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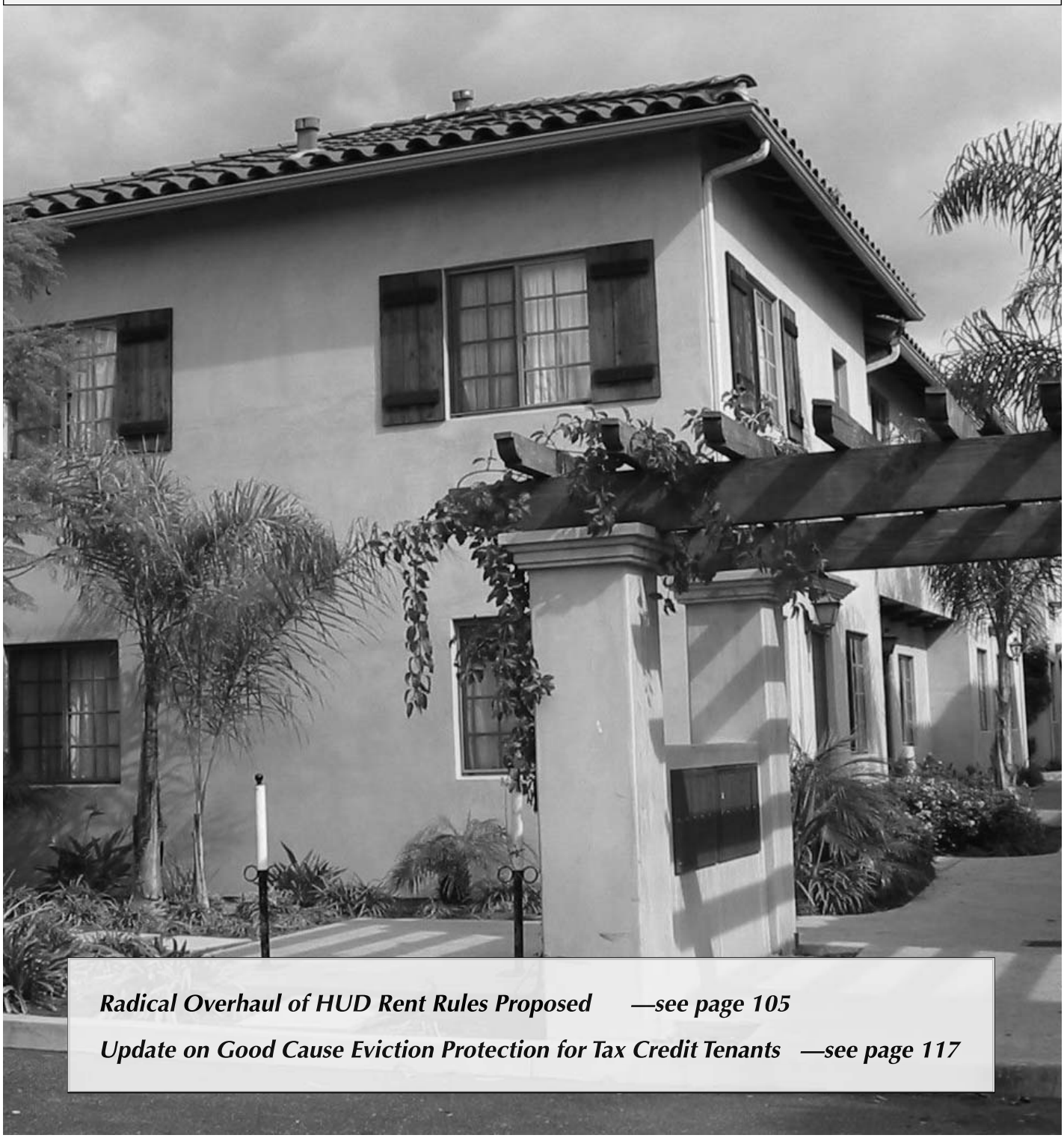

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SPECIAL FEATURE

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300

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

www.nhlp.org • nhlp@nhlp.org

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Cover: La Cumbre, an 11-unit public housing development in Santa Barbara, California. All the units in the development, which was constructed in 1996, have three bedrooms. The development was constructed with funding allocated to the Housing Authority of the City of Santa Barbara in 1991 under the Public Housing Acquisition program. Photo courtesy of the Housing Authority of the City of Santa Barbara.

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

Bush Administration Proposes Radical Overhaul of Rent Rules

The Bush Administration is proposing legislation to dramatically alter the way that rents are set in public housing and that the tenant share of the rent is determined in the voucher program.[1] The proposed legislation, entitled the "Public Housing Rent Flexibility and Simplification Act of 2005," would deregulate virtually the entire rent calculation process. Under the proposal, public housing authorities (PHAs) would be allowed to establish their own rent rules and formulas. As a result, there may be 3000 different rent formulas and neighboring PHAs may have vastly different rent schedules. Significantly, the administration is not proposing to change the rent formula for project-based Section 8 tenants. However, the proposal would eliminate the benefits of enhanced vouchers after the first twelve months.

Proposed New Rules for Public Housing

The proposed legislation amounts to a complete overhaul of the current rent structures and a rollback of housing affordability protections guaranteed by the Brooke Amendment. The Brooke Amendment established the income-based rent formula in 1969, which now generally provides that tenant rent is 30% of adjusted monthly income.

Under the new proposal, PHAs alone determine the amount of monthly rent for a family. The proposed legislation provides guidelines for PHAs to set the rent. Nothing is mandatory, but the legislation proposes the following rent structures that a PHA may adopt:

- A flat rent that is "based upon the rental value of the unit, as determined by the PHA"[2] and adjusted annually based upon an annual cost index;
- An income tiered rent structure based upon "broad tiers of income," adjusted by an annual cost index;
- A rent based upon a percentage of family income;
- A rent based upon the Brooke Amendment; or

[1]Talking Points—April 4, 2005, Subject: The State and Local Housing Flexibility Act of 2005, available at http://www.nlihc.org/news/041005.html [hereinafter Talking Points] (a document that does not reveal its author, which was circulated by HUD to congressional staff); *see also* The State and Local Housing Flexibility Act of 2005, S. 771, 109th Cong. (2005).

[2]This is the same language that is currently used to describe flat rents for public housing. 42 U.S.C.A. § 1437a(a)(2)(B) (West 2003). However, the current language regarding flat rents also contains an obligation to set rents so as not to create a disincentive to families who are attempting to be self-sufficient. This objective should be retained, strengthened and required to be incorporated into any determination of flat rents.

- Any other rent structure that includes one or more of the elements of the above listed rent structures.

The rent structures may be different for different types of families. In fact, the proposal would require PHAs to use the Brooke Amendment formula for all current elderly and disabled tenants up until January 1, 2009. For newly admitted elderly and disabled tenants, the Brooke Amendment rents must be used until the PHA adopts a different rent structure. That new rent structure must be established no later than January 1, 2009.

PHAs would be required to establish a minimum rent, and there would be no federally mandated hardship provision for families who cannot afford the minimum rents. Rent recertification must occur at least once every two years and may be every three years for elderly and disabled families. There would be no asset limitation for continued occupancy, but there would be an asset limitation for initial occupancy, to be established by the Department of Housing and Urban Development (HUD). Families who own a significant interest in real property also would not be eligible.[3] The proposal is silent on ceiling rents, but it would appear that a PHA could use ceiling rents, as a PHA would have broad authority and "determines the amount of any monthly rent."[4]

Current deductions for extraordinary medical expenses or child care costs would not be required. Overriding directives in other federal laws, the bill allows agencies to increase families' rent obligations if they receive other federal benefits, including Earned Income Tax Credits and Food Stamps.[5]

In addition to the flexibility proposed for rent, a PHA would be permitted to apply to become part of an expanded Moving to Work (MTW) Program, which provides that HUD may waive any provision of the United States Housing Act, except for public housing demolition and disposition procedures.[6] Under the new MTW Program, the PHA could combine public housing operating subsidies, modernization assistance and voucher funding. Participation in the new MTW Program would effectively be open to any housing authority, except those that have substantial performance problems.[7] The proposal would also allow the approximately thirty PHAs[8] that are part of the current MTW Demonstration Program to become part of the expanded MTW Program.

[3]It is not clear whether the ownership of a significant interest in real property is applicable only at admission or would also prohibit continued occupancy, if acquired after admission.

[4]S. 771, 109th Cong., tit. II, § 202 (2005).

[5]*Id.* § 103 (definition of terms).

[6]42 U.S.C.A. § 1437p (West 2003).

[7]S. 771, 109th Cong., tit. III, § 302 (2005).

[8]For information about some of the current MTW sites, see http://www.hud.gov/offices/pih/programs/ph/mtw/participatingsiteinfo.cfm.

Proposed New Rules for the Voucher Program

The rent reform rules for the voucher program are virtually identical to those for public housing. As noted above, there is also a proposal to limit the special benefits of enhanced vouchers to one year.[9]

Purpose of the Administration's Rent Reform Proposal

The apparent purpose of the Administration's rent reform policies for public housing is that "[i]t would reduce errors in income calculations and reporting; lessen the administrative burden on public housing authorities (PHAs) and HUD; lessen the intrusion in residents' lives; and provide incentives for work and increased income."[10]

The Administration appears to prefer rent structures that are not based upon a percentage of income, as it states that

> [o]nce eligibility based on income is determined, the legislation would offer other means to set rents besides solely basing that calculation on family or individual income. . . . Permitting the calculation of rent on bases other than family income creates a transparent system that promotes fairness, eliminates incentive to under report income or minimize household income for fear of paying higher rent.[11]

Administration's Proposals Could Be Disastrous for Low-Income Families

A critical weakness of the Administration's proposals is that there is no affordability standard by which rents may be measured. There is no standard to which PHAs can be held accountable and no standard that HUD or any reviewing agency can use to determine if the rents are affordable.[12] For the voucher program, PHAs would be permitted to set the maximum subsidy for units at any

[9]In other words, if a tenant elects to remain in her unit after the owner opts out of the project-based Section 8 program and receives an enhanced voucher because the rent for the unit exceeds the payment standard, the tenant receives the benefit of the enhanced voucher for twelve months. At the end of the twelve-month period, the tenant is converted to the tenant-based voucher program and would have to pay out of pocket any difference between the payment standard and the rent for the unit.

[10]Talking Points, *supra* note 1.

[11]*Id.*

[12]S. 771, 109th Cong., tit. II, § 202, "Sec. 3A" (2005). In the MTW Program, housing authorities would have to "establish a reasonable rent policy, in accordance with section 3A, which is designed to encourage employment and self-sufficiency by participating families." S. 771, 109th Cong., tit. III, § 302, "Sec.36(d)(3)." Under the MTW Demonstration the legislation added an example, "such as by excluding some or all of a family's earned income for purposes of determining rent." 42 U.S.C. § 1437f note (West 2003) (Public Housing Moving to Work Demonstration, § (c)(3)(B)).

level that is "reasonable and appropriate for the market area."[13] In addition, there is nothing to prevent a PHA from setting rents at levels such that the lowest-income families could not afford them.

These and other potential problems are made more substantial both because the proposed legislation also would relax the targeting requirements for the programs.[14] In addition, there is no requirement that PHAs with new rent policies be required to serve the same number of families with a comparable mix of family sizes, nor is there a requirement that families with the lowest incomes be served.[15] As a result, PHAs will be forced to market units to higher-income families and set rents accordingly. It may also mean that the lowest-income families or large families with single wage earners will be compelled to pay a disproportionate share of their income for rent.[16]

HUD appears to recognize that many of the problems with the current rent and income verification system can be attributed to errors in income calculations and the administrative burden on PHAs. The Government Accountability Office (GAO) recently determined that HUD made an estimated net $377 million in overpayments due to inaccurate rent and subsidy calculations by program administrators.[17]

However, the legislative proposal fails to acknowledge that the errors related to overpayments are being addressed and that there has been a substantial reduction in such errors.[18] According to the GAO, "total estimated subsidy overpayments have decreased by 64 percent since fiscal year 2000."[19] These efforts and improvements may be lost if the rent structure is drastically changed. It will take time for the nearly 3000 PHAs to set up new systems and implement them accurately. Any new system is likely to be plagued by all the problems that PHAs and HUD currently face, including lack of staff.[20] Moreover, PHA staff who actually implement the rent system and make eligibility determinations are overburdened, paid low wages and tend to have short job tenure.[21] A new rent system will not dramatically change this situation. The administrative burden may be diminished somewhat, but the work of the PHA staff will continue to be substantial. Under the proposal, PHA staff will continue to be required to verify family income eligibility for continued occupancy every two or three years.

As shown in the stated purpose of the rent simplification proposal, HUD continues the myths that tenants are under reporting income. The GAO report recently found little evidence of such under reporting. According to the GAO, of the 2401 files reviewed, only 1.2% (thirty files) had one or more unreported income sources.[22] HUD responded to this finding by agreeing that "unreported income sources may not be a major problem."[23] But HUD

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[13]S. 771, 109th Cong., tit. I, § 109(f) (2005).

[14]The Administration's proposal sets a target that 90% of the families issued vouchers during the year have incomes that are at or below 60% of area median income. That same standard would be applicable for PHAs that opt to participate in the MTW Program.

[15]The MTW Demonstration contains the limitations regarding serving the same number of families and same mix of families by family size along with a requirement that 75% of families assisted shall be "very low income families" (i.e., families at 50% of AMI). 42 U.S.C. § 1437f note (West 2003) (Public Housing Moving to Work Demonstration, § (c)(3)(A), (C) and (D).

[16]Compounding the problem is the recent redraft of the public housing operating subsidy rule, which makes it clear that HUD has no intention of setting a realistic formula for determining the amount of operating subsidies that PHAs should receive in the future. NLIHC Letter to Hill Staff (Mar. 31, 2005) (re draft proposed operating subsidy rule), *available at* http://www.nlihc.org.

[17]The net figure is derived from an estimated $896 million in overpayment minus $519 million in underpayments.

[18]GAO, GAO-05-224, HUD Rental Assistance: Progress and Challenges in Measuring and Reducing Improper Rent Subsidies 29 (Feb. 2005) [hereinafter GAO Report] ("Each of the rental assistance programs experienced substantial reductions in gross program administrative error—50 percent for public housing, 35 percent for vouchers, and 32 percent for project-based Section 8.").

[19]*Id.* at 32. HUD reported that between 2000 and 2003, it reduced gross improper payments by 50%. It estimated that the gross overpayments in 2000 were $3,216 million and the gross improper payments in 2003 were $1,610 million. Significantly, HUD concentrated on reducing the tenant overpayments, which were reduced by 58% (2,594 million to 1,087 million); whereas the tenant underpayments were only reduced by 17% (622 million to 519 million). HUD, Performance & Accountability Report, FY 2004, at 1-24 (2004), *available at* http://www.hud.gov/offices/cfo/pafinal.pdf.

[20]"[I]nadequate staff resources and competing work demands kept some HUD field offices from issuing reports in a timely manner or completing all of their other PHA oversight responsibilities." GAO Report, *supra* note 18, at 39.

[21]"Program administrator staff responsible for calculation of rent subsidies are often poorly paid, have large caseloads, and have limited education." In addition there is high turnover in these positions. *Id*. at 66.

[22]*Id.* at 33-4 (HUD estimated that it paid $191 million in FY 2003 in improper subsidies due to unreported income, but the GAO found the figure unreliable), 28 (GAO found HUD paid an estimated net $377 million in overpayments due to the inaccuracy of subsidy determinations by program administrators. The net figure is derived from an estimated $896 million in overpayment minus $519 million in underpayments.)

[23]*Id*. at 34 and 7.

New Address

The National Housing Law Project's Washington, D.C. office has moved. The new address is:

National Housing Law Project
727 Fifteenth Street, N.W., 6th Floor
Washington, D.C. 20005

also argued that a low incidence of under reporting is "counterintuitive, given that tenants have an incentive to conceal income."[24] What HUD failed to recognize, and the GAO Report did not mention, is the substantial countervailing incentive. Public housing and vouchers are housing programs of last resort. Residents, some of whom have waited years to obtain this housing, appreciate that fact and therefore have a strong incentive to report income accurately to avoid jeopardizing a very valuable family resource.

While HUD expresses concerns regarding income-based rents, it has proposed only one rent structure that is not based on income—flat rents—which is based upon the market rate rental value of the unit. The overwhelming majority of families live in public housing because they cannot afford market rents. Such a rent structure will not benefit the lowest-income families and will price all but the highest-income residents out of public housing, and the units in the most desirable locations would have the highest rents and would be available only to those families with the highest incomes, frustrating efforts to deconcentrate poverty.

A tiered rent proposal would also create problems as tenant incomes near the upper limits of the tiers. If there are few tiers provided, the step-up in rent will be substantial when tenants move from a lower tier to a higher tier. Such a tiered rental system may also discourage families from increasing income as they approach the upper limits of each tier.

Better Alternatives

The current proposal is an abdication by HUD of its responsibilities. HUD has made mention of rent simplification or rent reform for several years, and has felt burdened by the obligation to monitor and oversee PHAs in their implementation of the rent determination policies. Moreover, HUD is convinced—despite the lack of evidence to support this—that tenants are gaming the current rent system by concealing income. HUD's response has not been to use the data available to it to consider various rent policies and determine the impact upon tenants, as urged by advocates, the PHA trade groups and now the GAO. HUD has declined to undertake a detailed study to determine the impact of rent simplification approaches on rental payments as well as program costs.[25] In lieu of proposing a reasonable rent structure, HUD shifts the burden to housing agencies.[26] The costs of any new rent policy would fall upon local PHAs, which will have to retrain staff, update written procedures, and make potentially costly changes to software applications and inform tenants of any new policy.[27]

A better rent proposal would incorporate the following policies and objectives:[28]

- Rents should be set at a percentage of family income. Such a policy sets the rent at a level that all tenants regardless of income can afford, and it is a standard which is understood by all tenants and can be easily measured and enforced.
- Rents should be set so as to encourage self-sufficiency, and should not discourage residents from obtaining employment. Recertifying rent over a two- or three-year period rather than annually will help to encourage self-sufficiency. Permitting larger exclusions of earned income and setting rent based on the prior year's income will also encourage residents to seek employment.
- Any new system should not place a disproportionate burden on the lowest-income families and should take family size into account.
- Interim reporting of income increases and decreases and recalculation of rent as a result of such reporting should be addressed in any rent simplification proposal.
- Verification should not be required for assets, which are of small amounts because the amount of income generated would not substantially affect the tenant's share of the rent for voucher participants or the rent for public housing residents.
- Utilities and utility allowances should be included in rent calculations and thus included in any rent simplification proposal.
- Individual rent policies should be reviewed to ensure that no members of classes protected by fair housing and civil rights laws are disproportionately disadvantaged.
- Improved software should be made universally available to PHAs so that they can accurately and easily calculate rents and tenants can check them.
- PHAs should be allowed to rely upon verification of income by other need-based programs such as TANF, Food Stamps or Medicare, or upon IRS tax forms.
- Any rent simplification proposal should be revenue

[24] *Id.* at 34.

[25] "In order to inform potential debate on this issue, policymakers will need to fully understand how simplification could affect the amount of rent subsidy errors, program administrators' workload, tenants' rental payments, and program costs." GAO Report, *supra* note 18, at 69.

[26] *Id.* at 68.

[27] It does not appear that there will be any additional funding to assist housing agencies in adopting new rent structures. *See* note 16, *supra*.

[28] These policies were developed in consultation with the members of the Housing Justice Network (HJN).

neutral. Rent simplification proposals should not be designed to address budget deficits by charging the lowest income families more rent.

What Types of Rent Reform Have Been Suggested and/or Tried?

Variations on Rent Based upon a Percentage of Income

In addition to the current Brooke Amendment system, there are several proposals which have been suggested which base rent on a percentage of family income. These proposals are described briefly below. There is no guarantee that a PHA would adopt any of these proposals. Congress could, however, adopt a proposal based upon tenant income that simplifies rent and protects the lowest income families, such as that proposed by the Center on Budget and Policy Priorities (CBPP) in conjunction with NHLP and the Coalition as described below.

The best proposal is one that CBPP developed with input from the Housing Justice Network, the National Low Income Housing Coalition and National Housing Law Project. In this proposal, rent would be based upon adjusted income, including most major exclusions which are now required, such as the Earned Income Tax Credit, the benefit of food stamps, etc. This proposal would adjust the gross income and provide for an expanded standard deduction for elderly and disabled families to include an amount for medical expenses and a standard deduction based upon the number of dependents and a disregard of a significant percentage of earned income, to remove any disincentive to work and to address expenses related to child care.

The Public Housing Agency Directors Association (PHADA) has developed several rent simplification proposals, one of which is an income-based rent structure. Under this proposal, rent is based upon a percentage of gross income without any deductions for medical, child care, elderly or disabled families or for dependents. This gross income would be indexed to the tax burdens of the family. Under this rent structure, a family roughly ends up paying:

- 25% of gross income if the family has any income subject to payroll tax;
- 27% of gross income if the family has any income none of which is subject to payroll tax, but all or a portion is subject to federal income tax (i.e., Social Security income, pension, unearned income); and
- 30% of gross income if none of the family's income is subject to either tax (i.e., TANF and General Assistance).[29]

HUD has considered a rental formula whereby rent would be based upon gross income without any deductions. Elderly and disabled families would pay 27% of their income for rent. For non-elderly non-disabled families, rent would be based upon 27% of income from earnings and 30% of income from all other sources. In effect this is a 10% (30% - 27% = 3%) disregard of income for the elderly, disabled and earned income as compared with those who would be paying 30% of income.[30] HUD recently informed the GAO that it is no longer considering this approach.[31]

Sherwood Research Associates, an independent housing research firm in Maryland, has suggested that rent could be set based upon an adjusted income using a standard deduction. The percentage that a family pays in rent begins at 24% and increases up to 28% in small steps related to increases of income of approximately $2,000 per year.

Tiered Rent Proposals

PHADA has proposed two variations on tiered rent which are quite similar. In the first proposal, the rent is based upon a percentage of income at the tiers of low-income, very low-income and extremely low-income. The rent would be set at 30% of the bottom of the range, as follows:

- for low-income families (50-80% of area median income (AMI)), the rent would be set at 30% of 50% of AMI;
- for very low-income families (30-50% of AMI) the rent would be set at 30% of 30% of AMI; and
- for extremely low-income families (30% of AMI and below), the rent would be set at 30% of 10% of AMI.

For example, in Peoria, IL, for a family of three, the percentage of AMI and the rent set at 30% of that figure

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[29]This new proposal would penalize larger families, including those with earned income and those who live in households with no income from employment, as these families would no longer receive the multiple child dependent deductions. For example, if a family with four children has an annual income of $8,000 and no other deductions, the rent would be $152 ($8,000 - $1,920 (4 x $480) = $6,080 x 30% = $1,824 divided by 12 = $152). Compare that with $8,000 x 25% = $ 2,000 divided by 12 = $166, or at 27% = a rent of $180, or at 30% = a rent of $200. Even with earned income, under this scheme large families with dependents do not fare well as compared to rents set pursuant to the Brooke Amendment.

[30]This proposal also is similar to the PHADA proposals and would disproportionately harm families with several dependents. For example, a minimum wage earner with two dependents who is receiving $5.25 per hour, working a forty-hour work week for fifty weeks annually, would earn an annual income of $10,500 ($10,500 - $960 = $9,540 x 30% = $2,862 divided by 12 = $238.50) compared to $10,500 x 27% = $262.25. If the tenant was unable to consistently work at least forty hours for fifty weeks or had more than two dependents, the rent under the 27% scheme would be more than the Brooke Amendment rent of 30% of income with the standard deduction of $480 per year per dependent.

[31]GAO Report, *supra* note 18, at 70. It is unclear which approach HUD has abandoned. HUD may have considered two approaches. At an October meeting with HUD, however, staff indicated that they had only analyzed data and information on the 27/30% of income approach.

is the following: if 50% of AMI = $26,200, the rent is $655; if 30% of AMI = $15,700 the rent is $392.50; if 10% of AMI = $5240, the rent is $131. Relative to the rent payments of current tenants of public housing or the voucher program, a base rent of $131 is substantial.[32]

Any meaningful changes to HUD rent rules must be informed by a careful study of current data regarding tenant incomes, rents, subsidies and other program costs.

The second tiered rent proposal uses the same income ranges but sets the rent at 25% of the midpoint of the tier. Thus it would be 25% of 65% of AMI for a low-income family, 25% of 40% of AMI for a very low-income family and 25% of 20% of AMI for an extremely low-income family. For example, in Peoria, IL, for a family of three, the percentage of AMI and the rent set at 25% of that figure is the following: if 65% of AMI = $34,060, the rent is $709.58; if 40% of AMI = $20,960, the rent is $436.67; and if 20% of AMI = $10,480, the rent is $ 218. This example consistently results in a higher rent than the previous tiered rent proposal.

Other rent reform proposals have been proposed and/or implemented by PHAs under the MTW Demonstration. These rent structures are not based upon a percentage of income but instead are a form of flat or tiered rent. Two of those PHAs with different rent structures are Keene, New Hampshire and Tulare, California. Both of the rent structures were combined with time limits. Time limits are provided as an option in the new bill.[33]

Need for Data

Any meaningful changes to HUD rent rules must be informed by a careful study of current data regarding tenant incomes, rents, subsidies and other program costs.[34] The GAO noted that because HUD as late as December 2004 was in its early stages of developing a policy simplification strategy, it had not conducted a formal study of several issues related to any change in the rent structure.[35] Thus, it recommended that "[t]he HUD Secretary study the possible impact of alternative strategies for simplifying program policies on subsidy errors, tenant rental payments, program administrator work load and program costs."[36]

Housing advocates and PHAs have requested program data from HUD, but, except for some limited data relating to 2001, no data has been provided. These groups have also requested that HUD conduct a study of the impact of rent reform or simplification policies upon current tenants. However, HUD has apparently abandoned the one rent simplification proposal that it was pursuing.

When and if such data is obtained, new recommendations regarding rent policies may emerge. In the meantime, NHLP will continue to report developments regarding the proposed legislation as they occur. ■

[32]The HUD Resident Characteristics Report, available at http://www.hud.gov/offices/pih/systems/pic/50058/rcr/index.cfm, states that the average rental payment in public housing is $243, the average family size is 2.2 individuals, the average tenant payment in the voucher program is $253 and the average family size is 2.6, http://pic.hud.gov/pic/RCRPublic/rcrmain.asp, information through March 31, 2005, site visited April 13, 2005. If the average payments are correct, then many tenants would experience a rent increase under a proposal in which the lowest rent is $131.22. The Administration's proposal does provide that PHAs must establish a minimum rent for public housing, but there are no guidelines currently available regarding what the minimum rent would be or who would qualify for that rent.

[33]S. 771, 108th Cong., tit. I, § 107(d) (voucher program; time (term) limit of not less than five years beginning January 1, 2008 and shall not apply to elderly and disabled families) and tit. III, § 302 (Moving to Work Program; there is no provision expressly authorizing time limits, but under the MTW Demonstration with similar language, some housing agencies adopted time limits.)

[34]GAO Report, *supra* note 18, at 69 ("In order to inform potential debate on this issue, policymakers will need to fully understand how simplification could affect the amount of rent subsidy errors, program administrators' workload, tenants' rental payments, and program costs. Regardless of the rent simplification approach that is adopted, HUD will face many difficulties in implementing the necessary policy changes. In particular, HUD will need to promote an efficient transition and assist program administrators in making the necessary adjustments to their procedures.")

[35]*Id.* at 69

[36]*Id.* The GAO also recommended that "HUD should determine how it intends to implement proposed changes and indicate how the department would help tenants transition from the old to the new rent structures." *Id.*

Encouraging PHA Compliance with Section 3 Employment Requirements

Many, but not all, public housing agencies (PHAs) do not pay enough attention to Section 3. Much of the neglect is due to a lack of monitoring, oversight and enforcement by the Department of Housing and Urban Development (HUD). Advocates have tools that they can use at the local level to address some of these failings.

Section 3 is a federal law requiring agencies that receive federal housing and community development funds to provide to the greatest extent feasible employment, contracting, and training opportunities for low-income people.[1] The law was enacted in 1968 as Section 3 of the Housing and Urban Development Act of 1968.[2] The HUD regulations set numerical goals for PHAs for compliance with Section 3, which state that 30% of all new hires by the PHA or its contractors in any year must be Section 3 residents.[3] Section 3 residents are low- and very-low income residents of the area,[4] and within this group, public housing residents have a preference for any new jobs or training.[5] With respect to contracts, the PHA must provide that 10% of the contracts are with Section 3 businesses for building trades work for maintenance, repair, modernization or development work and 3% of all other contracts are with Section 3 businesses.[6] Businesses owned by public housing residents are also subject to contract preferences.

Section 3 Requirements

PHAs are required to comply with Section 3 and ensure compliance with Section 3 by their contractors as well. To achieve that objective they must engage in a number of activities. In particular, PHAs must:[7]

- Implement procedures to notify Section 3 residents of training and employment opportunities and Section 3 businesses of contracting opportunities
- Notify contractors of their obligations and incorporate a clause into all contracts regarding the Section 3 obligations
- Engage in activities such as advertising training and employment opportunities, working with resident councils (where they exist), arranging assistance regarding job interviews for residents, maintain a file of Section 3 residents for future jobs, etc.[8]
- Assist HUD in obtaining compliance with contractors and subcontractors
- Document actions taken to comply with Section 3, the results of actions taken and impediments, if any.

PHAs are also required to submit to HUD an annual report for the purpose of determining the effectiveness of the program. These reports should be publicly available.[9] HUD requires PHAs to submit Form 60002.[10] This form, formerly required annually, is now required quarterly. It directs PHAs to report on the number of new hires, number of new hires who are Section 3 and the total number of Section 3 employees and trainees. In practice, many PHAs do not submit this form to HUD.

The documentation regarding compliance with Section 3 must be made available to the public in the PHA plan process.[11] A component of the annual plan and the PHA Plan Template is a "List of Supporting Documents Available for Local Review."[12] PHAs are instructed to review the list and "indicate which documents are available for public review by placing a mark in the "Applicable & On Display" column in the appropriate rows. All listed documents must be on display if applicable to the program activities conducted by the PHA."[13]

In accordance with HUD Notice PIH 2003-21, PHAs are required to make available, if applicable, "Section 3 documentation required by 24 CFR Part 135, Subpart E for public housing."[14] Unfortunately, many PHAs are not making that documentation available for review.

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[1] 12 U.S.C.A. § 1701u (West 2001).

[2] Pub. L. No. 90-448, § 3 (1968).

[3] 24 C.F.R. § 135.30(b)(1) (2004).

[4] *Id.* at § 135.5.

[5] *Id.* at § 135.34(a)(1).

[6] *Id.* at § 135.30(c). Section 135.5 states that a Section 3 business concern means a business concern, as defined in this section:

(1) That is 51% or more owned by Section 3 residents; or

(2) Whose permanent, full-time employees include persons, at least 30% of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents; or

(3) That provides evidence of a commitment to subcontract in excess of 25% of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth in paragraphs (1) or (2) in this definition of "Section 3 business concern."

[7] 24 C.F.R. § 135.32 (2004).

[8] *Id.* at app. to pt. 135.

[9] *Id.* at § 135.90.

[10] Section 3 Summary Report, Economic Opportunities for Low and Very Low Income Persons, HUD Form 60002, *available at* http://www.hudclips.org. (A PHA could also provide information on the percentage of aggregate number of staff hours of new hires who are Section 3 residents, but is not required to do so.).

[11] Every PHA is also required to submit to HUD an annual plan.

[12] Deregulation for Small Public Housing Agencies (PHAs) and Submission Requirements for New Small PHA Streamlined Annual PHA Plans, HUD Notice PIH 2003-21 (HA) (Sept. 9, 2003), *available at* http://www.hud.gov/offices/pih/pha/

[13] *Id.* (emphasis added).

[14] *Id.*

As a practical matter, any prospect of increased compliance with Section 3 in the near term will depend on action taken by advocates.

One possible explanation for the failure is that the obligation of a PHA to make this documentation available was never effectively implemented by amending the templates for PHA plans. A revised list of supporting documents (which includes Section 3 documentation) was incorporated into the streamlined annual and five-year plan templates.[15] However, it was never incorporated into the standard plan template.[16] This failure is critical because the majority of PHAs submit plans based on the standard PHA plan template.

Another explanation is that the PHAs are simply ignoring their Section 3 obligations. If that is the case, in the PHA plan process advocates should comment on the annual plan and complain that there is no Section 3 plan or documentation available, request the information and, if necessary, offer to assist the PHA to develop a Section 3 plan. Sample comment language appears in the box below.

Conclusion: The Role of Advocates

According to recent findings by the HUD Inspector General, HUD has failed to enforce Section 3 requirements effectively: "HUD has not implemented necessary controls for effective program oversight" and "has no assurance that Section 3 is functioning as intended by the HUD Act of 1968."[17] As a practical matter, then, any prospect of increased compliance with Section 3 in the near term will depend on action taken by advocates. ■

[15]The Streamlined Annual and Five-Year/Annual Templates, HUD Forms 50075-5A and 50075-SF, are available at http://www.hud.gov/offices/pih/pha/templates/index.cfm.

[16]The Standard Annual PHA Plan Template, HUD Form 50075, is available at http://www.hud.gov/offices/pih/pha/templates/index.cfm.

[17]Office of the Inspector General, Audit No. 2003-KE-0001, Survey of HUD's Administration of Section 3 of the HUD Act of 1968 (2003), *available at* http://www.hud.gov/offices/oig/reports/oiginter.cfm. NHLP has informed HUD of the need to revise the Standard Plan Template.

Sample Comment Language

The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD financial assistance shall, to "the greatest extent feasible," be directed to low- and very low-income persons, particularly those public housing residents and voucher recipients, and to "Section 3 businesses," 12 U.S.C.A. § 1701u(b) (West 2001). The Section 3 regulations provide that housing authorities may establish that they have met the "greatest extent feasible" requirement by committing to employ and ensuring that their contractors employ "Section 3 residents" as at least 30% of all new annual hires (24 C.F.R. § 135.30(b)(1) (2004)) and providing a preference for hiring and training public housing residents. The _____ HA is required to comply with Section 3 and ensure compliance with Section 3 by its contractors. To achieve that objective, the _____ HA must engage in a number of activities. In particular, the _____ HA must document actions taken to comply with Section 3, the results of actions taken and impediments, if any. 24 C.F.R. § 135.30 Moreover, the _____ HA must submit quarterly reports to HUD on Form 60002. Please make available the Section 3 plan/documentation for review and comment.

Alternatively, the _____ HA must develop a Section 3 plan. _____ would be glad to assist the _____ HA in developing a Section 3 plan.*

*Examples of Section 3 plans are posted on the NHLP Web site at http://www.nhlp.org/lalshac/hjn2004_conference_materials.htm

District Court Denies Motion to Dismiss in New Cabrini-Green Demolition Case

On January 7, 2005, the United States District Court for the Northern District of Illinois handed public housing residents an important initial victory in their challenge to the Chicago Housing Authority's (CHA) public housing demolition plans: *Cabrini-Green Local Advisory Council v. Chicago Housing Authority*.[1] And, the Cabrini-Green Row Houses are scheduled for rehabilitation only. *Id.* Denying CHA's motion to dismiss on most grounds, the court determined that: the Cabrini-Green Local Advisory Council (LAC) qualified as a "person" with the capacity to sue under a Section 1983 claim; the plaintiffs stood to suffer injuries due to CHA's actions that could be redressed; that the threat of injury was not removed by CHA's voluntary promise that residents could remain at Cabrini during the development process; and that the plaintiffs' case should not be stayed during the litigation of *Wallace v. CHA*.[2] In CHA's favor, the court concluded that CHA's Chief Executive Officer could be dismissed as a defendant. It also dismissed one of the plaintiffs' civil rights claims and found that the residents failed to cite allegations that rise to the necessary standard of intentional discrimination.

Background

Cabrini Green LAC involved statutory provisions (known as Section 202) that once required the conversion (essentially demolition) of public housing developments if the cost of continued operation and modernization exceeds the cost of providing residents with tenant-based housing subsidies.[3] Although the Quality Housing and Work Responsibility Act later repealed Section 202,[4] Section 202 continues to apply to public housing developments identified for conversion prior to October 1, 1998.[5]

CHA embarked upon a 10-year Plan for Transformation to redevelop a number of its public housing buildings.[6] The $1.5 billion plan began in 2000 with the stated intention of revitalizing public housing by demolishing developments and replacing them with mixed-income housing.[7] The plan's Relocation Rights Contract (RRC) required CHA to "make a good faith effort to enter into a Redevelopment Agreement with the LAC that reflects any property specific understandings with respect to the redevelopment process" and granted "families originally from the site first priority to rent one of the new or rehabilitated units."[8] The RRC's purpose was to ensure acceptance of the plan by all parties and to minimize disruption resulting from forced premature moves.[9]

Without tenant consultation, on April 20, 2004, residents of CHA's designated buildings received 180-day relocation notices that gave them the option to move to another public housing unit or to utilize a voucher elsewhere.[10] Prior to issuance of the notices, tenants unsuccessfully attempted to gain assurance that buildings would remain open until the development of a master plan.[11] In a subsequent meeting with CHA, the tenants objected to the relocation notices as premature and requested that CHA rescind them.[12] Without a plan already in place, tenants complained that CHA could in no way properly relocate those who chose to remain to other units in the Cabrini-Green development while staying within the 180-day window.[13] The only other option, according to the tenants, would be relocation outside of the development into racially segregated neighborhoods with high concentrations of poverty, troubled schools, inadequate social services and high crime.[14] The plaintiffs supplemented their court arguments with several studies about other adverse CHA relocation practices.[15]

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[1]Cabrini-Green Local Advisory Council v. Chicago Hous. Auth., 2005 WL 61467 (N.D. IL docketed Jan. 10, 2005) (unpublished order granting in part and denying in part defendants' motion to dismiss).

The complaint focuses on two of the Cabrini-Green development's buildings that are scheduled for demolition, including the William Green Homes and Cabrini Extension South. Plaintiffs' Complaint at 2, Cabrini-Green LAC v. CHA, No. 04 C 3992 (N.D. Ill. filed June 4, 2004). Cabrini Extension North, also a part of the development, is not of concern in the case. *Id.*

[2]Wallace v. CHA, 298 F. Supp. 2d 710 (N.D. Ill. 2003) *class cert. granted, in part, by* No. 03 C 491, 224 F.R.D. 420 (N.D. Ill. 2004) (settlement agreement filed March 15, 2005). Since the court's decision in Cabrini-Green LAC v. CHA, the *Wallace* case settled. However, the *Wallace* plaintiffs retain the right to reinstate the lawsuit if CHA breaches the agreement. Announcement, Sargent Shriver National Center on Poverty Law, Chicago Housing Authority and Housing Advocates Settle Lawsuit over Resident Relocation (undated), *available at* http://www.povertylaw.org/legal research/cases/act_abstract_for_print.cfm?id=55072.

[3]Pub. L. No. 104-134, 110 Stat. 1321-279 (Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) (1996).

[4]Pub. L. No. 105-276, Title V, § 522(a), 112 Stat. 2564 (Oct. 21 1998) (codified at 42 U.S.C.A. § 1437l note (West, WESTLAW, current through Pub. L. 109-2 approved 2/18/05)).

[5]42 U.S.C.A. § 1437z-5 note (West, WESTLAW, Pub. L. 109-2, approved 2/18/05); 24 C.F.R. §§ 971 *et seq.* (2004) (Assessment of the Reasonable Revitalization of Certain Public Housing Required by Law).

[6]2005 WL 61467 at *1.

[7]*Id.*

[8]*Id.* (internal quotations omitted).

[9]*Id.*

[10]*Id.* at *2.

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.* Columbia University sociologist Sudhir Venkatesh has monitored the city's redevelopment plan since its inception and found that

The Court's Decision

The Court Concludes that LAC May Sue Under Section 1983

The court recognized that the LAC, as an association, maintained the right to sue under a Section 1983 claim.[16] CHA argued that the LAC cannot sue under the 42 U.S.C. § 1983 statute because its corporate status within the state had been dissolved in 1999.[17] As such, CHA contended that the LAC was not a "person" within the meaning of the statute and could not sue.[18] While the LAC noted that it had reinstated its status in 2004 (and that the reinstatement applied retroactively), it raised more persuasive arguments on other grounds.[19] The LAC's rebuttal argument focused on the fact that the association is a federally authorized resident council and tenant organization that is empowered to act in the interests of the residents of Cabrini-Green.[20]

The court discounted the debate about the LAC's date of incorporation and cited several cases that support the position that unincorporated organizations have been deemed "persons" for purposes of bringing claims under the Section 1983 statute.[21] It noted that such representation was particularly appropriate "where an organization acts in a representative capacity and has a loss or deprivation coincident with that of the member individuals."[22] It stopped short of vesting representative rights in organizations that constitute a political subdivision of a state, a point that was not an issue with the LAC.[23] The court concluded that the LAC brought suit to protect the civil rights of its members and that it was the appropriate body to do so as a "person" under the relevant statute.[24]

Court Dismissed Claims Against "Unnecessary" Defendant

The court granted the motion to dismiss Terry Peterson, Chief Executive Officer of CHA, as a party-defendant because he was deemed unnecessary.[25] The court first pointed out that each count of the complaint was brought against CHA and Peterson.[26] Because the plaintiffs' complaint named both CHA and Peterson (in his official capacity) as a defendant, the court found it redundant to maintain both as defendants.[27] Although the plaintiffs argued that Peterson's behavior was an issue in the case and that dismissing him would be premature before discovery takes place, the court said that Peterson's dismissal would not interfere with discovery and that plaintiffs could still obtain the relief they sought.[28]

Because the court found that the plaintiffs had standing and that their claims were not moot, the court denied CHA's request to dismiss the plaintiffs' Section 1983 claims.

Plaintiffs Have Standing to Sue and Survive CHA's Mootness Argument

Because the court found that the plaintiffs had standing and that their claims were not moot, the court denied CHA's request to dismiss the plaintiffs' Section 1983 claims.[29] The claims that CHA moved to dismiss alleged violations of the Fair Housing Act (FHA),[30] FHA's regulations implementing the agency's affirmative duty to further fair housing,[31] executive orders,[32] Title VI of the Civil Rights Act of 1964 and its implementing regulations,[33] the Quality Housing and Work Responsibility Act (QHWRA)[34] and the Illinois Civil Rights Act.[35]

The court was persuaded, by a preponderance of the evidence, that the plaintiffs suffered, or were about to suffer (at the time the complaint was filed) some actual or threatened injury caused by CHA.[36] Further, it found that the relief sought by the plaintiffs would redress their injuries.[37] The court did not accept the promise from CHA's

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approximately 75% of the already relocated families wanted to return to their homes, but less than 20% were expected to be able to do so because there is an inadequate supply of low-income units in the redeveloped buildings. P.J. Huffstutter, *It's Bleak but It's Home*, Los Angeles Times, March 1, 2005, at A1. *See generally* NHLP, False HOPE (2003), *available at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf *(identifying serious shortcomings and inconsistencies in HUD's administration of the HOPE VI public housing redevelopment program).*

[16]2005 WL 61467 at *3.

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.* (internal quotation omitted).

[23]*Id.*

[24]*Id.*

[25]*Id.*

[26]*Id.* at *4.

[27]*Id.*

[28]*Id.*

[29]*Id.* at *5-6. Defendants brought their arguments regarding standing and mootness under Rule 12(b)(1) of the Federal Civil Rules of Procedure. *Id.* at *4.

[30]2005 WL 61467, at *1 (42 U.S.C. § 3604 (Count I)).

[31]2005 WL 61467, at *1 (42 U.S.C. § 3608(e)5, 24 C.F.R. §§ 960.103(b), 903.7(o)(1) (Count II)).

[32]2005 WL 61467, at *1 (Executive Orders 11063 and 12892 (Count III)).

[33]2005 WL 61467, at *1 (42 U.S.C. § 2000d; 24 C.F.R. §§ 1.4(b)(1), (6) (Count IV)).

[34]2005 WL 61467, at *1 (42 U.S.C. § 1437c-1(d)(15) (Count V)).

[35]2005 WL 61467, at *1 (740 Ill. Comp. St. 23/5(a) (Count VII)).

[36]2005 WL 61467, at *5.

[37]*Id.*

tenant notices that tenants could move to another Cabrini unit or to Section 8 housing and return to Cabrini once redevelopment was complete as proof that the plaintiffs did not face actual harm.[38] Instead, the court was persuaded by the plaintiffs' argument that CHA's promises were impossible to fulfill within the notice's 180-day time period if it were to properly identify and prepare alternate units within Cabrini for all tenants who chose to stay.[39] The plaintiffs supported their position by noting that CHA had created no detailed redevelopment and relocation plan at the time the notices were issued to tenants.[40] Further, the plaintiffs argued that once the 180 days expired,

> residents will be funneled into predominantly black, poverty-stricken, high-crime communities far from their existing support network. Once this occurs, it is likely that they will become more transient and more detached from work, school and social services, making it more likely that they will be denied the right to move back to Cabrini once redevelopment is complete.[41]

These factors evidenced standing to the court, such that it determined plaintiffs' case should not be dismissed.

Although CHA attempted to have the same claims dismissed under a mootness argument as well, the court found the claims viable.[42] CHA's reasoning that the claims were moot was based upon its reassurance to the plaintiffs that they could remain at Cabrini during the development process, and that CHA is currently living up to its promise.[43] However, the plaintiffs argued that once the claims were dismissed, CHA could freely renege on its promise.[44]

In analyzing the issue, the court cited case law which states that, "it is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Otherwise, a defendant could return to his or her ways after dismissal."[45] The court noted that a defendant bears a heavy burden in convincing a court to dismiss a claim based upon voluntary conduct.[46] Although CHA voluntarily agreed to maintain the status quo once the plaintiffs filed their case, the court found that CHA failed to meet its burden and cited the ongoing disputes between the parties regarding the details of the relocation process.[47] The court finally found that CHA's alleged unlawful behavior could recur. Therefore, the matters were not moot.[48]

Most of Plaintiffs' Claims Survive Dismissal

The court found that the plaintiffs possessed a private right of action under Section 1983 to bring their federal claims.[49] It made a similar finding regarding state claims, based upon the rights conferred by Section 202 of the Omnibus Consolidated Recision and Appropriations Acts of 1996 and its implementing regulations.[50] Prior case law supports the court's decision to deny CHA's motion to dismiss.

First, CHA argued that Count II (based on implementing regulations of the FHA) and Count III (based on executive orders) must be dismissed because they allege violations of regulations and executive orders and do not constitute statutes, which are the only law that can confer private rights of action.[51] In rejecting this argument, the court stated that it was persuaded by reasoning in similar cases that remains pending in the same court before a separate judge.[52] The court noted that CHA raised the same arguments, unsuccessfully, in *Wallace v. CHA*.[53] The court applied the same reasoning to Counts V and VI regarding plaintiffs' claim under QHWRA and the Illinois civil rights statute and regulations, respectively, thereby ruling against CHA on all four counts.[54]

However, the court ruled in favor of CHA and dismissed Count IV, which was based upon Title VI of the Civil Rights Act.[55] In so doing, it found that the plaintiffs' complaint did not allege "intentional discrimination,"

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at *6.

[43] *Id.*

[44] *Id.*

[45] *Id.* (internal quotations omitted).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* CHA filed a 12(b)(6) motion which, if granted, means that plaintiffs can prove no set of fact that would entitle them to relief. *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* In *Wallace,* plaintiffs complained that CHA knowingly failed to provide adequate relocation services to them or provided relocation services that either (1) discouraged plaintiffs from renting in white or integrated neighborhoods or (2) steered them to predominantly African-American neighborhoods with high poverty, high crime, poor schools and poor municipal services. Wallace v. CHA, 298 F. Supp. 2d 710, 714 (N.D. Ill. 2003) *class cert. granted, in part, by* No. 03 C 491, 224 F.R.D. 420 (N.D. Ill. 2004). Plaintiffs in *Wallace* include a class of present and former CHA public housing residents who (1) have moved or will move out of CHA public housing using a Housing Choice Voucher; (2) have moved or will move into segregated neighborhoods using the voucher after October 1, 1999; and (3) have been or will be adversely affected by CHA's segregative and discriminatory actions, policies and practices. 224 F.R.D. 420, 431. *See also* note 2, *supra*.

[54] 2005 WL 61467, at *6.

[55] *Id.* at *7 (relying, in part, on Alexander v. Sandovol, 532 U.S. 275 (2001)).

[56] *Id.*

as is required to bring a private right of action.[56] The court relied upon the reasoning of the *Wallace* court and found that the plaintiffs' allegations only state that CHA "know[s]" that their plan will perpetuate segregation and that it is "deliberately segregative."[57] Notwithstanding this later language, the court then concluded that the plaintiffs failed to allege facts that confer a private right of action under the act's implementing regulations.[58]

The court found that some of the instant plaintiffs fall outside of the Wallace class and that CHA failed to show that both sets of plaintiffs seek the same relief.

CHA's Motion to Stay Proceedings Denied

The court found no reason to hold the case in abeyance until the resolution of the *Wallace* case although case law states that the ability to stay a case is available if it is duplicative of a parallel action already pending before another federal court.[59] CHA, the defendant in the *Wallace* case, argued that the plaintiffs in the instant case fall within the category of *Wallace* plaintiffs who await class certification by the court.[60] CHA also asserted that the *Cabrini-Green LAC* plaintiffs bring the same claims and seek the same relief as the putative *Wallace* class.[61]

To the contrary, the court found that some of the instant plaintiffs fall outside of the *Wallace* class and that CHA failed to show that both sets of plaintiffs seek the same relief.[62] First, the court distinguished some of the instant plaintiffs because the *Wallace* class members must move or have already moved with a Section 8 voucher.[63] Such was not the case with the instant plaintiffs who have not moved, and intend to do so.[64] Further, the *Wallace* class would not encompass the LAC, one of the organizational plaintiffs in the instant case.[65] Second, unlike the *Cabrini-Green LAC* plaintiffs who seek to force CHA to negotiate about the relocation of families who wish to remain in public housing, the *Wallace* class seeks to remedy the voucher administration process.[66] Following these findings, the court denied CHA's motion to dismiss or stay the instant case pending the outcome of the *Wallace* case.[67]

Plaintiffs Join Other Housing Advocates in Arguing "Housing as a Human Right"

Although the residents did not rely upon international law for a particular count in their complaint, they joined a growing number of housing advocates who argue that housing for all is a human right.[68] More specifically, the plaintiffs argued that forced evictions violate international human rights.[69] Although the residents hope to affect the court's interpretation of domestic law by including references to international law, the court's decision did not rely upon or cite to international law in its analysis.

With the first hurdle behind them, the plaintiffs wait discovery to help further prove their case. NHLP will continue to update readers about developments of this case. ■

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at *8.

[67] *Id.*

[68] Bill Myers, *Panel Discusses the Impact of International Law on Housing*, Chicago Daily L. Bull., vol. 150, no. 205, Oct. 19, 2004 (quoting Noah S. Leavitt, attorney and advocacy director fo the Jewish Council on Urban Affairs, as saying that, "[a]dvocates should try to persuade judges that these treaties should take precedence . . . . Their arguments should point out that to do otherwise shows that 'the U.S. is out of step' with the rest of the world.") (on file with NHLP).

[69] Plaintiffs' Complaint at 16-17 (citing the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination).

Update on Good Cause Eviction Protection for Tax Credit Tenants

An earlier *Bulletin* article described the IRS July 2004 revenue ruling requiring all owners of Low-Income Housing Tax Credit (LIHTC) properties to place good cause eviction requirements in the recorded restrictions of their properties.[1] By so ruling, the IRS joined several state appellate courts that have held that the tax credit statute[2] requires good cause for all terminations of tenancy, whether during the lease term or at expiration.[3] This obligation exists throughout and for three years beyond the "extended use period," which begins when the building first becomes part of a tax-credit-qualified property, and ends on the later of the date specified by the state agency in the extended low-income housing commitment (ELIHC), the terms of which vary from state to state, or thirty years.[4] The LIHTC statute itself not only requires the language to be included in the project's ELIHC, but also provides the tenant an express right to enforce the prohibition on no-cause evictions.[5]

Numerous state agencies (e.g., Massachusetts, Florida and Wisconsin) had previously recognized this requirement, and placed good cause eviction protections in their recorded regulatory agreements.

Under the July ruling, state credit agencies were obligated to review their LIHTC inventory to determine the extent of noncompliance by December 31, 2004.[6] In situations of noncompliance—commonplace in most states—agencies were to notify owners and require amendment of the regulatory agreements to specify the good cause protection within one year. Failure to cure would jeopardize an owner's eligibility to claim the credits.[7]

Some state credit agencies have been reluctant to provide information about the extent of their 2004 compliance determinations. Almost all agencies have resisted requiring owners to amend the regulatory agreements as required by the ruling, arguing either that it is unnecessary or unduly burdensome. They have reportedly sought relief from the Treasury Department. Most agencies have been willing to revise the form agreements used for properties receiving new tax credit allocations.

In some jurisdictions (e.g., Washington, California and reportedly Idaho), while the issue of amending the regulatory agreement remains unresolved, credit agencies have been willing to require owners to execute lease addenda to specify the good cause protection, and provide notices of owners and tenants alike of this requirement. Placing the protection in the lease itself will be one of the most effective methods to ensure that owners and managers, tenants, advocates, and judges are aware of this requirement.[8] Augmenting this step with changes to agency regulations or training and compliance monitoring procedures will also be helpful.

In at least one jurisdiction, tenants have sued the state agency and project owners to require amendment of the regulatory agreement to include the good cause protection. *Mendoza v. Frenchman Hill Apts.*, No. CS-03-0494-RHW (E.D. Wa. pending 2005) (pleadings available at http://www.nhlp.org/html/lihtc/index.htm). Filed before the IRS issued its revenue ruling, this suit challenged the owner's proposed eviction without cause and both the owner's and the agency's failure to comply with the tax credit statute, I.R.C. Section 42, as a violation of federal law via Section 1983. The tenants also alleged a violation of their due process rights. In a January 20 decision that the trial court subsequently declined to amend,[9] it ultimately ruled that (1) the tax credit statute means what it says, requiring that the extended low-income housing commitments (regulatory agreements) prohibit evictions without cause, as reinforced by the July 2004 revenue ruling; (2) under its application of the U.S. Supreme Court's 2002 *Gonzaga* decision,[10] this requirement is *not* enforceable via Section 1983, because Section 42 speaks only to the required language in the recorded agreements and does not vest sufficient rights in the tenants themselves; (3) on the limited

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[1]NHLP, *IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants*, 34 HOUS. L. BULL. 208 (2004) (reviewing Rev. Rul. 2004-82, Q&A 5).

[2]26 U.S.C.A. § 42 (h)(6)(B)(i) (West 2002).

[3]26 U.S.C.A. § 42 (h)(6)(E)(ii)(I) (West 2002) ("eviction or termination of tenancy (other than for good cause)").

[4]Under the statute, the "extended use period" is fifteen years after the close of the compliance period, which is itself fifteen years, for a total of thirty years. 26 U.S.C.A. § 42 (h)(6)(D) (West 2002), which refers to the definition of "compliance period" in § 42(i)(1). The statute also requires the good cause protection to last for three years beyond the termination of the extended low-income housing commitment, which is usually the determinant of the extended use period, as it is often longer than thirty-years. 26 U.S.C.A. § 42 (h)(6)(E)(ii) (West 2002).

[5]26 U.S.C.A. § 42 (h)(6)(B) (i) (establishing the rent limitations and good cause eviction protections) and (ii) (authorizing state court enforcement) (West 2002).

[6]Rev. Rul. 2004-82, at A-5.

[7]26 U.S.C.A. § 42 (h)(6)(J) (West 2002). The ruling allows owners one year from the date of any state agency determination of noncompliance to bring the property into compliance, and preserve the ability to claim the credit for tax year 2004, and all subsequent and prior years. Rev. Rul. 2004-82, at A-5, ¶ 2.

[8]Sample documents are attached to NHLP's September 2004 memo to the National Council of State Housing Agencies and are included as attachments to a declaration of WSHFC staff Mark Flynn, filed in *Mendoza*. These documents are available on NHLP's Web site at http://www.nhlp.org/html/lihtc/index.htm.

[9]*Mendoza*, No. CS-03-0494-RHW (E.D. Wash. Jan. 20, 2005) (order denying in part and granting in part plaintiffs' motion for summary judgment), *available at* http://www.nhlp.org/html/lihtc/index.htm.

[10]Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

facts of this case, where a local housing authority was a general partner of the partnership owner, the tenants have shown a procedural due process violation, which can be cured by the owner's use of the state statutory eviction procedure, except that good cause is required and must be preceded by a termination notice specifying that cause.

Whatever the merits of the court's Section 1983 ruling, two additional points about *Mendoza* are especially noteworthy. First, the tenants' claims did not include any state law mandamus claim against the state agency seeking to require its performance of the duty specified by federal law—to include the language in the project's regulatory agreement. If available, this kind of claim could provide an alternative to relying solely on Section 1983. Second, the action itself has resulted in the state agency's taking steps to required amended leases and other notices to tenants and owners to effectuate the good cause eviction protection.[11]

Here are some suggested steps advocates should now take to ensure that tenants get the benefit of Section 42 good cause requirements:

- get a list of tax credit properties in your state or locality;[12]
- contact your state agency about the results of any compliance evaluation they conducted per the ruling prior to December 31, 2004;
- determine whether your state agency intends to require amended regulatory agreements for any noncomplying properties, or whether it is willing to require lease addenda specifying the protection and other measures to ensure that affected parties know their rights;[13]
- take action to protect tenants' rights during this process by ensuring that any tenants you represent from these properties do not face eviction without cause, through outreach and community education, by affirmative contact with owners or by eviction defense;[14]
- work with your colleagues to develop a statewide strategy and join the Housing Justice Network's ad hoc group working on this issue;[15]
- evaluate the utility of filing an affirmative action against the state agency and possibly noncomplying owners if they have not revised all leases to specify good cause protections, based upon mandamus or similar claims to require performance of ministerial duties required by Section 42 and the revenue ruling. ■

[11] *See* note 8, *supra*.

[12] LIHTC projects in local jurisdictions can be located through the HUDUser Web site, http://www.huduser.org/datasets/lihtc.html#data.

[13] Some sample forms for amended regulatory agreements or lease addenda and notices are available at http://www.nhlp.org/html/lihtc/index.htm. Consider the need for more detailed definition of the good cause protection, and what procedural protections, such as the length and content of any prior notice, will be required. *See* NHLP, HUD Housing Programs: Tenants' Rights ch. 14 (3d ed. 2004) (statutes, regulations and cases exploring these issues in other federal housing programs).

[14] Housing Justice Network members can obtain some pleadings and briefs at http://www.nhlp.org/html/lihtc/index.htm.

[15] Contact Jim Grow at NHLP's Oakland office at jgrow@nhlp.org.

Rural Housing Service Sued by Homeowners in Civil Rights Class Action

Civil rights problems within the United States Department of Agriculture (USDA) are not new. This time, the USDA Rural Housing Service's (RHS) administration of the Section 502 and 504 loan programs is being challenged based on racial and ethnic discrimination in violation of the Equal Credit and Opportunity Act (ECOA). ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction...on the basis of race, color, religion, national origin, sex or marital status, or age."[1] The United States District Court of the Virgin Islands certified a class in an action to pursue these claims against RHS, and, significantly, the Third Circuit Court of Appeals denied the RHS challenge to the class certification.[2]

Plaintiffs in this case, Chiang v. Veneman, are a group of people "who are 'Black, Hispanic, women and/or Virgin Islanders.'"[3] Plaintiffs claim that over a period of nineteen years, RHS discriminated against the class in its administration of the Section 502 and 504 loan programs, which are intended to help low and very low-income residents of rural areas purchase and/or make repairs to their homes.[4] Specifically, plaintiffs allege that

> the regional USDA office in Vermont, which had jurisdiction over the U.S. Virgin Islands, kept Virgin Islanders "out of the system" by implementing a "phony," illegal waiting list on which thousands of Virgin Islanders, almost all of whom were Black, Hispanic or female, had their names places instead of being given an actual loan application in violation [sic] of USDA policy, instructions, and regulations.[5]

[1] 15 U.S.C.A. § 1691(a) (West, WESTLAW through P.L. 109-6 (excluding P.L. 109-5) approved 03-31-05).

[2] Chiang v. Veneman, 385 F.3d 256 (3rd Cir. 2004).

[3] *Chiang*, 385 F.3d at 259.

[4] *Id.*

[5] *Id.* at 259-260.

After years of waiting, most people on the waiting list never received an application. Plaintiffs allege that the Virgin Islands was the only jurisdiction in the United States where such a waiting list system was implemented, allegedly an indicator that the true purpose of the list was to deny plaintiffs access to loans.[6]

More disturbing still, plaintiffs allege that RHS administrators in Vermont required local Virgin Island RHS staff to provide applications only if an applicant became a "problem;" local RHS officials also were allegedly given to understand that they were to frustrate the efforts of applicants until they gave up on the process, or that they were to manufacture reasons to deny the application.[7] To the extent that any loan applications were approved at all, applicants would find themselves in unsafe housing because, plaintiffs allege, funds were paid only to specific contractors who would perform construction in a substandard fashion.[8]

In challenging certification of the class, RHS argued that class treatment would not be superior to individual treatment of claims. RHS contended that the claims required a case-by-case, individual inquiry into loan eligibility and the basis of loan denials. Plaintiffs responded, however, that eligibility and loan denial decisions were "purely ministerial in nature," as RHS staff merely used an eligibility chart in a mechanical fashion that did not require "discretionary assessments of the circumstances of each applicant."[9] The Third Circuit concluded that the record did not, as yet, support the contentions of either the defendant or plaintiffs, and as such was a matter to be determined by the district court. However, the issue of the waiting lists and whether Virgin Islanders were denied initial access to the program most assuredly lent itself to class treatment, and the Third Circuit affirmed class certification as to these issues.[10]

The lead plaintiff in this case, Gail Watson Chiang, first became aware of the problem through the "hundreds if not thousands" of complaints she received from Virgin Islanders while she served as special assistant to the Governor for the Virgin Islands.[11] Chiang and named plaintiffs filed an administrative class complaint with the USDA's Office of Civil Rights in 1997. Plaintiffs have, allegedly, never received an official response to their complaint. However, the USDA allegedly sent an investigative team to research the claims, resulting in a report entitled "Civil Rights Compliance Review for the U.S. Virgin Islands, October 19-29, 1997," which identified two techniques used to deny class members loans.[12] "Those techniques were (1) creating the phony, illegal 'waiting list,' and (2) implementing the 'impossible yes' scheme."[13]

This document is, in fact, referenced in a 2003 report by the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation (OCRE), as an example of a compliance review that had found civil rights violations. Footnote 105 of the report states: "In addition, the compliance reviews found incidents suggesting a pattern of actions denying services to the citizens of the Virgin Islands."[14]

The OCRE report raises questions about the importance USDA attributes to civil rights compliance in its programs.

> USDA has had a spotty history of conducting compliance reviews of USDA agencies since the Commission's last study of the department. Officials reported conducting no compliance reviews in 1995 and 1996 and 2000 and 2001 because of budgetary constraints, limited travel funds, and organizational and staffing changes. In 1997 and 1998, OCR performed four reviews of USDA agencies in the Virgin Islands and 15 reviews of various agencies' programs (including FSA, NRCS, and FNS) in eight states. In 1999, it conducted four focused compliance reviews addressing specific areas of concern in southern states (two involving FSA programs); and three special reviews of FSA civil rights compliance to respond to a 1997 Office of Inspector General report. In 2002, it conducted three evaluations of enforcement at headquarters offices of USDA agencies.[15]

The report does not explain why USDA had not directed further resources towards compliance reviews. What's more, the OCRE report indicates that the USDA's civil rights data collection policy (drafted in 2002), was inadequate insofar as it relies on the Department of Justice's annual Civil Rights Implementation Plan, which does not include any information on the race, color, ethnicity, national origin or gender of program participants or beneficiaries.[16]

Chiang may well prove to be a new civil rights milestone. If plaintiffs' claims are borne out, yet another agency of the federal government will have been found to have undermined federal civil rights laws.[17] ■

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[6] *Id.*

[7] *Id.* at 260.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 263.

[12] *Id.*

[13] *Id.*

[14] U.S. Commission on Civil Rights, Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? vol. III, 31, n.105 (2003).

[15] *Id.*

[16] *Id.*

[17] *See generally* NHLP, *HUD Liable for Failing to Address Baltimore's Segregated Housing System*, 35 Hous. L. Bull. 70, 70 (2005).

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.

Attorney Fees; Housing Choice Voucher Program; Landlord-Tenant — Security Deposits; Landlord-Tenant — Unauthorized Entry

Rodriquez v. Ancona, 868 A.2d 807 (Conn. App. Ct. 2005). In this suit by a Housing Choice Voucher holder against her former landlord based on the unlawful withholding of a security deposit and unauthorized entry into the tenant's dwelling, the Appellate Court of Connecticut held that the proper measure of the "one month's rent" in damages to which the tenant was entitled under a state consumer protection statute was the full contract rent for the tenant's unit, not merely the portion the tenant paid under the voucher program. The court also held that the proper measure of "reasonable attorney's fees" to which the tenant was entitled under the state statute involved a range of factors and not just the amount of damages awarded by the trial court.

Constitutional Law — Contracts Clause; Habitability — Lead-Based Paint

Campbell v. Boston Hous. Auth., 443 Mass. 574 (2005). In this suit by a public housing resident against a public housing authority based on, *inter alia*, a breach of lease claim related to lead-based paint contamination in the tenant's dwelling, the Massachusetts Supreme Judicial Court concluded, *inter alia*, that retroactive application of a state law insulating public employers from liability for failure to conduct health and safety inspections to the tenant's breach of lease claim violated federal constitutional requirements regarding the impairment of contracts.

Constitutional Law — Due Process; Eviction — One-Strike Policies; Fair Housing — Disability; Public Housing — Eviction

Blatch v. Hernandez, 2005 WL 735932 (S.D.N.Y. Mar. 30, 2005). Plaintiff mentally disabled residents and occupants of New York City Housing Authority (NYCHA) public housing brought a class action suit against Defendant NYCHA and officials. Deciding the parties' motions for summary judgment, the federal district court ruled, *inter alia*, that Defendants' failure to inform hearing officers in termination proceedings of the mental disabilities of unrepresented residents and failure to provide appropriate training regarding mental disabilities to such hearing officers was a violation of federal due process requirements, and that Defendants' failure to inform the New York Housing Court of mental disabilities of unrepresented residents in judicial eviction proceedings also violated federal due process requirements. The court also ruled that modification by Defendants' of drug prohibition policies for mentally disabled residents was beyond the scope of Defendants' duty to provide reasonable accommodation of disability under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq*., and the Fair Housing Amendments Act, 42 U.S.C. § 3604.

Fair Housing — Generally; Federal Courts — Standing

Taliaferro v. Darby Township Zoning Bd., 2005 WL 696880 (E.D. Pa. Mar. 23, 2005). Plaintiff property owners filed suit against Defendant zoning board and officials challenging Defendants' failure to permit the development of affordable housing under an Urban Renewal plan dating from the 1960s as a violation of, *inter alia*, Urban Renewal requirements and federal civil rights laws. Plaintiffs alleged that African-American residents were displaced decades previously in connection with the Urban Renewal plan. The federal district court dismissed Plaintiffs' claims for lack of standing. The court concluded that Plaintiffs had not suffered nor were they threatened with any concrete injury as a result of Defendants' conduct. In particular, the court noted that none of the plaintiffs would be eligible to reside in any housing developed under the plan. The court also cited doctrines of abstention and lack of jurisdiction under the Rooker-Feldman doctrine as alternative bases for its decision.

Federal Courts — Private Right of Action

Walker v. Eggleston, 2005 WL 639584 (S.D.N.Y. Mar. 21, 2005). In this suit by federal nutritional assistance program participants against state social service officials, the

[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.

federal district court concluded that a provision of the Food Stamp Act of 1964 regarding transitional benefits was privately enforceable pursuant to 42 U.S.C. § 1983. The provision of the 1964 act, 7 U.S.C. § 2020(s)(3), stated in pertinent part:

> During the transitional benefits period . . . a household shall receive an amount of food stamp benefits equal to the allotment received in the month immediately preceding the date on which cash assistance was terminated, adjusted for the change in household income as a result of . . . the termination of cash assistance. ■

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 March of 2005. 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 Notices

70 Fed. Reg. 11,257 (Mar. 8, 2005)
Notice of HUD–Held Multifamily and Healthcare Loan Sale (MHLS 2005–1)

Summary: This notice announces HUD's intention to sell certain unsubsidized multifamily and healthcare mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale (MHLS 2005–1). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

Date: March 16, 2005.

70 Fed. Reg. 13,576 (Mar. 21, 2005)
Notice of HUD's Fiscal Year 2005 Notice of Funding Availability Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Programs

Summary: This notice provides information regarding HUD's FY 2005 policy requirements applicable to all of HUD's federal financial assistance programs announced through NOFAs published along with this notice and any subsequent NOFA published for FY 2005. Each such NOFA will provide a description of the specific requirements for the program for which funding is made available and each will refer to applicable policies contained in this notice. Each program NOFA will also describe additional procedures and requirements that apply to the individual program NOFA, including a description of the eligible applicants, eligible activities, threshold requirements, factors for award, and any additional program requirement or limitation.

70 Fed. Reg. 15,639 (Mar. 28, 2005)
Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Grant Application for Public Housing Graduation Incentive Bonus

Summary: HUD has submitted an information collection to the Office of Management and Budget for emergency review and approval, as required by the Paperwork Reduction Act. HUD is soliciting public comments on the subject proposal. This is a request for a new information collection that will be used to select awardees for the Graduation Incentive Bonus program grants that will be part of the 2005 Notice of Funding Availability. Congress has authorized this Graduation Incentive Bonus funding as a set-aside from the 2005 Public Housing Operating Fund allocation. Funds can be used for any and all operating expenses approved under Section 9 of the United States Housing Act of 1937 and 24 C.F.R. Part 990.

Comments Due Date: April 27, 2005.

70 Fed. Reg. 16,554 (Mar. 31, 2005)
Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2005

Summary: This NOFA announces the availability of approximately $110 million in FY 2005 funds for HOPE VI Revitalization Program grants, plus approximately $25 million additional for grantees' first-year, grant-related housing choice voucher (HCV) assistance.

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

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

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

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

HUD PIH Notice

Notice PIH 2005-10 (HA) (Mar. 23, 2005)
Posting of Class Action Notice (Taylor vs. Jackson, Civil Action No. 02-cv-1120AA)—Fairness Hearing for Proposed Settlement of Litigation Concerning Enhanced Vouchers Provided in Connection with Preservation Prepayments that Occurred in Federal Fiscal Years 1997, 1998, and 1999

Summary: The above class action lawsuit was brought against HUD and HUD's Secretary, in his official capacity. The plaintiffs are tenants who lived in privately owned apartment complexes at the time the owner prepaid the mortgage or voluntarily terminated the mortgage insurance of a preservation eligible property in Federal Fiscal Years 1997, 1998 and 1999. As a result, the families received enhanced housing choice vouchers (then commonly referred to as preservation vouchers) from their local public housing agencies (PHAs). The plaintiffs allege that, pursuant to directives issued by HUD to the PHAs, the amounts of voucher payments made by the PHAs to plaintiffs' landlords for certain periods were less than the amounts mandated by federal statutes. As a result, the plaintiffs contend that their portion of the rent was excessive. HUD denies the plaintiffs' claims and has asserted a number of legal defenses.

Expires: March 31, 2006.

RHS Federal Register Notices

70 Fed. Reg. 12,542 (Mar. 14, 2005)
Notice of Availability of Funds; Multi-Family Housing, Single Family Housing

Summary: The Rural Housing Service (RHS) announces the availability of housing funds for FY 2005. This action is taken to comply with 42 U.S.C. 1490p, which requires that RHS publish in the *Federal Register* notice of the availability of any housing assistance.

Effective Date: March 14, 2005.

70 Fed. Reg. 12,556 (Mar. 14, 2005)
Notice of Funding Availability (NOFA) for the Section 515 Rural Rental Housing Program for Fiscal Year 2005

Summary: This NOFA announces the time frame to submit applications for Section 515 Rural Rental Housing loan funds, including applications for the nonprofit set-aside for eligible nonprofit entities, the set-aside for the most Under served Counties and Colonias (Cranston-Gonzalez National Affordable Housing Act), and the set-aside for Empowerment Zones and Enterprise Communities and Rural Economic Area Partnership zones. This document describes the methodology that will be used to distribute funds, the application process, submission requirements, and areas of special emphasis or consideration.

Deadline: May 13, 2005.

70 Fed. Reg. 12,559 (Mar. 14, 2005)
Notice of Funds Availability (NOFA) for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2005

Summary: This NOFA announces the time frame to submit applications for Section 514 Farm Labor Housing (FLH) loans and Section 516 FLH grants for the construction of new off-farm FLH units and related facilities for domestic farm laborers. The intended purpose of these loans and grants is to increase the number of available housing units for domestic farm laborers. Applications may also include requests for Section 521 rental assistance and operating assistance for migrant units. This document describes the method used to distribute funds, the application process, and submission requirements.

Deadline: May 13, 2005. ■

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