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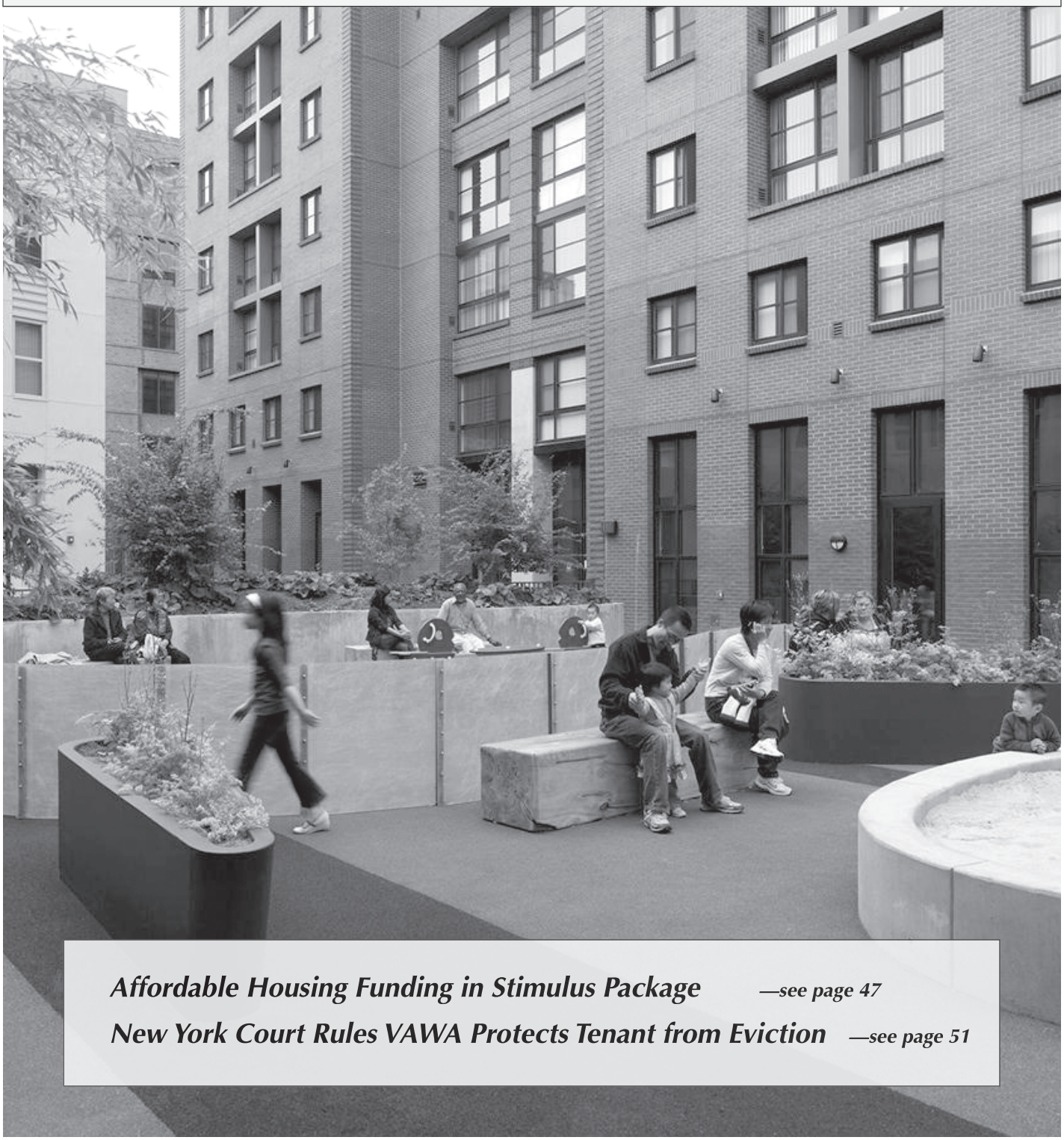

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Table of Contents

Cover: Developed by the Chinatown Community Development Center on the site of a former freeway off-ramp in San Francisco's dense Chinatown neighborhood, Broadway Family Housing has 81 units for very low-income families. It features a Head Start childcare center, two commercial spaces, landscaped interior courtyards, and a community room. Photograph by Tim Griffith.

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Congress Considers Affordable Housing Funding in Stimulus Package

President Obama's push for an economic recovery program during the first few weeks of his Administration has provided an unprecedented opportunity for Congress to address years of funding neglect for affordable housing programs serving the lowest-income people most in need of federal help. The quickly deepening recession promises to accelerate housing affordability problems experienced by millions, as family incomes are reduced by cuts in hours, jobs and possibly public benefits. Advocates, led by the National Low Income Housing Coalition, have been working diligently to encourage Congress to inject substantial sums for affordable housing into the more than $800 million in spending and tax cuts intended to stimulate demand and economic activity. [*Ed. Note: See box on page 50 for summary of funding components in final bill signed by the President on February 17, 2009. More detail in the next Bulletin.*]

Affordable housing programs provide an excellent match for the Administration's stated objectives of expeditiously creating domestic jobs, improving energy efficiency, providing long-term investments, and strengthening the social safety net as the recession deepens.

Advocates' Requests

In a January 14 letter to Speaker Pelosi, advocates sought funding for a wide range of affordable housing needs, at a total cost of approximately $45 billion. Affordable housing funding at such an unprecedented scale is consistent with several major policy objectives expressed by the President:

- *Providing relief to families hit hardest by the recession*. Rising unemployment is causing poverty to increase, forcing even more families into an already undersupplied low-cost rental housing market, even as single-family home values drop. Spending on affordable housing programs for very low-income families is required to prevent a surge in homelessness, which is both more humane and less costly in the long run.
- *Stimulating the economy by creating hundreds of thousands of new jobs* in the housing industry. Investment in housing is an economic stimulus because housing construction and rehabilitation are labor and material intensive, thus creating jobs, increasing sales of building and home furnishing goods, and generating new state and local tax revenue. Affordable housing construction and rehabilitation can replace jobs lost during the recent contraction of the housing industry.

- *Contributing to the "green" agenda.* As much housing rehabilitation and new construction as possible funded through the economic recovery package should use state-of-the-art green technology, for energy efficiency and environmentally friendly construction and operation. Such homes will save operating costs for tenants and owners, and ultimately taxpayers.
- *Promoting long-term social investments.* Rehabilitation of the existing federally assisted rental housing stock will also preserve it for future generations in need of affordable homes.

Included among advocates' requests were:

Emergency Shelter Grant (prevention and rehousing only)	$2 billion
HOME (for green rehab)	$7.4 billion
Housing Choice Vouchers	$3.6 billion
Low-Income Housing Tax Credit (fund stalled projects)	$5 billion
National Community Stabilization Trust	$1 billion
National Housing Trust Fund	$10 billion
Neighborhood Stabilization Program	$5 billion
Project-based Section 8 Green Rehab	$3 billion
Public Housing Capital Fund	$5 billion
Rural Housing Programs	$1.8 billion
Section 202 Elderly Housing and related services	$1.2 billion

House Floor and Senate Committee Versions

As with all appropriations measures, the House of Representatives was the first to take up the bill. On January 28, the House passed its $819 billion American Recovery and Reinvestment Act, H.R. 1. The vote was 244 to 188. All Republicans and eleven Democrats voted no.

The Senate Appropriations Committee commenced consideration of its recovery package in mid-January. The version that emerged for consideration on the Senate floor at the beginning of February[1] contained many housing provisions similar to the House-passed bill, although sometimes differing significantly on funding levels or program details.

Both bills included funds for vital affordable housing programs of the Department of Housing and Urban Development (HUD), including:

- public housing capital funds ($5 billion in both the House and the Senate bills)
- rehabilitation funding for energy efficiency retrofitting of project-based HUD-assisted housing, including Section 8, and Section 202 and 811 properties for the elderly and people with disabilities ($2.5 billion in House, $1.37 billion in Senate), plus another $2.13 billion in the Senate bill for fully funding one-year renewals of project-based Section 8 contracts)
- temporary housing assistance through the Emergency Shelter Grant program ($1.5 billion in both bills), with flexible uses to permit assistance for tenants facing economic hardships that jeopardize housing stability
- new funds for the Neighborhood Stabilization Program (created last July to address the community impacts of foreclosure) and related technical assistance ($4.19 billion in the House bill, $2.25 billion in the Senate bill)
- funding for the HOME program ($1.5 billion in the House, $2.25 billion in the Senate)
- funds for Native American Housing Block Grants ($500 million in the House, $510 million in the Senate)

Aside from the public housing and multifamily green rehab and renewal shortfall components, neither bill directed funds to the production of homes affordable for extremely low-income families.

Advocates had also requested capitalization of the National Housing Trust Fund (NHTF), created by the Housing and Economic Recovery Act last July, because its primary specified funding mechanism will likely yield little revenue for some time.[2] The initial capitalization for the National Housing Trust Fund went dormant when the Federal Housing Finance Agency suspended Fannie Mae and Freddie Mac contributions to the fund in December, as permitted by the law. Neither bill ultimately provided such a jump start, although the NHTF campaign sought sponsorship of an amendment on the Senate floor to include initial capitalization of the Fund.

Another major advocates' request sought funds for new rental assistance vouchers. A proposed House amendment providing for 200,000 new vouchers failed to obtain the rule required for floor consideration, and the Senate also declined to provide more vouchers.

The stimulus bills also contained various tax proposals, including provisions intended to address the collapsing Low-Income Housing Tax Credit (LIHTC) market that jeopardizes development or rehabilitation of thousands of affordable low-income units. Tax credits have become substantially less valuable because financial institutions, with fewer profits to offset the credits, have less need for them, not to mention the uncertainty and higher costs surrounding other necessary financing. The House bill would

[1]The Senate version was denominated Senate Amendment No. 98 (sponsored by Appropriations Chair Senator Inouye).

[2]Pub. L. No. 110-289, § 1131, 122 Stat. 2711 (July 30, 2008), which established the Fund along with its dedicated funding source—a percentage of new business of the Government Sponsored Enterprises.

Major Low-Income Housing Provisions of American Recovery and Reinvestment Act

	House (bill passed Jan. 28)	**Senate** (bill passed February 10)	**Final Conference Agreement**
Emergency Shelter Grants for homelessness prevention	**$1.5B** through formula (funds may be used for a range of specified homelessness prevention activities, including legal services)	**$1.5B** allocated in the same manner and used for the same purposes (except for legal services).	**$1.5B** (funds may be used for a range of homelessness prevention activities (possibly up to grantees to decide)
Public housing capital	**$5B; $4B through formula and $1B in targeted grants.**	**$5B; $3B through formula and $2B in targeted grants** (purposes similar to House).	**$4B**, **$3B through formula and $1B in targeted grants (priority critieria to be set by HUD)**
Privately-owned assisted housing energy retrofit (for 202, 811 and project-based sec. 8 developments)	**$2.5B** in loans or grants for energy retrofit and green investments, subject to owner agreement to extend affordability term as specified by HUD	**$118M** for similar purposes; additional affordability period of at least 15 years required.	**$250M** for similar purposes; additional affordability period of at least 15 years required.
Project-based Section 8 Renewal Funding	**$0**	**$2.1B** (to allow commitment of full 12 months of budget authority at annual renewal)	$**2.0B** (to allow commitment of full 12 months of budget authority at annual renewal)
CDBG for Neighborhood Stabilization (re foreclosed properties) ***Renter protection language***	**$4.19B**; $3.44M in competitive grants; non-profits as well as state/local governments eligible; HUD may use up to **$750M** to nonprofits for TA, capacity-building, and to increase scale of neighborhood activities. For properties acquired with new funds, protects renters from displace-ment and prohibits discrimination against voucher holders.	**No provision**	$2B to be distributed through competition to areas with high rates of foreclsure. Non-profits as well as state/local governments are eligible., and may partner with for-profit entities. For properties acquired with new funds *or with NSP funds appropriated in 2008 and committed after enactment,* protects renters from displacement and prohibits discrimination against voucher holders.
HOME	**$1.5B** – formula	**$225M** by formula	**none**
HOME LIHTC "gap filler	**No provision**	**$2B**	**$2.25B,** allocated by HOME formula to state LIHTC agencies
Native American block grant	**$500M**	**$510M**	**$510M**
CDBG	**$1B** in formula grants	**$0**	**$1B** in formula grants to 2008 grantees
Lead Hazard Reduction	**$100M**	**$100M**	**$100M**
Vouchers	$0	$0	$0
National Housing Trust Fund	$0	$0	$0
Total HUD Funding	**$16.3 billion**	**$11.6 billion**	**$13.6 billion**
LIHTC tax "fixes"	**$69M** to allow states to exchange unsold 9% LIHTCs from previous years and up to 40% of 2009 9% credits for 85 cents on the dollar	**$1.53 billion** to allow taxpayers to "accelerate" value of 9% credits in first 3 years of credit period.	**$69M** to allow states to exchange unsold 9% LIHTCs from previous years and up to 40% of 2009 9% credits for 85 cents on the dollar

Courtesy of the Center on Budget and Policy Priorities. Updated February 13, 2009.

allow state housing credit allocating agencies to receive a portion of their 2009 LIHTC allocation as a grant to address funding gaps for projects approved during 2007 and 2008. The Senate Committee bill would permit any credits from 2008 and 2009 to be carried back for five years, thus making the credits more valuable to investors who may not have current or future profits against which to use the credits.

On January 30, a coalition of thirty-two national and state organizations, including the National Low Income Housing Coalition, sent a letter to Congress urging a comprehensive approach to solving the LIHTC crisis.[3] Recommendations included:

- $5 billion to state credit agencies to provide gap funding to restore financial viability to credit projects stuck in the pipeline;
- Authorization to exchange a portion of 2009 credits for cash grants to provide substitute funding (as proposed by the House bill);[4]
- Accelerating the use of the credits earlier in their ten-year lifespan; and
- Allowing credit investors to carry back credits for up to five years to offset prior tax liabilities (as proposed by the Senate Finance Committee).

Senate Compromise Version

During floor debate on the Senate bill the week of February 2, an amendment was offered and passed to provide tax credits to homebuyers of any income, at a reported cost to the Treasury of $35 billion.[5] In light of the moderates' desire for a smaller overall price tag under $800 billion, this provision presented an enormous risk to funds devoted to affordable rental housing for very low-income families.

Also on the Senate floor, an amendment provided $2 billion in HOME funds to state allocating agencies to be used for providing gap financing for LIHTC pipeline properties.

As the Senate Appropriations Committee version of the bill was being debated on the floor, a group of self-described moderate Senators (including about a dozen Democrats and at least three Republicans, Senators Collins and Snowe of Maine and Specter of Pennsylvania) worked to develop a compromise version intended to reduce its overall costs, while providing more of the stimulus resources through tax cuts rather than direct spending. That compromise effort became central to passage of any legislation—securing sixty votes could cut off debate and force a vote on the legislation, in time to meet the President's request for a bill that he could sign by mid-February.

Late on Friday, February 6, this group reached an agreement on a compromise Senate version, known as the "Nelson-Collins amendment."[6] The Senate voted to end debate and approved the bill in middle of the following week.

On the low-income housing provisions, the Senate compromise provided $4.7 billion less for HUD programs than the House-passed bill.[7] The Senate compromise sharply reduced funding for energy efficiency and preservation

[3]For a copy of the letter, go to http://www.nlihc.org/doc/FIRM-SIGN-ON-LETTER.pdf.

[4]For background on the exchange proposal, *see* Center on Budget and Policy Priorities, *Exchange Plan in House Recovery Bill Offers Best Fix for Low-Income Housing Tax Credit,* available at http://www.cbpp.org/2-2-09hous.htm.

[5]For analysis of the homebuyer credit, *see* http://www.cbpp.org/2-9-09hous.htm.

[6]The text is available at http://thomas.loc.gov/cgi-bin/query/R?r111:FLD001:S01908.

[7]See the updated chart at http://www.cbpp.org/2-3-09hous-prac.pdf reflecting the changes.

Update on Final Stimulus

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111- 5. Major funding levels and changes in governing law for affordable housing programs are summarized on page 49 detailing the bills and the final Act, prepared and used with the permission of the Center on Budget and Policy Priorities. Highlights include:

- $4 billion for the Public Housing Capital Fund to repair existing public housing;
- $2 billion to fully fund one-year renewals of project-based Section 8 contracts;
- $250 million to repair and green privately owned HUD-assisted affordable multifamily housing;
- $1.5 billion in Emergency Shelter Grant funding for homelessness prevention;
- $2 billion for CDBG Neighborhood Stabilization funding; and
- significant new resources to help fund stalled Low-Income Housing Tax Credit properties nationwide, including a credit exchange program and $2.25 billion in gap funding through the HOME program.

of privately owned HUD assisted housing ($118 million in the Senate compromise, compared to $2.5 billion in the House bill) and zeroes out funding for Neighborhood Stabilization grants (the House provided $4.2 billion). In contrast to the House bill, the Senate bill provides $2.1 billion to enable HUD to commit a full twelve months of budget authority when renewing annual project-based Section 8 contracts.

To respond to the sharp reduction in the funding yielded by LIHTCs, the Senate compromise includes $2 billion of HOME funds to fill the gap on projects previously awarded LIHTCs. However, the Senate compromise bill provides only $225 million for HOME formula grants, compared to $1.5 billion in the House bill, and nothing for CDBG formula grants, for which the House had $1 billion. The Senate compromise bill includes the provision to "accelerate" the amount of the credit claimable in the first three years, which is intended to make the credit more attractive to investors (at an estimated cost of $1.5 - $2 billion), but not the more costly credit carryback provision included in the Senate Finance committee bill (estimated to cost $11 billion). It is likely the final bill will include both the House's exchange option and possibly the acceleration provision, but prospects for advocates' proposed extension of the exchange option to include 4% credits remained unclear.

While the total cost of the House and Senate compromise bills was similar, there were significant differences on how they would allocate funds. A Conference was being quickly held to resolve these differences in order to send a bill to the President.

As of press time, Conference negotiations had reportedly been concluded and bill language was being finalized. ■

Court: VAWA Bars Landlord from Evicting Domestic Violence Victim

In one of the first decisions of its kind, a New York City housing court ruled that the Violence Against Women Act of 2005[1] (VAWA) barred the eviction of a project-based Section 8 tenant. In *Metro North Owners, LLC v. Thorpe*,[2] the court rejected the landlord's argument that the tenant created a nuisance by stabbing her former partner during a domestic dispute, finding that the allegations were unsubstantiated. Instead, the court found that the tenant was in fact the victim of domestic violence and therefore entitled to VAWA's eviction protections. The tenant was represented by the Legal Aid Society, Harlem Community Law Offices.

Factual Background

In April 2008, police officers and emergency medical services responded to a violent incident at the tenant's apartment.[3] After this incident, the landlord commenced holdover proceedings against the tenant, alleging that the tenant violated her lease by creating a nuisance.[4] The tenant moved for summary judgment, arguing that VAWA required dismissal of the proceedings at the pretrial stage.

According to an affidavit from a property manager, the tenant stabbed her former partner during the incident.[5] The property manager also alleged that the tenant regularly allowed her former partner into the building, even though she had a criminal protection order against him, and complained when security guards denied him entry.[6] Further, the property manager alleged the tenant had repeatedly engaged in loud fighting, yelling, and screaming with her former partner.[7] The landlord submitted a security guard's incident report containing similar information.[8]

The tenant conceded that her former partner told the security guard and police that she had stabbed him, but

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[1]Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For a complete overview of VAWA's housing protections, see NHLP, *Reauthorized Violence Against Women Act Protects Housing Rights of Domestic Violence Survivors*, 36 Hous. L. Bull. 53 (Mar. 2006); Naomi Stern, *HUD Begins VAWA Implementation*, 36 Hous. L. Bull. 181 (Sept. 2006); NHLP, *HUD Continues VAWA Implementation*, 37 Hous. L. Bull. 7 (Jan. 2007); NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 Hous. L. Bull. 193 (Dec. 2007).
[2]870 N.Y.S.2d 768 (N.Y. Civ. Ct. 2008).
[3]*Id.* at 770.
[4]*Id.*
[5]*Id.* at 772.
[6]*Id.*
[7]*Id.*
[8]*Id.*

denied that she had harmed him. In fact, the tenant submitted evidence that the district attorney's office declined to prosecute her for the stabbing.[9] In an affidavit, the tenant stated that her former partner forcibly entered the apartment and assaulted her.[10] According to the tenant, he threw her into a cabinet and injured himself on broken glass.[11] The tenant asked the court to consider the entire history of her relationship with her former partner as proof that she was the victim of domestic violence.[12] To establish this history, the tenant submitted several police reports and a criminal protection order.

Applicable Law

VAWA provides that an incident of domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim and shall not be good cause for terminating the victim's tenancy.[13] Further, criminal activity directly relating to domestic violence, dating violence, or stalking shall not be cause for termination of the victim's tenancy.[14] The tenant in *Thorpe* argued that because the landlord's allegations of nuisance were based solely on acts of domestic violence committed against her, VAWA prevented her tenancy from being terminated.

The Court's Findings

The court first found that the tenant's affidavit, police reports, and protection order depicted her as the victim of domestic violence and shifted the burden of proof to the landlord to allege otherwise.[15] The court next found that the property manager's statement that the tenant was the assailant was unsubstantiated, because the manager did not witness the stabbing or any of the alleged prior disputes, nor did she provide a reliable basis to explain how she obtained her information.[16] Similarly, the court rejected the security guard's incident report because he did not witness the incident, and the report was unsworn.[17]

One of the court's most significant findings was that even if the landlord's evidence was not deficient, the court still would have concluded that the alleged stabbing was a domestic dispute and that the tenant was a victim of domestic violence.[18] The court acknowledged the landlord's allegations that the tenant allowed her former partner to enter the building, but said that this did not refute the evidence that she was a victim of domestic violence.[19] According to the court, "[t]he battered-woman syndrome, a well-established concept in law and science, explains the concept of anticipatory self-defense and seemingly inconsistent victim behavior."[20] The court stated that the tenant's conduct in allowing her former partner into the building was characteristic of battered-woman syndrome.[21] The court also noted that domestic violence is cyclical in nature, enticing the victim to remain with the abuser after the violence ends.[22]

The court concluded that the landlord failed to properly raise a triable issue of fact as to whether the tenant was the aggressor, and therefore concluded that she was a victim of domestic violence.[23] As a result, the court held that the tenant was either a victim of incidents of domestic violence under 42 U.S.C. § 1437f(c)(9)(B) or a victim of criminal activity relating to domestic violence under 42 U.S.C. § 1437f(c)(9)(C)(i).[24] As such, VAWA prohibited the landlord from terminating the tenancy, and the court dismissed the holdover proceeding.[25]

Conclusion

Thorpe is notable because it is one of the first written decisions holding that VAWA prohibits the eviction of a Section 8 tenant based on acts of domestic violence committed against her. Even more remarkable is the court's statement that the tenant still would have been protected even if the landlord's evidence regarding the stabbing and prior incidents was credible. Some of the most difficult VAWA cases are those involving domestic violence survivors who act in self-defense or whose batterers repeatedly return to the subsidized unit. *Thorpe* provides these advocates with helpful language supporting the argument that this type of conduct is part of the cycle of violence and does not disqualify survivors from VAWA's protections.[26] ■

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[9] *Id.* at 771.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 42 U.S.C.A. 1437f(c)(9)(B) (West, WESTLAW through P.L. 111-1 approved 1-16-09).
[14] *Id.* § 1437f(c)(9)(C)(i). In September 2008, HUD's Office of Housing issued a notice providing guidance on VAWA to project-based Section 8 owners. *See* Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005 for the Multifamily Project-Based Section 8 Housing Assistance Payments Program, H 08-07 (Sept. 30, 2008).
[15] *Thorpe*, 870 N.Y.S.2d at 771.
[16] *Id.* at 772.
[17] *Id.*
[18] *Id.* at 773.
[19] *Id.*
[20] *Id.* (citing People v. Torres, 488 N.Y.S.2d 358 (N.Y. Super. Ct. 1985)).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 774.
[25] *Id.*
[26] For sample pleadings and other advocacy materials regarding VAWA's housing provisions, contact Meliah Schultzman, NHLP Attorney and Equal Justice Works Fellow, at (510) 251-9400 x3116 or mschultzman@nhlp.org.

Will Fannie Mae's Lead in REO Rental Policy Set the Standard for the Private Market?

If the term "blameless victims" applies to any class affected by the mortgage meltdown, it must surely apply to tenants of properties which succumb to foreclosure. A recent report by the National Low Income Housing Coalition found that more than 20% of the properties facing foreclosure nationwide are rentals.[1] The report further found that because rental properties often are home to multiple families, renters make up roughly 40% of the families facing eviction.[2] In urban areas, mainly because of the high concentrations of large apartment buildings, the percentage may be as high as 56%.[3] This article reviews one Congressional attempt to prevent tenant displacement in foreclosed properties, advocates' attempts to enforce this statutory provision, and the response of Fannie Mae and Freddie Mac for their substantial REO portfolios.[4]

Congressional Action

On July 30, 2008, Congress attempted to address mortgage-based financial insecurity through the Housing and Economic Recovery Act of 2008 (HERA). HERA established the Federal Housing Finance Agency (FHFA) as an independent agency of the federal government and subjected Fannie Mae, Freddie Mac, the Federal Home Loan Banks and the Office of Finance to "supervision and regulation" of the FHFA. [5] On September 7, 2008, the FHFA placed Fannie Mae and Freddie Mac into conservatorship.[6]

On October 3, 2008, Congress passed and the President signed a massive spending package known as the Emergency Economic Stabilization Act of 2008 (EESA).[7] Title I, Section 109 of this act,[8] the Troubled Asset Relief Program (TARP), provides that the Secretary of the Treasury "shall coordinate with the [Federal Deposit Insurance] Corporation, the [Federal Reserve] Board,[9] the Federal Housing Finance Agency (FHFA), the Secretary of Housing and Urban Development, and other Federal Government entities that hold troubled assets" to take certain actions to facilitate loan modification and restructuring and "*where permissible, to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease*."[10]

Consequently, on October 3, 2008, FHFA, in coordination with the Treasury and other holders of troubled assets, became statutorily bound, where permissible, to require these federal or federally controlled entities to protect the occupancy rights of bona fide tenants.

Defense of Tenants by Greater Hartford Legal Aid and New Haven Legal Assistance

On September 9, 2008, a tenant in Hartford, Connecticut, current in her rent, received notice to vacate a recently foreclosed property by September 15, 2008. Fannie Mae followed this notice with an eviction action in state court. On October 21, 2008, Greater Hartford Legal Aid (GHLA) contested this eviction.[11] GHLA filed a Motion to Dismiss or in the Alternative Motion for Stay of Proceedings, citing their client's bona fide tenant status, the FHFA conservatorship of Fannie Mae, a statement by FHFA Director, James B. Lockhart, III, acknowledging the mandate of the conservatorship to protect renters,[12] and the EESA requirement that the Secretary of Treasury work with FHFA to permit tenants to remain post-foreclosure. GHLS asserted that Fannie Mae's failure to act consistently with such obligations deprived the court of subject matter jurisdiction.

Meanwhile, New Haven Legal Assistance (NHLA) built on the GHLA work by drafting answers to eviction cases asserting EESA, due process and public policy defenses.[13] On December 8, 2008, NHLA wrote a letter to the Interim General Counsel for Fannie Mae (copying

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[1] Danilo Pelletiere, Ph.D., NLIHC, Renters in Foreclosure: Defining the Problem, Identifying Solutions, Executive Summary (2008), at https://www2398.ssldomain.com/nlihc/doc/renters-in-foreclosure.pdf. Fannie Mae is the common name for the Federal National Mortgage Association. Freddie Mac stands for the Federal Home Loan Mortgage Corporation.

[2] *Id.*

[3] *Id.* at 7.

[4] Press Release, Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), available by title and date at http://www.fanniemae.com/index.jhtml; Press Release, Freddie Mac, Freddie Mac Suspends All Foreclosure Sales of Occupied Homes from Day Before Thanksgiving Until January 9, 2009 (Nov. 20, 2008), http://www.freddiemac.com/news/news_archive.htm. Beyond the scope of this article are the tenant protections enacted in the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, tit. XIII (Feb. 17, 2009) (AARA of 2009) for tenants in foreclosed properties acquired after the date of enactment (Feb. 17, 2009) with any amounts made available either under Title XIII, Community Development Fund of ARRA of 2009 or under the Neighborhood Stabilization Program (Pub. L. No. 110-289, Subdivision B., tit. III, § 2301 et seq. (July 30, 2008)).

[5] Pub. L. 110-289, tit. I, § 1101, 122 Stat. 2661 (July 30, 2008).

[6] Federal Housing Finance Agency, Statement of FHFA Director James B. Lockhart (Sept. 7, 2008), http://www.fhfa.gov/webfiles/23/FHFAStatement9708final.pdf.

[7] Pub. L. No. 110-343, 122 Stat. 3765, Emergency Economic Stabilization Act of 2008, (Oct. 3, 2008) [hereinafter EESA].

[8] Tit. I, § 109, 122 Stat. 3774.

[9] With the exception of "mortgages and securities held, owned, or controlled in connection with open market operations under section 14 of the Federal Reserve Act (12 U.S.C. 353), or as collateral for an advance or discount that is not in default." Tit. I, § 110(a) (1) (C), 122 Stat. 3775.

[10] Tit. I, § 109, 122 Stat. 3775 (emphasis added).

[11] Fed. Nat'l Mortgage Ass'n v. Doe, Superior Court/Housing Session, J.D. of Hartford (Oct. 21, 2008). Attorneys for Doe are Stephanie A. D'Ambrose and David A. Pels.

[12] Federal Housing Finance Agency Statement, *supra* note 6.

[13] Housing Justice Network listserve email (Dec. 10, 2008).

FHFA Director Lockhart, Senator Dodd,[14] and Congressman Frank[15]) asserting the illegality of the ongoing evictions of tenants living in properties foreclosed upon by Fannie Mae, requesting their immediate suspension and raising the specter of legal action.[16]

Fannie Mae's Response

In early December, Director Lockhart called the GHLA attorneys and negotiations followed. On December 15, 2008, Fannie Mae announced a suspension through January 9, 2009, of all tenant evictions from and foreclosure sales of its one- to four-unit properties.[17] On January 8, 2009, Fannie Mae extended the suspension of foreclosure sales and evictions through January 31, 2009, in part to "provide additional time for the company to operationalize its new National REO Rental Policy, [to] allow renters in company-owned foreclosed properties to stay in their homes."[18] On January 13, 2009, Fannie Mae issued notice of its National Real Estate Owned (REO) Rental Policy, subtitled "Renters in Fannie Mae-Owned Foreclosed Properties Eligible to Stay in Their Homes."[19] The announcement stated:

> The new policy applies to renters occupying foreclosed properties at the time Fannie Mae acquires the property. Renters occupying any type of single-family property will be eligible including residents of two- to four-unit properties, condos, co-ops, single-family detached homes and manufactured housing. Eligible renters will be offered a new month-to-month lease with Fannie Mae or financial assistance for their transition to new housing should they choose to vacate the property. The properties must meet state laws and local code requirements for a rental property.
>
> While the company markets the properties for sale, Fannie Mae will manage the properties through a real estate broker or a property management company. The company will not require security deposits to be posted in connection with this program.
>
> Renters in the foreclosed properties will be asked to pay market rate rent under the new leases. Rates may be determined by reviewing local comparable rents, conducting a neighborhood survey, or through other relevant indicators. Rates will also be subject to any legal rent control restrictions. The company will review each instance where the market rate may require a tenant to pay additional rent and will work to reach an equitable resolution.
>
> On behalf of the company, property managers are contacting renters in Fannie Mae-owned foreclosed properties to notify them of their options.[20]

Freddie Mac

On November 20, 2008, Freddie Mac announced its own moratorium on foreclosures and evictions involving occupied single-family and two- to four-unit properties effective from November 26, 2008, through January 9, 2009.[21] On January 8, 2009, this moratorium was extended through January 31, 2009,[22] and on January 30 it was extended again through February 28.[23]

While Freddie, like Fannie, will offer month-to-month leases, the programs differ in that Freddie proposes rents at the lesser of market or what the tenant was formerly paying, requires occupants to demonstrate the ability to pay the rent (a subject not addressed in Fannie Mae's public announcements), provides that buildings not meeting local code requirements are eligible if they can be brought into compliance for an affordable amount, and does not directly address treatment of tenants receiving rent subsidy via housing choice vouchers.

Issues for Advocates

The announcements of the Fannie Mae and Freddie Mac rental policies were welcomed by tenant advocates as an important step towards protecting bona fide tenants from eviction. However, a number of issues remain to be resolved. For example, while EESA provides that tenants should, where permissible, be permitted to "remain in their homes under the terms of the lease," both Fannie Mae and Freddie Mac are offering tenants new month-to-month leases. Presumably, many affected tenants have leases with unexpired terms significantly longer than one

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[14]Democrat, Chairman of the Senate Banking, Housing & Urban Affairs Committee.

[15]Democrat, Chair of the House Financial Services Committee.

[16]Signed by the litigation team of Amy Marks, Amy Eppler-Epstein, Shelley White and Francis Deneen.

[17]Fannie Mae, Statement by Brian Faith, Managing Director Communications on National Tenant Policy, News Release (Dec. 15, 2008). Fannie Mae had quietly circulated a draft lease for comment, at http://www.fanniemae.com/media/statements/index.jhtml?p=Media&s=Statements.

[18]Fannie Mae, Fannie Mae Extends Foreclosure Sale and Eviction (Jan. 8, 2009), available by title and date at http://www.fanniemae.com/index.jhtml.

[19]Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), available by title and date at http://www.fanniemae.com/index.jhtml.

[20]*Id*.

[21]Press release, Freddie Mac, *supra* note 4.

[22]Press Release, Freddie Mac, Freddie Mac Extends Suspension of Single Family Foreclosure Sales, Evictions until January 31, 2009 (Jan. 8, 2009), http://www.freddiemac.com/news/news_archive.htm.

[23]Press release, Freddie Mac, Freddie Mac Extends Eviction Suspension until March, Launches Rental Option for Foreclosed Borrowers, Tenants (Jan. 30, 2009), http://www.freddiemac.com/news/archives/servicing/2009/20090130_reo-rental.html.

month. It is also not clear whether any terms of current leases more protective of the tenant will be incorporated into the new lease.

EESA also requires that tenant occupancy plans "shall include protecting Federal, State, and local rental subsidies and protections."[24] While Fannie Mae has acknowledged being bound by rent control legislation in setting rents, it has not affirmed being bound by other state and local rental protections. With respect to honoring Housing Choice Vouchers, Fannie has agreed to do so, but has not explained how it will deal with a lease between the participant/tenant and the former landlord or with a Housing Assistance Payment contract between that landlord and the Section 8 administering agency (usually a public housing agency) if those agreements extend beyond one month or have other provisions not favored by Fannie Mae. Freddie Mac's announcement does not address the voucher issue.

On several issues, Freddie Mac's announced policies appear to be more favorable to tenants. Rents will be set at the lesser of market rent or what the tenant had been paying, whereas Fannie Mae will seek market rent, subject to an as-yet unspecified review if the tenant is currently paying below market. Freddie Mac will consider properties not up to code eligible if they can be brought into compliance, whereas Fannie Mae requires participating properties to be code compliant.

Current Status

Fannie Mae and Freddie Mac have, for the time being, suspended evictions as well as foreclosure sales on one- to four-unit buildings. During this moratorium Fannie and Freddie plan to manage the properties through real estate brokers or management companies.

Both Fannie Mae and Freddie Mac continue to design and develop programs which will allow many bona fide tenants to stay in their homes post foreclosure. Both have sought new allies, asking for advice and counsel from the advocate community. Both announced, on February 13, 2009, that they were extending the suspension of evictions through March 6, 2009.[25]

As of the fourth week in February, Fannie Mae had not withdrawn its eviction action against the tenant represented by GHLA, nor offered a new lease to the tenant. Neither Fannie nor Freddie had announced formal rules for the announced programs.

Conclusion

As Fannie and Freddie follow through on their commitments, the scale of their holdings, the number of potentially affected tenants and their potential success in stabilizing their troubled portfolios could influence others in the market to adopt similar programs to protect tenant occupancy and reduce abandonment, deterioration and vandalism.

Meanwhile, GHLA and NHLA continue to vigorously represent their clients and to make their pleadings and experience available to the tenant advocacy community, and tenant advocates should remain vigilant to ensure that the promise of these programs is fulfilled in a manner that ensures tenants' rights to remain in their homes.

For updates on tenant protection programs, visit the news and media sections of the Fannie Mae[26] and Freddie Mac[27] websites. ■

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[24]Pub. L. No. 110-343, tit. I, § 109(b), 122 Stat. 3775 (Oct. 30, 2008).

[25]Press release Fannie Mae, Fannie Mae Suspends Foreclosure Sales Pending Administration Announcement (Feb. 13, 2009), http://www.fanniemae.com/newsreleases/2009/4613.jhtml?p=Media&s=News+Releases; Freddie Mac, Freddie Mac Extends Moratorium on Foreclosure Sales (Feb. 13, 2009), http://www.freddiemac.com/news/archives/servicing/2009/20090213_suspension-march.html.

[26]*See* http://www.fanniemae.com/index.jhtml.

[27]*See* http://www.freddiemac.com/.

Supreme Judicial Court of Massachusetts Upholds Rights of Tenants with Disabilities

The Fair Housing Amendments Act (FHAA) requires that a housing provider grant a request for reasonable accommodation to a qualified person with a disability.[1] However, the housing provider may be exempt from providing an accommodation if a tenant with a disability poses a "direct threat to the health or safety" of others,[2] and determining the boundaries of such an exemption has been a contentious area of law.[3] The Supreme Judicial Court of Massachusetts recently addressed this issue in *Boston Housing Authority v. Bridgewaters*,[4] where it found in favor of a disabled tenant to whom the housing authority had refused to provide reasonable accommodation because of an alleged assault on his brother.[5] Mr. Bridgewaters was represented by Greater Boston Legal Services.

Factual Background

Emmitt Bridgewaters lives in public housing administered by the Boston Housing Authority (BHA). Mr. Bridgewaters is mentally disabled, living with bipolar disorder and borderline personality disorder. For a period of time, Mr. Bridgewaters' doctor took him off of his medication because of negative side effects. During that period, Mr. Bridgewaters got into a fight with his twin brother, a resident in the same complex, which ended in a physical altercation. The brother was severely injured.[6] At the time of the fight, Mr. Bridgewaters had lived in BHA housing for thirty-eight years without incident. Mr. Bridgewaters pleaded guilty to three assault charges. BHA subsequently initiated eviction proceedings.

Procedural Background

Both the Housing Court and the Appeals Court of Massachusetts found in favor of the housing authority.[7] At the trial court proceedings, Mr. Bridgewaters represented himself. He repeatedly testified about his disabilities and the fact that he had been temporarily taken off of his medication and that he had since been put on a new regimen.[8] Initially, the Housing Court asked whether the case needed to be referred to the Boston Tenancy Preservation Project, designed to help people with mental disabilities remain in their home. BHA rejected such a referral, saying that it was not interested in preserving the tenancy.[9] The Housing Court found that Bridgewaters "violated a provision of his lease by committing a crime on the public housing development grounds that threatened the health and safety of another resident" and therefore BHA had no obligation to provide him with a reasonable accommodation.[10]

The Appeals Court of Massachusetts ("the intermediate court") upheld the Housing Court decision and ruled that Mr. Bridgewater was not a qualified person with a disability and the housing authority was under no obligation to provide reasonable accommodation prior to eviction. The court used three cases to support its reasoning—two of which dealt with reasonable accommodation in the employment context.[11] The two employment cases discussed whether or not a person's "egregious workplace misconduct" prevented the person from being qualified for the position, whether or not a reasonable accommodation were granted.[12] As explained by the higher court below, under the FHAA's legislative history and the regulations of the Department of Housing and Urban Development (HUD), this analysis is inapplicable to the housing context. The housing case to which the intermediate court pointed did not deal with direct threat at all, but rather whether or not a reasonable accommodation could in fact help the tenant conform to the requirements of the tenancy.[13] The intermediate court ignored the decisions of other jurisdictions that have dealt with the direct threat issue by making the inaccurate distinction that those cases did not involve individuals who had pleaded guilty to criminal assault against a cotenant.[14] Based on such reasoning, the intermediate court upheld the initial decision to evict Mr. Bridgewaters.

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[1]42 U.S.C. § 3604. Although the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12131, *et seq*., also require reasonable accommodation, this decision based its analysis on the FHAA.

[2]42 U.S.C. § 3604(f)(9).

[3]Roe v. Sugar River Mills Assoc., 820 F.Supp. 636 (D. N.H. 1993) (finding that before a housing provider could proceed with an eviction, it had an obligation to determine if a reasonable accommodation would mitigate threat caused by tenant who had been convicted of disorderly conduct in the building); Roe v. Hous. Auth. of the City of Boulder, 909 F.Supp. 814 (D. Colo. 1995) (finding that a housing provider must make an accommodation to allow the continued tenancy where a tenant hit another and engaged in threatening behavior); McAlister v. Essex Prop. Trust, 504 F. Supp. 2d 903 (C.D. Cal. 2007).

[4]898 N.E.2d 848 (Mass. 2009)(hereinafter *Bridgewaters*).

[5]Bridgewaters took guilty pleas to three assault charges for the incident. *Id*. at 850.

[6]*See Bridgewaters* at 851-2. According to the factual record, Mr. Bridgewaters assaulted his brother Eric inside Eric's apartment during an altercation in which they were discussing negative childhood memories. The brother, who had been partially paralyzed since childhood, sustained severe injuries including temporary paralysis in one leg.

[7]Boston Hous. Auth. v. Bridgewaters, 871 N.E.2d 1107 (Mass. App. Ct. 2007).

[8]*Bridgewaters* at 852.

[9]*Id*. at 857.

[10]Boston Hous. Auth. v. Bridgewaters, 871 N.E.2d 1107, 1111 (Mass. App. Ct. 2007).

[11]*Id*. at 1112-3.

[12]*Id*. at 1113, *citing* Garrity v. United Airlines, Inc. 653 N.E.2d 173 (Mass. 1995) and Mammone v. President & Fellows of Harvard Coll., 847 N.E.2d 276 (Mass. 2006).

[13]Andover Hous. Auth. v. Shkolnik, 820 N.E.2d 815 (2005).

[14]*See, e.g.,. Roe v. Sugar River Mills Assoc.* at 638, a case cited by the intermediate court in *Bridgewaters*, where the tenant had been convicted of disorderly conduct.

The Supreme Judicial Court, Massachusetts' highest court, reversed the lower court's decision. The court held that BHA must consider whether or not a reasonable accommodation could mitigate the likelihood that a tenant creates a direct threat to the health and safety of others, that BHA had notice that Mr. Bridgewaters had a mental disability, and that he had in fact made a reasonable accommodation request.

With regard to the issue of how a direct threat should be analyzed, the court pointed to the federal scheme apparent in the FHAA and HUD regulations, as well as BHA's policies. The legislative history in the FHAA demonstrates that Congress meant to adopt the more exacting standard that had been applied in Section 504 employment cases[15]—that a tenant would not qualify for a reasonable accommodation if "he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation."[16] Furthermore, HUD regulations provide guidance on determining whether or not a person poses a direct threat:

> "(c) . . . the agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."[17]

Thus, the direct threat inquiry must be an individualized one that considers whether or not a reasonable accommodation would mitigate or eliminate the threat. If the threat cannot be mitigated, then the housing provider may evict the tenant.

In addition to federal rules and regulations, BHA policy itself lays out the process by which it may evict a disabled tenant who may pose a direct threat. It reinforces that the housing authority must determine if a reasonable accommodation could "lessen the risk of harm."[18] The policy also states that the burden is on the housing authority to demonstrate that no reasonable accommodation could be made. Thus, based on federal law, HUD regulations, and BHA policy, BHA was obligated to consider a reasonable accommodation request by Mr. Bridgewaters to determine if a reasonable accommodation could mitigate any threat he presented to the health and safety of others.

Additional Holdings

In addition to ruling that the housing authority must in fact consider reasonable accommodation prior to evicting a tenant on the basis that he is a direct threat to the health and safety of others, the court made two other significant rulings. The court found that BHA did have knowledge of Mr. Bridgewaters' disability—it knew that the Housing Court had referred the tenant to the Boston Tenancy Preservation Project, designed for people with mental disabilities; that he received Social Security disability benefits; and that he lived in housing designated for elderly and disabled individuals, as a thirty-nine-year-old.[19] Bridgewaters made clear his desire for a reasonable accommodation when, during trial, he repeatedly explained his disability and that he was back on medication and would thus like to remain in his unit. Bridgewaters never explicitly characterized his request as a reasonable accommodation, but the law does not require that. The law simply requires that a tenant make his disability known and that he would like a change in policy that would accommodate that disability.

Finally, the court held that Bridgewaters implicitly demonstrated the link between his disability and the requested accommodation. If he had not, BHA was under obligation, in accordance with its own policy, both to accept the nexus unless specific reasons to do otherwise exist, and to notify Bridgewaters of the need for more information if necessary.[20]

Conclusion

Bridgewaters reinforces the fair housing obligation of housing providers to consider reasonable accommodation even when a serious breach, including violence, is involved. Such rulings are vital to ensuring that people with disabilities have equal access to housing. ■

[15] *See, e.g.,* School Board of Nassau Cty. v. Arline, 480 U.S. 273 (1987).
[16] *Bridgewaters* at 853, *citing* H.R. Rep. No. 100-711, 28 (1988).
[17] 24 C.F.R. § 9.131(b) (2009).
[18] *Bridgewaters* at 856.
[19] *Id.* at 857-8.
[20] *Id.* at 859.

HUD-VASH Notice Reaffirms PHAs' Obligations Regarding Issuance of Vouchers

In the 2008 Consolidated Appropriations Act, Congress appropriated $75 million to assist approximately 10,000 homeless veteran families.[1] HUD issued a Federal Register notice implementing the program, which waived a number of admission criteria and designated Veterans Affairs Medical Centers (VAMC) to screen and determine eligibility. VAMC case managers will refer the family to a public housing agency (PHA), which will provide the voucher.

HUD has issued Questions and Answers (Q&A) and a PIH notice providing additional guidance regarding the program. Both documents reaffirm that the only reasons that a PHA may deny a referred family are that the family fails to meet income eligibility requirements or includes a member who is subject to a lifetime sex offender registration requirement.[2] The admissions criteria apply to all family members, not just veterans. For example, the Q&A states that a family may not be denied because a non-veteran family member's assistance was previously terminated due to a serious or repeated lease violation or because the family owes money to the PHA.[3] The PIH notice also informs PHAs that if they deny assistance to a family, they must provide a notice, a brief statement of the reasons for denial, and an informal review in accordance with the Housing Choice Voucher rules.[4]

As for continued occupancy issues, if the veteran dies, the voucher stays with the remaining members of the tenant family.[5] But if there is a divorce, the voucher remains with the veteran.[6] Other issues addressed in the Q&A include family self sufficiency, income calculation, portability, and case management.

As noted in a prior *Housing Law Bulletin*, advocates in jurisdictions that received HUD-VASH vouchers should monitor implementation to ensure that the vouchers are used in a manner that addresses the needs of homeless veteran families. The following chart lists the number of vouchers allocated to specific communities.[7] Many jurisdictions did not receive any VASH vouchers, and some jurisdictions received only a few. For example, Connecticut, Hawaii, Iowa, Minnesota, Nebraska, New Jersey, Oklahoma, and Wyoming received only seventy VASH vouchers each for the entire state. ■

[1]Pub. L. 110-161, tit. II, 121 Stat. 1844, 2414 (2007); Section 8 Housing Choice Vouchers: Implementation of the HUD-VA Supportive Housing Program, 73 Fed. Reg. 25,026 (May 6, 2008), as corrected 73 Fed. Reg. 28,863 (May 19, 2008) (providing additional information regarding portability); *see also* NHLP, *HUD-VASH: Long-Neglected Program Brought Back to Life*, 38 HOUS. L. BULL. 135 (2008).

[2]Reporting Requirements for the HUD-Veterans Affairs Supportive Housing Program, PIH 2008-37 (HA) (Oct. 14, 2008) [hereinafter VASH Notice]; HUD-VASH Qs&As, http://www.hud.gov/offices/pih/programs/hcv/vash/docs/hudvashqa.pdf [hereinafter VASH Q&A].

[3]VASH Q&A, *supra* note 2, ¶¶ 5, 7.

[4]VASH Notice, *supra* note 2; *see also* 24 C.F.R. § 982.544(a)-(b) (2008); VASH Q&A, *supra* note 2.

[5]VASH Q&A, *supra* note 2, ¶ 12.

[6]*Id*. ¶ 13. The PIH notice overrides the regulations that permit PHAs to determine how a voucher will be allocated if the family breaks up. *See* 24 C.F.R. §§ 982.54(d)(11), 982.315 (2008). Further, automatically assigning the voucher to the veteran if there is a divorce may be problematic in cases involving domestic violence and fails to consider the obligations imposed on PHAs by Violence Against Women and Justice Department Reauthorization Act 2005. *See* Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

[7]The complete list of PHAs administering the HUD-VASH program is available at http://www.hud.gov/offices/pih/programs/hcv/vash/docs/vamc.pdf.

Geographical Area	Name of PHA	Number of VASH Vouchers	PHA Number
Los Angeles Area, CA	City of Los Angeles	840	CA004
Denver, CO	Colorado Department of Human Services	175	CO901
Tampa, FL	Tampa HA	105	FL003
Atlanta, GA	DeKalb County	350	GA237
Brooklyn, NY	NYCHA	455	NY005
Houston, TX	Houston HA	385	TX005
Hampton, VA	Hampton RHA	140	VA017

HUD Issues New Guidance to Ensure Full Implementation of Voucher Portability

A key feature of the voucher program is portability—the ability of a voucher holder to use the voucher assistance outside the jurisdiction of the public housing agency (PHA) that initially issues the family its voucher. In the past, voucher participants have complained that they have been frustrated by PHAs' actions and denied the right to port. In response, the Department of Housing and Urban Development (HUD) has gradually taken steps to address the problem of full portability. Most recently it has set forth a policy which, if followed, should assure full portability for eligible voucher families.

There are limited grounds upon which a PHA may deny a family's request to move. In a recent PIH notice,[1] HUD set forth the six reasons, which are:

- the family's action or failure to act as it pertains to termination from the program, including for alcohol abuse and criminal and illegal drug activity;[2]
- the PHA has adopted a policy that requires a non-resident family initially to lease up for twelve months in the jurisdiction of the issuing PHA;[3]
- the applicant family is not income eligible in the area in which they initially wish to lease up;[4]
- the PHA has adopted policies on the timing and frequency of moves, and the requested move does not comply with those policies;[5]
- the PHA does not have sufficient funding;[6] and
- the family has moved out of its assisted unit in violation of the lease, except this provision does not apply if the family has complied with all other obligation of the voucher program and has moved out in order to protect a victim of domestic violence.[7]

Note that reasons numbered 2 and 4 are reasons that may temporarily deny the right to port, whereas reasons 1 and 3 may be more permanent, if the alleged reason for the denial persists.

Historically, many PHAs have denied portability on the basis that they lacked sufficient funding. Such claims arise when a family wants to move to an expensive area (i.e., an area with a higher payment standard) and the receiving PHA will not absorb the porting family. The new notice explains and restricts the circumstances in which a PHA may deny portability moves because of insufficient funds.[8] A PHA may deny a request to move to a higher-cost area if the PHA would be unable to avoid termination of voucher assistance for current participants during the calendar year.[9] The notice also provides that a "PHA **may not** deny a request due to insufficient funding . . . simply because the family wished to move to a higher-cost area."[10] The PHA must be able to document that granting the port would result in the termination of other families. Such documentation may include pending rent increases and the attrition rate for families leaving the voucher program. But the projected costs may not include the cost of vouchers issued to families who have not leased up. Significantly, a PHA may not deny a family the right to port for insufficient funding if it wants to serve other families on the waiting list. If a PHA denies the family's request to port for such a reason, it may not admit other families to the program until it has determined that there are sufficient funds to assist the porting family and has notified the family that it may now move to the higher-cost area.[11] Once the PHA determines that there is sufficient funding, it must promptly notify the family and process the request to port. If HUD determines that the PHA improperly denied a family's request to port due to insufficient funding, it will impose a sanction on the PHA, which may include a reduction of the PHA's administrative fee.[12]

The notice also addresses sanctions for failure of the receiving PHA to bill the initial PHA, failure of the initial PHA to make timely payments, and failure of the receiving PHA to inform the initial PHA that the family is no longer a participant.

Conclusion

It appears that HUD has finally issued sufficiently clear guidance. No family may be permanently denied the right to port because of insufficient funding. At the very minimum, every family—except those who are over-income or for whom there are grounds to terminate—will be able to port within a reasonable period of time. The only limitation may be for a PHA with no attrition in its voucher program. Such a situation is highly unlikely, as on

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[1]Housing Choice Voucher Portability Procedures and Corrective Actions, PIH 2008-43 (HA) (Dec. 3, 2008).
[2]24 C.F.R. §§ 982.552, 982.553 (2008).
[3]§ 982.353(c).
[4]§ 982.353(d)(1).
[5]§ 982.314(c)(2).
[6]§ 982.314(e)(1).
[7]42 U.S.C.A. § 1437f(r) (West, WESTLAW through P.L. 111-2 approved 1-29-09); § 982.353(a).

[8]For more information on portability, see Antonia M. Konkoly, *Portability Rights of Housing Choice Voucher Participants: An Overview*, 38 Hous. L. Bull 170 (Aug. 2008).
[9]*Id.* at 173.
[10]Housing Choice Voucher Portability Procedures and Corrective Actions, PIH 2008-43 (HA) (Dec. 3, 2008) (emphasis in original).
[11]*Id.*
[12]*Id.* The penalties include, but are not limited to, a reduction in the administrative fee of up to 5% for the two quarters following the quarter that HUD identified the improper denial.

average nationwide there is approximately a 10% annual attrition rate for vouchers.

As a practical matter, a family who is initially denied the opportunity to port should follow up with a letter expressing continued interest in porting. If one or possibly two months go by without an offer to port, the tenant should re-contact the PHA and make a complaint to HUD.

Advocates who are reviewing the Annual Plans for a local housing authority should recommend changes to the Section 8 Administrative Plan which reflect this clarification of HUD policy. ■

Public Housing Plan Requirements Continue to Erode

Since passage of the Quality Housing and Work Responsibility Act of 1998,[1] public housing authorities (PHAs) have been required to publish for public review and comment, and to file with the Department of Housing and Urban Development (HUD), Five-Year and Annual Plans that have provided significant information for residents and other interested parties about PHA intentions and operations. This article discusses changes wrought to PHA Five-Year and Annual Plan requirements by both HUD and Congress that alter the amount and accessibility of information maintained by PHAs.

Revised Template and Its Effective Date

Emblematic of these changes is the dramatic reduction of the required HUD Plan Template from more than fifty pages to a two-page form with three pages of instructions.[2] Approved in April 2008,[3] use of the revised template is required for all PHAs having fiscal years beginning April 1, 2009, and in each quarter thereafter.[4] PHAs must submit their plans to HUD seventy-five days before the end of the current fiscal year. For example, the first wave of PHAs subject to the revised template was required to submit their plans to HUD by January 16, 2009. Because PHAs must give forty-five-day notice prior to holding the required public hearings on their proposed plans and must then incorporate the public and resident advisory board (RAB) comments into their submissions to HUD, residents and advocates should look for notice of such hearings at least four months (45 + 75 = 120 days) in advance of the beginning of their PHA's fiscal year.

PHA Annual Plan Submission Dates[5]

FY Beginning	Annual Plans Due (75 days before the start of the PHA's fiscal year)	FY Ending
April 1, 2009	January 16, 2009	March 31, 2010
July 1, 2009	April 17, 2009	June 30, 2010
October 1, 2009	July 18, 2009	September 30, 2010
January 1, 2010	October 19, 2009	December 31, 2011

Note that the above chart, which appears in PIH Notice 2008-41, does *not* alert interested parties of the deadline for publication of notice of the public hearing.

Five-Year and Annual Plan Yet to Conform to VAWA

The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA)[6] mandates that PHA Five-Year Plans report on "the goals, objectives, policies, or programs [of the PHA] that will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking." (hereinafter collectively referred to as domestic violence).[7] Each Annual Plan must contain "a statement of any domestic violence, dating violence, sexual assault, and stalking prevention programs: (i) a description of any activities, services, or programs provided or offered by an agency. . . to child or adult victims of domestic violence. . .; (ii) . . . that help child and adult victims . . . to obtain or maintain housing; and (iii) . . .[that] prevent domestic violence . . . or to enhance victim safety in assisted families."[8]

The revised template[9] does not comply with VAWA. NHLP, along with other advocates and organizations, requested that HUD address the deficiencies. As recently as November 13, 2008, HUD acknowledged that "the VAWA requirement for the Annual Plan submission to HUD is not included in the revised template," and stated that "HUD expects to modify its current template to incorporate the Annual Plan requirements of VAWA shortly." On November 28, 2008, HUD issued an Interim Rule

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[1]Quality Housing and Work Responsibility Act of 1998 (QHWRA), *codified at* 42 U.S.C. 1437c-1; *see* 24 C.F.R. Part 903.

[2]*See* NHLP, *HUD Is Poised to Drastically Alter the PHA Plan Process*, 38 HOUS. L. BULL. 68 (2008).

[3]HUD-50075 (4/2008), *at* http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf.

[4]Public Housing Agency (PHA) Five-Year and Annual Plan Process for all PHAs, PIH 2008-41, (Nov. 13, 2008) (hereafter PIH 2008-41). Every PHA fiscal year begins on the first day of a calendar quarter, *e.g.* April 1, July 1, October 1 and January 1. Note that this reflects a one-year delay in the utilization of the revised template from the April 1, 2008, initial use date set forth in the instructions to the template.

[5]*Id.* at 6.

[6]Pub. L. No. 109-162, 119 Stat. 2960, 3040 (2006).

[7]*Id.* at 119 Stat. 3040, § 603

[8]*Id. See* NHLP, *PHAs and Advocates Begin Early Efforts to Implement VAWA*, 37 HOUS. L. BULL. 193 (2007).

[9]HUD-50075 (4/2008) *available at* http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf (hereafter HUD-50075).

purporting to conform HUD practices to VAWA,[10] but the Interim Rule did not fully remedy the problems.

First, the template can be used for either the Five-Year or Annual Plan or both. When viewed as a Five-Year Plan, the template does not require PHAs to meet the statutory obligation to state their goals or objectives with respect to serving the needs of victims of domestic violence.[11] In addition, without the goals, the PHA will not be required to report on progress in future Five-Year and Annual Plans.[12]

Second, when used as an Annual Plan, Instruction 6.0 does not make clear that the "elements" identified in the Instructions are integral components of the plan. Rather, it treats them as auxiliary pieces. The template only requires that the PHA "must have the elements listed below readily available to the public."[13] As a result, although Element 13[14] tracks the statutory[15] and regulatory[16] requirements for descriptions of domestic violence programs (both of which require inclusion of the domestic violence information in the plan itself), PHAs may not integrate this information into their actual plan.

Third, there remains a question of whether the required domestic violence elements will actually be made available by PHAs. By statute, PHAs "may comply [each year] by submitting an update of the plan."[17] The template conveys this requirement by stating that PHAs are only required to "[i]dentify . . . elements that have been revised . . . since its last Annual Plan submission."[18] PHAs that have not previously prepared these elements may not, therefore, identify them in the "update" section of their plan, and residents may not be aware that they can ask for access to these critical documents.

"Qualified PHAs" Need Not File Annual Plan

After two years of controversy over the evisceration of the plan template, Congress dramatically altered the future availability of information from PHAs with a small number of public housing units and vouchers. Title VII of the Housing and Economic Recovery Act of 2008 (HERA)[19] released a large number of the PHAs from the obligation to file Annual Plans. Crafted as an amendment to Section 5A (b) of the United States Housing Act of 1937,[20] § 2702 exempts PHAs from submission of an Annual Plan if they: (1) administer a combination of 550 or fewer ACC units and Section 8 housing choice vouchers, (2) are not designated "troubled" and (3) have not had a failing Section 8 Management Assessment Program (SEMAP) score during the prior twelve months. HUD has said that it will post lists of these "qualified PHAs" on its website.[21]

While not required to submit Annual Plans, qualified PHAs are still required to: submit annual Civil Rights Certification under 1437c-1(d)(16), have Resident Advisory Boards (RAB)[22] hold annual public hearings and invite public comment to discuss any changes to the goals, objectives and policies of the agency,[23] consider the recommendations of the RAB,[24] make information relevant to the hearings as well as determinations of the agency regarding proposed changes available to the public,[25] and provide notice of hearings and of the availability of the information forty-five days in advance of the hearing.[26]

Each PHA has set out the goals, objectives and policies of the agency in previously filed plans. Changes thereto must still be considered in a public forum. While qualified PHAs will not create documents which are called "plans," they must continue to put into writing and submit to public scrutiny any proposed or adopted changes in their goals, objectives and policies. To the extent that notice of such proposed changes is consistent both with the statutory directive that PHAs may meet their obligation by "submitting an update of the plan for the fiscal year"[27] and with the instructions for plan submission that the PHA "[i]dentify specifically which plan elements have been revised since the PHA's prior plan submission,"[28] HERA does not eliminate the public's ability to oversee qualified PHA operations, but it does make monitoring that much more difficult.

HERA did not change the requirement that qualified PHAs must file Five-Year Plans.

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[10]HUD Programs: Violence Against Women Act Conforming Amendments, Interim Rule, 73 Fed. Reg. 72,336 (Nov. 28, 2008).
[11]HUD-50075; compare with 42 U.S.C. § 1437c—1(a)(2) which requires that "[t]he 5-year plan shall include a statement by any public housing agency of the goals, objectives, policies, or programs that will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking."
[12]*Id*. at Sections 5.2 and 10.0(a).
[13]Instructions Form HUD-50075, 6.0 (hereafter Instructions Form), *available at* http://www.hud.gov/offices/adm/hudclips/forms/files/50075.pdf.
[14]*Id*. at 6.0 (b)(13).
[15]Pub. L. No. 109-162, 119 Stat. 2960, 3040 (2006).
[16]73 Fed. Reg. 72,336, 72,344; 24 C.F.R. 903.7(m)(5)(2009).
[17]42 U.S.C. § 1437c-1(b) (2).
[18]HUD-50075 Section 6.0(a).
[19]Pub. L. No. 110-289, tit. VII, §§ 2701, 2702, 122 Stat. 2863 (2008) ("Small Public Housing Authorities Paperwork Reduction Act").
[20]*Id*. 42 U.S.C. § 1437c-1(b)(2009).
[21]HUD website *at* http://www.hud.gov/offices/pih/pha/; *See* Public Housing Agency (PHA) 5-Year and Annual Plan Process for all PHAs, PIH 2008-41 (Nov. 13, 2008). As this goes to press, HUD had not yet posted the list of "qualified PHAs." HUD has published a Notice describing these and other applications of HERA to HUD housing. *See* The Housing and Economic Recovery Act of 2008, Applicability to HUD Public Housing, Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs, Notice, 73 Fed. Reg. 71,037 (Nov. 24, 2008).
[22]*See* 42 U.S.C. § 1437c-1 (e) (1)(2009).
[23]*Id*. *at* (f) (1).
[24]*Id*. *at* (e) (2).
[25]*Id*. *at* (f) (2).
[26]*Id*.; Pub. L. No. 110-289, tit. VII, § 2702, 122 Stat. 2864 (July 30, 2008); *See* Public Housing Agency (PHA) 5-Year and Annual Plan Process for all PHAs, PIH 2008-41 (Nov. 30, 2008);
[27]42 U.S.C. § 1437c-1(b)(2)(2009).
[28]Instruction Form.

Additional Exceptions to Annual Plan Filings

PHAs that are not designated as "qualified" under HERA must file the revised HUD-50075, the PHA Plan Template. A subset of these PHAs, however, continues to benefit from plan content exemptions which have allowed small, high-performing and tenant-based assistance only PHAs[29] to file streamlined plan forms rather than the traditional fifty-plus page Annual Plan.[30] The "Instructions for HUD-50075" explicitly state that while small and high-performing PHAs must submit Annual Plans, they need complete certain sections only for Annual Plans submitted with their Five-Year Plans.[31]

The required sections are:

- Section 9.0, "a statement of the housing needs of families residing in the jurisdiction serviced by the PHA and the means by which the PHA intends, to the maximum extent practicable, to address the needs;"[32]
- Section 9.1, "a description of the PHA's strategy for addressing the housing needs of families in the jurisdiction and on the waiting list in the upcoming year;"[33]
- Section 10.0 (a), "a statement of the PHA's progress in meeting the mission and goals described in the 5-Year plan" and the criteria for determining significant amendments and modifications to the Five-Year and Annual Plans; and
- Section 10.0 (b), definitions of "significant amendment" and "substantial deviation/modification."[34]

PHAs need not complete these sections in intervening years. HUD regulations contain detailed requirements for each of these three categories of partially exempt PHAs which must be consulted to determine if a particular PHA is compliant.[35]

Only once every five years, therefore, must small and high-performing PHAs report to HUD, their residents and community stakeholders regarding the housing needs of their jurisdiction, their strategy for addressing those needs and their progress in meeting their stated mission and goals. Omission of the narrative progress reports may substantially affect resident advocacy as they allow residents to assess the progress of the PHA in meeting its goals.

Access to Information and Challenges to Plan Content

The instructions to HUD-50075 further alter the facial requirement of the template. PHAs are not required to file plan "elements" with HUD for field office review. PHAs are only required to make the elements "readily available to the public."[36] The plan elements covered by this provision include virtually all of the operational aspects of housing agency activity that affect residents.[37]

PHAs must identify and describe to HUD their anticipated HOPE-VI, mixed finance modernization or development projects, demolition, disposition or conversion projects, needed capital improvements, and a statement of housing needs.[38]

Significantly, the required submissions to HUD include "Resident Advisory Board . . . comments," the PHA's "narrative describing their analysis of the recommendations and the decisions made on those recommendations" and "Challenged Elements."[39]

Residents should obtain copies of all plan elements from their PHA, review all major project descriptions and bring concerns to the attention of the RAB, the PHA and HUD. They should also be careful to file any resident objections or challenges to any portion of an attachment or exhibit to the agency plan with the PHA, either as a RAB comment or as a challenge to the plan, to make a record for future advocacy or litigation under the Administrative Procedures Act or 42 U.S.C. § 1983.

Conclusion

In the past two years, HUD has taken a number of steps to decrease the alleged burden on PHAs of producing and publishing detailed and accessible Annual and Five-Year Plans. HUD has, at the same time, resisted the mandate from Congress to conform its information collection tool to the requirements of VAWA. Congress has recently carved out a significant new exception to the plan

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[29] *See* 24 C.F.R. §§ 903.11: (1) PHAs that are determined to be high-performing PHAs as of the last annual or interim assessment of the PHA before the submission of the 5-Year or Annual Plan; (2) PHAs with less than 250 public housing units (small PHAs) and that have not been designated as troubled in accordance with Section 6(j)(2) of the 1937 Act; and (3) PHAs that only administer tenant-based assistance and do not own or operate public housing.

[30] 24 C.F.R. §§ 903.11 and 903.12 (2009). Prior to implementation of the revised HUD-50075, special versions of HUD-50075 were available for small and high-performing PHAs (HUD-50075-SA and HUD-50075-Small PHA). The revised HUD-50075 and instructions replace these specialized versions.

[31] Instructions Form 9.0-10.0.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 24 C.F.R. §§ 903.11 and 903.12 (2009).

[36] Instructions Form, 6.0.

[37] *Id.* The elements which need not be part of the plan include: Eligibility, Selection and Admissions Policies, including Deconcentration and Wait List Procedures, Financial Resources, Rent Determination, Operation and Management (including maintenance, pest control, management and agency programs), Grievance Procedures, Designated Housing for Elderly and Disabled Families, Community Service and Self-Sufficiency, Safety and Crime Prevention, Pets, Civil Rights Certification, Fiscal Year Audit, Asset Management and Violence Against Women Act.

[38] Instructions Form, 7.0- 9.0.

[39] HUD-50075, Section 11.0(f); Instructions Form, 11.0.

requirements of QHWRA. In conjunction with previously existing exceptions, PHA obligations of transparency are becoming increasingly intricate and resident oversight of PHA operations continues to become more difficult. ■

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.

Public Housing: Criminal Activity and Grievance Hearing

Hous. Auth. of City of New Haven v. DeRoche, __A.2d__, 2009 WL 153933 (Conn. App. Ct. 2009). A public housing tenant became intoxicated and started a fire in her apartment. The housing authority sought to evict on the grounds that the tenant violated her lease and created a nuisance, and the trial court granted the housing authority summary possession. The appellate court rejected the tenant's argument that the housing authority's pretermination notice was insufficient, finding that the notice included the statutorily required cure period. The court also rejected the tenant's argument that she was entitled to a grievance hearing prior to termination. Citing 24 C.F.R. § 966.4(l)(5)(iii)(A), the court found that no grievance hearing is required where a tenant has engaged in criminal activity. Finally, the court found that the housing authority was not required to include in the notice the criminal statute that the tenant allegedly violated.

Public Housing: Judicial Review of Termination

Brooks v. New York City Hous. Auth.,__N.Y.S.2d__, 2009 WL 202752 (N.Y. App. Div. 2009). The housing authority sent a notice to a public housing tenant informing her that a recommendation had been made to terminate her tenancy for late rent payments, and that a hearing was scheduled. The tenant failed to appear, and the hearing officer upheld the termination. The tenant submitted a request to the hearing officer for a new hearing. Shortly thereafter, the housing authority adopted the hearing officer's recommendation and terminated the tenancy. While the tenant's request for a new hearing was pending, the tenant sought judicial review of the housing authority's decision to terminate. The court dismissed the case as premature, because the tenant's request for a new hearing was still pending.

Public Housing: Private Right of Action to Prevent Demolition; Monetary Damages Under the Administrative Procedures Act; Preliminary Injunction Standard

Anderson v. Jackson, __F.3d__, 2009 WL 162412 (5th Cir. 2009). Displaced public housing tenants filed suit against the Department of Housing and Urban Development (HUD) and the Housing Authority of New Orleans (HANO), alleging that failure to repair and reopen four public housing developments violated the Fair Housing Act, the United States Housing Act of 1937, and the Equal Protection Clause. The district court dismissed the § 1983 claim against HANO, because the court found that 42 U.S.C. § 1437p did not confer rights enforceable via § 1983. The appellate court affirmed this result, finding that it was ambiguous as to whether Congress intended for the current version of § 1437p to create a federal right. The tenants also appealed the district court's dismissal of their § 1437p claim filed against HUD under the Administrative Procedures Act. The appellate court upheld the dismissal, finding that the APA barred their claim for money damages. Finally, the appellate court held that the district court was not required to hold an evidentiary hearing on the tenants' motion for a preliminary injunction, because the district court did not rely on any disputed facts in denying the motion.

Public Housing: Discrimination on the Basis of Religion in Admissions and Transfers

Ungar v. New York City Hous. Auth., 2009 WL 125236 (S.D.N.Y. 2009). Hasidic Jews applying for or living in public housing within the New York City Housing Authority's (NYCHA) jurisdiction alleged that admission and transfer policies functioned in such a way that Hasidic applicants were offered housing in neighborhoods in which they could not live due to their religious beliefs. The applicants sought an order that Hasidic applicants be allowed to specify a preference for the Williamsburg developments, which were near synagogues and yeshivas. The applicants sought summary judgment on their claims under the Religious Freedom Restoration Act (RFRA). Because NYCHA is an agency of the city of New York, and RFRA applies only to the federal government, the court denied the applicants' motion for summary judgment on their

[1] http://www.westlaw.com.
[2] http://www.lexis.com.
[3] For 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.

RFRA claims. The court granted NYCHA's motion for summary judgment on the applicants' Fair Housing Act claims, finding that the FHA does not require accommodation of religious beliefs. Further, the court found that the applicants failed to demonstrate that NYCHA's policies had a disparate impact on Hasidic applicants, and in fact found that Hasidic families were overrepresented in the Williamsburg developments. The court also granted NYCHA's summary judgment motion on the applicants' claims under the Free Exercise Clause of the First Amendment, finding that NYCHA's policies did not single out a particular religion and had not been selectively applied to Hasidic applicants.

Public Housing: Reasonable Accommodation, Direct Threat

Boston Hous. Auth. v. Bridgewaters, 898 N.E.2d 848 (Mass. 2009). A detailed review of this decision appears on page 50 of this issue of the *Bulletin*.

Public Housing: Income Exclusion for Wages Paid to Care for Disabled Family Member

Anthony v. Poteet Hous. Auth., 2009 WL 33629 (5th Cir. Jan. 7, 2009) (unreported). The state of Texas has a program in which in-home care services are funded by state and federal sources but are administered by private health maintenance organizations (HMOs). A public housing tenant was employed by an HMO to provide in-home services under this program to her son, who was severely disabled. The housing authority considered the tenant's wages from this employment as income for purposes of determining her rent. The tenant argued that the housing authority miscalculated her rent because the wages qualified for an income exclusion under 24 C.F.R. § 5.609(c)(16). The Fifth Circuit rejected the tenant's argument, finding that the wages were not amounts paid by a state agency to the family and were not intended to offset the cost of services needed to keep the tenant's son at home.

Public Housing: Right of Succession

McNeal v. Hernandez, __N.Y.S.2d__, 2009 WL 22265 (N.Y. App. Div. 2009). The court upheld the housing authority's determination that the occupant of a public housing unit was not a remaining family member and did not have rights of succession to her former mother-in-law's unit. The project management had denied the mother-in-law's only written request to add the daughter-in-law and her sons to the household, and every affidavit of income submitted by the mother-in-law listed herself as the unit's only occupant and listed only her own income.

Housing Choice Voucher Program: Exception Payment Standard and Utility Allowances as Reasonable Accommodations

Spieth v. Bucks County Hous. Auth., 2009 WL 197559 (E.D. Pa. Jan. 28, 2009). A voucher holder's disability required her to have a medically prescribed sauna. She requested a higher utility allowance and an exception payment standard as a reasonable accommodation for her disability, but the housing authority denied her request. The court dismissed her 42 U.S.C. § 1983 claim against the housing authority because she failed to allege that her rent payments exceeded the statutory ceiling imposed by the United States Housing Act. The court also dismissed her ADA and Rehabilitation Act claims because she failed to allege that she was denied the exception payment standard and higher utility allowance because of her disability. Further, the court found that she had no private right of action to enforce HUD's payment standard regulations. Finally, the court dismissed her Fair Housing Act claim because she did not allege that the exception payment standard was necessary for her to use and enjoy her residence.

Housing Choice Voucher Program: Motion to Enjoin Retaliatory Eviction

Johnson v. Iowa Dist. Ct., 2009 WL 142543 (Iowa Ct. App. Jan. 22, 2009) (unreported). A voucher tenant asked her landlord to make repairs to the apartment. When the repairs were not made, she contacted the housing authority, which sent the landlord a list of repairs she was required to make. Twelve days later, the landlord gave the tenant a sixty-day notice to terminate her tenancy. The tenant filed a motion for a declaratory judgment that the landlord's conduct was retaliatory, and sought a preliminary injunction enjoining the eviction. A judge found that the preliminary injunction motion was filed to cause delay and costs, imposed sanctions on the tenant, and ordered the tenant to pay the landlord's attorney fees. On appeal, the court held that the tenant's motion for preliminary injunction was not intended to permanently enjoin her eviction, but to preserve the status quo until a determination was made on whether the landlord's conduct was retaliatory. The appellate court therefore held that the trial court abused its discretion in concluding that the tenant's request for an injunction was sanctionable.

Housing Choice Voucher Program: Hearing Officer's Decision Must Consider Tenant's Evidence and Mitigating Circumstances

Pittman v. Dakota County Cmty. Dev. Agency, 2009 WL 112948 (Minn. Ct. App. Jan. 20, 2009) (unreported). A

voucher holder signed a tenant responsibilities agreement prohibiting anyone other than approved family members from residing in her unit, but allowing visitors to stay temporarily. The housing authority later initiated termination proceedings against the tenant for having an unauthorized adult living in the unit. At the informal hearing, the voucher tenant testified that the adult had occasionally stayed in her home, but did not live with her. She introduced mail and a child support order placing the adult at another address, and a social worker also testified on her behalf. The hearing officer upheld the termination based upon language in the tenant responsibilities agreement. The appellate court reversed the decision because the agreement was not part of the record. The court also found that the decision failed to consider the tenant's evidence and disregarded mitigating circumstances, such as the fact that the tenant had numerous children, one of her children was profoundly disabled, and she was the victim of domestic violence perpetrated by the alleged unauthorized occupant.

Housing Choice Voucher Program: Overstaying Lease Term Constitutes Serious Lease Violation

Wilhite v. Scott County Hous. & Redev. Auth., __N.W.2d__, 2009 WL 65595 (Minn. Ct. App. 2009). A voucher tenant's landlord gave her a notice to vacate by the end of her lease term, but the tenant failed to leave the unit. The tenant was evicted, and a hearing officer upheld the termination of her voucher on the grounds that she seriously violated her lease by failing to vacate the unit at the expiration of the lease term. The court affirmed, finding that the failure to vacate was a serious violation of her lease leading to a court-ordered eviction. The court rejected the tenant's argument that the termination notice was inadequate, because the notice clearly stated that the termination was due to the court-ordered eviction. Although the tenant argued that she was not permitted to confront and cross-examine her landlord and property manager during the informal hearing, the court found that she was not entitled to do so because the housing authority did not call them as witnesses during the hearing.

Housing Choice Voucher Program: Landlord's Failure to Complete Housing Assistance Payments Contract

Anthony v. Cole, 2009 WL 26688 (N.Y. Dist. Ct. Jan. 5, 2009) (unreported). A landlord agreed to accept an existing tenant's Section 8 voucher if she moved to another unit. The tenant agreed to do so, but the parties did not execute a lease for the unit. Further, the landlord failed to finalize the Housing Assistance Payments contract. As a result, the housing authority discontinued payments to the landlord. The landlord then sought to evict the tenant as a month-to-month tenant. The tenant submitted a letter from the landlord stating that he was offering her a one-year lease, along with a letter from the housing authority stating that the tenant's share of the rent would be $845. The court found that a one-year lease was contemplated between the parties, and that the landlord was equitably estopped from maintaining that the tenant was a month-to-month tenant. The court therefore found that she was a tenant for a one-year period at a monthly rental of $845.

Project-Based Section 8: Notice Requirements and Termination for Material Noncompliance

New Greenwich Gardens Assocs. v. Saunders, __ N.Y.S.2d __, 2009 WL 175013 (N.Y. Dist. Ct. 2009). A landlord sought to evict a project-based Section 8 tenant for failure to notify the landlord of additional residents living in the unit and failure to list these residents on her recertification paperwork. The tenant argued that the termination notice was insufficient because it did not state the number of unauthorized residents, their names, or when they purportedly lived with her. However, the notice to cure that accompanied the termination notice included this information. The court held that the notice to cure, in conjunction with the notice to terminate, was specific enough to enable the tenant to prepare a defense, as required by 24 C.F.R. § 247.4. The tenant also argued that her tenancy could not be terminated until her lease term expired. The court noted that HUD guidelines provide that terminations for other good cause may only be effective as of the end of a lease term. However, the court found that no such requirement exists where the termination is for material noncompliance, and termination of the tenancy therefore complied with HUD guidelines.

Project-Based Section 8: Stipulation to Vacate

Kings Ct. Hous. LLC v. Hudson, 2009 WL 175031 (N.Y. Civ. Ct. Jan. 23, 2009) (unreported). The daughter of a project-based Section 8 tenant was living in her mother's unit without the landlord's knowledge. After the mother died, the landlord commenced eviction proceedings, alleging that the daughter did not reside in the unit before her mother's death and had not been listed on the mother's recertification paperwork. The daughter signed a stipulation and agreed to move out. She later obtained counsel and moved to vacate the stipulation on the basis that she did not understand it, and alleged that she had succession rights to the unit. The court found that the daughter voluntarily entered into the stipulation, because she stated on the record that she understood the agreement and had adequate time to review it. The court therefore denied the daughter's motion to vacate the stipulation. ■

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), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Board, Federal Emergency Management Agency (FEMA) and the Veterans Administration issued in January of 2009. 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 Rules

74 Fed. Reg. 1867 (Jan. 13, 2009)
Prohibition on Use of Indian Community Development Block Grant Assistance for Employment Relocation Activities; Final Rule

Summary: This rule amends HUD's regulations for the Indian Community Development Block Grant (ICDBG) program by prohibiting Indian tribes and Alaska Native villages from using ICDBG funds to facilitate the relocation of for-profit businesses from one labor market area to another, if the relocation is likely to result in significant job loss.

Effective Date: February 12, 2009.

74 Fed. Reg. 2749 (Jan. 15, 2009)
Civil Money Penalties: Certain Prohibited Conduct

Summary: This final rule revises HUD's regulations that govern the imposition of civil money penalties. Specifically, this rule revises the definitions of "material or materially" and adds a definition of "ability to pay," which is one factor used in determining the appropriateness of the amount of any civil money penalty. Additionally, this rule requires respondents, in their responses to the pre-penalty notice, to specifically address the factors used in determining the appropriateness and amount of civil money penalty. This rule also allows government counsel to file complaints on behalf of the Mortgagee Review Board and departmental officials. Finally, this rule makes other minor clarifying changes. This final rule follows publication of an October 17, 2008, proposed rule, but makes no changes at this final rule stage.

Effective Date: February 17, 2009.

74 Fed. Reg. 2749 (Jan. 15, 2009)
Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs; Deferred Applicability Date for the Revised Definition of "Required Use"

Summary: This final rule delays the effective date of the definition of "required use" as revised by HUD's November 17, 2008, final rule amending its RESPA regulations. The November 17, 2008, final rule provides that the revised definition is applicable commencing January 16, 2009, the effective date of the final rule. As a result of recently initiated litigation, HUD has determined to delay the effective date of the revised definition of "required use" until April 16, 2009.

Dates: This correction is effective January 16, 2009. The definition of "required use" in Sec. 3500.2, as revised by HUD's final rule published on November 17, 2008, at 73 FR 68204, is delayed until April 16, 2009.

74 Fed. Reg. 4637 (Jan. 26, 2009)
Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts

Summary: This rule makes final the conforming amendments to the regulations of the Public Housing Operating Fund Program to reflect recent statutory amendments allowing for: (1) the maximum term of an energy performance contract (EPC) between a public housing authority and an entity other than HUD to be up to twenty years, and (2) the extension of an existing EPC, without re-procurement, to a period of no more than twenty years, to allow additional energy conservation improvements. The increase in the maximum EPC term, which was limited to twelve years, is provided by statutory amendments and will enable longer payback periods for energy conservation measures. This final rule adopts an October 16, 2008, interim rule without change.

Effective Date: February 25, 2009.

74 Fed. Reg. 4831 (Jan. 27, 2009)
Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs; Final Rule

Summary: This final rule revises HUD's public and assisted housing program regulations to implement the upfront income verification process and to require the use of HUD's Enterprise Income Verification system by public housing agencies, and multifamily housing owners and management agents, when verifying the employment and income of program participants at the time of all reexaminations or recertifications. This final rule will ensure

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

that deficiencies in public and assisted housing rental determinations are identified and cured. This final rule is consistent with HUD's comprehensive strategy under the Rental Housing Integrity Improvement Project initiative to reduce the number and dollar amount of errors in HUD's rental assistance programs. This final rule follows publication of a June 19, 2007, proposed rule, and makes certain changes at this final rule stage in response to public comment and further consideration of certain issues by HUD.

Effective Date: March 30, 2009.

HUD Federal Register Notices

74 Fed. Reg. 312 (Jan. 5, 2009)
S.A.F.E. (SAFE) Mortgage Licensing Act;
Notification of Availability of Model Legislation

Summary: This notice announces that the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators have developed model legislation to assist states in meeting the minimum requirements of the SAFE Mortgage Licensing Act. HUD has reviewed this model legislation and finds that it meets the minimum requirements of the SAFE Mortgage Licensing Act. The model legislation is available on HUD's website at http://www.hud.gov/offices/hsg/sfh/reguprog.cfm, along with HUD commentary on certain provisions of the statute, and the model legislation.

74 Fed. Reg. 1227 (Jan. 12, 2009)
Notice of Proposed Information Collection:
Comment Request Housing Counseling Program

Summary: HUD has submitted to the Office of Management and Budget an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to HUD's selection of organizations to receive funding to supplement their housing counseling program.

Comments Due Date: March 13, 2009.

74 Fed. Reg. 1227 (Jan. 12, 2009)
Native American Housing Assistance and
Self-Determination Reauthorization Act of 2008:
Initiation of Negotiated Rulemaking

Summary: This notice announces that HUD is initiating negotiated rulemaking for the purpose of developing regulatory changes to the programs authorized under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Changes to these programs were made by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, which also directs that HUD undertake negotiated rulemaking to implement the statutory revisions. This notice provides background information on the NAHASDA programs and describes the next steps in the negotiated rulemaking process.

74 Fed. Reg. 1228 (Jan. 12, 2009)
Section 8 Housing Assistance Payments Program—
Contract Rent Annual Adjustment Factors,
Fiscal Year 2009

Summary: The United States Housing Act of 1937 requires that assistance contracts signed by owners participating in the department's Section 8 housing assistance payments programs provide for annual adjustment in the monthly rentals for units covered by the contract. This notice announces revised Annual Adjustment Factors for adjustment of contract rents on assistance contract anniversaries.

Effective Date: January 12, 2009.

74 Fed. Reg. 4048 (Jan. 22, 2009)
Notice of Proposed Information Collection: Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Person or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing

Summary: The proposed information collection requirement described in this Notice pertains to supplemental information that housing providers participating in federally assisted housing are required to give an individual or family applying for assistance. The supplemental information would provide an individual or family applying for assistance under these programs with the option of including in the application for assistance the name, address, phone number, and other relevant information of a family member, friend, or person associated with a social, health, advocacy, or similar organization who is familiar with and may assist with the services and special care needed by the individual or family and assist in resolving any tenancy issues arising during the tenancy of such tenant. The information is to be maintained by the housing provider as confidential. The housing provider may not require the individual or family to provide the information. The information collection pertaining to this supplemental information will be submitted to the Office of Management and Budget for review. HUD is soliciting public comments on the subject proposal.

Comments Due Date: March 23, 2009.

74 Fed. Reg. 4215 (Jan. 23, 2009)
Announcement of Funding Awards for the Housing Choice Voucher Family Self Sufficiency Program for Fiscal Year 2008

Summary: This announcement notifies the public of funding decisions made by the Department for funding under the Fiscal Year (FY) 2008 Notice of Funding Availability (NOFA) for the Housing Choice Voucher Family Self Sufficiency funding for FY 2008. This announcement contains the consolidated names and addresses of award recipients selected for funding based on the rating and ranking of all applications and the allocation of funding available for each state.

74 Fed. Reg. 4448 (Jan. 26, 2009)
Notice of Proposed Information Collection: Comment Request; Implementation of the Housing for Older Persons Act of 1995 (HOPA)

Summary: The proposed information collection requirement established under the Housing for Older Persons Act of 1995 (HOPA) will be submitted to the Office of Management and Budget (OMB) for review. HUD is soliciting public comments on the subject proposal addresses and describes in greater detail the documentary evidence which HUD will consider when determining, in the course of a familial status discrimination complaint investigation, whether or not a housing facility or community qualified for the "55 or older" housing exemption as of the date of the alleged Fair Housing Act violation.

The information will be collected in the normal course of business in connection with the sale, rental or occupancy of dwelling units situated in qualified senior housing facilities or communities. The

HOPA's requirement that a housing provider must demonstrate the intent to operate a "55 or older" housing community or facility by publishing, and consistently enforcing, age verification rules, policies and procedures for current and prospective occupants reflects the usual and customary practice of the senior housing industry.

Comment Due Date: March 27, 2009.

HUD Notices

PIH-2009-01 (PHA) (Jan. 2, 2009)
Guidance for Obtaining HUD Consent for Takings of Public Housing Property by Eminent Domain

Summary: This Notice provides guidance on the factors that HUD will consider in determining whether to consent to a taking of public housing property that was developed/acquired by, or is maintained with funds from the United States Housing Act of 1937 by a governmental or quasi-governmental body using eminent domain authority. For purposes of this Notice, public housing property does not include the property of an Indian Housing/Tribally Designated Housing Entity. Most public housing property is owned by PHAs, but units owned by private entities in a mixed-finance arrangement may also be operated as public housing pursuant to 24 CFR 941 (Subpart F).

PIH 2009-2 (HA) (Jan. 16, 2009)
Operating Fund Program: Calculation of Transition Funding Amounts for Calendar Year 2009

Summary: This notice provides guidance regarding the calculation of transition funding under the Operating Fund Program for Calendar Year 2009. The purpose of this notice is to provide public housing agencies with the necessary information for proper budget and program planning.

Rural Housing Service/Rural Development Final Rules

74 Fed. Reg. 1872 (Jan. 14, 2009)
Income Limit Modification

Summary: The Rural Housing Service is delaying the effective date of a direct final rule, which was published on November 4, 2008, to amend its existing income limit structure for the Single Family Housing Guaranteed Loan Program.

Dates: The effective date of the direct final rule, published on November 4, 2008 [73 FR 65503-05], is delayed from January 20, 2009, to March 20, 2009.

74 Fed. Reg. 2823 (Jan. 16, 2009)
Rural Development Guaranteed Loans

Summary: Rural Development is delaying the effective date of the interim rule for Rural Development Guaranteed Loans, which was published on December 17, 2008. The interim rule establishes a unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs—Community Facility; Water and Waste Disposal; Business and Industry; and Renewable Energy Systems and Energy Efficiency Improvement Projects.

Dates: This effective date of the interim rule, published on December 17, 2008, is delayed from January 16, 2009, until February 17, 2009. ■

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