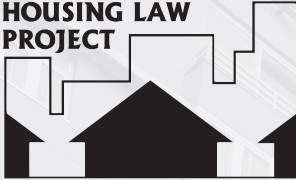


**NATIONAL  
HOUSING LAW  
PROJECT**



advancing housing justice

# Housing Law Bulletin

Volume 39 • June 2009

Published by the National Housing Law Project



***Federal Tenant Protections Enacted*** —see page 133

***HUD Budget Details Released*** —see page 134

## Housing Justice Community Loses Two Giants in the Field

This issue of the *Bulletin* is dedicated to the memory of two colleagues in the housing justice community who have recently passed away.

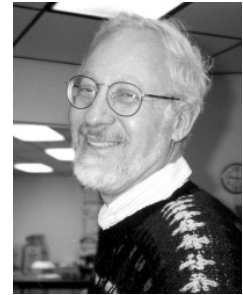
### Harris David March 7, 1938 – April 13, 2009

J. Harris David, Vice President and Assistant General Counsel at Legal Services of New Jersey, died on April 13, after a long illness. Harris, a nationally recognized authority on the law of public housing, litigated a number of significant low-income housing cases in both the federal and state courts. In addition, Harris taught professional responsibility as an Adjunct Professor at the law schools of both Rutgers-Newark and Seton Hall.

Harris was a graduate of Haverford College and NYU Law School. A life-long advocate for the poor, he began his legal career in the South during the civil rights movement in the 1960s as Staff Counsel in the Louisiana Office of the Lawyers' Constitutional Defense Committee. He returned north two years later to begin a Legal Services career that spanned almost forty years, first at Essex-Newark Legal Services, where he served as Director of Litigation and Acting Director, and then with Legal Services of New Jersey from 1984 until his death.

Harris was a passionate advocate for the poor. He worked through the Newark civil disturbances of 1967, and mounted a jury discrimination challenge on behalf of J.W. Smith (on the cover of *Time*, June 13, 1967), the Newark cab driver whose arrest and beating sparked the Newark riots. He was lead counsel in a major class-action against the Newark Housing Authority and the U.S. Department of Housing and Urban Development, which resulted in

—see *Harris David*, continued on inside back cover



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### John Calmore June 2, 1945 – February 24, 2009

John Calmore, a friend and colleague, great and honest scholar, memorable and inspiring teacher, and strong voice for justice, died earlier this year. John was a staff attorney at the National Housing Law Project from 1977 to 1982.

John drew on a profound first-hand knowledge of the worlds of poverty law, racial injustice and social policy to frame a unique view of critical race theory and to develop a social justice lawyering method which informed both his teaching and his many works of scholarship. While at the National Housing Law Project, John authored *Fair Housing v. Fair Housing: The Conflict Between Providing Low-Income Housing in Impacted Areas and Providing Increased Housing Opportunities Through Spatial Deconcentration*. In that article, John advocated for improving the quality and viability of impacted neighborhoods through the rehabilitation and development of assisted housing, thereby giving residents a choice in where they want to live. John retained and advocated for that view throughout his career.

John grew up in modest circumstances in Pasadena, California, and he was a brilliant member of the first wave of modern African-American students to attend Stanford University (BA '67) and Harvard Law School (JD '71), where he met many future civil rights leaders and scholars who became friends and admirers over the following thirty-five years.

—see *John Calmore*, continued on inside back cover



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**Cover:** 990 Polk Street, developed by Citizens Housing Corp. and Tenderloin Neighborhood Development Corp., is a senior development for seniors who are low-income, formerly homeless or have mental disabilities.

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## Obama Signs Law Protecting Renters in Foreclosed Properties

Tenants' rights and housing advocates secured a major victory on May 20, 2009, when President Obama signed into law the Protecting Tenants at Foreclosure Act of 2009.<sup>1</sup> In most cases, tenants will now have the right to remain in their homes after foreclosure for ninety days or until the end of their lease terms. Unless extended, these provisions will remain in effect until December 31, 2012.<sup>2</sup>

The law applies to any foreclosure on a federally related mortgage loan or on any residential property occurring after May 20, 2009.<sup>3</sup> Any immediate successor in interest in such a property at foreclosure must permit bona fide tenants with leases entered into before the notice of foreclosure to occupy the premises until the end of the lease term.<sup>4</sup> However, the lease can still be terminated on ninety days' notice if the unit is sold to a purchaser who will occupy it as a primary residence.<sup>5</sup> Additionally, bona fide tenants with month-to-month tenancies, with leases terminable at will, or without leases must receive a ninety-day notice prior to eviction.<sup>6</sup> The law does not preempt any federal, state or local laws that provide longer time periods or other additional protections for tenants.<sup>7</sup>

The law provides that a lease or tenancy can be considered "bona fide" only if: (1) the mortgagor or the mortgagor's child, spouse or parent is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires rent payments that are not substantially less than fair market rent for the property, or the unit's rent is subsidized by a federal, state or local entity.<sup>8</sup>

The law contains additional protections for Section 8 voucher tenants, which are similar to those described above. It also amends 42 U.S.C. § 1437f(o)(7) to provide that in any foreclosure on a property in which a Section 8 tenant resides, the new owner takes subject to the Section 8 lease and the Housing Assistance Payment contract. Further, vacating the property prior to sale does not constitute other good cause for terminating the tenancy.<sup>9</sup> However, if the new owner who acquires the property at foreclosure will occupy the unit as a primary residence, the owner

<sup>1</sup>The tenant protection provisions are found at Title VII of the Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22 (S.896) (2009).

<sup>2</sup>Helping Families Save Their Homes Act § 704.

<sup>3</sup>§ 702(a).

<sup>4</sup>§ 702(a)(2).

<sup>5</sup>§ 702(a)(2).

<sup>6</sup>§ 702(a)(1)-(2).

<sup>7</sup>§ 702(a)(2)

<sup>8</sup>§ 702(b).

<sup>9</sup>§ 703.

can still terminate the tenancy upon ninety days' notice to the Section 8 tenant.<sup>10</sup>

Advocates can begin implementing the new protections by sending copies of the law and summaries of its provisions to owners, managers, public housing authorities, judges and tenants.<sup>11</sup> ■

<sup>10</sup>§ 703.

<sup>11</sup>NHLP has developed a variety of sample documents for use by advocates, which are available at <http://nlihc.org/template/page.cfm?id=227>.

### NHLP Institutes Neighborhood Stabilization Initiative

The National Housing Law Project (NHLP) is pleased to announce the launch of its *Neighborhood Stabilization Initiative*. Under this initiative, NHLP is expanding its training, technical assistance and policy development services in three areas:

1. *Using Neighborhood Stabilization Funds to Create Affordable Housing Opportunities.* NHLP will collaborate with advocates, community development agencies and local governments to encourage communities to use federal Neighborhood Stabilization Program (NSP) funds for increasing long-term affordable housing options.
2. *Using Neighborhood Stabilization Funds to Maximize Employment Opportunities.* NHLP seeks to work with advocates, community development agencies and local governments to promote the use of NSP funds for the creation of economic opportunities for low-income residents under HUD's Section 3 program.
3. *Protecting Tenants in Foreclosed Properties.* NHLP will partner with advocates, local governments and community-based organizations to identify strategies and model policies for preventing displacement of tenants in foreclosed properties.

NHLP recognizes that many organizations are already engaged in groundbreaking work on these issues, while others are new to these areas. Please let us know how we can best support you, how you have addressed these issues locally, and how we can partner with you to launch this work in your communities. For more information, contact Meliah Schultzman, [mschultzman@nhlp.org](mailto:mschultzman@nhlp.org) or (510) 251-9400 x3116.

## Administration Releases More Detailed Proposed FY 2010 HUD Budget

Following up on his February budget overview, on May 7, 2009, President Obama released his detailed Fiscal Year (FY) 2010 funding request for federal programs, seeking an overall increase of approximately 7% for Department of Housing and Urban Development (HUD) programs compared to FY 2009 funding levels. HUD Secretary Shaun Donovan provided a walk-through of the HUD highlights in a same-day webcast,<sup>1</sup> emphasizing "a renewed commitment to core [HUD] programs" and funding levels for rental housing programs that demonstrate a "rock-solid commitment to preserving public and assisted housing" and a "new era of housing and community development." Recognizing that "HUD has to be a different kind of partner, a different kind of agency," he stated that the nation would see the beginnings of transformation in this FY 2010 budget.

Notable among the budget details is increased funding for two major rental housing programs—Housing Choice Vouchers and project-based Section 8 assistance as well as \$1 billion for the newly created National Affordable Housing Trust Fund. More funds for formula grants under the Community Development Block Grant program would be provided, as would funding for several major new initiatives intended primarily to revitalize high-poverty communities. Most other programs would receive level funding or modest increases compared to FY 2009. However, despite the deep recession and growing needs for affordable housing among very low-income families, the budget seeks no funding to expand significantly the number of families receiving federally funded rental assistance.

### Housing Choice Vouchers

The Budget requests \$17.84 billion for Housing Choice Vouchers, covering both renewals and administrative fees, a \$1 billion increase over the FY 2009 level.<sup>2</sup> HUD projects that the FY 2010 request seeks enough funding to renew all existing Housing Choice Vouchers, including the new tenant protection and other incremental vouchers funded

<sup>1</sup>In addition to the May 7 webcast, other sources for this article include HUDs' Budget documents (summary at <http://www.hud.gov/budgetsummary2010/fy10budget.pdf>, more detailed Appendix at <http://www.whitehouse.gov/omb/budget/fy2010/assets/hud.pdf>, and summaries prepared by the National Low Income Housing Coalition (Budget Chart at <http://www.nlihc.org/doc/FY10-presidents-request33.pdf>) and the Center on Budget and Policy Priorities ([www.cbpp.org](http://www.cbpp.org)).

<sup>2</sup>The net funding increase may be even higher, since FY 2009 also included a rescission of \$750 million in previously appropriated but unexpended funds, usually held in PHA reserves, and such a rescission is not proposed this year.

in FY 2009, covering at least 116,000 more vouchers than were supported in FY 2008. Some of these might simply be renewed tenant protection vouchers issued during FY 2009 and thus may not represent a real increase. However, the flexibility permitted under the proposed revisions to the voucher renewal funding formula that would encourage more efficient use of reserve funds (discussed *infra*) could increase the number of vouchers. In total, this funding should serve more than 2.1 million families nationwide. In addition, the Budget proposes to lift the cap on the number of vouchers each agency can issue. In combination, if the Budget for vouchers is adopted, by the end of 2010 more than 2.1 million families will receive vouchers, more than ever before.

HUD proposes to pursue a number of reforms to improve the operation of the voucher program, including legislative changes to facilitate full utilization of available funding, reduce administrative burdens on PHAs, and establish a predictable funding mechanism capable of serving more eligible families. More families could be served by, among other things, eliminating the cap imposed by recent appropriations bills on the number of families in each PHA's program. Also proposed are regulatory reforms to improve administration of Housing Quality Standard inspections and performance, as well as the overall Section 8 Management Assessment Program, and to develop an improved formula to allocate administrative fees based on efficient management.

HUD proposes three changes to the voucher renewal funding formula that should prove extremely important for program stability. Many of these changes are similar to those contained in the more extensive roster of improvements in the Section 8 Voucher Reform Act, soon to be reintroduced in House for the 111<sup>th</sup> Congress. First, the formula would switch from the current system of using leasing and cost data during the fiscal year ending September 30 to one using data from the calendar year. The net effect would be to base renewal funding on more recent cost information, permitting renewal funding to be allocated more accurately. Second, the proposed formula would eliminate the prohibition against PHA's "overleasing," the practice of funding more vouchers than authorized. By permitting more flexibility concerning the number of vouchers in use, subject to the overall available funding, PHAs with available funding may use it to maximize the number of assisted families, rather than needlessly contracting leasing to avoid exceeding the cap.

A third major change to the renewal funding formula would cover the offset and reallocation mechanism, which is intended to prevent PHAs from sitting on unused funds in their reserves while needy families go unserved. Under the proposal, HUD could reduce a PHA's renewal funding if its reserve balances exceed two weeks of funding (3.85%). The big change in this proposal is that HUD could then retain the offset funds within the voucher program by reallocating them to other PHAs to meet renewal needs

or to serve more families, rather than returning them to the Treasury, as was required by legislative rescissions over the past two fiscal years.

The Budget also proposes a modest increase in voucher administrative expenses. However, only \$103 million, fully 30% less than prior years, is proposed for new tenant protection vouchers provided to replace lost hard units of public or assisted housing. It is unclear whether this reduced request stems from better data about needs and projected usage, or reflects estimated savings from improved preservation policies. As in the past two years, tenant protection vouchers would replace all units that have been occupied at any time during the twenty-four months prior to the demolition approval or other conversion action.

## Project-Based Section 8

Secretary Donovan has established full renewal funding for project-based Section 8 contracts as an agency priority, pushing hard for including \$2 billion of additional funding to cover the prior shortfall in the February stimulus package. HUD's FY 2010 request of \$8.1 billion, \$7.9 billion for renewals and the rest for contract administrators, will apparently provide for a full twelve months of funding for renewal of every expiring contract with a willing owner. Of this amount, \$400 million would be an advance appropriation for FY 2011, only available for contracts expiring after September 30, 2010, which would not count against this year's FY 2010 budget cap.

Of this amount, the Budget also requests a line item for HUD to spend up to \$10 million for tenant resources, information and outreach grants to build the capacity of tenant organizations whose homes face restructuring, renewal or conversion, as authorized by Section 514 of the Multifamily Assisted Housing Reform and Affordability Act of 1997.<sup>3</sup> Until about five years ago, HUD's tenant outreach program had provided funding for assistance to tenant groups to permit informed participation in decisions about their homes, and this budget request would enable that outreach and organizing effort to restart.

## National Housing Trust Fund

As promised, the Budget proposes first-time funding to capitalize the National Housing Trust Fund, created by the July 2008 Housing and Economic Recovery Act, to provide more affordable housing for very low- and extremely low-income families. Because this \$1 billion request is subject to PAYGO, an internal procedure adopted by the House to ensure that additional mandatory spending be paid for up front, it must be approved by authorizing legislation and Congress must either raise the revenue or find an offsetting reduction in mandatory spending elsewhere in the federal budget.

<sup>3</sup>Codified at 42 U.S.C. § 1437f note ("Multifamily Housing Assistance").

## Public Housing Operating and Capital Funds

In stark contrast with past Administrations, the President requests a slight increase (3.3%) in public housing operating funds, to a level of \$4.6 billion, allegedly enough for full 100% funding of the operating subsidy system. The Secretary has committed to full funding, and vowed to work with Congress to adjust the funding level if needed to cover an increase in operating subsidy needs due to decreases in tenant incomes and rents in this faltering economy, which are not offset by reductions in other expenses.

The FY 2010 budget would slightly reduce public housing capital funds by \$206 million to the \$2.24 billion level, a cut that HUD believes was mitigated by the \$4 billion capital fund infusion included in the February economic stimulus package.

The public housing request includes nothing for the HOPE VI and Resident Opportunity and Supportive Services programs, the purposes of which would be subsumed by a new "Choice Neighborhoods Initiative," described below.

### Choice Neighborhoods Initiative

The Budget requests \$250 million for a new "Choice Neighborhoods Initiative," reaching beyond public housing to fund the preservation, rehabilitation and transformation of both public and other HUD-assisted housing. Proposed funding substantially exceeds that recently provided for the HOPE VI Public Housing Revitalization program (\$120 million in FY 2009). The stated goal of these competitive grants would be to revitalize high-poverty neighborhoods into sustainable mixed-income neighborhoods with appropriate services, schools, public assets, transportation and job opportunities, using preferences for areas engaged in school reform or early childhood intervention activities. Public housing agencies, local governments, nonprofits and for-profit developers could seek funding for resident and community services, community development and affordable housing activities. As a new initiative departing from existing legislative authorizations, the Administration plans to prepare and submit authorizing language with more operational details.

### Community Development Block Grants

The FY 2010 Budget would significantly increase funding for Community Development Block Grants while also revising the allocation formula and creating new set-asides within the program. CDBG would receive \$4.45 billion in total, with \$4.19 in formula grants, both figures fully \$550 million over the FY 2009 level. The increase is intended primarily to protect communities from funding reductions that would otherwise occur under the new formula. Although the Budget contains no details on the revised formula, it states that the changes will improve

targeting of funds to communities with the greatest economic need. Three new initiatives are proposed to receive funding set-asides within the overall CDBG total: a Sustainable Communities Initiative (\$150 million), a Rural Innovation Fund (\$25 million) and a University Community Fund (\$25 million).

The largest of these efforts, the Sustainable Communities Initiative, would provide grants to integrate transportation and housing planning decisions in order to foster more sustainable development patterns that provide transit-accessible housing choices and lower transportation costs, while reducing emissions. Of the \$150 million, \$100 million would fund a regional planning effort jointly administered by HUD and the Department of Transportation (DOT), and \$40 million would provide challenge grants to encourage changes to local planning and land use rules and local building codes. The balance would fund research and evaluation jointly administered by HUD and DOT.

### Homeless Assistance

The Budget request for HUD's homeless assistance programs would increase by \$117 million to \$1.8 billion. The Secretary stated that HUD will continue to emphasize homelessness prevention and rapid re-housing in its homeless assistance programs.

### Other Housing Programs and Initiatives

The Budget requests only level funding (at FY 2009 levels) for formula grants under the HOME program (\$1.825 billion), as well as for Section 202 Supportive Housing for the Elderly (\$765 million), Section 811 Supportive Housing for Persons with Disabilities (\$250 million) and Housing Opportunities for Persons With AIDS (HOPWA) (\$310 million).

Native American and Native Hawaiian Housing block grants would also be level-funded at \$645 and \$10 million, respectively, as would the Healthy Homes and Lead Hazard Control programs (at \$140 million).

Both the Fair Housing Assistance program and the Fair Housing Initiatives program would receive increases, but the latter would be dramatically expanded from \$28 million to \$42 million, fully 50% higher.

Funding for Housing Counseling would also be increased by 50%, from \$65 million to \$100 million, to combat mortgage fraud and predatory lending.

The Budget also proposes a \$100 million Energy Innovation Fund to promote activities that would make both HUD-assisted rental and single-family housing more energy-efficient, including ways to integrate improved energy efficiency with home buying or refinancing.

Finally, the Administration proposes a Transformation Initiative that would utilize up to 1% of the HUD funding requested for each HUD program to modernize HUD's

research, evaluation, technology and technical assistance functions. Funding this Initiative could thus reduce funding below needed levels in the short run, before the benefits of any cost-effective improvements are realized.

### Conclusion

When combined with the substantial additional investments of more than \$13 billion in affordable housing programs from the Economic Recovery Act, the President's FY 2010 Budget represents a renewed commitment to affordable housing for low-income families nationwide. Congress will now begin its deliberations concerning these requests in the appropriations process commencing in late May and early June, with enactment of final funding levels scheduled for September, before the new fiscal year begins October 1. ■

## State Appellate Court Recognizes Bankruptcy as Public Housing Eviction Defense\*

In *Housing Authority of New Orleans v. Eason*, a Louisiana court of appeal recently held that § 525(a) of the federal Bankruptcy Code prohibited a housing authority from evicting a bankrupt tenant solely for failure to pay discharged pre-bankruptcy rent.<sup>1</sup> The court also held that § 525(a) is an affirmative defense in a state court eviction lawsuit. *Eason* is the first published state appellate decision that enforces § 525(a) to protect a public housing tenant from eviction.<sup>2</sup> At the federal level, the only appellate ruling on this issue has also held that § 525(a) may bar eviction for nonpayment of rent.<sup>3</sup>

### Background

Section 525 of the Bankruptcy Code<sup>4</sup> entitled "Protection against discriminatory treatment" prohibits certain acts or discrimination by "government units," including public housing authorities. However, the title of § 525 is somewhat of a misnomer, since § 525(a) is also violated if the proximate cause for denial of a "license, permit, charter, franchise, or other similar grant" is the failure to pay a debt dischargeable or discharged in bankruptcy. Thus, a debtor does not have to prove discrimination to prevail on a § 525(a) "discrimination" claim or defense.<sup>5</sup> Although pre-petition rent owed to a housing authority is generally dischargeable in bankruptcy, absent a recognized exception to discharge such as fraud, the bankruptcy courts have been divided as to whether § 525(a) may bar a public housing eviction.<sup>6</sup>

The housing authority sued to evict Eason for failure to pay nine months of rent. One day before the eviction trial, Eason filed a Chapter 7 bankruptcy, which listed the rent owed to the authority as an unsecured, non-priority

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\*The author of this article is Mark Moreau of Southeast Louisiana Legal Services."

<sup>1</sup>*Housing Authority of New Orleans v. Eason*, \_\_\_So.2d \_\_\_, 2009 WL 553303, 2008-0525 (La. App., March 4, 2009), rehearing denied (La. App. 4<sup>th</sup> Cir, April 2, 2009).

<sup>2</sup>Several other courts have held that state courts have jurisdiction to hear and decide § 525 claims. See e.g., *In re Morrow*, 189 B.R. 793, 804 (Bankr. C.D. Cal. 1995). Lifting the bankruptcy stay frees the parties to litigate their substantive claims in state court. *In re Roberts*, 367 B.R. 677, 686 (Bankr. D. Colo. 2007).

<sup>3</sup>*In re Stoltz*, 315 F.3d 80 (2d Cir. 2002).

<sup>4</sup>11 U.S.C. § 525.

<sup>5</sup>*Federal Communications Comm'n v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 301-02 (2003).

<sup>6</sup>See *In re Stoltz*, 315 F.3d at 87-88. See also Appellant's Brief in *Housing Authority of New Orleans v. Eason*, 2008 WL 2477931 (May 23, 2008). Many of the prior rationales for denying § 525(a) relief are no longer valid after the Supreme Court's decision in *Federal Communications Comm'n v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

debt. The eviction lawsuit asserted no other grounds for eviction. By operation of law, the bankruptcy filing automatically stayed the state court eviction lawsuit.<sup>7</sup>

As commonly done by certain creditors, the authority then filed a motion to lift the stay, which the bankruptcy court granted. Eason then appealed the order lifting the stay to the United States District Court and also sought an emergency stay pending appeal, again to prevent the state court eviction suit from proceeding. The federal district court refused to grant the emergency stay pending appeal, issuing an interlocutory opinion that the housing authority had shown sufficient cause to lift the stay and that unpaid dischargeable rent could be used as a basis for eviction.<sup>8</sup> Before Eason's appeal of the underlying order lifting the stay could be heard by the district court, the bankruptcy court granted Eason a full discharge of his debts, including the unpaid pre-bankruptcy rent owed the authority. Because this discharge mooted Eason's appeal of the bankruptcy court's original order lifting the stay,<sup>9</sup> on Eason's motion the appeal was dismissed for lack of jurisdiction.

The housing authority re-set its eviction of Eason for trial in state court a few days after the federal district judge denied the emergency stay pending appeal. As a defense to the eviction, Eason asserted that § 525(a) of the Bankruptcy Code prohibited eviction for his failure to pay the dischargeable rent owed to the Authority. The trial court nevertheless ordered Eason's eviction, stating that she agreed with the federal district judge that the unpaid dischargeable rent could support the housing authority's eviction for nonpayment. Eason then appealed the eviction judgment to the state Court of Appeal.

## Challenges Faced When Enforcing Public Housing Tenants' § 525(a) Claims

Housing authorities often seek to evict tenants who file a Chapter 7 bankruptcy. The bankruptcy courts are split on whether § 525(a) protects a housing authority tenant from eviction for failure to pay rent. Therefore, a Chapter 13 bankruptcy could be a safer way to protect a housing authority tenant from eviction, since confirmation of a Chapter 13 payment plan binds creditors, including landlords, and prevents eviction so long as the tenant makes the plan payments, including any provisions for promptly curing rent arrearages. However, the challenging issue in a Chapter 13 bankruptcy is whether the

tenant can "promptly" cure the rent arrearages.<sup>10</sup> Because the confirmed plan binds creditors, the successful Chapter 13 bankrupt tenants will not have to worry about whether the bankruptcy court will or will not apply § 525(a) to bar public housing evictions. In contrast, in a typical Chapter 7 bankruptcy, a housing authority files a motion to lift the stay against eviction, which, as a summary proceeding, must be heard within thirty days. Given the unsettled law outside the Second Circuit, a Chapter 7 bankruptcy poses a risk that the bankruptcy court will refuse to provide § 525(a) protections.<sup>11</sup>

As a procedural matter, a bankrupt tenant cannot file a § 525(a) counterclaim to a motion to lift an automatic bankruptcy stay.<sup>12</sup> Instead, the § 525(a) claim must be filed as an "adversary proceeding," which is a separate lawsuit within the bankruptcy case and is subject to the delays for ordinary proceedings, often consuming several months for trial. Thus, if the tenant cannot defeat the motion to lift the stay (either with the bankruptcy court or by an emergency stay pending appeal to district court), the housing authority will be free to bring an eviction in state court. In such cases, the only practical remedy for the tenant is to assert a federal bankruptcy § 525(a) claim defensively in the state court eviction action, or if viable, consider conversion to a Chapter 13 bankruptcy.

In *Eason*, as in many cases, the preliminary rulings in the federal bankruptcy case did not bar relitigation of the § 525(a) claims in state court. Under federal jurisprudence, a hearing on a motion to lift the stay does not involve a full adjudication of claims, defenses and counterclaims.<sup>13</sup> Also, *res judicata* did not apply because bankruptcy rules barred Eason from litigating his § 525(a) claim in the hearing on the lifting of the stay, and no final judgment was entered by the district court since the appeal was dismissed as moot.<sup>14</sup>

## § 525(a) of the Bankruptcy Code May Bar Certain Public Housing Evictions

The housing authority made the usual arguments against application of § 525(a) to evictions, which had succeeded below:

- that a public housing lease is not an "other similar grant" under § 525(a);

<sup>10</sup>§ 365 of the Bankruptcy Code does not define the "prompt cure" requirement. One court has held that a subsidized tenant's cure within two years is sufficiently prompt, but others have held otherwise. Compare *In re Whitsett*, 163 B.R. 752 (Bankr. E.D. Pa. 1994) with *In re Yokley*, 99 B.R. 394 (Bankr. M.D. Tenn. 1989).

<sup>11</sup>If § 525(a) is not enforced by the bankruptcy court in a Chapter 7 bankruptcy, a public housing tenant may consider conversion to a Chapter 13 bankruptcy. See 11 U.S.C. § 1307(a).

<sup>12</sup>Nonetheless, tenants often argue § 525(a) as an equitable factor when opposing a motion to lift the stay.

<sup>13</sup>See e.g., *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30-35 (1st Cir. 1994).

<sup>14</sup>9 *Collier on Bankruptcy* ¶ 4001.02 [2] (Lawrence P. King, 15th ed. rev.); Bankruptcy Rule 7001(7).

<sup>7</sup>11 U.S.C. § 362.

<sup>8</sup>*In re Eason*, 2008 WL 298819 (E.D. La., Feb. 1, 2008).

<sup>9</sup>An appeal of a bankruptcy order lifting the § 362 automatic stay becomes moot when the bankruptcy discharge is granted. *In re Biggs*, 271 Fed. Appx. (3d Cir. 2008).



- that federal housing policy trumped § 525;
- that § 365 of the Bankruptcy Code trumped § 525;<sup>15</sup> and
- that it did not commit § 525 discrimination because it evicts all tenants who fail to pay rent.

In addition, the authority argued that § 525(a) did not apply because its proposed “notice of termination” letter terminated the lease before Eason filed his bankruptcy.<sup>16</sup> On this latter point, Eason argued that the lease was not terminated under state law until there was a final state court judgment terminating the lease.

The Louisiana Court of Appeal rejected all of the Authority’s arguments. It found that an eviction solely for failure to pay pre-petition rent was the type of discrimination expressly prohibited by § 525(a), and that this was an affirmative defense that could be raised in a state court eviction since it would entitle the tenant to remain in possession. The Court rejected the Authority’s argument that a mere notice of lease termination terminates the lease so as to prevent the application of § 525(a) to bar eviction. The Court also rejected the Authority’s argument that the Second Circuit’s ruling *In re Stoltz* decision was unpersuasive or distinguishable.

The Court noted that a tenant could be evicted for other lease violations and for failure to pay post-petition rent, but not for failure to pay pre-petition rent. Because the protection of § 525 only applies to “government units,” the question of whether § 525 also bars a non-governmental but publicly subsidized landlord from evicting a bankrupt tenant for pre-petition rent remains largely unresolved.<sup>17</sup> ■

<sup>15</sup>Several bankruptcy courts have denied § 525(a) relief, reasoning that § 365 of the Bankruptcy Code requires public housing tenants to cure the rent default as a condition of assuming the lease. *See, e.g., In re Bacon*, 212 B.R. 66 (Bankr. E.D. Pa. 1997)(dicta). Section 365 allows landlords to evict once the § 362 automatic stay is lifted or expires. The *Eason* decision endorsed the *In re Stoltz* majority decision, which expressly held that § 525(a) controls over § 365 when the landlord is a public housing authority.

<sup>16</sup>Bankruptcy courts look to state law to determine when the lease was terminated. *In re Stoltz*, 315 F.3d at 84-85; *Brattleboro Housing Authority v. Stoltz*, 197 F.3d 625, 631 (2d Cir. 1999). It is very important that a bankruptcy be filed before termination of a lease under state law. *See e.g., In re Caldwell*, 174 B.R. 650 (Bankr.N.D. Ga. 1994).

<sup>17</sup>The reach of Section 525 may extend to federally regulated private owners. *In re Oksentowicz*, Nos. 04-73913 and 04-74260 (E.D. Mich. Sept. 16, 2005) (affirming ruling of Bankruptcy Court, 314 B.R. 638, project-based Section 8 owner covered by § 525(a), due to extensive HUD regulation of operations, and prohibits discrimination for reasons related to discharged debt).

## NHLP Survey of Northern California Utility Allowances Reveals Potential Deficiencies

A recent analysis of utility allowances used by Northern California public housing authorities (PHAs) indicates that several of these agencies failed to regularly adjust their allowances despite significant increases in natural gas and electric rates. This article summarizes the results of the public records act requests that the National Housing Law Project (NHLP) sent to forty-one PHAs in 2008 and 2009. NHLP conducted this research to assist legal services advocates in assessing whether the utility allowances provided to public housing and Section 8 tenants were adequate.<sup>1</sup>

### Overview of Utility Allowances

The United States Housing Act provides that the resident’s share of the rent in most federally assisted housing programs usually be limited to 30% of the household’s adjusted monthly income.<sup>2</sup> In interpreting the statute, the Department of Housing and Urban Development (HUD) defines the tenant rent contribution as including the costs for reasonable amounts of utilities.<sup>3</sup> Where utilities are tenant-paid, an amount that a PHA determines necessary to cover reasonable utility costs is the “utility allowance,” which is generally credited against the tenant’s share paid to the owner, for those tenants paying an income-based rent.

Utility allowances are based on an estimate of the reasonable cost of different types of utilities.<sup>4</sup> Covered tenant-paid utilities include electricity, natural gas, propane, fuel oil, wood or coal, water, sewage service, and garbage collection. The functions covered by an allowance include space heating, water heating, cooling, refrigeration, lighting or appliances, but not telephone or cable TV service.

To maintain the resident’s rent-to-income share within the statutory limit, for public housing and vouchers, the PHA must review the utility allowance schedule at least annually.<sup>5</sup> In addition, if utility rates have increased by 10% or more since the allowance was last adjusted, the PHA

<sup>1</sup>For more information about utility allowances, see NHLP, *Fifth Circuit Holds Voucher Utility Allowances Privately Enforceable*, 36 HOUS. L. BULL. 82 (2006); NHLP, *Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs*, 35 HOUS. L. BULL. 249 (2005); NHLP, *Third Circuit Requires Philadelphia Housing Authority to Increase Utility Allowances for Rate Hikes*, 35 HOUS. L. BULL. 252 (2005).

<sup>2</sup>42 U.S.C.A. § 1437a(a) (Westlaw May 8, 2009).

<sup>3</sup>*See, e.g., Tenant Allowances for Utilities*, 49 Fed. Reg. 31,399, 31,400 (Aug. 17, 1984); *Wright v. Roanoke Redv. & Hous. Auth.*, 479 U.S. 418, 420 (1987).

<sup>4</sup>*See* NHLP, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS, ch. 6 (3d ed. 2004).

<sup>5</sup>24 C.F.R. §§ 965.507(a), 982.517(c) (2008).

must immediately increase the allowance accordingly.<sup>6</sup> Unfortunately, some PHAs fail to adjust their allowances in a timely fashion, leaving the tenant with the burden of paying any rate increases.

## Public Records Act Requests

To determine whether Northern California PHAs were providing adequate utility allowances, NHLP mailed public records act requests to forty-one PHAs.<sup>7</sup> NHLP sought all utility allowance schedules used by each PHA in administering its public housing, Section 8 vouchers, and any other program under the United States Housing Act. Additionally, NHLP sought all supporting documentation used by each PHA in determining, reviewing or revising utility allowances. NHLP asked the PHAs to provide all documents used during the past five years. NHLP gave PHAs the option of responding via mail, email or fax. The information was requested pursuant to the California Public Records Act.<sup>8</sup> Because several PHAs failed to respond to NHLP's initial request or provided incomplete records, follow-up requests were mailed in early 2009. By February 2009, thirty-seven PHAs had submitted documents to NHLP.

## Analysis of the Records

NHLP reviewed the results of its record requests in February 2009. NHLP first examined each PHA's records individually to determine whether there were any obvious deficiencies in the utility allowances. There were several potential inadequacies:

- The most common problem was the *failure of several PHAs to regularly update their utility allowances*, even though electric and gas rates in Northern California have increased significantly during several periods over the past five years. Stanislaus County, for example, had not updated its utility allowance for gas heating, cooking and water heating in public housing since 2004, while gas rates in the jurisdiction had increased 53% between 2004 and 2008.

<sup>6</sup>24 C.F.R. §§ 965.507(b), 982.517(c) (2008).

<sup>7</sup>Those PHAs served Alameda City, Alameda County, Berkeley, Butte County, Contra Costa County, El Dorado County, Fairfield, Fresno County, Humboldt County, Lake County, Livermore, Madera County, Marin County, Mendocino County, Monterey County, Napa, Nevada County, Oakland, Pittsburg, Placer County, Plumas County, Redding, Richmond, Sacramento County, San Francisco, San Joaquin County, San Mateo County, Santa Clara County, Santa Cruz County, Santa Rosa, Shasta County, Sonoma County, South San Francisco, Stanislaus County, Suisun City, Sutter County, Tehama County, Vacaville, Vallejo, Yolo County and Yuba County.

<sup>8</sup>CAL. GOV'T CODE §§ 6250-6270 *et seq.*

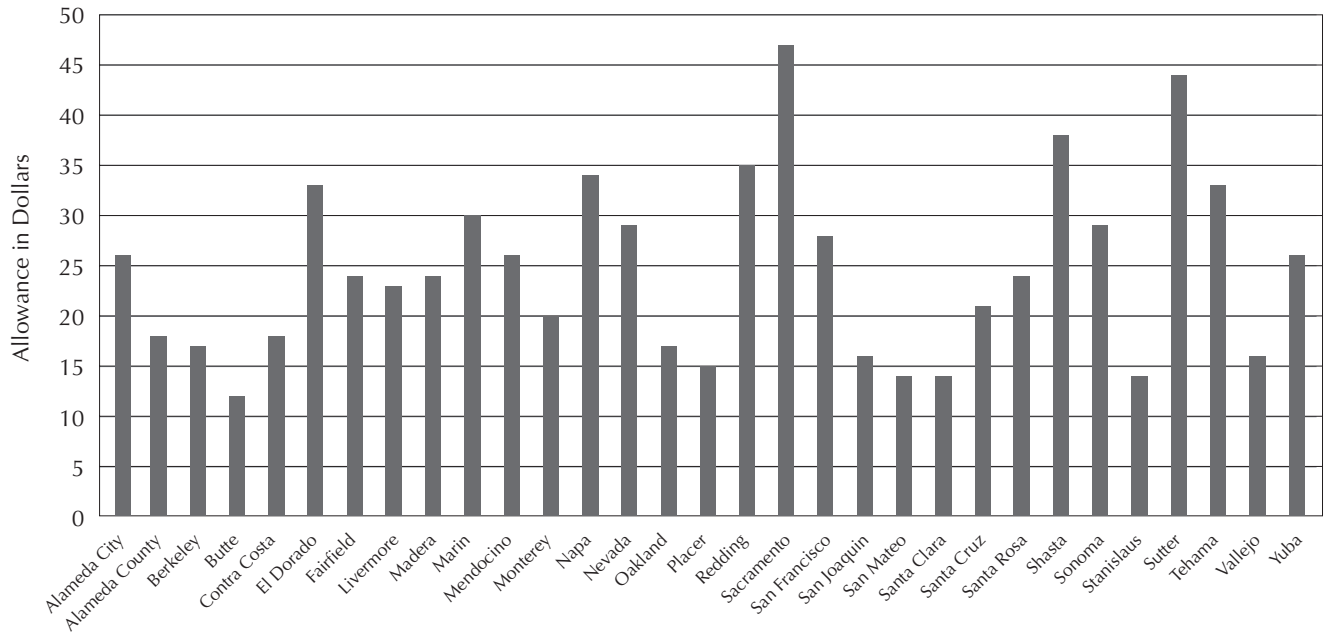
- Some PHAs *failed to provide allowances for certain types of utilities*, such as water, garbage collection or other electric.<sup>9</sup>
- Some PHAs *used the same utility allowances for detached homes and apartments*, even though the heating and water expenses for detached homes are generally higher than those expenses for apartments. Further analysis is necessary to determine whether the allowances provided for detached homes in those jurisdictions are sufficient.
- Some PHAs *used flawed methodologies* in calculating their utility allowances. For example, one PHA calculated its utility allowances by averaging the utility allowances used by neighboring PHAs. There was no indication that this PHA conducted an independent assessment to determine whether the neighboring PHAs were correctly setting their utility allowances. Another PHA's records indicated that it only adjusted its utility allowances if utility rates had gone up an average of 10% or more during the prior year. In contrast, the appropriate analysis is whether "there [has] been a change of 10 percent or more in the utility rate since the last time the utility allowance schedule was revised."<sup>10</sup> The PHA therefore should have been determining whether utility rates had gone up 10% or more since the last time it adjusted its utility allowances.

In addition to its individual analysis of PHA records, NHLP also compared neighboring PHAs' utility allowances to determine whether their allowances were consistent with one another. For example, for each PHA, NHLP recorded the utility allowance that was provided for gas heat in a two-bedroom apartment in the Section 8 voucher program. As the chart accompanying this article illustrates, NHLP found that these utility allowances varied widely from PHA to PHA. Some variation was expected among the thirty-seven PHAs analyzed due to differences in elevation, climate and utility service providers. However, NHLP discovered significant disparities in utility allowances even among PHAs that were in close proximity to one another and that were served by the same utility provider. For example, while the County of Butte provided a gas heating allowance of \$12 for a two-bedroom Section 8 apartment, the neighboring counties of Yuba, Tehama and Sutter provided gas heating allowances of \$26, \$33, and \$44 respectively. This amounts to a difference of 117%, 175%, and 267% between Butte County's utility allowances and those of Yuba, Tehama and Sutter

<sup>9</sup>"Other electric" is essentially the catchall allowance that covers electric needs other than heating, cooling and cooking, such as lighting and appliances.

<sup>10</sup>See 24 C.F.R. § 982.517(c).

## Section 8 Voucher Allowances for Gas Heat, Two-Bedroom Apartment



counties respectively. Further, Butte County’s gas heating allowance was less than half of the average gas heating allowance for all the PHAs analyzed, which was \$25.

Similar disparities existed among electric heating allowances. For example, while the city of Vallejo provided an electric heating allowance of \$16 for a two-bedroom Section 8 apartment, nearby housing authorities in Sacramento and Napa counties had electric heating allowances of \$35 and \$49 respectively. Additionally, Vallejo’s electric heating allowance was half of the electric heating allowance for all the PHAs analyzed, which was \$32. More analysis is needed to determine the cause of these disparities, as well as whether the heating allowances provided by Butte County and Vallejo are reasonable.

### Conclusion

NHLP’s utility allowance study uncovered several irregularities that are likely occurring in housing authorities throughout the country, including failing to regularly adjust allowances, using flawed methodologies to set allowances, and failing to provide allowances for certain categories of utilities. Advocates should therefore consider investigating whether their PHAs have made similar errors in maintaining their utility allowances.

One of the first steps in this investigation is to send a public records act request to the PHA. Preparing these requests is relatively simple and may be an appropriate task for law student interns, deferred law firm associates, or pro bono counsel. Once the records arrive, advocates will quickly be able to determine whether the allowances were regularly adjusted during the period for which records were requested, and will be able to begin the process of determining whether the allowances were properly adjusted.<sup>11</sup> For more information, including sample public records act requests, advocates should consult *Advocating for Higher Utility Allowances in Federally Subsidized Housing: A Practical Guide*, by NHLP and the Legal Aid Society of Hawaii.<sup>12</sup> ■

<sup>11</sup> Advocates may want to base their decision on how far back to go with the records request on the applicable statute of limitations for a breach of contract claim and for a personal injury tort.

<sup>12</sup> The Guide is available free of charge to Housing Justice Network members at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800064>.

# Rural Housing Service Modifies Operation of Rural Voucher Program

For the third time in as many years, the Rural Housing Service (RHS) has modified the operation of the Rural Voucher Demonstration Program, this time without giving the public official notice of the changes and without fully explaining the effects of the changes.<sup>1</sup> The changes were made in an Unnumbered Letter (UL) sent by the Rural Housing Service to all state Rural Development (RD) Offices and published only on the Rural Development website.<sup>2</sup>

Most significantly, it is not clear from the UL whether it is intended to replace or supplement the Notice that the agency published in the Federal Register on March 24, 2008,<sup>3</sup> setting out its then current policies for operating the program. Thus, it is not clear, for example, whether the voucher term, which was set at three years in the March Federal Register notice, continues to be in effect or whether that unauthorized term has been lifted.<sup>4</sup>

Most significantly, the UL announces that field administration of the voucher program has been contracted to Quadel Consulting Corporation. In that role, Quadel is responsible for sending notices to residents of developments whose owners have announced their intention to prepay the Section 515 loans, retrieving from tenants and forwarding to RD Voucher Obligation Forms, forwarding the Housing Assistance Payment (HAP) contracts to the owners, and forwarding voucher renewal packets to residents.

The UL also makes clear that voucher eligibility is not restricted to residents living in developments whose owners are prepaying their loans early. They are also available to residents of developments that are being foreclosed upon by RD, prepaid in response to a loan acceleration, debt settlement, compromise offer, or transfer of the development by a deed-in-lieu of foreclosure, and held by RD as inventory property.

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<sup>1</sup>Unnumbered Letter from James C. Alsop, Acting Administrator Housing and Community Facilities Programs, to State Directors, Rural Development (April 10, 2008).

<sup>2</sup>Unnumbered Letters (ULs) are formal letters from the Rural Housing Service to Rural Development field staff. They are available on the RD website at [http://www.rurdev.usda.gov/regs/ul\\_list.html](http://www.rurdev.usda.gov/regs/ul_list.html). Typically ULs address administrative issues and clarifications regarding RHS program policy. They are posted to the RD website on a regular basis in the month that they are published. Information published in a UL may reflect agency policy but it does not satisfy the publication, notice or comment requirements of a statute requiring RHS to publish its regulations for comment, 42 U.S.C. § 1490, or the requirements of the Administrative Procedures Act, 5 U.S.C. § 703.

<sup>3</sup>73 Fed. Reg. 15,473.

<sup>4</sup>For a review of the RHS March 24, notice see NHLP, *RHS Makes Dramatic Changes to Rural Voucher Program*, 38 HOUS. L. BULL. 92 (Apr.-May 2008).

The UL continues to make clear that only citizens and permanent residents are eligible to receive the vouchers but that a copy of a birth certificate from a United States hospital bearing an official seal is an acceptable form of proof of United States' citizenship.<sup>5</sup>

The UL relieves tenants and landlords from having to forward leases to RD for review. This is unfortunate, as it provides no independent review of leases entered under the HAP contract.

It is unfortunate that RHS has chosen to operate the Voucher Demonstration Program for over three years without publishing regulations for public comment. Many of the program's provisions do not conform to the authorizing law and thus deprive program participants of rights that are guaranteed them by statute. It is expected that Congress will soon adopt new legislation that will establish a permanent rural voucher program that RHS will be forced to implement according to the Administrative Procedures Act. ■

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<sup>5</sup>As discussed in the *Housing Law Bulletin* article, *supra*, the citizenship restrictions adopted for the voucher program are inconsistent with many of the provisions of the statute authorizing RD to restrict its programs to citizens and persons legally admitted to the United States. Most importantly, it does not permit mixed-households to secure a voucher and does not provide for an appeal of a decision denying a voucher to a household.

# RD Foreclosures Delayed in Twenty-Two States

Rural Development (RD) recently made an error in which it sent acceleration notices to approximately 1327 Section 502 direct home loan borrowers giving them the wrong address for filing an administrative appeal. Borrowers who attempted to appeal the decision had their appeal letters returned because of an undeliverable address. These notices went to borrowers in twenty-two New England, Mid-Atlantic and Upper Mid-west states, which comprise the Eastern Division of the United States Department of Agriculture's National Appeals Division.<sup>1</sup> The faulty notices went to borrowers whose loans were accelerated between September 4, 2008, and March 25, 2009.

When RD was first confronted with the faulty notice problem, the agency proposed to simply delay or freeze any currently pending accelerations or foreclosures, give borrowers forty-five days to appeal and, if they failed to appeal, or lost the appeal, continue the acceleration and foreclosure where it was prior to the new acceleration notice. When advised that this would deprive borrowers of due process and an opportunity to seek assistance, the agency agreed to rescind all pending accelerations and foreclosures, reimburse borrowers for all expenses charged to their accounts,<sup>2</sup> and send out a new acceleration notice that would give the borrowers renewed rights of appeal prior to the initiation of the foreclosure action. RD state directors in the twenty-two states as well as attorneys and title companies handling foreclosures have been advised of the RD decision and new acceleration notices were sent to affected borrowers during the latter part of May.

In approximately sixteen cases RD actually foreclosed on borrowers. In these cases, it agreed to work with the borrowers on a case-by-case basis depending on whether the borrower was still residing in the home and whether the home was still in the RD inventory.

In approximately forty-three cases RD used the government benefit offset procedure to collect past due amounts from other federal government payments that were due to borrowers from, for example, the IRS, Social Security, or the Department of Veterans Affairs. In several of those cases, the collections brought the borrower accounts current or at least to the point where RD could not foreclose unless the borrowers again defaulted on their loans. Those borrower accounts have been reinstated and classified as current.

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<sup>1</sup>The affected states are ME, NH, VT, RI, MA, CT, NY, NJ, PA, DE, MD, VA, WV, OH, KY, MI, IN, IL, WI, MO, IA and MN.

<sup>2</sup>RD did not reverse appraisal charges in cases where the appraisal may be used as part of a new foreclosure. If, however, the loan is not foreclosed, RD will also reverse those charges.

## Advocate Assistance Needed

Unfortunately, most of the 1327 borrowers affected by this improper notice are unrepresented. Many will not understand why their account is being accelerated again or what their RD servicing options are or should have been. Moreover, in several instances the RD regulations with respect to borrower eligibility for a moratorium on payments are inconsistent with the law. RD takes the position that borrowers whose loans have been accelerated are ineligible for moratorium relief. In fact, the moratorium authorizing statute states that borrowers are eligible for a moratorium as long as the loan is outstanding and courts have ruled that borrowers are eligible for a moratorium up to the time of foreclosure.<sup>3</sup>

Due to privacy act considerations, RD has not released the names of the affected borrowers. It is therefore difficult, if not impossible, to locate them. Legal Services and other housing advocates are therefore urged to be on the lookout for RD Section 502 direct loan borrowers who may walk into their offices. Advocates are also urged to send copies of this article to local counseling agencies that may be servicing RD borrowers but may not know of the servicing options that RD can offer them.

Since many housing advocates may have legal interns in their offices this summer, it should be an interesting task for them to search through local county land or court records to identify any foreclosure actions initiated by RD that have been withdrawn by the agency as a result of its agreement to rescind prior accelerations and thereby locate the borrowers.

Advocates who need technical assistance with respect to RD borrowers' rights are urged to contact Gideon Anders at the National Housing Law Project at [ganders@nhlp.org](mailto:ganders@nhlp.org) or at (510) 251-9400 x3103. ■

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<sup>3</sup>United States v. Shield, 733 F.Supp. 776 (D. Vt. 1989), United States v. Rodriguez, 453 F. Supp. 21 (E.D. Wash. 1978).

# Public Housing Demolition in Galveston, Texas Is Subject to One-for-One Replacement<sup>1</sup>

On September 13, 2008, Hurricane Ike made landfall in Galveston, Texas. The powerful storm damaged large swaths of Galveston, including over half of the city's public housing units.<sup>2</sup> Seventy-five percent of the island was flooded, and the city's population fell to about 45,000 from 57,000.<sup>3</sup> In preparation for Ike's landfall, an evacuation order was issued for the area, and residents living in Galveston's public housing were forced to leave their homes.<sup>4</sup> The public housing units remain boarded up or unavailable, and the displaced public housing families have not been permitted to return.<sup>5</sup>

Many Galveston residents, along with the displaced public housing tenants, qualify for the Department of Housing and Urban Development's (HUD) Disaster Housing Assistance Program (DHAP).<sup>6</sup> But the vast majority of those who qualified could not find homes where they were able to use the available housing assistance.<sup>7</sup> Moreover, the need for affordable housing continues to be substantial. Prior to Ike, 57% of Galveston's households were occupied by renters.<sup>8</sup> Based on HUD criteria, Harish Krishnarao, the executive director of the Galveston Housing Authority (GHA), estimated that 83% of the 6000 displaced Galveston residents eligible for DHAP need some form of ongoing assistance.<sup>9</sup>

On January 28, 2009, the GHA board met and agreed to tear down immediately two of its large public housing developments, Oleander Homes and Palm Terrace, which comprise over 54% of the multifamily housing

stock.<sup>10</sup> In addition, GHA proposed to renovate two other developments, Cedar Terrace and Magnolia Homes, so as to rehouse some public housing tenants more quickly.<sup>11</sup> Ultimately, it is anticipated that these units will also be demolished and reconstructed. One month later, GHA submitted a letter to HUD notifying it that GHA intended to demolish Oleander Homes and Palm Terrace.<sup>12</sup> Believing that its actions were permissible under a HUD website guideline regarding accidental losses, GHA wanted confirmation that it had authority to hasten the demolition. GHA had hoped to demolish the complexes by March 23, 2009, the deadline by which the Federal Emergency Management Agency would pay for debris removal, saving GHA an estimated \$1.2 million.<sup>13</sup>

On March 2, 2009, Lone Star Legal Aid (LSLA) filed an administrative complaint with HUD on behalf of displaced Galveston public housing residents, opposing GHA's plans to demolish these public housing developments without complying with laws governing the demolition and disposition of public housing.<sup>14</sup> The parties recently entered into a settlement agreement in which LSLA has agreed to withdraw its opposition to GHA's demolition plans in exchange for GHA agreeing to provide a one-for-one replacement of the multifamily public housing units that it intends to demolish.<sup>15</sup> This article outlines the law governing demolitions related to natural disasters, LSLA's administrative complaint, and the terms of the settlement agreement.

## HUD's Policy Regarding Demolition for Accidental Loss

In response to questions raised by a series of particularly destructive hurricanes, HUD issued an undated guidance on its website addressing "demolition to alleviate the damage caused by accidental losses such as fires, storms, and other natural disasters."<sup>16</sup> The guidance states that the standard contract between HUD and public housing agencies, the Annual Contributions Contract (ACC), allows housing authorities to take all necessary steps to ensure the safety of their residents, employees and the general public without waiting for approval from HUD in

<sup>1</sup>The author of this article is Julieanna Vinogradsky, a J.D. candidate at the University of California, Hastings, School of Law and an intern at the National Housing Law Project.

<sup>2</sup>Roma Khanna, *Recovering from Hurricane Ike*, HOUSTON CHRON., Mar. 4, 2009, at B1.

<sup>3</sup>Leigh Jones, *Galveston Housing Authority Wants \$60M of Ike Fund for New Public Housing Units*, GALVESTON DAILY NEWS, Mar. 25, 2009.

<sup>4</sup>*Id.*

<sup>5</sup>Rhiannon Meyers, *Two Public Housing Complexes To Be Demolished*, GALVESTON DAILY NEWS, Jan. 29, 2009, <http://galvestondailynews.com/story.lasso?ewcd=fa1e3c75cc66215b>.

<sup>6</sup>Press Release, HUD, HUD, FEMA Announce 18-Month Housing Assistance Program for Families Displaced by Hurricane (Sept. 24, 2008), <http://www.hud.gov/news/release.cfm?content=pr08-145.cfm>.

<sup>7</sup>Meyers, *supra* note 5 (reporting that of the 7000 Galveston County families who qualified for the Disaster Housing Assistance Program, only 1800 or 26% had found places to live).

<sup>8</sup>Galveston Community Recovery Plan: Project Recovery Value, [http://recoverygalveston.org/documents/RecoveryProjectsbyRanking\\_100word\\_4.7.09.pdf](http://recoverygalveston.org/documents/RecoveryProjectsbyRanking_100word_4.7.09.pdf).

<sup>9</sup>Leigh Jones, *Housing Authority Officials Defend Plans*, GALVESTON DAILY NEWS, Apr. 1, 2009, <http://galvestondailynews.com/story.lasso?ewcd=0d762c48d0813117>.

<sup>10</sup>In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. at 2 (on file with NHLP).

<sup>11</sup>Meyers, *supra* note 5.

<sup>12</sup>Letter from Harish Krishnarao, Executive Director, Galveston Housing Authority, to Dan Rodriguez, Program Center Coordinator, HUD Houston Field Office (Feb. 27, 2009) (on file with NHLP).

<sup>13</sup>Rhiannon Meyers, *Complaint Halts Planned Public Housing Demolition in Galveston*, GALVESTON DAILY NEWS, Mar. 5, 2009, [http://www.khou.com/news/local/galveston/stories/khou090305\\_tnt\\_housing-demolition.5e265fa.html](http://www.khou.com/news/local/galveston/stories/khou090305_tnt_housing-demolition.5e265fa.html).

<sup>14</sup>In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. (on file with NHLP).

<sup>15</sup>In re Oleander Homes & Palm Terrace Apartments, Settlement Agreement (on file with NHLP).

<sup>16</sup>HUD, *Demolition for an Accidental Loss*, [http://www.hud.gov/offices/pih/centers/sac/demo\\_dispo/acclloss.cfm](http://www.hud.gov/offices/pih/centers/sac/demo_dispo/acclloss.cfm).

the event of “abrupt damage” from a natural disaster.<sup>17</sup>

The guidance provides that if a natural disaster occurs, a housing authority may demolish all or part of a damaged structure and dispose of the debris “to the extent needed to maintain the site in a safe condition or to eliminate an attractive nuisance.”<sup>18</sup> If the housing authority decides to rebuild the damaged structure, any additional demolition required to carry out the repair would also not be subject to the required procedure for demolition and disposition of public housing.<sup>19</sup> But if the housing authority decides not to rebuild the structure, an application for demolition and disposition under 42 USC § 1427p must be submitted to formalize the removal of the units from the inventory. This requirement stems from Section 13 of the ACC, which directs housing authorities to “restore, rebuild or reconstruct a damaged or destroyed project to the extent that insurance proceeds permit, unless HUD authorizes otherwise in writing.”<sup>20</sup> According to HUD, demolition arising from accidental loss is the one exception where it may approve applications for demolition and disposition after the fact.<sup>21</sup>

HUD based this new guidance upon Section 4 of the ACC, which the website references but does not quote. Section 4 provides as follows:

Mission of the HA. The HA shall at all times develop and operate each project solely for the purpose of providing decent, safe, and sanitary housing for eligible families in a manner that promotes serviceability, economy, efficiency, and stability of the projects, and the economic and social well-being of the tenants.<sup>22</sup>

Significantly, the guidance does not mention Section 7 of the ACC, which provides that the housing authority “shall not demolish or dispose of any project, or a portion thereof, other than in accordance with the terms of the ACC and applicable HUD requirements.”<sup>23</sup>

### Administrative Complaint

On behalf of displaced public housing residents, LSLA filed an administrative complaint with HUD objecting to the proposed demolition. The complaint asserted that HUD’s exception for demolition due to accidental loss did not apply to the situation faced by GHA.<sup>24</sup> More than five

months elapsed between the dates the storm damaged the buildings and the date on which GHA sought confirmation that the proposed demolition did not require HUD approval. During that time, the buildings in question were “fenced and secured to keep away residents and general public.”<sup>25</sup> Accordingly, the buildings were neither impinging on the safety of the residents, employees and the general public nor creating an attractive nuisance. The administrative complaint also alleged that at the time of GHA’s request to HUD, GHA had maintained the site in a safe condition and was in a position to do so for the duration of an application for demolition and disposition pursuant to 42 U.S.C. § 1427p.

LSLA also objected to GHA’s assertion in its letter to HUD that “residents have been relocated to other developments.”<sup>26</sup> As noted above, the displaced public housing tenants were eligible for DHAP because of the nationally declared disaster. However, DHAP payments are set to expire in eighteen months<sup>27</sup> or sooner for some tenants.<sup>28</sup> Many families have not been able to find a unit where they can use the DHAP subsidy. Moreover, this subsidy may require recipients to pay more than 30% of household income as soon as May 2009, in order to remain eligible for the assistance.<sup>29</sup> Most importantly, DHAP assistance does not provide the permanent replacement housing that is required for families displaced due to demolition or disposition of public housing.<sup>30</sup>

### Settlement Agreement

The settlement agreement requires GHA to rebuild the units it plans to demolish on a one-for-one basis and in the same bedroom size configurations as existed pre-Hurricane Ike. Displaced residents will have first preference to return to both repaired housing and replacement housing. GHA further agreed to provide tenant protection vouchers to displaced public housing tenants when the demolition begins. Additionally, GHA committed to a timeframe of no more than three to five years for the construction of replacement housing, and agreed to meet and consult with LSLA on at least a quarterly basis regarding planning and implementation of demolition and replacement housing.<sup>31</sup>

<sup>25</sup>Letter from Harish Krishnarao, *supra* note 12.

<sup>26</sup>*Id.*

<sup>27</sup>Disaster Housing Assistance Program - Ike (DHAP-Ike) Operating Requirements, PIH 2008-38 (Oct. 14, 2008) (some families may become ineligible for DHAP as of July 31, 2009).

<sup>28</sup>Disaster Housing Assistance Program-Ike (DHAP-Ike) Case Management Guidelines, PIH-2008-45 (Dec. 10, 2008).

<sup>29</sup>The public housing tenants may be eligible for a hardship waiver. See *id.* at ¶ i.

<sup>30</sup>See 42 U.S.C.A. § 1437p(a)(4) (West 2003); 24 C.F.R. § 970.21 (2008).

<sup>31</sup>Rhiannon Meyers, *GHA to Move Forward with Demolition*, GALVESTON DAILY NEWS (Mar. 16, 2009), <http://www.galvnews.com/story.lasso?ewc d=5aaca9c35b3632f2> (“I don’t like the idea of Lone Star Legal Aid setting themselves up as a permanent monitor of what we do,” said Robert Bastien, attorney for the Galveston Housing Authority. “But, if the idea

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>See 42 U.S.C.A. § 1437p (West 2003).

<sup>20</sup>HUD, *Demolition for an Accidental Loss*, *supra* note 16.

<sup>21</sup>*Id.*

<sup>22</sup>Terms and Conditions: Constituting Part A of a Consolidated Annual Contributions Contract Between Housing Authority and the United States of America, HUD 53012A (7/95), § 4, <http://www.hud.gov/offices/adm/hudclips/forms/files/53012-a.pdf>.

<sup>23</sup>*Id.* § 7.

<sup>24</sup>In re Oleander Homes & Palm Terrace Apartments, Admin. Compl. (on file with NHLP).

## Conclusion

HUD's guidance regarding demolition in the context of accidental loss violates the public housing demolition/disposition statute and the Administrative Procedure Act rules regarding the publication of rules for notice and comment. There is only one statutory exception to the demolition and disposition statute, which is for a de minimus loss of units.<sup>32</sup> The regulations, which were adopted after notice and comment, provide for fifteen additional exceptions to 42 U.S.C. § 1427p.<sup>33</sup> These regulatory exceptions do not mention an exception due to accidental loss or natural disaster. HUD's reliance upon a mission statement in the ACC is insufficient to support its guidance and ignores the most relevant ACC provisions. The ACC must not be read to nullify the statute.

To the extent that the guidance may have some value in instructing public housing agencies to move quickly to address real dangers, any such policy should be limited to situations posing an imminent danger to health or safety. HUD's failure to limit the guidance means that public housing agencies may attempt to eliminate a substantial number of public housing units without seeking HUD oversight, without providing permanent replacement housing, and without consulting with the residents or local government. Moreover, the decision to demolish may be made in situations in which the housing may be rehabilitated. GHA's proposal is an example of what may happen as a result of HUD's overbroad policy of encouraging agencies to demolish public housing post-disaster without even following the provisions of the demolition/disposition statute. ■

## Stimulus Funding Seeks to Improve Energy Efficiency of Multifamily Housing

The American Reinvestment and Recovery Act of 2009 (ARRA)<sup>1</sup> provided unprecedented funding for improving the energy efficiency of housing serving low-income families. The Department of Housing and Urban Development's (HUD's) Green Retrofit Program (GRP) for Multifamily Housing<sup>2</sup> will provide \$250 million in grants and loans for building rehabilitation that will reduce utility costs, improve tenant health and provide other environmental benefits. This article describes in detail the Notice<sup>3</sup> HUD recently published to implement the GRP funds.<sup>4</sup> Additionally, the Department of Energy's (DOE) Weatherization Assistance Program<sup>5</sup> will provide \$5 billion to states to make homes more energy efficient, and DOE and HUD are working together to ensure that these funds can be used to improve federally subsidized housing.

### Eligible Projects

Eligible projects for GRP include Section 202 projects with at least thirty-two units, Section 811 projects with at least eight units, USDA Section 515 projects with at least twenty units, and all other project-based Section 8 projects with at least seventy-two units.<sup>6</sup> Project-based voucher units are not eligible for the GRP. Additionally, projects with Real Estate Assessment Center inspection scores of less than sixty are ineligible.<sup>7</sup>

HUD will limit the number of each type of project units that will be accepted into the program. Approximately 3700 Section 202 units, 350 Section 811 units, 1000 Section 515 units, and 15,000 project-based Section 8 units will be accepted into the program.<sup>8</sup> Further, no more than 3% of all the units initially accepted into the program can be under the control of a single owner.<sup>9</sup> Additionally, HUD is seeking geographical diversity, and no more than 20% of the units accepted into the program will be located in any one HUD region.<sup>10</sup>

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here is that we don't want to tie all this stuff up with HUD for months and this addresses their concerns ... and gets the ball rolling, this is what we want to do. And it's not terribly burdensome. It does place some burdens on us, but not terrible burdens.”)

<sup>32</sup>42 U.S.C.A. § 1437p(e) (West 2003).

<sup>33</sup>24 C.F.R. § 970.3 (2008).

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<sup>1</sup>Pub. L. 111-5 (2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf).

<sup>2</sup>ARRA div. A, tit. XII.

<sup>3</sup>Green Retrofit Program for Multifamily Housing (GRP), H 09-02 (May 13, 2009) [hereinafter Notice].

<sup>4</sup>For more information about the Green Retrofit Program, visit HUD's Recovery website, which contains a Frequently Asked Questions document and a recording from a presentation HUD conducted on the program on May 13.

<sup>5</sup>ARRA div. A., tit. IV.

<sup>6</sup>Notice at 7.

<sup>7</sup>*Id.* at 9.

<sup>8</sup>*Id.* at 22.

<sup>9</sup>*Id.* at 22-23.

<sup>10</sup>*Id.* at 23.



## Eligible Activities

Owners may receive funding for green building rehabilitation projects that conserve energy and water, improve indoor air quality and provide other environmental benefits.<sup>11</sup> A third-party contractor known as a Participating Administrative Entity (PAE) will recommend a green retrofit plan to the owner. In developing the plan, the PAE must conduct a physical condition assessment and a tenant meeting.<sup>12</sup> The PAE must use its “best efforts” to consider the tenants’ feedback when developing the plan.

Owners must accept at least 75% of the PAE’s recommended green retrofit items. Owners must consider green recommendations in the following areas:

- efficient appliances, heating and cooling systems, water heaters and lighting;
- improvements to windows, doors and insulation;
- indoor air quality improvements, such as fans and low volatile organic compound (VOC) paints, sealants and cabinets; and
- other green features, including landscaping improvements, integrated pest management, recycling programs, hazardous waste collection and green management of construction debris.<sup>13</sup>

## Amount and Type of Assistance

HUD will award grants and loans on a first-come, first-served basis and anticipates that between 300 and 350 projects will receive funding. HUD may award up to \$15,000 per unit, but the average cost for all units retrofitted under the program cannot exceed \$10,000 per unit.<sup>14</sup> Both green retrofit grants and green retrofit loans are available. There are three categories of projects that are eligible for the green retrofit grant: (1) Section 202 projects; (2) Section 811 projects; and (3) projects where the owner is a nonprofit and tenants pay their own utilities for at least heat and lights.<sup>15</sup> All other projects are eligible for the green retrofit loan, which has an interest rate of either 1% or the applicable federal rate at the owner’s request.<sup>16</sup>

## Extension of Affordability Requirements

To receive GRP funds, owners must agree to extend project affordability use agreements for fifteen years beyond current affordability requirements.<sup>17</sup> Prepayment of the GRP loan does not terminate these affordability

requirements. Additional requirements apply to developments with project-based Section 8 contracts that will expire within eighteen months of the date of the GRP application. Once the owner’s GRP application has been accepted for processing by HUD, the owner must agree to make a contract renewal request within sixty days.<sup>18</sup> HUD will accelerate the contract renewal process for these developments.

## Application Process

HUD began accepting applications for GRP funds on June 15, and it is processing applications in the order that they were received by HUD. It is limiting the initial number of owners whose applications will be processed in order to stay within the \$250 million allocated for the program. All other applicants will be placed on a waiting list. At least weekly, HUD will post on its GRP website a summary of all the applications that it is currently processing, as well as the waiting list status of all other applications.<sup>19</sup> This enables advocates to monitor which developments in their communities will likely receive GRP funds.

As part of the application, owners must secure releases from tenants so that HUD can obtain information about tenant utility consumption directly from utility companies.<sup>20</sup> The releases must authorize the utility company to release consumption data to the owner, HUD and any designee of HUD. An owner must obtain releases from at least half of the project’s tenants. If the owner fails to do so, it must explain the efforts undertaken to obtain the releases, which must include at least two written communications and two in-person attempts to contact the tenants. After the green retrofits are complete, the data will be used to conduct analyses to determine the amount by which utility usage has decreased in a particular development. Given the GRP program’s benefits for tenants, including newer appliances, improved air quality and preservation of affordable units, advocates, tenant organizers and resident leaders should volunteer to assist owners in obtaining these releases.

Once HUD receives an owner’s application, it will assign it to a PAE, which will manage the due diligence, underwriting, negotiation and closing of the green retrofit grant or loan. The PAE must close the grant or loan within 120 days after the application is assigned to it.<sup>21</sup>

HUD will begin obligating GRP funds by September 2009, and owners must begin making improvements immediately thereafter. Owners will generally be required to complete rehabilitation within twelve months following the closing of the green retrofit grant or loan.

<sup>11</sup>*Id.* at 2.

<sup>12</sup>*Id.* at 5.

<sup>13</sup>*Id.* at 20.

<sup>14</sup>*Id.* at 2.

<sup>15</sup>*Id.* at 33-34.

<sup>16</sup>*Id.* at 37.

<sup>17</sup>*Id.* at 14.

<sup>18</sup>*Id.* at 15.

<sup>19</sup>*Id.* at 23. Information on applications received and waiting list status will be posted at [http://portal.hud.gov/portal/page?\\_pageid=153,7973195&\\_dad=portal&\\_schema=PORTAL](http://portal.hud.gov/portal/page?_pageid=153,7973195&_dad=portal&_schema=PORTAL).

<sup>20</sup>*Id.* at 11.

<sup>21</sup>*Id.* at 6.

HUD may extend the deadline for completing the retrofits, but owners must finish the retrofits within twenty-four months.<sup>22</sup>

### Owner Incentives

All owners are eligible for four incentives under the GRP. The pre-development incentive will be paid to the owner at the closing of the green retrofit grant or loan to offset the owner's due diligence and out-of-pocket closing costs.<sup>23</sup> The incentive is equal to 1% of the estimated costs of the green retrofits and is capped at \$10,000.<sup>24</sup> The efficiency incentive is paid to the owner upon completion of the retrofits.<sup>25</sup> The maximum amount of this incentive is the lesser of 3% of the costs of the retrofit or \$30,000.<sup>26</sup> Under the incentive performance fee, owners will receive incentive payments at the end of each year that they participate in the GRP.<sup>27</sup>

Perhaps most significant to advocates is the targeted incentive for job creation. This incentive encourages owners to employ low-income persons residing in the metropolitan area in which the project is located, or to contract with businesses that are owned by or employ such persons.<sup>28</sup> Once the owner completes the green retrofits, it will receive the lesser of 10% of the amounts paid to the low-income persons or businesses, or \$25,000. To qualify for this incentive, an owner must comply with the requirements of Section 3 of the Housing and Urban Development Act of 1968<sup>29</sup> and its implementing regulations.<sup>30</sup> Advocates should work with successful GRP applicants to ensure that Section 3 goals are reached and maintained throughout the term of the contract. Owners are required to comply with the Section 3 annual reporting requirements<sup>31</sup> and submit a final Section 3 report indicating the number of employment, contracting and other economic opportunities that were generated.

### Utility Allowances

If any utilities at a project are tenant-paid, the owner must agree to re-determine utility allowances within eighteen months after the green retrofits are complete, "in accordance with applicable requirements of HUD."<sup>32</sup> It is unclear at this time whether HUD will issue additional guidance to owners on how to recalculate or implement utility allowances once green retrofits are complete. Due

to reduced energy consumption as a result of green retrofits, tenants' utility allowances will likely decrease once the retrofits are finished. Ideally these decreases should be phased in gradually to alleviate any resulting hardship to tenants.

### Use of Weatherization Funds in Subsidized Housing

In addition to the GRP, another ARRA-funded program that seeks to improve the energy efficiency of homes is the Department of Energy's Weatherization Assistance Program (WAP).<sup>33</sup> WAP reduces the heating and cooling costs of low-income families by improving the energy efficiency of their homes. Examples of energy efficiency improvements performed through WAP include weatherstripping, caulking, attic insulation, and heating system repair or replacement.

To be eligible for weatherization assistance, a rental unit must be occupied by a family whose income is below 200% of the federal poverty level.<sup>34</sup> At least 66% of the units in multifamily buildings (50% for properties with fewer than five units) must be occupied by families whose incomes fall below this threshold.<sup>35</sup> Income verification procedures under WAP have been burdensome for multifamily owners, and they are duplicative of HUD's procedures for verifying income eligibility for federally assisted housing.

To increase the number of federally subsidized units that are weatherized under WAP, DOE and HUD recently entered into an agreement to streamline WAP income verification procedures.<sup>36</sup> DOE also published a proposed rule on weatherization of public housing, project-based Section 8 developments, Section 202 Supportive Housing for the Elderly, Section 811 Supportive Housing for Persons with Disabilities, and Low-Income Housing Tax Credit properties.<sup>37</sup> The proposed rule would significantly streamline the income verification requirements for owners seeking to weatherize federally subsidized housing. States would be able to rely upon HUD's income verification procedures in WAP determining income eligibility.<sup>38</sup> Under the proposed rule, HUD would provide a listing, to be posted on DOE's website, of all properties that meet WAP income requirements.<sup>39</sup> Comments on the proposed

<sup>22</sup>*Id.* at 3.

<sup>23</sup>*Id.* at 39.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 40.

<sup>28</sup>*Id.*

<sup>29</sup>12 U.S.C.A. § 1701u (Westlaw May 26, 2009).

<sup>30</sup>24 C.F.R. Part 135.

<sup>31</sup>*See id.*

<sup>32</sup>Notice at 39.

<sup>33</sup>42 U.S.C.A. § 6861 *et seq.* (Westlaw May 14, 2009).

<sup>34</sup>Weatherization Assistance Program for Low-Income Persons, 74 Fed. Reg. 23,804, 23,806 (May 21, 2009).

<sup>35</sup>*Id.*

<sup>36</sup>Memorandum of Understanding Between Department of Energy and Department of Housing and Urban Development, Coordinating Recovery Act Funds for Home Energy Retrofits, May 6, 2009, <http://www.hud.gov/recovery/doemoucombined.pdf>.

<sup>37</sup>Weatherization Assistance Program for Low-Income Persons, 74 Fed. Reg. at 23,804.

<sup>38</sup>*Id.* at 23,806.

<sup>39</sup>*Id.* at 23,807. The list would be available on the WAP website, [www.eere.energy.gov/wip](http://www.eere.energy.gov/wip).

rule were due June 22. DOE and HUD are planning to conduct a series of forums across the country to facilitate the use of WAP funds in federally subsidized housing.

### Conclusion

Advocates should encourage subsidized owners to apply for GRP and WAP funds. The benefits for tenants include lower utility bills, improved air quality, newer appliances, and warmer housing in the winter and cooler housing in the summer. GRP funds have the additional advantage of extending affordability requirements for fifteen years and expediting contract renewals for project-based Section 8 properties. The benefits for owners include increased property value, extension of the property's long-term viability, and the GRP's financial incentives. ■

## President Obama Signs Serve America Act

In keeping with President Obama's promise to increase service in the United States, Congress passed and the President signed the Edward M. Kennedy Serve America Act on April 21, 2009.<sup>1</sup> The Act was both a reauthorization of current federal community service programs,<sup>2</sup> as well as a dramatic expansion of those programs. Notably, the bill aims to increase the number of Americorps members from 75,000 to 250,000 by the year 2017 and includes five new service corps—education, healthy futures, clean energy, veterans and opportunity. The opportunity corps will provide opportunities for service in various areas of housing, including construction of housing, assistance to homeless populations and preservation of affordable housing, among other issues.<sup>3</sup>

Generally, the Serve America Act is designed to increase volunteerism in the United States. The Act will do this by encouraging more groups of people to serve and increasing the number of service corps. For example, the Act creates tax incentives for employers to allow employees to take one year to do service work. It also encourages retirees and youth to engage in service activities. Additionally, the Act establishes a commission to study how the federal government, nonprofits and the private sector can work together to more effectively meet the needs of disadvantaged individuals and other issues that the legislation seeks to address.

Most relevant to housing advocates, the National Association of HUD Tenants launched a campaign to include housing as a priority program in late 2008. Support from the National Low Income Housing Coalition was also vital. Though Congress ultimately did not add a housing corps, it explicitly added housing-related activities as priority activities within the opportunity corps. The Act lays out several priorities for the economic opportunity corps. One priority is to assist in the construction, rehabilitation or preservation of housing units for low-income families. This provision will help organizations build staff capacity on vital preservation issues, including making homes more energy efficient.

In addition to working toward preserving affordable housing, participants in the opportunity corps may provide direct assistance to economically disadvantaged<sup>4</sup> and homeless individuals in finding and maintaining housing.

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<sup>1</sup>Edward M. Kennedy Serve America Act, Pub. L. No. 111-013, \_\_ Stat. \_\_ (2009).

<sup>2</sup>The Edward M. Kennedy Serve America Act amends the National and Community Service Act of 1990, 42 U.S.C.A. §§ 12501 *et seq.*

<sup>3</sup>Pub. L. 111-013, § 1302(a)(5), *amending* 42 U.S.C. § 12572.

<sup>4</sup>The term "economically disadvantaged" means, with respect to an individual, an individual who is determined by the Chief Executive Officer to be low income according to the latest available data from the Department of Commerce.

In conjunction with another enumerated activity, "assisting individuals in obtaining information about Federal, State, local, or private programs or benefits focused on assisting economically disadvantaged individuals, economically disadvantaged children, or low-income families," opportunity corps members may be able to work with low-income families to find or maintain housing.

Other activities under the opportunity corps may provide a chance for members to work on Section 3 issues, because the Act states that eligible activities include "assisting economically disadvantaged individuals in obtaining access to job placement assistance" and helping enroll such individuals in job training programs. The Section 3 program, enacted under the Housing and Urban Development (HUD) Act of 1968, requires that recipients of certain HUD funds, as well as the contractors they employ, provide job training, employment and contract opportunities for low- and very-low income residents "to the extent feasible."<sup>5</sup>

The Act sets forth indicators to assess an activity. One indicator is the number of housing units built or improved for economically disadvantaged individuals or low-income families. There is also a provision that would allow the HUD Secretary and the Secretary of the Treasury to establish additional indicators so long as they help economically disadvantaged and low-income individuals. Again, these signal a clear commitment to including housing as an integral aspect of the opportunity corps work.

Currently, organizations that receive Americorps VISTA volunteers, one of the major federal community service programs, must apply through their Corporation for National and Community Service state office to participate in the program.<sup>6</sup> If accepted, the organization may elect to cost-share by providing living expenses for corps members, but is not required to do so. The volunteers are otherwise paid directly by the government. Assuming the expanded service programs will use the same selection method, organizations would ordinarily apply after release of a Notice of Funding Availability.

Subject to appropriations, the Serve America Act, which goes into effect on October 1, 2009, will create significant opportunities to increase the number of people working on housing issues, especially preservation. The Congressional Budget Office estimates that \$481 million is needed in 2010 to fully implement the Act's programs; approximately \$6 billion will be needed from 2010-2014.<sup>7</sup> Housing organizations should be aware of these possibilities as funds are appropriated for the opportunity corps. ■

<sup>5</sup>12 U.S.C.A. § 1701u (Westlaw May 26, 2009).

<sup>6</sup>Corporation for National And Community Service, Selection of Americorps VISTA Sponsors and Projects; Guidelines, 60 Fed. Reg. 7172 (Feb. 7, 1995).

<sup>7</sup>Congressional Budget Office, H.R. 1388 Generations Invigorating Volunteerism and Education Act, March 17, 2009, available at <http://www.cbo.gov/ftpdocs/100xx/doc10027/hr1388.pdf>.

## 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,<sup>1</sup> Lexis,<sup>2</sup> or, in some instances, the court's website.<sup>3</sup> Copies of the cases are *not* available from NHLP.

### Project-Based Section 8: Tenant Evicted for Failure to Comply with Recertification Procedures

*Clay Hill Assocs. v. Irizarry*, 2009 WL 1353760 (Conn. Super. Ct. May 8, 2009) (unreported). The court found that the landlord met its burden of proving that the tenant violated the terms of her lease and entered judgment for the landlord's immediate possession of the unit. The lease agreement stated that the tenant was required to meet with the landlord by a certain date to provide information for recertification of her HUD rental assistance eligibility. As the recertification date approached, the tenant received an initial notice and two reminder notices restating these lease terms. The tenant did not appear at the first meeting. At the second meeting, she refused to sign the HUD documents because of a dispute as to how her income should be calculated. Finding that the tenant failed to assert any special defenses, the court entered judgment for eviction.

### Public Housing: Housing Authority Not Immune to Personal Injury Suit Because Elevator Maintenance Is a Ministerial Activity

*D.C. Hous. Auth. v. Pinkney*, \_\_A.2d\_\_, 2009 WL 1227726 (D.C. May 7, 2009). A public housing tenant sued the District of Columbia Housing Authority (DCHA) and its elevator service contractor for injuries incurred when an elevator malfunctioned. Against contractor recommendations, DCHA did not repair the malfunctioning elevator because it planned to replace the entire development. A jury found DCHA negligent. The court of appeals affirmed, rejecting DCHA's argument that it was protected by governmental immunity. For immunity to apply, DCHA's act must have been discretionary, "involv[ing] the formulation of policy," rather than ministerial. The court found elevator

<sup>1</sup><http://www.westlaw.com>.

<sup>2</sup><http://www.lexis.com>.

<sup>3</sup>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>.

maintenance to be a ministerial activity. The court also found that the tenant established the appropriate standard of care even though expert testimony did not speak directly to a standard for elevators in municipally owned buildings, that a jury instruction on *res ipsa loquitur* was warranted, and that DCHA had notice of the elevator's dangerous condition.

### **Fair Housing Amendments Act: Disabled Tenant Obtains Temporary Restraining Order Halting Eviction**

*Gwin v. Pyros*, 2009 WL 1269075 (W.D. Pa. May 6, 2009). The court granted a tenant's emergency motion for a temporary restraining order, thereby allowing the disabled tenant to remain in her home after a county court entered a judgment for her eviction. The tenant had expressed concern about the rights of persons with disabilities in the building, and she was associated with disabled tenants whom the landlord had previously attempted to evict. Shortly after the tenant voiced her concern, the landlord sought to evict her for keeping ferrets in the unit, even though property management staff knew for several months that the tenant had the animals in her unit. Given the seemingly retaliatory and discriminatory nature of the landlord's eviction action in violation of the Fair Housing Amendments Act, the court found good cause for the issuance of the restraining order and scheduled a preliminary injunction hearing.

### **Public Housing: Tenant May Pursue Section 1983 Claims Against Housing Authority**

*Comer v. Hous. Auth. of Gary*, \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 1299576 (N.D. Ind. May 6, 2009). The president of a public housing resident council brought a Section 1983 claim against the Gary Housing Authority (GHA) and a GHA consultant. The tenant-president alleged that, in response to his speaking publicly about GHA improprieties, the defendants retaliated against him with "threats, harassment and public humiliation," some of which constituted violations of HUD resident participation regulations. The case came before the court on two motions to dismiss. With respect to the claims against the GHA consultant, the court held that the tenant could not use Section 1983 to bypass the HUD enforcement scheme, and therefore the tenant's allegations regarding violations of HUD regulations could not proceed. However, the court denied GHA's motion to dismiss, finding that the tenant alleged sufficient facts to support his claim that GHA retaliated against him for exercising his First Amendment rights.

### **Fair Housing Amendments Act: Pattern or Practice of Race Discrimination; Vicarious Liability**

*United States v. Sturdevant*, 2009 WL 1211051 (D. Kan. May 1, 2009). The manager of an apartment complex engaged in egregious and hostile discriminatory conduct directed at African-American tenants. In retaliation for an employee's compliance with a related HUD investigation, the manager had the employee terminated. At the election of the employee, the Attorney General commenced a civil action in federal court pursuant to the Fair Housing Amendments Act. The management company and complex owners brought two motions to dismiss, arguing respectively that a pattern or practice of discrimination had not been established and that the government failed to allege facts to support a claim for vicarious liability. The court denied both motions. The former motion failed because courts have consistently refused to establish a minimum number of incidents that constitute a pattern or practice of discrimination. The court therefore rejected the argument that, as a matter of law, conduct at one property out of 1500 could not constitute a pattern or practice. The latter motion failed because the "FHA imposes liability in accordance with traditional agency principles." The owner therefore was vicariously liable for the discriminatory acts of the manager who operated the apartment buildings.

### **Housing Choice Voucher Program: Rooker-Feldman Doctrine; Res Judicata**

*Pondexter v. Allegheny County Hous. Auth.*, 2009 WL 1144022 (3d Cir. Apr. 29, 2009) (unreported). The court affirmed motions to dismiss and summary judgment against a tenant suing the Allegheny County Housing Authority, HUD and an apartment complex. The complex obtained an eviction judgment against the tenant in state court, after which he filed a federal suit alleging claims of race discrimination under the Fair Housing Act (FHA) and Title VI. The court found that the district court was incorrect in applying the Rooker-Feldman doctrine to bar the tenant's FHA claims against the complex, as Rooker-Feldman does not bar federal discrimination claims for conduct predating a state court's judgment. However, principles of res judicata barred these claims instead. The court also held that federal regulations precluded the tenant from pursuing a private claim against HUD under his Housing Assistance Payment contract.

## **Housing Choice Voucher Program: Tenant May Not Withhold Rent; Hearsay Admissible in Administrative Hearings**

*Gandy v. Hous. Auth. of San Diego*, 2009 WL 1154281 (Cal. Ct. App. Apr. 29, 2009) (unreported). The Housing Authority of the County of San Diego terminated a voucher tenant's assistance after he was evicted from his apartment for refusing to grant access to his unit to make repairs and for withholding rent. The housing authority terminated the tenant's participation on three grounds: (1) for causing a breach in the housing quality standards by denying the owner access to make repairs; (2) for breaching the lease by denying access for repairs, failing to pay rent, and being evicted; and (3) for providing untrue information in stating that his two minor children were living with him. Although the tenant had withheld his rent because the owner had not repaired hazardous conditions in his apartment, housing authority employees informed the tenant that withholding rent was not an option under the voucher program and that failure to pay rent would result in program termination. The court of appeals found that the record supported the trial court's conclusion that the tenant committed serious violations of the lease by failing to pay rent and failing to permit the owner to repair the unit. The court also found that the tenant was required to abide by the housing authority's policy precluding him from withholding rent without the housing authority's agreement. Finally, the court found that the trial court could consider hearsay evidence regarding the tenant's family composition, as federal regulations provide that hearsay evidence is admissible in housing authority administrative proceedings.

## **Housing Choice Voucher Program: Repayment of Funds No Defense in Government Theft Action**

*United States v. Fields*, 2009 WL 1090059 (11th Cir. Apr. 23, 2009) (per curiam) (unreported). A tenant was convicted of theft from the United States government after she misreported her income during recertification. The appellate court upheld the district court's exclusion of evidence regarding the tenant's repayment of the balance. The court found that intent to repay stolen money, and "even actual repayment," is not a defense to a government conversion action. The court thus affirmed the tenant's conviction.

## **Public Housing: Housing Authority's Liability for Dangerous Conditions**

*Spinola v. City of Union City*, 2009 WL 1025165 (N.J. Super. Ct. App. Div. Apr. 17, 2009) (unreported). The plaintiff was injured on a poorly maintained flight of stairs during a

visit to a public housing complex and filed a tort action against the Union City Housing Authority (UCHA). The motion judge granted summary judgment to UCHA, finding that it did not have prior notice of the stairs' condition and that it was entitled to an allocation of resources defense. The court reversed on two grounds. First, the allocation of resources defense was not available because UCHA did not prove that, prior to the accident, it had made a specific discretionary expenditure decision not to repair the stairs. Second, although no HUD reports contained note of poor stair conditions until ten months following the accident, the question of whether UCHA acted in a "palpably unreasonable manner" in failing to maintain or repair the stairs was one suited for the jury and not the motion judge.

## **Public Housing: Hearing Officer Not Required to Make Inquiries of Pro Se Tenant**

*Jackson v. Hernandez*, 877 N.Y.S.2d 274 (N.Y. App. Div. 2009). A public housing tenant was arrested for firearms possession, and the housing authority sought to terminate her tenancy for nondesirable conduct and breach of her lease. She appeared before a hearing officer, who apprised her of her rights and explained the proceedings to her. The tenant did not retain an attorney, and she indicated that she understood the hearing officer and that she had no questions. Subsequently, the hearing officer recommended a termination of her tenancy. The tenant then claimed that her due process rights were violated because the hearing officer did not explicitly ask her whether the firearms were hers or if she knew that the firearms were in her apartment. The court found that although a hearing officer may generally make inquiries of a pro se tenant to develop the administrative record, an inquiry is not required where there are no complex legal issues or confusing details. In this case, the court found that no such inquiry was required because the tenant's only disagreement was with the factual account.

## **Uniform Relocation Assistance Act: Resident Adequately Pleaded Procedural Due Process Claim**

*Faylor v. Szupper*, 2009 WL 1034696 (W.D. Pa. Apr. 15, 2009). Westmoreland County, Pennsylvania entered into a contract with HUD whereby the county would receive HUD funds in exchange for an agreement to develop affordable housing. The resident's townhouse was purchased with these funds, and she qualified as a displaced person pursuant to the Uniform Relocation Assistance Act. The resident alleged that she did not receive sufficient support for relocation and that HUD and the county failed to

adequately and promptly address her complaints. The court granted motions to dismiss on the resident's equal protection, substantive due process, contract, and tort claims. However, the court held that the resident had a property right to the benefits pursuant to the URA and thus had adequately pleaded a cause of action for the deprivation of procedural due process because of the alleged unresponsiveness of the government agencies.

### **Housing Choice Voucher Program: No Due Process Violation Where Recipient Was Given Notice of Termination Hearing and an Opportunity to Attend the Hearing**

*Vann v. Dakota County Cmty. Dev. Agency*, 2009 WL 982117 (Minn. Ct. App. Apr. 14, 2009) (unreported). A voucher tenant's benefits were terminated based on repeated violations of the lease by failing to supply information and not paying utilities as stipulated in the lease. The recipient did not attend the termination hearing and claimed that her due process rights were violated. The court found that there was no evidence to support the tenant's claim that she did not timely receive notice of the hearing because her neighbor mistakenly received the letter. The court then found that there was substantial evidence in the record supporting the agency's decision to terminate the tenant's benefits.

### **Housing Choice Voucher Program: Tenant Was Obligated to Report All Changes in Income Regardless of the Duration and Time of Employment**

*Larsen v. Dakota County Cmty. Dev. Agency*, 2009 WL 982124 (Minn. Ct. App. Apr. 14, 2009) (unreported). A voucher tenant failed to report \$583 in earned income, and his benefits were terminated. The tenant argued that because he was never employed for more than ten consecutive days, he did not violate the housing authority's policy requiring that tenants report all changes in household income within ten days. He also argued that because he was not employed at the time he signed the zero income form, he did not have to report the \$583. The court rejected both arguments. The court also found that the hearing officer's conclusions were supported by substantial evidence and that the findings were sufficiently specific to support the termination of the recipient's voucher.

### **Housing Choice Voucher Program: Panel Had Authority to Terminate Voucher for Criminal Activity, But Hearing Procedures Violated Tenant's Rights**

*Costa v. Fall River Hous. Auth.*, 903 N.E.2d 1098 (Mass. 2009). A voucher tenant received a termination notice from the Fall River Housing Authority (FRHA) after being charged with engaging in sexual conduct for a fee and keeping a house of ill fame. The hearing officer affirmed the decision to terminate at an informal settlement conference. This conference was followed by an informal appeal hearing at which the grievance panel affirmed the termination. The hearing officer who conducted the settlement conference was also on the grievance panel and authored the termination decision. The evidence before the panel consisted of an unsigned police report and a newspaper article detailing the recipient's arrest.

The tenant argued that her assistance could not be terminated because of criminal conduct that was neither drug-related nor violent. However, the court found that HUD regulations state that criminal activity which threatens health, safety and peaceful enjoyment is also an adequate basis for termination and that FRHA could have determined that the tenant's conduct fell into this category. The panel's decision stated that the police report and the newspaper article established by a preponderance of the evidence that the recipient had engaged in criminal conduct. The court found that the use of hearsay evidence as the sole factor in establishing criminal activity is permissible, provided that the hearsay is sufficiently reliable. The court found that the police report was reliable, but that the newspaper article was not. However, the panel's written decision was so inadequate that the court was unable to determine which piece of evidence the panel relied on. The decision's lack of specificity also made it impossible for the court to determine whether the panel carried out its regulatory and statutory duties. The court held that the tenant's due process rights were violated because of the insufficiency of the written decision and the possible impermissible use of unreliable hearsay evidence. The court also found that the grievance panel's composition violated HUD regulations providing that the same person may not conduct an initial informal hearing and be a member of a higher decision-making body in the grievance process. The court remanded for further proceedings.

### **RICO: Tenants Failed to State Claim Against Managers Who Allegedly Rented to Undocumented Immigrants**

*Delrio-Mocci v. Connolly Props. Inc.*, 2009 WL 971394 (D.N.J. Apr. 9, 2009). Tenants claimed that the value of their leaseholds was diminished by the apartment managers'

“scheme” of renting to undocumented immigrants. The tenants contended that the managers rented to undocumented individuals because they would pay more for subpar housing and would be less likely to report code violations. The tenants claimed that this was a violation of the Racketeer Influenced and Corrupt Organizations Act because it constituted harboring, encouraging or inducing undocumented immigrants to violate the Immigration and Nationality Act. The court rejected this argument, finding that the apartment managers did not affirmatively prevent the authorities from detecting the presence of undocumented individuals. The court granted the apartment managers’ motion to dismiss, holding that the tenants’ evidence was not sufficient to state a claim.

### **Public Housing: Tenancy Can Be Terminated for Drug-Related Activity Regardless of the Tenant’s Knowledge of the Activity or the Tenant’s Psychiatric History**

*Rolon v. N.Y. City Hous. Auth.*, 2009 WL 1067396 (N.Y. Sup. Ct. Apr. 8, 2009) (unreported). A public housing tenant challenged the termination of her occupancy based on ineffective assistance of counsel because her counsel did not present evidence of her psychiatric condition. The hearing officer found that her tenancy should be terminated because of illegal drug-related activity in her residence and the repeated presence of an unauthorized individual in the apartment. The court found that substantial evidence supported the hearing officer’s decision because illegal drug-related activity is sufficient to terminate a public housing tenancy, regardless of the tenant’s knowledge of the illegal activity. The court also found that the hearing officer considered the tenant’s psychiatric history as a mitigating factor despite the fact that the officer had no duty to take this into consideration in the termination decision.

### **Section 3: Right to Monetary Damages for Violation of Contracting Requirements**

*Mannarino v. HUD*, 2009 WL 918355 (W.D. Pa. Apr. 2, 2009). The plaintiffs operated a Section 3 business concern, which entitled them to priority in the awarding of contracts paid for by Community Development Block Grant funds. The plaintiffs filed a complaint with HUD alleging that Dunkard Township and the Pennsylvania Department of Community and Economic Development failed to provide this priority. HUD issued a determination that these entities violated Section 3 regulations by failing to provide contracting opportunities, to the greatest extent feasible, to Section 3 business concerns, including the plaintiffs’ company. HUD imposed a resolution requiring

that all sub-recipients in the jurisdictions where the plaintiffs’ company qualified as a Section 3 business prioritize the plaintiffs’ bid proposals. The plaintiffs appealed the resolution because their company had gone out of business, and they requested monetary compensation. HUD rejected the plaintiffs’ request, stating that the Section 3 regulations did not provide for monetary compensation. The plaintiffs then filed an action against HUD alleging that its refusal to order compensation was arbitrary in violation of the Administrative Procedure Act. The court granted HUD’s motion for summary judgment, finding that the Section 3 statute and regulations did not explicitly authorize HUD to impose monetary sanctions. The court therefore found that HUD’s conclusion that it was not authorized to impose monetary sanctions was not arbitrary or capricious. ■



# 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 Agency, Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs issued in May 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,<sup>1</sup> (2) bound volumes of the Federal Register, (3) HUD Clips,<sup>2</sup> (4) HUD,<sup>3</sup> and (5) USDA's Rural Development website.<sup>4</sup> Citations are included with each document to help you secure copies.

## HUD Final Rules

**74 Fed. Reg. 22,822-22,826 (May 15, 2009)**

**Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs Withdrawal of Revised Definition of "Required "Use"**

*Summary:* This final rule withdraws the revisions to the definition of "required "use" as provided in HUD's November 17, 2008, final rule amending its Real Estate Settlement Procedures Act (RESPA) regulations. HUD therefore leaves in place the definition of "required "use" before the revisions made by the November 17, 2008, final rule. HUD remains committed to the RESPA reform goals of the November 17, 2008, final rule and concerned about some of the practices reported by commenters, and will initiate a new rulemaking process on required use.

*Effective Date:* June 15, 2009, except the amendment to 24 CFR 3500.2, which is effective July 16, 2009.

## HUD Federal Register Notices

**74 Fed. Reg. 20,492-20,493 (May 4, 2009)**

**Notice of Proposed Information Collection: Comment Request; Budget-Based Rent Increases**

*Summary:* HUD will submit to OMB for review an information collection requirement about which it is solic-

iting public comments. The information collected relates to Budget-Based Rent Increases. This information is necessary to allow certain owners of multifamily housing projects to plan for expected increases in expenditures. The information will be used to determine the reasonableness of rent increases.

*Comments Due Date:* July 6, 2009.

**74 Fed. Reg. 20,493 (May 4, 2009)**

**Notice of Proposed Information Collection: Comment Request; Pre-Foreclosure Sale Procedure**

*Summary:* HUD will submit to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to pre-foreclosure sale procedure. The respondents are mortgagees/loan services, homeowners, counselors and real estate professionals who are attempting to sell a homeowner's property prior to foreclosure. The information collection records the process from the homeowner's application to participate in the program and the mortgagee's approval, to HUD's review and approval to the specifics of the sale. Homeowners participating in the program may also receive housing counseling, and a confirmation that counseling is available must be documented.

*Comments Due Date:* July 6, 2009.

**74 Fed. Reg. 20,494 (May 4, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2009; Brownfields Economic Development Initiative (BEDI)**

*Summary:* HUD announces the availability on its Web site of the application information, submission deadlines, funding criteria and other requirements for the FY 2009 Brownfields Economic Development Initiative.

*Dated:* April 28, 2009

**74 Fed. Reg. 20,493-20,494 (May 4, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2009; Rural Housing and Economic Development Program (RHED)**

*Summary:* HUD announces the availability on its website of the application information, submission deadlines, funding criteria and other requirements for the FY 2009 Rural Housing and Economic Development Program NOFA.

*Dated:* April 28, 2009.

**74 Fed. Reg. 21,377 (May 7, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 2009; Neighborhood Stabilization Program Technical Assistance Under the American Recovery and Reinvestment Act of 2009**

*Summary:* HUD announces the availability on its website of the application information, submission deadlines, funding criteria and other requirements for the FY 2009 Neighborhood Stabilization Program Technical

<sup>1</sup>[http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs).

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

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

<sup>4</sup><http://www.rdinit.usda.gov/regs>.

Assistance under the American Recovery and Reinvestment Act of 2009.

*Dated:* April 14, 2009.

**74 Fed. Reg. 21,377 (May 7, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for the Neighborhood Stabilization Program 2 Under the American Recovery and Reinvestment Act, 2009**

*Summary:* HUD announces the availability of and funding criteria for approximately \$1.93 billion in competitive grants for the Neighborhood Stabilization Program 2 authorized under the American Recovery and Reinvestment Act of 2009. The purpose of this assistance is to stabilize neighborhoods whose viability has been and continues to be damaged by the economic effects of properties that have been foreclosed upon and abandoned.

*Dated:* April 30, 2009.

**74 Fed. Reg. 21,377-21,383 (May 7, 2009)  
Announcement of Funding Awards for Fiscal Year 2008 for the Housing Choice Voucher Program**

*Summary:* This document notifies the public of funding awards for FY 2008 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses and the amount of the awards to HAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements and HOPE VI voucher awards.

*Dated:* April 27, 2009.

**74 Fed. Reg. 21,383 (May 7, 2009)**

**Notice of Availability: Implementation of the Tax Credit Assistance Program (TCAP)**

*Summary:* Through this notice, HUD announces the availability on its website of the submission requirements, eligible uses, fund commitment and expenditure deadlines, fund distribution and other requirements for the Tax Credit Assistance Program authorized by Section 2, Division A, Title XII of the American Recovery and Reinvestment Act of 2009. TCAP funding is eligible to be used for capital investment in eligible Low-Income Housing Tax Credit projects.

*Dated:* April 14, 2009.

**74 Fed. Reg. 21,705-21,706 (May 8, 2009)**

**Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request Homelessness Prevention and Rapid Re-Housing Program (HPRP)**

*Summary:* HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to Homelessness Prevention and Rapid Re-Housing Program.

*Comments Due Date:* May 15, 2009.

**74 Fed. Reg. 21,816 (May 11, 2009)**

**Notice of Availability: Program Requirements for Community Development Block Grant Program Funding Under the American Recovery and Reinvestment Act of 2009**

*Summary:* HUD announces the program requirements, submission deadline, and waivers and alternative requirements for funding available under the Community Development Block Grant Recovery (CDBG-R) program. The focus of CDBG-R funding is on infrastructure improvements that meet the overall goals of the American Recovery and Reinvestment Act, which are to stimulate the economy through measures that modernize the nation's infrastructure, improve energy efficiency, and expand educational opportunities and access to health care. Approximately \$1 billion is available for CDBG-R to states and local governments.

*Date:* April 14, 2009.

**74 Fed. Reg. 21,953-21,955 (May 11, 2009)  
Semiannual Regulatory Agenda**

*Summary:* HUD is publishing its agenda of regulations already issued or that are expected to be issued during the next several months. The agenda also includes rules currently in effect that are under review and describes those regulations that may affect small entities, as required by Section 602 of the Regulatory Flexibility Act. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with advance information about pending regulatory activities.

*Dated:* May 11, 2009.

**74 Fed. Reg. 22,174-22,175 (May 12, 2009)**

**Notice of Proposed Information Collection: Comment Request; Home Mortgage Disclosure Act (HMDA) Loan/Application Register**

*Summary:* HUD proposes to submit to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to HMDA. The HMDA Loan/Application Register collects information from mortgage lenders on application for, and originations and purchases of, mortgage and home improvement loans. Nondepository mortgage lending institutions are required to use the information generated as a running log throughout the calendar year, and send the information to HUD by March 1 of the following calendar year.

*Comments Due Date:* July 13, 2009.

**74 Fed. Reg. 22,175 (May 12, 2009)**

**Notice of Availability: Notice of Funding Availability (NOFA) for American Recovery and Reinvestment Act Capital Fund Recovery Competition Grants**

*Summary:* Through this notice, HUD announces the availability on its website of the application information,

eligibility requirements, review and selection procedures, and other program requirements governing the availability of \$995 million in Capital Fund Recovery Competition Grants under the American Recovery and Reinvestment Act of 2009.

*Dated:* May 5, 2009.

**74 Fed. Reg. 22,566-22,568 (May 13, 2009)  
Announcement of Funding Awards for the Resident Opportunities and Self-Sufficiency (ROSS) Service Coordinators Program for Fiscal Year 2008**

*Summary:* This announcement notifies the public of funding decisions made by HUD under the FY 2008 Notice of Funding Availability (NOFA) for the ROSS Service Coordinators Program funding for FY 2008. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the funding priority categories established in the NOFA.

*Dated:* April 28, 2009.

**74 Fed. Reg. 23,426-23,427 (May 19, 2009)  
Supplement to Application for Federally Assisted Housing**

*Summary:* HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to Section 644 of the Housing and Community Development Act of 1992 (42 U.S.C. 13604), which imposed on HUD the obligation to require housing providers participating in HUD's assisted housing programs to provide any individual or family applying for occupancy in HUD-assisted housing with the option to include in the application for occupancy the name, address, telephone number and other relevant information of a family member, friend or person associated with a social, health, advocacy or similar organization. The objective of providing such information, if this information is provided, and if the applicant becomes a tenant, is to facilitate contact by the housing provider with the person or organization identified by the tenant, to assist in providing the delivery of any services or special care to the tenant and assist with resolving any tenancy issues arising during the tenancy of such tenant.

*Comment Due Date:* June 18, 2009.

**74 Fed. Reg. 23,737-23,738 (May 20, 2009)  
Disaster Housing Assistance Program-Ike (DHAP-Ike Grant Agreement)**

*Summary:* The proposed information collection requirement described below has been submitted to the OMB for review, as required by the Paperwork Reduction Act. The department is soliciting public comments on the subject proposal. In August and September 2008, Hurricanes Ike and Gustave struck the United States causing catastrophic damage. On September 23, 2008, HUD and FEMA executed an Interagency Agreement under which HUD shall act as the servicing agency of DHAP-Ike. The

paperwork involved in this action covers all activities related to DHAP-Ike from execution of the grant agreement to case management.

*Comments Due Date:* June 19, 2009.

**74 Fed. Reg. 25,573-25,574 (May 28, 2009)  
Mortgagee's Certification of Fees and Escrow and Surety Bond Against Defects Due to Defective Materials and/or Faulty Workmanship**

*Summary:* HUD proposes to submit to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to mortgagees' provision of information to ensure that their fees are within acceptable limits and the required escrows will be collected. HUD determines the reasonableness of the fees and uses the information in calculating the financial requirement for closing.

*Comments Due Date:* June 29, 2009.

**74 Fed. Reg. 25,574-25,575 (May 28, 2009)  
Mark-to-Market Program: Requirements for Community-Based Non-Profit Organizations and Public Agencies**

*Summary:* HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the provision of proof of tenant endorsement of entity proposing to purchase restructured property and obtain modification, assignment or forgiveness of second mortgage debt.

*Comments Due Date:* June 29, 2009.

**74 Fed. Reg. 25,758 (May 29, 2009)  
Screening and Eviction for Drug Abuse and Other Criminal Activity**

*Summary:* HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to PHA screening requirements to obtain criminal conviction records from law enforcement agencies to prevent admission of criminals into the public housing and Section 8 programs and to assist in lease enforcement and eviction of those individuals in the public housing and Section 8 programs who engage in criminal activity.

*Comments Due Date:* June 29, 2009.

**74 Fed. Reg. 25,760 (May 29, 2009)  
Public Housing Agency (PHA) Lease and Grievance Requirements**

*Summary:* HUD has submitted to OMB for review an information collection requirement about which it is soliciting public comments. The information collected relates to the public housing lease and grievance procedures which place a recordkeeping requirement on the part of PHAs as they are required to enter into and maintain lease agreements for each individual or family that occupies a public housing unit. Also, both PHAs and ten-

ants are required to follow the protocols set forth in the grievance procedures for both an informal and formal grievance hearing.

*Comments Due Date:* June 29, 2009.

## HUD Notices

### Notice CPD-09-03 (May 4, 2009) Implementation of the Tax Credit Assistance Program (TCAP)

*Summary:* This notice sets forth the submission requirements, eligible uses of funds and program requirements for TCAP. HUD will issue supplemental or interpretive guidance on program requirements, including the process for disbursing funds, recordkeeping, reporting and applicable federal grant requirements, as they become available.

### Notice H09-03 (May 27, 2009) Exclusion of Deferred Department of Veterans Affairs Disability Benefits from Annual Income

*Summary:* This notice informs administrators of project-based Section 8 programs of the passage of the Housing and Economic Recovery Act of 2008 (HERA). As a result of HERA, any deferred Department of Veterans Affairs disability benefits that are received in a lump sum or in prospective monthly amounts by the tenant shall be excluded as annual income.

### Notice PIH-2009-15 (HA) (May 18, 2009) Extension – Guidance on Integrated Pest Management (IPM)

*Summary:* The purpose of this Notice is to inform public housing agencies and Tribally Designated Housing Entities about IPM. Reference materials on IPM are located at paragraph seven of the referenced notice. Pest problems routinely rate as one of the top concerns by residents.

### Notice PIH 2009-13 (HA) (May 6, 2009) Implementation of the Federal Fiscal Year 2009 Funding Provisions for the Housing Choice Voucher Program

*Summary:* This Notice implements the Housing Choice Voucher (HCV) program funding provisions resulting from enactment of the "Omnibus Appropriations Act, 2009" (Public Law 111-8), enacted on March 11, 2009. The 2009 Act establishes the allocation methodology for calculating housing assistance payments renewal funds, new incremental vouchers and administrative fees.

## Rural Housing Service Federal Register Notices

### 74 Fed. Reg. 21866-21885 (May 11, 2009) Semiannual Regulatory Agenda.

*Summary:* This agenda provides summary descriptions of significant and not significant regulations being developed in agencies of the U.S. Department of Agricul-

ture (USDA) in conformance with Executive Order 12866 "Regulatory Planning and Review."

*Date:* March 6, 2009

## Rural Housing Service Administrative Notices

### RD AN No. 4436 (1980-D) (May 7, 2009) Single Family Housing Guaranteed Loan Program Applicant Traditional and Nontraditional Credit History Verification

*Summary:* The purpose of this Administrative Notice is to elaborate upon the forms of credit history and current debt verifications acceptable for loans guaranteed under the Single Family Housing Guaranteed Loan Program.

### RD AN No. 4438 (1980-D) (May 21, 2009) Single Family Housing Guaranteed Loan Program Official Record – Minimal Essential Documents

*Summary:* This Administrative Notice (AN) is applicable to Rural Development State and Field offices only. The purpose of this AN is to expand upon guidance and update the list of minimal essential documents for permanent record retention of loans guaranteed under the Single Family Housing Guaranteed Loan Program (SFHGLP). This guidance is applicable to SFHGLP only. Lenders are expected to retain complete origination records for each guaranteed loan in addition to documents listed within this notice.

### RD AN No. 4441 (1980-D) (May 7, 2009) Single Family Housing Guaranteed Loan Program Qualifying for Reduced Documentation when Requesting the Conditional Commitment for Loan Note Guarantee by Utilizing Credit Scores

*Summary:* The purpose of this Administrative Notice (AN) is to affirm 620 as the minimum Fair Isaacs & Company (FICO) credit score required for underwriters to utilize streamlined documentation for manually underwritten guaranteed loan files. The term "streamlined" refers only to the amount of documentation to be submitted by the lender requesting a "Conditional Commitment for Loan Note Guarantee." Streamlined documentation does not imply a no cost loan, no documentation or limited underwriting. This guidance also applies to loan files that receive a "Refer" or "Refer with Caution" underwriting recommendation through the Guaranteed Underwriting System. This AN is effective immediately for all guaranteed loan requests for which a conditional commitment has not been issued.

## Rural Housing Service Unnumbered Letters

### Expanded First-time Homebuyer Tax Credit Under The American Recovery and Reinvestment Act (May 4, 2009)

*Summary:* This letter is an update to the Unnumbered Letter dated November 18, 2008, regarding the

new first-time homebuyer tax credit. The guidance in the November 18, 2008, letter regarding the new homebuyer tax credit remains valid; however, this letter is to inform the states that the American Recovery and Reinvestment Act of 2009 expands the first-time homebuyer tax credit. This letter is to be used in conjunction with the previous letter solely for information purposes to provide guidance to Rural Development state offices when questions arise regarding how the first-time homebuyer tax credit should be considered in loan processing by the agency.

## **Federal Finance Agency Proposed Rules**

**74 Fed. Reg. 20,0236-20,263 (May 1, 2009)**

### **2009 Enterprise Transition Affordable Housing Goals**

*Summary:* The Housing and Economic Recovery Act of 2008 (HERA) transferred the authority to establish, monitor and enforce the affordable housing goals for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) from HUD to the Federal Housing Finance Agency (FHFA). HERA further provides that the annual housing goals in effect for 2008 as established by HUD shall remain in effect for 2009, except that the Director of FHFA shall review such goals to determine their feasibility given current market conditions, and make appropriate adjustments consistent with such market conditions. Pursuant to this directive, FHFA has analyzed current market conditions and is issuing and seeking comments on a proposed rule that would adjust the affordable housing goal and home purchase sub goal levels for the Enterprises for 2009. The proposed rule would also permit loans owned or guaranteed by an Enterprise that are modified in accordance with the Administration's Homeowner Affordability and Stability Plan announced on March 4, 2009, to be treated as mortgage purchases and count for purposes of the housing goals. In addition, the proposed rule would exclude purchases of jumbo conforming loans from counting towards the 2009 housing goals.

*Comment Due Dates:* May 22, 2009.

## **Veterans Affairs Department Proposed Rules**

**74 Fed. Reg. 22,145-22,147 (May 12, 2009)**

### **Loan Guaranty: Assistance to Eligible Individuals in Acquiring Specially Adapted Housing; Cost-of-Construction Index**

*Summary:* The Department of Veterans Affairs (VA) proposes to amend the Loan Guaranty regulations concerning assistance to eligible individuals in acquiring specially adapted housing. The proposed change would implement provisions of the Housing and Economic Recovery Act of 2008, which authorized VA to provide for automatic annual increases in the dollar amounts available to certain Specially Adapted Housing grant recipients.

*Comments Due Date:* June 11, 2009. ■

# NATIONAL HOUSING LAW PROJECT | PUBLICATION ORDER FORM



PUBLICATION	UNIT PRICE	QTY.	TOTAL PRICE
<b>Combined Set: HUD Housing Programs: Tenants' Rights (3d ed. 2004) and 2006-2007 Supplement</b>	\$ 415	<input type="checkbox"/>	<input type="checkbox"/>
HUD Housing Programs: Tenants' Rights 2006-2007 Supplement	\$ 130	<input type="checkbox"/>	<input type="checkbox"/>
Housing Law Bulletin (10-issue subscription)	\$ 175	<input type="checkbox"/>	<input type="checkbox"/>
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	\$ 5	<input type="checkbox"/>	<input type="checkbox"/>
Housing for All: Keeping the Promise (1995)	\$ 5	<input type="checkbox"/>	<input type="checkbox"/>
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	\$ 10	<input type="checkbox"/>	<input type="checkbox"/>
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	\$ 10	<input type="checkbox"/>	<input type="checkbox"/>
An Affordable Home On Reentry: Federally Assisted Housing and Previously Incarcerated Individuals (2008)	\$ 25	<input type="checkbox"/>	<input type="checkbox"/>

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—Harris David, continued from inside front cover

a settlement requiring the construction and rehabilitation of more than 4000 housing units, including more than 1700 units of new construction.

He also represented homeless plaintiffs in *Williams v. Department of Human Services*, in which the Supreme Court of New Jersey required that the New Jersey Department of Human Services establish programs to ensure that low-income individuals previously housed temporarily in motels and facing homelessness be provided with shelter and eventual housing elsewhere.

Harris authored legal briefs and appeared as *amicus* counsel in a number of other Supreme Court cases, including *Franklin Tower One v. N.M.*, *Community Realty Management v. Harris*, and *Hodges v. Sasil Corporation*. Each of these cases established or extended the rights of low-income individuals to decent, affordable and continued housing. Thousands of low-income tenants are the beneficiaries of Harris' work in these cases. Studs Terkel, whom Mr. David knew and greatly admired, recognized his fighting spirit in dedicating a photo to him: "Here's to all the good fights – let's keep punching – 'till, oh God, forever."

Harris' expertise extended beyond New Jersey. He was a frequent lecturer on public housing law at seminars and legal training programs nationwide, and, as a member of the Housing Justice Network, was routinely consulted about public housing cases by attorneys throughout the country, offering advice, legal insight and practical guidance. Through his many years of affordable housing advocacy, Harris worked closely with the staff of the National Housing Law Project, including his close friend the late David Bryson, for the benefit of his clients and tenants nationwide.

Harris was a devoted Mets fan and season ticket holder. He also had a keen appreciation of music and the arts. He sang in his Synagogue choir and he loved opera, even once singing in the choir of *Aida* at the New Jersey Performing Arts Center. He enjoyed being in nature. With his family, he loved hiking and skiing in Vermont during the winter season, as well as canoeing in the summer at Gunflint Lake, on the border between the U.S. and Canada.

"The parameters of life are measured most starkly by the date of birth and the date of death," said Melville D. Miller, Jr., President of Legal Services of New Jersey. "But what really matters is the 'dash' in between those years. By that measure, Harris lived a full, active, and meaningful life. The world of the poor, and of those who knew him as a colleague and friend, is a better place because he walked and worked among us."

His wife of forty-five years, Shoshanna, two sons, Charles and Jonah, a grandson, Cashlyn Joseph, mother Ethel, and two brothers, Henry and Bill, survive Harris, a devoted husband, father, colleague and friend. ■

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—John Calmore, continued from inside front cover

He was selected as a Reginald Heber Smith Fellow after graduation, serving at the Legal Aid Foundation of Los Angeles between 1972 and 1974. He then joined the Western Center on Law & Poverty in 1975. In 1977, he became staff attorney at the National Housing Law Project. Five years later, in 1982, he was invited to become Director of Litigation for the Legal Aid Foundation of Los Angeles. In 1985, John began his distinguished academic career at North Carolina Central University School of Law, before moving to Loyola Law School in Los Angeles in 1987, where he became a full professor in 1994. He moved to the University of North Carolina in 1994, where he became Reef C. Ivey Professor of Law in 1999. John taught civil rights, critical race theory, local government law, social justice lawyering and torts to UNC students for a dozen years. He was a coauthor, with Martha Mahoney and Stephanie Wildman, of an innovative and widely used law school text, *Social Justice: Professionals, Communities, and Law* (2003). John also served as a program officer with the Ford Foundation from 1990-92, and as a member of the Board of The New World Foundation, the National Asian Pacific American Legal Consortium and Oxfam America.

Beyond his legal scholarship and teaching, John maintained a remarkable network of admiring colleagues and former students nationwide, including many of the most important social justice voices of his time. Many of them gathered in Chapel Hill in the fall of 2006 for a symposium devoted to John's work, which led to a special issue of the *North Carolina Law Review*, published in March of 2008. John responded to this outpouring of admiration with wit, grace and dignity, all suffused with his characteristic self-deprecation.

John was a resolutely modest man, says his wife Alyce. He did not want either a funeral or a memorial service. The only words he thought necessary at the time of his death were: "*John O. Calmore: Sunrise, June 2, 1945; Sunset, February 24, 2009.*" ■



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