NATIONAL HOUSING LAW PROJECT
advancing housing justice

Housing Law Bulletin

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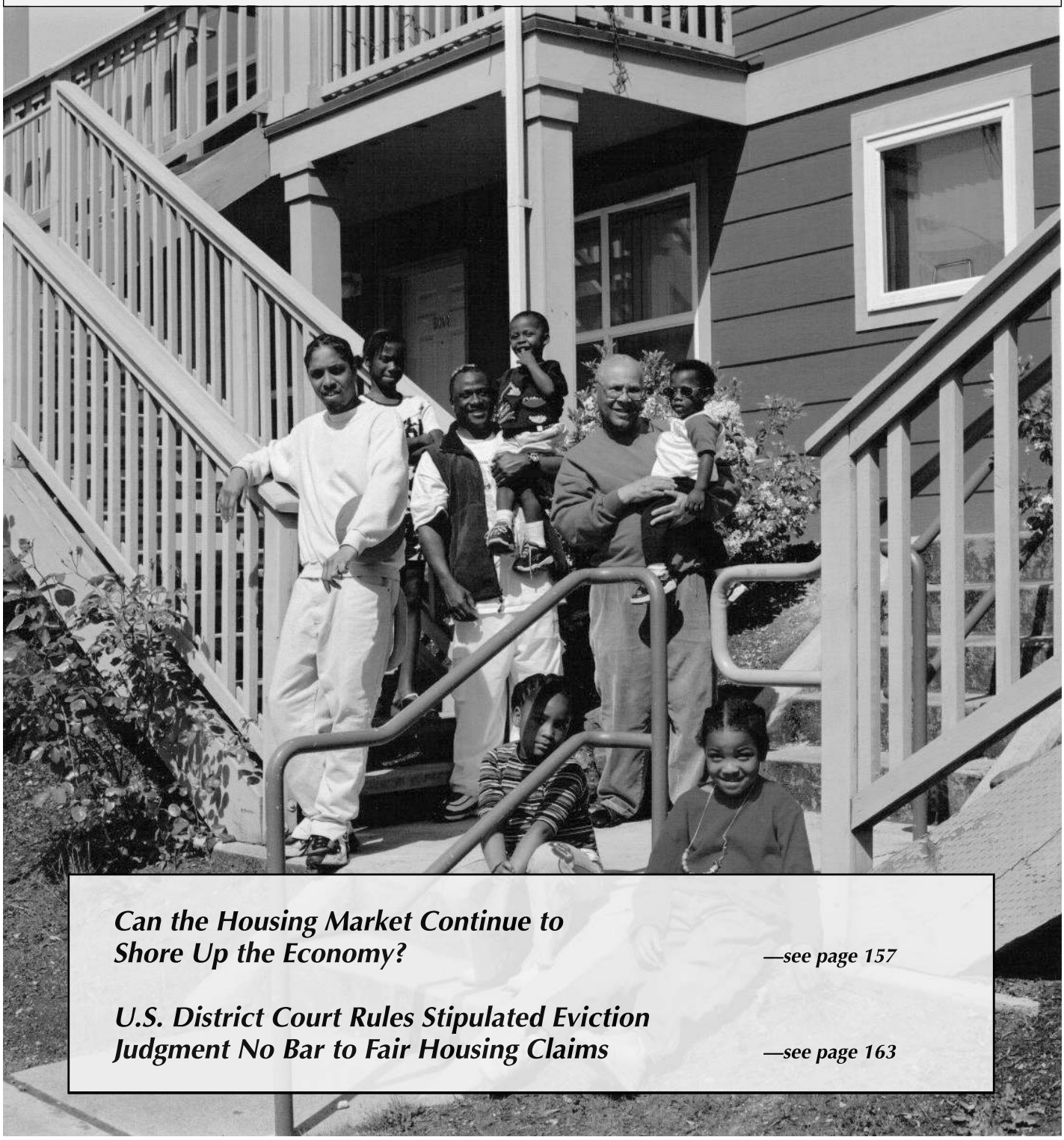

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OF THE HOUSING JUSTICE NETWORK

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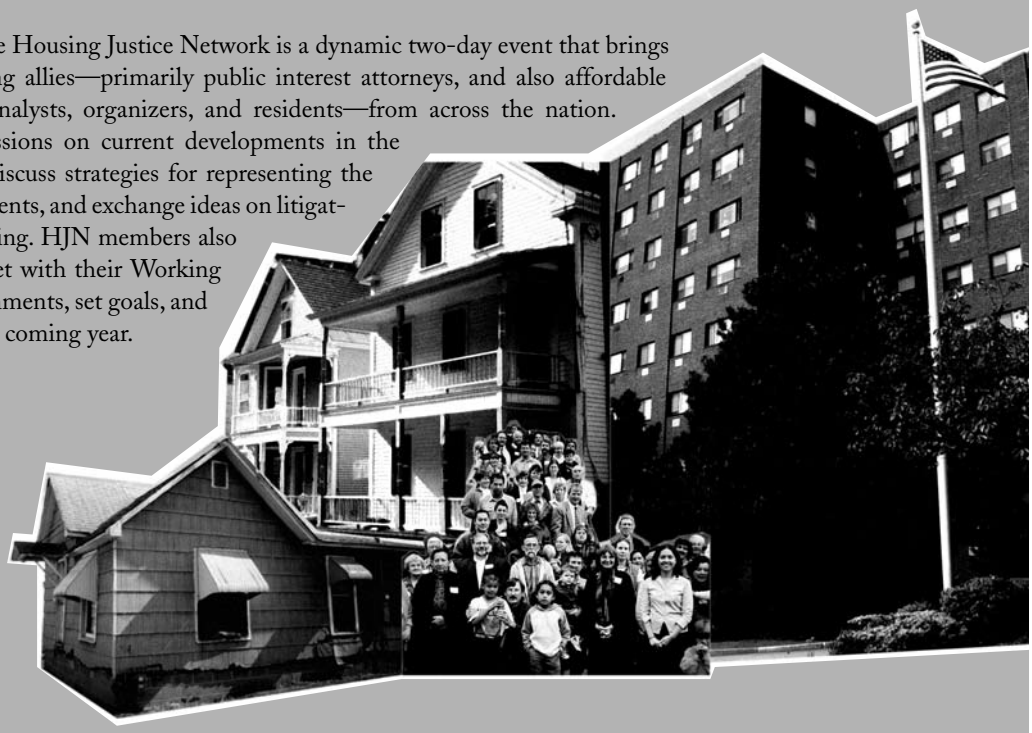

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Conducted by expert NHLP staff attorneys, this substantive training will provide a comprehensive overview of the federal housing system, recent changes in the programs, and current trends and issues facing practitioners. The training is designed for advocates with limited housing experience—and will give them a solid grounding in the federal housing programs. For those who plan to attend the HJN Meeting, this training will provide an excellent preparation for faster-paced and in-depth discussions that will take place during the Meeting sessions.

Join us in Washington D.C. to help advance housing justice for low-income households across America.

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Cover: Residents of Aki Kurose Village, developed and managed by the Low Income Housing Institute (LIHI) Seattle, WA. Currently, LIHI owns or manages forty-four properties containing over 1,377 housing units, 500 of which are set aside for previously homeless households. A majority of LIHI housing serves families and individuals earning less than 30 percent of the area median income. www.lihi.org. Photographer: Duncan Haas.

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Can the Housing Market Continue to Shore Up the Economy?

This past year saw a mortgage frenzy fueled by interest rates that were at a 40-year low, and a significant increase in the presence of immigrants, their children, and women in the housing market. Economists agree that the U.S. housing market has been a key element in softening the blow of recession and keeping the U.S. economy afloat over the past three years. With that in mind, a burning question is whether the housing market as the key economic driver is sustainable. This article discusses the issue within the context of the findings of the Joint Center for Housing Studies' (JCHS) *State of the Nation's Housing, 2004* report.

Housing Market Performance in 2003

Growth in the housing market boosted consumer spending drastically in 2003. Rising home values alone accounted for more than 25% of the growth in personal consumption in 2002 and 2003.[1] Cash-out refinances were at record highs,[2] reflecting the changing philosophy promoted by the mortgage industry regarding the nature of the family home. Rather than functioning as an asset for the future—something to be protected and passed to the next generation—the family home is now being portrayed and marketed as a piggybank. Homeowners are encouraged to use that piggybank as a source of emergency cash, vacation money and so forth.[3]

Increasing residential construction has also supported the economy. The JCHS report indicates that the pace of construction over the next 10 years is likely to exceed that of the past decade but notes "growing concern" over the pace of development.[4] That concern is centered around the fact that construction, inexplicably, increased through the recession and into the recovery, despite job losses. In the absence of an adequate explanation for this phenomenon, the JCHS report expresses concern about what the future may portend in the construction sector. Viewed as a leading indicator of our economic health as a country, construction represents jobs that pay decently and general business growth. A sudden downturn would cause significant job

[1]Joint Center for Housing Studies of Harvard University, The State of the Nation's Housing, 2004, 1 (2004) [hereinafter The State of the Nation's Housing].

[2]*Id.* at 7.

[3]Jonathan Clements, *House as Piggy Bank: Some Risky Business*, Wall St. J. Online, *at* http://homes.wsj.com/buysell/mortgages/20030422-clements.html (Apr. 22, 2003).

[4]The State of the Nation's Housing, *supra* note 1.

losses, and may signal a broader problem in the economy.

In 2003, home purchase and refinance loans hit all-time record highs. The JCHS report offers the startling statistic that "[f]ully half of mortgage debt [currently] outstanding was originated or refinanced last year."[5] Women and immigrants played a significant role in creating those figures. Immigrants (directly and through native-born offspring) have supported the U.S. housing market since the 1990s, accounting for more than *one-third* of household growth. In addition, people of color have bolstered the rental market, increasing their share of households from 31 to 39% over this past decade. Homeownership rates for immigrants and for people of color still lag significantly behind those of white residents, but people of color accounted for two out of every five net new homeowners over this past decade.[6] Meanwhile, women also contributed significantly to housing market maintenance and gains in 2003, as unmarried female-headed households increased while wives' earnings rose from 30 to 37%.[7]

What Lies Ahead?

Curiously, according to the JCHS, the U.S. housing boom "has outlasted an international finance crisis in 1998, an economic recession in 2001, and job losses in 2002-3."[8] Housing construction increased, and low interest rates kept average housing prices climbing.[9] It is the very strength that the housing sector has shown that has analysts concerned that a market correction is in the offing. Economists' predictions are all over the map, but a thread of agreement seems to be that if interest rates increase significantly or rapidly, and/or if job creation stalls, the housing market will suffer.

The JCHS report notes that already there is an affordability gap as home prices have risen faster than incomes. A rapid increase in interest rates would significantly reduce affordability for homebuyers.[10] Whether this rate increase has already begun to happen is still uncertain but bears careful scrutiny. The average, national rate on a thirty-year, fixed-rate mortgage from May of 2003 to May of 2004 rose from 5.48% to 6.27%.[11] On June 30, 2004, the Federal Reserve raised interest rates by twenty-five basis points to 1.25%. Some prognosticators believe another seventy-five basis points' increase will take place by the end of 2004. Whether this will yield a rapid or slow increase in mortgage rates is uncertain.[12]

Even a slower increase in interest rates may trigger financial disaster for millions of Americans. U.S. consumers are leveraged to a degree heretofore unseen.[13] In other words, consumers are living on the edge and do not have the cash-on-hand to manage an increase in their mortgage payment, or other significant debts. Despite lower interest rates, Americans are the most cash-strapped that they have been since World War II.

At a time when they can least afford it, a tremendous number of Americans have opted to obtain one of the riskiest forms of home financing—an adjustable rate mortgage (ARM). As of April 2004, 50% of all new mortgages outstanding in the U.S. were ARMs.[14] In California, 52% of all mortgages (not just new ones) are now adjustable rate.[15] In Colorado, the District of Columbia, Illinois, Massachusetts, Michigan and Minnesota, the share of ARMs originated in 2003 was 25% or more.[16] Hybrid 5/1 ARMs accounted for almost half of the $175 billion worth of ARM originations in 2002.[17] These ARMs offer a fixed rate for five years, adjusting annually thereafter. As of the week of June 1, 2004, ARM applications increased to 34.6%from 33.9%.[18]

ARMs are not risky for the buyer if rates are not likely to adjust upward, or the buyer has sufficient liquidity to manage an increase in monthly debt payments. Such, however, is not the case for most Americans. Although the federal government has recently propped up national savings figures by including pension and retirement accounts in the calculation, savings rates still remain appallingly low.[19] Homeowners do not have savings to fall back on. One lender suggests that Freddie Mac and Fannie Mae's effort to boost homeownership because of their mandate

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[5]*Id.* at 5.

[6]*Id.* at 2-3.

[7]*Id.* at 10-14.

[8]*Id*. at 1.

[9]*Id*. at 7.

[10]*Id.* at 2.

[11]*See* Freddie Mac, *Monthly Average Commitment Rate And Points On 30-Year Fixed-Rate Mortgages Since 1971*, *at* http://www.freddiemac.com/pmms/pmms30.htm (2004) (Interest rate on a 30-year, fixed rate mortgage in May of 2002 was 6.81%.).

[12]Holden Lewis, *Mortgage Rates Slide Despite Coming Fed Move*, BankRate.com, *at* http://www.bankrate.com/brm/news/mtga/20040624a1.asp (June 24, 2004).

[13]Press Release, CIBC World Markets, Higher US interest rates: Why a little means a lot (June 8, 2004), *at* http://www.cibcwm.com/information/press/pressroom.asp?id=252.

[14]*Id.*

[15]*Report: Default threat haunts California home sales*, Sacramento Bus. J., *at* http://sacramento.bizjournals.com/sacramento/stories/2004/05/24/daily5.html (2004).

[16]The State of the Nation's Housing, *supra* note 1, at 18.

[17]Press Release, Fannie Mae, Fannie Mae Offers New Standard 5/1 Adjustable-Rate Mortgage (ARM) Mortgage-Backed Security Pooling Option; Designed to Enhance Uniformity and Liquidity in the ARM Market (April 7, 2003), *at* http://www.fanniemae.com/newsreleases/2003/2473.jhtml?p=Media&s=News+Releases.

[18]Press Release, Mortgage Bankers Association, Mortgage Application Volume Down During Holiday Shortened Week (June 9, 2004), *at* http://www.mortgagebankers.org/news/2004/wk0609.asp.

[19]The gross national savings rate (gross national disposable income - private and government consumption) for the United States is 4.7%,

may be yielding too many loans to people who cannot afford them.[20]

A phenomenon that has averted the appearance of even more foreclosures is the rapid increase in home values. Some homeowners have taken advantage of this fact by selling their property when their debt load has become overly burdensome, but before foreclosure has taken place.[21] However, values are likely to decline as interest rates increase. JCHS posits that home prices will probably stabilize, rather than drop precipitously.[22] As this is uncharted territory, it is difficult to predict how much longer homeowners will have the luxury of an ever-growing equity cushion.

New units are not likely to be affordable, as production costs have increased. On top of that, there may be few or no governmental subsidies to assist the public in accessing housing, both owned and rental. For example, over the past six months the federal government has cut funding for the Section 8 housing choice voucher program—the nation's largest affordable housing subsidy program which currently assists about 2 million low and extremely low-income people. As a result, thousands of families with vouchers have been told in the past two months that their benefit is canceled. For next year, if elected, this administration plans to cut voucher funding by more than $1 billion.

If these proposed cuts are implemented, approximately 250,000 households will lose their vouchers.[23] That means another quarter of a million households will be searching for affordable housing in 2005 without any subsidy. It appears that the odds of their joining the ranks of the overcrowded, inadequately housed, or homeless are high.[24]

With even deeper cuts in domestic support programs proposed for 2006, these numbers will undoubtedly swell. The federal government has overspent by approximately $713 billion over the past three and a half years, turning a $236 billion surplus as of the year 2000 into a $477 billion deficit. Defense spending rose by approximately 7% of Gross Domestic Product between the year 2000 and the present, while non-defense discretionary and entitlements rose by 4% and 3%, respectively. Note that 27% of the obliteration of the year 2000 surplus has been caused by spending increases, while 33% has been caused by tax cuts. [25]

Another quarter of a million households may be searching for affordable housing in 2005 without any subsidy.

Yet it is domestic programs that are slated to bear the burden of correction for revenue reductions and overspending. The White House has already notified government agencies of proposed across-the-board cuts in 2006 in domestic programs, including the Department of Veterans Affairs, the Education Department, a nutrition program for women, infants and children, Head Start, and homeownership, job-training, medical research and science programs.[26]

Projecting ahead further, it is already estimated that there will be a $45 billion gap between what seniors need for retirement and what they will actually have in hand. Women will be the hardest hit, as they continue to earn lower wages than men and will not have the resources to save additional money for retirement. Notably, a recent study finds that "[d]espite growing interest in mechanisms that allow retirees to turn their housing equity into income, neither annuitizing the value of their residence, nor selling it when required to provide added income, eliminates the projected shortfall in retirement income

compared to 11.1% in Japan and 14.5% in Canada for 2003. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MAIN ECONOMIC INDICATORS (2003).

[20]Blanche Evans, *Fannie Mae, Freddie Mac's Role In The Perfect Real Estate Storm*, Realty Times *at* http://realtytimes.com/rtnews/rtapages/20040628_fanniefreddie.htm (2004).

[21]THE STATE OF THE NATION'S HOUSING, *supra* note 1, at 17 (2004).

[22]*Id.* at 7-8.

[23]BARBARA SARD & WILL FISCHER, CENTER FOR BUDGET AND POLICY PRIORITIES, ADMINISTRATION SEEKS DEEP CUTS IN HOUSING VOUCHERS AND CONVERSION OF PROGRAM TO BLOCK GRANT (2004), *at* http://www.cbpp.org/2-12-04hous.htm.

[24]Recent action by the House of Representatives leads advocates to believe that the Housing Choice Voucher program will be adequately funded in 2005. However, because the current proposal depends upon reductions in the funding for other housing and non-housing programs, the possibility of underfunding for the voucher program remains, regardless of changes in administration. Key, of course, is the issue of the composition of Congress, where the bills originate. On July 22, the House Appropriations Committee approved its version of the FY 2005 VA-HUD appropriations bill. The bill comes close to fully funding the voucher program, by providing $1.49 billion more for renewal of existing vouchers than the President requested. (The shortfall was roughly $1.6 billion.) For this reason, advocates believe the voucher program is likely to be adequately funded in FY 2005. However, because the current proposal depends upon reductions in the funding for other programs, including other housing programs that serve low-income people, the possibility of underfunding for the voucher program remains, as do other housing hardships for low-income people.

[25]DALLAS FEDERAL RESERVE, THE FEDERAL BUDGET: DEVELOPMENTS AND OUTLOOK (2004), *at* http://www.dallasfed.org/news/educate/04ecsummit-viard.pdf. Please note that 27% of the obliteration of the year 2000 surplus has been caused by spending increases, while 33% has been caused by tax cuts.

[26]Jonathan Weisman, *2006 Cuts in Domestic Spending on Table*, WASH. POST A01 (May 27, 2004).

adequacy for all individuals."[27] In other words, even homeowners will not be able to count on their homes as a solution to their shortfall in retirement income.

The JCHS report states that, in addition to rising interest rates, the biggest threat to the housing market could be a slowing in job creation.[28] To support the housing market, the economy needs to produce jobs that pay well. However, the jobs that have been created over the last three years are low paying and less stable. Some consist of self-employment, others are part-time.[29] Most jobs since the recession have wages that are at least 20% lower than those in the industries that have lost the most jobs. The prospects for the next ten years are just as bleak.[30] The consequence to the housing market is clear: low-paying, unstable jobs will offer little support to the home purchase market and weak support to the rental market. As it stands now, many of the jobs created by the economy are so low-wage that earners cannot afford "even a modest one-bedroom rental anywhere in the country."[31] For seniors, reliant on retirement incomes, returning to the workforce is the only option for addressing rising housing costs (not to mention healthcare costs).

Undiscussed Threats—Energy and Medical Costs

A critically important component of the U.S. economic future is energy prices. "In April [2004] energy prices in the consumer price index (CPI) were 5.5% above a year earlier and *19% above two years earlier*."[32] Rising energy prices could induce severe economic problems that will affect the U.S. housing market, as well as the overall economy. Higher energy costs slow consumer spending and economic growth. Second quarter 2004 figures are predicted to show greater slowing of consumer spending. Increasing energy costs may also slow business investment, particularly in industries that are heavy energy users.[33] This factor, in turn, may affect job growth and wages. The obvious effect on the housing market is further to limit available consumer income, thereby restricting consumers' housing choices.

The health cost burden on U.S. consumers will also have an increasingly negative impact on Americans' ability to pay for housing. "About 20 million American families—representing 43 million people—reported problems paying medical bills in 2003…"[34] Almost two-thirds of families with medical problems reported difficulty paying for other basic necessities—such as rent and mortgage payments. The burden is carried by moderate-income residents but is felt most heavily by low-income residents. As more Americans are forced to take lower-paying jobs, more will face the choice between paying for housing and paying for healthcare.

Conclusion

Almost one-third of U.S. households are already spending 30% or more of their income on housing. This is the same astonishing rate as in 2002, indicating that whatever economic recovery may have taken place has not made any dent in the housing woes of Americans. Overcrowding—another sign of insufficient affordable housing—has increased. Meanwhile, 2.5 to 3.5 million people are homeless at some point during the year, while another 2 million households (not just individuals) live in "severely inadequate units."[35] As more low-wage jobs are produced, an increasing number of residents in the U.S. will find themselves under-housed or homeless, unable to satisfy one of their most basic needs—the need for decent, safe housing. It also seems likely that the replacement of high-wage jobs with low-wage jobs, combined with projected interest rate hikes, will cause slowing in the housing market, both in sales and rentals. Slowing of the housing market will, in turn, have a negative effect on the national economy. To what degree and how quickly these problems set in remains to be seen. ■

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[27]Press Release, Employee Benefit Research Institute Online, U.S. Retiree Income in 2030 Will Be $45 Billion Short of Need; But Saving Added 5% of Income Could Protect Many Future Retirees (Dec. 9, 2003), *at* http://www.ebri.org/prrel/pr647.html.

[28]The State of the Nation's Housing, *supra* note 1, at 7 (2004).

[29]Benjamin Tal, CIBC World Markets, U.S. Employment Quality Index, Assessing U.S. Job Quality (2004), *at* http://research.cibcwm.com/economic_public/download/eqi-us-062004.pdf.

[30]The State of the Nation's Housing, *supra* note 1, at 29 (2004) (citing Bureau of Labor Statistics data).

[31]*Id.*

[32]*Rising Energy Prices: A Quandary for the Fed*, MBA Economic Commentary, Issue No. 116 (June 14, 2004), *at* http://www.mbaa.org/marketdata/econ.comm/ec0604.html.

[33]*Id.*

[34]Jessica H. May & Peter J. Cunningham, Center for Studying Health System Change, Issue Brief No. 85, Tough Trade-offs: Medical Bills, Family Finances and Access to Care (2004), *at* http://www.hschange.com/CONTENT/689/?.

[35]*Id.* at 4.

Discharge Petition Filed for National Housing Trust Fund Bill

The National Housing Trust Fund (NHTF) legislation in the House of Representatives, H.R. 1102,[1] now has 214 co-sponsors. Despite this widespread bipartisan support, the House Financial Services Committee still has not taken up the bill. In response to the committee's inaction, Representatives Barbara Lee (D-CA), Michael Capuano (D-MA) and Bernie Sanders (I-VT) have recently filed a discharge petition in an effort to move the NHTF legislation forward. If a majority of voting House members sign the discharge petition, the NHTF bill would then go directly to the floor to be considered by the full House.

Since only 209 of the 214 members co-sponsoring the bill have voting privileges, all of the current voting supporters and nine additional voting members must sign the discharge petition for the bill to make it to the House floor. Due to procedural requirements, members will not be able to sign the petition until Congress returns from its summer recess in early September, which gives advocates time to contact members' offices and let them know the importance of signing the discharge petition.

An enormously significant effort to put the nation's growing affordable housing needs on the federal agenda, the NHTF proposal would commit funds for the production and preservation of 1.5 million housing units over the next decade.[2] The fund is intended primarily for rental units serving low-income people that would remain affordable for at least fifty years—but 25% of the NHTF funding would be set aside for homeownership programs.[3]

Originally proposed to capitalize the NHTF with excess Federal Housing Administration (FHA) and Ginnie Mae funds, the bill reportedly no longer identifies a specific source of funding, which could attract members who would not have supported FHA funding. The NHTF would not replace alternate housing funding and is intended to be compatible with other low-income housing programs.[4] States, localities, and nonprofit organizations would be encouraged to match NHTF funding.[5] Proponents are also adamant that the NHTF be implemented equitably to avoid segregating low-income households from other income groups.[6]

Advocates may familiarize themselves with the bill and call for their members to endorse it at the NHTF Web site at http://www.nhtf.org. It is especially important to ensure that original co-sponsors follow through on their commitment to the NHTF by signing the discharge petition, while persuading at least nine other members to do so as well. ■

[1]For more on the National Housing Trust Fund, see NHLP, *National Housing Trust Fund Bill Reintroduced*, 33 Hous. L. Bull. 55, 58 (March 2003); NHLP, *Omnibus Housing Bill Introduced in the House*, 32 Hous. L. Bull. 95, 98 (Apr. 2002); NHLP, *National Housing Trust Fund Spoiled*, 32 Hous. L. Bull. 164, 186 (Aug. 2002).

[2]NHTF, The Campaign's Policy, *at* www.nhtf.org/about/proposal.asp (last visited July 27, 2004).

[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]*Id.*

NHT Study Documents Affordable Housing Losses

The National Housing Trust (NHT), in collaboration with the Center on Budget and Policy Priorities, recently published a study on the loss of HUD-subsidized project-based housing units between 1995 and 2003.[1] This study revealed that approximately 300,000 affordable housing units were lost during this period. The study also shows that tenant-based vouchers, intended to off-set the loss of affordable housing units, have not adequately replaced the diminished affordable housing stock, resulting in a net decline of at least 74,000 total rental subsidies.

The NHT study, compiled from various HUD documents and sources, analyzed the number of project-based units subsidized through HUD rental assistance and mortgage subsidy programs. The study found that between 1995 and 2003, the number of affordable units dropped by 300,000 from 1.7 million to 1.4 million. Over half of the units lost disappeared from the stock of project-based rental assistance units (primarily Section 8), the remainder resulting from a decline in Section 236 mortgage subsidy units and Section 8 Moderate Rehabilitation

[1]National Housing Trust, Changes to Project-Based Multifamily Units in HUD's Inventory Between 1995 and 2003 (2004), *available at* http://www.nhtinc.org/documents/PB_Inventory.pdf. NHT is a national, nonprofit organization that works to save multifamily properties at risk of conversion to market-rate and "troubled" properties suffering from physical deterioration and economic distress. The Center on Budget and Policy Priorities is a bipartisan policy organization working at the state and federal levels on fiscal policy and public programs that affect low- and moderate-income families and individuals.

units.[2] The study also finds that, while there was a loss of over 300,000 subsidized units, HUD issued no more than 236,000 tenant-based vouchers—thus resulting in at least 74,000 subsidies unreplaced, despite already growing gaps between the need for and availability of affordable housing nationwide.

Project-Based Rental Assistance

Project-based rental assistance units saw the largest decline, experiencing a loss of 162,341 units. These privately owned units were subsidized through various rental assistance programs including project-based Section 8, Section 236 Rental Assistance Payments (RAP) and Rent Supplement. The report cites owners' voluntary conversion of project-based subsidized units to market-rate housing as the main reason for the loss of units. Section 8 and other deep subsidy contracts began to expire in the mid 1990s, and many owners "opted-out" or did not renew their contracts, resulting in the loss of subsidized units. HUD also terminated or failed to renew some contracts due to non-compliance with HUD rules, usually involving failure to provide habitable housing.

Although HUD awarded Section 8 vouchers to minimize the effects of declining subsidized housing stock, the NHT study shows a net decline of 74,000 rental subsidies.

These losses represent a loss of "deep subsidies"—subsidies covering the difference between the affordable income-based rent paid by the tenant (usually set at 30% of household income) and the actual rent for the unit. Such deep subsidies are needed to make housing affordable to most very low-income tenants. They ensure that rent levels are based on a tenant's income and thus set financially manageable levels for each individual tenant. The loss of deep subsidies could have profound implications if tenants are forced into housing that consumes a higher proportion of their monthly income.

[2]HUD also subsidized thousands of units under the HUD Section 221(d)(3) Below Market Rate Interest Rate (BMIR) program, but because of limitations in the data sources, the NHT study did not include data on the loss of these units. The NHT study also did not include data on a number of newer HUD multifamily subsidy programs that provide rental assistance to poor, elderly and disabled households, including the Section 202 PAC, Section 202 and Section 811 PRAC, project-based Section 8 vouchers, and numerous other loan-based subsidy and non-HUD funded subsidy sources.

Section 236

Primarily as a result of mortgage prepayments and the consequent termination of use restrictions which kept rents affordable, there was a decline of 82,055 Section 236 units between 1995 and 2003. These properties were subsidized through a federal mortgage insurance program accompanied by interest reduction payments, which carried use restrictions that required owners to make units available to low-income tenants at HUD-approved rents for the duration of the mortgage. Section 236 units provide affordability initially by reducing rent below market by the amount of the interest reduction payment; affordability can grow over time if market rents increase faster than the HUD-approved Section 236 rent level, which can increase only due to operating expenses. In the mid 1990s, Congress lifted restrictions on prepayments, and owners began to prepay and convert their properties to market-rate, terminating their affordability restrictions. Although these "shallow subsidy" Section 236 units provide less assistance than those with project-based rental assistance, the loss of Section 236 units still diminishes the overall stock of affordable housing.

Section 8 Moderate Rehabilitation

Section 8 Moderate Rehabilitation (Mod Rehab) units have experienced a decline of approximately 46,830 units.[3] Mod Rehab units were provided under a HUD program instituted in 1978 to rehabilitate and upgrade existing low-income housing stock. Mod Rehab units provide deep subsidies to low and very low-income tenants by providing affordable income-based rental units, similar to the other project-based rental assistance programs, except that contracts were made between the owner and the local housing authority.

Tenant Protection Vouchers

Although HUD awarded Section 8 vouchers to minimize the effects of declining subsidized housing stock, the NHT study shows a net decline of 74,000 rental subsidies because the number of vouchers awarded fell short of the total number of affordable units lost.

Vouchers were issued to eligible tenants when certain HUD-subsidized and HUD-assisted properties terminated their participation in the subsidy programs. The purpose of these vouchers was to protect low-income tenants who would be unable to afford increased market-rate rents when the owners shed prior federal restrictions. The

[3]Due to differences between HUD data sources, the number of Section 8 Moderate Rehabilitation units lost was somewhere between 39,173 and 54,487 units. The number reported, 46,830, reflects an average of this range.

replacement vouchers (often called "enhanced vouchers") allow tenants to remain in their current unit or to relocate to the housing of their choice, while paying approximately 30% of income in rent.

The study estimates that HUD awarded approximately 236,000 vouchers to tenants in response to Section 8 opt-outs, prepayments of HUD-subsidized mortgages, HUD enforcement actions and lost Mod Rehab units. However, in comparison to the approximately 300,000 units lost, this leaves approximately 74,000 subsidies unreplaced, permanently.

Conclusion

The loss of existing affordable housing units reported in the NHT study adds an important piece to understanding the problem of the growing lack of affordable housing. With a decline in deeply subsidized housing units and the additional loss of shallow subsidies, opportunities for low-income people to find affordable housing continue to dwindle. Additionally, with the failure of HUD to adequately replace the loss of housing stock with one-for-one tenant protection vouchers, tenants in need of affordable housing will have an increasingly difficult time finding it. ■

U.S. District Court Rules Stipulated Eviction Judgment No Bar to Fair Housing Claims

On June 2, 2004, the United States District Court in the Central District of California denied a motion for summary judgment made by the defendants in *Housing Rights Center v. Sterling*.[1] This decision paves the way for adjudication on the merits of whether defendant Donald Sterling and his property rental corporation racially discriminated against non-Korean tenants and indicated a preference of renting units to Korean tenants over non-Korean tenants.

Facts

In February 1997, Plaintiff Jeffery High entered into a lease agreement with the prior owner of an apartment building purchased by Donald Sterling. The terms of the lease stated that High was to make his rent payments on the first of the month, with a $10 late fee charged to payments tendered after the fifth of the month. During his tenancy, High frequently paid his rent after the fifth of the month and had an informal agreement with the prior owner allowing him to pay between the tenth and the fifteenth of the month.

In April 2002, Donald Sterling purchased the building and his "related family trust," the Sterling Family Trust, took title to the property. Beginning in May 2002, Sterling allegedly informed his property manager of a preference for Korean tenants[2] and took other actions that indicated a preference for Korean tenants. The defendants renamed the apartment building "Korean World Towers," requiring that rent payments be made to that name.[3] Banners were hung outside the building advertising "Apartments for Rent" and "Korean Managers." Notices were distributed to tenants written entirely in Korean. The defendants terminated the doormen and replaced them with Korean-American security guards who allegedly would open the doors for Korean tenants, but not for non-Korean tenants. During the early months of ownership, Sterling allegedly informed his property manager that he wanted to try and force out some of the existing tenants with an "experiment." Allegedly, High was to become a victim to this experiment.

In May 2002, defendants sent tenants a notice stating that, beginning in June 2002, failure to pay the rent by the fifth of the month would result in a late fee and in the issuance of a three-day Notice to Pay Rent or Quit. During the month of May, High paid his rent on the fifteenth, per his usual practice. However, defendants had already served him with a three-day notice on May 9. High contends that the prior practice for handling late rent payments involved the issuance of three-day notices and then the commencement of an unlawful detainer proceeding, even allowing tenants to cure after the commencement of the unlawful detainer proceedings. After the May 9 three-day notice, High failed to pay his rent within the three-day period and instead of charging him a late fee or filing an unlawful detainer action, defendants served him with a small claims complaint. When High did pay his rent on May 15, his rent was returned to him without explanation.

For the next three months High attempted to make timely rent payments and each time the rent was returned to him without an explanation. High continued to receive

[1]Hous. Rights Ctr. v. Sterling, No. CV 03-859 DSF (Ex), slip op. (C.D. Cal. June 2, 2004) [hereinafter *Hous. Rights Ctr. II*]. A copy of the decision is available at http://www.nhlp.org.

[2]Defendants made statements regarding preferences for Korean tenants and also made negative comments about other ethnic minorities. *Hous. Rights Ctr. II* at 4. *See also* Hous. Rights Ctr. v. Sterling, 274 F. Supp 2d. 1129, 1134 (C.D. Cal. 2003) [hereinafter *Hous. Rights Ctr. I*].

[3]In December 2003, the district court issued a preliminary injunction enjoining defendants from using the word "Korea" in the name of the building or in any notices, banners, advertisements, or applications relating to tenancy. *Hous. Rights Ctr. I,* 274 F. Supp 2d. at 1140.

three-day notices during these months and finally, in August 2002, defendants filed an unlawful detainer action against High in the Los Angeles County Superior Court. At that time, the small claims court suspended the case, pending the outcome of the unlawful detainer action.

The unlawful detainer action did not go to trial, and no evidence was presented by either side. High entered into a stipulation for judgment with the defendants stating that he would pay $6,570.48 in back rent and fees by November 1, 2002. If the money was not paid, High would be locked out of the apartment on November 4, 2002. High did not pay the money and lost possession of the apartment on November 4, although he contends that he voluntarily left the apartment in October 2002. Throughout the period from August to October, High contends that he received notices written in Korean which he could not understand, that he was aware of the change in the property name to Korean World Towers, and the security guards treated him differently than they treated the Korean tenants.

In January 2004, plaintiffs filed a complaint against defendants alleging: (1) violations of the Fair Housing Act;[4] (2) violations of the California Fair Employment and Housing Act;[5] (3) violations of the California Unruh Civil Rights Act;[6] (4) unfair business practices; (5) negligence; (6) breach of the implied covenant for quiet enjoyment; (7) violations of the Civil Rights Act of 1866;[7] and (8) violations of the Bane Civil Rights Act.[8] The defendants filed a motion for summary judgment, or in the alternative, partial summary judgment.

Discussion

In support of their motion for summary judgment, the defendants argued that (1) the *Rooker-Feldman* doctrine bars High's fair housing claims insofar as they are based on his eviction; (2) *res judicata* bars High from litigating whether his eviction proceeding were lawful; (3) the plaintiffs failed to produce evidence that there is a claim under fair housing; and (4) High's seven other claims fail for the same reason that the fair housing claim fails. The district court rejected these arguments.

Rooker-Feldman Doctrine

The defendants asserted that High's fair housing claim was barred by the *Rooker-Feldman* doctrine because it was based on the state court stipulated judgment. The district court held that the *Rooker-Feldman* doctrine does not preclude High's present claim because High was asserting a different, independent claim from the claim decided in the eviction case.

The district court held that the Rooker-Feldman doctrine does not preclude High's present fair housing claim because High was asserting a different, independent claim.

The *Rooker-Feldman* doctrine states that a federal district court lacks "subject matter jurisdiction to hear a direct appeal from the final judgment of a state court."[9] This doctrine bars attempts to raise issues in federal court that could have been raised in a prior state court action, as well as issues that are "inextricably intertwined" with the prior decision of the state court. An issue is inextricably intertwined if there was a reasonable opportunity to raise the issue in the state proceeding. The defendants argued that to determine whether High's allegation of racial discrimination has merit would be a violation of the *Rooker-Feldman* doctrine because it would require the court to review the state court judgment regarding the eviction.

The court held that High was not challenging the stipulated judgment entered in state court in the eviction case, nor was he claiming that the judgment caused him injury—instead he "seeks to prove allegations entirely separate from the previously litigated eviction proceedings and payment of back rent."[10] The court held that High's claim that the defendant's discriminatory actions led him to leave the apartment and agree to the stipulated judgment were not inextricably intertwined with the state judgment and not barred by the *Rooker-Feldman* doctrine.[11]

In reaching this conclusion, the court distinguished

[4]42 U.S.C.A. § 3601 (West, WESTLAW through P.L. 108-275 (excluding P.L. 108-265), approved 7-15-04).

[5]Cal Gov't code § 12900 (West, WESTLAW through Ch.183 & Res. Ch.1 of

2004 Reg. Sess., Ch. 1 (end) of 3rd Ex. Sess., Chs. 1 & 2 (Prop. 57) & Res. Ch. 1 (Prop. 58) of 5th Ex. Sess., & Props. 55 & 56).

[6]Cal Civ. code § 51 (West, WESTLAW through Ch. 183 & Res. Ch. 1 of 2004 Reg. Sess., Ch. 1 (end) of 3rd Ex. Sess., Chs. 1 & 2 (Prop. 57) & Res. Ch. 1 (Prop. 58) of 5th Ex. Sess., & Props. 55 & 56.).

[7]42 U.S.C.A. § 1981 (West, WESTLAW through P.L. 108-275 (excluding P.L. 108-265) approved 7-15-04).

[8]Cal Civ. code § 51.7 (West, WESTLAW 183 & Res. Ch. 1 of 2004 Reg. Sess., Ch. 1 (end) of 3rd Ex. Sess., Chs. 1 & 2 (Prop. 57) & Res. Ch. 1 (Prop. 58) of 5th Ex. Sess., & Props. 55 & 56).

[9]*Hous. Rights Ctr. II* at 8 (quoting Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003)).

[10]*Id.* at 10.

[11]The Ninth Circuit has taken a more restrictive interpretation of the "inextricably intertwined" test holding that it "simply means that a plaintiff cannot assert legal error of a state court judgment in a district court." Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003).

two other fair housing cases involving evictions. In one case, the plaintiff sought damages for a wrongful eviction based on racial animus.[12] In the second case, the plaintiff sought damages for the enforcement of the judgment through a writ of possession.[13] The court distinguished High's case because he did not claim wrongful eviction and does not seek damages or the execution of a writ of possession.

Res Judicata

The court rejected the defendants' argument that even if the suit was not barred by the *Rooker-Feldman* doctrine, the suit should be barred by *res judicata* because the current case involves the same claim as the state court unlawful detainer action.

Under *res judicata*, a federal action is barred where a previous lawsuit: "1) involved the same claim sued on in the present action; 2) involved the same parties or persons in profit of interest with them; and 3) resulted in a final judgment on the merits."[14] The defendants argued that the discrimination case arises out of the "same transitional nucleus or operative facts" as the previously decided unlawful detainer case, that both cases involved a landlord's right to timely payment of rent and the right to evict, and because the same evidence would be presented in both actions.[15] Defendants argued that High waived his right to raise the discrimination claim by not raising it at the time of the unlawful detainer action.

The court held that the discrimination claim was not barred by *res judicata*. First, the court stated that decisions in unlawful detainer actions usually have very limited *res judicata* effect and will not prevent subsequent legal or equitable claims between the parties. The court stated that the unlawful detainer action and the federal action did not involve the same claim. The unlawful detainer action determined Sterling's right to repossess the apartment if High did not pay the rent, whereas the federal case involved Sterling's discriminatory behavior during High's tenancy. The court also held that because no evidence was presented in the unlawful detainer case and the stipulated judgment did not contain evidence relevant to the current case, that the current case would not present evidence presented in the previous state action.

Fair Housing Claims

The court held that High raised a triable issue as to whether or not he was racially discriminated against in violation of the Fair Housing Act (FHA). The elements of a prima facie case for discrimination are: "1) the plaintiff's rights are protected under FHA; and 2) as a result of the defendant's discriminatory conduct, plaintiff has suffered a distinct and palpable injury."[16] The court found that High established the prima facie case for each of the three sections of the FHA under which he made a claim.

Section 804(a)

Section 804 of the Fair Housing Act states that it is "unlawful to sell or rent . . . or to refuse to negotiate for the sale or rental, or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[17]

The court concluded that High established a prima facie case sufficient to defeat a motion for summary judgment. The court found merit in High's claim that Sterling engaged in discriminatory behavior that made the apartment "unavailable" to him within the meaning of § 804. The court pointed to evidence of the renaming of the building as "Korean World Towers," the distribution of materials in Korean, Sterling's stated preference for Korean tenants, the different treatment High received from staff in comparison to the treatment afforded to Korean tenants, and an instruction by Sterling to the building manager to harass High. In construing the evidence most favorably to the non-moving party, the court held that there was a triable issue as to whether High was subjected to discriminatory practices that were unlawful under § 804(a).

Section 804(b)

Section 804(b) states that it is unlawful to discriminate against a person in "terms, conditions, or privileges of sale or rental of a dwelling" on the basis of their protected status.[18] The court held that High presented evidence sufficient for his § 804(b) claim to withstand a motion for summary judgment by showing he was "subjected to different 'terms, conditions, or privileges because of a protected status.'"[19] The court concluded that High's evidence presented in support of his claim raised a triable issue as to whether Sterling's actions created an environment that subjected High to different terms and conditions from the Korean tenants in the apartment complex.

Section 804(c)

Section 804(c) makes it unlawful to publish written or oral notices or statements that indicate a preference,

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[12]Fayyumi v. City of Hickory, 18 F. Supp 2d. 909 (N.D. Ill. 1998).

[13]Busch v. Torres, 905 F. Supp. 766 (C.D. Cal. 1995).

[14]*Hous. Rights Ctr. II* at 10 (quoting Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993)).

[15]*Id.* at 12.

[16]*Id.* at 15.

[17]42 U.S.C. § 3604(a) (West, WESTLAW through P.L. 108-261, approved 06-25-04).

[18]*Id.* at § 3604(b).

[19]*Hous. Rights Ctr. II* at 15 (quoting Inland Mediation Board v. City of Pomona, 158 F. Supp 2d. 1120, 1148 (C.D. Cal. 2001)).

limitation or discrimination based on a protected class in the sale or rental of a dwelling.[20] Section 804(c) applies to both prospective and existing tenants. The court held that High's § 804(c) claim survives summary judgment because the evidence, including notices and banners written only in Korean and the statements indicating defendants' preference for Korean tenants "suggest to the ordinary reader a racial preference for Korean tenants," and raise a triable issue as to whether the defendants expressed a preference to rent to Korean tenants.[21]

High's Seven Other Claims

The court held that High's other claims, including claims under the California Fair Employment and Housing Act, the Unruh Act, and claims for unlawful and unfair business practices under the California Business and Professional Code, also survived summary judgment. The court ruled that High's rights under the state laws offer broader protection against discrimination than under the FHA and "the outcome of the FHA claim is not determinative of the other claims." Furthermore, even if defendants' alleged actions were lawful under FHA, they would still be actionable under those broader state laws.

Conclusion

The district court's decision to deny defendants' summary judgment motion ensures that plaintiff's claims will be tried on their merits. The district court's decision is also particularly significant for its holding that a stipulated judgment in an eviction action does not preclude a tenant from suing affirmatively alleging civil rights violations related to his or her tenancy. Although the eviction action was from a California court, the reasoning of the court is logically applicable to eviction actions in other states. This case may also interest advocates who are pursuing limited English proficiency litigation, because it may help to establish boundaries as to what is adequate communication to limited-English-speaking and non-English-speaking tenants. ■

[20]42 U.S.C. § 3604(c) (West, WESTLAW through P.L. 108-261, approved 06-25-04).

[21]*Hous. Rights Ctr. II* at 21.

HUD Notes

Negotiated Rulemaking Concludes for New Public Housing Cost Formula

On June 8 and 9, 2004, the final meeting of the public housing operating subsidy negotiated rulemaking committee took place in Potomac, Maryland.[1] The gathering concluded a series of multi-day meetings and negotiations between HUD, public housing authorities (PHAs), housing authority trade groups, and other interested parties, including resident representatives, to finalize the details of HUD's new formula to calculate public housing operating subsidies that PHAs receive. Operating subsidies are used to cover a PHA's costs for administration, maintenance and utilities. The new formula was devised using a study ordered by Congress in 1999 to assess the true costs of operating well-run public housing. The study, performed by the Harvard University Graduate School of Design, likened public housing to Federal Housing Administration (FHA)-insured properties and established recommendations for how public housing should be run and what should and should not be included in a formula to fund such public housing operations.[2]

The new formula would dramatically change the way in which public housing authorities do business, control and dispose of their housing stock, and support their residents. Under this new approach, housing authorities would be forced to manage, account for and maintain their properties individually on a project-by-project basis. Therefore, funding would be awarded using a Project Expense Level (PEL) designation instead of the current Allowable Expense Level (AEL). Three factors would be included in this formula: a project expense level (PEL) amount, a utilities expense level (UEL) and add-on expenses such as resident participation funding, independent audit costs and self-sufficiency program coordinators. Also included in this formula would be a new asset management fee, which would range from $2-4/unit months, depending on the number of units. This fee, however, would be forfeited if a housing authority fails to transition quickly to an asset-based management system.

This new approach to property management, treating public housing as an "asset," seeks to reward housing authorities who employ conservation efforts and other

[1]The information presented in this article was obtained from NHLP staff notes taken at the negotiated rulemaking committee meeting held on June 8 and 9, 2004, at the Bolger Center, a government training facility in Potomac, Maryland. For more on the negotiated rulemaking committee, see NHLP, *HUD Notes: Negotiated Rulemaking on New Public Housing Cost Formula*, 34 Hous. L. Bull. 105, 114 (June 2004).

[2]Harvard University Graduate School of Design, Public Housing Operating Cost Study: Final Report (2003), *available at* http://www.gsd.harvard.edu/research/research_centers/phocs/documents.html.

cost saving methods and punish those agencies that cannot run their projects efficiently. Under the new formula, housing authorities would not be able to receive any operating funds for projects that exceed a 3% vacancy rate. For a limited time, this would be calculated based on a PHA's overall number of units vacant; beginning July 1, 2005, it will be based on the number of vacant units per project. Housing authorities that transition buildings out of their inventory or demolish and dispose of them would also be eligible for an asset repositioning fee under the new rule.

Under the new formula, housing authorities would not receive any operating funds for projects that exceed a 3% vacancy rate.

Unlike the current rule, which applies the operating formula to all rental units under Annual Contribution Contracts (ACCs), the new rule would allow receipt of funds only for each unit "month" that the unit is both under an ACC and occupied by a public housing family under lease. The only vacant units eligible to receive operating subsidies would be those undergoing modernization and those used for resident services, resident organization offices, self-sufficiency activities or anti-crime related initiatives. Housing authorities would further be able to receive operating funds for other vacant units affected by litigation, disasters and casualty losses only upon prior HUD approval and only for a limited period of time to be agreed to by HUD on a project-by-project basis. Under the new rule, housing authorities would also be entitled to file an appeal with HUD to receive operating funds for units left vacant by changing market conditions. For example, if there is a sudden drop in the population or dislocation of residents due to economic disaster, and the PHA demonstrates that it has conducted aggressive outreach and marketing to no avail, it could appeal to HUD for funds for said vacant units.

While under the current system housing authorities each have different fiscal year starting dates, beginning in 2006 all housing authorities would be required to shift to a January 1 start date to make their fiscal year coincide with the calendar year.

Under this newly proposed rule, housing authorities would need to shift to a project-based accounting system no later than January 2007 and completely change to asset-based management by 2011.

NHLP will discuss the details and implications of this new formula in a future issue of the *Housing Law Bulletin*. ■

Report by Urban Institute and Brookings Institution Endorses HOPE VI Program

In May 2004, the Urban Institute and the Brookings Institution issued a report, *A Decade of HOPE VI: Research Findings and Policy Changes*, on the HOPE VI public housing redevelopment program.[1] The sixty-two page report provides a survey of research on the HOPE VI program and a general outline of policy recommendations. The report also provides a description of the history and origins of the program.

Created in 1992, HOPE VI is a multi-billion dollar competitive grant program administered by the Department of Housing and Urban Development (HUD). It is intended to fund the demolition and redevelopment of "severely distressed" public housing. Critics, including NHLP, have challenged the program for a lack of clear standards and harm caused to low-income families due to ineffective implementation.[2]

A Decade of HOPE VI offers a clear endorsement of HOPE VI in some form and its continued funding by Congress: "evidence strongly supports continuation of the HOPE VI approach as a way to improve outcomes for distressed developments, residents, and neighborhoods."[3] As an apparent consequence, much of the report is concerned with accentuating the positive aspects of the program.

The report traces the origins of the HOPE VI program and the deteriorated condition of a portion of the public housing stock in the late 1980s.[4] It then describes the poverty deconcentration, mixed-income and mixed-finance approaches that underlie HOPE VI and draws from other research and publications to outline the effect of the program on public housing developments, public housing residents and broader neighborhood conditions.[5] The report concludes with a list of areas where the program "needs significant improvement," focusing

[1]Susan J. Popkin, Urban Institute, Bruce Katz, Brookings Institution, et al., A Decade of HOPE VI: Research Findings and Policy Challenges (2004) [hereinafter A Decade of HOPE VI], *available at* http://www.urban.org/UploadedPDF/411002_HOPEVI.pdf.

[2]For more on HOPE VI, see NHLP, et al., False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program (2002) [hereinafter False HOPE], *at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf; Center for Community Change, HOPE Unseen: Voices from the Other Side (2003) (prepared on behalf of Everywhere and Now Public Housing Residents Organizing Nationally Together (ENPHRONT)), *available at* http://www.communitychange.org/housing/HOPEVI/hopeunseen.htm.

[3]A Decade of HOPE VI, *supra* note 1, at 5.

[4]*Id*. at chs. 2 and 3.

[5]*Id*. at chs. 3-7.

primarily on the relocation of residents displaced as a result of HOPE VI activities and "implementation failures" of some public housing authorities that have received HOPE VI funds.[6] It also emphasizes the necessity of addressing the continuing capital needs of the public housing stock over the coming decades.[7]

In essence, the report by the Urban Institute and the Brookings Institution attempts to put the best possible face on the HOPE VI program, while maintaining some balance and evenhandedness. This approach is understandable at a time when the program repeatedly has been threatened with cancellation.[8]

Nonetheless, it is difficult to read the report without also developing a sense of the inconsistent implementation of the program and slipshod oversight by HUD. As noted in *A Decade of HOPE*, there are significant gaps in the available data on HOPE VI program results, particularly with regard to the effects of the program on public housing families.[9] This lack of data is symptomatic of the inattentive oversight by HUD which has had negative consequences for the program. As HUD Assistant Secretary Michael Liu testified before Congress in 2003, fewer than 10% of the HOPE VI projects funded by HUD since Fiscal Year (FY) 1993 have been completed.[10]

A Decade of HOPE appears to explain or justify the shortcomings of the HOPE VI program by referring to the experimental nature of HOPE VI.[11] HUD has used a similar rhetorical device in the past.[12] Calling HOPE VI an "experiment" simply is not an excuse for the shortcomings of the program. A decade-long experiment held with so little careful oversight and producing so few concrete results is, on the whole, a poorly conducted one.[13]

It is clear that steps must be taken to address the long-neglected capital needs of the public housing stock, which remains a vital national resource for affordable housing. What is not clear is whether current and future public housing needs are best met with the HOPE VI strategies that have been employed to date. ■

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[6]*Id*. at 49-50.

[7]*Id*. at 53-4.

[8]The President's proposed FY 2004 and 2005 HUD budgets requested no funds for HOPE VI. HUD, Fiscal Year 2004 Budget Summary 21 (2003), *at* http://www.hud.gov/about/budget/fy04/budgetsummary.pdf; HUD, Fiscal Year 2004 Budget Summary app. A (2004), *at* http://www.hud.gov/about/budget/fy05/budgetsummary.pdf. Despite this, Congress did continue funding for HOPE VI in FY 2004, but at a greatly reduced level: $150 million, approximately one-third of previous funding levels. Pub. L. No. 108-199, div. G, tit. II, 118 Stat. 3, 375 (2004). It appears that Congress will provide for another $150 million appropriation for FY 2005.

[9]*See, e.g.*, A Decade of HOPE VI, *supra* note 1, at 27. *See also* False HOPE, supra note 2, at ch. V (HUD's Inadequate Reporting of HOPE VI Outcomes).

[10]Statement of Michael Liu, Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development, before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Housing and Community Opportunity (Apr. 29, 2003) ("Only 15 of the 165 grants awarded through FY2001 have completed all planned units and only 18 grants are nearing completion (i.e., 80% or more construction completed)."), *at* http://www.hud.gov/offices/cir/test42903hope6.cfm.

[11]A Decade of HOPE VI, *supra* note 1, at 12 ("In many respects, HOPE VI has served as a laboratory to test new and often contentious ideas about public housing finance, management, and design.") and 48 ("HOPE VI has encouraged housing authorities to experiment with new management approaches . . . .").

[12]HUD Notice PIH 95-10 (Feb. 22, 1995) ("HUD intends for HOPE VI to be the laboratory for the reinvention of public housing."), *at* http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi; Abt Assocs., An Historical and Baseline Assessment of HOPE VI, Vol. I: Cross-site Report (1996) (Foreword by then HUD Assistant Secretary Michael Stegman: "HOPE VI provides an opportunity to test ideas that have promise."), *at* http://www.huduser.org/publications/pdf/hopevi_vol1.pdf.

[13]*See generally* False HOPE, supra note 2, at ch. V.

Ninth Circuit Dismisses Resident's RHS Prepayment Appeal

In an unpublished opinion, a panel of the United States Court of Appeals for the Ninth Circuit recently dismissed as moot an appeal by a resident of an Idaho Rural Housing Service (RHS) Section 515 rental housing development. The resident was denied the right to intervene in the development owner's quiet title action against RHS for RHS's failure to accept the owner's tender of the balance due on the Section 515 loan that financed the development. Kimberly Associates v. United States, Nos. 02-36165 and 03-35422, 2004 WL 1663523 (9th Cir. July 22, 2004) (*Kimberly II*).

The *Kimberly* case originated in 1998, when Kimberly Associates, the owner of a twenty-four unit senior development financed under the Section 515 program and subsidized under the project-based Section 8 program, tendered to RHS the balance due on its Section 515 loan nearly fourteen years prior to the loan's final maturity date. RHS refused the payment on the grounds that it constituted a loan prepayment that was prohibited by the Emergency Low-Income Preservation Act of 1987 (ELIHPA). In response, the owner initiated a lawsuit

seeking, *inter alia*, to quiet title under Idaho law based on RHS's failure to accept the tender for the balance of the loan. RHS filed a motion to dismiss, contending that the owner's claims were barred by sovereign immunity and the unmistakability doctrine.

The unmistakability doctrine is a special canon of contract construction that protects the federal government from damage claims in breach of contract cases. Under the doctrine, the government is protected from contract damages claims when the breach was caused by a sovereign act of the government, such as the passage of subsequent legislation, unless the government has surrendered its right to exercise its sovereign authority in unmistakable terms.

The district court rejected RHS's sovereign immunity defense, ruling that the government had waived sovereign immunity in quiet title actions under 28 U.S.C. § 2410. However, the district court upheld RHS's argument that the suit was barred by the unmistakability doctrine.

The owner appealed the decision to the Ninth Circuit, which upheld the district court decision on the sovereign immunity issue, but reversed on the applicability of the unmistakability doctrine. Kimberly Associates v. United States, 261 F.3d 864 (9th Cir. 2001) (*Kimberly I*). In so ruling, the Ninth Circuit followed a developing trend in damage actions against the United States that merges the unmistakability doctrine with what heretofore had been considered as a separate legal doctrine, known as the sovereign acts doctrine,[1] and limits the applicability of the unmistakability doctrine to cases where the sovereign acts doctrine has first been determined to be applicable. In other words, the Ninth Circuit concluded that it did not need to reach the issue whether the government had unmistakably waived its right to abrogate its contractual duty to Kimberly Associates unless the act by which the duty was abrogated, ELIHPA, was a sovereign act.

Following prior decisions by the federal Court of Claims, the Ninth Circuit concluded that ELIHPA was not a sovereign act because it was adopted for the limited purpose of altering the government's contracts with Section 515 owners and had no broader applicability.[2] Accordingly, the Ninth Circuit held that it need not reach the issue of whether the government had unmistakably waived its right to alter the contract. The Ninth Circuit reversed the district court decision and remanded the case for further proceedings. Unfortunately, in *dicta*, the Ninth Circuit panel suggested that the owner may be entitled to relief under an Idaho law that permits the issuance of a quiet title order when a lender wrongfully refuses to accept tender of a final payment on a loan.[3] In making that statement, the panel did not consider whether Idaho or federal law was applicable to the case or whether the form of relief sought was appropriate in an injunctive action—as opposed to a claim for damages, on which all the Court of Claims precedents were predicated.

The district court concluded that ELIHPA was not a "soverign act" and therefore did not need to be considered at all.

On remand to the district court, two residents of the development who were not previously aware of the case sought to intervene. The district court postponed consideration of the residents' motion, granted the owner the right to a quiet title, then concluded that the residents had no interest that would give them the right to intervene in the case. In ruling in the owner's favor, the district court concluded that it did not need to reach the issue of whether RHS's refusal of the tender was justified by ELIHPA because ELIHPA was not a "sovereign act" and therefore did not need to be considered at all. It thus granted the owner a quiet title judgment.

RHS filed an appeal of the district court's decision. However, for reasons that are not clear, it subsequently entered into a settlement agreement that allowed the owner to prepay its Section 515 loan. The government and the owner filed their agreement with the district court, which issued a judgment in the owner's favor and issued an order granting the owner clear title to the property. One of the two residents appealed the denial of the residents' right to intervene in the case and also secured a conditional right to appeal the substantive decision.[4]

In *Kimberly II*, the Ninth Circuit decided that the resident's case was moot because "the settlement agreement between the original parties and the government's

[1]The sovereign acts doctrine allows the United States to assert the generally applicable contract impossibility defense in a breach of contract case even when the change in circumstances precluding the government from performing its contractual obligations is a government act. However, under the sovereign acts doctrine, in order successfully to assert the defense, the government act that precludes performance by the United States must be related to the accomplishment of broader governmental objectives and not merely the abrogation of the contractual obligations of the United States.

[2]*Kimberly I*, 261 F.3d at 869.

[3]*Id.* at 868.

[4]As an applicant intervenor the resident was not a party to the case and was not entitled to appeal the district court's substantive decision. However, following a Seventh Circuit precedent, the appellant asked for and secured the right to file a conditional appeal of the substantive decision, which would ripen only if the court actually granted her the right to intervene. In granting the right to appeal the substantive decision conditionally, a court of appeals avoids the need to remand the matter to the district court where it is to decide the case on the merits.

transfer of title to Kimberly deprives this Court of any way to effect meaningful relief from the quiet title judgement and that appeal is likely moot."[5]

The Ninth Circuit buttressed its conclusion by addressing the substance of the resident's appeal. It stated that *Kimberly I* addressed and decided the issues presented in the second appeal and that the first opinion stands as the law of the case. It rejected the appellant's argument that ELIHPA precluded the prepayment, reiterating that when Congress enacted ELIHPA it was not acting in a sovereign capacity. It stated: "[T]he question of whether the government waived its sovereign power to alter the terms of housing loans was superfluous. The government was bound by the 'law applicable to private parties unaltered by the government's sovereign status.'"[6] In addition, the Ninth Circuit stated that the applicant intervenor's contention that the government lacked authority to contract away Congress's legislative power is an issue that was disposed of in *Kimberly I*. Concluding that the intervenor could not prevail in her substantive claim, the Ninth Circuit concluded that her appeal from the denial of intervention was likewise moot because there was no longer any action in which the appellant could intervene.

Because *Kimberly II* is unpublished it may not, with narrow exceptions, be cited in any court within the Ninth Circuit and because its citation in other circuits is disfavored, its impact should, therefore, be limited—particularly because the Ninth Circuit panel's substantive discussion is *dicta*. Nonetheless, its interpretation of *Kimberly I* and the effects of ELIHPA is rather disturbing. This appears to be the first case in which a court has refused to give consideration to an otherwise valid act of Congress and granted a private party injunctive relief in derogation of that act.

While the ultimate impact of the Kimberly decisions on Section 515 prepayments is not yet clear, Kimberly II validates Kimberly Associates' right to prepay the Section 515 loan and terminate RHS's oversight of the development. While this terminates the project residents' RHS rights, such as the right to a grievance and appeals procedure, the residents' rents will continue to be subsidized as long as the owner remains in the Section 8 program. ■

[5]*Kimberly II*, 2004 WL 1663523, at *3.

[6]*Id.* at *3-4 (citing *Kimberly I*, 261 F.3d at 869).

Recent Cases

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

Eviction—Generally; Eviction—Section 8 Programs

Kuzuri Kijiji, Inc. v. Bryan, 2004 WL 1620815 (N.J. Super. App. Div. July 21, 2004). In an appeal in an eviction action, the appellate division held, *inter alia*, that a lease agreement based on a HUD multifamily housing model lease adequately reserved a landlord's right of re-entry, and thus allowed the landlord to seek to recover possession for material noncompliance with the agreement, even though the term "re-entry" did not specifically appear in the agreement.

Fair Housing—Disability

White Cliffs at Dover v. Bulman, 2004 WL 1586365 (N.H. July 16, 2004) (not released). Affirming a judgment for possession in favor of Plaintiff-Appellee landlord, the New Hampshire Supreme Court, *inter alia*, rejected Defendant-Appellant disabled tenant's argument that Appellee's refusal to allow her to place her garbage in the building laundry room violated Fair Housing Act, 42 U.S.C. § 3604(f), reasonable accommodation of disability requirements. Stating that federal law requires "a reasonable accommodation for [Defendant-Appellant], not her ideal accommodation," the court pointed to the installation of railings, attempts to employ outside agencies and other actions by Plaintiff-Appellee to accommodate Defendant-Appellant's arthritis-related disability.

Fair Housing—Generally; Environmental Justice

Ball v. Union Carbide Corp., 2004 WL 1573172 (6th Cir. July 15, 2004). Distinguishing *Hills v. Gautreaux*, 425 U.S.

[1]http://www.westlaw.com.

[2]http://www.lexis.com.

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

284 (1976), and related authorities, the Sixth Circuit concluded, *inter alia*, that Defendant-Appellee manufacturers had no affirmative civil rights duty to remedy Plaintiff-Appellants' exposure to chemical emissions as vestiges of historical *de jure* racial residential segregation. Noting that there was no allegation that Defendant-Appellees "initiated the segregation," the court affirmed summary judgment in favor of Defendant-Appellees.

No Trespass Policies

State v. Wood, 2004 WL 1631468 (Ohio Ct. App. July 15, 2004). Briefly addressing, *inter alia*, Defendant-Appellant's constitutional argument in his appeal of his conviction for trespassing on a public housing property, the court of appeals, relying on *State v. Burnett*, 755 N.E.2d 857 (Ohio 2001), concluded that a Portsmouth, Ohio, municipal trespass ordinance was narrowly tailored sufficient for constitutional purposes.

Travis v. State, 2004 WL 1682253 (Ind. Ct. App. July 28, 2004). Defendant-Appellant appealed his criminal trespass conviction. Defendant-Appellant was ejected from a public park by city police for "playing dice and gambling," told not to return, and listed in a police record system. Defendant-Appellant did return two days later and was arrested for trespassing. In reversing the conviction, the court of appeals held that, under state and municipal law, police lacked authority to ban persons from public parks permanently.

Relocation—Federal Law

Renfroe v. Hous. Auth. of New Orleans, 2004 WL 1630496 (E.D. La. July 19, 2004). In an action filed by public housing residents of a HOPE VI redevelopment site for violation of the Uniform Relocation Act (URA), 42 U.S.C. § 4621, the federal district court denied Defendant housing authority's motion to dismiss for failure to exhaust URA administrative remedies with HUD. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in July of 2004. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Final Rules

69 Fed. Reg. 41,712 (Jul. 9, 2004)
Equal Participation of Faith-Based Organizations

Summary: Consistent with Executive Order 13279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," this final rule describes HUD's policy for the participation of faith-based organizations in HUD programs and activities. HUD has decided to adopt the proposed rule without change.

Effective Date: August 9, 2004.

HUD Federal Register Proposed Rules

69 Fed. Reg. 41,434 (Jul. 9, 2004)
Community Development Block Grant Program Revision of CDBG Eligibility and National Objective Regulations

Summary: This proposed rule would revise the Community Development Block Grant (CDBG) program regulations to clarify the eligibility of brownfields cleanup, development, or redevelopment within existing program eligibility categories. In part, these changes respond to a 1999 statutory direction with respect to brownfields-related eligible activities. In addition, this proposed rule would make changes to CDBG national objectives that relate to brownfields and clarify regulatory language.

Comments Due Date: September 7, 2004.

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[1]*At* http://www.access.gpo.gov/su_docs.

[2]*At* http://www.hudclips.org/cgi/index.cgi.

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

[4]*At* http://www.rdinit.usda.gov/regs.

69 Fed. Reg. 43,488 (Jul. 20, 2004)
Supportive Housing Program

Summary: This proposed rule would amend HUD's Supportive Housing Program regulations. The regulations would be updated to improve the implementation of existing program requirements in conformance with recent statutory changes.

Comment Due Date: September 20, 2004.

HUD Federal Register Notices

69 Fed. Reg. 43,006 (Jul. 19, 2004)
Meeting of the Manufactured Housing Consensus Committee

Summary: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee). The meeting is open to the public and the site is accessible to individuals with disabilities.

Dates: Meetings were held on Monday, August 9, 2004, 2 p.m.–4 p.m.; Tuesday, August 10, 2004, 8 a.m.–5 p.m.; Wednesday, August 11, 2004, 8 a.m.–5 p.m.; and Thursday, August 12, 2004, 8 a.m.–12 p.m.

69 Fed. Reg. 43,427 (Jul. 20, 2004)
Notice of HUD's Fiscal Year (FY) 2004 Notice of Funding Availability (NOFA), Policy Requirements and General Section to FY 2004 SuperNOFA for HUD's Discretionary Grant Programs; Correction

Summary: This document makes corrections to the documents published in the Federal Register on June 22, 2004, and on May 14, 2004, concerning HUD's Fiscal Year (FY) 2004 SuperNOFA. The corrections pertain to the General Section to the SuperNOFA; the Section 202 Supportive Housing for the Elderly Program (Section 202 Program); the Section 811 Program of Supportive Housing for Persons with Disabilities (Section 811 Program); and the Public Housing Resident Opportunities and Self-Sufficiency (ROSS) Program, Resident Service Delivery Models-Family.

69 Fed. Reg. 45,888 (Jul. 30, 2004)
Homeless Management Information Systems (HMIS); Data and Technical Standards Final Notice

Summary: This notice implements data and technical standards for Homeless Management Information Systems (HMIS). The final notice follows publication of a draft notice on July 22, 2003.

Effective Date: August 30, 2004.

HUD Housing Notices

Notice H 2004-11 (July 15, 2004)
Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance

Summary: This notice provides guidance to Public Housing Agencies and Project Owners and Management Agents in determining annual and adjusted income in HUD's assisted housing programs under the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Public Law 108-173.

Expires: July 30, 2005.

Notice H 2004-12 (July 21, 2004)
Fiscal Year 2004 Annual Operating Cost Standards-Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

Summary: Attached are the Operating Cost Standards (OCS), which HUD Office staff should use for calculating the annual per person/per unit Amount of a Project Rental Assistance Contract (PRAC) when making Fiscal Year 2004 subsidy fund reservations for Capital Advance applications under the subject programs.

Expires: July 31, 2005.

Notice H 2004-13 (July 22, 2004)
Extension of Notice H 03-13, Guidelines for Calculating and Retaining Section 236 Excess Income

Summary: Notice H 03-13, which was issued July 15, 2003, and expires on July 31, 2004, is being extended to July 31, 2005.

Expires: July 31, 2005.

HUD PIH Notice

Notice PIH 2004-11 (July 15, 2004)
Income Calculation Regarding Medicare Prescription Drug Cards and Transitional Assistance

Summary: This notice provides guidance to Public Housing Agencies (PHAs) and Project Owners and Management Agents in determining annual and adjusted income in HUD's assisted housing programs under the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Public Law 108-173.

Expires: July 30, 2005.

Notice PIH 2004-12 (July 19, 2004)
Housing Choice Voucher Portability Procedures and Corrective Actions - Revision of Family Portability Information, Form HUD-52665

Summary: This notice provides guidance on public housing agency administrative responsibilities related to portability moves.

Expires: July 19, 2005. ■

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