process claim, based on a lack of proper notice, and an Administrative Procedures Act claim against the government defendants alleging that the approvals and acceptances of the prepayments were arbitrary and capricious, not in accordance with law, without observance of procedure, short of statutory and constitutional right and constituted abuses of discretion.³¹ Regarding DBSI, the residents claim that the owner violated their rental agreements as well as ELIHPA and its implementing regulations when it (1) failed to provide the residents with proper notice, (2) failed to offer to sell the projects to qualified nonprofits or public agencies, and (3) failed to submit prepayment requests and other required information and documentation to RHS prior to prepaying the loans.³² The residents raised state claims against the private defendants as well.³³

Following a temporary restraining order hearing on December 23, 2003, the owner of the projects agreed to refrain from raising rents for sixty days. However at the expiration of that period, the owners threatened to raise rents as early as April 1, 2004. Faced with this threat, residents pursued their request for a preliminary injunction.

Because DBSI, in anticipation of residents filing *Goldammer*, sought and secured a quiet title declaration in *DBSI/TRI IV Limited Partnership v. USA*, the residents also sought to intervene in that case. The residents sought to have the two quiet title orders set aside upon intervention.

The District Court's Denial of the Residents' Motion to Intervene

On September 15, 2004, the Oregon District Court denied the residents' motion to intervene in the owners' *DBSI/TRI IV Limited Partnership v. USA* matter.³⁴ The court's rationale, similar to an argument by the owner in *Kimberly*, pointed to the fact that the residents sought to assert the same claims as they had in their affirmative *Goldammer v. Veneman* case (a pending matter before the same judge). Therefore, the court reasoned that the resident-applicants "failed to establish that they are so situated that the disposition of the action may, as a practical matter, impair or impede Applicants' ability to protect their interest."³⁵

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Goldammer*, No. 03-CV-1749-BR, slip op. (D. Or. Sept. 15, 2004) (internal quotations omitted).

³⁵*Id.* at 8.

The District Court's Denial of Residents' Preliminary Injunction Request

Two weeks after the Oregon District Court denied the residents the right to intervene in the owners' quiet title case, the same judge denied their request for a preliminary injunction.³⁶ Prior to rendering its decision, the court engaged in a lengthy discussion about *Kimberly*. It then stated that all of the arguments raised by the Oregon residents were raised in the *Kimberly* litigation.³⁷

Although the *Kimberly* resident attempted to raise an APA argument, the court never considered it because the Ninth Circuit precluded the resident from participation in the owners' case by denying intervention. An analysis, under the APA, is precisely what the Oregon District Court would need to undertake and reconcile with a quiet title claim in light of the congressionally mandated ELIHPA. No court has yet to conduct such an analysis.

The Oregon District Court ultimately stated that the Ninth Circuit concluded that ELIHPA could not prevent the enforcement of contracts between RHS and owners.³⁸ It then decided that the residents were not likely to succeed on the merits of their claims and denied the preliminary injunction.³⁹

The District Court's Dismissal of the Residents' Case

In a brief decision, on May 25, 2005, the Oregon District Court deferred to its ruling upon the preliminary motion and simply stated that, "Plaintiffs have not offered any compelling reason for the Court to depart from its previous analysis."⁴⁰ With *Kimberly* as the only case cited on the residents' substantive federal issues, the court dismissed their federal claims and remanded their state claims to state court.⁴¹

Progress from Oregon Negotiations

Negotiations between the parties in the *DBSI/TRI IV Limited Partnership v. USA* case have decreased some of the more immediate threats of displacement for a few of the residents. The prepaid project, Seacrest, that had been conveyed to Northwest Real Estate Capital Corporation remains outside of the Section 515 program although residents were able to secure tenant-based Section 8 subsidies. The owners later agreed to convey the other prepaid project, Forest Village, to the Douglas County Housing Authority which will keep the project within the Section 515 program.

The status of the four projects for which loans were approved remains mixed. Owners conveyed one project,

³⁶*Goldammer*, 2004 WL 2203278 (D. Or. Sept. 29, 2004).

³⁷*Id.* at *5.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Goldammer*, No. 03-CV-1749-BR, slip op. at 4 (D. Or. May 25, 2005).

⁴¹*Id.* at 7.

Vittoria Square, to the Yamhill County Housing Authority, which will keep the project within the Section 515 program. Residents of two other projects, Norseman Village and Hillside Terrace, hope for similar results. Plans for the sixth project, Meadowbrook, remain unknown at this time.

Next Steps

As negotiations progress, the residents continue to attempt to have their APA arguments considered. With the assistance of the Oregon Law Center, they have filed a notice of appeal with the Ninth Circuit for their affirmative, *Goldammer v. Veneman*, case. The residents' dedication and the efforts of their counsel have kept this matter alive and have already prevented some displacement. NHLP will continue to report further developments in the *Housing Law Bulletin*. ■

Housing Authority Ordered to Pay Porting Tenant's Voucher Assistance

by Jessica Ritter*

*Avanesova v. Housing Authority of the City of Los Angeles*¹ involved Plaintiff Zhanneta Avanesova's attempt to port her Housing Choice Voucher from Los Angeles to Glendale, California. After she moved to Glendale, both the Housing Authority for the City of Los Angeles (HACLA)² and the City of Glendale, which is the public housing authority for Glendale (Glendale),³ denied her voucher assistance.

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¹*Avanesova v. Hous. Auth. of the City of Los Angeles*, No. CV 04-5588-GAF, slip op. (C.D. Cal. Dec. 20, 2004) (will be available at <http://www.nhlp.org>). Attorneys for Plaintiff were Robert F. Graziano and Rocio Y. Garcia, Staff Attorneys with Neighborhood Legal Services of Los Angeles County, Los Angeles, CA.

²Attorneys for Housing Authority of the City of Los Angeles, Arthur J. Lettenmaier, Brown, Winfield & Canzoneri, Los Angeles, CA.

³Attorney for City of Glendale, Ann M. Mauer, City of Glendale Attorney, Glendale, CA.

Neighborhood Legal Services of Los Angeles County filed a complaint on Avanesova's behalf and moved for summary judgment on multiple claims. The United States District Court for the Central District of California granted Avanesova's motion for summary judgment on her first cause of action, which was brought pursuant to 42 U.S.C. § 1983 and alleged that Glendale violated the voucher statute and implementing regulations by failing to administer and pay for her voucher. The court also granted her claim (also brought via Section 1983) that Glendale violated Avanesova's constitutional due process rights. It denied her motion regarding her remaining claims.⁴

Voucher Portability Statute and Regulation

Avanesova's first cause of action claimed that Glendale, pursuant to the provisions of the voucher statute relating to portability and implementing regulations,⁵ bore primary responsibility for administering and paying for her voucher. The court agreed and ordered Glendale to make subsidy payments on Avanesova's behalf.

The voucher statute states that "the public housing agency [PHA] having authority with respect to the dwelling unit to which a family moves under this subsection shall have the responsibility of carrying out provisions of this subsection with respect to the family."⁶

The regulation implementing the statute further provides that "when the portable family requests assistance from the receiving PHA, the receiving PHA must promptly inform the initial PHA whether the receiving PHA will bill the initial PHA for assistance on behalf of the portable family, or will absorb the family into its own program."⁷ In addition, the regulations provide that "the receiving PHA must provide assistance for the family" when the family has the right to lease a unit within the jurisdiction.⁸

The court determined that because Avanesova had

⁴The five additional claims made by Avanesova included:

A second claim for relief, in which Avanesova asserted that she relied to her detriment on her expectation that the city of Glendale would honor the voucher and make the assistance payments to her landlord. A third claim for relief, in which Avanesova asserted that Glendale was not in compliance with its administrative plan, 24 C.F.R. § 982.54. The court held there was no regulation or federal statute that requires the receiving PHA to bill the initial PHA within a six-month time frame and therefore she presented no evidence that the PHA violated the administrative plan. A fourth claim for relief, in which Avanesova claimed Glendale was negligent and failed in its duty to comply with its administrative plan including portability procedures, billing requirements and hearing requirements. A fifth claim for relief, in which Avanesova contended HACLA violated the United States Housing Act and 42 USC § 1983, by failing to handle her voucher in a manner that would have ensured Glendale's assistance. A sixth claim for relief, in which Avanesova sued HACLA for detrimental reliance and breach of oral contract.

⁵42 U.S.C.A. § 1437f (r) (West 2003); 24 C.F.R. § 982.355 (c)(5) (2004).

⁶42 U.S.C.A. § 1437f(r)(2) (West 2003).

⁷24 C.F.R. § 982.355(c)(5) (2004).

⁸*Id.* § 982.355(c)(10).

properly moved her residence to the city of Glendale, the statute and regulations obligated Glendale to provide voucher assistance to Avanesova.

The facts are undisputed. In early 2003, Avanesova received a voucher from HACLA. In May of 2003, she requested to port her voucher to Glendale. In July of 2003, Glendale received her request and thus became the receiving PHA.

*Avanesova was a case of first impression
regarding the statutory and regulatory
obligations of public housing authorities with
respect to voucher portability.*

Avanesova complied with all of the requirements of the voucher program. She submitted a request for lease approval for a unit, which eventually passed inspection. Glendale received her file and recertified her. Glendale went so far as to negotiate the rent with her landlord and was preparing to execute the housing assistance payment (HAP) contract when it became tangled in a bureaucratic battle with HACLA.

Glendale refused to sign the HAP contract with Avanesova's landlord after having approximately 99 billing requests for payment on transferred vouchers rejected by HACLA and fearing it would not be reimbursed by HACLA for Avanesova's transfer.

These undisputed facts led the court to order Glendale to execute the HAP contract and take financial responsibility for Avanesova's voucher assistance payments. In reaching this conclusion, the court stressed that Avanesova had met every request of the Glendale PHA and as the receiving PHA, Glendale was required to provide voucher assistance to Avanesova.⁹ Moreover, Glendale's unrelated issues with HACLA did not warrant Glendale's refusal to assume responsibility for Avanesova's voucher.

Right to Procedural Due Process, Termination Hearing

Avanesova's second successful claim, also asserted via 42 U.S.C. § 1983, was that her due process rights to adequate notice and to a fair hearing under the Fourteenth Amendment were violated. She alleged that neither Glendale nor HACLA provided her with an informal review

⁹*Id.* § 982.355(c)(5) provides that "the receiving PHA is required to promptly inform the initial PHA of its choice." Further, § 982.355 (c)(10) provides: "The receiving PHA must provide assistance for the family. Receiving PHA procedures and preferences for selection among eligible applicants do not apply, and the receiving PHA waiting list is not used."

or termination hearing.¹⁰ The court agreed and concluded that Avanesova had substantial rights under the statute that Glendale was required to provide and that Glendale denied her those rights without a hearing.¹¹

In determining whether Avanesova's due process rights had been violated, the court rejected Glendale's contention that it did not violate Avanesova's due process rights because its duty to provide any type of hearing expired when HACLA terminated her voucher. The court was not persuaded by this argument.¹²

Conclusion

After the favorable summary judgment motion, Avanesova agreed to settle the case. She obtained back rent for the period that she did not receive the benefit of Section 8 subsidy payments. The two housing authorities contributed to the payments with HACLA paying the most. The remainder of the claims, including Glendale's cross-complaint against HACLA, were dismissed.

Avanesova was a case of first impression regarding the statutory and regulatory obligations of public housing authorities with respect to voucher portability. This case did not involve civil rights claims. However, future portability cases may well support such claims.¹³ ■

¹⁰Complaint at ¶¶ 21-26, *Avanesova* (No. CV 04-5588-GAF).

¹¹*Id.* at ¶ 51; *Avanesova*, slip op. at 3. See also 24 C.F.R. § 982.555 (2004).

¹²While the following facts were not cited by the court as undisputed, Avanesova alleged in her complaint that she had been waiting since August of 2003 for Glendale to pay her housing assistance payments. On or about December 3, 2003, Avanesova met with HACLA to discuss her situation. HACLA informed her she could have three months to look for a different residence once Glendale returned her file to HACLA. The very next day, December 4, 2003, Avanesova met with an official from the Glendale PHA who informed her they would help resolve her problem and that there was no need to send her file back to HACLA. Glendale did not act on its promise and in February 2004, Avanesova received a letter from HACLA terminating her voucher assistance. In March 2004, she went to the Glendale PHA again. Despite these efforts, Glendale refused to make housing assistance payments to Avanesova's landlord. Complaint at ¶¶ 19-24, *Avanesova* (No. CV 04-5588-GAF).

¹³Letter from Judith Liben, MLRI and Phil Tegeler, PRRAC, to Alphonso Jackson, Secretary, HUD, (Aug. 6, 2004), available at http://www.prrac.org/full_text.php?text_id=1025&item_id=9103&newsletter_id=0&header=Current%20Projects; Letter from William O. Russell, Dep. Ass't Sec., HUD, to Judith Liben, MLRI (Oct. 21, 2004), available at http://nhlp.org/html/sec8/voucher_funding/09.%20Letter%20from%20Russell%20to%20Liben%2010212004.pdf. There is additional information available on the PRRAC Web site regarding portability at http://www.prrac.org/full_text.php?text_id=1025&item_id=9103&newsletter_id=0&header=Current%20Projects.

Court Recognizes Domestic Violence Survivor's Fair Housing Challenge to Eviction

by Danielle Pelfrey Duryea*

Hailed by the ACLU Women's Rights Project as "the first case ever to hold that the Fair Housing Act prohibits discrimination against domestic violence victims," *Bouley v. Young-Sabourin*¹ represents a significant advance for the housing rights of domestic violence survivors.² In a March 2005 decision denying cross-motions for summary judgment, the United States District Court for the District of Vermont recognized domestic violence survivor Quinn Bouley's claim of disparate treatment as a *prima facie* case of sex discrimination under the Fair Housing Act. Bouley settled favorably with her landlord in April before the case could go to trial.

Background: Domestic Violence, Women and Housing

United States Department of Justice statistics indicate that intimate partners inflicted 20% of all non-fatal violence against women in 2001 and about one-third of all homicides of women in 2000.³ Because about 85% of all intimate partner violence in the United States is committed against women, the far-reaching effects of domestic violence have a dramatically disproportionate effect on women.⁴ Although non-fatal intimate partner violence against women is down by about one-half since 1993,⁵ domestic violence remains a major reason for homelessness across the United States.⁶ More than a third of U.S. cities report domestic violence as a primary cause of

homelessness.⁷ Depending on their region of residence, between 22% and 57% of homeless women report that domestic violence was the precipitating cause of their homelessness.⁸ Whether they face losing shelter when they flee intrafamily violence or when they are evicted as a direct result of the violence, women living in poverty are at special risk.

Domestic violence survivors face a variety of forms of housing discrimination in admissions and occupancy, as well as in evictions.⁹ Women who have been complaining victims in a criminal proceeding may find themselves "screened out" of housing opportunities when their names appear in background checks. Mandatory arrest policies and courts that issue mutual protection orders may even result in criminal record checks that make victims appear to be perpetrators. A survivor often may not have a solid work or credit history or landlord references because the abuser has prevented her from holding a steady job, maintaining financial independence, or developing interpersonal relationships with others.

As a condition of tenancy, landlords sometimes demand that no violence occur in the future, a condition not imposed on other residents. Where a victim is living with her abuser but only the abuser's name is listed on the lease, authorities may assert that they cannot evict the perpetrator and allow the victim to continue her occupancy. A victim may be held financially accountable for her abuser's damage to a rental property. And anecdotal evidence from advocates in the field suggests that sex stereotype-based animus underlies much discrimination against domestic violence victims in admissions, occupancy and evictions.

Landlord Tried to Evict Within Seventy-Two Hours of Violent Domestic Incident

Jacqueline Young-Sabourin owns one three-unit private rental property in St. Albans, Vermont, that includes two rental apartments and a bungalow inhabited by her daughter-in-law and apartment manager, Windee Young. Three months after Quinn Bouley and her family rented one of the apartments, Bouley's husband attacked her at their home. Daniel Swedo was arrested the night of the incident and eventually pled guilty to several criminal charges related to the attack, including assault. Bouley applied for a restraining order against her husband on the night of the attack, and he never returned to the apartment.

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¹No. Civ.1:03 CV 320, 2005 WL 950632 (D. Vt. Mar. 10, 2005).

²Press Release, American Civil Liberties Union, Federal Law Protects Battered Women From Housing Discrimination, Court Rules (April 1, 2005), available at <http://www.aclu.org/WomensRights/WomensRights.cfm?ID=17883&c=173>. The decision and ACLU *amicus* brief are available at the same location.

³CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 1993-2001 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. The comparable figures for men victimized by intimate partners were 3% for nonfatal violence and 4% for murders. *Id.*

⁴*See id.* These statistics are for 2001.

⁵*Id.*

⁶Emily J. Martin and Naomi S. Stern, *Domestic Violence and Public and Subsidized Housing: Addressing the Needs of Battered Tenants Through Local Housing Policy*, CLEARINGHOUSE REV. 551, 552 (2005).

⁷*Id.* (citing 2003 survey).

⁸*Id.* (citing eleven national and regional studies).

⁹Telephone Interview with Naomi Stern, Staff Attorney, National Law Center on Homelessness and Poverty (June 22, 2005); Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 377, 384-85 (2003); Telephone Interview with Emily Martin, Staff Attorney, ACLU Women's Rights Project (June 20, 2005).

Apartment manager Young, on whose judgment Young-Sabourin relied, however, had already decided that Bouley “didn’t fit the role of a victim of domestic violence.” Not only had she not been in shock and was still able to function following the incident, observed Young, but she had also expressed anger toward her husband and showed no interest in reconciling with him. On deposition, Young explained further that she was also dubious of Bouley’s abuse claim because she had seen Bouley with a male visitor not long after the attack, and because Bouley had received attention from men in her workplace that the apartment manager found inappropriate.

The day after the attack, landlord Young-Sabourin made a list of reasons to evict Bouley that included the domestic violence incident. She then went to visit Bouley, engaging her in a conversation about the incident and about Bouley’s religious faith. The conversation apparently ended with Bouley angrily refusing to discuss religion with her landlord. Later that day, less than seventy-two hours after Bouley’s husband criminally attacked her, the landlord sent a letter giving Bouley thirty days’ notice to leave the apartment. The letter quoted a lease provision that read:

Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous, or any other manner offensive to any other occupant of the building.

Young-Sabourin’s letter further cited Bouley’s angry response to her religious inquiries as proof that “the violence that has been happening in your unit would continue.”

Survivor Points to Gender Stereotypes

Represented by Vermont Legal Aid, Bouley argued to the federal court that Young-Sabourin initiated eviction proceedings against her on the basis of her sex and her religion in violation of the Fair Housing Act. Initially, Bouley brought her sex discrimination claim under a disparate impact theory. Because women represent the great majority of domestic violence victims, the complaint alleged that discriminating against domestic violence victims on the basis of their victim status disproportionately affects women in violation of the Fair Housing Act. Cases such as *Alvera v. The C.B.M. Group* did much to establish a disparate impact theory for domestic violence victims threatened with eviction as a result of their abuser’s actions.¹⁰ Alvera, a plaintiff whose situation was similar to Bouley’s, argued that the defendant management company’s “zero-tolerance” policy against household violence—which had the effect of displacing both the perpetrator and the

victim of domestic violence—amounted to prohibited sex discrimination because the victims of domestic violence are disproportionately women. This approach has been sanctioned, too, by the Department of Housing and Urban Development’s Fair Housing and Equal Opportunity office, which issued a charge of discrimination against Alvera’s landlord on this basis. The *Alvera* case subsequently settled without judicial resolution of the Fair Housing Act claim’s validity.

As discovery in *Bouley v. Young-Sabourin* proceeded, however, Vermont Legal Aid attorney Meris Bergquist, working with the ACLU Women’s Rights Project, realized that there was more than disparate impact involved in the case. The landlord and apartment manager’s depositions clearly revealed that they believed that Bouley did not behave “normal[ly]” for a woman who had been victimized” and that she and her husband were equally responsible for the incident that led to his arrest and subsequent guilty plea. So Bouley’s cross-motion for summary judgment, supported by the ACLU’s *amicus curiae* brief, advanced a novel approach to domestic violence survivors’ sex discrimination claims under the Fair Housing Act: disparate treatment rather than disparate impact.

Under the disparate treatment theory, modeled on and analogous to the well-developed case law on employment discrimination under Title VII, housing discrimination against a woman because she fails to conform to sex or gender stereotypes violates the Fair Housing Act. Just as an employee cannot be denied a promotion because she is “too aggressive for a woman,” then, a tenant cannot be evicted because she fails to conform to a stereotype of appropriate feminine behavior for a victim of domestic violence.¹¹ According to an expert in the field of female abuse and victimization who submitted a declaration on behalf of Bouley, Young-Sabourin acted on three gender stereotypes:

1. that domestic violence can be provoked and that sometimes, as in this case, both parties are responsible;
2. that victims do not get angry and therefore that Bouley’s anger both at her husband and at Young-Sabourin was proof that she had violent potential; and
3. that men who appear “upright” and “honorable,” as Young-Sabourin perceived Daniel Swedo to be, do not beat their wives.¹²

Because Bouley’s behavior after the violent incident was not consistent with the landlord and apartment manager’s gender-stereotyped expectations of how a domestic violence victim “should” behave, and because they held a positive view of her husband, Bouley’s motion argued, they sought to evict her.

¹⁰*Alvera v. The C.B.M. Group, Inc.*, Civil No. 01-857-PA (D. Or. October 2001); see *Domestic Abuse Victim Settles Discriminatory Eviction Claim Favorably*, 31 HOUS. L. BULL. 265, 265 (2001).

¹¹See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹²See Pl.’s Cross Mot. for Summary Judgment at 10 (citing Decl. of Sharon Lamb, Ed.D.).

Court Denies Summary Judgment and Allows Fair Housing Claim to Proceed

Denying Bouley and Young-Sabourin's cross-motions for summary judgment, Judge J. Garvan Murtha stated without qualification that "[t]he plaintiff has demonstrated a prima facie case" of sex discrimination under the Fair Housing Act.¹³ Under the *McDonnell Douglas*¹⁴ burden-shifting framework, the timing of the eviction, combined with reasonable inferences a jury could draw from the eviction notice, were held to return responsibility to the landlord to assert a legitimate, non-discriminatory reason for the decision to evict Bouley. Having asserted no such reason, Young-Sabourin was not entitled to summary judgment.

The Court's brief discussion did not explicitly address the disparate treatment and disparate impact arguments. Although the Second Circuit has played a significant role in developing the disparate treatment law under Title VII, and even though that circuit has "pointedly accepted" the analogical relationship between Title VII and Fair Housing Act interpretation,¹⁵ the Court declined to elaborate on its reasoning, naming as authority for its determination a single case in which both disparate impact and disparate treatment were cited in opposition to a police policy treating domestic and non-domestic disputes differently.¹⁶ The ACLU *amicus* brief had discussed this case at some length, however, as judicial recognition that "treatment of domestic violence victims in a 'stereotypic and predefined place' within the family constitute[s] sex discrimination."¹⁷

More significantly, the fact that the Court applied the *McDonnell Douglas* test implies that it had disparate treatment, rather than disparate impact, in mind, as the *McDonnell Douglas* applies only to disparate treatment claims.

The Court also denied, though it did not discuss, Bouley's cross-motion for summary judgment.¹⁸

¹³Bouley v. Young-Sabourin, No. Civ.1:03 CV 320, 2005 WL 950632 at *5 (D. Vt. Mar. 10, 2005).

¹⁴McDonnell Douglas Corp. v. Green, 411 U.S. 7952 (1973).

¹⁵ACLU Women's Rights Project, Mem. of Law as *Amicus Curiae* in Supp. of Pl.'s Mot. for and Opp'n to Summary Judgment at 11 (quoting Huntington Branch NAACP v. Town of Huntington, 844 F.2d 1096 (2d. Cir. 1988), *aff'd* 488 U.S. 15 (1988)); *see also* Pl.'s Cross Mot. for Summary Judgment at 7.

¹⁶Smith v. City of Elyria, 857 F. Supp. 1203, 1212-13 (N.D. Ohio 1994).

¹⁷ACLU, Mem. of Law as *Amicus Curiae* in Supp. of Pl.'s Mot. for and Opp'n to Summary Judgment at 4 (quoting *Elyria*, 857 F. Supp. at 1212).

¹⁸Presumably the Court did not accept her argument that, under the *Price Waterhouse* analysis of "mixed motives"—i.e., where there may have been both legitimate and illegitimate reasons for the adverse action—the *McDonnell Douglas* prima facie case concept did not apply. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (finding firm liable where both legitimate and sex-discriminatory factors motivated its denial of partnership to a woman). Under this analysis, Bouley argued, she would have been entitled to summary judgment if the Court accepted: (1) that Bouley had established that gender was a motivating factor in the attempt to evict her; and (2) that Young-Sabourin would be unable to prove by a

Advocates' Best Lessons

The housing issues faced by domestic violence survivors have sometimes "fallen between the stools," according to both Emily Martin of the ACLU and Naomi Stern of the National Law Center on Homelessness and Poverty.¹⁹ Housing advocates have not always recognized the special plight of women threatened with homelessness as a result of intrafamily violence, and the women's rights community has sometimes misunderstood the nature of housing legal issues. And there has been little communication or cooperation between housing and domestic violence advocates. As a result, the law is underdeveloped. As Martin emphasizes, however, this is a "winnable fight": once educated about the problem, most law- and policymakers are sympathetic.

There has been little communication or cooperation between housing and domestic violence advocates. As a result, the law is underdeveloped.

Although both Stern and Martin lament the lack of detailed discussion in the Court's decision, both are optimistic about the future of the disparate treatment theory of sex discrimination against intrafamily violence survivors. "This [decision] is the clearest law we have yet," says Martin, while Stern characterizes sex discrimination under the Fair Housing Act as a "very powerful" theory that should be vigorously pursued to fill out the law in this area. Celebrating the *Bouley* litigation's partnership between a national advocacy organization and a zealous legal services attorney, both Stern and Martin emphasize the need for local advocates to think of domestic violence victims' housing issues as potential civil rights claims.

A variety of factors will suggest the best strategy for each case. Despite the fact that the disparate impact theory emerged first, Stern suggests that disparate treatment claims may ultimately prove more acceptable to courts than disparate impact claims, given general skepticism regarding the latter. Although both Stern and Martin emphasize that large public housing authorities are not necessarily less apt to discriminate against domestic violence victims on the basis of gender stereotypes, the disparate treatment theory may be better suited to cases involving non-institutional landlords. Martin notes that intent to discriminate and reliance on gender-stereotyped thinking may be easier to prove in smaller, less bureaucratic settings, such as in

preponderance of the evidence that she would have taken the same action for nondiscriminatory reasons alone.

¹⁹See Telephone interviews, *supra* note 9.

cases against private and tenant-based Section 8 landlords as well as small public housing authorities.

The ACLU's Lenora Lapidus has suggested that, in addition to Fair Housing Act claims, a domestic violence survivor living in public or other assisted housing may be able to bring constitutional claims.²⁰ Where seeking police assistance or obtaining a protective order has led to eviction, the survivor may be able to claim that public housing authorities chill and/or punish her exercise of the First Amendment right to petition the government. If intentional sex discrimination can be established, the survivor may have an equal protection claim under the Fourteenth Amendment. And, given that claims under the Equal Protection Clause require proof of intentional discrimination, notes Martin, rather than just disparate impact, a gender stereotype argument like the one made in *Bouley* may be especially helpful for constitutional claims.

Not only litigation, but also legislative and administrative advocacy, are essential tools for taming what Stern calls housing's "wasteland of sex discrimination." Responding to litigation and advocacy by a coalition of national civil rights, domestic violence and housing groups, the 2003 edition of HUD's Public Housing Occupancy Guidebook included new guidance that encouraged public housing authorities to prefer domestic violence victims in admissions and transfers, and to avoid evicting and terminating survivors for the actions of their abusers.²¹

National legislation to protect the housing rights of abuse survivors in public and other federally assisted housing is now pending before Congress.²² In addition to such efforts at the federal level, advocates are working to enact state legislation to prohibit housing discrimination against all domestic violence victims, not just those living in assisted housing. Rhode Island and Washington already have such statutes in force.²³ Wisconsin prohibits landlords from determining that someone's tenancy should be terminated on the basis that it poses a direct threat to others' safety or property on the basis of the tenant's domestic abuse status,²⁴ while Arizona invalidates any lease provisions waiving or limiting a tenant's right to call for emergency assistance in a domestic violence situation.²⁵ In spring 2005, Colorado passed legislation that provides a variety of new protections for domestic violence survivors (see box for further detail).²⁶ In New

Mexico, intimate partner violence is recognized as a defense in eviction actions as well.²⁷

Conclusion

"[W]hether or not someone subject to domestic violence is considered to be a 'victim' is intimately connected to ... 'good girl/bad girl' stereotypes."²⁸ The decision in *Bouley* represents a new judicial recognition that such stereotypes can result in violations of core fair housing rights. To develop the sex discrimination law in housing to match its power in the area of employment, local advocates must look to the civil rights dimensions of their work with domestic violence survivors facing housing crises. ■

²⁷N.M. Stat. § 47-8-33(J) (2004).

²⁸Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 22 (1998) (quoted in ACLU, Mem. of Law as *Amicus Curiae* in Supp. of Pl.'s Mot. for and Opp'n to Summary Judgment at 5).

New Colorado Law Protects Housing Rights of Domestic Violence Survivors

Colorado has previously recognized domestic victimization as an eviction defense, but a new law, 2005 Colo. HB 1169 (codified at COLO. REV. STAT. §§ 13-40-104, 13-40-107.5(5), 38-12-402), offers affirmative protections to survivors of domestic violence and abuse. Legislation signed by Colorado governor Bill Owens on April 27 now provides that a domestic violence victim, as documented by police report or protective order, cannot be held liable for unlawful detention of real property as a result of abuse. It further establishes that abusive behavior cannot be considered a substantial violation of a lease by the victim of that abuse, and preserves the landlord's right to evict the abuser. Finally, the new law permits a victim to break his or her lease on written notice to the landlord.

The new law went into effect on July 1.

²⁰See Lapidus, *supra* note 9, at 383.

²¹See HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 215-21 (2003) (Chapter 19: Domestic Violence).

²²See *Violence Against Women Act Reauthorization Includes Significant New Housing Provisions* in this issue of the *Housing Law Bulletin*.

²³R.I. GEN. LAWS § 34-37-2.4 (2005); WASH. REV. CODE §§ 58.18.580, 59.18.352 (2005).

²⁴Wis. Stat. § 106.50(5m)(d) (2004).

²⁵A.R.S. § 33-1315 (2004).

²⁶COLO. HB. 1169 (2005).

Violence Against Women Act Reauthorization Introduced

by Danielle Pelfrey Duryea*

On June 8, declaring that the “backbone of our country’s fight to end domestic violence and sexual assault [must not] lapse or become buried in partisan bickering,” Senator Joseph Biden (D-DE) introduced legislation to reauthorize the Violence Against Women Act (VAWA).¹ VAWA will expire at the end of September 2005 if not reauthorized.

Coauthored by Senators Arlen Specter (R-PA) and Orrin Hatch (R-UT), Senate Bill 1197 would add to the landmark legislation a new subtitle devoted to housing issues. It would, further, appropriate \$150 million over five years to fund collaborative efforts between domestic violence organizations and housing providers, programs to combat family violence in public, Indian and other federally assisted housing, and enhancements to transitional housing resources for survivors of domestic violence. While advocates for homeless people and domestic violence survivors applaud the proposal, however, some housing industry organizations are wary.

Background: The Violence Against Women Acts of 1994 and 2000

VAWA was originally passed in 1994 in recognition of epidemic domestic and sexual violence against women.² The original VAWA legislation provided grants and other financial assistance for crime prevention programs targeted at violence against women, enforcement of domestic violence and child abuse laws in rural areas, battered women’s shelters, community education programs, services to sexual assault victims, and research on violence against women. It also strengthened federal penalties for sex offenders, established the National Domestic Violence Hotline, and altered evidentiary rules regarding sexual history in civil and criminal cases.

Despite the Supreme Court rejection of its federal civil remedy for victims of gender-motivated violence,³ VAWA has survived. Reauthorization in 2000⁴ and amendments in 2003⁵ expanded the range of violence against women

covered by the law to include dating violence and stalking as well as domestic and sexual violence, and added provisions to enhance protections for battered immigrant women, law enforcement capabilities related to violence against women, education efforts on domestic and sexual violence, and services to victims, including grants to support transitional housing services for survivors of gender-based violence.

The Violence Against Women Act of 2005: New Housing Provisions

The proposed VAWA reauthorization adds many innovations to the developments of the last decade, including a proposed new section that systematically addresses the near- and long-term housing issues faced by victims of violence. Significant Congressional findings on the issue include:

- **a strong link between domestic violence and homelessness:** 92% of homeless women have experienced severe physical or sexual abuse;
- **an existing problem of housing discrimination** against survivors of domestic violence: 150 documented eviction cases and 100 denials of housing based on domestic violence victim status in the last year alone;⁶
- **a severe lack of emergency, transitional and long-term housing options** for domestic violence victims and their children that can result in victims returning to their abusers;
- **barriers to housing access as a direct result of domestic abuse**, including lack of income, credit history and landlord references; and
- **challenges faced especially by victims of domestic violence in rural areas**, including geographical isolation, extra difficulty ensuring confidentiality, and decreased access to resources such as jobs, child care and education.

The proposed housing provisions emphasize public-private and government-advocate collaboration and would make millions of new dollars available to public housing agencies (PHAs), owners and managers of other assisted housing, and victim advocacy organizations. Title VI, Housing Opportunities and Safety for Battered Women and Children, would:

- establish \$10 million in new annual grants for collaborative projects providing safe, affordable, non-time-limited housing for victims of domestic and sexual violence, including direct assistance to families as well as renovation, maintenance, and new construction of

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¹151 Cong. Rec. S6229 (2005).

²Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

³United States v. Morrison, 529 U.S. 598 (2000) (finding that Congress lacked Commerce Clause and Fourteenth Amendment authority to enact § 13981 of the legislation).

⁴Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁵Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁶See *Court Recognizes Domestic Violence Survivor’s Fair Housing Challenge to Eviction*, also in this issue of *Housing Law Bulletin*.

affordable units, with priority given to linguistically and culturally specific services;

- expand an existing VAWA grant program to help survivors transition from unsafe and unstable situations to secure, permanent housing;
- require PHAs and Indian housing authorities to incorporate victims' housing needs in their five-year plans and to report programs in place that prevent violence against women and provide services to victims of violence;
- amend the public housing and Section 8 voucher programs to prevent victims of domestic and sexual violence from being evicted from or denied access to public and assisted housing on the basis of their victim status or their abusers' criminal activity;
- initiate \$10 million in new annual grants to owners and managers of public and assisted housing to prevent victims of domestic and sexual violence from losing benefits or being denied opportunities to live in public and assisted housing;
- require localities to incorporate the needs of victims of domestic and sexual violence into their five-year affordable housing strategic planning; and
- protect the confidentiality of survivors within the homeless services system.

Advocate proposals that were not incorporated in the final proposed housing title include a provision that would have prohibited all housing discrimination on the basis of domestic violence victim status. Although not proposed as an amendment to the Fair Housing Act, this prohibition would have been analogous to Fair Housing Act protections against discrimination on the basis of race, color, religion, sex, national origin, familial status or disability in all housing. Among the states, Rhode Island and Washington currently have laws that prohibit landlords from discriminating against tenants who have suffered domestic violence.⁷ Other states protect tenants from discrimination on the basis of their victim status in some but not all conditions of tenancy.⁸

In addition to the new Title VI, the Senate bill includes provisions to continue successful VAWA-based programs as well as to strengthen law enforcement and legal representation for victims of violence against women, prohibit

cyberstalking, enhance public health and workplace responses to violence against women, address the specific needs of Native American women, and improve protections for battered and trafficked immigrant women.

*Eleven housing industry organizations
have objected to parts of the
VAWA reauthorization bill.*

Among the organizations involved in the drafting of the Senate bill were the American Bar Association, the National District Attorneys Association, the National Council on Family and Juvenile Court Judges, the National Association of Chiefs of Police, the National Sheriffs' Association, the National Coalition Against Domestic Violence, the National Network to End Domestic Violence, the Family Violence Prevention Fund, Legal Momentum (formerly National Organization for Women Legal Defense Fund), the National Alliance to End Sexual Violence, and the National Center for Victims of Crime.

Housing Industry Objects to Some Provisions

Eleven housing industry organizations—including the Public Housing Authorities Directors Association, the Council of Large Public Housing Authorities, the National Association of Housing and Redevelopment Officials, and the National Association of Realtors—have objected to parts of the VAWA reauthorization bill. Chief among their concerns are the bill's proposed changes to occupancy and evictions procedures, as well as its additional planning and reporting requirements.⁹

The industry coalition objects to the proposed VAWA reauthorization's implicit limits on PHA and property owner authority to engage in "one-strike" eviction and termination policies, which were upheld in the 2002 U.S. Supreme Court decision in *HUD v. Rucker*.¹⁰ Under HUD rules approved in *Rucker*, a public housing tenancy can be terminated if any member of the tenant's household or any guest engages—even once—in drug-related or other criminal conduct on or off the premises.¹¹ Public and subsidized housing tenants can be evicted even if they were

⁷Both states forbid discrimination against tenants and rental applicants solely on the basis of their status as victims of domestic violence. R.I. GEN. LAWS § 34-37-2.4 (2005); WASH. REV. CODE § 59.18.580 (2005). Washington state law also permits tenants who inform their landlords that another tenant has assaulted them to terminate their rental agreements without further obligation if the landlord does not evict the perpetrating tenant. WASH. REV. CODE § 59.18.575 (2005).

⁸See *Federal Court Recognizes Fair Housing Act Claim*, *supra* note 6, for discussion of other state laws related to the housing rights of domestic violence survivors.

⁹Public Housing Authorities Directors Association, et al., Letter to Members of the Senate Judiciary and Banking, Housing and Urban Affairs Committees, available at <http://www.nahro.org/members/news/2005/vawa.pdf>.

¹⁰*United States Dep't. of Housing & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

¹¹See 42 U.S.C. § 1437d(1)(6) (2005). For analysis of the aftermath of the *Rucker* decision, see, e.g., NHLP, *One-Strike Eviction Decisions: Two Years After Rucker*, 34 HOUS. L. BULL. 143 (July 2004).

unaware of the illegal activity or even if they had taken affirmative steps to prevent the family member or guest's criminal conduct.¹² Industry organizations now argue that the bill's proposed changes to occupancy and evictions procedures could inadvertently protect household members and guests engaged in criminal activity where a tenant has claimed to be a domestic violence victim. Responding that it is perverse to evict victims on the basis of their abusers' criminal violence, domestic violence advocates believe that the bill preserves landlords' right to evict anyone engaging in criminal conduct, including abusers.

The industry organizations characterize the bill's substantive protections for Section 8 and public housing residents as in direct conflict with existing law and regulations. In addition, they claim that new federal law governing evictions could dramatically change protections for renters and owners alike in some states and localities. Advocates for the bill see no such conflicts.

Citing their extensive experience with housing assistance, PHAs also wish to be independently eligible to apply for grants to develop long-term housing for survivors of domestic violence, dating violence, sexual assault, and stalking. The current proposal permits them to be partners in coalitions seeking these grants, but does not require applicant coalitions to include a PHA.

Finally, the industry coalition claims that the bill's new reporting and planning requirements would thwart years of efforts to simplify PHA planning and reporting. The new requirements are particularly unnecessary, they claim, because many PHAs have already enacted policies specifically designed to protect victims of domestic violence from eviction and to enhance victim safety. Advocates for victims of violence respond that such self-reported, piecemeal, and uncoordinated efforts are simply insufficient.

Next Steps

The September 30 expiration date for the current Violence Against Women Act should spur quick congressional action on this bill and its companion House legislation (H.R. 2876 and H.R. 3171). The Senate bill, with thirty-two cosponsors, has been referred to that body's Judiciary Committee. Similar legislation, introduced by Representative Mark Green (R-WI) on June 14, 2005, with fifty-five cosponsors, and by Representative Zoe Lofgren (D-CA) on June 30, 2005, with 114 cosponsors, has been referred to the House Judiciary, Education and the Workforce, Energy and Commerce, Financial Services, Agriculture, and Ways and Means Committees. Future issues of the *Bulletin* will cover the bills' progress. ■

¹²See generally *Rucker*, 535 U.S. 125 (2002). Some lower courts have proven disinclined to approve broad uses of the *Rucker* "one-strike" power and have seemed concerned both with the severity of the crime in question and with whether the tenant was aware of the criminal conduct. See generally NHLP, *One-Strike Eviction Decisions*, *supra* note 11.

New GSE Bill Would Create Affordable Housing Funds

by Anthony Ha*

The Federal Housing Finance Reform Act of 2005, H.R. 1461, 109th Cong. (2005), would establish new affordable housing funds at the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac. The purpose of the funds would be to increase homeownership and rental housing for extremely low- and very low-income families.

Each GSE would dedicate 5% of its after-tax profits to its affordable housing fund. The initial estimate is that each of the GSEs would provide \$400-\$600 million to the funds in the first years and that the contribution would eventually reach \$1 billion annually.¹

Although the legislation is still in its early stages, inclusion of the funds provisions represents tremendous progress for affordable housing production.

Background

H.R. 1461 was introduced in the House Financial Services Committee by Chairman Michael Oxley. Its primary purpose is to increase federal regulation and oversight of the two GSEs. As introduced, the bill did not include any references to affordable housing funds, but during the committee's mark up of H.R. 1461, Rep. Oxley offered an amendment to establish the affordable housing funds.²

This followed a similar amendment proposed last year in the 108th Congress in the Senate Banking Committee by Senator Jack Reed. That amendment, which would have required Fannie Mae and Freddie Mac to set aside 5% of their pretax profits to support the financing and funding of affordable housing, was attached to a GSE regulatory bill. That bill was voted out of committee on a partisan vote but never received action on the Senate floor.³

The House Financial Services Committee has approved H.R. 1461 by a vote of 65-5; the Senate Banking Committee is expected to mark up similar GSE legislation shortly.

However, a House vote on the bill has been delayed until at least mid-September to allow a second committee to review the legislation. This delay is particularly worrisome because some are likely to use the additional time to muster opposition to the bill.

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¹Letter from Sheila Crowley, President, NLIHC, to National Housing Trust Fund Campaign Partners (May 26, 2005) (re Affordable Housing Fund).

²The bill, as introduced, is available at <http://thomas.loc.gov>. Rep. Oxley's amendment is available at <http://financialservices.house.gov> (follow "Legislation" link).

³For more information about Sen. Reed's amendment, see <http://www.nlihc.org/advocates/gses.htm>.

Highlights of the Affordable Housing Fund

As amended, Section 128 of the Federal Housing Finance Reform Act of 2005 (H.R. 1461) would strike the text of Sections 1337 and 1338⁴ of the Housing and Community Development Act of 1992 and insert new text establishing the affordable housing funds.

Allocation of Amounts by GSEs

In the funds' first year, both GSEs would allocate 3.5% of their after-tax income for the preceding year.⁵ Every year thereafter, both GSEs would allocate 5% of their after-tax income.

A GSE would not have to make allocations to its fund unless the GSE generated after-tax income and is classified by the Director of the Federal Housing Finance Agency as adequately capitalized.

For these purposes, after-tax income is defined as the amount reported to the Securities and Exchange Commission. If no filing were made with the Securities and Exchange Commission, the Director would determine after-tax income based on the GSE's income tax filings.

Eligible Activities

Money from the funds will be eligible to be used only for: (1) the production, preservation and rehabilitation of rental housing; (2) the production, preservation and rehabilitation of housing for homeownership, including down payment assistance, closing cost assistance and assistance for interest rate buy-downs; and (3) leveraged grants for the development, preservation, rehabilitation or purchase of affordable housing.⁶ The amounts provided from the funds could be used for the benefit only of targeted families. In the case of homeownership uses, participating families would also have to be first-time homebuyers.

Limitations on Use

In each year, at least 10% of money from the affordable housing funds would be required to be used for homeownership and leveraged grants, and not more than 12.5% of funds could be used for leveraged grants.⁷

Any amounts allocated to the affordable housing funds would have to be used or committed for use within two years of the allocation.

The Director of the Federal Housing Finance Agency would be required to issue regulations prohibiting the funds from being used to cover administrative costs except for maintaining and operating the funds. The monies used

for such administrative purposes could not be counted toward meeting a GSE's affordable housing goals.

Consistency of Use with Housing Needs

The bill would require each GSE to submit a periodic report to the Director of the Federal Housing Finance Agency and the affordable housing board (described below). These reports would be made available to the public.⁸ If the board determines that an activity funded by an affordable housing fund is not consistent with the director's selection criteria (described below), the GSE would be required to replenish the fund by the amount used.

Affordable Housing Board

The affordable housing board would be required to meet at least quarterly to determine housing needs for targeted families, to advise the director with respect to the establishment of selection criteria and the operation of the funds, and to review reports submitted by the GSEs.⁹

The Director of the Federal Housing Finance Agency would appoint a board of seven, nine, or eleven persons. This board would be required to include the director or the director's designee, the Secretaries of HUD and USDA or their designees, two persons from the for-profit or business world involved in providing or promoting extremely low- and very low-income affordable housing, and two persons from nonprofit organizations involved in providing or promoting extremely low- and very low-income affordable housing.

Regulations

The Director of the Federal Housing Finance Agency would be required to issue regulations that include the authority for the director to audit the GSE's activities, a requirement that the director ensure that each affordable housing fund is audited not less than annually, and requirements for a process for application to, and selection by, a GSE for activities to be funded.¹⁰ The bill states that selection shall be based upon specific criteria, and must be prioritized based on greatest impact, geographic diversity, and the ability to obligate amounts and undertake activities in a timely manner. In the case of rental housing projects, prioritization is also to be based on affordability of rents and the duration of restrictions.

Discussion

The *Wall Street Journal* editorial board was quick to attack the affordable housing funds, describing them as

⁴These sections, which established transitional housing goals for Fannie Mae and Freddie Mac, are codified at 12 U.S.C. § 4562 note.

⁵H.R. 1461, 109th Cong., § 128 (2005) (would create new Section 1337(2)(b) of the Housing and Community Development Act of 1992).

⁶H.R. 1461, 109th Cong., § 128 (2005) (would create new § 1337(2)(d) of the Housing and Community Development Act of 1992).

⁷H.R. 1461, 109th Cong., § 128 (2005) (would create new § 1337(2)(e) of the Housing and Community Development Act of 1992).

⁸H.R. 1461, 109th Cong., § 128 (2005) (would create new § 1337(2)(f) of the Housing and Community Development Act of 1992).

⁹H.R. 1461, 109th Cong., § 128 (2005) (would create new § 1337(2)(i) of the Housing and Community Development Act of 1992).

¹⁰H.R. 1461, 109th Cong., § 128 (2005) (would create new Section 1337(2)(j) of the Housing and Community Development Act of 1992).

“Mr. Oxley’s slush fund” and a candidate for “worst Congressional legislation ever.”¹¹ An editorial published in the *Journal* argued that “siphoning profits from Fan and Fred [sic] would make it even harder to impose sensible, free-market reforms on the companies.”¹²

The *New York Times*, on the other hand, published an editorial supporting the funds. The *Times* acknowledged that taking profits from Fannie Mae and Freddie Mac could potentially “prompt them to become even more aggressive in the mortgage market, putting pressure on banks that already believe the two companies are too domineering,” but noted that “money to house the poor, and to promote home ownership in depressed areas, has to come from somewhere.”¹³

H.R. 1461, if enacted, could create a substantial new source of funding for affordable housing programs. The National Low Income Housing Coalition has expressed strong support for the bill, but NLIHC President Sheila Crowley also noted that the bill fails to specify how the money should be divided between extremely low- and very low-income groups.¹⁴

Nationwide, there is a shortage of at least 1.6 million rental housing units that extremely low-income households can afford.¹⁵ There is a surplus of rental housing units that are affordable for every other income group, including very low-income households.¹⁶ Sixty-five percent of extremely low-income renter households are renting units that they cannot afford, which means they are occupying units that very low-income and low-income households could afford if they were available.¹⁷

Crowley argues, “If we expand the supply of rental housing that extremely low-income households can afford, we will not only help those with the most serious problems, but we will free up units that very-low income households can afford as well.”¹⁸

Update: The Senate version of the GSE reform bill, S. 190, passed by the Banking, Housing, and Urban Affairs Committee on July 28 does not include affordable housing fund provisions. See Press Release, National Low Income Housing Coalition, Senate Banking Committee Misses Chance On Affordable Housing, Members Pledge to Reach Agreement When Bill Goes to the Floor (July 28, 2005), available at <http://www.nhtf.org/gseaseantebankingpr.asp>. ■

¹¹Mr. Oxley’s Slush Fund, Editorial, WALL ST. J., June 14, 2005.

¹²*Id.*

¹³The Affordable-Housing Crisis, Editorial, N.Y. TIMES, June 16, 2005.

¹⁴Sheila Crowley, NLIHC, *Point of View*, MEMO TO MEMBERS, June 10, 2005, available at <http://www.nlihc.org/mtm/mtm10-23.html#1>.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

Recent Cases

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

Attorney Fees; HUD-Held Mortgages—Prepayment

Brighton Vill. Nominee Trust v. Mayshev, 2005 WL 1513116 (D. Mass. June 23, 2005). Plaintiff residents of a HUD-held mortgage property moved for an award of attorney fees pursuant to 28 U.S.C. § 2412(d)(1)(A) on their successful claim against Defendant Department of Housing and Urban Development for failure to comply with Section 250 of the National Housing Act, 12 U.S.C. § 1715z-15(a). The district court granted Plaintiffs’ motion, concluding that Defendant’s position was not substantially justified. For more on this case, see NHLP, *Persist[le]nt Tenants Win Challenge to Wrongful Mortgage Payment*, 34 HOUS. L. BULL. 105, 120 (2004).

Federal Constitutional Law—Search and Seizure; Federal Courts—State Actors; Public Housing

United States v. Couch, 2005 WL 1607451 (N.D.N.Y. July 11, 2005). A criminal defendant in a federal drug prosecution moved to suppress, pursuant to the Fourth Amendment, various statements and evidence obtained during an inspection of a public housing unit operated by the Schenectady Municipal Housing Association (SMHA) leased by Defendant’s sister and in which Defendant was staying. The inspection was conducted pursuant to the terms of the lease agreement for the unit and 24 C.F.R. § 966.4(j) by two off-duty police officers employed by SMHA, one uniformed sheriff’s deputy not employed by SMHA, and a dog from the canine unit of the local sheriff’s office. In granting Defendant’s motion, the court ruled that, while the off-duty police officers would not be considered government agents for Fourth Amendment purposes in conducting an inspection on behalf of SMHA, the uniformed deputy was clearly such an agent. The court also ruled, *inter alia*, that the lease inspection provision did not constitute consent for a warrantless search by law enforcement.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

Federal Courts—Preemption; Housing Choice Voucher Program

Rosario v. Diagonal Realty, LLC, 2005 WL 1615230 (N.Y. Sup. Ct. July 1, 2005). In this case by Housing Choice Voucher tenants against landlords who sought to withdraw from the voucher program, the trial court concluded, *inter alia*, that 1996 and 1998 amendments to the voucher provisions of the United States Housing Act did not preempt state and local rent control and housing laws requiring good cause for nonrenewal of residential leases.

Federal Courts—State Actors; Housing Choice Voucher Program

Benford v. Smith, 2005 WL 1325003 (E.D. Tenn. June 3, 2005). Pro Se Plaintiff Housing Choice tenant filed suit pursuant to 42 U.S.C. §§ 1983-1986 against Defendant landlord based on alleged sexual assault. The district court granted Defendant's motion to dismiss Plaintiff's claims pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. The district court concluded, *inter alia*, that the landlord's participation in the voucher program was "insufficient to transform [the landlord] into a state actor" for the purposes of 42 U.S.C. § 1983.

Federal Courts—Unmistakability Doctrine; Project-Based Section 8

Cuyahoga Metro. Hous. Auth. v. United States, 65 Fed. Cl. 534 (June 2, 2005). In this case by a public housing authority against the United States for breach of housing assistance payments (HAP) contract provisions regarding the determination of subsidies for project-based Section 8 properties, the court of federal claims issued a partial summary judgment order regarding damages. Central to the case was a Fiscal Year 1995 federal appropriations act, Pub. L. No. 103-327, 108 Stat. 2298, 2315 (1994), which the court had previously concluded repudiated the housing authority's rights under the HAP contract. In its prior ruling, the court, *inter alia*, rejected the government's "banner defense—that no repudiation or breach arose under the so-called unmistakability doctrine." ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in June and July of 2005. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Final Rule

70 Fed. Reg. 36,790 (June 24, 2005) Office of Inspector General (OIG) Subpoenas and Production in Response to Subpoenas or Demands of Courts or Other Authorities

Summary: On December 7, 2004, HUD published a proposed rule proposing to amend HUD's Office of Inspector General's (OIG's) regulations to provide an appellate review procedure regarding the OIG's responses to subpoenas issued to OIG employees requesting documents or testimony in legal proceedings where the OIG is not a party. HUD did not receive any public comments on the proposed rule and, therefore, is adopting the proposed rule without change.

Effective Date: July 25, 2005.

HUD Federal Register Notices

70 Fed. Reg. 32,402 (June 2, 2005) Proposed Fair Market Rents for Fiscal Year 2006 for Housing Choice Voucher, Moderate Rehabilitation Single Room Occupancy and Certain Other HUD Programs

Summary: Section 8(c)(1) of the United States Housing Act of 1937 (USHA) requires the Secretary to publish FMRs periodically, but not less than annually, adjusted to be effective on October 1 of each year. Today's notice proposes FMRs for Fiscal Year (FY) 2006. The proposed numbers would amend FMR schedules used to determine payment standard amounts for the Housing Choice

¹http://www.access.gpo.gov/su_docs.

²<http://www.hudclips.org/cgi/index.cgi>.

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

⁴<http://www.rdinit.usda.gov/regs>.

Voucher program, to determine initial renewal rents for some expiring project based Section 8 contracts, and to determine initial rents for housing assistance payment contracts in the Moderate Rehabilitation Single Room Occupancy program. Other programs may require use of FMRs for other purposes. The proposed FY 2006 FMRs in this notice differ from the final FY 2005 and previous year FMRs in that they were calculated using the revised Office of Management and Budget (OMB) area definitions that were issued in 2003. For FY 2006, HUD is using the county-based statistical areas as defined by OMB, with some modifications. The FMR estimates have been trended to April 2006, the midpoint of FY 2006.

Comments Due Date: August 1, 2005.

70 Fed. Reg. 32,470 (June 2, 2005)

Public Housing Graduation Incentive Bonus Program

Summary: The purpose of this NOFA is to invite public housing agencies (PHAs) to apply for a Graduation Incentive Bonus. The Graduation Incentive Bonus is granted to PHAs that can show their public housing residents are moving away from long-term dependence on housing assistance as evidenced by the proportion of households that leaves public housing and ends their participation in assisted housing programs during calendar year 2004 as well as the average length of stay among public housing residents. In addition, HUD wants to encourage the timely submission of tenant household data, including End of Participation records.

70 Fed. Reg. 35,968 (June 21, 2005)

Notice of Regulatory Waiver Requests Granted for the First Quarter of Calendar Year 2005

Summary: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly *Federal Register* notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous *Federal Register* notice. The purpose of this notice is to comply with the requirements of Section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on January 1, 2005, and ending on March 31, 2005.

70 Fed. Reg. 36,944 (June 27, 2005)

Notice of Submission of Proposed Information Collection to OMB; Assisted Living Conversion Program & Emergency Capital Repair Program

Summary: The proposed information collection requirement described below has been submitted to the Office of Management and Budget for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal. The Assisted Living Conversion Program provides funding for the physical costs of converting some or all of the units of an eligible multifamily development into an assisted

living facility. Funding available through the Emergency Capital Repair Program provides funds for substantial capital repairs to eligible multifamily projects with elderly tenants that are needed to rehabilitate, modernize, or retrofit aging structure, common areas, or individual dwelling units. HUD will use this information to determine an applicant's need for and capacity to administer grant funds.

Comments Due Date: July 27, 2005.

70 Fed. Reg. 38,704 (July 5, 2005)

OIG Fraud Alert: Bulletin on Detecting and Preventing Embezzlement by Section 8 Fund Handlers

Summary: This *Federal Register* notice provides important information recently issued by HUD's Office of the Inspector General on a recurring national problem in the embezzlement of Section 8 funds by housing authority officials empowered to issue Section 8 vouchers (checks) on behalf of low-income renters.

70 Fed. Reg. 41,780 (July 20, 2005)

Privacy Act of 1974; Establishment of a New System of Records

Summary: Pursuant to the provision of the Privacy Act of 1974, as amended (5 U.S.C. § 552a), the Department of Housing and Urban Development (HUD) developed the Enterprise Income Verification (EIV) system, which, heretofore, was known as the Up front Income Verification (UIV) system used by the Office of Public and Indian Housing. This system of records currently supports the administration of programs for families receiving housing assistance from HUD by public housing agencies (PHAs) that administer HUD's public housing and Section 8 tenant based rental assistance programs. EIV contains income data of Public Housing and Section 8 program participants. EIV also enables PHAs to verify participant reported income and identifies households that may have under reported their household's annual income. Eventually, EIV will be made available to administrators (owners and management agents) of the Office of Housing's rental assistance programs.

When a PHA submits family data to PIC, the EIV system will validate each household member's identity. If a household member's identity cannot be verified, EIV will (1) flag the household member record; (2) provide an error message to the PHA, informing the PHA to verify the household member's Social Security number, name, and/or date of birth; and (3) request the PHA to submit a corrected record (HUD Form 50058) into PIC. EIV will remove the unverified household member record from computer matching request files. This household member identity verification feature was established to help HUD maintain data quality and integrity and to support one of its strategic objectives to prevent fraud and abuse.

In addition, EIV will receive income data from State Wage Information Collection Agencies, federal agencies,

and one or more private vendors. This will allow PHAs and, eventually, owners and management agents to verify the income of newly admitted applicants and tenants at the time of mandatory annual and/or interim reexaminations.

Effective Date: This proposal shall become effective without further notice in thirty calendar days (August 19, 2005) unless comments are received during or before this period which would result in a contrary determination.

Comments Due Date: August 19, 2005.

**70 Fed. Reg. 41,926 (July 20, 2005)
Notice of Availability of Draft Changes to HUD Handbook 4350.3 REV-1, "Occupancy Requirements of Subsidized Multifamily Housing Programs" and Request for Comments**

Summary: This notice advises the public that HUD is revising Handbook 4350.3 REV-1, "Occupancy Requirements of Subsidized Multifamily Housing Programs." HUD will make available a copy of the draft, revised handbook on the HUD Web site and invites interested parties to comment on the revisions.

Comment Due Date: August 9, 2005.

**70 Fed. Reg. 42,150 (July 21, 2005)
Notice of Funding Availability for Fiscal Year (FY) 2004 HOPE VI Main Street Grants**

Summary: The purpose of the HOPE VI Main Street program is to provide grants to small communities to assist in the rehabilitation and new construction of affordable housing in conjunction with an existing program to revitalize an historic or traditional central business district or "Main Street Area." The objectives of the program are to: redevelop Main Street Areas; preserve historic or traditional architecture or design features in Main Street Areas; enhance economic development efforts in Main Street Areas; provide affordable housing in Main Street Areas.

**70 Fed. Reg. 43,168 (July 26, 2005)
Notice of HUD's Fiscal Year (FY) 2005 Notice of Funding Availability Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs; Youthbuild NOFA; Competition Reopening Announcement**

Summary: On March 21, 2005, HUD published its Fiscal Year (FY) 2005 Notice of Funding Availability (NOFA) Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Grant Programs. The Youthbuild Program NOFA competition, which was included in the SuperNOFA, closed on June 21, 2005. This document announces the reopening of the Youthbuild Program NOFA competition.

Dates: The new application submission date for the Youthbuild NOFA competition is August 25, 2005.

**70 Fed. Reg. 43,169 (July 26, 2005)
Notice of HUD's Fiscal Year (FY) 2005 Notice of Funding**

Availability Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs; Community Development Block Grant Program for Indian Tribes and Alaska Native Villages; Competition Reopening Announcement

Summary: On March 21, 2005, HUD published its Fiscal Year (FY) 2005 Notice of Funding Availability (NOFA) Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Grant Programs. The Community Development Block Grant Program for Indian Tribes and Alaska Native Villages (ICDBG) Program NOFA competition, which was included in the SuperNOFA, closed on June 20, 2005. This document announces the reopening of the ICDBG Program NOFA competition.

Dates: The new application submission date for the ICDBG Program is August 25, 2005.

**70 Fed. Reg. 43,170 (July 26, 2005)
Notice of HUD's Fiscal Year (FY) 2005 Notice of Funding Availability Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs; Brownfields Economic Development Initiative NOFA; Competition Reopening Announcement**

Summary: On March 21, 2005, HUD published its Fiscal Year (FY) 2005 Notice of Funding Availability (NOFA) Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Grant Programs. The Brownfields Economic Development Initiative NOFA competition, which was included in the SuperNOFA, closed on June 17, 2005. This document announces the reopening of the Brownfields Economic Development Initiative NOFA competition.

Dates: The new application submission date for the Brownfields Economic Development Initiative is August 25, 2005.

HUD PIH Notices

**Notice PIH 2005-16 (HA) (June 15, 2005)
Policy Guidance on College Student Admissions**

Summary: HUD has recently become aware that PHAs may be admitting ineligible college students to HUD's public and assisted housing programs. In order to be eligible for program assistance, an applicant must meet income eligibility requirements, as established by Section 3(a)(1) and 8(o)(4) of the U.S. Housing Act of 1937 and implementing regulations at 24 CFR 960.201 and 982.201.

Expires: June 30, 2006.

**Notice PIH 2005-17 (HA) (June 15, 2005)
Reporting Requirements for the Family Report (Form HUD-50058) to the Public Housing Information Center (PIC)**

Summary: This notice applies to Public Housing Agencies (PHAs) administering public housing (low-rent "conventional") or Housing Choice Voucher programs

(including the project-based certificate and voucher program). For PHAs that participate partially in the Moving to Work (MTW) program, this notice only applies to those PHAs' households that are not part of the MTW program. This notice does not apply to PHAs that participate fully in the MTW program and entities administering Moderate Rehabilitation Programs and Tribal Designated Housing Entities.

Expires: June 30, 2006.

**Notice PIH 2005-18 (HA) (June 15, 2005)
Calendar Year 2005 Administrative Fee Funding for the
Housing Choice Voucher Program**

Summary: This notice expands upon existing guidance provided under Paragraph 5 of Notice PIH 2005-1 (HA), Implementation of the Consolidated Appropriations Act (HR 4818 - H Rept 108-792), 2005 Funding Provisions for the Housing Choice Voucher Program and Notice PIH 2005-14 (HA), Calendar Year 2005 Administrative Fee Funding for Homeownership Voucher Program Implementation and Closings.

Expires: June 30, 2006.

**Notice PIH-2005-19 (TDHEs) (June 21, 2005)
Limiting Housing to Indian Families or Tribal Members
when using Indian Housing Block Grant (IHBG) Funds**

Summary: This notice explains when tribes or tribally designated housing entities (referred to in this notice as "Tribe") may limit housing assistance to Indian families or tribal members. This notice outlines how the requirements are different if only IHBG funds are used or if IHBG funds are leveraged or combined with funds from other sources.

Expires: June 30, 2006.

**Notice PIH 2005-20 (HA) (June 22, 2005)
Reinstatement - Units with Low-Income Housing Tax
Credit Allocations Combined with Housing Choice
Voucher Assistance under the Tenant-Based and Project-
Based Programs**

Summary: This notice reinstates and extends Notice PIH 2002-22, same subject, which expired November 30, 2004, until June 30, 2006.

Expires: June 30, 2006.

**Notice PIH 2005-21 (TDHEs) (June 22, 2005)
Reinstatement - Notice PIH 2003-26 (TDHEs),
Accessibility Notice for Native American Program: Sec-
tion 504 of the Rehabilitation Act of 1973; the Americans
with Disabilities Act of 1990; the Architectural Barriers
Act of 1968; and the Fair Housing Amendments Act of
1988**

Summary: This notice reinstates Notice PIH 2003-26 (TDHEs), same subject, which expired October 31, 2004, for another year until June 30, 2006.

Expires: June 30, 2006.

**Notice PIH 2005-22 (HA) (June 24, 2005)
Fiscal Year 2005 Capital Fund Grants Processing Notice**

Summary: The purpose of the notice is to provide public housing agencies with information and guidance on the Fiscal Year 2005 Capital Fund. This notice also provides guidance on the Replacement Housing Factor grants.

Expires: June 30, 2006.

**Notice PIH 2005-23 (TDHEs) (July 7, 2005)
Depository Agreements for Recipients of the Indian
Housing Block Grant (IHBG) Program**

Summary: This notice transmits the current depository agreement forms to be used when investing IHBG funds: form HUD-52736A (10/2004) for banking accounts and form HUD-52736B (10/2004) for brokers/dealers. Also, the notice clarifies when to use depository forms and when tribes or tribally designated housing entities may utilize brokers in the investment of Indian Housing Block Grant funds under 24 CFR 1000.58.

Expires: July 31, 2006.

**Notice PIH 2005-24 (HA) (July 8, 2005)
Housing Choice Voucher Program - Enhanced Vouchers—
Adjustment of Voucher Housing Assistance Payments for
Certain Families that Received "Preservation" Voucher
Assistance as the Result of an Owner Prepayment or
Voluntary Termination of Mortgage Insurance for a
Preservation Eligible Property in Federal Fiscal Year (FY)
1997, FY 1998, and FY 1999**

Summary: This notice revises the procedure for the calculation of voucher housing assistance payments (HAP) under PIH Notices 97-29, 98-19, 99-16, and 00-09 for families that received enhanced vouchers as the result of an owner decision to prepay the mortgage or voluntarily terminate the FHA mortgage insurance of a "preservation eligible" property in FY 1997, 1998 and 1999. The notice provides instructions to PHAs on identifying impacted families, re-calculating HAP for the period in question, and paying this assistance directly to the impacted families.

Expired: July 31, 2006.

**Notice PIH 2005-25 (PHA) (July 13, 2005)
Using ENERGY STAR to Promote Energy Efficiency in
Public Housing**

Summary: This notice encourages ENERGY STAR as the standard for Public Housing Agencies (PHAs), encourages PHAs to implement energy saving activities, and informs PHAs that ENERGY STAR expertise is available to provide valuable assistance for implementing energy conservation initiatives.

Expires: July 31, 2006.

**Notice PIH 2005-26 (HA) (July 13, 2005)
Public Housing Development Cost Limits**

Summary: The purpose of this notice is to explain procedures for establishing public housing development cost

limits, and transmit the updated schedule of unit Total Development Cost limits. This notice does not apply to Native American housing.

Expired: July 31, 2006.

Notice PIH 2005-27 (HA) (July 12, 2005)
Transition of Operating Subsidy Funding to a Calendar Year Basis and Associated Modifications to the Federal Fiscal Year 2005 Calculation of Operating Subsidy

Summary: This notice provides public housing agencies and field offices with guidance necessary to understand the calculation of Federal Fiscal Year 2005 operating subsidy in accordance with the Consolidated Appropriations Act of 2005 (Public Law 108-447).

Expires: July 31, 2006.

Notice PIH 2005-28 (HA) (July 15, 2005)
Extension—Housing Choice Voucher Portability Procedures and Corrective Actions - Revision of Family Portability Information, Form HUD-52665

Summary: This notice extends Notice PIH 2004-12, same subject, which will expire on July 19, 2005, for another year until July 19, 2006.

Expires: July 31, 2006.

RHS Administrative Notice

Prior Review Requirements for State Multi-Family Housing (MFH) Issuances (RD AN No 4083 (2006-B) (May 10, 2005)

Summary: RD Instruction 2006-B, Section 2006.55, requires that all state issuances be approved by the National Office and Section 2006.55 (a) (iii) permits the National Office to require prior approval for specific types of issuances for a limited time. The type of issuances covered by the "prior review" requirements of this administrative notice includes all State Administrative Notices, Unnumbered Letters, Forms, Guide Letters, State Procedure Notices, and State Instructions as they relate to RD Instructions 3560 and 3565. To ensure compliance and consistent nationwide adherence with RD Instructions 3560 and 3565, the practice of developing State Issuances is generally discouraged. National Office approval will be granted only to allow states to comply with unique state specific circumstances. While we anticipate only a limited number of state issuances, especially related to RD Instruction 3565, we are committed to a two-week approval turnaround time line to avoid potential delays.

Expiration Date: May 31, 2006. ■

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