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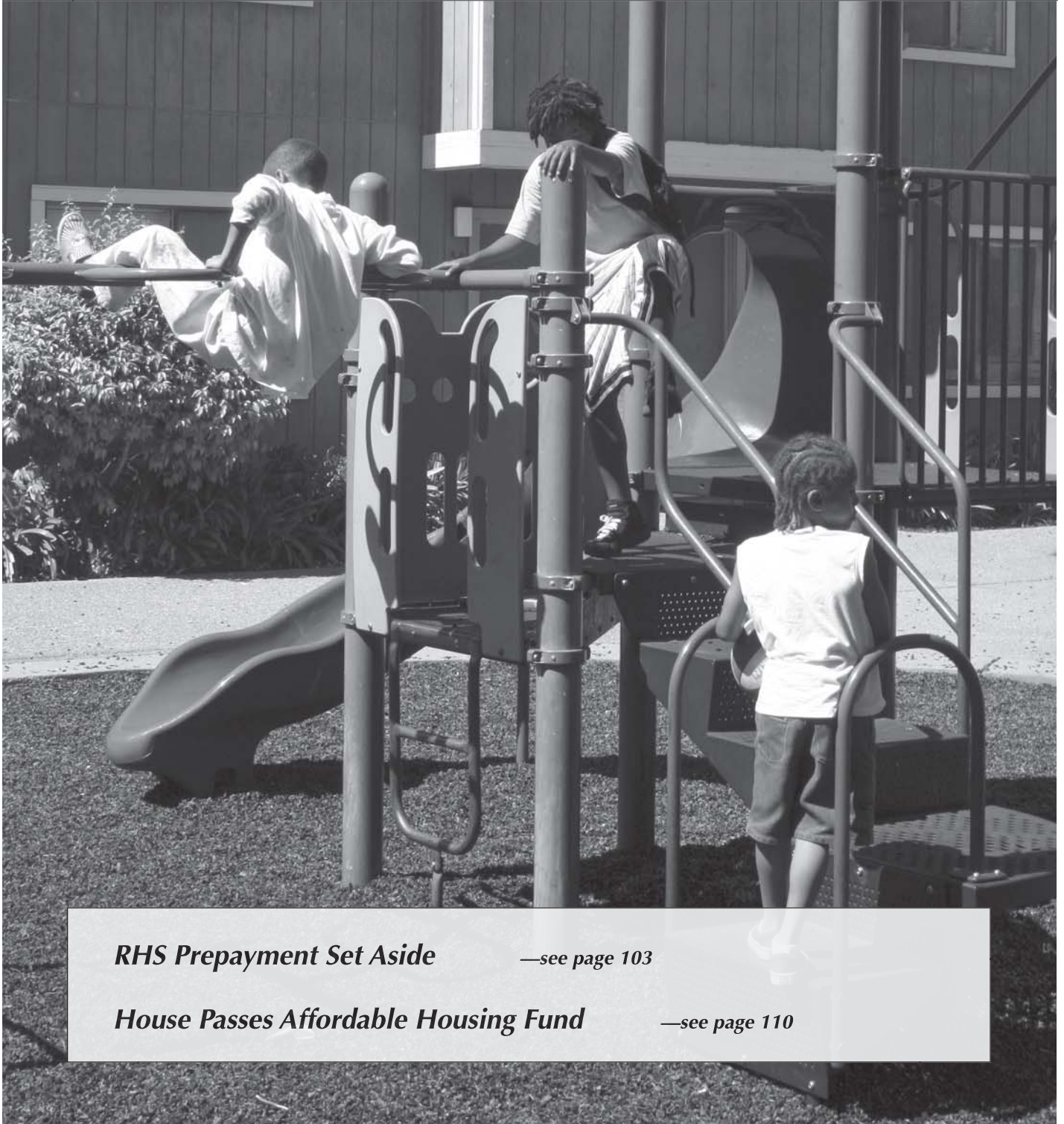


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Housing Law Bulletin

Volume 37 • June/July 2007

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RHS Prepayment Set Aside

—see page 103

House Passes Affordable Housing Fund

—see page 110

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Telephone (510) 251-9400 • Fax (510) 451-2300

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

www.nhlp.org • nhlp@nhlp.org

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Cover: Children at play at Emery Glen, a 36-unit family public housing complex in Emeryville, California that is operated by the Housing Authority of the County of Alameda.

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

Prepayment and Sale of RHS Apartment Complex Ruled Illegal

By Jason Lee*

In *Goldammer v. Veneman*,¹ the United States District Court for the District of Oregon has invalidated the approval and acceptance of a Section 515² loan prepayment by the Rural Housing Service (RHS) because it violated the prepayment restrictions established by the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).³ In granting summary judgment in favor of the residents of the Seacrest Apartments, the court paved the path for also invalidating the sale of the twenty-unit property to another owner and to have it reinstated into the Section 515 program as a deeply subsidized development. Significantly, the decision effectively overturns a court-approved settlement agreement in a related case that granted the owners quiet title to the Seacrest property. It should also bring to an end Section 515 owners' attempts to circumvent ELIHPA by bringing state quiet title actions to remove RHS mortgage liens from Section 515 properties after RHS, consistent with ELIHPA, has rejected an owner's tender of the Section 515 loan balance.

Background

Seacrest was one of six properties in Oregon owned by the defendants, DBSI Limited Partnership. All six apartment complexes were financed under the Section 515 program before the ELIHPA prepayment restrictions were adopted by Congress in 1988. This controversy first arose in 1998, when DBSI sought to prepay the loan balances on the apartments pursuant to their loan agreements with RHS, which gave the owners unrestricted rights to prepay the loans. Because the properties were subject to the ELIHPA restrictions, RHS refused to accept the prepayments and directed DBSI to comply with the ELIHPA prepayment regulations. DBSI refused to comply, tendered the balance due on the loans and, when RHS refused to accept the tender, filed a quiet title action in federal court seeking to remove the RHS liens from the six properties.⁴ DBSI contended that Oregon's quiet title law enables a

* Jason Lee was a summer law clerk at the National Housing Law Project and a student at UCLA School of Law.

¹No. 03-CV-1749-BR (D. Or. Jun. 14, 2007) (The decision is available from Westlaw at 2007 WL 1748665. Citations in this article are to the original slip opinion).

²42 U.S.C.A. § 1475 (West, WESTLAW through P.L. 110-36 approved 06-15-07).

³Codified as 42 U.S.C.A. § 1472(c) (West, WESTLAW through P.L. 110-36 approved 06-15-07).

⁴See *DBSI v. U.S.*, No. CV98-1325-JE, (D. Or. Oct. 26, 1998).

borrower to quiet title whenever a lender wrongfully refuses to accept the balance due on the loan.

Rather than proceed with the action, DBSI and RHS agreed to stay the proceeding until decisions were reached in two similar Idaho cases brought by DBSI-related partnerships.⁵ After four years of litigation, which included an appeal to the United States Court of Appeals for the Ninth Circuit,⁶ the Idaho owners were successful in securing quiet title decisions to eighteen Section 515 properties in Idaho.⁷ Due to the owners' Idaho victory, RHS agreed to settle the Oregon case by entering into an agreement under which DBSI agreed to offer to sell the six developments to nonprofit or public agencies but also giving it the right to prepay the loans in the event it and RHS could not agree to the sales price for any of the properties. In the case of Seacrest, RHS and DBSI could not agree to a sales price and DBSI advised RHS of its intention to prepay the loan without regard to any of the prepayment restrictions imposed by ELIHPA.⁸ Before actually prepaying the loan in accordance with a court entered quiet title settlement decree, DBSI sold Seacrest to Northwest Real Estate Capital Corporation, an Idaho based nonprofit entity that was loosely related to DBSI. Since the prepayment terminated the Section 515 tenants' subsidies, Northwest had to increase rents at the development, thereby threatening to displace all of the residents or burdening them with substantially higher rent payments. Fortunately, a local housing authority stepped in to protect the residents by issuing HUD vouchers to residents who wanted to remain at Seacrest.

After learning of DBSI's intent to prepay the loan, several Seacrest residents filed a motion to intervene as a matter of right in the original DBSI quiet title lawsuit against RHS. Several weeks later the same residents filed a separate federal lawsuit against RHS, DBSI, and Northwest under the Administrative Procedures Act (APA).⁹ Under their separate lawsuit, as well as in their proposed cross complaint in the original quiet title action, the residents alleged that RHS violated ELIHPA in accepting the prepayment and enabling the sale of the apartment complex.

⁵Kimberly v. United States, CV 98-0083-S-LMB (D. Id., filed Feb. 25, 1998) and Atwood-Leisman v. U.S., Civ. No. 98-0416-S-BLW (D. Id., filed Oct. 26, 1998).

⁶Kimberly Assocs. v. United States, 261 F.3d 864 (9th Cir. 2001).

⁷See Atwood-Leisman v. U.S., Civ. No. 98-0416-S-BLW (D. Id., Nov. 18, 2002) and Kimberly v. United States, CV 98-0083-S-LMB (Dec. 12, 2002). In fact, all but one of the properties remained in the Section 515 program when RHS stepped in to protect the residents of the developments by negotiating the sale of the properties to private nonprofit organizations. One property, which was subsidized by the HUD project-based Section 8 program, was removed from the Section 515 program but none of the residents were displaced because the owners maintained the HUD subsidy contract after the prepayment.

⁸During the pendency of the *Goldammer* litigation, DBSI actually sold four of the other developments to Oregon nonprofit or public agencies. The sixth development remains in DBSI's ownership and in the Section 515 program.

⁹5 U.S.C.A. § 701, *et seq.* (West, WESTLAW through P.L. 110-36 approved 06-15-07).

The district court denied the residents' intervention motion on the ground that their interests were adequately protected in their separate APA case. However, it then denied the residents' motion for preliminary relief in their separate case on the ground that they were not likely to prevail on the merits of their case. Shortly thereafter the court ruled in favor of RHS and DBSI on cross motions for summary judgment.¹⁰ The district court held that its decision to deny relief to the residents was mandated by the Ninth Circuit's earlier ruling in one of the Idaho quiet title cases, *Kimberly v. United States*.¹¹ According to the district court, *Kimberly* held that ELIHPA was not a "sovereign act" and was therefore not enforceable against the earlier loan agreements entered into by and between RHS and DBSI, which gave DBSI the unrestricted right to prepay its Section 515 loans. The residents appealed both decisions to the United States Court of Appeals for the Ninth Circuit.¹²

The Ninth Circuit concluded that because the sale to Northwest could be undone and the prepayment reversed, the residents' APA claim was not moot.

In its decision, the Ninth Circuit first ruled on the residents' right to intervene in the DBSI case. It upheld the district court's decision and denied the residents the right to intervene in the quiet title suit on the ground that they were adequately protected in their separate APA lawsuit.¹³ With respect to the APA suit, the court of appeals ruled that they had suffered non-economic injury as a result of the prepayment and had standing to pursue their claim.¹⁴ The court also rejected DBSI's argument that the Seacrest tenants' claims were mooted by the sale of Seacrest to Northwest. It explained that federal courts are authorized to void property transfers when necessary. Accordingly, it concluded that because the sale to Northwest could be undone and the prepayment reversed, the residents' APA claim was not moot.¹⁵

Turning to the main argument, the Ninth Circuit determined that the district court decision was based on an incorrect understanding of its earlier *Kimberly* decision. While it agreed that *Kimberly* found ELIHPA not to be a

¹⁰See *Goldammer v. Veneman*, 2005 WL 1307698, at *1. (D. Or. May 26, 2005).

¹¹See *Kimberly*, 261 F.3d at 870.

¹²See *DBSI/TRI IV Ltd. P'ship v. U.S.*, 465 F.3d 1031 (9th Cir. 2006). For more information on the Ninth Circuit's decision, see NHLP, *Victory: Ninth Circuit Allows Residents to Challenge RD Prepayment*, 36 Hous. L. Bull. 197, 206 (2006).

¹³*DBSI/TRI IV Ltd. P'ship v. U.S.*, 465 F.3d 1031, 1037 (9th Cir. 2006).

¹⁴*Id.* at 1038.

¹⁵*Id.* at 1039.

New Utility Allowance Advocacy Guide Available from NHLP

For most federally subsidized housing programs, tenants that pay their own utilities are supposed to be provided with a utility allowance to cover reasonable utility costs. In recent years, as utility rates have skyrocketed across the nation, many owners and administrators of subsidized housing have failed to make corresponding increases in their utility allowances, leaving public housing tenants to unfairly shoulder the costs. In light of this problem, advocating for higher utility allowances is one of the most effective ways to improve housing affordability for subsidized housing tenants, either as an individual case or as a class action. Recent efforts have resulted in multi-million dollar rent reductions or damage recoveries.

Advocating for Higher Utility Allowances in Federally Subsidized Housing: A Practical Guide is a useful tool for all tenant advocates, regardless of their experience with housing issues. A combined effort of Housing Justice Network member Gavin Thornton of the Legal Aid Society of Hawaii and the National Housing Law Project, the *Guide* provides sufficient instruction so any advocate will be able to successfully find, develop and litigate a utility allowance case. The guide focuses on the “rate increase” utility allowance case, which challenges a subsidized landlord or public housing agency’s failure to update utility allowances to account for recent significant increases in utility rates. The guide identifies the key steps in determining whether a utility allowance problem exists and provides useful strategies for resolving that problem. Conveniently organized to permit efficient extraction of necessary basic information, the *Guide’s* appendices also includes spreadsheets to ease the pain of required calculations, several practical documents (e.g., information requests and demand letters), and pleadings.

The utility allowance guide provides step-by-step instructions on how to...

Determine Whether There Is a Violation

Locate subsidized housing in the area

Identify and obtain the information needed

Analyze the gathered information

- Determine utility rates and recent increases
- Determine whether utility allowances have been properly updated

Fix the Problem

Issues to consider

- Whether increasing the voucher allowances will help or hurt
- Tolling the statute of limitations
- Administrative advocacy

Litigation techniques

- Causes of action
- Sample filings

Until it is posted with restricted access on NHLP’s website, free copies are available to legal services and tenant representatives by sending an e-mail request to asiemens@nhlp.org.

“sovereign act,” that determination was made solely for the purpose of determining the federal government’s total immunity against lawsuits, such as the quiet title action that was the subject of that case. *Kimberly* did not address or find that ELIHPA was invalid or that the residents could not enforce it under the APA if it were violated by RHS.¹⁶ Accordingly, the panel reversed the district court’s grant of summary judgment and remanded the case to determine whether RHS acted contrary to law by accepting the Seacrest prepayment.¹⁷

The District Court’s Decision

In deciding the residents’ motion for summary judgment, the issue of whether RHS violated ELIHPA when it accepted the Seacrest prepayment was easily resolved when RHS admitted the violation. It thus gave the court the authority to set aside the defendants’ actions under Section 706(2)(A) of the APA.¹⁸ However, RHS and the owners argued that their actions should not be set aside because to do so would impose severe burdens on them.¹⁹ Instead, they argued, the court should balance the equities and deny the tenants’ request to undo the prepayment and sale of Seacrest to Northwest. The district court agreed that under prior Ninth Circuit precedents, equitable principles had to be considered in deciding whether to set aside the transactions.²⁰ Thus, the court went on to address the equitable arguments made by the defendants.²¹

RHS first contended that rescission of the Seacrest sale and its return to the Section 515 program could subject the government to litigation from tenants admitted to the development who did not meet the Section 515 program’s eligibility requirements because they would have to be evicted. According to RHS, such an outcome would be untenable. The court rejected the argument, noting the existence of RHS regulations “for both removing ineligible tenants from Section 515 housing and for waiving the requirements of Section 515 in certain circumstances.”²² Because RHS possessed these avenues for dealing with ineligible tenants, its assertion was flatly rejected by the court as it did not demonstrate that the equities weighed in its favor.²³

RHS also contended that returning Seacrest to the Section 515 program may not be possible because of the uncertainty surrounding the availability of funds to reimburse DBSI the amount that it prepaid and to reinstate the Rental Assistance subsidy contracts. This argument was quickly dismissed by the court as RHS had failed to provide suf-

ficient evidence to prove its contentions and instead relied on vague affidavits to support its position. Additionally, the court noted that the Ninth Circuit had previously held that “the government’s economic loss could not be considered compelling when balancing the equities if the government incurred the loss while knowingly acting in contravention of federal law.”²⁴ Therefore, due to RHS’s obvious violation of the law, it could not hide behind its potential economic loss in order to avoid a just resolution, even if it were able to prove such economic loss would occur.

The court concluded that rescission of the sale and returning the Seacrest property to Section 515 would not harm DBSI or Northwest in such a way as to tip the balance of equities in their favor.

Having discarded RHS’s equitable defenses, the court went on to consider the arguments of DBSI and Northwest. Northwest asserted that rescission of the sale would result in its losing the ability to recoup its start-up costs and other expenses spent to obtain financing to rehabilitate the property. The district court did not accept this argument. Agreeing with the tenants, it found that Northwest accrued the start-up costs before the RHS loan had been prepaid and the property released from the Section 515 program. Accordingly, Northwest incurred the costs at its own risk without any assurance that they could recoup them.²⁵ Moreover, the court found that even if the rescission might harm Northwest and DBSI financially, neither is without a remedy for alleged monetary damages. As noted by the Ninth Circuit, DBSI still has recourse against RHS for the breach of its loan agreement.²⁶ Indeed, the court noted that Northwest could bring an action against DBSI or join in the action against RHS to recoup its costs.

DBSI and Northwest also argued that money damages would not make them whole for their losses because real property, which is unique, is involved in the case. While that may be true in cases where individuals are seeking to live on the property, the court noted damages were a sufficient remedy in actions brought by commercial investors.²⁷ Accordingly, the court concluded that rescission of the sale and returning the Seacrest property to Section 515 would not harm DBSI or Northwest in such a way as to tip the balance of equities in their favor.

¹⁶*Id.*

¹⁷*Id.* at 1041.

¹⁸See *Goldammer*, No. 03-CV-1749-BR, slip op. at 10.

¹⁹*Id.*

²⁰*Id.* at 11-13.

²¹See *id.*

²²*Id.* at 17.

²³*Id.*

²⁴*Id.* at 19-20 (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988)).

²⁵*Id.* at 21.

²⁶See *DBSI/TRI IV Ltd. P’ship*, 465 F.3d at 1041 (citing *Franconia Assocs. v. United States*, 536 U.S. 129 (2002)).

²⁷See *Geneva Ltd. Partners v. Kemp*, 779 F. Supp 1237, 1241 (N.D. Cal. 1990).

FEMA May Have to Provide Procedural Protections Before Terminating Benefits

By Rachel Williams*

Having rejected all of the defendants' arguments, the district court went on to declare that the equities weighed in favor of the tenants because RHS had violated ELIHPA by accepting the prepayment of the Seacrest loan. This violation showed a blatant disregard of the law as Congress had enacted ELIHPA specifically to prevent such prepayments and transfers of property out of the Section 515 low-income housing program. Accordingly, the court granted summary judgment in favor of the tenants.²⁸

Unfortunately, the court did not issue an order actually rescinding the sale and the prepayment. Instead, it has set a case management hearing for July of 2007, at which, presumably, it will consider a specific order to reinstate Seacrest into the Section 515 program.

Conclusion

The district court's *Goldammer* decision is very significant for two reasons. First, it appropriately sets aside an illegal prepayment that should return a twenty-unit development into the Section 515 subsidized housing stock. It thus reaffirms the proposition, first established in *Lifgren v. Yeutter*,²⁹ that ELIHPA was established to protect the interests of low-income residents of Section 515 developments and that its prepayment restrictions cannot be ignored. More significantly, *Goldammer* should put to an end owners' efforts to sidestep ELIHPA by bringing state quiet title lawsuits that improperly seek to elevate state quiet title claims as the applicable federal common law when federal law, ELIHPA, explicitly precludes RHS from accepting the prepayment of Section 515 loans except under the conditions specified in that law. In dictum, the Ninth Circuit's *Kimberly* decision inadvertently and without argument by either party to the appeal, suggested that owners may be entitled to relief under state quiet title law suits. The Ninth Circuit's and the district court's decisions in *Goldammer*, should now bring this argument to a rest.³⁰

The residents of Seacrest were represented by Art Schmidt and Micky Ryan of the Oregon Law Center. They were assisted by the staff of the National Housing Law Project. ■

A federal court in Louisiana recently issued a preliminary injunction prohibiting the Federal Emergency Management Agency (FEMA) from terminating displaced households from its temporary housing assistance program without first providing adequate due process protections.¹ Although temporarily stayed by an emergency order of the Fifth Circuit,² the lower court's order, if ultimately upheld, will ensure important procedural protections for disaster victims facing termination of essential benefits.

In the aftermath of hurricanes Katrina and Rita, hundreds of thousands of displaced persons were in need of housing, and many qualified for transitional housing assistance under Section 408 of the Stafford Act (42 U.S.C. § 5174). This program provides \$2358 per household as an initial payment for three months' rental assistance, and can be extended by up to eighteen months for qualified applicants. However, despite many flaws in the administration of the Section 408 program, FEMA began terminating assistance without giving recipients a reason for the termination and an opportunity to be heard. FEMA also cut off assistance to allegedly overpaid recipients, again without explaining why it believed the individuals were overpaid, without informing them that they could request a hardship waiver, and without procedures to contest the overpayment determination.

As a result of these severely flawed processes, affected individuals brought suit to block FEMA from continuing with such terminations. The case was brought by two affected groups: Section 408 assistance recipients who had been or will be denied continued assistance and appealed or will be appealing the denial of those benefits; and FEMA assistance recipients who are now being asked to repay that money.

On June 13th, the U.S. District Court in Louisiana granted a preliminary injunction to prohibit FEMA from terminating or withholding payments from Section 408 hurricane assistance recipients without appropriate notice and an opportunity for a pre-termination hearing. In its decision, the court reviewed the four ordinary

²⁸See *Goldammer*, No. 03-CV-1749-BR, slip op. at 23.

²⁹67 F.Supp. 1473 (D. Minn., 1991).

³⁰Whether it will, is yet to be determined. There are two known quiet title cases pending in two federal district courts. The first case, *Schroeder v. U.S.*, 2:06-cv-00818-SU (D. Or. filed June 6, 2006), is pending in another Oregon district court. In that case the magistrate recently filed a recommendation that the owner be allowed to prepay the loan under Oregon quiet title law. The recommendation is inconsistent with the Ninth Circuit's and the district court's opinions in *Goldammer*. The second, *Meadowfield Apts. v. U.S.*, No. 5:05-cv-412-OC-10-GRJ (M.D. Fl., filed Sept. 26, 2005), is pending in a Florida district court.

*Rachel Williams was a summer law clerk at the National Housing Law Project and a student at BYU Law School.

¹*Ridgely v. FEMA*, 2007 WL 1728724, No. 07-2146 (E.D. La. June 13, 2007) (order granting preliminary injunction).

²*Ridgely v. FEMA*, No. 07-30615 (5th Cir. order July 3, 2007) (issuing temporary stay pending disposition of FEMA's motion for an emergency stay pending appeal).

requirements for granting a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) a showing that the threatened injury to the plaintiffs outweighs the threatened harm to the defendants; (4) that granting a preliminary injunction will not disserve the public interest.³ In granting the injunction, the court held that the plaintiffs successfully met these four requirements.

The court accepted the plaintiffs' argument that a near certainty of homelessness for many individuals and less adequate accommodations for others represented irreparable harm.

First addressing the factors unrelated to the merits, the court accepted the plaintiffs' argument that a near certainty of homelessness for many individuals and less adequate accommodations for others represented irreparable harm. FEMA made some arguments that irreparable harm would not result from refusal to grant an injunction, but these were all rejected by the court. FEMA argued that even if an injunction were granted, this would not change the current position of the plaintiffs, and thus no irreparable harm could result. The court explained, however, that FEMA had misapprehended the nature of the plaintiffs' claims, essentially that "with minimal due process imposed, the outcomes will in fact be more accurate and reliable."⁴ Also, the court rejected FEMA's argument that there was no irreparable harm since the plaintiffs had delayed in seeking injunctive relief. The court reasoned that such delay may have been a result of deficiencies in FEMA's processes, and thus added no proof that the plaintiffs would not suffer irreparable harm.

The court then determined that the plaintiffs had sufficiently demonstrated that the threatened injury of not granting an injunction outweighed the threatened harm of any injunction to the defendants. The court ruled that the threat of homelessness and the adverse effect of such circumstances on one's health, safety, and well-being was more serious than the burden that would be placed on FEMA. The court also noted that this "burden" on FEMA was, as plaintiffs argued, neither "new nor undue."⁵

The court also found that the fourth factor, requiring consistency with the public interest, was also satisfied. The court reasoned that granting the injunction

would actually serve the public interest by sheltering displaced persons and promoting public safety. While FEMA argued that the injunction would harm the public interest because it would overwhelm FEMA's resources, the court found bewildering the claim that "infusing more due process in the termination phase threatens FEMA's ability to respond to future disasters."⁶ The court also looked to the mandate of the Stafford Act, under which FEMA operates, to demonstrate that the injunction is consistent with FEMA's ultimate goal, which is to "alleviate suffering and damage which result from . . . disasters."⁷ While the court recognized that emergency response is important, the court also pointed out that there should never be such urgency in terminating an individual's aid.

The remainder of the opinion primarily addresses the first factor for issuing a preliminary injunction—a substantial likelihood that the plaintiffs will prevail on the merits. In order to prevail, the plaintiffs must show both that they have a property interest in the Section 408 benefits, and that the process FEMA uses is constitutionally deficient.

However, before addressing the final criterion—whether the plaintiffs would likely prevail on their due process claim—the court evaluated and then dismissed several defenses FEMA raised, including lack of subject matter jurisdiction, lack of standing, and sovereign immunity. The court found that it did have subject matter jurisdiction because there was in fact a "case or controversy" for purposes of Article III of the Constitution, and the plaintiffs did have standing and could show injury in fact. The court found FEMA's arguments unpersuasive, explaining that FEMA was again failing to understand the nature of the plaintiffs' complaint. The plaintiffs claimed injury in the process used by FEMA, not just the results of a flawed process: they claimed that "FEMA's procedures are so flawed and haphazard that the outcomes are often erroneous and certainly unreliable."⁸ Thus, the court found injury in fact because "[f]ailure to correct these allegedly flawed procedures. . . does injure members of the class."⁹

The court also rejected the government's defense of sovereign immunity, explaining that the government cannot be immune from claims that are constitutional in nature.¹⁰ While the Stafford Act states that FEMA is not liable for discretionary functions, the court adopted the

⁶*Id.* at *3.

⁷*Id.*

⁸*Id.* at *4.

⁹*Id.* FEMA also contended that the repayment claims of two of the named plaintiffs were mooted by its withdrawal of the repayment demand, but the court disagreed with this as well, citing plaintiffs' challenge to the process. *Id.* at *4, note 3.

¹⁰*Id.* at *5.

³*Id.* at *1.

⁴*Id.* at *2.

⁵*Id.*

reasoning from *McWaters*¹¹ to conclude that this limited waiver did not preclude judicial review of plaintiffs' constitutional claims here.

Turning to the substance of the case, the court found that the plaintiffs did indeed have a property interest protectable by due process in their Section 408 benefits, contrary to FEMA's claim that no such interest exists because of the agency's absolute discretion. The court analogized Section 408 benefits to others protected in past due process cases, such as Social Security, public assistance and public housing.¹²

Then, the court addressed the major question presented—whether the process FEMA uses, without adequate statement of grounds or notice of appeal rights, is constitutionally deficient. The constitutional standard, set forth in *Mathews v. Eldridge*,¹³ requires the court to consider “1) the private interest that will be affected by the official action, 2) the risk of an erroneous deprivation of such interest through the procedures used and 3) the probable value, if any, of additional or alternative procedural safeguards, and the government's interest, its function and the fiscal and administrative burdens entailed by the additional or substitute procedural requirements.”¹⁴

In regard to the first factor, the court found that the benefits at issue are substantial and worthy of due process protection. Concerning the second factor, the court “unhesitatingly” found that “FEMA's notice and appeals process is fraught with the potential for mistaken determinations.”¹⁵ The court also found that the last factor weighed in favor of the plaintiffs as “their request is relatively modest—a notice that is comprehensible, an opportunity to respond in a meaningful way and an appellate process that is navigable.”¹⁶

In finding that the plaintiffs were substantially likely to prevail on the merits of their case, the court censured FEMA for its “cavalier” attitude and reprimanded the agency for the way in which it has handled assistance issues since Katrina and Rita, finding its “abdication of responsibility incomprehensible.”¹⁷ The court noted that FEMA did not even try to defend “any of the incomprehensible hieroglyphic abbreviations that riddle their so-called ‘notice’ letters,”¹⁸ nor did FEMA confront any of the

allegations brought by the aid recipients.¹⁹ Instead, FEMA had quickly dismissed the claims, callously asserting that no irreparable harm would result from losing FEMA assistance and that if the individuals do not understand the notice letters, they can simply appeal.²⁰ That definitely will not suffice, said the court:

[D]efendants appear to treat the plaintiffs' [sic] and their prospects of homelessness and the despair and stress of such added worries as if it were gnats to be brushed away while the defendants busy themselves with creating more bureaucratic regulations. To brush off the correction of errors to the appellate process under these circumstances of real human suffering is simply unacceptable.²¹

The District Court's granting of the preliminary injunction against FEMA was a significant step forward. The court directly confronted the deficiencies in FEMA's processes, and refused to allow the continuation of such injustices. However, on June 27, FEMA filed a motion for a stay of the preliminary injunction, claiming that the injunction would cause FEMA irreparable harm. FEMA asserted that compliance with the preliminary injunction would cost FEMA \$249.6 million, and would hamper FEMA's ability to respond effectively to future disasters. On July 3, the Fifth Circuit granted a temporary stay of the preliminary injunction,²² pending disposition of FEMA's motion for a stay during the pendency of the appeal. The plaintiffs have responded, and the Fifth Circuit is expected to rule soon on this matter. ■

¹¹*McWaters v. FEMA*, 436 F.Supp.2d 802, 813-14 (E.D. La. 2006). *McWaters* had reasoned that the Stafford Act contains no explicit language barring judicial consideration of constitutional questions, FEMA is not competent to decide the constitutionality of its own regulations and policies, and that there is a need to construe the Stafford Act in a constitutional manner by interpreting it as leaving open review of constitutional issues.

¹²*Id.* at *6.

¹³424 U.S. 319, 335 (1976).

¹⁴*Id.* at *3.

¹⁵*Id.* at *7.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at *6.

¹⁹*Id.* at *7.

²⁰*Id.*

²¹*Id.*

²²*Ridgely v. FEMA*, No. 07-30615 (5th Cir. order July 3, 2007).

House of Representatives Passes Affordable Housing Fund

By Joe Akman*

On May 22, 2007, the House of Representatives passed the Federal Housing Finance Reform Act of 2007 (FHFRA) (H.R. 1427).¹ The House-passed legislation includes an “Affordable Housing Fund” (AHF) as part of a larger package to reform the regulatory framework governing the two Government-Sponsored Entities (GSEs), Fannie Mae and Freddie Mac. The AHF legislation represents the first significant effort of the federal government to provide new funds for affordable housing outside of the Low-Income Housing Tax Credit and HOME programs.

The purpose of the AHF is to increase homeownership for extremely low- and very low-income families; increase investment and preserve housing and public infrastructure development in connection with housing in low-income areas; and leverage investments from other sources in affordable housing and in public infrastructure development.² Under the bill, in each of the next five years, 2007-2011, each GSE would be required to contribute an amount equal to 1.2% of the average total dollar amount of outstanding mortgages for the GSE during the preceding year.³ The legislation would also create a new regulator to oversee the GSEs, the Federal Housing Finance Agency (FHFA), and authorizes the new agency’s director to determine grant amounts from the AHF.⁴

H.R. 1427 was introduced in March by House Financial Services Chairman Barney Frank (D-MA). The legislation’s primary purpose is to increase federal regulation and oversight of the two GSEs. The bill included the AHF, which became an issue of contention during the committee’s mark-up and subsequently on the House floor.⁵

*Joe Akman was a summer intern with the National Housing Law Project and a student at University of California Hastings College of Law.

¹Rep. Barney Frank (D-MA), Chairman of the House Financial Services Committee, introduced H.R. 1427 on March 9, 2007, with co-sponsors Rep. Richard Baker (R-LA), Rep. Carolyn Maloney (D-NY), Rep. Gary Miller (R-CA), Rep. Terry Lee (R-NE), and Rep. Melvin Watt (D-NC). It was passed by the House 313-104 on May 22, 2007, on Roll Call 396, at <http://clerk.house.gov/cgi-bin/vote.asp?year=2007&rollnumber=39>. For the full text of the bill, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1427eh.txt.pdf.

²Federal Housing Finance Reform Act of 2007, H.R. 1427, 110th Cong. 1st Sess. (2007), § 140 (as amending § 1337(a)(1)-(5) of the Housing and Community Development Act of 1992). Hereinafter all references to the text of H.R. 1427, as passed by the House, refer to the amended § 1337 that, if enacted into law, would replace the existing text of §§ 1337, 1338 of the Housing and Community Development Act of 1992.

³*Id.* at § 1337(b)(1).

⁴*Id.* at § 1337(d)(1).

⁵REPRESENTATIVE SPENCER BACCHUS, SUMMARY OF H.R. 1427, FEDERAL HOUSING FINANCE REFORM ACT (2007) at <http://republicans.financialservices.house.gov/news/PRArticle.aspx?NewsID=42>. See also Cong. Record, 110th Cong., H5, 374-418 (1st Sess. 2007) at <http://thomas.loc.gov/cgi-bin/query/F?r110:25::/temp/~r110WzAlc:e:0>.

In its current form, the AHF is similar to an amendment proposed in the last Congress by Senator Jack Reed (D-RI) to GSE reform legislation (S. 190, 109th Cong., considered in the Senate Banking Committee) and an amendment included in House-passed legislation two years ago, H.R. 1461.⁶ Both previous proposals to create an AHF required Fannie Mae and Freddie Mac to set aside 5% of their pre-tax profits to support the financing and funding of affordable housing and were similarly attached to bills relating to GSE regulatory reform.

The Senate Banking Committee is expected to mark-up another version of GSE legislation shortly, and further action will be necessary to produce legislation which can then be reconciled with the House version.

Background

As the National Low-Income Housing Coalition notes, “Nationwide, there are only 6,187,000 homes renting at prices affordable to the 9,022,000 extremely low income renter households—a shortage of 2,835,000 homes.”⁷ Given the great need for affordable housing throughout the country, AHF proponents like Chairman Frank argue that new resources are necessary to address the affordable housing crisis.

In addition, in his opening remarks on the floor in support of the AHF, Chairman Frank highlighted that the GSEs receive certain benefits from the federal government, including the ability to borrow money at a below-market interest rate.⁸ In return, the GSEs must meet certain benchmarks, including targeting goals for lending to low-income populations. The affordable housing fund is consistent with this arrangement whereby the GSEs obtain benefits from the federal government in the course of operation, but must in turn provide public benefits.

In opposition, many Republicans, most notably the Ranking Member of the House Financial Services Committee, Rep. Spencer Bacchus (R-AL), argue that the AHF will be a tax on low-income and middle-class homebuyers, who utilize the GSEs to obtain mortgages, and may bear any increased costs of GSE operations in the form of higher interest rates.⁹ In support of the previous proposal, the *New York Times* had noted that “money to house the

⁶Federal Housing Finance Reform Act of 2005, H.R. 1461, 109th Cong. (1st Sess. 2005); Federal Housing Regulatory Reform Act of 2005, S. 190, 109th Cong. (1st Sess. 2005).

⁷NLIHC, *Memo to Members: Housing Advocates Praise House for First Pot of Money for National Housing Trust Fund* (May 22, 2007) at http://www.nlihc.org/detail/article.cfm?article_id=4214.

⁸Cong. Record, 110th Cong., H5, 374-5 (1st Sess. 2007) at <http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=6053928197+4+0+0&WAIAction=retrieve>.

⁹REPRESENTATIVE SPENCER BACCHUS, SUMMARY OF H.R. 1427, FEDERAL HOUSING FINANCE REFORM ACT (2007) at <http://republicans.financialservices.house.gov/news/PRArticle.aspx?NewsID=42>. See also Wall Street Journal Editorial, *Freddie Guts Frank* (May 22, 2007); WSJ Editorial, *Ill-Gotten Raines* (Dec. 20, 2006) (criticizing fund as “patronage bonus” to liberal housing organizations).

poor, and to promote home ownership in depressed areas, has to come from somewhere," while acknowledging that reallocating profits might increase the GSEs' presence in the mortgage market.¹⁰

Highlights of the Bill's Affordable Housing Fund

Allocation of Amounts by GSEs

Over the course of the five years, each GSE would have to allocate 1.2% of the average total mortgages outstanding for the entity during the preceding year.¹¹ In the first year, the AHF would be solely targeted to Louisiana and Mississippi to support the disaster relief efforts there following Hurricane Katrina.¹² Accordingly, 75% will be allocated to the Louisiana Housing Finance Agency and 25% will be allocated to the Mississippi Development Authority.¹³ During the remaining four years of the AHF, amounts would be allocated to states and federally recognized Indian tribes through a formula developed by the Secretary of the Department of Housing and Urban Development (HUD).¹⁴ The states may designate a governmental agency to manage the funds and the state agency or governmental entity would allocate the funds to individual recipients engaged in the eligible activities described below.¹⁵

A GSE will be exempt from making allocations to the AHF if the contribution would cause financial instability, create an undercapitalized entity, or prevent a capital restoration plan.¹⁶ The GSE is also prohibited from increasing costs of mortgages in order to comply with the new AHF contribution requirement¹⁷ and counting contributions to the AHF towards meeting other required affordable housing targets.¹⁸

Eligible Activities

Money from the funds can be used only for: (1) the production, preservation and rehabilitation of rental housing; (2) the production, preservation and rehabilita-

tion of housing for homeownership, including down payment assistance, closing cost assistance and assistance for interest rate buy-downs; and (3) related public infrastructure developments.¹⁹ The amounts provided from the funds must be used for the benefit of extremely low-income and very low-income individuals.²⁰ In the case of homeownership uses, participating families would have to be first-time homebuyers.²¹

Limitations on Use

In each year, at least 10% of the money from the affordable housing funds would have to be used for homeownership and leveraged grants, and not more than 12.5% for public infrastructure.²² Additionally, 25% of the annually contributed funds must be used to retire certain REFCORP bonds, apparently in order to maintain the AHF's status as revenue-neutral.²³

Any amounts allocated to an AHF grantee would have to be used or committed for use within two years of the allocation.²⁴ H.R. 1427 would also limit the amount of the grant that can be used for administrative costs to less than 10%.²⁵ The bill also prohibits use of funds from the AHF to support political activities, advocacy, lobbying, counseling services, travel expenses, and preparing or providing advice on tax returns.²⁶

AHF funds may only be used in order to support affordable housing for legal residents.²⁷ The legislation requires identification to ensure recipients of AHF benefits are not illegal immigrants.²⁸

Consistency of Use with Housing Needs

The bill would require each grantee to make periodic reports (publicly available) to the Director of the Federal Housing Finance Agency.²⁹ Funds used for ineligible purposes can be recaptured.³⁰

Regulations

The Director of the Federal Housing Finance Agency, in conjunction with the HUD Secretary, will be required to issue regulations that include the creation of an allocation formula.³¹ The bill states that determination of grant amounts shall be based upon specific criteria, and must be prioritized based on greatest impact, geographic diversity, ability to obligate amounts and undertake activities

¹⁰New York Times Editorial, *The Affordable Housing Crisis* (Jun. 16, 2005).

¹¹*Id.* at § 1337(b)(1).

¹²*Id.* at § 1337(c)(1)(A)(i)-(ii).

¹³*Id.*

¹⁴*Id.* at § 1337(c)(2)(A-G). The formula must include: (A) the ratio of the population of the state or federally recognized Indian tribe to the aggregate population of all the states and eighteen tribes; (B) the percentage of families that pay more than 50% of income for housing; (C) the percentage of persons that are members of extremely low- or very low-income families; (D) the cost of developing or rehabilitating housing; (E) the percentage of families in substandard housing; (F) the percentage of housing stock that is extremely old; and (G) any other factors that the Secretary determines appropriate.

¹⁵*Id.* at §§ 1337(d)(3)(A), 1337(h).

¹⁶*Id.* at § 1337(b)(2).

¹⁷*Id.* at § 1337(b)(4).

¹⁸*Id.* at § 1337(i)(7).

¹⁹*Id.* at § 1337(g)(1)-(3).

²⁰*Id.* at § 1337(g)(2)(A)(i).

²¹*Id.* at § 1337.

²²*Id.* at § 1337(i)(2)-(3).

²³*Id.* at § 1337(i)(1) (as provided in section 21B(f)(2)(E) of the Federal Home Loan Bank Act (12 U.S.C. 1441b(f)(2)(E)).

²⁴*Id.* at § 1337(i)(4).

²⁵*Id.* at § 1337(i)(6)(C).

²⁶*Id.* at § 1337(i)(6).

²⁷*Id.* at § 1337(i)(8)(A).

²⁸*Id.*

²⁹*Id.* at § 1337(j)(2)(A).

³⁰*Id.* at §§ 1337(j)(1)(B)(i), 1337(j)(2)(B).

³¹*Id.* at § 1337(m)(1). See note 14, *supra*.

in a timely manner, the use of other funding sources, the merits of proposed applicant's activity, and, in the case of rental housing projects, rental affordability and its duration.³²

Affordable Housing Trust Fund

In the event Congress creates a separate national affordable housing trust fund, the bill would require transfer of the AHF funds to the newly created fund.³³ Subsequent to passage of H.R. 1427 in the House, Rep. Barney Frank introduced the National Affordable Housing Trust Fund Act of 2007, H.R. 2895, to create a National Housing Trust Fund (NHTF).³⁴ The NHTF would pool different sources of federal funds, including the AHF, for the sole purpose of constructing, rehabilitating, and preserving 1.5 million units of affordable housing over the next ten years.³⁵ Federal funds distributed through states and localities would be awarded to recipients targeting the needs of low-income and very-low income populations, and would be subject to specified matching requirements.³⁶ Thus the GSE Affordable Housing Fund could become one of the funding sources for the National Affordable Housing Trust Fund.

Major Variations from Previous Version of the AHF

In the previous version of the AHF (H.R. 1461 in the 109th Congress), the GSEs allocated funds directly to the grantees with oversight provided through an Affordable Housing Board, including the FHFA Director.³⁷ Under the new bill, H.R. 1427, the GSEs would contribute funds to the AHF and the FHFA Director would allocate the AHF funds directly to the states and monitor the allocations rather than overseeing the GSEs' administration of the AHF.

Additionally, the figure that each GSE must annually contribute has been altered to reflect a percentage of the total mortgage portfolio of each of the GSEs, rather than a percentage of the annual profits, as previously proposed.³⁸

Conclusion

If the AHF is enacted into law, low-income housing advocates see the fund as the first step towards establishing a National Housing Trust Fund that would support the production, rehabilitation and preservation of 1.5 million rental homes over ten years, at least 75% of which will be affordable to extremely low-income families. Sheila Crowley, president of the National Low Income Housing Coalition, said, "This is a major first step toward the establishment of a National Housing Trust Fund. Finally, a solution to the housing crisis is in sight for many elderly and disabled people on fixed incomes and low wage workers who cannot afford to rent a decent home in today's market."³⁹ ■

³²*Id.* at § 1337(m)(2)(C).

³³*Id.* at § 1337(o).

³⁴National Affordable Housing Trust Fund Act of 2007, H.R. 2895, 110th Cong., 1st Sess. (2007).

³⁵NATIONAL LOW-INCOME HOUSING COALITION, SUMMARY OF NATIONAL AFFORDABLE HOUSING TRUST FUND ACT OF 2007 (2007) at http://www.nlihc.org/detail/article.cfm?article_id=4302&id=61.

³⁶*Id.*

³⁷Anthony Ha, *New GSE Bill Would Create Affordable Housing Funds*, 35 HOUS. L. BULL. 187, 188 (2005).

³⁸*Id.* at 187. See note 6, *supra*.

³⁹NLIHC, Press Release (May 22, 2007), available at http://nlihc.org/detail/article.cfm?article_id=4214&id=48.

PHA Plan Template Revisions Proposed

By Joe Akman*

Introduction

On May 7, 2007, the Department of Housing and Urban Development (HUD) published a "Notice of Submission of Proposed Information Collection to OMB (Office of Management and Budget)"¹ that informed the public of its submission of a revised Public Housing Authority (PHA) Annual and Five-year Plan Template, Form-50075,² to OMB for expedited review. The proposed PHA Plan Template contains a number of changes that will be disadvantageous to PHA staff, beneficiaries of PHA programs, and advocates working on behalf of low-income tenants.

Background

When the Quality Housing and Work Responsibility Act³ was passed in 1998, the increased flexibility given to PHAs was balanced with the requirement that they submit five-year and annual plans.⁴ The purpose of the PHA Plan requirement is to ensure "local housing authority accountability and an easily identifiable source by which public housing residents, participants in the [Section 8] tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services."⁵ Congress dictated the contents of the Annual Plan and required the plan contain nineteen elements.⁶

Presumably to lessen the workload on individual PHAs and provide uniform reporting, HUD developed templates to assist them submit their plans. The templates provided a mechanism for PHAs to report to HUD, the residents, program participants, and the public on all

nineteen of the required elements. A small number of PHAs (high performing agencies, agencies with 250 units or less of public housing, or agencies that only administer tenant-based assistance) are eligible to submit streamlined plans.⁷ As a result of this statutory framework, HUD eventually developed three different templates for PHAs. Form-50075,⁸ the full standard PHA Plan, is a template for the five-year and annual plan (including the nineteen components required to be included in the plan).⁹ Form-50075-SF¹⁰ and Form-50075-SA¹¹ represent the streamlined PHA template plans for the five-year and annual plans respectively, which are abbreviated versions of the full standard template for high performing and small PHAs.¹² HUD reviews and approves the annual PHA Plan. The Secretary of HUD must examine three specific components: deconcentration admissions policy, demolition and disposition, and civil rights certification.¹³ The remaining components for the full standard PHA Plan are only examined when a "challenge" is made to one of the other sixteen required components.¹⁴

HUD Proposes Changes to the PHA Plan Template

On May 7, 2007, HUD published a "Notice of Submission of Proposed Information Collection to OMB (Office of Management and Budget)"¹⁵ that informed the public of its submission of a revised Public Housing Authority (PHA) Annual and Five-year Plan Template, Form-50075,¹⁶ to OMB for expedited review. HUD provided no basis in the Federal Register for seeking expedited review under 5 C.F.R. § 1320.13, but sought expedited review nevertheless. HUD also reduced the normally required public comment

*Joe Akman was a summer intern with the National Housing Law Project and a student at University of California Hastings College of Law.

¹72 Fed. Reg. 25,770 (May 7, 2007).

²See Form HUD-50075 (Apr. 2007), available at <http://www.hud.gov/offices/pih/programs/ph/am/docs/annualpln.pdf>. Also see NHLP, *New Streamlined PHA Plan Template*, 36 HOUS. L. BULL. 202 (2006), which critiques a prior draft of revisions to the PHA Plan Template.

³Pub. L. No. 105-276 (1998).

⁴42 U.S.C.S. § 1437c-1 (Lexis, LEXIS through P.L. 110-46 approved 07-05-07).

⁵24 C.F.R. § 903.3(b) (2006).

⁶42 U.S.C.S. § 1437c-1(d) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07) requires that a PHA Annual Plan contain: (1) Needs (2) Financial Resources (3) Admissions, Eligibility, and Selection Policy (4) Rent Determination (5) Operation and Management (6) Grievance Procedure (7) Capital Improvements (8) Demolition and Disposition (9) Designation of Housing for Elderly and Disabled (10) Conversion of Public Housing (11) Homeownership (12) Community Service and Self-Sufficiency (13) Domestic Violence (14) Safety and Crime Prevention (15) Pets (16) Civil Rights Certification (17) Annual Audit (18) Asset Management (19) Other.

⁷42 U.S.C.S. § 1437c-1(k) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07). See 24 C.F.R. §§ 903.7, 903.11 (2007) and 69 Fed. Reg. 64,826 (Nov. 8, 2004) (Notice of Further Annual Plan Deregulation for High Performing Public Housing Agencies) for PHA Plan Rules on streamlined plans.

⁸See Form HUD-50075 (Apr. 30, 2003), available at http://www.hudclips.org/sub_nonhud/html/pdfforms/50075.pdf.

⁹See, note 4, *supra*.

¹⁰See Form HUD-50075-SF (Apr. 30, 2003), available at http://www.hudclips.org/sub_nonhud/html/pdfforms/50075-sf.doc.

¹¹See Form HUD-50075-SA (Apr. 30, 2003), available at http://www.hudclips.org/sub_nonhud/html/pdfforms/50075-sa.doc.

¹²See 24 C.F.R. 903.11(c)(3) (2006). A PHA that operates only the Section 8 program must annually submit a plan, but is not required to complete all the elements of the Annual Plan.

¹³42 U.S.C.S. § 1437c-1(i)(2) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07).

¹⁴24 C.F.R. § 903.23(b) (2006), 42 U.S.C.S. § 1437c-1(i)(2) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07).

¹⁵72 Fed. Reg. 25,770 (May 7, 2007).

¹⁶See Form HUD-50075 (Apr. 2007), available at <http://www.hud.gov/offices/pih/programs/ph/am/docs/annualpln.pdf>. See also, NHLP, *New Streamlined PHA Plan Template*, 36 HOUS. L. BULL. 202 (2006), which critiques a prior draft of revisions to the PHA Plan Template.

period for OMB review from “not less than 30 days”¹⁷ to seven days. Due in part to objections, HUD announced on May 14, the day comments were due, that the comment period would be extended until May 29, 2007.¹⁸ But the announcement was not published in the Federal Register, or otherwise given wide distribution. On July 3, 2007, advocates that had commented on the proposal received notice from HUD that the PHA Plan template would be redrafted based on comments received and the notice would be reposted with a sixty-day comment period.¹⁹

The ability of a tenant or the public to clearly identify the PHA Plan components and changes within those components is tremendously eroded.

Substantive Changes Proposed to the PHA Plan Template

The changes made to the PHA Plan template are significant in several respects. The following summary highlights some of the major changes between the current PHA Plan template and the proposed revisions to the PHA Plan template.²⁰

Structural Format of PHA Plan Template

The proposed template eliminates the full-length forms and combines all three templates into one template form, closely resembling the format of the streamlined templates. This revised template obscures the distinction between the different requirements for the PHA Plan and the streamlined PHA Plan. Irrespective of the proposed changes to the template, the statutory requirements for the non-streamlined annual PHA Plan remain the same. Therefore, PHAs not qualifying under the streamlined qualifications (i.e. small, high-performing and PHAs that administer only Section 8 vouchers), are required to continue to include the required nineteen components in their annual PHA Plans even if the template in its proposed

¹⁷44 U.S.C.S. § 3507(b) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07).

¹⁸NLIHC, *Memo to Members*, available at <http://www.nlihc.org/pubs/issue.cfm?id=524> (5/18/07) (citing HUD, Public Housing Asset Management, available at <http://www.hud.gov/offices/pih/programs/ph/am/>).

¹⁹Email Message from Darlene Felton, Housing Program Specialist, HUD (July 3, 2007) on file at NHLP. Although the email message states that the proposed PHA Plan template will be redrafted based on comments received, NHLP is operating under the assumption that the reposted proposed PHA Plan template will be identical to the earlier proposed version summarized in this article.

²⁰For additional substantive changes, see NHLP, *Comments Regarding Proposed Template Plan*, on file at NHLP.

form only includes a subset of the required components.²¹ Requiring two different annual plans, one truncated to be submitted to HUD and another complete one to be available locally, will only serve to confuse everyone, especially tenants and the public who have a responsibility to review and comment upon PHA policies.

Organizational Clarity

For the non-streamlined annual PHA Plan, the proposed template removes the organizational clarity that was a feature of the current template. As a result, many of the nineteen components that were clearly defined in the current annual PHA Plan template are significantly curtailed or eliminated. For twelve of the nineteen components, the proposed template only contains a check box to indicate when a change is made, omitting the requirement that a PHA specify in the plan what type of change occurred within the checked component. The proposed template also removes boxes and checklists related to demolition, disposition, and conversion to tenant-based vouchers, which provided useful information. Furthermore, the proposed template removes a checklist of strategies related to addressing potential needs, which highlights potential options for a PHA to pursue, such as ways to maximize the number of units available or used. As noted above, for PHAs required to develop the full annual PHA Plan, the proposed template does not provide an all-inclusive template in compliance with the required components.²²

Implications for Resident Advisory Board Involvement

Due to the structural and organizational problems with the proposed template, the ability of a tenant or the public to clearly identify the PHA Plan components and changes within those components is tremendously eroded. Local tenants will encounter increased difficulty understanding the PHA Plan, thereby diminishing their ability to meaningfully contribute to the PHA Plan process.

The proposed template also removes the statutory and regulatory requirements detailing the role of Resident Advisory Boards (RABs) in the PHA Plan Process. 42 U.S.C. § 1437c-1(e)(2) (Lexis 2007) provides that,

The agency shall consider the recommendations of the resident advisory boards in preparing the final public housing agency plan, and shall include, in the public housing agency plan submitted to the Secretary under this section, a copy of the recommendations and a description of the manner in which the recommendations were addressed.

²¹See 42 U.S.C.S. § 1437c-1(d) (Lexis, LEXIS through P.L. 110-46 approved 07-05-07).

²²*Id.*

The omission of this language in the PHA Plan Template increases the likelihood that PHAs will fail to comply with this statutory requirement and may also tend to minimize RAB participation in the annual PHA Plan process.

List of Supporting Documents Available for Review

The current PHA Plan Template requires each PHA to identify documents that address the pertinent provisions of the PHA Annual Plan. The absence of this list of supporting documents in the proposed template removes another valuable resource for residents and the public. It also undercuts the purposes of the PHA Plan, which include PHA accountability and a source for the tenants and public of basic PHA policies.

Conclusion

As indicated in the email message from HUD on July 3, 2007, advocates will have an additional opportunity to consider changes made to the PHA Plan template and offer comments in response to the proposal. NHLP encourages all advocates to submit comments in the coming weeks when HUD republishes the notice in the Federal Register with a sixty-day comment period.²³ ■

HUD Regulatory Waivers Benefit Individual Participants and Public Housing Authorities

By Jason Lee^{1*}

HUD is required to publish quarterly in the Federal Register a description of waivers of federal regulations that it has issued.² As of June 15, 2007, the Department of Housing and Urban Development (HUD) published descriptions of all the waiver requests granted during the last three quarters of 2005, each quarter of 2006 and the first quarter of 2007.³ Summaries of key waivers are set out in this article.⁴

The majority of the waivers granted affecting the voucher program can be divided into two broad categories: waivers made for disabled individuals who needed a reasonable accommodation, the majority of which were for payment standard increases, and waiver requests regarding the project-based voucher program. HUD has also granted waivers for other programs, as well as in response to the damage caused by hurricanes in 2005 and 2006. The waivers granted in connection with the HOME program for the period 1996-2006 are available and listed separately on the HUD website.⁵

This summary is intended to assist advocates in determining whether to urge a public housing authority (PHA) to seek a waiver of HUD regulations to assist families in leasing a unit and in determining whether a PHA would be successful when seeking a waiver to facilitate the

¹Jason Lee was a summer law clerk at the National Housing Law Project and a student at UCLA School of Law.

²In 1989, Section 106 of Public Law 101-235 added the provisions regarding the reporting of waivers granted and the delegation of the authority to grant a waiver. 42 U.S.C.A. § 3535(q) (West, Westlaw, Current through P.L. 109-57 approved 08-02-05).

³70 Fed. Reg. 67,540 (Nov. 7, 2005) (second quarter 2005); 71 Fed. Reg. 8,746 (Feb. 17, 2006) (third quarter 2005); 71 Fed. Reg. 27,350 (May 10, 2006) (fourth quarter 2005); 71 Fed. Reg. 38,214 (Jul. 5, 2006) (first quarter 2006); 71 Fed. Reg. 61,595 (Oct. 18, 2006) (second quarter 2006); 71 Fed. Reg. 77,040 (Dec. 22, 2006) (third quarter 2006); 72 Fed. Reg. 15,783 (Apr. 2, 2007) (fourth quarter 2006); 72 Fed. Reg. 36,300 (Jul. 2, 2007) (first quarter 2007).

⁴NHLP previously summarized relevant HUD waivers for 2002, 2003, 2004 and the first quarter of 2005 in two articles. NHLP, HUD Regulatory Waivers: Summary of Recent Waivers Regarding Voucher and Other Program, 35 Hous. L. Bull. 223, 238 (2005); NHLP, HUD Waivers Benefit Individual Program Participants and Facilitate the Use of Project-Based Vouchers, 33 Hous. L. Bull. 309, 320 (2003).

⁵See <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm> (HOME resources and Waiver). It would be helpful to advocates, PHAs and other recipients of HUD programs if other offices within HUD, especially Public and Indian Housing, Fair Housing and Housing, provided on the web a list of waivers granted by program (e.g., Project-Based Vouchers), year, and subject matter (e.g., reasonable accommodation).

²³Email Message from Darlene Felton, Housing Program Specialist, HUD (July 3, 2007) on file at NHLP.

placement of project-based vouchers.⁶ For each waiver there is a citation to the issue of the Federal Register in which the notice of the waiver was published and in which further detail is provided.

Waiver of Effective Date of Reduced Payment Standard for Voucher Program

The Housing Choice Voucher program regulations provide that if the payment standard is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular re-examination following the effective date of the decrease.⁷ As a result of the voucher funding crisis, which has created problems for many local PHAs, HUD urged them to reduce their program costs. In particular, HUD urged PHAs to reduce their payment standards and to implement a new payment standard as soon as possible. To seek immediate implementation, HUD advised PHAs to seek a waiver of the rule regarding the effective date.⁸

Forty-six housing authorities were granted waivers of the regulation regarding the effective date of a reduced payment standard.⁹ All waivers except for the one appearing at 71 Fed. Reg. 77,040 (Dec. 22, 2006) were granted for the 2005 calendar year. The exception was granted for calendar year 2006. HUD granted the waiver requests

⁶There is no limitation on who may request a waiver, but all the published waivers appear to be from PHAs, project owners and other recipients of grant funds, including cities. There does not seem to be a prohibition on waiver requests from program participants, but it is not the practice. If a program participant sought a waiver, it would seem that obtaining the grant recipient's endorsements—such as the PHA—would substantially improve the likelihood of success. If that is true, there are possibly few situations in which a recipient of assistance would make the waiver request independently.

⁷24 C.F.R. 982.505(c)(3) (2006).

⁸Public Housing Agency (PHA) Flexibility to Manage the Housing Choice Voucher Program in 2005, PIH Notice 2005-9 (Feb. 25, 2005).

⁹70 Fed. Reg. 67,540, 67,555-7, 67,560-5 (Nov. 7, 2005) (thirty-one waivers) (Municipality of Vega Baja Housing Division, PR; Jacksonville HA, FL; Cincinnati Metropolitan HA, OH; HA of the City of Key West, FL; Monroe County HA, FL; Dickey/Sargent HA; HA of Skagit County, WA; HA of City of Crystal City, TX; HA of City of South Bend, IN; Inglewood HA, CA; Coos-Curry HA, OR; Sheridan HA, CO; Englewood HA, CO; Dowagiac Housing Commission, MI; HA of the City of Loveland, CO; City of Fairfield Housing Services, CA; HA of Thurston County, WA; Cohoes HA, NY; HA of the County of Merced, CA; Wilkes-Barre HA, PA; Danville Community Development Agency, KY; Asbury Park HA, NY; Georgia Department of Community Affairs, GA; HA of the County of Ford, IL; Sanford HA, NC; Littleton HA, CO; City of Pittsburg HA, CA; Knoxville Community Development Corporation, TN; Fairfield HA, CT; Sullivan County HA, PA; Boston HA, MA); 71 Fed. Reg. 8,746, 8,769-72, 8,774-80 (Feb. 17, 2006) (fourteen waivers) (Longmont HA, CO; Olathe HA, KS; Rochester HA, NY; HA of Christian County, IL; Providence HA, RI; HA of the City of Martinsburg, WV; Harrison County HA, WV; Boonville HA, NY; Leavenworth HA, KS; San Juan HA, TX; HA of the City of Freeport, IL; HA of the City of Rock Hill, SC; Brunswick HA, GA; Wyoming County Housing and Redevelopment Authorities, PA); 71 Fed. Reg. 77,040, 77,055 (Dec. 22, 2006) (Ypsilanti Housing Commission, MI).

because the costs saved from implementing the reduced payment standards earlier would enable the affected PHAs to manage their Housing Choice Voucher program within the allocated budget authority and avoid the termination of HAP contracts due to insufficient funding. Of course, such action had an immediate and adverse consequence for most voucher participants. Implementation of the reduced payment standards translates into increased rental costs if the payment standard is less than the rent charged for the unit and forces the tenants to make up the difference or relocate.

Utility Allowance Adjustments

A PHA is required to review its utility allowances each year and revise them if there has been a change of 10% or more in the utility rate since the last time the utility allowance was revised.¹⁰ The Maine State Housing Authority applied for and received a waiver for calendar year 2005 because the cost-saving benefits from not adjusting the utility rate allowances would enable it to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.¹¹ The fact that the Maine State Housing Authority was expected to save funds by not adjusting the utility rate allowances suggests the utility rates in that area had increased more than 10%. Therefore, the granting of this waiver must have had an adverse impact on tenants who were forced to pay the higher utility costs.¹² If the utility allowances had been set accurately at a reasonable level prior to 2005, then tenants consuming the same reasonable amount in 2006 would be forced to pay the increased costs out of pocket due to the higher rates. Even tenants who might have been consuming less than the reasonable level may have experienced additional financial burdens depending on their usage and the amount that the utility rates increased.

Reasonable Accommodation of Disability

Increases in Payment Standards

A PHA may approve a higher payment standard as a reasonable accommodation to a person with a disability if the rent is within the basic range of 90 to 110% of Fair Market Rent (FMR).¹³ HUD granted several waiver requests which resulted in an increase of the payment standard to an amount above 110% of the FMR as well as a number of waivers that increased the payment standard to an amount above 120% of the FMR. The waivers are typically granted for an additional lease term of one year.

¹⁰24 C.F.R. 982.517(c) (2006).

¹¹70 Fed. Reg. 67,540, 67,557 (Nov. 7 2005).

¹²See NHLP, Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs, 35 Hous. L. Bull. 249, 249 (2005) for more information regarding utility allowances.

¹³24 C.F.R. § 982.505(d) (2006).

All of the requests approved were for a waiver of the cap on the PHA's ability to approve a payment standard above the basic range. Six waivers were granted for the general purpose of enabling the participant to locate or remain in housing that provided the personal connections and necessary space and services for a healthy, independent life.¹⁴ Three waivers were granted to participants who owned manufactured homes modified to meet their needs and required exceptions to the payment standard in order to pay the family share.¹⁵ Two waivers were granted to participants who had multiple chemical sensitivities and had special housing needs.¹⁶ In another case, HUD granted two waivers to allow participants who suffered from multiple sensitivities and disabilities to rent an unattached home.¹⁷ HUD granted one waiver because the participant needed a wheelchair-accessible unit due to an arthritic condition and upcoming surgery.¹⁸ Finally, HUD granted a request where a participant simply could not find a unit that met his needs.¹⁹

The final rule provides more flexibility to PHAs in assessing whether the proposed site is consistent with the goal of deconcentrating poverty.

Project-Based Vouchers

Development Located in Census Tract with Poverty Rate Greater than 20%

Section II, subpart E, Revisions to PHA Project-Based Assistance Program, Initial Guidance provides that all new project-based voucher assistance agreements must be for units in census tracts with poverty rates of less than 20%.²⁰ HUD has granted waivers for several developments in census tracts with poverty rates as high as 66.1%. In some cases, the poverty rate of the census tract was not mentioned. In other cases, one waiver was granted for developments in multiple census tracts with varying poverty rates.

Requests were generally granted if it was demonstrated that the area was formally designated as an Enter-

prise Zone or Empowerment Zone or there was other economic activity occurring in the area that promoted the goal of deconcentration and expanding housing and economic opportunities. In all, twenty-five waivers were granted. Eight waivers were granted to projects that were located within areas that had been formally designated as an Enterprise Zone or an Empowerment Zone.²¹ HUD granted eleven waivers due to planned or recent economic developments near the projects that were consistent with the goal of deconcentration or because property values had increased significantly within the census tract.²² Two waivers were granted by HUD because the projects themselves would provide comprehensive services to or create economic opportunities for its residents and also assist in attracting higher-income residents to the area.²³ HUD approved two more waivers because the projects were replacing existing larger ones, thereby decreasing the number of assisted units in the census tract.²⁴ One waiver was provided because the poverty rate, if adjusted to account for the student population, would be below 20%.²⁵ One other waiver was granted by HUD because the property was a HOPE VI development, which shares the goal of lessening poverty concentration.²⁶

These waivers were granted under the January 16, 2001, Guidance regarding project-based vouchers but it is important to note that a new regulation has been finalized at 24 C.F.R. § 983.57 (2006). The final rule provides more flexibility to PHAs in assessing whether the proposed site is consistent with the goal of deconcentrating poverty and thereby reduces the need for future requests for similar types of waivers.

Project-Based Voucher Units Exceeding 25% of the Units in a Building

Section II, subpart F of the Initial Guidance for project-based vouchers states that no more than 25% of the dwelling units in any building may be assisted under a HAP contract for project-based vouchers. However, the

¹³70 Fed. Reg. 67,540, 67,652 (Nov. 7, 2005) (PS above 120%); 71 Fed. Reg. 8,746, 8,770, 8,779-80 (Feb. 17, 2006) (three waivers) (PS above 120%); 72 Fed. Reg. 36,300, 36,309 (Jul. 2, 2007) (two waivers) (PS above 110%).

¹⁴72 Fed. Reg. 36,300, 36,309-10 (Jul. 2, 2007) (three waivers) (PS above 110%).

¹⁵70 Fed. Reg. 67,540, 67,652 (Nov. 7, 2005) (PS above 120%); 71 Fed. Reg. 8,746, 8,777 (Feb. 17, 2006) (PS above 120%).

¹⁶72 Fed. Reg. 15,783, 15,798 (Apr. 2, 2007) (PS above 110%); 72 Fed. Reg. 36,300, 36,310 (Jul. 2, 2007) (PS above 110%).

¹⁷71 Fed. Reg. 27,350, 27,376 (May 10, 2006) (PS above 110%).

¹⁸72 Fed. Reg. 15,783, 15,798 (Apr. 2, 2007) (PS above 110%).

¹⁹66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

²⁰70 Fed. Reg. 67,540, 67,565-6 (Nov. 7, 2005) (poverty rate not given); 71 Fed. Reg. 8,746, 8,771 (Feb. 17, 2006) (49.8%); *id.* (36.7%); *id.* at 8,776 (29.83%); *id.* at 8,777 (35.8% and 26.9%); *id.* at 8,777-8 (34.9%, 51.8%, 26.8% and 33.2%); *id.* at 27,350, 27,376-7 (May 10, 2006) (two waivers) (poverty rates not given). The goals of Empowerment Zones include opening new businesses and creating jobs. The goals of Enterprise Zones include creating jobs, housing and new educational and health care opportunities. For more information on HUD's Renewal Community/Empowerment Zone/Enterprise Zone, see www.hud.gov/offices/cpd/economicdevelopment/programs/rc/about/ezecinit.cfm.

²¹70 Fed. Reg. 67,540, 67,558 (Nov. 7, 2005) (three waivers) (22%); *id.* at 67,559 (23.6%); *id.* at 67,565 (20%); 71 Fed. Reg. 8,746, 8,770 (Feb. 17, 2006) (66.1%); *id.* at 8,772 (poverty rate not given); *id.* at 8,772-3 (poverty rate not given); *id.* at 8,774 (20.99%); *id.* at 8,775 (47.3%); *id.* (40.5%); *id.* at 8,777 (21.5%); *id.* at 8,778 (51.9%).

²²70 Fed. Reg. 67,540, 67,559 (Nov. 7, 2005) (poverty rate not given); *id.* at 67,560 (37.46%).

²³70 Fed. Reg. 67,540, 67,565 (Nov. 7, 2005) (21.4%); 71 Fed. Reg. 8,746, 8,772 (Feb. 17, 2006) (poverty rate not given).

²⁴70 Fed. Reg. 67,540, 67,565 (Nov. 7, 2005) (24.2%, 28.3% and 23.9%).

²⁵*Id.* at 67,559 (54.9%).

percentage can be exceeded when the dwelling units are specifically made available for elderly families, disabled families and families receiving supportive services.²⁷ HUD granted eight waivers for family units based upon the self-sufficiency nature of the services provided at the project, such as assistance with finding and retaining employment, financial responsibility, and encouraging neighborhood and community involvement.²⁸ Three waivers were approved because the families that would be occupying the units would all be receiving services through programs operated by entities other than the project owners.²⁹

The January 16, 2001, Guidance did not implement the supportive services exception to the 25% cap. The new rules implement the exception.³⁰ Under the new regulation, services do not need to be provided on site and only one member of the family must need the supportive services. Implementation of the exception will reduce the need for the types of waivers described above.

Competitive Bidding

Before 2006, PHAs had to engage in a competitive bidding process for awarding project-based voucher assistance.³¹ The regulations required PHAs to select units to be subsidized with project-based voucher assistance in accordance with a written, HUD-approved unit selection policy that prescribes advertising procedures that must be followed. In addition, the regulation required that a PHA's written selection policy identify the factors the PHA will use to rank and select applications.

HUD granted two waiver requests because the particular development had already been competitively selected for Low-Income Housing Tax Credits (LIHTC).³² HUD granted three other waivers due to the fact that the developer successfully competed for HOPE VI funds.³³ Two more waivers were granted to projects that had been selected through other competitive procurement processes.³⁴

²⁶66 Fed. Reg. 3,605, 3,608 (Jan. 16, 2001).

²⁷70 Fed. Reg. 67,540, 67,558 (Nov. 7, 2005) (social service budget to cover case management and supportive services); *id.* at 67,560 (intensive on-site case management, employment training and counseling, educational programs and child care); *id.* at 67,566 (job training); *id.* (job training, GED and ESL classes); 71 Fed. Reg. 8,746, 8,770 (Feb. 17, 2006) (HOPE VI Community and Supportive services plan); *id.* at 8,771 (obtaining and retaining financial and medical benefits, behavior assessments, transportation and eviction prevention); *id.* at 8,773 (economic literacy, education training and employment opportunities); *id.* at 8,776 (job training and family case management).

²⁸71 Fed. Reg. 8,746, 8,773, 8,755, 8,777 (Feb. 17, 2006) (families would receive supportive services through the local PHA's Family Self-Sufficiency program).

²⁹24 C.F.R. § 24 C.F.R. 983.56 (2006).

³⁰60 Fed. Reg. 34,717, § 983.51 (July 3, 1995) as amended.

³¹70 Fed. Reg. 67,540, 67,565-6 (Nov. 7, 2005) (two waivers).

³²71 Fed. Reg. 8,746, 8,772-3 (Feb. 17, 2006) (three waivers).

³³70 Fed. Reg. 67,540, 67,558 (Nov. 7, 2005) (the project was selected pursuant to a competitive process to receive support from the Washington Families Fund); 71 Fed. Reg. 27,350, 27,377 (May 10, 2006) (the developer had been selected by the local HA through a competitive procurement process).

In 2006, HUD updated this regulation so that a project which had been competitively selected for a government housing assistance program within three years of the project-based voucher proposal selection date was qualified to be selected for project-based vouchers by the PHA. However, the earlier competitive selection proposal must not have involved any consideration that the project would receive project-based voucher assistance. This updated regulation³⁵ should eliminate the need for the waivers described above.

Housing Opportunities for Persons with HIV/AIDS

Under the project-based voucher assistance program, PHAs may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.³⁶ However, the law requires that only persons with HIV/AIDS may occupy units developed with Housing Opportunities for Persons with AIDS (HOPWA) funds.³⁷ In one case involving project-based vouchers in a unit that also received HOPWA funds, the local PHA perceived a conflict between the two programs and sought and obtained a waiver to pass over persons on their waiting lists in order to select a participant with HIV/AIDS.³⁸

Site-Specific Waiting Lists

Site-specific waiting lists were not authorized under the prior project-based voucher program regulations.³⁹ HUD granted two waivers to the site-based waiting list rule because the requests were consistent with Section 8(o)(13)(J) of the United States Housing Act of 1937, which allows PHAs to maintain separate waiting lists for project-based voucher developments as long as all families on the PHA's waiting list can place their names on any of the separate waiting lists.⁴⁰ There is no indication in the granting of the waiver request what evidence the PHA submitted to demonstrate that all applicants were fully aware of their opportunity to get on the site-based waiting list.

The new project-based rules allow for site-specific waiting lists, but the PHA must continue to maintain the list and the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for project-based voucher assistance.⁴¹

³⁴24 C.F.R. § 983.51 (2006).

³⁵*Id.* § 982.207(b)(3).

³⁶42 U.S.C. § 12,901-12,912 (West, WESTLAW current through P.L. 109-57 approved 08-02-05); 24 C.F.R. § 574.3 (2004) (definition of eligible person).

³⁷72 Fed. Reg. 15,783, 15,798 (Apr. 2, 2007).

³⁸60 Fed. Reg. 34,717, § 983.203(a)(3) (Jul. 3, 1995) as amended. This regulation is now codified at 24 C.F.R. § 983.251(c)(3) (2006).

³⁹42 U.S.C. § 1437f(o)(3)(J) (West 2003); 71 Fed. Reg. 8,746, 8,772-4 (Feb. 17, 2006) (two waivers).

⁴⁰24 C.F.R. § 983.251(c)(3) (2006).

Hurricanes Katrina, Rita and Wilma

REAC Inspections

HUD's Real Estate Assessment Center (REAC) must provide an independent physical inspection of a PHA's inventory of properties.⁴² Nine waivers were granted to those projects that were damaged by Hurricanes Katrina, Rita and Wilma as well as to projects that assisted families affected by those hurricanes.⁴³

Waivers for Disaster Areas

HUD regulatory waivers were made available to presidentially declared disaster areas as a result of damages caused by Hurricanes Katrina, Rita and Wilma.⁴⁴ Local authorities could defer or suspend compliance with a number of regulations for an initial period of twelve months, unless otherwise specified, by submitting a written request to HUD.⁴⁵ A total of 105 PHAs received waivers pursuant to this plan, with many of the PHAs receiving more than one waiver and appearing in more than one issue of the Federal Register.⁴⁶

Conclusion

HUD regulatory waivers continue to be a fairly common occurrence. In general, the recently granted waivers appear to be consistent with the reasonable and efficient administration of HUD programs by local entities. Significantly, in the case of project-based vouchers, HUD has reduced the need to seek waivers by issuing regulations giving PHAs more flexibility to design their own program.

Advocates should work closely with local PHAs to determine when they are seeking waivers of regulations. Resident Advisory Boards and PHA Boards of Commissioners should request PHA staff to provide them with advance notice of any proposed request for a waiver of rules (such as changing the effective date of a reduced payment standard or not revising utility allowances) that have an impact on a large number of program participants. ■

⁴¹Id. § 902.20 (2006).

⁴²71 Fed. Reg. 27,350, 27,374-5 (May 10, 2006) (five waivers); id. at 38,214, 38,231 (Jul. 5, 2006); id. at 61,595, 61,613-5 (Oct. 18, 2006) (two waivers); 72 Fed. Reg. 15,783, 15,795 (Apr. 2, 2007).

⁴³70 Fed. Reg. 57,716 (Oct. 3, 2005); id. at 66,222 (Nov. 1, 2005); 71 Fed. Reg. 12,988 (Mar. 13, 2006).

⁴⁴24 C.F.R. § 5.216(g)(5) (2006); id. at § 5.512(c); id. at §§ 5.801(c) and (d); id. at § 902; id. at § 903.5; id. at § 905.10(i); id. at § 941.306; id. at § 965.302; id. at § 982.54; id. § 982.206 (2004); id. § 982.401; id. § 982.503(b) (2006); id. § 984.303; id. § 984.105; id. § 985; id. § 990.145; id. §§1000.156 and 1000.158; id. §1000.214; id. §§ 1003.400(c) and Section I.C. of FY 2005 Indian Community Development Block Grants Program (ICDBG) Notice of Funding Availability (NOFA) (2006); 24 C.F.R. 1003.401 and Section I.C. of FY 2005 ICDBG NOFA (2006); 24 C.F.R. 1003.604 (2006).

⁴⁵71 Fed. Reg. 27,350, 27,372-4 (May 10, 2006) (sixty PHAs); id. at 38,214, 38,230-1 (Jul. 5, 2006) (twenty-two HAs); id. at 61,595, 61,615-6 (Oct. 18, 2006) (ten PHAs); id. at 77,040, 77,056 (Dec. 22, 2006) (five HAs); 72 Fed. Reg. 15,783, 15,799-800 (Apr. 2, 2007) (seven HAs); id. at 36,311-4 (Jul. 2, 2007) (seventy-eight HAs).

Recent Cases

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

Denial of Assistance—Voucher Program Drug-Related Criminal Activity

Williams v. Integrated Community Services, 2007 WL 1500263 (Wis.App., May 24, 2007). Court reversed lower court and administrative hearing decision upholding defendant's denial of voucher assistance to the plaintiff on the ground that a guest in her household was involved in a drug-related criminal activity. Court based its decision on the HUD regulation, 24 C.F.R. § 982.553(a)(2)(ii)(A), and its regulatory history, which authorizes the denial of voucher assistance if any member of the applicant's household was involved in drug-related criminal activity but does not extend the denial of assistance if a guest was involved in the criminal activity.

Illegal Charges—Voucher Program *Qui Tam* Action

Coleman v. Hernandez, 2007 WL 1515163 (D. Conn. May 24, 2007). Voucher holder brought a *qui tam* action under the U.S. False Claims Act against landlord who on six occasions charged voucher holder \$60 for water even though the landlord was obligated to provide the water under the Housing Assistance Payment Contract. Court awarded United States \$1080 in treble damages plus a civil penalty of \$33,000 (six times \$5,500). Court awarded voucher holder 30% of amount due to the United States or \$10,224. Court also awarded voucher holder for portion of rental deposit improperly retained and \$13,375 in attorney fees. Court rejected voucher holder's discrimination claim and refused to award separate damages under Connecticut's Unfair Trade Practice Act on the ground that it would be duplicative of the award made under the False Claims Act.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

Termination—Voucher Program Notice, Waiver

Sultanik v. Byrd, 2007 WL 1532274 (N.Y. Just. Ct. 2007) (Unreported). Landlord's action to terminate a Section 8 voucher holder's tenancy was dismissed on three grounds. First, the landlord failed to send a copy of the termination notice to the housing authority as required by HUD regulations and the lease. Second, the notice of termination was inadequate as it was not signed by the owner but by the owner's attorney without proof of the attorney's authorization to represent and bind the owner. Landlord's argument that tenant knew that the attorney represented the owner does not estop the resident from raising the defense when HUD regulations require that the owner provide the resident with the notice of termination. Third, the owner's acceptance of payments from the housing authority after the date of the notice nullified the notice. Landlord's holdover action was dismissed.

Termination—Voucher Program Failure to Disclose Additional Resident

Gammons v. Massachusetts Dept. of Housing and Community Development, 2007 WL 1385704 (D. Mass., May 9, 2007). Court denied voucher holder's motion for preliminary injunction which sought to preclude the department from terminating her voucher on the ground that she failed to disclose that her husband was residing with her in the assisted unit. The court rejected the voucher holder's argument that the administrative termination hearing violated her due process rights because it relied on hearsay evidence and did not give the voucher holder adequate opportunity to cross examine non-testifying witnesses. The court found that it is well established that hearsay evidence is admissible in administrative hearings. It also rejected the voucher holder's contentions that the evidence proffered at the administrative hearing was insufficient and that the hearing officer improperly relied on information protected by the privacy act to reach the decision to uphold the termination.

Termination—Voucher Program Failure to Disclose Additional Resident

Smith v. New York City Housing Authority, 2007 WL 1247228 (N.Y.A.D. 1 Dept., May 1, 2007). Court upheld termination of public housing resident's tenancy for concealing her husband's residency in the apartment, resulting in the resident's benefiting from reduced rent charges. Court found that termination of long-term tenancy was not of a shock to the conscience as it was based on the resident's own conduct.

Rent Abatement—Voucher Program Right to Recover Housing Authority's Contribution

Anderson v. District of Columbia Housing Authority, 2007 WL 1280576 (D.C., May 3, 2007). Section 8 voucher holder who successfully asserted a breach of the implied warranty of habitability against the landlord appealed a decision of the Superior Court which, as abatement, only awarded the tenant that portion of the total rent that the resident had paid to the landlord. The superior court allowed the District of Columbia Housing Authority (DCHA) to intervene in the case and recover its payments to the landlord. On appeal, the Court of Appeals affirmed. It concluded that tenant did not have the right to receive the monies paid by DCHA to the landlord under the Section 8 program, that DCHA had a right to intervene in the case, to seek rental abatement for the money paid by it to the landlord, and that it was entitled to receive its portion of the rent payments during the period that the landlord violated housing code conditions.

Right to Exclude Visitors—Public Housing Sex Offender

Gilmore v. Hernandez, 2007 WL 1438666 (N.Y.A.D. 1 Dept., May 17, 2007). Appellate court reversed lower court holding that exclusion of godson, a registered sex offender, from visiting petitioner's public housing apartment was burdensome and subjects the resident to constant threats of eviction. Court held that a blanket prohibition on residency and visitation is clearer, easier to enforce, and better protects the community from a potential danger.

Right of Household Member to Remain—Public Housing One-year Residency Rule

Torres v. New York City Housing Authority, 2007 WL 1364690 (N.Y.A.D. 1, May 10, 2007). Appellate division reversed lower court determination that sister of deceased public housing resident, who had been given permission to join the household, had a right to remain in her sister's apartment after her death. The appellate court concluded that the applicant failed to raise the arguments which she raised in court—that the housing authority's requirement that a remaining household member have lived in the unit with permission for at least one year in order to qualify as a remaining household member was arbitrary and capricious and not in accordance with the household lease—at the administrative grievance hearing conducted by the New York City Housing Authority. Accordingly, she could not raise them for the first time in court.

Eviction—Public Housing Violent Criminal Activity Near Premises

Lowell Housing Authority v. Melendez, 449 Mass. 34, 865 N.E.2d 741 (Mass. 2007). The Court upheld city's housing authority right to evict public housing tenant on the ground that he assaulted and attempted to rob a patron at a convenience store about a mile from the housing development where the tenant lived. Court found that violent criminal activity a mile from the development was close enough to other public housing residents to threaten their health, safety, and quiet enjoyment and therefore was grounds for termination of the resident's lease.

Foreclosure Defense—FHA Insured Home Loan Failure to Follow Loss Mitigation Regulations

Wells Fargo Home Mortg. v. Neal, 2007 WL 1310141 (Md. May 7, 2007). Maryland's highest court reversed lower court holding that single family homeowner, whose home was insured by the Federal Housing Administration, could not assert the loan servicer's failure to comply with HUD single family loss mitigation regulations as a defense to a foreclosure. The court held that Maryland's foreclosure actions are equitable forms of action and that the doctrine of clean hands will not permit a servicer to foreclose on the loan when the servicer has failed to comply with the regulations. The court also found that the homeowner did not have private right to action to maintain a damages contract claim against the servicer for failing to follow the same regulations even though they were referenced in the mortgage documents.

Prepayment Restriction Damages—RHS Section 515 Program Statute of Limitations

Tamerline Ltd. v. United States, 2007 WL 1469392 (Fed.Cl., May 18, 2007). Court held that a Section 515 owner who, in conformance with the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), applied to prepay the Rural Housing Service (RHS) loan and accepted incentives to remain in the program more than six years before bringing a damage action against RHS for the government's repudiation of the owner's right to prepay the loan, was barred by the statute of limitations from maintaining the action. Court found that the owner's application to prepay the loan triggered the owner's right to bring suit and the failure to file the suit until after the Tucker Act's six-year statute of limitations had run barred the owner's claim. The court, however, rejected the government's claim that the statute of limitations also barred the owners' claims for damages that may arise after the use restrictive period, imposed when the owner accepted the

incentives, expires. The court concluded that the right to bring suit for the repudiation of the right to prepay after that use restricted period, which is also barred by ELIHPA, has not yet vested and is not barred by the statute of limitations.

Right to Rent by Persons Not Legally Admitted to the United States

Villas at Parkside Partners v. City of Farmers Branch, 2007 WL 1498763 (N.D.Tex., May 21, 2007). Court preliminarily enjoins city ordinance that sought to restrict the rights of persons not legally admitted to the United States to reside in the city by requiring landlords to verify their admission status. Court held that the plaintiffs are likely to prevail on the merits of their claim, namely that the ordinance is preempted by federal immigration laws and may not be adopted or enforced by the city. ■

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 (USDA—Rural Housing Service/Rural Development (RD)) issued in May of 2007. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

HUD Final Regulations

72 Fed. Reg. 27,221 (May 14, 2007) Manufactured Home Dispute Resolution Program; Final Rule

Summary: This rule establishes a federal manufactured home dispute resolution program and guidelines for the creation of state-administered dispute resolution programs. Under the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000, HUD is required to establish a program for the timely resolution of disputes among manufacturers, retailers, and installers of manufactured homes regarding responsibility, and the issuance of appropriate orders, for the correction or repair of defects in manufactured homes that are reported during the one-year period beginning on the date of installation.

Effective Date: February 8, 2008.

72 Fed. Reg. 29,737 (May 29, 2007) Self-Insurance Plans Under the Indian Housing Block Grant Program

Summary: This final rule establishes standards for recipients under the Indian Housing Block Grant program to purchase insurance through nonprofit insurance entities owned and controlled by Indian tribes and tribally designated housing entities. This rule follows publication of a March 7, 2006, proposed rule, and takes into account the public comments received on the proposed rule. This final rule provides additional clarifications in the preamble

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>.

and adopts, with one change, the regulations in the March 7, 2006, proposed rule.

Effective Date: June 28, 2007.

HUD Proposed Regulations

72 Fed. Reg. 24,079 (May 1, 2007) Project-Based Voucher Rents for Units Receiving Low-Income Housing Tax Credits

Summary: This proposed rule would revise the low-income housing tax credit (LIHTC) rent provisions of HUD's final Project-Based Voucher (PBV) program rule, which was published on October 13, 2005, and took effect on November 14, 2005. The October 13, 2005, final rule capped the PBV rents at the LIHTC rent in buildings with LIHTC units, even in cases where HUD formerly permitted such units to receive the higher rents permitted under the PBV program. After giving the issue further consideration, HUD now proposes to revert to the regulations that address this specific issue and were in effect prior to issuance of the October 13, 2005, final rule. The regulations in effect prior to the October 13, 2005, final rule did not necessarily require public housing agencies (PHAs) to cap Section 8 maximum rents at the tax credit rent. PHAs may not enter into assistance contracts until HUD or an independent entity approved by HUD has conducted the required subsidy layering review and determined that the assistance is in accordance with HUD requirements.

Comment Due Date: July 2, 2007.

72 Fed. Reg. 27,047 (May 11, 2007) Standards for Mortgagor's Investment in Mortgaged Property

Summary: Through this proposed rule, HUD submits, for public comment, specific standards governing a mortgagor's investment in property for which the mortgage is insured by the Federal Housing Administration. Specifically, this proposed rule would codify HUD's long-standing practice, authorized by statute, of allowing a mortgagor's investment to be derived from gifts by family members and certain organizations. The standards would address a situation in which the mortgagor's investment is derived from a gift, loan, or other payment that is provided by any donor, including an individual or an organization, and would also specify prohibited sources for a mortgagor's investment. The proposed rule would establish that a prohibited source of downpayment assistance is a payment that consists, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale: (1) the seller, or any other person or entity that financially benefits from the transaction; or (2) any third party or entity that is reimbursed directly or indirectly by any of the parties listed in clause (1).

Comments Due Date: July 10, 2007.

72 Fed. Reg. 29,743 (May 29, 2007)

Housing Choice Voucher Program Homeownership Option; Eligibility of Units Not Yet Under Construction

Summary: This proposed rule would revise HUD's regulations for the homeownership option authorized under the Housing Choice Voucher (HCV) program. Through the homeownership option, a public housing agency may provide voucher assistance for an eligible family that purchases a dwelling unit for residence by the family. The current homeownership option regulations provide that, to be eligible for purchase with voucher assistance, a unit must be either an existing unit or under construction at the time the family enters into the contract for sale. This proposed rule would permit the use of voucher homeownership assistance for the purchase of units not yet under construction at the time the family contracts to purchase the home. This proposed rule also makes conforming changes for purposes of the homeownership option. These revisions would expand the housing choices available to families participating in the homeownership option under the HCV program.

Comment Due Date: July 30, 2007.

HUD Federal Register Notices

72 Fed. Reg. 25,327 (May 4, 2007)

Manufactured Housing Consensus Committee; Advanced Notice of Proposed Rulemaking

Summary: This notice invites interested persons to submit recommendations related to proposed changes to the Federal Manufactured Construction and Safety Standards and Manufactured Home Procedural and Enforcement Regulations. The recommendations are to be submitted to the Manufactured Housing Consensus Committee for review, and consideration for providing periodic recommendations to the Secretary of the Department of Housing and Urban Development to adopt, revise, and interpret the federal manufactured housing construction standards and proposed procedural and enforcement regulations. Proposed changes should be mailed to: The National Fire Protection Association, One Batterymarch Park, P.O. Box 9101, Quincy, Massachusetts 02269, Attention: Robert Solomon.

72 Fed. Reg. 25,770 (May 7, 2007)

Notice of Submission of Proposed Information Collection to OMB: Emergency Comment Request; Public Housing Agency Plan

Summary: HUD has submitted to the Office of Management and Budget (OMB) for emergency review and approval the collection of information on public housing agency (PHA) Plans. PHAs must submit five-year plans and annual plans for tenant-based assistance and public housing operating subsidies, including Deregulated and Streamlined Plans. Through these plans a PHA will advise HUD, its residents, and the public of the PHA's

mission for serving the needs of low-income and very low-income families and the PHA's strategy for addressing those needs.

Comments Due Date: May 14, 2007.

72 Fed. Reg. 26,144 (May 8, 2007)

Notice of Submission of Proposed Information Collection to OMB: Alternative Housing Pilot Program Evaluation Baseline Survey

Summary: The proposed information collection requirement described below has been submitted to OMB for emergency review and approval. HUD is soliciting public comments on the subject proposal. The proposed information collection will collect baseline data from families before they received housing under FEMA's Alternative Housing Pilot Program. HUD is conducting an evaluation of AHPP. Four states affected by Hurricanes Katrina and Rita received AHPP grants to test out alternative approaches to providing temporary housing after a disaster. HUD is charged with measuring what benefits and costs are associated with each of the alternatives being implemented by the states. Measuring the program impact on health, satisfaction, and general well-being of the occupants are a key part of the evaluation. This baseline survey is needed to know the characteristics of eligible households applying to participate in the program. This information is critical as an evaluation tool.

Comments Due Date: May 22, 2007.

72 Fed. Reg. 26,826 (May 11, 2007)

Notice of Proposed Information Collection for Public Comment: Exigent Health and Safety Deficiency Correction Certification

Summary: The proposed information collection requirement described below will be submitted to OMB for review. HUD's Uniform Physical Condition Standards (UPCS) regulation (24 CFR part 5, subpart G) provides that HUD housing must be decent, safe, sanitary, and in good repair. Public housing agencies (PHAs) must maintain housing in a manner that meets prescribed physical condition standards to be considered decent, safe, sanitary, and in good repair. The UPCS regulation also provides that all areas and components of the housing must be free of health and safety hazards. HUD conducts physical inspections of the HUD-funded housing to determine if the UPCS standards are being met. Pursuant to the UPCS inspection protocol, at the end of the inspection (or at the end of each day of a multi-day inspection) the inspector provides the property representative with a copy of the "Notification of Exigent and Fire Safety Hazards Observed" form. Each exigent health and safety (EHS) deficiency that the inspector observed that day is listed on the form. The property representative signs the form acknowledging receipt. PHAs are to correct EHS deficiencies (i.e., emergency work orders) within twenty-four hours. PHAs are to notify HUD, using the electronic for-

mat, within three business days of the date of inspection, which is the date the PHA was provided notice of these deficiencies, that the deficiencies were corrected within the prescribed time frames.

Comments Due Date: July 10, 2007.

72 Fed. Reg. 27,031 (May 11, 2007)
Notice of Supplementary Information and Technical Corrections to Fiscal Year 2007 SuperNOFA for HUD's Discretionary Programs

Summary: On January 18, 2007, HUD published its Notice of HUD's Fiscal Year (FY) 2007 Notice of Funding Availability (NOFA) Policy Requirements and General Section to the FY 2007 SuperNOFA for HUD's Discretionary Programs (General Section). On March 13, 2007, HUD published its FY 2007 SuperNOFA for HUD's Discretionary Programs. In this notice published in today's Federal Register, HUD announces that it has posted corrected materials to Grants.gov, extends deadline dates for submission of applications, and clarifies requirements for submitting faxed documents. HUD is also providing supplemental information for and making technical corrections to the General Section and several individual program NOFAs. In order to give applicants the opportunity and time to submit or resubmit their applications with the corrected Logic Models, HUD is reopening competition for program NOFAs whose deadline dates have already passed and extending the deadline dates for all NOFAs. Finally, this document provides supplementary information for and makes corrections to the General Section and the individual NOFAs for a number of HUD programs.

Dates: The application deadline dates for all program NOFAs are extended to the dates provided in Appendix A of this notice published in today's Federal Register.

72 Fed. Reg. 27,146 (May 14, 2007)
Notice of Proposed Information Collection: Economic Opportunities for Low- and Very Low-Income Persons

Summary: The proposed information collection requirement concerning the Section 3 program will be submitted to the Office of Management and Budget for review. The information will be used by HUD to monitor program recipients' compliance with the requirements of Section 3 of the Housing and Urban Development Act of 1968. HUD Headquarters will use the information to assess the results of the department's efforts to meet the statutory objectives of Section 3. The data collected will be used by recipients as a self-monitoring tool. If the information is used, it will be used to prepare the mandatory reports to Congress assessing the effectiveness of Section 3. The department is soliciting public comments on the subject proposal.

Comments Due Date: July 13, 2007.

72 Fed. Reg. 27,146 (May 14, 2007)
Notice of a Computer Matching Program Between the Department of Housing and Urban Development (HUD) and the Rural Housing Service (RHS)

Summary: HUD is announcing a new matching program involving comparisons between data provided by applicants or participants in HUD's assisted housing programs and applicants for RHS's rural housing programs. The matching program will be carried out to detect excessive or duplicate housing assistance as result of Hurricanes Katrina and Rita. The matching program will be accomplished by comparing income, family size, family address, family identity, and benefit data for individuals participating in HUD's assisted housing programs and subsidized multifamily housing programs with rural housing assistance data maintained by RHS in its HS Multifamily Programs, Multifamily Information System, Single Family Housing Programs, Dedicated Loan Origination and Servicing System, and Guaranteed Loan System databases within its system of records known as System of Records titled "USDA/Rural Development," last published 63 FR 38546 (July 17, 1998). The tenant comparisons will identify, based on criteria established by HUD, tenants whose incomes, family size, address, or benefit levels, etc. require further verification to determine if the tenants received excessive or duplicate rental assistance. The program also provides for the verification of the matching results and the initiation of appropriate administrative or legal actions.

Effective Date: Computer matching is expected to begin June 13, 2007, unless comments are received which will result in a contrary determination, or forty days after copies of the underlying matching agreement is signed, approved by HUD and RHS Data Integrity Boards, and sent to both Houses of Congress, whichever is later.

Comments Due Date: June 13, 2007.

72 Fed. Reg. 28,986 (May 23, 2007)
Notice of Submission of Proposed Information Collection to OMB: Mortgage Insurance Termination; Application for Premium Refund or Distributive Share Payment

Summary: The proposed information collection requirement 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 Mortgage Insurance Termination Information is used by FHA-approved lenders to terminate FHA insurance to comply with HUD requirements. The Application for Premium Refund or Distributive Share Payment is used by homeowners to apply for the unearned portion of the mortgage insurance premium or a distributive share payment.

Comments Due Date: June 22, 2007.

72 Fed. Reg. 28,988 (May 23, 2007)
**Notice of Submission of Proposed Information
Collection to OMB: Disclosure of Adjustable Rate
Mortgages (ARMs) Rates**

Summary: HUD has submitted the proposed information collection requirement described below to OMB for review and is soliciting public comments on the subject proposal. Lenders must provide mortgagors with adjustable rate mortgages an annual ARM Disclosure Notice at least twenty-five days before any adjustment to a mortgagor's monthly payment may occur, and the mortgagee must inform the borrower of the changed interest rate, monthly mortgage amount, the current index interest rate value, and how the payment adjustment was calculated. HUD reviews lenders loan files to ensure lenders are in compliance.

Comments Due Date: June 22, 2007.

Rural Housing Service Proposed Regulations

72 Fed. Reg. 27,470 (May 16, 2007)
Thermal Standards

Summary: The Rural Housing Service is proposing to amend its regulations to be consistent with other federal agencies. The current thermal standards for existing single family housing can impose an unnecessary financial burden on the borrower. Removing the thermal standards for existing single family housing will provide consistency with HUD existing single family housing thermal standards. This change will not affect the thermal standards for new construction; such requirements are generally prescribed by adopted building and model energy codes. Construction materials and building techniques have improved tremendously during the last thirty years, creating many alternatives to achieve thermally efficient homes. Removing the agency's imposed thermal standards for existing single family housing will give a borrower the opportunity to allocate money towards other improvements which may result in higher cost savings. The rule will not result in any increase in costs or prices to consumers, nonprofit organizations, businesses, federal, state, or local government agencies, or geographic regions.

Comment Due Date: July 16, 2007.

72 Fed. Reg. 27,988 (May 18, 2007)
**Streamlining of the Section 523 Mutual and
Self-Help Housing Program**

Summary: This action proposes to replace the Mutual and Self-Help Housing Program's (MSH) administration under 7 CFR part 1944, Subpart I with 7 CFR part 3551. This rule will apply to grants executed after the effective date of the final rule. The Rural Housing Service proposes to streamline and clarify its regulations for MSH. This action is taken to reduce regulations, improve customer service and enhance efficiency, flexibility, and effectiveness in managing the program.

Comment Due Date: July 17, 2007.

RHS Federal Register Notices

72 Fed. Reg. 27,146 (May 14, 2007)
**Notice of a Computer Matching Program Between the
Department of Housing and Urban Development (HUD)
and the Rural Housing Service (RHS)**

See notice summary under HUD Federal Register Notices, *supra*.

72 Fed. Reg. 30,337 (May 31, 2007)
**Notice of Availability of Funds; Multi-Family Housing,
Single Family Housing**

Summary: The Rural Housing Service (RHS) announces the availability of housing funds for Fiscal Year 2007. This action is taken to comply with 42 U.S.C. 1490p, which requires that RHS publish in the Federal Register notice of the availability of any housing assistance.

Effective Date: May 31, 2007. ■

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