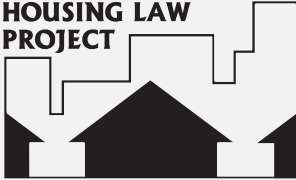


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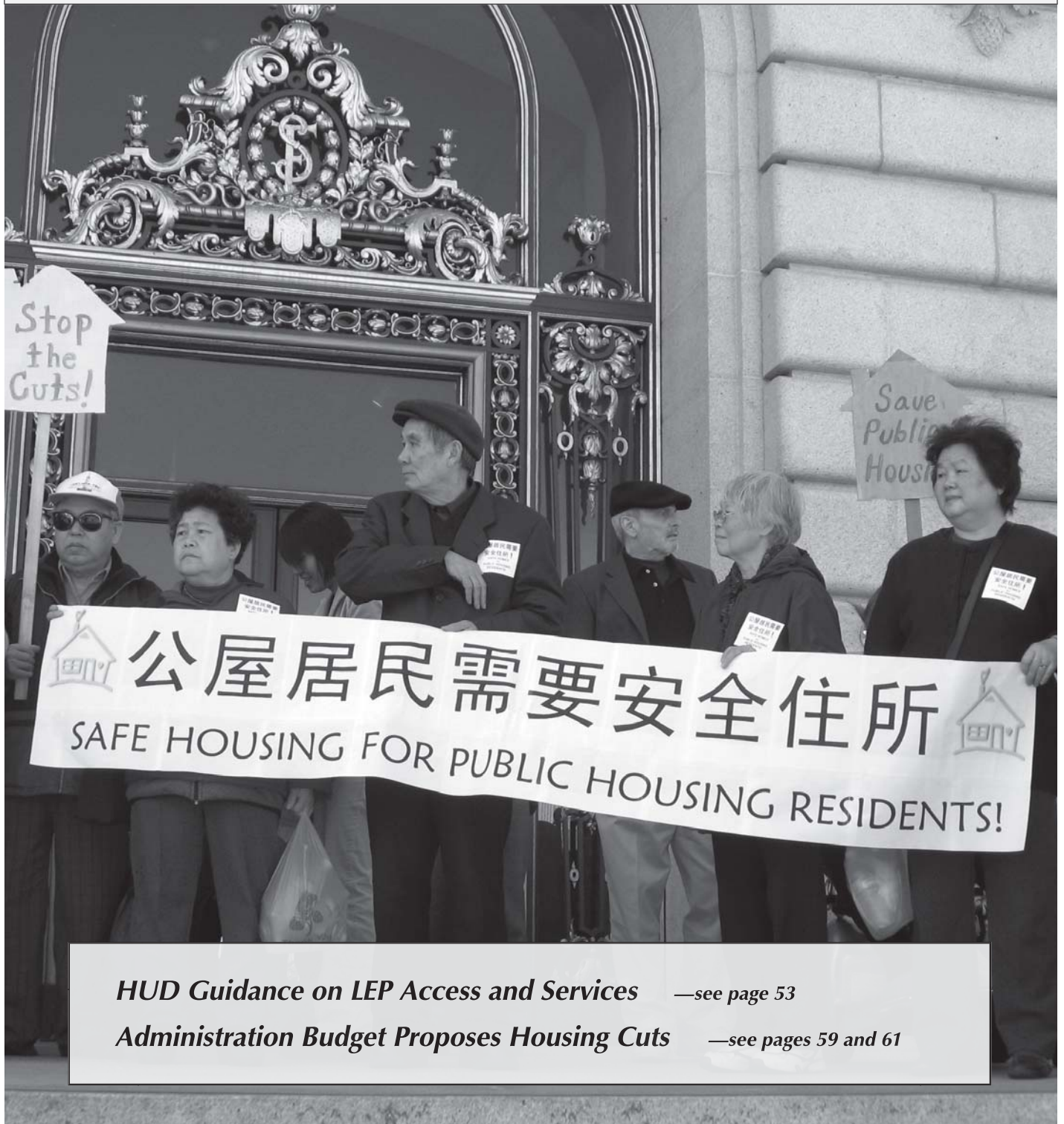


advancing housing justice

Housing Law Bulletin

Volume 37 • March 2007

Published by the National Housing Law Project



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SAFE HOUSING FOR PUBLIC HOUSING RESIDENTS!

HUD Guidance on LEP Access and Services —see page 53


Administration Budget Proposes Housing Cuts —see pages 59 and 61


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 FEATURE

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Cover: San Francisco City Hall, March 8, 2007. Demonstration in opposition to HUD cuts in public housing funding that resulted in a reduction of security in San Francisco public housing developments occupied by seniors and people with disabilities. Photo by Terrie Frye; provided courtesy of The San Francisco Bay Area Independent Media Center.

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HUD Issues Final Guidance on National Origin Discrimination and Title VI

By Ellen Johnson*

On January 22, 2007, HUD published a final guidance designed to assist recipients of federal funding to comply with Title VI of the Civil Rights Act of 1964 and implementing regulations.¹ Title VI² was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.³ The guidance describes a number of steps HUD grantees and funding recipients should be taking to provide better access to programs and services, including oral interpretation or written translations of important information about their programs, where appropriate.⁴

While most individuals living in the United States read, write, speak and understand English, there are many for whom English is not their primary language. If these individuals have a limited ability to read, write, speak or understand English, they are considered limited English proficient (LEP) individuals. For LEP persons, language can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information relevant to the program, activity or services. In certain circumstances, failure to ensure that LEP persons can effectively participate in, or benefit from, federally assisted programs and activities may violate the Title VI prohibition against discrimination on the basis of national origin.⁵

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¹72 Fed. Reg. 2732. The guidance was originally made effective as of February 21, 2007. However, on February 16, 2007, HUD published a notice postponing the effective date of the guidance to March 7, 2007. 72 Fed. Reg. 7666.

²42 U.S.C. § 2000d-2000d-1.

³HUD takes the position that private or public entities that directly or indirectly receive federal funding are subject to Title VI and the Guidance. However, if the entity is only the beneficiary of FHA insurance, it is not subject to Title VI. 72 Fed. Reg. 2733 (Jan. 22, 2007).

⁴24 C.F.R. § 1000.12(d). Title VI does not apply to Indian tribes that are not covered by the Indian Civil Rights Act (25 U.S.C. §§ 1301-03). However, Title VI does apply to actions by Indian tribes under Section 201(b) of the Native American Housing Assistance and Self-Determination Act (25 U.S.C. §§ 4101-4212).

⁵In *Lau v Nichols*, 414 U.S. 563 (US 1974), the Supreme Court interpreted regulations promulgated by the former Department of Health, Education and Welfare—which were similar to those published by HUD at 24 C.F.R. § 1.4—to hold that Title VI (§ 602) prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination.

Background

Under Title VI and its implementing regulations, recipients of federal financial assistance have a responsibility to ensure meaningful access to programs and activities by LEP persons.⁶ On August 11, 2000, President Clinton signed Executive Order 13166 directing each federal agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying this objective.⁷ Subsequently, the U.S. Department of Justice (DOJ) published a model LEP Guidance establishing a format for all federal agencies to use in developing guidance for their respective recipients.⁸ Following the U.S. Supreme Court's decision in *Alexander v Sandoval*,⁹ the Assistant Attorney General clarified and reaffirmed the LEP Guidance, stating that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups, the Executive Order and guidance remain in place.¹⁰

HUD Guidance Applies Only to Recipients of Federal Funding

Title VI states that no program or activity receiving "federal financial assistance" shall discriminate against individuals based on their race, color, or national origin. The clearest example of federal financial assistance is the award or grant of money. Federal financial assistance, however, also may be in non-monetary form.¹¹ Federal financial assistance may include the use or rental of federal land or property at below market value, federal training, a loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not encompass contracts of guarantee or insurance, regulated programs, licenses,

procurement contracts by the federal government at market value, or programs that provide direct benefits. It is important to remember that not only must a program receive federal financial assistance to be subject to Title VI, but the entity also must receive federal assistance at the time of the alleged discriminatory act(s).¹²

Examples of Federal Financial Assistance

Many agency regulations use similar, if not identical, language to define federal financial assistance:

- (1) grants and loans of federal funds;
- (2) the grant or donation of federal property and interests in property;
- (3) the detail of federal personnel;
- (4) the sale and lease, and the permission to use (on other than a casual or transient basis), of federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and
- (5) any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. § 42.102(c). See also 24 C.F.R. § 1.2(e) for HUD's definition of federal financial assistance.

It should be noted that, while contracts of guaranty and insurance may constitute federal financial assistance, Title VI specifically states that it does not apply to "Federal financial assistance...extended by way of a contract of insurance or guaranty."¹³

Relevance of LEP Guidance in an Advocate's Practice

Title VI prohibits intentional discrimination. However, agency Title VI regulations prohibiting conduct that has an unjustified discriminatory effect have been upheld as valid.¹⁴ A claim alleging a violation of an agency's

⁶Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Section 602 authorizes and directs federal agencies that are empowered to extend federal financial assistance to any program or activity "to effectuate the provisions of [Section 601]... by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1.

⁷65 Fed. Reg. 50121 (Aug. 16, 2000).

⁸The Department of Justice initially issued LEP Guidance on August 16, 2000 (65 Fed. Reg. 50,123) and final LEP guidance on June 18, 2002 (67 Fed. Reg. 41,455).

⁹*Alexander v Sandoval*, 532 U.S. 275 (2002). Finding no private right of action to enforce agency regulation implementing Section 602.

¹⁰The Assistant Attorney General for the Civil Rights Division issued a memorandum for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" (July 8, 2002) clarifying and reaffirming the Department of Justice LEP Guidance in light of *Sandoval*. Available at www.usdoj.gov/crt/cor/lep/BoydJuly82002.htm.

¹¹See *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 607 n.11 (1986).

¹²See *Huber v. Howard County, Md.*, 849 F. Supp. 407, 415 (D. Md.1994) (Motion to dismiss claim of discriminatory employment practices under § 504 denied as defendant received federal assistance during the time of probationary employment and discharge.), *aff'd* without opinion, 56 F.3d 61 (4th Cir. 1995), cert. denied, 516 U.S. 916 (1995); see also *Delmonte v. Department of Bus. Prof'l Regulation*, 877 F. Supp. 1563 (S.D. Fla. 1995).

¹³42 U.S.C. § 2000d-4; see also *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275, 277 (6th Cir. 1996).

¹⁴See *Guardians Ass'n v Civil Serv. Comm'n*, 463 U.S. 582 (1983) and *Alexander v Choate*, 469 U.S. 287, (1985).

regulation that implements Title VI will be based upon a disparate impact theory. Title VI disparate impact claims are analyzed using principles similar to those used to analyze Title VII disparate impact claims.¹⁵

It is important to note that the HUD Guidance and 24 CFR § 1.41 (the regulation implementing Section 602 of Title VI¹⁶) are not individually enforceable.¹⁷ The HUD Guidance is not a set of regulations and will not be “enforced” against a recipient. However, the absence of a language assistance plan, or documentation of the basis for the recipient’s decisions regarding the nature or scope of language services, can be used as circumstantial evidence of intentional discrimination. In addition, the absence of a language assistance plan, or the adoption of an inadequate plan, could result in an “English only” rule or policy that could be challenged as a facially neutral rule with a discriminatory impact.

Persons who believe that a HUD grantee or fund recipient has discriminated or is discriminating based upon national origin and the lack of translation services was the method of discrimination may file an administrative complaint with HUD alleging both intentional (a statutory violation) and disparate impact (a regulatory violation) discrimination. HUD will then investigate both allegations. If HUD finds violations of Title VI (a statutory or regulatory violation), it will seek to secure the violator’s voluntary compliance with the Guidance and Title VI. If unsuccessful, HUD may enforce Title VI and/or its regulations by suspending or terminating funding or refusing to provide future funding. It may also refer the matter to DOJ for enforcement. A plaintiff may also consider using the “facially neutral rule,” or a disparate impact theory, as circumstantial evidence of intentional discrimination, a violation of Section 601.¹⁸

A recent example of an administrative complaint based upon national origin discrimination is one filed by Rafael and Ana Rodriguez against the Nashua Housing Authority on September 8, 2006, in HUD Region I. This complaint was settled with the signing of a voluntary conciliation agreement. Terms of the settlement included payment of \$2,500 to the complainants and an agreement that New Hampshire Legal Assistance would provide training on LEP obligations to the housing authority.¹⁹ HUD is currently conducting other Title VI compliance

reviews and utilizing the Guidance to measure compliance. There are a number of recent voluntary compliance agreements that have required public housing authorities to adopt language assistance plans in accordance to the Guidance.²⁰ These agreements may serve as models for others to use or advocate for.

The Four-Factor Self-Analysis

All federal funding recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. In its Guidance, HUD has adopted the four-factor analysis, developed initially by the DOJ, as the methodology by which funding recipients determine what reasonable steps are needed to provide meaningful access.²¹

²⁰www.hud.gov/offices/FHEO/library.htm.

²¹The Guidance contains an appendix which describes various examples of the application of the four-factor analysis in an attempt to illustrate its application in the housing context and an FAQ section as well. The FAQ is also available online at www.hud.gov/offices/fheo/promotingfh/lep-faq.cfm.

Thank You MacArthur Foundation

NHLP is extremely pleased to share with our readers the fact that we have been selected by the John D. and Catherine T. MacArthur Foundation as one of eight nonprofit organizations world-wide to receive the 2007 MacArthur Award for Creative and Effective Institutions.

NHLP’s award will be used to establish a much-needed cash operating reserve, to add staffing to develop additional initiatives that can become self-supporting, and to upgrade our aged phone system. These resources will help stabilize NHLP’s services, while simultaneously building our expertise and organizational capacity for the coming years.

We take this opportunity to thank the MacArthur Foundation for selecting NHLP for this award. We also want to thank the foundation for its unmatched commitment and dedication to preserving affordable housing throughout the United States

We also feel tremendous gratitude for the steadfast support that has been given to us by our colleagues in the legal services and housing advocacy community. We would not have been selected and could not have accomplished the work for which we are being recognized without their support, cooperation, and dedicated work in advancing housing justice on behalf of our clients. This award is an affirmation of the value of our collective efforts.

¹⁵*Young by and through Young v. Montgomery County (Ala) Bd. of Edu.*, 922 Supp. 533, 549 (M.D. Ala. 1996).

¹⁶24 CFR § 1.41.

¹⁷See *Alexander*, *supra* note 9. The HUD Guidance is not regulatory. It is an analytical framework to guide HUD recipients as to the information and analysis HUD will consider in determining whether a recipient has complied with Title VI. See 72 Fed. Reg. 2738.

¹⁸See *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 254 F. Supp. 2d 486 (D. New Jersey 2003).

¹⁹The voluntary compliance agreement resolving a Title VI and Title VIII complaint filed administratively on September 2006 is located at www.hud.gov/offices/fheo/enforcement/nha-conciliation.pdf. Case Numbers: 01-06-0526-8 (Fair Housing Act) and 01-06-0062-6 (Title VI).

The four-factor test involves a balancing of the following elements:

1. Number of LEP persons from a particular language group eligible to be served or encountered

Persons eligible to be served, or likely to be directly affected by a recipient's program or activity, are those who are served or encountered in the eligible service population. This population will be program-specific and includes persons who are in the geographic areas that have been approved by HUD as the recipients' jurisdiction or service area. Where no relevant service area has been approved, the relevant service area may be that which is approved by state or local authorities or designated by the recipient itself, provided these designations do not themselves exclude certain populations in a discriminatory manner.

The term "serve" is used to include not only those who are often considered direct beneficiaries of government programs and activities, but also those individuals who are, or should be, subject to the public information missions of recipients. This would include LEP parents or guardians when their English proficient or LEP minor children and dependents encounter their programs, activities, or services.

Appendix A to the HUD Guidance makes clear that recipients are required by existing regulations to conduct outreach, educate, and affirmatively market the availability of housing and housing-related services to eligible persons that are least likely to apply for and/or receive the program benefits in the geographic area.²² In many cases, those least likely to apply are LEP persons, and where there are few LEP persons in the immediate geographic area, such outreach, education, and affirmative marketing may require marketing to residents of adjoining areas, communities, or neighborhoods.

There are a variety of sources for demographic information. The Bureau of Census is one potential source. Detailed information about the racial and ethnic populations, including languages, can also be inferred from Department of Education data. Links to the Bureau of the Census, Department of Education, and other demographic data sources can be found at <http://www.lep.gov>.²³ Other web-based data sources include www.Dataplace.com and www.Fairdata.com.

2. Frequency of contact with LEP persons

The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. It is advisable to

consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intense solution. If a LEP person accesses a program or service on a daily basis, a recipient has greater duties than if the same person's frequency of contact with a recipient's program or activity is unpredictable or infrequent. Regardless of frequency of contact, recipients should consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

As a rule of thumb, the more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed.

3. Nature and importance of the program, activity or service to the LEP individuals

As a rule of thumb, the more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The HUD Guidance recognizes the critical role housing plays in maintaining quality of life. The funding recipient should determine whether denial or delay of access to services or information could have serious implications for the LEP individual given the basic purpose for which it was funded. Similarly, a recipient should consider whether a specific activity is compulsory in order to participate, or to continue to participate, in a program, such as filling out forms, providing certain information, or attending an administrative hearing.

4. Resources available, including costs of providing LEP services

The level of resources available to a recipient and the costs that would be imposed on the recipient may have an impact on the nature of the steps it should take to meet LEP persons' needs. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. Regardless of size, a recipient has an obligation to carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Any decision to limit language assistance based upon resource limitations should be well substantiated. Notwithstanding any decision to limit language services based upon a lack of

²²24 C.F.R. §§ 200.625, 92.351, and 903.2(d)(1) and (2).

²³LEP.gov is a website maintained by the U.S. Department of Justice. It was created by the Federal Interagency Working Group on Limited English Proficiency. That Working Group was created at the request of Assistant Attorney General for Civil Rights. The Working Group includes members representing more than thirty-five federal agencies.

resources, a funding recipient still has an obligation, under the four-factor analysis, to provide meaningful access.

The HUD Guidance is clear that these issues can often be reduced by technological advances, including the sharing of language assistance materials and services among and between recipients, advocacy groups, and federal grant agencies, and by reasonable business practices. Other possible ways to reduce costs include training bilingual staff to act as interpreters and translators, pooling resources, standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be “fixed” later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, or the formalized use of qualified community volunteers.

There are a number of LEP tools and resources on www.lep.gov. Posted on that website is “I Speak” Language Identification Flashcard (PDF), a helpful document developed by the U.S. Department of Commerce, Bureau of the Census. This document is written in thirty-eight languages and can be used to identify the language spoken by an individual accessing services provided by federally assisted programs or activities. It can be accessed directly at <http://www.usdoj.gov/crt/cor/Pubs/ISpeakCards.pdf>. [Lep.gov](http://www.lep.gov) also contains links to other resources including translator and interpreter organizations, cultural competence guides for providing language assistance services, and guidance issued by all federal agencies for recipients under their various programs.

Safe Harbor Provision

The HUD Guidance does not provide a “bright line” rule that clearly describes a recipient’s obligation to provide language services in any specific context. While it does offer examples and a Frequently Asked Questions (FAQ) section, even these do not provide the certainty that a recipient might want from the Guidance. In the alternative, the Guidance offers two “safe harbors” which HUD will consider as strong evidence of compliance:

1. When an eligible LEP language group makes up 5% of the population or reaches 1,000 people, whichever is less, “vital” documents must be translated in writing. Translation of other documents, if needed, can be provided orally.
2. When there are fewer than 50 people in an LEP language group that reaches the 5% trigger, written notice must be given of the right to free oral interpretation.

There is no “safe harbor” for oral interpretation. These safe harbor provisions apply to the translation of written documents only. They do not affect the obligation to provide meaningful access to LEP individuals through

competent oral interpreters where the application of the four-factor test leads to the determination that oral language services are needed and are reasonable.

Developing a Language Assistance Plan

After completing the four-factor analysis and deciding which language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs. A Language Assistance Plan (LAP) that is developed and periodically updated will be the most cost-effective means of documenting compliance. It establishes a framework for the provision of timely and reasonable language assistance. The HUD guidance recommends that the LAP contain certain topics including: 1) the manner in which the recipient will identify LEP individuals who need language assistance; 2) information about the ways in which language assistance will be provided; 3) staff training; 4) identification of vital documents; and 5) providing notice to LEP individuals.²⁴ In many ways, an LAP is no different in purpose or scope than a reasonable accommodation policy.

An eighteen-page “Language Assistance Self-Assessment and Planning Tool for Recipients of Federal Financial Assistance” developed under the auspices of the DOJ and an Interagency Task Force is currently available at <http://www.lep.gov/selfassesstool.pdf>. This fill-in-the-blank and check-off format tool walks federal funding recipients through a series of self-assessment questions and planning considerations, and includes a section that provides a framework for an LAP that is responsive to general Title VI requirements.

Vital Documents

A vital document is any document that is critical for ensuring meaningful access to the recipients’ major activities and programs by beneficiaries generally and LEP persons specifically.²⁵ Whether a document is “vital” depends upon two factors: the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. Generally, documents relating to the major purpose of the federal funding will be considered vital. Applications for ancillary programs, such as certain recreational programs in public housing, would not generally be considered vital documents.

²⁴72 Fed. Reg. 2732 (Jan. 22, 2007)(Appendix B Questions and Answers IX).

²⁵*Id.* (Question and Answer X).

Advocacy Points

On March 1, 2007, HUD held a public meeting to discuss the Guidance and identify documents it considered to be vital.²⁶ A video of that meeting has been archived and can be accessed through HUD's website.²⁷ In viewing the video, it is clear there is confusion in regard to HUD's obligation to provide translation of documents it provides and a recipient's obligation to provide translation of documents it uses in the operation of its housing program. It is likely that some recipients will use the statements on the video as a definitive declaration of their obligation to provide "vital documents" and skip the four-factor analysis.

The Office of Public and Indian Housing has identified the following documents as "vital": the tenancy addendum for the Section 8 voucher program, Housing Assistance Payment contract, Request for Tenancy Approval, Authorization for Release of Information, Family Self Sufficiency (FSS) Escrow Account worksheet, Voucher, Statement of Homeownership Obligations, FSS Contract of Participation, and the document entitled "A Good Place to Live." HUD has already translated the "How Your Rent is Determined" fact sheet.²⁸ HUD will translate these documents into Spanish, Vietnamese, Haitian, Creole, Hmong, French, Chinese, Cambodian, Korean, Arabic, Russian and Laotian.

For the Office of Multifamily Housing, the only document that is identified as "vital" is the model lease. HUD plans on posting the model lease in eight languages (Spanish, Chinese, Russian, Vietnamese, Portuguese, Amharic, Korean and French) some time in the next few months and such leases will include disclaimer language that the translated lease is for informational purposes only. Only the English version of the lease should be executed.

HUD's classification of certain documents notwithstanding, an owner or public housing authority is expected to identify other vital documents that may need to be translated or otherwise communicated in various languages based upon the four-factor analysis. For example, a program's rules and regulations, occupancy rules, warning notices, or eviction notices could be categorized as "vital" and, therefore, would be expected to be translated or interpreted.

There are a number of voluntary compliance agreements on the Fair Housing and Equal Opportunity website involving Title VI compliance reviews.²⁹ These documents are valuable examples of "vital documents" in programs operated by a public housing authority. In general, in the housing context, any document that has the potential for an adverse impact upon the applicant or tenant should be considered a vital document.

Receipt of any federal financial assistance obligates the recipient to provide LEP persons with appropriate language assistance for all of the recipient's programs and services, including non-federally funded programs.³⁰ However, neither Executive Order 13166 nor the HUD LEP Guidance may be enforced by an individual.³¹ The value of the four-factor analysis is that it establishes a balancing test to measure compliance with Title VI's proscription against national origin discrimination. An individual may file an administrative complaint alleging a violation of Title VI and Title VI implementing regulations prohibiting disparate impact. DOJ has publications that describe Title VI case law, provide a legal analysis of a Title VI complaint, and include an investigation procedures manual. These should be useful for advocates contemplating filing a Title VI complaint.³²

By analogy, the four-factor analysis may be used to measure a private housing owner's compliance with the Title VIII prohibition against national origin discrimination. In housing that is privately owned but publically subsidized, the "eligible population" will be defined by a specific income group. Where there is a sizeable number of LEP persons within that income group, it may be possible to allege that the failure to provide appropriate language services is intentional discrimination and to file an affirmative Title VIII case against the owner.

The nature of the LEP language assistance will vary based upon demographics and needs of LEP persons within a defined market area. Advocates should consider not only the formally adopted definition of "market area or jurisdiction," but also whether that definition itself is discriminatory. For example, adjacent PHAs in an urban metropolitan area may define their jurisdictions as the municipalities in which they operate, but, in the absence of a justification for residency preferences, the real market area may be the entire metropolitan region.

However LEP language services are provided, whether under an LAP or not, advocates will be able to utilize the analysis contained in HUD's Guidance as an objective measure of what are reasonable steps to take in ensuring "meaningful access" to programs and services. An agency's failure to document its consideration of the four factors and the basis for the policy decisions regarding language services may be helpful in establishing a claim for national origin discrimination based upon language under Title VI and possibly Title VIII. ■

³⁰Civil Rights Restoration Act of 1987. Pub. L. 100-259 (Mar. 22, 1988).

³¹Alexander, supra n. 9.

³²U.S. Department of Justice Title VI Legal Manual, January 11, 2001, available at www.us.doj.gov/crt/cor/coord/titlevi.htm. U.S. Department of Justice Investigation Procedures Manual For The Investigation And Resolution Of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes, September 1998, available at www.usdoj.gov/crt/cor/coord/invmanual.htm.

²⁶<http://www.hud.gov/webcasts/schedule/index.cfm>.

²⁷<http://www.hud.gov/webcasts/archives>.

²⁸<http://www.hud.gov/offices/pih/programs/ph/rhiip/factsheet.cfm>.

²⁹<http://www.hud.gov/offices/ftheo/library>.

Bush Proposes Yet Another Inadequate Budget for HUD Programs

Despite growing housing needs of very low-income families, the administration again proposes a Fiscal Year 2008 (FY 08) HUD budget¹ insufficient for making any serious progress. The proposed \$35.2 billion budget would represent an 8% reduction below the funding provided in the recently enacted FY 07 HUD Appropriations bill.²

With HUD reporting more than 5 million households with critical housing burdens and the National Low Income Housing Coalition's recent "Out Of Reach" study showing a national hourly "housing wage" of more than \$16 to support a modest two-bedroom apartment, there is no doubt that the federal government needs to do more, not less. The Bush administration once again fails to address the most serious housing problems of many American families, instead proposing cuts or inadequate funding levels insufficient to maintain current services.

As has been the case in recent years, the Community Development Block Grant (CDBG), public housing, and supportive housing programs for the elderly and people with disabilities would take the deepest cuts under the President's proposal.

The budget continues to propose insufficient funding for public housing capital and operating funds, which will result in service cuts and delays of necessary repairs and upgrades, further eroding this vital source of affordable housing. It also would eliminate funds for the Resident Opportunity and Supportive Services program (ROSS), which provides funds for job training and supportive services to help public housing residents improve their employment prospects.

While the President has apparently abandoned his quixotic effort to move the CDBG program to the Department of Commerce, the budget still would cut the program far below prior levels, a full \$700 million less than last year's already reduced level.

The President once again proposes changes to the Housing Choice Voucher program that have been unpopular with Congress and would still fail to ensure that available funds reach those communities most in need. Funding for vouchers would remain flat, which would mean that fewer vouchers would be funded, as housing costs increase.

The President did propose increases in two important programs: Homeless Assistance would increase by almost 10% (by \$118 million) over the FY 07 funding level, and Housing for People with AIDS (HOPWA) would increase by \$14 million. But these increases just continue the administration's prior practice of shifting funds from one vulnerable population to another.

Tenant-Based Rental Assistance

The budget requests a total of \$16 billion for tenant-based rental assistance in FY 08, which is just an \$80 million increase over FY 07. Because this would be insufficient to cover inflation in housing costs, it would result in funding lower payment standards or fewer vouchers. Of the \$16 billion requested, \$14.45 billion would be used for voucher renewals, only a \$9 million increase from the FY 07 funding level. Administrative fees would receive \$1.35 billion and will be distributed based on the number of families served, and \$48 million would support the Family Self Sufficiency Program. The budget would also provide a central \$100 million for adjusting local allocations due to unforeseen exigencies and for portability costs.

Tenant protection vouchers for relocation and replacement of converted housing units would be funded at \$150 million. HUD intends to continue efforts to make permanent its recent policy change of providing these funds only for units under lease, rather than for all units leaving the affordable housing inventory. This policy would lead to the loss of housing assistance in many communities.

HUD's budget also proposes to base 2008 voucher renewal funding on the amount that public housing authorities (PHAs) received in 2007, as adjusted by an annual adjustment factor and other factors. If this budget for voucher renewal funding were enacted, the Center on Budget and Policy Priorities estimates 40,000–80,000 vouchers could be cut in FY 08 (although others might be added if other new vouchers were created by any new PHA option to do so). Where the actual figure would land within an estimated \$300–\$600 million shortfall range depends on whether PHAs use all of their available funding on their authorized vouchers and whether voucher costs stay within inflation forecasts for 2008. If PHAs use all of their available funds to issue all of their authorized vouchers in 2007 and per-unit costs stay within inflation-adjusted costs, then the requested FY 08 voucher renewal funding will be insufficient, producing a loss of about 40,000 vouchers in 2008. If PHAs improve their performance and use their reserves to issue more vouchers, then the FY 08 shortfall will be greater.

The budget also proposes to lift the cap on the number of vouchers a PHA is authorized to issue, ostensibly to free up some fund balances to serve more families. Eliminating the cap would divorce the nationwide voucher inventory as well as individual PHA voucher counts from any accountability, as no one would ever know how many

¹The HUD portion of the budget is available at <http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/hud.pdf>.

²Pub. L. 110-5 (Feb. 15, 2007). See *HUD Appropriations for FY 2007*, 37 Hous. L. Bull. 38 (Feb. 2007). This article is based in major part on information from the National Low Income Housing Coalition's weekly "Memo to Members." You may obtain the Memo and join NLIHC at www.nlihc.org.

vouchers should ideally be in circulation or under lease at any given time. The budget proposes that after the cap is eliminated, a PHA's voucher funding (presumably in FY 09) would be based on its most recent year's spending.

The budget request also proposes reducing PHA funding if reserve accounts show significant unspent funds from a prior year, noting more than \$1 billion was left unspent at the end of 2006. Of course, in addition to PHAs' failure to issue all authorized vouchers, HUD's flawed voucher funding formula put in place in 2004 is primarily responsible for this imbalance. The budget seeks to use HUD's own wasteful funding formula as an excuse to support its long-held goal of block-granting the voucher program.

The FY 08 request also proposes \$5 million in incentive bonuses for PHAs that voluntarily consolidate their voucher programs, and would further seek to tie a PHA's administrative fees to its vouchers in use, creating an incentive for PHAs to improve their utilization rates, hopefully with affordability considerations in mind.

The budget again states that the administration will submit its voucher reform legislation to Congress early in the year.

Project-Based Rental Assistance

The HUD budget requests about \$5.8 billion for project-based rental assistance for FY 08, with about \$5.52 billion of this to cover expiring contract renewals. Just as in last year's budget, these levels are obviously insufficient, since they are substantially lower than the funding levels in the FY 07 funding resolution, \$5.976 billion and \$5.829 billion, respectively. Contract administrators would be funded at \$286 million in FY 08.

Public Housing Operating Fund

The FY 08 budget request calls for \$4 billion for public housing operating funds. Although it is approximately \$136 million higher than the FY 07 funding resolution, PHAs estimate that an FY 08 operating fund level of \$4 billion would represent only about 85% of actual need, and thus they are seeking at least \$4.7 billion for public housing operating subsidies for FY 08.

Public Housing Capital Fund

The budget request would continue to underfund the public housing capital fund, notwithstanding the more than \$20 billion backlog of modernization needs. For FY 08, the President requests only \$2.02 billion for the capital fund, a 17% reduction from the \$2.44 billion FY 07 level. In contrast, PHAs are requesting \$3.5 billion for the capital fund.

HOPE VI

The administration continues to request no funding for the HOPE VI public housing revitalization program, while also seeking rescission of the \$99 million provided by Congress in FY 07. The FY 08 request reports that the following cumulative results of the HOPE VI program as of March 31, 2006: 63,885 households relocated, 78,115 units demolished, 50,482 units (new and rehabilitated) completed, of which 48,012 are occupied.

Native American Housing Block Grants

The budget request seeks \$627 million for the Native American Housing Block Grant program, similar to the FY 07 level, including \$17 million for loan guarantees to encourage private lenders to provide financing in Indian country.

Housing Opportunities for Persons with AIDS

The FY 08 request for HOPWA would increase the program to \$300 million, a 4.9% increase above the FY 07 funding, to support about 67,000 housing units for persons with HIV/AIDS and their families. The budget also includes a proposal to amend HOPWA's authorizing legislation to permit HUD to change the current program formula to incorporate both the local AIDS caseload and local housing needs.

Community Development Block Grants

Again, the President's budget request seeks deep cuts in the Community Development Fund and in the Community Development Block Grant program. The request would fund the overall Community Development Fund at \$3.04 billion, approximately \$700 million less than FY 07 and more than \$1 billion less than FY 06. CDBG formula grants would be funded at \$2.975 billion. Although CDBG would remain at HUD, the budget states that it will repropose legislation to revise the CDBG allocation formula to better target funds to communities with the greatest need and to improve accountability.

The budget also calls for rescinding \$356 million in FY 07 Economic Development Initiatives and other earmarks and provides no funding for these initiatives.

HOME

The Home Investment Partnership Program (HOME) would receive \$1.97 billion, \$233 million over the FY 07 level, while HOME grants themselves would be funded at \$1.9 billion. An additional \$50 million would go toward the administration's American Dream Downpayment Initiative, another \$50 million to Housing Counseling, with \$40 million allocated to the Self-Help and Assisted Homeownership Opportunity program, which became a separate account in FY 06.

Homeless Assistance Grants

The FY 08 request for homeless assistance grants is \$1.56 billion, an increase of \$117 million over the final FY 07 level. The prisoner reentry initiative in the Department of Labor would receive \$25 million. HUD's budget again includes a proposal to consolidate its three competitive homeless assistance programs (Shelter Plus Care, Supportive Housing and Section 8 Moderate Rehab Single Room Occupancy) into a single program. This new consolidated program will incorporate up to \$50 million for a proposed Samaritan Housing Initiative to specifically address the supportive housing needs of chronically homeless individuals. HUD will ostensibly propose legislation for these initiatives.

Rural Housing and Economic Development

The FY 08 budget again seeks to eliminate HUD's Office of Rural Housing and Economic Development, which was funded for \$17 million in FY 07.

Housing for the Elderly

The request would again cut the Section 202 Housing for the Elderly program from FY 07's \$735 million to only \$575 million, a 22% reduction. Service coordinators would receive \$71 million.

Housing for Persons with Disabilities

For the third year in a row, the budget seeks to cut the Section 811 Housing for Persons with Disabilities program almost in half, from FY 07's \$237 million to \$125 million. Of this amount, \$74.7 million would be for tenant-based assistance contracts, including contract renewals and amendments.

Fair Housing and Equal Opportunity

The budget would almost level-fund fair housing programs at \$45 million, with the Fair Housing Assistance Program funded at \$25 million and the Fair Housing Initiatives Program at \$20 million.

Lead-Based Paint Hazard Reduction

The budget proposes only \$116 million for the lead-based paint reduction program, a 35% cut from FY 07's \$152 million.

Congress will soon begin hearings on the budget as part of the annual appropriations process, with counter-proposals emerging from the appropriations committees usually in late spring or early summer. With the 110th Congress in new hands, it should make for an interesting exchange. ■

Administration Proposes to Cut RD Housing Programs Serving Low Income Persons

The President's Fiscal Year (FY) 2008 Budget¹ proposes a devastating blow to the Rural Development (RD) rural housing programs that serve low- and extremely low-income households. It does so by proposing to eliminate the two major RD direct loan programs, the Section 502 single family home loan program² and the Section 515 Rural Rental Housing program,³ and by reducing funding for practically all the other housing programs serving low-income households. The budget proposes to expand the RD guaranteed loan programs, which serve moderate-income households, and states that the administration is considering a subsidy mechanism that will enable the guaranteed program to serve low-income households. No comparable subsidy mechanism is even suggested for the guaranteed Rural Rental Housing program. Thus, while purporting to continue a subsidized rural rental housing program, the administration is in fact terminating it. In effect, the administration is proposing to continue to expand homeownership opportunities for low- and moderate-income households but eliminate all new rental housing opportunities for low- and extremely low-income rural households.

Section 502 Direct Loan Program

The Section 502 direct single family home loan program has been the mainstay of the RD rural housing programs since 1949. Since 1968, the program has had an interest subsidy attached to it that enables it to serve low- to moderate-income households.⁴ While funding for the program has not grown substantially over the past ten to fifteen years, the program is currently funded at over \$1.1 billion dollars. Over 12,000 new loans are expected to be funded with current funding, enabling low- and moderate-income households to construct new homes and to purchase and rehabilitate existing homes. In recent years the new construction portion of the program has been directed primarily at the self-help housing program, under which households, typically working in groups of ten to fifteen, build their homes with supervision provided through a nonprofit agency contractor. In order to

¹Budget for the United States Government for the Fiscal Year 2008. Available at <http://www.whitehouse.gov/omb/budget/fy2008/>. The RD budget is available at <http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/agr.pdf> (page 121).

²42 U.S.C. § 1472.

³42 U.S.C. § 1485.

⁴42 U.S.C. § 1491a(a)(1)(B).

promote and facilitate self-help construction, RD provides financing priority for self-help applicants.⁵

The administration's FY 2008 Budget proposes to totally eliminate the Section 502 direct home loan program. No rationale is advanced for the program's elimination other than to state that RD is the only federal agency to make direct loans and that the agency proposes to follow the Department of Housing and Urban Development (HUD) and the Veterans Administration, both of which insure private lenders against losses when making single family home loans to eligible borrowers, by expanding its guaranteed loan program, which has been in existence since the early 1990s.⁶ The budget states that the agency is considering proposing legislation that would allow for guaranteed loans to be subsidized, theoretically in a manner comparable to the now-terminated HUD Section 235 program;⁷ however, no specific subsidy proposal is included in the budget nor is funding proposed for such a subsidy. Thus it is questionable, even if Congress follows the administration's proposal, whether such a subsidy program would become effective before the current subsidized direct home loan program is terminated.

Significantly, the budget does not address the reason that RD is the only federal agency that has been making direct loans in rural areas—the lack of readily available private financing in rural areas, particularly for low-income borrowers. The proposal also does not address how rural financial institutions are likely to respond to financing requests from borrowers who propose to build their own homes under the self-help construction program.

Section 515 Rural Rental Housing Loan Program

For the third year in a row, the President's budget proposes to terminate the Section 515 direct loan program, which was first authorized in 1962 and has produced over 500,000 units of rural rental housing. The budget gives no reason for terminating the program, which at its height, in 1979, received nearly \$1 billion in annual funding but, more recently, has only been funded in the \$100 million range. While the agency proposes to increase the number of rental units produced in rural areas by increasing funding for the Section 538 Guaranteed Rental Housing program,⁸ no subsidies are attached to that program. Hence, it has no capacity to serve low- or extremely low-income households, which are currently served by the Section 515 program. For example, the average annual income of households living in Section 515 housing is about \$9,000 while the average income of persons living in the Guaranteed Rental Housing Program is \$18,400.

Rental Assistance

The FY 2008 Budget proposes to “increase” the amount made available for the Rental Assistance program, a deep subsidy program that is comparable to the HUD project-based Section 8 subsidy, which serves approximately 275,000 low- and very low-income households residing in Section 515 housing. In fact, the amount requested, \$567 million, is less than the \$616 million appropriated for FY 2007. However, because the FY 2007 appropriations was for two-year vouchers and the FY 2008 request is for one-year vouchers, the amount requested, calculated on an annual basis, is actually larger than was appropriated in FY 2007. However, the increased funding request is not driven by the administration's desire to assist more low-income households. Instead, it is reflective of the larger number of RA contracts that need to be renewed and the fact that RD is looking to facilitate its proposed revitalization program, discussed below, by increasing the amount of available rental assistance and, thereby, lessening resident displacement.

The term of RD Rental Assistance contracts was twenty years when the program was first initiated back in 1976. In the 1980s, the term was reduced to five years, where it has remained until 2003, when the term was reduced to four years in order to lessen the annual budget impact of renewing expiring contracts. To further lessen the annual budget impact, Congress reduced the term of Rental Assistance contracts to two years in the FY 2007 Appropriations Act.⁹ The administration is now proposing to reduce the term to one year. The problem with reducing the contract term is that the contracts come up for renewal faster and the number of units that must be renewed on an annual basis increases. Thus, the change in contract terms is creating a need for additional funding without increasing the number of units assisted.

The second reason that RD is requesting increased RA funding is its program to revitalize the existing Section 515 stock. In 2004, RD released a study showing that its Section 515 inventory is aging and that if it was going to continue to serve as decent and affordable housing it was in need of revitalization, which could not be funded from generally underfunded project reserves.¹⁰ In 2006, RD sought legislative authority to undertake a revitalization and loan restructuring program; however, it failed to pass because of the increased funding the program demanded and because RD proposed to lift prepayment restrictions on the pre-1979 housing stock in the same legislation.¹¹ While RD is again likely to seek authority to restructure existing Section 515 loans and possibly defer

⁵Pub. L. 110-5 (Feb. 15, 2007).

¹⁰Rural Rental Housing—Comprehensive Property Assessment and Portfolio Analysis Final Study Report (November 2004). A copy of the report is available at <http://www.rurdev.usda.gov/rhs/mfh/Property%20Assessment/Property%20Assessment.htm>.

¹¹HR 50-39 (109th Cong. 2nd Sess.).

⁵See 42 U.S.C. § 1490c.

⁶42 U.S.C. § 1472 (h).

⁷12 U.S.C. §1715z.

⁸42 U.S.C. § 1490p-2.

or forgive parts of the existing Section 515 debt on each revitalized development, the agency is also looking to use its Section 538 guaranteed loans and private non-agency funding to finance the revitalization that is needed for the aging stock of over 460,000 Section 515 units. To use these unsubsidized funding sources without displacing residents, RD must increase the amount of RA that is available for existing residents. Absent additional subsidies, the residents will be displaced or forced to pay a higher portion of income for rent. Thus, while the amount requested in the 2008 Budget is technically higher than before, it does not actually increase the number of households assisted by the program.

"The Bush Budget, regarding rural housing, is a callous abandonment of the needs of lower and moderate-income people in rural areas."

—Cong. Barney Frank.

Rural Housing Vouchers and Revitalization Related Financing

In order to protect residents of Section 515 housing against displacement when owners prepay their loans, Congress in FY 2006 and FY 2007 appropriated \$16 million each year for a rural voucher program. The voucher program allows residents to remain in their homes when an owner prepays the Section 515 loan and, thereby, removes the development from the Section 515 use restrictions. The amount appropriated for the voucher program far exceeds the amount that the agency has obligated because the prepayment restrictions that limit Section 515 owners' right to prepay their loans have not been lifted as the administration had proposed in 2006.¹² As a result, the number of residents that actually need protection from displacement has been quite small.

Notwithstanding, the FY 2008 Budget request is asking that the Rural Voucher program be funded at \$27.8 million. There are two reasons for this. First, it is anticipated that the agency will again seek to lift the prepayment restrictions on Section 515 developments financed prior to 1979, thus increasing the need for tenant protection vouchers. Second, as noted earlier, RD also intends to introduce legislation in 2007 that will allow it to undertake a major Section 515 revitalization and loan restructuring program and to use the voucher appropriations to subsidize that program. As the RD revitalization program was funded on a demonstration basis at \$9 million for both FY 2006 and FY 2007, and the Voucher program for each of

those two years was funded at \$16 million, the \$27.8 million requested for FY 2008 is only a modest increase over this year's funding.

Other Programs

The RD FY 2008 Budget request cuts practically all the other programs that serve low-income rural residents. This includes the Section 504 very low-income home repair grant program for the elderly,¹³ the farm labor housing loan and grant programs,¹⁴ and the Self Help Technical Assistance grants.¹⁵ The table on page 64 sets out the requested budget amounts and compares them to current program funding. Aside from the programs mentioned above, the only programs for which increased funding is requested are the Single Family Guaranteed Loan program—currently funded at \$3.681 billion—for which the agency is seeking \$4.848 billion, and the Section 538 multi-family guaranteed loan program—currently funded at \$100 million—for which the agency is seeking \$200 million.

Likelihood of Passage

Immediately after the President released the FY 2008 budget, House Democrats, led by Speaker Pelosi, blasted the administration's cuts in the rural housing program in a press release.¹⁶ "These proposed cuts to America's rural housing initiatives, by the Bush administration, are simply immoral," said House Democratic Leader Nancy Pelosi. She continued by stating that "[t]o shelter the elderly and disabled is part of the essential safety net and social fabric of our country."

Congressman Peterson, Agriculture Committee Ranking member, stated that "[t]his budget says a lot about the President's priorities, which certainly do not include the needs of rural Americans who are struggling during difficult economic times. By proposing cuts to rural housing on top of cuts to agriculture and rural development programs, the President's budget shows a lack of concern for the basic needs of rural America."

Congressman Frank, the ranking member of the House Financial Services Committee, followed by stating that "[t]he Bush budget, regarding rural housing, is a callous abandonment of the needs of lower and moderate-income people in rural areas. The complete absence of any effort to build or maintain affordable units is a complete abdication of any social responsibility."

In a separate statement on the HUD and RD FY 2008 budgets, Congressman Frank and Congresswoman Maxine Waters, ranking member of the Housing and Community Opportunity Subcommittee, criticized the

¹³42 U.S.C. § 1474.

¹⁴42 U.S.C. §§ 1484 and 1486.

¹⁵42 U.S.C. § 1490c.

¹⁶A copy of the release is available at <http://financialservices.house.gov/pr02092006.html>.

¹²See H.R. 5039 (110th Cong. 2nd Sess.).

administration's FY 2008 Budget Request.¹⁷ Representative Waters stated that "[t]here is a housing crisis in America. It is inconceivable that the President's budget would reduce support for low and moderate income families rather than expand affordable housing opportunities for those truly in need." Representative Frank followed by stating that "[t]he President has said he wants to be conciliatory and work with Democrats, but today he released his budget where it is apparent he intends to do even more damage to people in need. The President has now adopted the argument that the nation must sacrifice at a time of war, but based on his housing budget, only those that are the most in need and the most vulnerable, should sacrifice. It is now clear the president is choosing to cut assistance to those in need and resources to our cities and communities in order to finance the tax cuts and the war in Iraq."

Given that the President's past efforts to reduce or eliminate funding for the RD housing programs that serve low-income households have failed when Congress was led by the Republican Party and, given that the administration's efforts to lift the program's prepayment restrictions failed to pass even the House of Representatives last year, it is doubtful that Congress will go along with his proposals this year. Nonetheless, because of the budget constraints under which Congress is operating and the more aggressive role that the administration is likely to take with respect to appropriations bills passed by a Congress controlled by the Democrats, there are no assurances that the cuts that are proposed in the President's budget will not be implemented. A major education and lobbying effort will have to be undertaken to preserve the RD housing programs. ■

¹⁷A copy of the February 9, 2007, press release can be found at <http://financialservices.house.gov/pr02092006.html>.

The President's FY 2008 Budget Proposal for Rural Development Housing Programs

Program	FY 2007 Appropriations ¹	FY 2008 Budget Request
Section 502 Single Family Direct Home Loans	1,141	0
Section 502 Single Family Guaranteed Home Loans	3,681	4,848
Section 504 Home Repair Loans	35	22.9
Section 504 Home Repair Grants (elderly only)	30	30
Section 514 Farm Labor Rental Housing Loans	38	14
Section 516 Farm Labor Rental Housing Grants	14	4
Section 515 Rural Rental Housing	100	0
Section 521 Rental Assistance Subsidy	616 ²	567 ³
Section 523 Self Help Technical Assistance Grants	34	9.5
Section 533 Housing Preservation Grants	10	9
Section 538 Guaranteed Rental Housing Loans	100	200
Section 542 Rural Housing Vouchers	16	27.8
Rental Preservation Revolving Loan Funds	3	0
Rental Housing Preservation Demonstration Program	9	0

¹All numbers are in millions.

²Appropriation is for two-year renewal contracts.

³Request is for one-year renewal contracts.

Public Housing Tenants in New Orleans Get Mixed Ruling From Federal Court

When other avenues failed, New Orleans public housing tenants displaced by Hurricane Katrina and the decisions made in its wake sought redress from the judicial system.¹

The *Anderson* plaintiffs formerly inhabited New Orleans public housing developments, which prior to the storm were all occupied by African-Americans. Displaced at first by the disaster, the dispossessed tenants attempted to reoccupy their units but were prevented from doing so by the Housing Authority of New Orleans (HANO), who argued that the structures were damaged irreparably by the storm. With the approval of the Department of Housing and Urban Development (HUD),² HANO continued to bar reoccupancy and took steps to plan for demolition of the developments and replacement with “mixed income” housing.

HANO repeatedly refused the tenants’ request to repair and reopen the units, which the tenants alleged remain habitable or capable of repair within a reasonable time. So the tenants brought suit in June 2006, contending that HUD and HANO had violated provisions of the Fair Housing Act, the United States Housing Act, the Constitution, and international law, in addition to claims for breach of contract and constructive eviction under state law.

Summary of the Decision

The tenants had filed a motion for a preliminary injunction to block further steps toward demolition and to require repairs that would permit reoccupancy, on which the court had earlier held an evidentiary hearing and requested further briefing. HUD had filed a motion to dismiss, and HANO had filed a motion to dismiss or for summary judgment, and the tenants had also filed a cross-motion for partial summary judgment. The court’s decision was directed at all of these pending motions.

The court’s order denied in part and granted in part the motions to dismiss, ruling that the tenants could pursue their claims that HUD and HANO failed to “affirmatively further” the Fair Housing Act and violated due process, while rejecting on the merits their claims of disparate treatment or disparate impact under the Fair

Housing Act, as well as that of equal protection. The ruling also granted judgment to HUD and HANO on the tenants’ statutory demolition claims, finding them unenforceable due to lack of a private right of action, standing, and ripeness, as well as judgment on the international law claim, finding no binding law. However, the court also permitted the tenants to pursue their breach of contract and constructive eviction claims. For all of the surviving claims, the court found that numerous factual issues requiring further development precluded partial summary judgment, while also finding that other adequate but unspecified legal remedies supported denial of the requested injunction. Thus the claims remaining for trial include the failure to affirmatively further fair housing, due process, breach of contract and constructive eviction claims.

The ruling thus keeps alive the tenants’ goal of returning to their pre-Katrina homes.

Background

Before Hurricane Katrina devastated the Gulf Region, New Orleans hosted 8,000 public housing units, of which about 5,000 were occupied. Most of these occupied units were in the city’s four largest public housing developments—St. Bernard, B.W. Cooper, CJ Peete, and Lafitte. In the immediate aftermath of the disaster, HANO completely shut down these developments and proposed to demolish them, planning to destroy thousands of affordable housing units in the process. While some residents eventually returned to their units, only an estimated 1200 units are occupied.

Wanting to return to their former homes, plaintiffs requested access to their units. Against this backdrop, federal and state officials made hostile public commentary regarding reoccupancy. For example, defendant HUD Secretary Alphonso Jackson remarked that New Orleans “is not going to be as black as it was for a long time, if ever again.”³ Another prominent official commented that “We finally cleaned up public housing in New Orleans. We couldn’t do it, but God did.”⁴ Tenants then brought suit against HANO and HUD, seeking repair and reoccupancy, based on numerous legal theories.

Legal Claims

“Failing to Affirmatively Further” Fair Housing Claim, Brought Under Section 1983 and the APA

The plaintiffs claimed that HUD and HANO’s actions violated the Fair Housing Act⁵ in several respects, including breach of the duty to “affirmatively further” fair

¹*Anderson v. Jackson*, No. 06-3298, 2007 WL 458232 (E.D.La. Feb. 6, 2007). On March 21, the House passed comprehensive Katrina-related housing legislation sponsored by Rep. Maxine Waters to address several of the issues raised by *Anderson*. See Gulf Coast Hurricane Housing Recovery Act, H.R. 1227, 110th Cong., 1st Sess. (March 21, 2007).

²HUD in fact serves as receiver for the Housing Authority of New Orleans.

³See Complaint at ¶¶ 6, 7, 70.

⁴See *id.* at ¶¶ 8, 71.

⁵42 U.S.C. §§ 3601 *et seq.*

housing.⁶ While disparate treatment and disparate impact claims under § 3604 may be brought directly under the statute's private right of action, the "failure to affirmatively further" claim⁷ requires resort to another judicial enforcement vehicle, such as Section 1983 against HANO, or the Administrative Procedure Act (APA) against HUD. HUD and HANO sought to dismiss the § 3608 "affirmatively furthering" claim as judicially unenforceable.

However, the court affirmed the judicial enforceability of the § 3608 duty of the Fair Housing Act against HUD under the APA, and against HANO under Section 1983.

As judicially interpreted, the Administrative Procedure Act⁸ provides judicial review of specific agency action, while barring judicial review of general agency policies or other actions that are committed to agency discretion. Because tenants in *Anderson* sought review of specific plans to demolish particular developments and HUD's actions in failing to repair and reopen them, the court found judicial review of HUD's plans entirely appropriate.

As for the tenants' § 3608 claim against HANO,⁹ HANO had contended that the tenants could not bring this claim under Section 1983. Rejecting HANO's position, the court concluded that the tenants' claim satisfied the restrictive *Gonzaga*¹⁰ test, which is in turn based on *Blessing*.¹¹ In reaching this conclusion, the court relied upon similar results in *Langlois v. Abington Housing Authority*¹² and *Wallace v. Chicago Housing Authority*.¹³ Because disputed factual issues surround this claim, the court declined to enter judgment for either side.

Statutory Demolition Claims

The tenants asserted two demolition claims under the United States Housing Act, contending that their homes were being "constructively demolished" by HUD and HANO's failure to repair, as well as being actually demolished without compliance with the required procedures.

⁶Section 3608 provides that HUD shall administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Fair Housing Act. The tenants' disparate treatment and disparate impact claims under § 3604 were brought directly under the statute's private right of action, and are reviewed *infra*.

⁷42 U.S.C. § 3608(e)(5).

⁸5 U.S.C. §§ 701 *et seq.*

⁹Numerous courts have held that the Section 3608 duty also applies to state and local agencies. See *Anderson*, slip op. at 6, citing, e.g., *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973). See also *Wallace v. Chicago Housing Authority*, 298 F.Supp.2d 710 (N.D.Ill. 2002).

¹⁰*Gonzaga University v. Doe*, 536 U.S. 273 (2002).

¹¹*Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), established a three-pronged test to determine whether Congress intended to confer a private right of action to enforce a particular statute: (1) did Congress intend that the provision benefit the plaintiff; (2) is the right not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) does it unambiguously impose a binding obligation on the state or other state actor.

¹²234 F.Supp. 2d 33, 73 (D. Mass. 2002).

¹³298 F.Supp. 2d 710 (N.D.Ill. 2002).

The court found that 42 U.S.C. § 1437p contains no private right of action for constructive demolition, declining to follow cases decided prior to the 1998 repeal of the statutory language explicitly prohibiting PHAs from taking any action toward demolition without following the statutory requirements.¹⁴ The court's conclusion here was also influenced by its inability to find that the current statutory language satisfied *Blessing's* "rights creating" test, relevant whether the claim is made directly under the statute or via Section 1983. The court thus granted HUD and HANO judgment on the constructive demolition claim.

The tenants also pressed a claim of actual demolition against HUD and HANO, but this was successfully parried. Because HANO has not yet submitted an application to demolish the developments to HUD for approval, the court found this claim unripe and that the tenants therefore lacked standing, granting judgment to HUD and HANO. This claim could be refiled when HANO files an application and HUD makes a decision.

Other Fair Housing and Civil Rights Claims

The tenants also claimed that HUD's and HANO's actions violated the Fair Housing Act¹⁵ because they both evidenced illegal disparate treatment on the basis of race and had a disparate impact on a protected class. These claims raise no serious enforceability issue, since they could be brought directly under the statute's private right of action. The tenants also pursued an equal protection claim, alleging discriminatory intent.

Defendants challenged these claims. However, the court found the evidence wanting, since the only evidence of discriminatory intent was comments by public officials. Despite the obvious racial hostility of various public officials' comments, the court declined to link them to any determinative racial motivation attributable to HUD or HANO in deciding to demolish the units. Thus the court granted defendants summary judgment on the disparate treatment claim, as well as the equal protection claim.

The court also rejected plaintiffs' discriminatory effect claim against HUD and HANO, also granting judgment to the defendants. To make a showing of discriminatory impact under § 3604, plaintiffs must demonstrate disproportionate harm or an illegal perpetuation of segregation. The plaintiffs had argued that because the developments were occupied by 100% African Americans, the threatened loss was necessarily discriminatory in impact. The court found this position untenable, instead commenting that preserving the developments and the pre-Katrina

¹⁴*Anderson*, at 8-11. The court relied on *Banks v. Dallas Hous. Auth.*, 271 F.3d 605 (5th Cir. 2001), which in turn had cited *Edwards v. District of Columbia*, 821 F.2d 651 (D.C. Cir. 1987), even though *Edwards* was explicitly overruled by Congress in 1988 by the now-repealed language of § 1437p(d). The opinion lacks any analysis of whether a constructive demolition claim in these circumstances could proceed against HUD under the APA.

¹⁵42 U.S.C. § 3604.

racial composition might perpetuate racial segregation. The court failed to focus on the fact that the overall demolition and revitalization plan would remove housing from African-American tenants, an exclusion which has been held sufficient to demonstrate a prima facie case of discriminatory impact.

The tenants had also claimed that HUD and HANO's actions violated international law, specifically the Guiding Principles on Internal Displacement. The court granted judgment to defendants on this claim as well, finding that those principles lacked the force of law, by their own terms.¹⁶

Due Process

Tenants claimed that HUD and HANO violated their procedural due process rights to adequate notice prior to their dispossession. Aside from a sovereign immunity defense, asserted by HUD and rejected by the court, the defendants also challenged whether the tenants in fact had a sufficient property interest, which was complicated by the circumstances surrounding the tenants' displacement. Fortunately, the court could draw upon precedent recognizing a continued property interest even in the absence of possession. Helpful for this conclusion was the fact that, whether due to Katrina or the landlord, in no way was the dispossession here due to the tenants' actions. Denying summary judgment for any party on this claim, the court ordered further factual development on "(1) the number of units, if any, that are presently habitable; (2) the extent of the repairs required to render non-habitable units habitable; (3) the number of tenants who presently wish to return and are able to return; (4) and the inadequacies of the current voucher program."¹⁷

Constructive Eviction and Breach of Contract

The tenants had also claimed that HANO's actions constituted constructive eviction and breach of the lease contract. The court denied HANO's motion for summary judgment, reserving these issues for trial. The tenants claimed that the failure to repair, as well as the boarding and locking of units, constitutes constructive eviction, which under Louisiana law, occurs when leased premises are rendered uninhabitable because of a lessor's act or omission. HANO claimed that uninhabitability was caused by Katrina, not its actions. The court concluded that only trial could determine whether HANO or Katrina is ultimately responsible for the current uninhabitable state of the properties, and that in any event, a preliminary injunction would not be an appropriate remedy.

On the tenants' breach of lease claim, the court concluded that only trial could establish what is a "reasonable time" for repair under the lease provision obligating repairs and establishing liability for breach.

¹⁶*Anderson*, at 21-22.

¹⁷*Id.* at 22.

Finding that these actions did not involve HUD, but only HANO as lessor, the court granted judgment to HUD on these claims, leaving resolution to plaintiffs and HANO at trial.

Conclusion

The *Anderson* ruling has delivered a mixed bag for tenants seeking to return to their homes. The decision keeps important portions of their case alive, permitting the battle to move forward in both the local and federal political arenas, while the case proceeds on their remaining claims. Hopefully, one day soon, they will be able to return to their repaired homes and begin the process of rebuilding their lives and communities. ■

Assessing the Economic Benefits of Public Housing

Public housing has significant economic value and benefits local and regional economies in ways that the private market could not provide or maintain without significant subsidies. These are the conclusions of a recent study released by the Council of Large Public Housing Authorities (CLPHA).¹ The study is the first to develop a framework for making quantitative estimates of the economic benefit of public housing investment and is intended to inform the ongoing debate about the role of the federal government in providing affordable housing. This article summarizes the study, its findings and conclusions.

The study, which examined ten public housing market areas,² addresses three overarching questions:

- What benefits do public housing residents derive from the program?
- What benefits accrue to local communities through the maintenance and enhancement of the existing public housing stock?
- What financial resources are necessary to maintain public housing's current value, and can the private market realistically provide those resources?

¹CLPHA, *Assessing the Economic Benefits of Public Housing*, Final Report 8 (January 2007). A copy of the study is available at <http://www.clpha.org/page.cfm?pageID=1068>. The study was conducted by Econ-sult Corporation and sponsored by CLPHA and the Housing Authority Insurance Group. It was also supported by the Public Housing Authorities Directors Association (PHADA).

²The chosen cities are: Akron, OH, Boston and New Bedford, MA, Charlotte, NC, Dallas, TX, Kansas City, MO, Miami, FL, New Bedford, MA, Oakland and San Diego, CA, and Seattle, WA.

Resident Benefits

Public housing residents cannot afford private apartments renting at the 25th percentile of the local market rent because their incomes are simply too low. The estimated annual value of the effective public housing subsidy is nearly \$6,000 per public housing household in the sampled cities and about \$7.2 billion nationally. Effectively, the subsidy increases public housing households' disposable income by 57%, helping public housing residents to better afford food and other necessities.

The subsidy provided by public housing allows low-income wage earners to remain in urban areas with tight rental markets.

Impact on Employers

The subsidy provided by public housing allows low-income wage earners to remain in urban areas with tight rental markets. It indirectly subsidizes those industries that rely on such workers to remain competitive. Notwithstanding, low-wage workers, those working in accommodation and food services, retail trade and other services, face a fundamental housing crisis because they generally cannot afford two-bedroom apartments renting at the 25th percentile of market rents.

Impacts of PHA Spending

On average, the study found that every dollar spent by a PHA on capital and maintenance generates \$2.12 in total regional spending. Expenditures for operations generate \$1.93 for each PHA dollar spent. In the sampled markets, the housing authorities generate over \$643 million in annual economic activity. This supports over 12,600 annual jobs. Expanding these numbers to the entire country, the study estimates that the net economic effect of \$8.1 billion in PHA expenditures generates an additional \$8.2 billion in annual economic activity.

Economic Value of Public Housing Stock

The average per-unit cost of building new public housing in the sampled markets is \$125,081. This is slightly higher than the average for the nation, which is \$120,833. Based on these numbers and land acquisition costs, which, on average cost \$14,225, the total replacement cost of this country's public housing units with similar residential units would cost approximately \$162 billion. This is higher than the \$102.3 billion value estimate of the

housing, which is based on a discounted cash flow model. The study explains that this gap illustrates a fundamental economic reality of housing made available to low- or very low-income people. Specifically, it concludes that without substantial subsidy, public housing developments do not make economic sense to a private developer investor. In other words, the cost of acquiring land and building the housing far exceeds the investment value of the resulting affordable housing property.

Impact on Capital Needs

Without calculating systemic shortfalls in capital expenditures, the study estimates that the annual capital needed to maintain this country's public housing stock is \$4.8 billion. This is nearly double the amount PHAs receive nationwide, which is \$2.5 billion per year.

Conclusion

The CLPHA study helps shape the debate regarding the role of the federal government in providing affordable public housing. It begins by confirming the widely known fact that public housing serves a very low income population that cannot be served by the private market. It goes on to highlight less known facts, namely, that the public housing subsidy also benefits businesses that rely on low-wage workers, that federal support of public housing is a significant stimulant for local economies, and that the public housing inventory represents a very valuable and important resource that cannot be duplicated or maintained by the private market because it is simply not economically viable. While not directly critical of the federal government's diminished funding of, and support for, public housing, the study makes clear that the failure to adequately fund public housing operating and maintenance needs will result not only in the loss of critically needed housing but also in the loss of a very valuable and significant economic resource. ■

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.

Termination of HAP Contract—Adequate Notice

Park Village Apts. Tenants Assoc. v. Mortimer Howard Trust, 2007 WL 519038 (N.D.Cal., Feb. 14, 2007) The court preliminarily enjoined the defendant owner-operator of an eighty-four-unit senior development that was subsidized under the HUD project-based Section 8 program from raising rents or evicting any of the residents for failure to pay rents beyond the Section 8 approved rents because the owner did not give the required federal notice prior to his not renewing the HUD Housing Assistance Payment contract. At the preliminary hearing the tenant association showed that it was likely to prevail on the merits of its claim and that the residents would suffer irreparable harm if the owner's actions were not enjoined.

Prepayment—State Housing Finance Agency Loan

Renaissance Management Company v. Connecticut Housing Finance Authority, 281 Conn. 227, 2007 WL 328592 (Conn., Feb. 13, 2007). The Connecticut Supreme Court affirmed the trial court's refusal to issue an injunction in favor of owner who sought to force the Connecticut Housing Finance Authority (CHFA) to accept prepayment of affordable rental housing loan made by CHFA. The Supreme Court affirmed the trial court finding that the decision to accept the prepayment was within the discretion of the CHFA and that it appropriately withheld the right to prepay because the need for affordable housing in the community continued to be acute. The court also upheld the trial court's conclusion that CHFA's failure to accept the prepayment did not violate CHFA's implied contractual covenant of good faith and fair dealing.

Bankruptcy—Automatic Stay Provision Eviction—Public Housing

Biggs v. Housing Auth. of Pittsburgh, 2007 WL 654247 (W.D.Pa., Feb. 28, 2007) The court reversed the bankruptcy

court's granting an exception to the housing authority from the automatic stay provision of Section 525(a) of the Bankruptcy Code and, thereby, allowing the housing authority to evict a public housing resident for failure to pay rent that accrued prior to the resident filing a Chapter 7 bankruptcy petition. The court concluded that Section 525(a) applies to government entities and precludes them from discriminating against debtors solely on the basis of their being debtors who have sought the protection of the bankruptcy court and who will have, or have had, their pre-bankruptcy debts discharged. Accordingly, the court vacated the bankruptcy court's order, reinstated the stay and prevented the housing authority from evicting the plaintiff or failing to renew her lease for her failure to pay rent accrued prior to her filing the bankruptcy petition.

Eviction—Lock Out, Damages

Hinton v. Sealand Brokerage, 2007 WL 470396 (D.C., Feb. 15, 2007). Court vacated superior court holding in favor of landlord in tenant action brought after the landlord allegedly locked her out of her single-family rental house before she was able to move her furniture and personal belongings. The court also vacated superior court holding in favor of landlord for unpaid rent attributable to the tenant holding over by leaving property in the house after she had left. The court held that landlord had properly installed new locks and security when unit was unsecured but improperly locked tenant out of her unit while her lease was still in effect. Accordingly, the court held that the tenant is entitled to provable damages. With respect to landlord's claim for damages for the period that tenant left furnishings in the apartment, the court held that the landlord had an obligation to mitigate damages and that the award of damages by the lower court, which was based on monthly rent, was improperly calculated.

Public Housing—Demolition, Failure to Repair; Public Housing—Constructive Eviction; Fair Housing—Failure to Affirmatively Further;

Anderson v. Jackson, 2007 WL 458232 (E.D. La., Feb. 6, 2007). See detailed article on page 65.

Foreclosure—Cooperative Interest State Courts—Res Judicata

Mary Ebanks v. 547 West 147th Street Housing Development Fund, 2007 WL 509232 (N.Y.A.D. Feb. 20, 2007). The New York Supreme Court denied a cooperative the right to foreclose on a cooperative member's interest in order to collect a \$20,321 maintenance arrearage owed, indirectly, by the City of New York's Department of Housing and Preservation Development under the Section 8 voucher

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>.

program that it administers. The cooperative and member had previously settled an eviction action for \$1,482 for the member's failure to pay the arrearage. The court held that under New York's transactional approach to *res judicata* issues, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.

Voucher Termination—Due Process in Termination Hearing

Basco v. Machin, 2007 WL 433404 (M.D. Fla., Feb. 6, 2007). Court upheld termination of Section 8 Voucher holder for allowing unauthorized person to reside in her apartment. The court rejected the resident's argument that the informal hearing violated her due process rights in that it relied on hearsay evidence and denied her the right to cross examine certain persons that were not at the hearing. It also rejected the resident's argument that she did not have the burden of proving that the unauthorized guest was not residing in the apartment.

Fair Housing Act—Familial Status Discrimination

White v. U.S. Dept. of Housing and Urban Development, 475 F.3d 898 (7th Cir. 2007). The appeals court reversed an administrative law judge's (ALJ) decision that the defendant landlord did not discriminate against a prospective tenant on the basis of familial status under § 604(c) of the Fair Housing Act. The court found that an "ordinary listener" would conclude that the landlord judged plaintiff based solely upon her familial status, the knowledge that the plaintiff was the mother of two small children, not on her financial situation. The court rejected the landlord's argument that she discriminated against the applicant based on her marital status, which is not protected by the Fair Housing Act. The court affirmed the ALJ's denial of plaintiff's motion to amend her complaint to include a claim of harassment.

Fair Housing—Discriminatory Zoning Ordinance

Nevada Fair Housing Center v. Clark County, 2007 WL 610640 (D.Nev., Feb. 23, 2007). The court found Clark County's former zoning ordinance facially discriminatory and in violation of the Fair Housing Act. The ordinance provided that six non-disabled, unrelated adults could live together at any location without acquiring any permit, while no group of three to six disabled, unrelated adults could live together within 1500 feet of an existing group home without obtaining a special use permit.

Fair Housing Act—Discriminatory Zoning Ordinance

Jeffrey O. v. City of Boca Raton, 2007 WL 628131 (S.D.Fla., Feb. 26, 2007). The court ruled in favor of individual recovering alcoholics and drug addicts that two Boca Raton zoning ordinances violated the Fair Housing Act by limiting their capacity to live in residential neighborhoods. The first ordinance classified residential facilities, which test recovering individuals, as substance abuse facilities and required that they be located in non-residential neighborhoods. The second ordinance limited the number of unrelated individuals that could reside in a residential unit without providing for reasonable accommodation exceptions. The court ruled that the individual plaintiffs had standing to challenge the ordinances, that the first ordinance intentionally intended to discriminate against recovering alcoholics and drug addicts by facially differentiating between them and persons without handicaps, and that the second ordinance had a disparate impact on persons with disabilities while failing to make exceptions to make reasonable accommodations. The court temporarily enjoined the city from enforcing the two provisions of the zoning ordinance. Because the plaintiffs did not prove actual damages, the court only awarded them nominal damages. The court refused to grant relief to the housing provider plaintiff with respect to the second ordinance on the grounds that the provider had no reason to accommodate more than three individuals in one unit and because the provider did not have "clean hands" by virtue of having agreed several times to abide by the ordinance but having failed to do so. ■

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 February 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. 8579 (Feb. 26, 2007)

Public Access to HUD Records Under the Freedom of Information Act (FOIA) and Production of Material or Provision of Testimony by HUD Employees

Summary: This final rule clarifies and explains the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by the Department's document production and testimony approval regulations. This final rule describes the procedures to be followed by a party in making a demand for HUD documents and HUD testimony. The final rule also explains the standards to be followed by HUD in determining whether production of documents or testimony should be permitted and, if so, any conditions or restrictions that HUD should impose. This final rule follows publication of an August 15, 2006, proposed rule on which HUD received one public comment. After careful consideration of the issues raised by the commenter, HUD has decided to adopt the August 15, 2006, proposed rule with minor changes.

Effective Date: March 28, 2007.

HUD Federal Register Notices

72 Fed. Reg. 4917 (Feb. 1, 2007)

Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, Fiscal Year 2007

Summary: This notice announces revised Annual Adjustment Factors (AAFs) that are applied to Section 8 contract rents for specific programs. These factors are applied at Housing Assistance Payment contract anniversaries for those calendar months commencing after the effective date of this notice. The AAFs are based on residential rent and utilities time-series cost indices from the Bureau of Labor Statistics Consumer Price Index surveys.

Effective Date: February 1, 2007.

72 Fed. Reg. 5071 (Feb. 2, 2007)

Notice of Proposed Information Collection: Comment Request; Service Members Civil Relief Notice

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the Office of Management and Budget (OMB). The information collection is intended to provide a statement or notice to homeowners in default explaining the mortgage and foreclosure rights of service members and their dependents under the Servicemembers Civil Relief Act, including the toll-free military one source number to call if service members, or their dependents, require further assistance. This notification is required by law and must be made within forty-five days from the date the missed payment was due unless the homeowner pays the overdue amount before the expiration of the forty-five-day period. All mortgage loans, including conventional mortgages and mortgages insured by HUD, are subject to this notification requirement.

Comments Due Date: April 3, 2007.

72 Fed. Reg. 5072 (Feb. 2, 2007)

Notice of Proposed Information Collection: Comment Request; Management Certifications and Management Entity Profile

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. Owners of insured and assisted multifamily properties submit these information collections to HUD. The information is needed to assist HUD in determining the acceptability of a proposed management agent. Without these documents, HUD's ability to screen out unacceptable management agents and control fraud would be limited, and the incidence of defaults and unauthorized use of subsidy funds would increase.

Comments Due Date: April 3, 2007.

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>.

72 Fed. Reg. 5077 (Feb. 2, 2007)

Privacy Act of 1974; New System of Records, Audit Resolution and Corrective Action Tracking System, HUD/CFO-02

Summary: HUD proposes to establish a new record system to add to its inventory of systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a). The proposed new system of records identified as HUD/CFO-02, entitled Audit Resolution and Corrective Action Tracking System (ARCATS, P136), will be used by HUD to track and monitor Audits and Recommendations issued by the Office of the Inspector General (OIG) and the Government Accountability Office, and will reflect the disposition of funds granted, loaned, or administered for key audits resolutions for the department.

Effective Date: This action will be effective without further notice on March 5, 2007, unless comments are received that would result in a contrary determination.

Comments Due Date: March 5, 2007.

72 Fed. Reg. 5581 (Feb. 6, 2007)

America's Affordable Communities Initiative; HUD's Initiative on Removal of Regulatory Barriers: Incentive Criteria on Barrier Removal in HUD's Competitive Funding Allocations; Solicitation of Comments on Effectiveness of Criteria

Summary: In this notice HUD solicits comment on the effectiveness of increasing efforts to reduce regulatory barriers to affordable housing by establishing, in HUD's competitive funding allocations, a policy priority for increasing the supply of affordable housing through the removal of regulatory barriers. A description of this policy priority, along with HUD's other policy priorities for competitive funding allocations, can be found each year in HUD's annual publication of its General Section to HUD's Super Notice of Funding Availability (SuperNOFA). Policy priorities provide applicants with the opportunity to obtain higher rating points if the applicants can demonstrate they are undertaking activities that promote the policy priorities. As part of this renewal process, HUD is seeking additional input on the effectiveness of the questionnaire in contributing to or promoting efforts to reduce regulatory barriers, and whether HUD should either (1) continue to implement this incentive criteria through the questionnaire or (2) consider any alternative and more effective means of providing incentive criteria for higher rating points in HUD NOFAs for removal of regulatory barriers. HUD will take this input into consideration in the development of its FY 2008 SuperNOFA.

Comment Due Date: March 23, 2007.

72 Fed. Reg. 5733 (Feb. 7, 2007)

Notice of Proposed Information Collection: Comment Request; Implementation of the Violence Against Women and Department of Justice Reauthorization Act of 2005

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. Residents of Section 8 project-based units who are victims of abuse sign and submit to the project owner or management agent a form certifying that the individual is a victim of domestic violence, dating violence, or stalking and that the incident in question is bona fide. Owners and management agents will use the information in order to evaluate whether individuals are eligible to receive VAWA 2005 protections that will enable the individuals to retain their housing assistance and/or occupancy of subsidized housing units.

Comments Due Date: April 9, 2007.

72 Fed. Reg. 6251 (Feb. 9, 2007)

Notice of Submission of Proposed Information Collection to OMB; Monthly Report of Excess Income and Annual Report of Uses of Excess Income

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. Project owners are permitted to retain Excess Income for projects under terms and conditions established by HUD. Owners must submit a written request to retain some or all of their Excess Income. The request must be submitted at least ninety days before the beginning of each fiscal year, or ninety days before any other time during a fiscal year that the owner plans to begin retaining excess income for that fiscal year. HUD uses the information to ensure that required excess rents are remitted to the department and/or retained by the owner.

Comments Due Date: March 12, 2007.

72 Fed. Reg. 6252 (Feb. 9, 2007)

Notice of Submission of Proposed Information Collection to OMB; Request for Withdrawals From Replacements Reserves/Residual Receipts Funds

Summary: The proposed information collection requirement described below has been submitted to the OMB for review, as required by the Paperwork Reduction Act. The department is soliciting public comments on the subject proposal. Project owners are required to submit this information and required supporting documentation when requesting a withdrawal for funds from the Reserves for Replacement and/or Residual Receipt Funds. HUD reviews this information to ensure that funds are withdrawn and used in accordance with regulatory and administrative policy.

Comments Due Date: March 12, 2007.

72 Fed. Reg. 7449 (Feb. 15, 2007)
Notice of Proposed Information Collection for Public Comment for the Housing Choice Voucher Program: Application, Allowances for Tenant-Furnished Utilities, Inspections, Financial Reports, Request for Tenancy Approval, Housing Voucher, Portability Information, Housing Assistance Payments Contracts and Tenancy Addenda, Homeownership Obligations, Tenant Information for Owner, Voucher Transfers and Homeownership Contracts of Sale

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. Public housing agencies (PHAs) will prepare an application for funding which specifies the number of units requested, as well as the PHA's objectives and plans for administering the HCV program. The application is reviewed by the HUD Field Office and ranked according to the PHA's administrative capability, the need for housing assistance, and other factors specified in the Notice of Funding Availability (NOFA). The PHAs must establish a utility allowance schedule for all utilities and other services. Units must be inspected using HUD-prescribed forms to determine if the units meet the housing quality standards of the HCV program. PHAs are also required to maintain financial reports in accordance with accepted accounting standards. The PHA is required to submit one financial document into an internet-based Voucher Management System four times a year. After the family is issued an HCV to search for a unit, the family must complete and submit to the PHA a Request for Tenancy Approval when it finds a unit which is suitable for its needs. Initial PHAs will use a standardized form to submit portability information to the receiving PHA who will also use the form for monthly portability billing. PHAs and owners will enter into HAP contracts each providing information on rents, payments, certifications, notifications, and owner agreement in a form acceptable to the PHA. A tenancy addendum is included in the HAP contract as well as incorporated in the lease between the owner and the family. Families that participate in the Homeownership program will execute a statement regarding their responsibilities and execute contracts of sale including an additional contract of sale for new construction units. PHAs that wish to voluntarily transfer their HCV programs will notify HUD for approval and, once approved, all affected families and owners of the divested PHA.

Comments Due Date: April 16, 2007.

72 Fed. Reg. 7451 (Feb. 15, 2007)
Notice of Proposed Information Collection for Public Comment on Life After Transitional Housing: Family Follow-Up Interview

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. HUD has spent over

\$7 billion of public funds supporting Transitional Housing for homeless individuals and families. There is little research, however, that focuses on what the impact of that substantial public investment has meant in the lives of homeless people. This interview protocol is structured to find out what happens to formerly homeless families once they leave HUD-assisted Transitional Housing and what the impact of Transitional Housing is on the lives of those families. The department originally submitted this survey for OMB review in June 2005. Completion of the participant follow-up survey by July 2007, the twelve-month end-date for those participants who joined the study last, demands extension of OMB approval from April through July 2007.

Comment Due Date: April 16, 2007.

72 Fed. Reg. 7666 (Feb. 16, 2007)
Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons: Change in Effective Date of Final Guidance

Summary: Through this notice, HUD advises members of the public that its final "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient (LEP) Persons," as required by Executive Order (EO) 13166, published in the Federal Register on January 22, 2007, and scheduled to become effective on February 21, 2007, will now become effective on March 7, 2007. HUD is moving the effective date to March 7, 2007, in order to allow HUD the opportunity to brief interested members of the public on the guidance before it takes effect. A meeting for this purpose originally scheduled to be held at HUD Headquarters on February 13, 2007, had to be rescheduled for February 28, 2007. Therefore, HUD is moving the effective date of the final guidance to March 7, 2007.

Effective Date: March 7, 2007.

72 Fed. Reg. 7775 (Feb. 20, 2007)
Delegation and Redlegation of Authority for the Office of the Inspector General

Summary: This notice updates the delegation of authority of the Office of the Inspector General to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by the Inspector General Act to the Deputy Inspector General, the Assistant Inspectors General, the Deputy Assistant Inspectors General, the Special Agents in Charge, the Regional Inspectors General for Audit, and the Directors within the Office of Audit. This notice also redelegates to the above-mentioned officials the authority of the Inspector General to cause the seal of the department to be affixed to certain documents and to certify that a copy of any book,

record, paper, microfilm or other document is a true copy of that in the files of the department. This notice also delegates the authority to the Deputy Inspector General, the Assistant Inspector General for Investigation, the Deputy Assistant Inspectors General for Investigation, and the Special Agents in Charge, to request information under 5 U.S.C. Section 552a(b)(7).

Effective Date: February 12, 2007.

**72 Fed. Reg. 8192 (Feb. 23, 2007)
Notice of Submission of Proposed Information Collection to OMB; Multifamily Default Status Report**

Summary: The department is soliciting public comments on the subject information collection proposal, which is being submitted to the OMB. Mortgagees use this report to notify HUD that a project owner had defaulted on their mortgage and that an assignment of mortgage will result if HUD and the mortgagor do not develop a plan for reinstating the loan.

Comments Due Date: March 26, 2007.

**72 Fed. Reg. 8571 (Feb. 26, 2007)
Notice of Funding Availability (NOFA): Section 202 Demonstration Pre-Development Grant Program; Notice**

Summary: Initial announcement: Funding Opportunity Title: Section 202 Demonstration Pre-Development Grant Program.

Application Deadline: Wednesday, March 28, 2007.

**72 Fed. Reg. 8764 (Feb. 27, 2007)
Notice of Submission of Proposed Information Collection to OMB; Rural Housing and Economic Development Program Application and Semi-Annual Reporting**

Summary: The department is soliciting public comments on the subject information collection proposal that has been submitted to OMB for review. Information is required to rate and rank competitive applications for Rural Housing and Economic Development program grant funds and ensure eligibility of applicants for funding. Semi-annual reporting is required to monitor grant management.

Comments Due Date: March 29, 2007.

HUD Notices

**PIH 2007- 4 (Feb. 4, 2007)
Extension Disaster Voucher Program (DVP) Operating Requirements Rental Assistance for HUD-Assisted Families and Special Needs Families Displaced by Hurricanes Katrina and Rita**

Summary: This notice extends HUD Notice PIH 2006-12, same subject, which will expire on February 28, 2007, for another year until February 28, 2008, with the exception of any guidance that has been superseded by subsequent HUD notices related to the DVP. These notices are: HUD Notice PIH 2006-29, Disaster Voucher Program

(DVP) Supplemental Guidance Voucher Program Fungibility Issues Associated with Combining Voucher and Public Housing Funding During Calendar Year 2006, issued July 28, 2006; HUD Notice PIH 2006-37, Changes to Disaster Voucher Program (DVP) Operating Requirements Family Eligibility and Initial Lease Terms, issued September 28, 2006; HUD Notice PIH 2007-3, Reoccupancy Policies for Pre-Disaster HUD Assisted and Special Needs Families Displaced by Hurricanes Katrina and Rita, issued January 23, 2007.

Expires: February 28, 2008.

**PIH 2007-5 (Feb. 16, 2007)
Revised Voucher Housing Assistance Payments Contract (Form HUD 52641) and Tenancy Addendum (form HUD 52641A); Housing Choice Voucher Program Administration and the Violence Against Women and Justice Department Reauthorization Act of 2005 (VAWA 2005)**

Summary: This notice transmits a revised Housing Assistance Payments Contract (HAP Contract, form HUD 52641) and a revised Tenancy Addendum (form HUD 52641A). These forms have been revised to reflect the statutory requirements of the Violence Against Women and Justice Department Reauthorization Act of 2005 (VAWA 2005) that are related to housing choice voucher program HAP contracts and leases. These forms are available through HUDCLIPS (www.hudclips.org). This notice further provides guidance to public housing agencies on several additional provisions of the law that impact on voucher program administration. This notice does not supersede HUD Notice PIH 2006-23.

Expires: February 28, 2008.

**H 2007-01 (Feb. 2, 2007)
Disaster Recovery Guidance by Multifamily Housing After a Presidentially-Declared Disaster**

Summary: Notice H 2004-22, which was issued on November 10, 2004, and expired on November 30, 2005, is being reinstated and extended to February 28, 2008. The notice was previously reinstated by Notice 05-20, which was issued on December 1, 2005, and expired on December 31, 2006.

Expires: February 28, 2008.

Rural Development/Rural Housing Service Final Rules

**72 Fed. Reg. 5153 (Feb. 5, 2007)
Direct Single Family Housing Loans and Grants**

Summary: Through this action, the Rural Housing Service is adopting homeownership education requirements. The lack of homeownership education is a well-known barrier to successful homeownership for many families. The intended effect of this action is to assure that first-time homeowners financed under the Section 502

Direct program are well prepared for homeownership by assuring that they receive homeownership education.

Effective Date: May 7, 2007.

Rural Development/Rural Housing Service Federal Register Notices

72 Fed. Reg. 8339 (Feb. 26, 2007)

Notice for Requests for Proposals for Guaranteed Loans under the Section 538; Guaranteed Rural Rental Housing Program (GRRHP) for Fiscal Year 2007

Summary: This is a request for proposals for guaranteed loans under the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) pursuant to 7 C.F.R. § 3565.4 for Fiscal Year (FY) 2007 subject to the availability of funding. FY 2006 funding for the Section 538 was \$99 million. This notice is being issued prior to passage of a final appropriations bill to allow applicants sufficient time to leverage financing and submit proposals in the form of "RESPONSES", and give the agency maximum time to process applications within the current fiscal year. A Notice of Funding Availability will be published announcing the funding level for GRRHP for FY 2007 once an appropriations act has been enacted. The commitment of program dollars will be made to applicants of selected responses that have fulfilled the necessary requirements for obligation, to the extent an appropriation act provides funding for GRRHP for FY 2007.

Dates: The RHS will review and score all responses received through April 27, 2007.

Rural Housing Service/Rural Development Administrative Notices

RD AN No. 4238 (1980-D) (Feb. 2, 2007)

Single Family Housing Guaranteed Loan Program Refinancing of Section 502 Direct Loans with Section 502 Guaranteed Loans

Summary: This administrative notice (AN) renews instruction to field staff involved in the Single Family Housing Guaranteed Loan Program (SFHGLP) of the process used to refinance Direct loans to SFHGLP loans. A separate AN is being issued to address the requirements for refinancing an existing SFHGLP loan with a new SFHGLP loan.

Expiration Date: February 28, 2008.

RD AN No. 4239 (1980-D) (Feb. 2, 2007)

Single Family Housing Guaranteed Loan Program Refinancing of Single Family Housing Guaranteed Loans

Summary: The AN renews instruction to field staff involved in the SFHGLP of the process used to refinance existing SFHGLP loans. A separate AN is being issued to address the renewal requirements for refinancing an existing 502 Direct loan with a new SFHGLP loan.

Expiration Date: February 28, 2008.

RD AN No. 4249 (1980-D) (Feb. 23, 2007)

Single Family Housing Guaranteed Loan Program Conditional Commitment for Loan Guarantee Proposed New Construction

Summary: This AN renews the guidance surrounding the expiration date of the SFHGLP Conditional Commitment when new construction is involved.

Expiration Date: February 28, 2008. ■

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