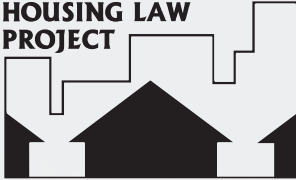


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Housing Law Bulletin

Volume 38 • November-December 2008

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Ramped Up Foreclosure Prevention Efforts

—see page 235

Courts Respond to Landlord's Source of Income Defenses —see page 239

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Cover: Plaza East, a 193-unit public housing development in San Francisco, California.

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Lenders, Government Entities Ramp Up Foreclosure Prevention Efforts

In the past several months, the public and private sectors have launched a variety of initiatives to keep homeowners out of foreclosure, to temporarily suspend foreclosure sales, and to protect tenants living in foreclosed properties. This article provides updates on the foreclosure prevention and tenant protection measures included in the Housing and Economic Recovery Act,¹ the Emergency Economic Stabilization Act,² and the proposed Second Stimulus Package,³ as well as foreclosure prevention activities initiated by the private sector.

Housing and Economic Recovery Act

On July 30, 2008, President Bush signed into law the Housing and Economic Recovery Act of 2008 (H.R. 3221).⁴ This article examines the status of three of the act's provisions. First, the act's Hope for Homeowners Program authorized the Federal Housing Administration to refinance \$300 billion of mortgages for eligible borrowers at risk of foreclosure. Second, the act allocated \$3.92 billion in Neighborhood Stabilization funds to states and local governments to purchase and redevelop abandoned and foreclosed homes. Third, the act established an Affordable Housing Trust Fund to provide states with dedicated funding for the development of affordable housing.

Hope for Homeowners

Title IV of the Housing and Economic Recovery Act created the Hope for Homeowners program, which became effective on October 1, 2008.⁵ The program allows borrowers at risk of default to qualify for new, thirty-year, fixed-rate mortgages insured by the Federal Housing Administration. As launched, borrowers could only participate in Hope for Homeowners if their current lender voluntarily agreed to write down the size of the mortgage to a maximum of 90% of the home's new appraised value.⁶ The program's early results were discouraging, with HUD receiving only seventy applications during the program's first month.⁷

¹Pub. L. 110-289, 122 Stat. 2654 (July 30, 2008).

²Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008).

³S.3689, 110th Cong. (2008).

⁴Pub. L. 110-289, 122 Stat. 2654 (July 30, 2008). For a comprehensive overview of the act, see Katherine Lehe, *Foreclosure Relief Legislation Includes GSE Regulation and National Housing Trust Fund*, 38 Hous. L. BULL. 161 (Aug. 2008).

⁵Pub. L. No. 110-289, § 1401-1404, 122 Stat. 2654, 2800-08 (2008).

⁶Press Release, HUD, Bush Administration Launches "Hope For Homeowners" Program to Help More Struggling Families Keep Their Homes (Oct. 1, 2008), http://portal.hud.gov/portal/page?_pageid=73,7605828&_dad=portal&_schema=PORTAL.

⁷Alison Vekshin, *HUD Said to Entice Banks to Enter Foreclosure Program*,

In response, on November 19, 2008, HUD modified the program to increase the incentive for lenders to participate. Specifically, HUD increased the loan-to-value ratio from 90% to 96.5% for some Hope for Homeowners loans, and authorized lenders to extend mortgage terms from thirty to forty years.⁸ These changes are intended to apply only to borrowers whose mortgage payments do not exceed 31% of their monthly gross income.⁹ Further, borrowers cannot have household debt of more than 43% of their monthly income.¹⁰ Many of the original Hope for Homeowners rules remain in place. For example, the mortgage must have originated before January 1, 2008, the borrower must have made at least six payments on the first mortgage, and the loan amount cannot exceed \$550,440.¹¹ All Hope for Homeowners loans will remain fixed-rate mortgages.¹²

Contributions that the government sponsored entity's will make to the Housing Trust Fund are based on their volume of new business, not their profits.

Neighborhood Stabilization Program

Title III of the Housing and Economic Recovery Act created the Neighborhood Stabilization Program (NSP) and granted \$3.92 billion for emergency assistance to states and localities to redevelop abandoned and foreclosed homes and residential properties.¹³ States and localities receiving NSP funds were required to submit plans to HUD by December 1, 2008, detailing their need, anticipated use, and allocation plan for use of the funds. Advocates throughout the country submitted comments on their jurisdictions' plans, addressing issues such as preventing displacement of families in foreclosed properties, ensuring long-term affordability, complying with fair housing obligations, and increasing the amount of funds targeted to serve very low-income and extremely low-income

BLOOMBERG.COM, Nov. 19, 2008, <http://www.bloomberg.com/apps/news?pid=20601103&sid=ahcR.ajXp4Fc&refer=us>.

⁸Press Release, HUD, Bush Administration Announces Flexibility for "HopeForHomeowners" Program (Nov. 19, 2008), http://portal.hud.gov/portal/page?_pageid=73,7699757&_dad=portal&_schema=PORTAL.

⁹The program currently does not address what will happen if a homeowner's monthly income decreases, causing mortgage payments to exceed 31% of the homeowner's monthly gross income.

¹⁰*Id.* The program will continue to offer borrowers with higher debt loads a 90% loan-to-value ratio on their Hope for Homeowners loans.

¹¹*Id.*

¹²*Id.*

¹³Pub. L. No. 110-289, §§ 2301-2305, 122 Stat. 2654, 2850-4 (July 30, 2008). For a detailed review of the NSP, see *HUD Issues Regulations Implementing the Neighborhood Stabilization Program*, 30 HOUS. L. BULL. 215 (Oct. 2008). To obtain a checklist of activities that advocates can undertake to ensure that their jurisdictions are appropriately using NSP funds, contact David Rammler of NHLP at drammler@nhlp.org.

families.¹⁴ HUD is expected to approve NSP plans by early January. Any revisions to the plans or resubmissions of disapproved plans must be completed by February 13, 2009. NSP grantees are then required to submit quarterly reports on use of the funds for fifteen months.¹⁵

National Housing Trust Fund

Title I of the Housing and Economic Recovery Act created the national Housing Trust Fund (HTF).¹⁶ Funds for the HTF will come from annual contributions made by Fannie Mae and Freddie Mac, with the amount based on a percentage of each government-sponsored entity's (GSE) annual new business. However, on September 7, 2008, Fannie Mae and Freddie Mac were placed into conservatorship by the U.S. Treasury, raising concerns about the HTF's future. According to the National Low Income Housing Coalition, contributions that the GSEs will make to the HTF are based on their volume of new business, not their profits, and their new business is increasing and will continue to do so.¹⁷ Further, the HTF is not scheduled to receive any funding until fiscal year 2010, by which time the GSEs' fiscal conditions are expected to improve.¹⁸

Protections for Tenants in Foreclosed Properties

The Emergency Economic Stabilization Act (EESA),¹⁹ enacted October 3, 2008, provides \$700 billion to the Treasury Secretary to purchase troubled assets, especially mortgage-backed securities, from the nation's banks. As the federal government purchases distressed mortgage-related assets, it will become the owner of rental properties throughout the country. EESA requires that the Treasury Secretary coordinate with the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, the Federal Housing Finance Agency, the Secretary of HUD, and other federal entities, "to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease."²⁰ EESA also requires the Treasury Secretary, in modifying any mortgage, to ensure (1) the continuation of any federal, state and local rent subsidies and protections for tenants; and (2) that any modification take into account the need for funds to maintain safe and decent conditions at rental properties.²¹

¹⁴See, e.g., Letter from Evan Lewis, Legal Aid of North Carolina Inc., to Vickie Miller, North Carolina Department of Commerce, Comments on Draft Neighborhood Stabilization Program Substantial Amendment (Nov. 25, 2008) (on file with NHLP).

¹⁵HUD Notice Implementing Neighborhood Stabilization Program Under the Housing and Economic Recovery Act, 73 Fed. Reg. 58,330, 58,341 (Oct. 6, 2008).

¹⁶Pub. L. No. 110-289, § 1331, 122 Stat. 2654, 2711-22 (July 30, 2008).

¹⁷National Low Income Housing Coalition, *What Fannie and Freddie Crisis Means for NHTF*, 13 MEMO TO MEMBERS (Sept. 5, 2008), https://www.w2398.sslsdomain.com/nlihc/detail/article.cfm?article_id=5481.

¹⁸*Id.*

¹⁹Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008).

²⁰*Id.* § 109, 122 Stat. 3774-75.

²¹*Id.*

Despite EESA's tenant protections, Fannie Mae initiated eviction proceedings against tenants in Hartford, Connecticut, who were living in recently foreclosed properties.²² Greater Hartford Legal Aid, Inc., citing EESA, moved to dismiss the eviction proceedings and entered into negotiations with Fannie Mae.²³ On December 14, 2008, Fannie Mae announced that it is creating a program to assist tenants in foreclosed properties, and that it will stay all eviction proceedings nationwide until the new program is implemented.²⁴ The program, which will offer tenants the opportunity to enter into leases while foreclosed properties are marketed, will be available on or before January 9, 2009.²⁵ Fannie Mae is also in the process of reviewing the eviction cases identified by Greater Hartford Legal Aid, Inc. and intends to work with these tenants to establish leases.²⁶

Advocacy on behalf of tenants in foreclosed properties may receive a boost from S. 3689, commonly known as the Second Stimulus Package.²⁷ The bill would appropriate \$100.3 billion, including \$575 million for relocation and temporary housing assistance, to tenants living in foreclosed properties or properties where foreclosure is imminent.²⁸ The bill would also allocate \$37.5 million to the Legal Services Corporation to provide legal assistance related to "tenancy associated foreclosure," as well as legal assistance related to home ownership preservation and foreclosure prevention.²⁹ The bill was introduced in the Senate on November 17, but Congressional leaders and the White House failed to reach an agreement on a stimulus package.³⁰ The bill likely will be reintroduced in January 2009.³¹

Loan Modifications

On November 11, 2008, the Federal Housing Finance Agency (FHFA), the entity that seized control of Fannie Mae and Freddie Mac in September, announced the

creation of a streamlined loan modification program.³² The FHFA's announcement came shortly after several major lenders, including Bank of America, Citigroup, and JP Morgan Chase & Co., initiated loan modification programs of their own.

The FHFA's program became effective December 15 and applies only to mortgages owned or guaranteed by the GSEs.³³ To qualify, a borrower must be at least three months behind on loan payments, own and occupy the

³²Federal Housing Finance Agency, Statement of FHFA Director James Lockhart (Nov. 11, 2008), <http://www.fhfa.gov/GetFile.aspx?FileID=169>.

³³*Id.*

NEW PUBLICATION

An Affordable Home On Reentry: Federally Assisted Housing and Previously Incarcerated Individuals

The National Housing Law Project (NHLP) has just published a new guidebook on the housing rights of persons who have been incarcerated. It is written for advocates working with or representing individuals with criminal records who are seeking access to federally assisted housing. The guidebook describes the current law with respect to the admission process in general and, more specifically, as it relates to individuals with criminal records who have also been incarcerated; the barriers these individuals face as they seek housing; the process by which to challenge a denial; and suggestions for advocates seeking to change local policies and practices addressing the rights of persons who have been incarcerated.

A copy of the 195-page guidebook was recently sent to the main offices of all legal services programs and to members of the Council of Large Public Housing Authorities. An electronic copy of the guidebook is accessible on the NHLP website at www.nhlp.org.

Hard copies of the guidebook are available from NHLP for a shipping and handling charge of \$25. If you would like to order a copy, please send a check for \$25 to:

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²²Kenneth R. Gosselin, *Hartford Tenant Fights to Stay in Home After Foreclosure*, HARTFORD COURANT, Oct. 24, 2008.

²³Mot. to Dismiss, Fed. Nat'l Mortgage Assoc. v. Doe, No. HDSP 149558 (Conn. Super. Ct. Oct. 21, 2008).

²⁴Letter from Curtis P. Lu, Senior Vice President and Principal Deputy General Counsel, Fannie Mae Legal Department, to Amy Marx, Amy Eppler-Epstein, and Shelley White, New Haven Legal Assistance Association, Inc. (Dec. 14, 2008) (on file with NHLP); Kelly Evans, *Fannie Mae to End Tenant Evictions in Foreclosures*, WALL ST. J., Dec. 15, 2008.

²⁵*Id.*

²⁶*Id.*

²⁷S. 3689, 110th Cong. (2008).

²⁸*Id.* Ch. 9.

²⁹*Id.* Ch. 2.

³⁰National Low Income Housing Coalition, Congress Leaves without Passing Stimulus Legislation; Funds for Renters Included in Senate Proposal, 13 MEMO TO MEMBERS (Nov. 21, 2008), http://nlihc.org/detail/article.cfm?article_id=5661.

³¹*Id.*

property as a primary residence, and not have filed for bankruptcy.³⁴ The program creates a fast-track method of getting borrowers to an affordable monthly payment of no more than 38% of the household's monthly gross income.³⁵ This will be achieved via a combination of reducing the mortgage interest rate, extending the term of the loan, or deferring payment on part of the principal.³⁶ The program is modeled on the loan modification procedures the FDIC instituted at failed lender IndyMac.³⁷ However, FDIC chair Sheila Bair has stated that the FHFA's modification program fails to adequately address mortgages held in private securities, and that the government should use \$24 billion in EESA funds to directly guarantee modified loans.³⁸ The program has also been criticized for failing to assist homeowners who are struggling to make payments but are not yet in default.

The governors of California, Connecticut and Florida have called for temporary moratoriums on all residential foreclosures in their respective states, but these moratoriums have yet to be enacted.

Foreclosure Moratoriums

On November 20, 2008, Fannie Mae and Freddie Mac issued notices to loan servicing organizations and foreclosure attorneys directing them to suspend foreclosure sales and evictions from occupied single-family and two- to four-unit properties from November 26, 2008, until January 9, 2009.³⁹ The moratorium is intended to enable borrowers to retain their homes while the GSEs work with mortgage servicers to implement the streamlined loan modification program. The foreclosure moratorium applies only to loans owned or securitized by Fannie Mae and Freddie Mac, and therefore falls far short of the ninety-day national foreclosure moratorium proposed

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸Eileen Ambrose, *FDIC Chair Urges Focus on Foreclosures*, BALTIMORE SUN, Nov. 21, 2008.

³⁹Press Release, Fannie Mae To Suspend Foreclosures Until January 2009 While Streamlined Modification Program is Implemented (Nov. 20, 2008), <http://www.fanniemae.com/newsreleases/2008/4531.jhtml?Media&s=News+Releases>; Press Release, Freddie Mac Suspends All Foreclosure Sales of Occupied Homes from Day Before Thanksgiving Until January 9, 2009 (Nov. 20, 2008), http://www.freddiemac.com/news/archives/servicing/2008/20081120_foreclosure-suspend.html. Neither Fannie Mae nor Freddie Mac has specified how it will determine whether properties are "occupied."

by President-Elect Barack Obama.⁴⁰ It does not apply to vacant properties.⁴¹ The GSEs have directed servicers and foreclosure attorneys to contact the estimated 16,000 borrowers with foreclosure sales scheduled between November 26, 2008, and January 9, 2009.⁴²

The governors of California,⁴³ Connecticut⁴⁴ and Florida⁴⁵ have called for temporary moratoriums on all residential foreclosures in their respective states, but these moratoriums have yet to be enacted. In the private sector, Citigroup announced in early November that it will not initiate a foreclosure or complete a foreclosure sale on any eligible borrower "where Citi owns the mortgage, the borrower is seeking to stay in the home which is his/her principal residence, is working in good faith with Citi, and has sufficient income for affordable mortgage payments."⁴⁶

Conclusion

Recent efforts by the public and private sectors to keep homeowners out of foreclosure appear promising. However, a recent survey of California mortgage counselors found that lenders are not modifying home loans at scale; lenders are not conducting sufficient outreach to borrowers facing growing payments; foreclosure is still lenders' most common response to borrowers in distress; and federal, state and industry initiatives that rely on voluntary industry compliance are not working.⁴⁷ In light of these findings, the California Reinvestment Coalition recommends a 180-day moratorium on foreclosures to allow time for loan workouts and a mandate that all loan servicers adopt FDIC-like loan modification programs that include principal reduction.⁴⁸ As these results and recommendations indicate, much work remains to be done to ensure that foreclosure prevention efforts have a systemic impact. ■

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³Jim Wasserman, *Assembly's Foreclosure Moratorium on Slow Track*, SACRAMENTO BEE, Nov. 18, 2008.

⁴⁴Kenneth Gosselin, *Rell Proposes Moratorium on Residential Foreclosures*, HARTFORD COURANT, Nov. 21, 2008.

⁴⁵Aaron Deslatte, *Crist Says Banks Being Asked to Temporarily Stop Foreclosures*, SUN-SENTINEL, Dec. 1, 2008. In response to pressure from Florida Governor Charlie Crist, members of the lending industry have voluntarily agreed to stop filing new foreclosure petitions until January 15, 2009.

⁴⁶Press Release, Citigroup, Citi Announces New Preemptive Initiatives to Help Homeowners Remain in Their Homes (Nov. 11, 2008), <http://www.citigroup.com/citi/press/2008/081111a.htm>. This is a step in the right direction, but Citi has retained significant discretion to define terms such as "working in good faith" and "sufficient income for affordable mortgage payments."

⁴⁷California Reinvestment Coalition, *The Widening Chasm Between Words and Deeds IV*, Nov. 25, 2008, <http://www.calreinvest.org/system/assets/177.pdf>.

⁴⁸*Id.*

Courts Consider Landlord Defenses to Source of Income Laws*

Over the past two years, courts have decided numerous cases where Section 8 voucher holders have sought enforcement of state and local laws that prohibit landlords from discriminating against tenants and applicants based upon source of income. Many of these cases have upheld local source of income statutes, rejecting landlord claims that local source of income laws are preempted.¹ On what is usually the threshold question, courts have evaluated whether the state and local anti-discrimination protection covers the receipt of Section 8 assistance. Frequently, these cases have also addressed defenses raised by landlords that the rejection of a tenant with a Section 8 voucher was not discriminatory, but instead based upon legitimate reasons, such as burdensome program requirements, poor credit or insufficient income. The courts have usually rejected such claims as inadequate. This article briefly reviews these recent cases, as well as prior precedents addressing source of income issues where necessary.

Do Local Source of Income Laws Apply to Section 8 Vouchers?

New York City

The New York City Administrative Code provides that landlords receiving local property tax abatements for affordable housing may not discriminate against voucher holders.² In 2008, the New York City Council amended the Administrative Code to further prohibit housing

discrimination by all landlords, except for owners of buildings containing fewer than six units, based on lawful source of income, defined to include income derived from Social Security, or any form of federal, state, or local public assistance or housing assistance including Section 8 vouchers.³ A recent New York trial court decision held that this provision applied to both current residents and new applicants with Section 8 vouchers and that the local law was not preempted by federal law.⁴

District of Columbia

The D.C. Human Rights Act prohibits owners of housing accommodations from refusing to rent to someone on the basis of source of income, which includes “federal payments.”⁵ In *Bourbeau v. Jonathan Woodner Co.*,⁶ a federal district court, in rejecting the landlord’s motion to dismiss, found that a Section 8 voucher applicant had stated a claim that the landlord’s refusal to rent to her because of her Section 8 status could violate the local source of income law. In so doing, it dismissed the landlord’s characterization that the local law effectively mandates participation in the Section 8 program. It noted that “landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory grounds, such as an applicant’s rental history or criminal history,” or the need to charge rents higher than allowed under the program.⁷ The court also rejected the landlord’s related attempt to frame a federal conflict preemption defense, relying on the strong line of prior cases to that effect.⁸

California

The California Fair Employment and Housing Act (FEHA) makes it unlawful “for the owner of any housing accommodation to discriminate against...any person because of the...source of income...of that person.”⁹ FEHA defines “source of income” as “lawful, verifiable income

*Substantial portions of this article were written by Katherine Lehe, a J.D. Candidate at the University of California, Berkeley School of Law (Boalt Hall) and a Summer 2008 intern at the National Housing Law Project.

¹See *States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 HOUS. L. BULL. 11 (Jan. 2008) (reviewing the *Montgomery County, Sullivan II* and *DiLiddo* decisions mentioned *infra*). The preemption argument frequently made by landlords, which asserts that the voluntary character of the federal Section 8 program displaces any state or local power that might mandate participation in certain cases, has been repeatedly rejected by the courts. The decision with the most comprehensive discussion of the preemption issue is *Commission on Human Rights & Opportunities v. Sullivan Assocs.*, 250 Conn. 763, 739 A.2d 238 (1999) (*Sullivan I*). *Sullivan I* has been cited in subsequent source of income cases rejecting the preemption argument. See *Rosario v. Diagonal Realty, LLC*, 9 Misc. 3d 681, 689, 803 N.Y.S. 2d 343 (N.Y. Sup. Ct. 2005), *aff’d*, 32 A.D. 3d 739 (App. Div. 2006) and 872 N.E.2d 860 (N.Y. 2007); *Bourbeau v. Jonathan Woodner Co.*, 549 F.Supp. 2d 78 (D.D.C. 2008); *Montgomery County v. Glenmont Hills Assocs.*, 402 Md. 250, 272-273, 936 A. 2d. 325 (Md. 2007), *cert. denied* 2008 LEXIS 4793 (U.S. June 8, 2008). The preemption argument is not addressed in this article.

²Administrative Code of the City of N.Y. § 11-243K. New York City’s J-51 program prohibits covered landlords from discriminating against tenants who receive, or are eligible to receive, Section 8 assistance.

³Administrative Code of the City of N.Y. § 8-101 et seq., as amended in March 2008. The text of the Ordinance is available at: <http://www.nyc.gov/html/cchr/html/ammend08.html>. The small building exception does not apply if the units are subject to rent control laws or if the owner or agent rents at least six units in any one building, regardless of the size of its other holdings.

⁴*Matter of Rizzuti v. Hazel Towers Co. LP*, 2008 N.Y.Misc. LEXIS 2176, 239 N.Y.L.J. 63 (N.Y. Sup. Ct., March 27, 2008). See also *Rosario v. Diagonal Realty, LLC*, 872 N.E.2d 860 (N.Y. 2007) (holding that landlord’s acceptance of Section 8 is a “term and condition” of lease within meaning of local rent stabilization law, so that renewal lease must contain that term. Moreover, it held that federal law requiring good cause for eviction only during Section 8 lease term does not preempt tenant’s right to renewal lease that includes landlord’s acceptance of Section 8 nor the nondiscrimination provisions of NYC’s J-51 tax abatement program).

⁵D.C. Code § 2-1402.21; definition of source of income at D.C. Code § 2-1401.02(29). Another 2002 local law had clarified that voucher assistance constituted a source of income for purposes of the D.C. Human Rights Act. D.C. Code § 42-2851.06. See *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 78, 89 (D.D.C. 2008).

⁶*Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 78 (D.D.C. 2008).

⁷*Id.*, at 87.

⁸*Id.*, at 87-89. See also cases cited in note 1, *supra*.

⁹Calif. Gov. Code § 12955(a).

paid directly to a tenant or paid to a representative of a tenant.”¹⁰ In addition, where a rent subsidy is involved, another FEHA provision prevents landlords making eligibility decisions from using income standards not based upon the tenant’s share of the rent.¹¹ A California trial court has recently found that the California legislature did not intend to include Section 8 as income,¹² but this issue is now on appeal.¹³

In addition to holding that “lawful rent payment” clearly encompassed Section 8, Franklin rejected the landlord’s argument that refusal to accept Section 8 because of the program’s administrative burdens was not illegally discriminatory.

Landlord Claims that Rejection Was Based Upon Poor Credit or Insufficient Income

New Jersey

The New Jersey courts have issued several decisions exploring the interrelationship between the state’s source of income protection and landlord practices that seek to utilize credit history to deny applications from certain voucher holders. The New Jersey Law Against Discrimination (LAD), passed in 1981 and revised in 2002, has been interpreted to prohibit discrimination because of status as a Section 8 recipient, and at least one court has held that the refusal to rent based on alleged poor credit was pretextual. Some cases also suggest that the LAD prohibits discrimination for reasons necessarily related to Section 8 voucher receipt, such as the program’s alleged administrative burdens, or for reasons such as credit problems that are unrelated to an applicant’s ability to satisfy the applicant’s actual rent obligations.

The initial version of the LAD prohibited discrimination “because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the house or apartment.”¹⁴ However, it also initially included an exception permitting landlords to

refuse to rent “because of...creditworthiness.”¹⁵ In September 2002, the original LAD was repealed and reenacted without the explicit “creditworthiness” exception. The LAD now makes it unlawful to “refuse to sell, lease, assign, or sublease or otherwise deny to or withhold” any real property “because of the source of any lawful income received by the person or the source of any lawful rent payment to be paid for the real property.”¹⁶

In 1999, the New Jersey Supreme Court had construed the initial version of the source of income protections in *Franklin Tower One, L.L.C. v. N.M.*, holding that a landlord’s refusal to accept Section 8 from a current tenant who became program-eligible constituted unlawful discrimination.¹⁷ The court’s reasoning was based on the plain language and legislative intent¹⁸ of the LAD, as well as the state’s policy of protecting low-income tenants.¹⁹ The court found further support in the New Jersey Governor’s press release, characterizing the act’s purpose to protect “tenants receiving governmental rental assistance.”²⁰

In addition to holding that “lawful rent payment” clearly encompassed Section 8, *Franklin* rejected the landlord’s argument that refusal to accept Section 8 because of the program’s administrative burdens was not illegally discriminatory. The court noted that the program requirements were not overly burdensome, particularly considering the numerous rental property regulations already imposed on landlords by the state.²¹

Two years later, a New Jersey trial court revisited the original source of income law, finding that a landlord’s denial of a Section 8 recipient’s application based on allegedly poor credit was a pretext for illegal source of income

¹⁵*Franklin Tower One, L.L.C. v. N.M.*, 304 N.J. Super. 586, 589-90, 701 A.2d 739 (N.J. Super. 1997), citing N.J.S.A. 2A:42-100 (repealed).

¹⁶N.J.S.A. 10:5-12 (g)(4) (2002). Separate provisions make it unlawful for landlords and real estate agents “to refuse to sell, lease, assign or sublease or otherwise deny to or withhold,” or to advertise “any limitation, specification or discrimination,” or to discriminate in any related “terms, conditions, or privileges,” based on “source of lawful income used for rental or mortgage payments.” *Id.*, § 10:5-12 (g)(1)-(3) and (5), (h)(1)-(5). See also *id.*, § 10:5-4.

¹⁷*Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 619, 725 A.2d 1104 (1999).

¹⁸The court noted the state assembly’s statement of the LAD’s purpose “to prohibit[] a landlord from refusing to rent to a person merely because of objections to the source of the person’s lawful income.” *Id.*, at 605, citing Assembly Commerce, Industry and Professions Committee, Statement to A. 944 (May 1, 1980).

¹⁹The existence of the New Jersey Anti-Eviction Act requiring good cause for termination of a tenancy demonstrated the state’s strong public policy of tenant protections. *Id.*, at 614. The court distinguished *Knapp v. Eagle Property Mgmt. Corp.*, 54 F.3d 1272 (7th Cir. 1995), which had held that the Wisconsin source of income law did not cover Section 8 recipients, noting that Wisconsin’s protections based on “lawful source of income” differed from New Jersey’s specific prohibition of discrimination based on “lawful rent payment.” *Id.*

²⁰*Id.* at 605-06, citing News Release, Office of the Governor, at 1 (Dec. 9, 1981).

²¹*Id.* at 621.

¹⁰*Id.* § 12955(p). While the statute also states that a landlord is not considered such a representative, the tenant has argued that, in the context of Section 8 vouchers, the PHA is the tenant’s representative, thus indicating that the statute remains applicable.

¹¹*Id.* § 12955(o).

¹²*Sabi v. Donald T. Sterling Corp.*, No. BC313345 (Order Re: Plaintiff’s Source of Income Claims, etc., Feb. 7, 2008).

¹³*Sabi v. Donald T. Sterling Corp.*, No. B205279 (Cal. Ct. App., 2d Dist., pending 2008).

¹⁴N.J.S.A. 2A:42-100.

discrimination.²² In that case, an unemployed Section 8 voucher holder also receiving other public assistance applied for an apartment for herself and her twelve-year-old daughter. After initially rejecting her application “due to credit,” the landlord claimed she was rejected due to unemployment and a poor credit report, which reflected two unpaid medical bills totaling \$434.²³ Subsequently, the landlord alleged that her application was denied because of poor credit and insufficient income.²⁴

The court found that creditworthiness only relates to landlords’ “legitimate concern that a prospective tenant has a reliable and steady source of income to fund rent payments and satisfy the other financial requirements of a lease.”

In response to the discrimination claim, the landlord argued that denial based on poor credit fell within the original statutory exception for denials based on “creditworthiness,” a term which landlords could define under their “business judgment.”²⁵ Although the first version of the LAD permitted denials based on “creditworthiness,” the court was careful to ensure that landlords could not simply define the term to their advantage.²⁶ The court noted that as a remedial statute, the LAD’s protections must be construed liberally and the exception for lack of creditworthiness construed narrowly.²⁷ In so doing, the court found that creditworthiness only relates to landlords’ “legitimate concern that a prospective tenant has a reliable and steady source of income to fund rent payments and satisfy the other financial requirements of a lease.”²⁸

Using this definition, the court then examined the landlord’s assessment of the applicant as credit unworthy, rejecting the landlord’s reliance on the cursory

credit report showing small debts for necessary medical expenses, and noting that it never contacted past landlords and did not apply uniform and objective application standards.²⁹ Although Landmark West withdrew its allegation of insufficient income, the court found it significant that at trial the manager expressed concern that the applicant would be unable to pay rent if she lost her voucher.

Because the applicant’s Section 8 voucher ensured her ability to pay rent, and because she was able to pay the security deposit, the court concluded that the landlord had not established “any rational relationship between the plaintiff’s credit report and Landmark West’s legitimate concern that plaintiff has the means to pay the rent.”³⁰ Accordingly, the court found that the applicant’s allegedly poor credit was a pretext for denial on the basis of “economic status, including her unemployment, lack of sufficient income and her participation in the Section 8 program.”³¹ Holding that Landmark West thus illegally discriminated based on “the source of ... lawful rent payment,” the court required it to enter into a lease and comply with all reasonable Section 8 program requirements.

A subsequent decision, *Pasquince v. Brighton Arms Apartments*,³² clarified the circumstances in which credit-related denials may be nondiscriminatory and thus legitimate. In *Pasquince*, a landlord had denied a disabled Section 8 recipient’s rental application based on his credit report, which included unpaid utility bills, an eviction for nonpayment of rent and a \$2,922 debt owed to a prior landlord. The landlord informed the applicant that he could contact the credit reporting agency to dispute his credit report.³³ Although the New Jersey Legislature revised the LAD between the *T.K.* decision and the 2005 *Pasquince* decision to delete the creditworthiness exception, the court found no evidence that this revision was intended to prevent landlords from ever denying applicants based on poor credit.

The *Pasquince* court held that lack of creditworthiness was not a pretext for illegal discrimination based on the “source of any lawful rent payment.”³⁴ Key to distinguishing *T.K.* factually were that Brighton Arms applied written application standards, presented consistent reasons for rejecting Pasquince’s application, exempted Section 8 applicants from the minimum income requirements, and rented to other Section 8 tenants. Moreover, Pasquince’s unpaid utility bills and eviction for nonpayment supported a conclusion that he was not creditworthy.³⁵ In

²²*T.K. v. Landmark West*, 353 N.J. Super. 353, 802 A.2d 609 (N.J. Super. Ct. App. Div. 2001).

²³*Id.* at 361.

²⁴*Id.* at 357-58.

²⁵*Id.* at 359, citing N.J.S.A. 2A:42-100 (since repealed).

²⁶See *id.* at 359-60, analogizing to Comm’n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 253 (1999), *reh’g denied*, 742 A.2d 364 (1999) (noting that it was inconsistent with the remedial nature of the Connecticut source of income statute to allow landlords “*carte blanche* authority to define the term [creditworthiness] so as to qualify for the exception”).

²⁷*T.K. v. Landmark West*, *supra* at 359. In the absence of a statutory definition, the court construed the term by referencing the dictionary definition, as well as the legislative intent not to “deny or interfere with a landlord’s legitimate considerations of *sufficiency of income or reliability of rent payment*.” *Id.* at 360, citing Assembly Commerce, Industry and Professions Committee, Statement to Assembly No. 944, May 1, 1980 (emphasis in opinion).

²⁸*Id.* at 360.

²⁹*Id.*

³⁰*Id.* at 362.

³¹*Id.* at 363.

³²*Pasquince v. Brighton Arms Apartments*, 378 N.J. Super. 588 (N.J. Super. Ct. App. Div., 2005).

³³*Id.*, at 592.

³⁴N.J.S.A. 10:5-12, 10:5-4 (2002). The court noted, however, that denials based on poor credit may be pretextual if landlords alter their standards for Section 8 tenants. *Pasquince v. Brighton Arms Apartments*, 378 N.J. Super. 588, 601 (N.J. Super. Ct. App. Div., 2005).

³⁵*Pasquince*, at 600-01.

discussing the significance of past rent nonpayment, the court rejected an unpublished opinion holding that landlords may not consider a tenant's creditworthiness where a voucher would pay at least 50% of the monthly rent.³⁶ The court noted that voucher recipients must still pay their portion of the rent, and that past nonpayment reasonably suggests they will be unable to do so in the future,³⁷ certainly sound reasoning if the past nonpayment accrued during a subsidized voucher tenancy.

In another more recent case, *Miller v. Brookside at Somerville, LLC*,³⁸ the court addressed similar issues in affirming the lower court's denial of a preliminary injunction. The tenant claimed that the landlord violated the statute and public policy when it used a point-based formula to deny his application based on an erroneous credit report and wrongfully refused to examine the tenant's actual credit history.

The court again affirmed that it is lawful for landlords to use creditworthiness as a selection criterion for Section 8 tenants and that rejection based on a poor credit history did not violate the LAD. As to whether the trial court should have required the landlord to consider the accuracy of the credit history, the court found no abuse of discretion by the trial court in refusing the injunction,³⁹ because the tenant had no legal claim to require the owner to use accurate credit reports. However, the court did provide some guidance for the lower court as the case proceeds, stating that "the lawsuit relating to plaintiff's allegedly successful dispute over the security deposit and his landlord's action to regain possession of his rental unit for personal occupancy do not appear to pertain to the applicant's prior ability or inclination to pay rent. Accordingly, reliance on those items would provide little insight into an individual's creditworthiness."⁴⁰ The court also suggested that the tenant could obtain a copy of the report from the credit agency and dispute its accuracy under the Federal Fair Credit Reporting Act.⁴¹ In addition the court suggested the option of joining the reporting agency as a party.⁴²

Although the decision in *Franklin Tower One* clarified that New Jersey's source of income definition covers Section 8 vouchers and is not preempted, the subsequent decisions in *T.K., Pasquince* and *Miller* suggest that courts are more likely to find that denials based on poor credit are nondiscriminatory if landlords consistently use written screening standards and make consistent statements

regarding applicants' rejection. Similarly, whereas outstanding debts due to medical expenses are likely inadequate to show poor credit that would justify rejection, evictions and debts related to prior tenancies may be found nondiscriminatory, especially if they also involved subsidized tenancies, even though vouchers make apartments more affordable to recipients.

*The Connecticut source of income statute
has been interpreted as prohibiting landlords
from rejecting applicants for reasons related
to their receipt of Section 8.*

Connecticut

Like the New Jersey law, the Connecticut source of income statute has been interpreted as prohibiting landlords from rejecting applicants for reasons related to their receipt of Section 8, including program requirements, and related to income requirements that do not consider voucher participants' personal share of the rent. Connecticut law prohibits landlords from refusing to rent or offering different terms, conditions, or privileges based on "lawful source of income," and from advertising any such preferences or limitations.⁴³ The statute defines source of income as "income derived from Social Security, supplemental security income, housing assistance, child support, alimony or public or state-administered general assistance."⁴⁴ The statute further specifies that its provisions "shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income."⁴⁵

Back in 1999, in *Commission on Human Rights and Opportunities v. Sullivan Associates*,⁴⁶ the Connecticut Supreme Court had held that a landlord's reluctance to accept the terms of the Section 8 lease was not a legitimate basis for denial,⁴⁷ and that a landlord may only consider a voucher holder's personal rent obligation and other reasonable rental expenses when assessing sufficiency of income. In that case, Sullivan had denied applications from two Section 8 recipients, citing their failure to meet Sullivan's minimum income requirements, and noting that the required security deposit exceeded the maximum

³⁶*Id.* at 598, citing *Reed v. Rustic Village Apartments*, No. DC-4136-02M (N.J. Super. Ct. Law Div. Jan. 14, 2003).

³⁷*Id.* at 598.

³⁸2008 WL 351338 (N.J. Super. Ct. App. Div., Feb. 11, 2008) (unpublished).

³⁹*Id.*, at slip op. 5.

⁴⁰*Id.*

⁴¹15 U.S.C. §§ 1681-1681t (2008).

⁴²*Miller v. Brookside at Somerville, LLC*, 2008 WL 351338 (N.J. Super. Ct. App. Div., Feb. 11, 2008), slip op. at 5.

⁴³Conn. Gen. Stat. § 46a-64c(a).

⁴⁴*Id.* § 46a-63.

⁴⁵*Id.* § 46a-64c(b)(5).

⁴⁶*Commission on Human Rights & Opportunities v. Sullivan Assocs.*, 250 Conn. 763, 739 A.2d 238 (1999) (*Sullivan I*).

⁴⁷At the time of the denial in 1994, federal regulations required prospective Section 8 renters and landlords to use a standardized lease and addendum in order to participate in the Section 8 program. 24 C.F.R. § 882.209(j)(1) (1994).

allowed by Section 8.⁴⁸ In response to the Commission's discrimination allegations, Sullivan argued that its objections to terms in the standardized Section 8 lease⁴⁹ constituted a non-discriminatory basis for denial. Sullivan further argued that its policy of denying applicants whose weekly incomes were not equal to a month's rent was authorized by the statutory exception for denials based on insufficient income.

In addressing the Commission's complaint, the court first noted that the law "makes mandatory landlord participation" in Section 8,⁵⁰ while acknowledging that landlords may deny applicants for non-discriminatory reasons.⁵¹ To determine whether the statute was intended to allow denials if landlords objected to the Section 8 lease, the court examined the statute's legislative history. It held that to read such an exception into the statute would undermine the legislature's intent to provide low-income families access to the rental market, citing the legislature's awareness of Section 8 requirements at the time of enactment, as well as two failed attempts to amend the statute explicitly to include such an exception.⁵²

The court then evaluated Sullivan's argument that denials based on its minimum income requirements, which considered the entire rental obligation, were permissible under the statute's exception for "insufficient income." Since both the statute and its legislative history were silent, the court turned again to the statute's purpose and the law dictionary to support its conclusion that this exception allowed landlords to determine only whether applicants lack "sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other [tenancy] obligations...."⁵³ The case was remanded to allow the landlord the opportunity show that applicants did not have sufficient income, considering their income, personal rental obligation, foreseeable utility expenses, and so forth.

Although *Sullivan I* did not ultimately resolve whether the applicants' income was insufficient within the meaning of the exception, the court revisited the issue early in 2008 in a separate case against the same landlord. In *Commission on Human Rights and Opportunities v. Sullivan (Sullivan II)*,⁵⁴ the court affirmed its *Sullivan I* holdings, and considered whether the landlord's denial of voucher holders,

allegedly based on "insufficient income, bad credit, or bad attitude" were credible and non-discriminatory.

Applying a mixed-motives analysis to the landlord's defense, *Sullivan II* upheld the trial court's determination that Sullivan failed to prove it would have denied applicants even if they had not been Section 8 participants.⁵⁵ Significantly, the court held that Sullivan's denial was not based on the applicant's ability to pay only their monthly portion of the rent, and that alleged poor credit was not a credible basis of denial, because it appeared as an afterthought and was based on a stale application that listed only a delinquent student loan.⁵⁶

As the *Sullivan* decisions make clear, the Connecticut source of income law prevents landlords from circumventing its protections by denying applications based on inherent Section 8 program requirements or based on alleged insufficient income or bad credit, where such reasons fail to account for the voucher subsidy or are not proven to be legitimate and non-discriminatory.

Courts Reject Landlords' Claim that Section 8 Program Is Burdensome

Montgomery County, MD

The source of income protections of the Montgomery County, Maryland, fair housing law also encompass Section 8 vouchers and, as interpreted by the Maryland Court of Appeals,⁵⁷ set a high standard for landlords to prove that Section 8 administrative burdens are a viable defense to allegations of discrimination. Montgomery County law prohibits certain landlords from refusing to rent to any person based on "source of income," defined as including "any lawful source of money, paid directly or indirectly to a renter or buyer of housing, including income from... any government or private assistance, grant, or loan program,"⁵⁸ and the county interprets "source of income" as including Section 8 vouchers.⁵⁹

The landlord, Glenmont, had a policy of rejecting vouchers, confirmed by its refusal to rent an apartment to a Section 8 participant. After an administrative finding that Glenmont had unlawfully discriminated based on source of income was invalidated by a lower court, the Maryland Court of Appeals addressed two issues: (1) whether Section 8 was a source of income under local law; and (2) if so, whether landlords' objections to the administrative burdens of the program constituted a valid basis for denial.

⁴⁸*Sullivan I*, *supra*, at 771. Sullivan also denied two fair housing testers posing as Section 8 recipients. *Id.*

⁴⁹Sullivan objected to Section 8 lease provisions that set maximum allowable security deposits and regulated lease termination by a landlord. *Id.*

⁵⁰*Id.* at 765.

⁵¹*Id.* at 776.

⁵²*Id.* at 782.

⁵³*Id.* at 790 (emphasis added).

⁵⁴285 Conn. 208, 939 A.2d 541 (2008) (*Sullivan II*). See also *States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. BULL. 11 (Jan. 2008).

⁵⁵*Sullivan II*, at 228-230.

⁵⁶*Id.* at 231.

⁵⁷*Montgomery County v. Glenmont Hills Assocs.*, 402 Md. 250, 936 A.2d. 325 (Md. 2007), *cert. denied* 2008 LEXIS 4793 (U.S. June 8, 2008). See also *States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 Hous. L. BULL. 11 (Jan. 2008).

⁵⁸Montgomery County Code §§ 27-6 and § 27-12.

⁵⁹*Montgomery County v. Glenmont Hills Assocs.*, 402 Md. 250, 260, 936 A. 2d. 325 (Md. 2007).

In considering whether the law's source of income definition covered Section 8, the court noted that the definition includes both government assistance, which unquestionably includes Section 8, and money "paid directly or indirectly to a renter."⁶⁰ The court reasoned that although Section 8 Housing Assistance Payments are paid to the landlord rather than the tenant, the payment is "clearly and identifiably on behalf of the tenant," and "therefore constitutes money paid indirectly to the tenant."⁶¹ Therefore, the court concluded that the source of income definition encompassed Section 8 vouchers.

Analyzing the landlord's administrative burdens defense, the court noted the administrative body's determination that the program requirements complained of by the landlord⁶² were not unduly burdensome and therefore did not unduly interfere with the landlord's property rights.⁶³ The court affirmed that administrative burden was not a proper defense in any event, because "if a landlord could avoid the mandate of the County's fair housing law with the defense of 'administrative burden,' then landlords could easily thwart the Council's intent underlying the law."⁶⁴ The fact that most courts addressing the administrative burden defense have rejected it was also persuasive,⁶⁵ as was the fact that the alleged burdens did not constitute a taking or a violation of due process.⁶⁶ While also rejecting the owner's implied preemption claim, Montgomery County thus makes it harder for those landlords who seek to evade source of income protections for voucher holders by citing allegedly burdensome Section 8 program requirements.

Massachusetts

Going further than other states to preclude an administrative burden defense, the Massachusetts legislature has enacted a source of income law explicitly prohibiting discrimination based on the requirements of any housing subsidy program. Massachusetts law currently prohibits

discrimination by "any person furnishing...rental accommodations" against "tenant[s] receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program."⁶⁷

A prior version of the law had prohibited discrimination "solely on the basis of the tenant's status as a Section 8 recipient."⁶⁸ In 1987, the Supreme Judicial Court of Massachusetts construed that version of the statute as allowing denials because of objections to Section 8 program requirements. In *Attorney General v. Brown*, the court had held that a landlord's refusal to rent to a Section 8 participant because of objections to a standardized lease did not violate the anti-discrimination law, because although it was related to the requirements of the Section 8 program, the denial was not "solely" on the basis of the tenant's status as a Section 8 recipient.⁶⁹ In response to this unfavorable ruling, the state legislature amended the statute in 1990, eliminating the word "solely," and adding language prohibiting discrimination against housing subsidy recipients "because of any requirement of such ...program."⁷⁰

In 2007, in *DiLiddo v. Oxford Street Realty*,⁷¹ the Supreme Judicial Court construed the amended source of income law. Reversing the lower court, the court held that a lease term mandated by a state housing voucher program was a program requirement, making unlawful the landlord's refusal to execute a lease based on objections to the lease terms.⁷² The court declined the landlord's request to read into the statute an exception allowing landlords to reject participants in any program that would cause a landlord "substantial economic harm," finding it without statutory support.⁷³ The court noted that in light of the 1990 statutory amendment, the legislature had clarified that "both kinds of housing discrimination that this court had parsed so carefully in *Brown* were now unlawful," regardless of any alleged non-discriminatory reasons.⁷⁴

⁶⁰*Id.* at 264.

⁶¹*Id.* at 264-65.

⁶²Glenmont complained of the following provisions of the HUD lease addendum: (1) PHA failure to pay its portion of the rent does not constitute a breach of the lease; (2) tenant is allowed to engage in profit-making activities incidental to the primary use as a residence; (3) the addendum prevails over the standard lease terms and cannot be changed by the landlord or tenant. Glenmont also complained of the following Section 8 Housing Assistance Payment contract terms: (1) PHA may terminate assistance to tenant on various grounds, and if so, the lease will automatically terminate without notice to the landlord; (2) if HAP contract terminates for another reason, the lease terminates without notice to the landlord. Glenmont also complained that program participation requires the apartment to satisfy HUD Housing Quality Standards, requiring a PHA inspection. *Id.* at 275.

⁶³*Id.* at 276.

⁶⁴*Id.*

⁶⁵*Id.* at 276 (citing Comm'n on Human Rights v. Sullivan Assocs., 739 A.2d 238 (Conn. 1999), *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 828 (Ill. App. 2004), and *Franklin Tower One, L.L.C., v. N.M.*, 725 A.2d 1104 (N.J. 1999)).

⁶⁶*Id.*

⁶⁷Mass. Gen. Laws Ann. ch. 151B, § 4(10) (Westlaw Oct. 22, 2008) (emphasis added).

⁶⁸*DiLiddo v. Oxford Street Realty, Inc.*, 876 N.E.2d 421, 427 (Mass. 2007). See also *States Uphold Source of Income Discrimination Laws Protecting Voucher Holders*, 38 HOUS. L. BULL. 11 (Jan. 2008).

⁶⁹*Attorney General v. Brown*, 511 N.E.2d 1103, 1109 (Mass. 1987).

⁷⁰See *DiLiddo v. Oxford Street Realty, Inc.*, 876 N.E.2d 421, 429 (Mass. 2007) (citing Mass. Gen. Laws ch. 151B, § 4(10)).

⁷¹*DiLiddo v. Oxford Street Realty, Inc.*, 876 N.E.2d 421 (Mass. 2007).

⁷²*Id.* at 427.

⁷³*Id.* at 430.

⁷⁴*Id.* at 429.

Conclusion

For those jurisdictions that have determined that Section 8 is covered by local laws preventing source of income discrimination, the litigation has now become focused upon the landlord defenses that a family may be rejected for other factors, including poor credit or insufficient income, or that its basis for rejecting applicants is non-discriminatory because the program is burdensome. While recent decisions have unanimously found that Section 8 program requirements alone are insufficient to justify rejection of Section 8 applicants, the issues of whether a landlord may reject assisted applicants for poor credit or insufficient income continue to evolve. In most cases, courts are requiring a demonstrated relationship between a poor credit report and a legitimate concern about the tenants' ability to make future payments of their share of the rent. Other related issues remain unresolved, such as how to handle erroneous and unreliable credit reports. These recent cases also demonstrate that determining the specific policies and practices at issue in each case, as well as the actual reasons for rejection, will always be critically important. ■

Using HUD's Updated Physical Inspection Scores to Preserve Threatened Multifamily Properties

One vital aspect of affordable housing preservation is ensuring the proper physical and financial maintenance of projects to avoid loss of the property. The Department of Housing and Urban Development (HUD) created its current inspection standards for multifamily properties a decade ago, as part of its 2020 Management Plan.¹ HUD also created the Real Estate Assessment Center (REAC) and the Enforcement Center, both located in HUD Headquarters, to address problems presented by noncomplying properties. The REAC evaluates the financial and physical condition of all HUD-funded public and assisted housing developments. The Enforcement Center takes action against troubled developments that fail the financial and physical inspection standards.² Enforcement actions may include termination of the project-based contract. Understanding the standards and enforcement can help advocates take action to preserve affordable housing.

REAC's physical condition standards help determine if a development is decent, safe, sanitary and in good repair. Inspectors review the site, building exterior, building systems, dwelling units, common areas, and health and safety concerns.³ The standards neither include state or local housing codes, nor do they supersede or preempt them.⁴ While the REAC process also encompasses financial and management issues, physical conditions create the most common risk of enforcement action that could lead to precipitous termination of the project-based Section 8 contract and displacement of the residents.

Under the REAC physical inspection scoring system, all multifamily housing properties are rated on a 100-point scale, resulting in rankings as either a Standard 1 (90 points or higher), Standard 2 (80 to 89 points), or Standard 3 (fewer than 80 points) performing properties. Standard 1 performing properties are required to undergo physical inspection only once every three years; Standard 2 performing properties, once every two years; Standard 3 performing properties are inspected annually.⁵ The regulations also require that Standard 1 and 2 performing properties address any health and safety

¹24 C.F.R. Part 200, subpt. P (2007). *See also* 63 Fed. Reg. 35,649 (June 30, 1998).

²Notice of New HUD Field Structure, 62 Fed. Reg. 62,478 (Nov. 21, 1997); HUD 2020 Management Reform Plan, 62 Fed. Reg. 43,212 (Aug. 12, 1997).

³24 C.F.R. § 5, Subpt. G (2007) (Physical Condition Standards and Inspection Requirements).

⁴*Id.* § 5.703(g)(2007).

⁵*Id.* § 200.857(b) (2007).

hazards immediately in order to maintain their favorable classification,⁶ and admonish that all properties must be maintained according to HUD's uniform physical condition standards.⁷

The regulations require that HUD publish REAC scores on its website, in the Federal Register, or elsewhere.⁸ Last November, after many years of advocacy by NHLP and allies, HUD finally posted each building's most recent REAC score online.⁹ Owners must also notify residents of any physical inspections and make all related documents available for tenant review.¹⁰

On September 23, 2008, HUD updated its website data to provide the three most recent physical inspection scores for almost 27,000 HUD-assisted project-based Section 8 multifamily housing contracts. This database reportedly covers approximately 18,000 properties, as some properties have more than one contract. Listed along with the REAC scores are the release dates of the inspection score, the name of the property, the property's city and state, and the property identification number. Using the standard query features in programs such as Access, advocates can use the property ID to link these REAC scores with other multifamily housing datasets published by HUD.

The recent September 2008 posting marks the first time HUD has provided the last three inspection scores. The scores and related data are available in PDF files by state and city, or in one Excel spreadsheet for all properties nationally. The Excel spreadsheet is especially useful because it enables sorting of the information by jurisdiction, and by score from lowest to highest within each jurisdiction, permitting advocates to focus attention on properties facing or undergoing enforcement action.

Hopefully, HUD will honor its commitment to keep these scores updated periodically, every sixty days, with a goal of posting monthly revisions.

Low REAC scores are the primary determinant of whether HUD will commence enforcement action against a non-complying owner. Especially low scores correlate with properties in serious trouble and thus can help housing advocates target preservation efforts. Because the scores provide early warning on significant physical problems, they can be extremely helpful for developing proactive strategies to improve conditions and avoid sudden contract terminations.

How Scores Are Theoretically Determined

On the REAC 100-point scale, a higher score indicates a property in better condition. A property is divided into five areas for scoring. A property's overall score is the weighted average of "area" scores,¹¹ which are adjusted to take into account how many of an area's listed items can actually be inspected. If all five property areas are available for inspection, HUD's system establishes the following overall weights for each:

- 15% – Site
- 15% – Building exterior
- 20% – Building systems
- 15% – Common areas
- 35% – Dwelling units

Each individual area score is calculated by deriving weighted averages of sub-area scores over buildings or dwelling units as appropriate. These sub-area scores are calculated by deducting points for deficiencies observed based on criticality and severity levels, with further decreases for identified health and safety issues. Additional controls theoretically prevent disproportionate influence of deficiencies at particular sub-areas or units.

The REAC physical inspection protocol includes more than 600 potential deficiencies, which are further graded for severity level. Although all observed deficiencies are reported in each inspection, each particular deficiency has its own point deduction from the score, as determined by various labels. Seven named deficiencies are categorized as "very-high" impact, whereas thirty-three are "high" impact, and fifty-four are "medium."¹² The very-high impact deficiencies all involve only individual dwelling units; these include such items as inoperable Ground Fault Interrupters in bathrooms or kitchens, clogged plumbing or toilets, inoperable ventilation in bathrooms, inoperable heat, and damaged or missing kitchen sinks. High- and medium-impact deficiencies cover many more areas and items. The remaining deficiencies (approximately 500 in number) are designated low impact and can each reduce the score only by relatively small amounts.

⁶*Id.*, at § 200.857(b)(iii)(2).

⁷*Id.*, at § 200.857(b)(iii)(3). See also 24 C.F.R. § 5, Subpt. G (2007) (Physical Condition Standards and Inspection Requirements).

⁸*Id.*, § 200.857(f)(2).

⁹HUD's website address for the REAC physical inspection scores is: www.hud.gov/offices/hsg/mfh/rem/reminspecscores/remspphyspscores.cfm.

¹⁰24 C.F.R. § 200.857(g). Residents and advocates can increase the probability of getting notice of future inspections by reminding owners and HUD of this obligation and requesting individual notices.

¹¹According to HUD's guidance at <http://www.hud.gov/offices/reac/pdf/reapscr.pdf>, the numerical scores are accompanied by a letter that grades the property on what HUD calls health and safety (H&S) deficiencies (if any). An "a" denotes no adverse H&S, a "b" denotes non-life-H&S deficiencies, and a "c" calls out exigent deficiencies requiring immediate attention or remedy, including fire safety H&S conditions. The H&S letter grades have two forms: with and without an asterisk (*). The asterisk designates that the property has at least one smoke detector deficiency. When the asterisk is present, that part of the score is pronounced as "risk," as in "93a, risk" for 93a* and "71c, risk" for 71c*.

¹²Appendix 2 to HUD's REAC explanation, *id.*, contains more detail about the categorization of various deficiencies by impact.

For the building exterior or systems areas, one to two high-impact deficiencies will effectively take away all or most of the possible points. For the areas involving site, building exterior and building systems, two medium-impact deficiencies could also remove all or most of the possible points. For dwelling units, it would take one very-high, two or three high- or three to six medium-impact deficiencies to deduct all or most of the possible points. With common areas, the one possible medium-impact deficiency (damaged stairs or handrails, if graded “severe”) cannot result in loss of all possible points if the common areas have a substantial point value. A large number of low-impact deficiencies in an area could also result in deduction of all or a substantial number of possible points, and various combinations of different level deficiencies could have the same effect.

Impact of Physical Inspection Scores

Under the regulations, properties scoring thirty points or less are automatically referred to the Departmental Enforcement Center (DEC) for evaluation.¹³ These owners may submit corrective action plans to assist the DEC in creating a Compliance Plan, which the owner must accept or promptly counter.¹⁴

Late in 2002, HUD’s Office of Asset Management announced a new procedure for properties scoring less than sixty points.¹⁵ Under that policy, apparently still effective, properties with scores under sixty points are also referred to the DEC, but the HUD Multifamily Hub Director may delay or recall the referral of any property scoring between thirty-one and fifty-nine upon providing a written justification to the Asset Management Director in Headquarters. However, owners receive no additional time for repairs to correct deficiencies if the Hub Director is overruled and the referral to DEC proceeds. In any case, owners must correct all health and safety conditions. After referral, the DEC reviews the file, prepares a notice of violation, and meets with the owner promptly (within fifteen days of the release of an under-sixty inspection score). A re-inspection is scheduled approximately sixty days after the meeting, and the owner has the intervening period to complete and certify necessary repairs. Additional time for repairs may be approved by Asset Management. If the reinspection yields a score higher than sixty, normal monitoring resumes. If not, DEC apparently pursues its enforcement protocol for properties in default.

If the DEC compliance process fails to deliver both the necessary repairs and improved scores, HUD moves to abate or terminate Section 8 contracts before pursu-

ing a foreclosure on any underlying HUD-insured mortgage. Congress recently established policies requiring that HUD retain project-based assistance rather than terminate contracts as part of the foreclosure process.¹⁶ However, the department’s actions to abate or terminate a contract prior to pursuing foreclosure sometimes leave no Section 8 contract to maintain because the contract authority has already been used for relocation vouchers. In such cases, the contract is lost as a critical resource to preserve and improve the development. Although advocates have sought changes in HUD’s administrative procedures to ensure pursuit of alternative default remedies that retain project-based assistance contracts prior to foreclosure, subject to relocation for imminent major health and safety threats, no major changes in HUD policy have yet been made. Hopefully, a new Administration will soon bring a more preservation-oriented perspective to this complex issue.

The September 2008 data indicates that only about 160 contracts (out of 27,000) scored below the automatic DEC referral threshold of thirty points. However, approximately ten times as many—1650—had recent inspection scores equal to or less than the presumptive referral threshold of sixty points. The recent data also indicates that many properties have experienced wild swings in REAC scores between inspections, so that changes of thirty or forty points from one to the next are not uncommon. Thus, properties with current or prior scores lower than sixty, or those that do not substantially exceed the sixty-point threshold, remain very much at risk.

Suggested Advocacy Steps

- Advocates should evaluate the data for properties in their area, and consider setting priorities for properties with scores less than thirty, as presenting imminent enforcement risks, or even below sixty, since referral remains probable and final owner-DEC compliance plans may never be successfully negotiated.
- Advocates who are not familiar with the property or properties should consider visiting the site by contacting tenants who may be former clients and arranging an informational meeting with residents to discuss the problems, their goals and possible strategies.
- Advocates should obtain the physical inspection report from the owner or manager. Evaluate the report, and talk to the owner and HUD about any remedial efforts. Ask the owner to provide a copy of any technical review request submitted to HUD concerning the inspection, any corrective action plan submitted to DEC, or any DEC compliance plan.

¹³24 C.F.R. § 200.857(h) (2007).

¹⁴*Id.*, § 200.857(i) (within thirty days).

¹⁵Memo from Beverly J. Miller, Director, HUD Office of Asset Management, to All Owners, Agents and Contract Administrators, Re: Properties with Inspection Scores Under 60 Points (Jan. 16, 2003) (refers to procedures effective November 1, 2002).

¹⁶Pub. L. No. 110-161, § 220, 121 Stat. 2436 (Dec. 26, 2007) (“Schumer Amendment,” largely reenacting a policy first adopted in 2005 as part of the FY 2006 HUD Appropriations Act).

- Working with the tenants, advocates can determine the viability of a strategy that emphasizes preservation. If contract termination or foreclosure is not imminent, this strategy may include taking action against the owner to enforce compliance with the lease and housing quality standards. Preservation should also include investigating the possibility of transferring the property to a new owner that has the capacity to undertake rehabilitation while retaining the assistance contract. If preservation proves undesirable or infeasible, advocates should work to ensure adequate tenant protections for all currently assisted households, such as replacement vouchers and other relocation benefits.

For further information on addressing troubled properties in your area, please contact Jim Grow at NHLP's Oakland office at jgrow@nhlp.org. ■

State Court Hands Down Disappointing Preemption Ruling

A New York state appellate court recently invalidated a New York City local preservation law that gives tenants the first right to purchase a building in which an owner is opting out of a project-based Section 8 contract.¹ The court based its decision on an improper analysis of federal preemption law. While this decision sets back the New York City preservation law, its reach need not extend further than New York state and should be limited for reasons further discussed below.

Background

Federal law governing properties with project-based Section 8 contracts permits most owners to withdraw from the program when their fixed-term contracts expire.² This framework allows the owner to convert the property into a market-rate operation. Recognizing that the unregulated ability to withdraw from the program could lead to a severe reduction in affordable housing, several localities have passed laws designed to induce preservation of the building's affordability. In 2005, New York City Council enacted one such law—Local Law 79.³ This law enables a tenant association to exercise a right to purchase or a right of first refusal to purchase a building when an owner intends to sell or take other action that would result in the owner withdrawing from an assisted rental housing program.⁴ If tenants assert and execute their right to purchase the property, it will remain affordable.

In March 2006, the owner of Mother Zion Apartments issued notice of its intent to opt out of the project-based Section 8 program, thus triggering Local Law 79. A month later, in April 2006, the Mother Zion Tenant Association invoked its right to purchase the property. Instead of convening a panel to appraise the value of the property as required by the local law, the New York City Department of Housing Preservation and Development (HPD) and the owners of Mother Zion challenged the tenants' right in

¹Mother Zion Tenant Ass'n v. Donovan, 865 N.Y.S.2d 64 (2008) (hereinafter *Mother Zion*).

²See Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), codified at 42 U.S.C.A. § 1437f (Historical and Statutory Notes, "Multifamily Housing Assistance") (West, Westlaw through P.L. 110-449 approved 11-21-08).

³Local Law 79, N.Y.C. Admin. Code 60.4, *et seq.* (1990); see also NHLP, *New York City Enacts Preservation Purchase Law*, 36 HOUS. L. BULL. 45, 45 (Feb. 2006).

⁴*Id.*

state court. The state trial court ruled in favor of HPD and owners.⁵ The court reasoned that because the NYC law requires property owners to either remain in the federal housing program or sell the property to the tenants, it conflicts with Congress' scheme for the program which allows owners to withdraw after a certain term. The court thus ruled that the local law was preempted by federal law. The tenants appealed the decision, but the intermediate state court affirmed the lower court ruling.⁶ The tenants have filed a motion for leave to appeal with the State of New York Court of Appeals.

Preemption

Congress may preempt state or local law either expressly or impliedly. Local Law 79 is not expressly preempted by any federal law. Implied preemption occurs when a local law conflicts with federal law or when federal law occupies a field completely. Conflict preemption can either result from an actual conflict that makes complying with both laws impossible or when the local law impedes the achievement of a federal objective.⁷

Trial Court Ruling

The initial trial court decision in *Mother Zion* based its reasoning on an Eighth Circuit case, *Forest Park II*.⁸ In *Forest Park II*, the Eighth Circuit held that a Minnesota preservation law dealing with notice requirements for the prepayment of mortgages on Section 236 housing was preempted expressly by the Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA) and impliedly by conflict preemption. It reasoned that the local law stood as an obstacle to Congress's objective of involving private developers in a housing subsidy program to provide low-income housing because prepayment was created as an incentive to enter the program.⁹ Thus, the state notice laws interfered with the framework by which Congress set up the subsidy program. This conclusion was reached without using a traditional preemption analysis because the Court asserted that the "unique federal laws and programs involved in [*Forest Park II*] make it difficult to apply a traditional preemption analysis."¹⁰ No reasoning for such a bold assertion is given. LIHPRHA does not apply to project-based Section 8 and thus that portion of *Forest Park II* is irrelevant to *Mother Zion*.

However, the trial court extended *Forest Park II*'s reasoning on implied preemption to the project-based Section 8 at issue in *Mother Zion*. It ruled that Local Law 79 conflicts with Congress' intent to allow an owner to withdraw from the project-based Section 8 program and interferes with the framework that Congress prescribed for such opt-outs.

Appellate Division Ruling

The Appellate Division, First Department of the New York Supreme Court affirmed the lower court ruling regarding conflict between the local and federal law. It stated that because Local Law 79 "actually conflicts with the federal regime of an entirely voluntary program with inducements to encourage owner to remain in Section 8" it is invalid.¹¹ The court supported this statement with the contention that Local Law 79 was enacted partly to nullify the federal provision allowing for an owner's withdrawal from the program and with the characterization that the local law turns a voluntary federal program into a mandatory one.¹² The opinion further states that "Local Law 79 would have the effect of discouraging owners from embarking on new Section 8 housing developments, which would also run afoul of congressional goals."¹³ Thus, the court relied on *Forest Park II*'s analysis which ignored the presumption against preemption and instead focused on whether the local law conflicts with the methods by which Congress chose to implement its objective. Using this analysis, the Appellate Division upheld the lower court ruling.

The decision offers little explanation of its rejection of petitioners' arguments. It quickly dismissed *Rosario v. Diagonal Realty*, a case also decided by the New York Court of Appeals, by stating that the law at issue there was expressly contemplated by legislative and regulatory language.¹⁴ It then distinguishes state cases relied upon by the tenants as dealing with antidiscrimination laws and thus not relevant to the instant case.¹⁵ These antidiscrimination laws dealt with source of income issues that provided state and local protections to Section 8 voucher holders. With regard to *Kenneth Arms*,¹⁶ a case that conflicts with *Forest Park II*, the court simply stated that it found the reasoning in the latter case to be more persuasive.¹⁷

¹¹*Mother Zion* at 67.

¹²*Id.*

¹³*Id.*

¹⁴*Rosario v. Diagonal Realty*, 8 N.Y.3d 755 (2007).

¹⁵*Mother Zion* at 67, citing Commission on Human Rights & Opportunities v. Sullivan Assoc., 739 A.2d 238 (Conn. 1999); Attorney General v. Brown, 511 N.E.2d 1103 (Mass. 1987); Franklin Tower One, LLC v. N.M., 725 A.2d 1104 (NJ 1999).

¹⁶*Kenneth Arms Tenant Assoc. V. Martinez*, 2001 U.S. Dist. LEXIS 11470, No. Civ. S-01-832 LKK/JFM (E.D.Ca. order July 3, 2001) (enjoining preliminarily proposed prepayment of HUD Section 236 mortgages and termination of Section 8 project-based contracts based primarily on violation of state law that was not federally preempted).

¹⁷*Mother Zion*, at 68.

⁵*Mother Zion Tenant Ass'n v. Donovan*, 2007 WL 2175521 (N.Y. Sup. Apr. 11, 2007).

⁶*Mother Zion*, 865 N.Y.S.2d 64 (2008).

⁷*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁸*Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003); see also Jason Lee, *New York City's Preservation Law Preempted by Federal and State Law*, 37 Hous. L. Bull. 88 (Apr.-May 2007).

⁹*Forest Park II* at 733.

¹⁰*Id.* at 731.

Critique

The court's ruling is flawed for a number of reasons. First, as explained in the tenants' brief, any analysis of federal preemption must begin with the strong presumption against preemption admonished by both federal and state courts.¹⁸ As noted earlier, the court in *Forest Park II*, and in turn *Mother Zion*, ignored this presumption. To find a state or local law preempted, there must be a "clear demonstration of conflict."¹⁹ This clear demonstration cannot rely on a conjecture regarding congressional intent. In *Mother Zion*, both the lower and intermediate courts acknowledged that the Local Law 79 may comport with Congress' objective of creating affordable housing, but claimed that it conflicted with an intent the court imposed upon Congress—that an owner must be allowed to withdraw from the project-based Section 8 program without any restrictions. Nothing in the federal statute points toward such an intent.

Bolstering the tenants' argument that Congress did not intend to preempt state and local preservation laws is the fact that both states and localities have always had a hand in regulating housing. When Congress created laws regulating affordable housing, it did so knowing that an extensive system of housing regulation existed and designed such laws to work in conjunction with state and local law. In fact, a number of courts have specifically found that even when local laws regulate entities also regulated by the federal government, those laws are not preempted.²⁰ Furthermore, when Congress has wanted to preempt local law, it has expressly stated as much.²¹ Congress revised the statute numerous times over a twenty-year period and only twice sought to expressly preempt any local preservation law. The first, found in LIHPRHA, does not apply to project-based Section 8. The second, in MAHRAA, prohibits local laws that restrict the return on investment earned by Section 8 landlords, but does not at all address withdrawal from the program. The lack of express preemption on preservation laws relating to project-based Section 8 opt-outs is strong evidence that Congress did not intend to do so.

Moreover, the court's ruling dismissed the tenants' position that another New York Court of Appeals case,

Rosario v. Diagonal Realty, LLC should be persuasive.²² That case addressed a local law that imposed a rule that a Section 8 voucher lease must be renewed after the initial lease term absent good cause—after Congress had removed such a requirement from federal law.²³ In *Rosario*, the court held that Congress did not intend to "remove state and local law protections afforded to Section 8 participants" when it removed the "endless lease rule."²⁴ While the court in *Mother Zion* simply dismissed this case as distinguishable, it provided no explanation. In fact, the reasoning in *Rosario* supports the tenants' argument in *Mother Zion*. As explained in the Petitioners' Motion for Leave to Appeal, the laws governing the project-based Section 8 program are analogous to the statutes governing the voucher program that were at issue in *Rosario* in that they "merely refrain from imposing any federal obstacles to their withdrawal."²⁵ Owners do not have an affirmative and absolute right to withdraw from the project-based Section 8 program under the statute. Thus, under the State of New York Court of Appeals' prior analysis in *Rosario*, Local Law 79 should be upheld.

Implications

The effects of the *Mother Zion* decision should be limited for a few reasons. First, the tenants have moved to appeal the decision. Given prior state decisions, such as that in *Rosario*, the tenants may prevail in the New York Court of Appeals. Second, other state courts have already considered the law and reasoning of *Forest Park II* and, unlike the Appellate Division in New York, rejected it. Finally, Congress may well address the preemption issue in pending legislation in the upcoming legislative session. Therefore, while the *Mother Zion* decision is certainly negative, its effects may be limited and very possibly reversed by legislative action. ■

¹⁸Brief of Petitioner-Appellants at 14, *Mother Zion Tenant Ass'n. v. Donovan*, No. 402239/06 (N.Y. Sup., App. Div., Nov. 19, 2007), citing *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 238 (2d Cir. 2006); *Balbuena v. IDR Realty, LLC*, 6 N.Y.3d 338, 356 (2006); *Holtzman v. Oliensis*, 91 N.Y.2d 488, 494 (1998); and *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990).

¹⁹*Id.*

²⁰See *College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp.*, No. 03AM03563, slip. Op. (Cal. Super. Ct. Nov. 19, 2003); *Independence Park Apts. v. U.S.*, 449 F.3d 1235, 1243 (D.C. Cir. 2006); *TOPA Equities, Ltd. v. City of L.A.*, 342 F.3d 1065 (9th Cir. 2003).

²¹See *Low Income Housing Preservation and Resident Homeownership Act* (hereinafter LIHPRHA), 12 U.S.C.A. § 4101 (West, Westlaw through P.L. 110-449 approved 11-21-08).

²²*Mother Zion* at 67.

²³*Rosario v. Diagonal Realty*, 8 N.Y.3d 755 (2007).

²⁴*Id.* at 762.

²⁵Motion for Leave to Appeal of Petitioner-Appellants, *Mother Zion Tenant Ass'n. v. Donovan*, No. 402239/06 (N.Y. Nov. 2008).

Settlements Advance Integration for Displaced Public Housing Tenants*

Advocates for fair housing achieved victories in two civil rights lawsuits filed on behalf of public housing tenants facing relocation after the demolition of their developments. In Lowell, Massachusetts, attorneys with the Massachusetts Law Reform Institute and Neighborhood Legal Services reached an agreement on behalf of residents relocated after a state public housing development was demolished.¹ In Rockford, Illinois, attorneys with the Sargent Shriver National Center on Poverty Law and Prairie State Legal Services entered a consent decree on behalf of residents of a federally funded public housing development.² Both agreements extend more housing choices to displaced tenants.³

Lowell, Massachusetts

Background

The Julian D. Steele (JDS) development was a 284-unit, state-funded public housing complex for low-income families in Lowell, Massachusetts.⁴ In 2000, the Massachusetts legislature authorized the Lowell Housing Authority (LHA) to demolish the development.⁵ After receiving this authorization, LHA began to relocate JDS residents to other areas of Lowell in preparation for demolition.⁶ On May 7, 2001, two classes of plaintiffs filed suit challenging these moves: (1) low-income families who were on LHA's subsidized housing waiting list; and (2) families who lived at the JDS development.⁷ In their complaint against LHA, the city of Lowell, and the Massachusetts Department of Housing and Community Development (DHCD), the plaintiffs alleged claims under the Fair Housing Act, Title VI of the 1964 Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, state and federal relocation laws, and federal community development laws.⁸

The plaintiffs originally sought to enjoin the development's demolition, but the court denied this motion.⁹ The plaintiffs then filed a second motion for summary judgment, arguing that LHA's relocation plan violated federal and state laws.¹⁰ Among other counts, the plaintiffs alleged that the relocation plan: (1) did not provide tenants with relocation benefits as required by Massachusetts law; (2) did not provide a one-for-one replacement of demolished units as required by federal law; and (3) moved tenants to racially segregated neighborhoods in violation of federal fair housing and civil rights laws.¹¹ In a ruling issued by the court in December 2005, the plaintiffs' second motion for summary judgment was granted in part and denied in part.¹²

Subsequent to this ruling, attorneys for the plaintiffs and defendants entered into settlement negotiations, and Judge Paul Troy approved a settlement on August 26, 2008.

Discussion

Massachusetts law requires that tenants displaced by the demolition of public housing be provided with moving expenses and compensation of up to \$4000 for any increases in rent necessary to lease a comparable dwelling.¹³ After LHA denied one JDS tenant funding to cover her increased rent, DHCD issued a ruling stating that the tenant was eligible for replacement housing costs of up to \$4000.¹⁴ The court agreed that LHA failed to comply with state law, and it granted summary judgment to the plaintiffs on this claim.¹⁵

If federal assistance from either Community Development Block Grants or HOME Investment Partnership funds is used for the demolition of low-income housing units, federal laws and regulations require that such housing units be replaced one-for-one with comparable low-income units.¹⁶ Both parties agreed that the use of these funds triggers the "one-for-one" replacement requirement when such funds are used "in connection with a development project."¹⁷ However, the defendants contended that because these funds were used only in the project's preliminary stages, the replacement requirement did not apply.¹⁸ The funds were used by two different development companies for land-use studies and

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¹Settlement Agreement and Enforcement Order, *Mendonsa v. Lowell Hous. Auth.*, Civil No. 01-2034 C (Mass. Dist. Ct. June 19, 2008), available at <http://www.povertylaw.org/poverty-law-library/case/54200/54284> [hereinafter Lowell Settlement Agreement].

²Consent Decree, *Jones v. HUD*, No. 07 C 50142 (N.D. Ill. Jan. 24, 2008) [hereinafter Rockford Consent Decree]. For a detailed review of the *Jones* case, see NHLP, *Public Housing Residents Gain One-for-One Replacement*, 38 HOUS. LAW BULL. 53 (Feb. 2008).

³*Id.*; Lowell Settlement Agreement, *supra* note 1.

⁴Lowell Settlement Agreement, *supra* note 1, ¶ 2.

⁵*Id.*

⁶*Id.*

⁷*Id.* ¶¶ 1, 3.

⁸*Id.* ¶ 3.

⁹Pls.' Second Mot. for Partial Summ. J. at 3, *Mendonsa v. Lowell Hous. Auth.*, Civil No. 01-2034 C (Mass. Dist. Ct. Feb. 22, 2005).

¹⁰*Id.*

¹¹*Id.*

¹²Rulings on Pls.' Mot. for Summ. J., Pls.' Mot. to Strike, and Def.'s Mot. to Strike at 2, *Mendonsa v. Lowell Hous. Auth.*, Civil No. 01-2034 C (Mass. Dist. Ct. Dec. 30, 2005).

¹³MASS. GEN. LAWS ANN. ch. 79A, § 7 (West, WESTLAW through Ch. 349 of the 2008 2d Annual Sess.).

¹⁴*Mendonsa*, Rulings on Pls.' Mot. for Summ. J., *supra* note 12, at 8.

¹⁵*Id.* at 7-9.

¹⁶42 U.S.C.A. § 5304(d) (West, WESTLAW through P.L. 108-271 approved 7-7-04); 24 C.F.R. §§ 42.350, 42.375 (2008).

¹⁷*Mendonsa*, Rulings on Pls.' Mot. for Summ. J., *supra* note 12, at 10.

¹⁸*Id.*

“site evaluation, property inspections, cost estimates, preparation of plans and designs, creation of schematics, financial pro formas, engineering, and architectural work.”¹⁹ The plaintiffs alleged that these activities were connected closely enough with the development that they should trigger the replacement requirement.²⁰ The court ruled against the plaintiffs and granted summary judgment to the defendants on this count.²¹ In its decision, the court relied on a 2002 Department of Housing and Urban Development (HUD) ruling which stated that the replacement requirement was triggered only if the federal funds were used for “demolition, rehabilitation, conversion, or similar activities having direct physical consequences.”²² Since the federal funds were not used in conjunction with these activities, the court ruled against the plaintiffs and found that there was no replacement requirement.

The settlement agreement provides more housing options for residents displaced because of the demolition.

Finally, the court ruled that there was a genuine issue of material fact as to whether the defendants had violated federal fair housing and civil rights laws. The plaintiffs alleged that the defendants’ relocation plan discriminated against them by perpetuating segregation; that the defendants did not further anti-discriminatory housing practices as required by Title VIII of the Civil Rights Act of 1964; and that the defendants were intentionally discriminatory and “steered” plaintiffs into racially segregated neighborhoods. To support these claims, plaintiffs submitted a declaration by Harvard University housing policy researcher Nancy McArdle, in which she found that the relocation of JDS families perpetuated racial segregation in Lowell.²³ Further, McArdle found that the city of Lowell planned to site most of the replacement units in areas of high minority concentration.²⁴ According to her declaration, 91% of the proposed units were in “areas of minority concentration,” and 83% of the proposed units were in subdivisions with higher concentrations of minorities than the JDS development.²⁵ In fact, half of the relocation units were planned for the census block group with the single highest minority concentration in the entire city.²⁶

¹⁹*Id.* at 10-11.

²⁰*Id.* at 11.

²¹*Id.* at 12.

²²*Id.* at 11.

²³Decl. of Nancy McArdle at 2, *Mendonsa v. Lowell Hous. Auth.*, Civil No. 01-2034 C (Mass. Dist. Ct. Jan. 2005).

²⁴*Id.* at 3.

²⁵*Id.*

²⁶*Id.*

In response, the defendants submitted a rebuttal from their own expert.²⁷ Because of this factual dispute, the court denied summary judgment on plaintiffs’ disparate impact and perpetuation of segregation claims.²⁸ As to whether defendants acted intentionally and steered plaintiffs into segregated neighborhoods, the court noted that summary judgment is usually inappropriate for questions of intent, and it reserved the question for trial.²⁹

The Settlement

The settlement agreement provides more housing options for residents displaced because of the demolition.³⁰ The agreement creates a mobility counseling program to advise and assist displaced tenants with the logistics of finding new housing and moving.³¹ The program’s goal is to facilitate the mobility of residents who were slotted into segregated areas. The settlement also requires the city to create thirty-five more replication housing units than the 122 it had previously planned. It also mandates that these units be created in designated “opportunity areas,” defined as neighborhoods that do not have high concentrations of minorities or that have beneficial qualities.³² The city must make “all reasonable efforts” to complete the thirty-five units within four years, and the agreement specifies steps the city must take to comply with “reasonable efforts.”³³ Finally, the settlement agreement requires semiannual progress reports. As part of the settlement, the plaintiffs were awarded \$215,000 in attorneys’ fees.

Rockford, Illinois

Background

In June 2006, the Rockford Housing Authority (RHA) submitted a plan to demolish eighty-four units of Jane Addams Village in the city of Rockford, Illinois.³⁴ RHA

²⁷*Mendonsa*, Rulings on Pls.’ Mot. for Summ. J., *supra* note 12, at 14.

²⁸*Id.*

²⁹*Id.* at 15.

³⁰See Lowell Settlement Agreement, *supra* note 1.

³¹*Id.* ¶ 44.

³²*Id.* ¶ 45.

³³See *id.* ¶ 46. According to the settlement agreement, “reasonable efforts” may be assessed by actions such as promptly requesting Section 8 vouchers when housing units are identified for replication; communicating with LHA and private developers to identify units for replication in opportunity areas; monitoring foreclosures to look for possible replication units; encouraging nonprofit organizations to develop replication units; promptly viewing all replication opportunities brought by the mobility counselor; communicating frequently with the mobility counselor; communicating with private developers in opportunity areas to make replication units available; promptly reviewing all suggested replication units brought by the plaintiffs’ counsel; contacting landlord groups to find replication units; promptly assessing whether HOME funds are being used appropriately for replication; encouraging landlords who are developing properties in opportunity areas to apply for vouchers from LHA; asking neighborhood groups for information about landlords who should be notified about voucher programs; and working with LHA to educate landlords about voucher programs.

³⁴Compl. ¶ 32, *Jones v. HUD*, No. 07 C 50142 (N.D. Ill. July 27, 2007).

listed a number of factors in support of its plan, including deteriorating buildings and area crime rates.³⁵ In fact, the area around the development had recently started to gentrify.³⁶ The plaintiffs, tenants living in Jane Addams Village, filed suit against HUD and RHA in July 2007, alleging that the development was not obsolete and that RHA exaggerated the repair costs.³⁷ The complaint also alleged that RHA's replacement housing plan perpetuated segregation because it did not provide mobility counseling, and most of its proposed relocation units were in high-crime areas with large minority populations.³⁸ Attorneys for the tenants and defendants reached a settlement agreement, which was finalized in a consent decree signed by a federal district court judge in January 2008.

Discussion

In October 2006, HUD approved RHA's application to demolish a portion of the Jane Addams Village. Federal law permits the secretary of HUD to approve demolition of a portion of a public housing project only if the property is physically obsolete *and* the demolition will help ensure the viability of the remaining units.³⁹ The test for physical obsolescence requires that (1) the property be "obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes," and (2) that there be no cost-effective way to restore the project.⁴⁰ The tenants' attorneys initially challenged HUD's determination by submitting a report prepared by a structural engineer. The report found that Jane Addams Village was not obsolete within the meaning of the federal regulations and that RHA had exaggerated the rehabilitation costs.⁴¹ HUD responded with a letter stating that it had determined that "RHA failed to show that the development met the 2-part obsolescence test of 24 C.F.R. 970.15(a)(1)."⁴² RHA then met with HUD and submitted a revised application for partial demolition, which justified the demolition solely upon the viability criterion and failed to address the obsolescence requirement.⁴³ Nonetheless, HUD approved the new application.⁴⁴

The tenants filed suit, asserting a number of claims in addition to RHA's failure to satisfy the obsolescence requirements. The tenants alleged that RHA failed to provide comparable replacement dwellings, that its actions had an adverse disparate impact on African Americans,

women, and families with children, and that it failed to affirmatively further fair housing.

The tenants alleged that RHA's relocation plan had the effect of steering residents away from racially integrated or predominantly white neighborhoods and into predominantly minority areas.⁴⁵ RHA gave residents the option of either moving to another RHA property or taking a Section 8 voucher.⁴⁶ However, the RHA-supplied lists of potential rental units predominantly consisted of units in poor neighborhoods with large minority populations.⁴⁷ RHA did not provide housing counseling services to the displaced residents, and did not inform them of the benefits available in some of the more integrated areas of Rockford.⁴⁸

Federal law requires that each family displaced by a public housing demolition be offered comparable housing that meets quality standards and is "in an area that is generally not less desirable than the location of the displaced person's housing."⁴⁹ The tenants contended that the RHA steered them toward areas that were generally less desirable than Jane Addams Village.⁵⁰ Because approximately two-thirds of the families on RHA's public housing waiting list are African American, and because Rockford's public housing residents are also predominantly African American, the tenants alleged that the demolition of the Jane Addams Village would have an adverse disparate impact on the city's African-American residents, who compose only 17.4% of the city's total population.⁵¹

The Settlement

In January, the parties entered into a consent decree permitting the demolition of Jane Addams Village, but requiring RHA to provide seventy-seven new units of housing for displaced families by December 1, 2012.⁵² Similar to the Lowell, Massachusetts settlement agreement, RHA also must provide a mobility program to enable displaced tenants to make educated decisions about where to move, including the opportunity to move to more prosperous and integrated neighborhoods.⁵³ As in the Lowell agreement, the goal of the housing mobility program is to facilitate the movement of displaced residents into more integrated areas of the city, and the housing authority must make regular compliance reports.⁵⁴ The program will provide mobility counseling, assistance in accessing moving

³⁵*Id.* ¶ 34.

³⁶*Id.* ¶ 40.

³⁷*Id.* ¶¶ 42-43.

³⁸*Id.* ¶¶ 44-45.

³⁹42 U.S.C.A. § 1437p(a)(1) (West, WESTLAW through P.L. 110-390 (excluding P.L. 110-329, 110-343, 110-344, 110-351, 110-355, 110-356, 110-360, 110-369, 110-372 to 374, 110-376 to 382, 110-384 to 389 approved 10-10-08)); 24 C.F.R. § 970.15 (2008).

⁴⁰§ 1437p(a)(1)(A).

⁴¹*Jones, Compl., supra* note 34, ¶¶ 41, 43.

⁴²*Id.* ¶ 49.

⁴³*Id.* ¶ 51.

⁴⁴*Id.* ¶¶ 51-52, 56.

⁴⁵*Id.* ¶ 38.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹42 U.S.C.A. § 1437p(a)(4) (West, WESTLAW through P.L. 110-390 (excluding P.L. 110-329, 110-343, 110-344, 110-351, 110-355, 110-356, 110-360, 110-369, 110-372 to 374, 110-376 to 382, 110-384 to 389 (End) approved 10-10-08)).

⁵⁰*Jones, Compl., supra* note 34, ¶¶ 47, 60.

⁵¹*Id.* ¶¶ 61-63.

⁵²Rockford Consent Decree, *supra* note 2, at 4-5.

⁵³*Id.* at 3.

⁵⁴*Id.*

services, counseling on housing vouchers, and funding for moving expenses.⁵⁵ Shortly after reaching settlement, RHA demolished Jane Addams Village, replacing it with green space.⁵⁶ RHA plans to apply for HOPE VI funding to redevelop the site.⁵⁷ Additionally, RHA has hired a housing mobility consultant, is seeking an increase in the fair market rents from HUD to provide more housing opportunities, and has issued a request for proposals to redevelop the housing units with project-based vouchers or as public housing.⁵⁸ Attorneys' fees litigation in the case is ongoing.⁵⁹

Conclusion

Both of these cases illustrate housing authorities' efforts to "clean up" cities by removing affordable housing from gentrifying neighborhoods. In both cases, the housing authorities attempted to ignore state or federal laws and sought to further segregate marginalized communities by pushing them continually further away from areas populated by wealthier citizens. To cynics, these cases may be viewed as more evidence of the failure of federal and state housing policies to end de facto segregation in American cities. As has been documented by several legal scholars, federally funded housing programs have failed to achieve widespread integration.⁶⁰ However, the fact that advocates in both cases obtained agreements mandating the creation of affordable housing opportunities in desirable neighborhoods demonstrates the benefits that can be reaped from carefully monitoring demolition applications and relocation plans. ■

⁵⁵*Id.* at 5-6.

⁵⁶Sean F. Driscoll, *Demolition Starts on Jane Addams Housing Development*, WASH. TIMES-REP., Feb. 26, 2008, <http://www.washingtontimesreporter.com/archive/x1382803728>.

⁵⁷Cathy Bayer, *Rockford Housing Authority OKs Pursuit of HOPE VI Grant*, ROCKFORD REGISTER STAR, Oct. 24, 2008, <http://www.rstar.com/homepage/x1157495762/Rockford-Housing-Authority-OKs-pursuit-of-HOPE-VI-grant>.

⁵⁸Email from Kate Walz, Sargent Shriver National Center on Poverty Law, to Meliah Schultzman, National Housing Law Project (Dec. 2, 2008) (on file with NHLP).

⁵⁹*Id.*

⁶⁰See, e.g., NGAI PINDELL, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385 (2003) (arguing that HUD's implementation of the HOPE VI program has failed to decrease segregation); FLORENCE WAGMAN ROISMAN, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913 (2005) (discussing the history of segregation in HUD housing); KRISTINE L. ZEABART, Note, *Requiring a True Choice in Housing Choice Voucher Programs*, 79 IND. L.J. 767 (2004) (arguing that current housing choice voucher programs are not successfully achieving integration).

Recent Cases

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

Public Housing: Eviction and Criminal Activity

Portage Metro. Hous. Auth. v. Brumley, 2008 WL 4693200 (Ohio Ct. App. Oct. 24, 2008) (slip op.). The tenant and her son appealed from a final judgment of eviction due to the son's criminal activity, which included an assault of another public housing resident on the premises. The court affirmed the eviction based upon *HUD v. Rucker*, 535 U.S. 125 (2002). Until the last moment, the mother had refused an offer to exclude the son and remain.

Public Housing: Eviction for Chronic Late Payment and Other Lease Violations

Scott County Hous. and Redevel. Auth. v. Phongsavat, 2008 WL 4552386 (unreported) (Minn.App. 2008). Affirming the lower court, the appellate court upheld this public housing eviction for various lease violations, including repeated late payment of rent, dual occupation of primary residences during prolonged move-in, and misrepresentation of income. The court also rejected the *pro se* tenant's reasonable accommodation claim, finding that she was not disabled and that the requested accommodations were unreasonable and unrelated to any disability.

Public Housing: Eviction for Chronic Late Payment

Bobian v. New York City Hous. Auth., 55 A.D.3d 396, 865 N.Y.S.2d 216, 2008 N.Y. Slip Op. 07797 (N.Y. App. Div. 2008). The appellate court, reversing the trial court, held that the trial court exceeded its authority in vacating a PHA's decision to terminate a public housing tenancy for alleged chronic rent delinquency. The PHA had already obtained eviction judgment for nonpayment when the tenant's judicial review petition was filed, thus depriving the trial court of jurisdiction to hear a collateral attack on the judgment.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

³For a list of courts that are accessible online, see <http://www.uscourts.gov/links.html> (federal courts) and <http://www.ncsc.dni.us/COURT/SITES/courts.htm#state> (for state courts). See also <http://www.courts.net>.

Public Housing: Challenge to Termination and Statute of Limitations

Gray v. Hernandez, 2008 WL 5072846 (N.Y. Sup. Ct. Nov. 25, 2008) (unreported). New York City Housing Authority (NYCHA) initiated termination proceedings against a public housing tenant for failure to pay rent. The tenant was unrepresented by counsel during the termination hearing and admitted to nonpayment. In 2005, the hearing officer issued an order terminating the tenancy. While the tenant's eviction was pending, she was diagnosed with depression and physical disabilities. The tenant's appointed counsel requested that NYCHA grant a new termination hearing on the basis of *Blatch v. Hernandez*, 360 F. Supp. 2d 595 (S.D.N.Y. 2005), which held that NYCHA's hearing procedures failed to protect the due process rights of tenants with mental disabilities. In 2008, NYCHA denied the hearing request, and the action was filed. The court held that the tenant's claim was time-barred by state law, which requires that a writ of mandamus be filed within four months after the administrative determination to be reviewed becomes final. The court found that NYCHA's denial of the tenant's request for a new hearing did not constitute a determination on her tenancy, and her claim based on the 2005 hearing decision was therefore untimely.

Public Housing: Succession Rights of Remaining Family Member

Pelaez v. New York City Housing Authority, 867 N.Y.S.2d 413 (2008). The state court upheld a decision by the New York City Housing Authority that a deceased tenant's daughter was not a successor to the mother's apartment. The daughter had attended school out of state and thus had not lived with her mother for a year prior to the mother's death, and had also been removed from the family composition by the mother. The court therefore found that NYCHA had not acted in an arbitrary or capricious manner in making its decision to deny the tenant's daughter succession rights.

Public Housing: Succession Rights of Remaining Family Member

Torres v. Hernandez, 866 N.Y.S.2d 163 (N.Y. App. Div. 2008). The court upheld the hearing officer's determination that a son was not a qualified remaining member of the tenant family because he did not request to be added to his mother's public housing household until two days before his mother's death, could not show that he had been in occupancy of the apartment for one year prior to her death, and lacked the housing authority's written consent to permanently join his mother's household.

Public Housing: State Open Records Act

Bart v. City of Paterson Hous. Auth., 959 A.2d 1227 (N.J. Super. Ct. App. Div. 2008). A legal services attorney filed a request under the state's open records act for a copy of an allegedly discriminatory Spanish language notice that had been posted in the housing authority's office, and any documents referencing a requirement that Spanish speakers bring their own interpreters. The housing authority responded by stating that the agency could not provide these documents because it had removed the notice, and that it had no documents requiring participants to bring their own interpreters. The attorney filed a complaint with the Government Records Council alleging that he had been denied access to records. The council recommended that the housing authority be fined \$1,000 for failure to comply with the open records act. The court reversed the fine, finding that the housing authority's conduct did not amount to a knowing or willful violation of the law.

Public Housing: Lead-Based Paint

Hous. Auth. of the City of Beaumont v. Landrio, 2008 WL 4735570 (Tex. App. Oct. 30, 2008). Several parents, individually and on behalf of their children, sued the housing authority in tort, alleging that their children were injured after ingesting lead-based paint from their public housing units. The housing authority appealed the trial court's denial of its motion to dismiss for lack of jurisdiction. The appellate court affirmed the trial court's decision on three issues. First, the appellate court found sufficient evidence for trial that the housing authority had timely notice, in accordance with the Texas Tort Claim Act, of the children's alleged injuries. Second, the housing authority waived immunity because its lease provided that it would repair hazardous conditions, creating potential liability for failure to exercise reasonable care to complete repairs within a reasonable time. However, the court did agree with the housing authority that the tenants had no claim for breach of the warranty of habitability. Third, the court accepted as true the parents' allegations that the housing authority's fault caused injury to their children, but declined to reach the merits at this stage of the litigation.

Voucher Program: Housing Quality Standards and Termination

DuPont v. Donovan, 2008 WL 4901159 (N.Y. Sup. Ct. Oct. 27, 2008) (unreported). A previously homeless family that had obtained a Section 8 voucher appealed a hearing officer's determination to terminate the voucher because the family missed two scheduled inspections. The family had not violated any other program regulations. The court found that the alleged violation was minor and that termination was so harsh as to "shock the conscience and constitute an abuse of discretion as a matter of law."

Voucher Program: Hearing Officer's Termination Decision Must Be Supported By Substantial Evidence

Rinzin v. Olmsted County Hous. & Redev. Auth., 2008 WL 4977576 (Minn. Ct. App. Nov. 25, 2008) (unreported). The plaintiff requested that his daughter be removed from the Section 8 voucher household because with her income, the family would be ineligible for assistance. The housing authority told the daughter to provide a lease or written statement from a landlord by September 1, 2007, as proof that she was no longer living with her parents. When the daughter failed to do so, the housing authority initiated termination proceedings on the grounds of income ineligibility. At the termination hearing, the daughter and her father testified that she had moved out of the home on September 1. The hearing officer upheld the termination on the basis that the daughter had not provided documentation of her residence by September 1. The court reversed the hearing officer's decision as unsupported by substantial evidence. The housing authority did not submit any evidence that the daughter continued to live at the household on September 1, and failed to overcome her direct testimony. Additionally, the daughter's failure to timely supply the documentation did not constitute substantial evidence of continued occupancy.

Voucher Program: Alleged Discrimination in Denying Application When Wait List Closed

Boddie v. New York City Housing Auth., 21 Misc.3d 1130(A), 2008 WL 4901166 (N.Y. Sup. 2008). In a *pro se* action seeking administrative review of a decision to deny a voucher application because of a failure to fit within three specified exceptions during the closure of a waiting list, the petitioner alleged claims under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and due process and equal protection. The court rejected all of these legal claims, finding that the petitioner's application was not rejected because of his alleged disability, but because of his failure to fit within a specific exception to the waiting list closure. The court also found that the petitioner lacked any property interest or any basis for an equal protection claim, also noting his ineligibility as a sex offender subject to a lifetime registration requirement.

Voucher Program: Termination Hearing Did Not Violate Due Process

Thomas v. Hernando County Housing Authority, 2008 WL 4844761 (M.D. Fla. Nov. 6, 2008). A Section 8 voucher holder challenged the termination of his voucher under a number of theories, but the court addressed only whether or not a due process violation had occurred, using the

analysis in *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008). The tenant's voucher was terminated for allegedly having six unauthorized occupants and vacating the unit without notifying the PHA. The court distinguished *Basco* on several factual grounds. First, it found that in this case, the PHA had direct evidence showing that the voucher holder allowed unauthorized occupants and that he terminated his lease without prior approval. Second, the voucher holder never denied that he had unauthorized occupants, nor did he attempt to offer evidence that was rejected by the PHA. The court also found that the hearsay evidence used by the PHA was consistent with non-hearsay evidence presented and thus was "reasonably reliable and probative." Based on such reasoning, the court found no due process violation in the termination hearing.

Voucher Program: Adult Child as Remaining Family Member

Gill v. Hernandez, 865 N.Y.S.2d 843 (N.Y. Sup. 2008). An adult daughter tenant sought judicial review of a PHA's decision to terminate a Section 8 voucher subsidy. The court held that the PHA's actions in terminating a Section 8 subsidy and failing to add the tenant to the household were arbitrary, capricious, unreasonable, and contrary to law, and that the tenant complied with federal regulations for succession to Section 8 subsidy as a remaining member of her mother's family. The family had given notice to the PHA, requested approval of the addition of the adult child to the household in order to provide attendant care to her disabled mother, and listed the adult child and her income on the recertification form, and the tenant had occupied the unit for several years with the landlord's approval, yet the PHA had failed to act. While the PHA's policy permitted conditional approval of the tenant as a household member in these circumstances, it denied voucher succession rights to adult family members when the named recipient dies. Finding that the PHA's actions were inconsistent with federal law and due process, the court remanded the case to the PHA for further proceedings consistent with the decision.

Voucher Program: Criminal Fraud

Ohio v. Rhodes, 2008 WL 4681780 (Ohio Ct. App. Oct. 23, 2008) (slip op.). A voucher tenant appealed a conviction for tampering with records. The tenant fraudulently represented that he was living alone while he was living with another individual. The appeal considered whether the conviction was based upon sufficient evidence that the tenant gained a benefit or that another party suffered a detriment. The court found that the tenant's fraudulent acts benefited him, and that the fraud deprived other individuals of the program's benefits.

Voucher Program: Property Owner Required to Accept Enhanced Vouchers

Feemster v. BSA Limited Partnership, ___ F.3d ___, 2008 WL 4889959 (D.C. Cir. Nov. 14, 2008). The U.S. Court of Appeals for the District of Columbia found that lessor's refusal to accept Section 8 vouchers as payment for rent violated federal and local law. The owner of the property had opted out of a project-based Section 8 contract and subsequently refused to accept tenants' enhanced vouchers, contending that it was only required to accept enhanced vouchers under federal law so long as the "units are offered for rental housing." The owner then claimed that it intended to vacate the units in order to sell them. Furthermore, it argued that the local law that prohibited source of income discrimination did not apply because it simply wanted to vacate the units to ready them for sale and not for the purpose of discriminating against voucher holders. While the tenants agreed that the units must be offered for rental housing in order to be subject to enhanced voucher requirements, they argued that local law defines what "offered for rental housing" means, not the owner's subjective intent. Agreeing with the tenants, the court held that a landlord must accept enhanced vouchers unless the tenants are evicted in accordance with local law. With respect to source of income discrimination, the court held that Section 8 vouchers were precisely the sort of income which the local law intended to protect and the owner could not refuse to accept vouchers as payment for rent.

Voucher Program: Res Judicata Effect of State Court Action

Copeland v. Hous. Auth. of Hollywood, 2008 WL 4997184 (11th Cir. Nov. 25, 2008) (per curiam) (unreported). The tenant filed suit in federal district court contending that under 42 U.S.C. § 1983, the termination of her Section 8 benefits deprived her of a constitutionally protected property right and violated due process. The district court granted summary judgment against the tenant based on res judicata because the tenant had filed an earlier, related suit in state court. The appellate court affirmed. The court found that the tenant's current lawsuit involved the same parties, the same facts, the same relief, and nearly the same claims as her earlier state court suit, which was decided on the merits.

Project-Based Section 8: Entitlement to Rent Increase and Energy Costs

Englewood Terrace Ltd. v. United States, 2008 WL 5068700 (Fed. Cl. Nov. 25, 2008). The prior owner of a project-based Section 8 development failed to sign a rent increase request. Instead, the request was signed by the plaintiff, who later became the building's owner, but was not the owner at the time of the request. Additionally, the plaintiff

failed to certify that the information supporting the rent increase was true and accurate. The court found that the plaintiff was not entitled to a rent increase, noting that HUD's requirements that the request be signed by the current owner and certified for accuracy were reasonable. Further, the plaintiff waived the right to a rent increase by signing a HAP contract extension at the same rent, without objection. The plaintiff also sought reimbursement for higher energy costs, as HUD's Chicago office had informed owners that they could submit reimbursement requests and supporting invoices by September 30, 2001. HUD denied the plaintiff's reimbursement request for failure to timely submit the invoices. The court upheld the denial, finding that the Chicago office was authorized to set a deadline for reimbursements, although there was no deadline in the program guidance from headquarters.

Project-Based Section 8 Program: Abatement of Payments by HUD

Senate Manor Props., LLC v. HUD, 2008 WL 5062784 (S.D. Ind. Nov. 24, 2008) (unreported). A project-based Section 8 owner filed suit against HUD alleging that it violated the Administrative Procedures Act by abating Section 8 payments when the project failed two consecutive inspections. The owner argued that HUD had no authority to abate the payments under the Housing Assistance Payments (HAP) contract, that HUD provided no opportunity to correct the deficiencies identified in the inspections, and that HUD failed to follow the steps required by regulations to abate the payments. The court found that HUD had authority to abate payments because the HAP contract between HUD and the owner specifically allowed HUD to direct termination of the HAP contract where the contract administrator is a PHA. Although the court acknowledged that the HAP contract stated that the PHA, and not HUD, could abate payments, this had no bearing because the PHA would have been bound by HUD's decision to abate. The court then noted that the owner had been given adequate time to remedy the deficiencies identified in the inspection, as well as an opportunity to challenge the inspection scores. The court therefore concluded that HUD's decision to abate was not arbitrary or capricious.

Project-Based Section 8 Program: Petition for Rehearing Denied in Challenge to HUD's Termination of HAP Contract

Massie v. HUD, 2008 WL 4890174 (W.D. Pa. Oct. 31, 2008) (slip op.). The court's opinion denying plaintiffs' motion for summary judgment was summarized in Recent Cases in the October 2008 *Housing Law Bulletin*. The court has now denied the plaintiffs' motion for rehearing.

Project-Based Section 8 Program: Utility Allowances and Discovery Motion; Attorney's Fees

Blake v. Nishimura, 2008 WL 4754858 (D. Haw. Oct. 24, 2008) (slip op.). The tenants challenged the project-based Section 8 owners' failure to adjust utility allowances for ten years. The tenants served discovery and noticed a deposition to which the owners failed to respond. The court ordered the owners to: 1) serve their initial disclosures; 2) produce the requested documents; 3) identify a representative for a Rule 30(b)(6) deposition; and 4) provide proposed dates for the deposition. The court also ordered the defendants to pay attorney's fees for the motion, but reduced the hourly rates requested as they were not consistent with other prevailing awards.

Low-Income Housing Tax Credit Program: Alleged Discrimination in Rejecting for Bad Credit

Sutton v. Freedom Square Ltd., 2008 WL 4601372 (E.D.Mich. Oct. 15, 2008). In a *pro se* action for various disability and race discrimination claims against the owner of a Low-Income Housing Tax Credit development, the court entered summary judgment for the landlord. The plaintiff's application for tenancy had been rejected for poor credit and rental history, but after the plaintiff requested a waiver of the credit requirements as a reasonable accommodation of his disability, the landlord also had a criminal background check run, which disclosed two misdemeanor convictions. The plaintiff sued under the Fair Housing Act and the Americans with Disabilities Act, and then additional recent criminal convictions were disclosed. The court rejected the plaintiff's reasonable accommodation claim, distinguishing *Geibler v. M & B Associates*, 343 F.3d 1143 (9th Cir.2003), because the tenant there, who had been denied due to the landlord's minimum income requirements and refusal to permit a co-signer, had good credit and rent payment history—factors which the court found absent here. The court also rejected the plaintiff's disparate treatment claim (of both African Americans and people with disabilities) because his credit and rental history made him unqualified, the landlord had a legitimate nondiscriminatory basis for rejecting his application, and the landlord rents substantial numbers of units to African Americans with higher credit scores, as well as to people with disabilities. The ADA claim was rejected because the court, citing numerous cases, found that Title III of the Act applies only to places of public accommodation, not to apartments, and that Title II was inapplicable because the owner is not a covered public entity.

Fair Housing: Class Action Settlement Regarding Hearing Procedures for Certain Mentally Disabled Public Housing Residents

Blatch v. Hernandez, 2008 WL 4826178 (S.D.N.Y. Nov. 3, 2008). The district court issued an Amended Memorandum Opinion and Order approving the settlement terms in a class action lawsuit brought by mentally disabled tenants and occupants of public housing, operated by the New York City Housing Authority, who have been subject to eviction proceedings. The settlement bars the authority from proceeding with a termination hearing or grievance hearing with a resident who is incompetent due to a mental disability unless the resident is represented by a guardian *ad litem*, paid for by the authority. The housing authority must also inform the court if it has any information suggesting that a tenant may be incompetent. Furthermore, all relevant housing authority staff must be trained regarding such procedures. The court also concluded that the settlement terms are "fair, reasonable, and adequate."

ADA and Fair Housing Act: Landlord Is Not a Public Entity; FHA Claim is Time-Barred

Hawkins v. Hamlet, Ltd., 2008 WL 4660037 (11th Cir. Oct. 22, 2008) (per curiam) (unreported). A *pro se* tenant complained that the landlord's refusal to renew his lease violated civil rights laws and state tort and contract law. He appealed the dismissal of his complaint for failure to state a claim for relief within the court's federal question jurisdiction. The appellate court affirmed the rulings that the tenant did not adequately allege that the landlord is a public entity subject to Title II of the ADA and that the tenant's Fair Housing Act claim was time-barred.

Fair Housing Violations: Insurance Company's Duty to Defend

QBE Insurance Co. v. Witherington, No. 08-0364-M, 2008 WL 4627453 (S.D.Ala. Oct. 16, 2008). Entering summary judgment, the court found the plaintiff insurance company has no duty under policy to defend an insured party landlord against HUD-initiated familial status discrimination charges under the Fair Housing Act because the actions were intentional and the complaining parties were never occupants.

Fair Housing Act: Damages and Attorney's Fees for Successful Sex Discrimination Claim

Quigley v. Winter, 2008 WL 4539660 (N.D.Iowa 2008). A female tenant brought action against a male landlord alleging discrimination on the basis of sex in violation of the Fair Housing Act (FHA) and the Iowa Civil Rights Act,

as well as breach of contract. Following a jury verdict for the tenant, the landlord moved for judgment as a matter of law, for a new trial, and to alter or amend judgment, and the tenant moved for attorney's fees. The District Court held that the landlord was not entitled to judgment; evidence warranted *quid pro quo* harassment instruction; testimony of other former female tenants allegedly harassed by the landlord was admissible; and that proposed testimony concerning the tenant's mental state was inadmissible. On the jury awards, the court held that the jury award of \$13,685 in compensatory damages was proper and the evidence warranted a punitive damages instruction. However, it reduced the \$250,000 punitive damages award to approximately \$20,500 (1.5 times the compensatory damages) on due process grounds under *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 1063_64, 166 L.Ed.2d 940 (2007), and awarded only \$20,000 in attorney fees because of the asserted inequitable impact on the defendant, with no detailed analysis under applicable fee award precedents.

Fair Housing: Local Law's Ban on Children in SRO Units

Sierra v. City of New York, 579 F.Supp.2d 543 (S.D.N.Y. 2008). The plaintiff brought suit against the city alleging that provision of the city housing maintenance code prohibiting children from living in single room occupancy (SRO) units violated the familial status anti-discrimination provisions of the Fair Housing Act. The court had earlier found that a heightened level of scrutiny should apply to its evaluation of the facially discriminatory standard. The court had also found that the plaintiff, who had vacated her SRO unit but had suffered harm as a result of the restriction, had the requisite standing to sue. After a trial, the court also held that the local code prohibition on children in SRO units did not violate the Fair Housing Act because it furthers, both in theory and in practice, legitimate government interests in the health, safety and welfare of children that cannot be achieved through other alternatives.

Fair Housing: Liability for Inaccessible Design and Construction

U.S. v. Sharlands Terrace, LLC, 2008 WL 4547209 (D.Nev. 2008). In an action brought by the United States against the original owner, developer, contractor and designer of a multifamily rental property for failure to provide accessibility features required by the Fair Housing Act, the court entered partial summary judgment against those defendants, and ordered prompt development and submission of a remedial plan.

Fair Housing: Damages and Penalties for Inaccessible Design and Construction

U.S. v. Shanrie Co., Inc., 2008 WL 4566309 (S.D.Ill. 2008). In an action against a builder, owner and designer of multifamily rental property for failing to provide accessibility features required by the Fair Housing Act, the court had previously found violations. In this proceeding, the court awarded civil penalties of \$25,000, less than the maximum, as well as injunctive relief to enjoin further violations for a period of three years.

Section 3: APA Review of Insufficient HUD Investigation into Section 3 Violation

Mannarino v. HUD, 2008 WL 4960083 (W.D.Pa. Nov. 18, 2008). Two *pro se* plaintiffs brought a claim against HUD under the Administrative Procedures Act (APA) to review HUD's investigation of the failure of Dunkard Township and the Pennsylvania Department of Community and Economic Development (DCED) to comply with Section 3 of the Housing and Urban Development Act of 1968. DCED received CDBG funds and Dunkard Township chose the sub-recipients to carry out work paid for with CDBG funds. DCED and Dunkard Township were required to give priority to Section 3 business concerns. Plaintiffs alleged that both entities failed to comply with Section 3 requirements, that they filed a complaint with HUD in 1997, but that it did not act on the complaint until 2006. After both parties refused to sign a voluntary compliance agreement, HUD imposed a resolution on the parties in 2008. The plaintiffs brought the APA claim arguing that HUD's delay in decision-making led to the collapse of their business and that HUD's failure to impose monetary sanctions in the resolution provided no redress for the past harm. HUD filed a motion to dismiss based on four arguments: 1) lack of subject matter jurisdiction; 2) the agency acted within its discretion; 3) *res judicata*; and 4) HUD cannot force Dunkard Township to award plaintiffs monetary damages. The court denied HUD's motion, allowing plaintiffs to proceed with their claim against HUD.

Use Permit and Rental Housing; Attorney's Fees Awarded on Sanctions for Violation of TRO

Baker v. St. Bernard Parish Council, 2008 WL 4681373 (E.D. La. Oct. 21, 2008) (slip op.). Landowners in St. Bernard Parish challenged an ordinance that required a use permit to rent a single family unit and a \$250 application fee. The landowners alleged that the ordinance violated the Fifth Amendment, the procedural and substantive provisions of the Due Process Clause of the Fourteenth Amendment, and the dormant Commerce Clause. The court initially granted a TRO enjoining the Parish from cutting off utili-

ties to tenants in units rented by the plaintiffs. On cross motions for summary judgment, the court ruled that the Fifth Amendment claim was not ripe because the landowners had not sought compensation for the alleged taking through the State. The court held that procedural due process did not apply because the Parish's action was legislative. The court rejected the substantive due process claim because there was a rational basis for the ordinance that furthered a legitimate governmental interest. The Parish stated that its purpose was to stabilize the housing market and to "encourage single family residence owners to return, rebuild and resume living in" the area. The landowners argued racial animus, but because there was no allegation of racial discrimination in the complaint the court refused to apply a heightened standard of review. The landowners' claims that criteria for obtaining a permit were oppressive, time-consuming and vague were rejected as beyond the scope of the court's authority. The court rejected the Commerce Clause claim because the landowners failed to offer any credible evidence that the ordinance burdened interstate commerce. Previously, the court awarded the landowners \$9,000 in sanctions for the Parish's violation of the TRO. The court awarded attorney's fees, but reduced the number of hours because a number of the landowners' allegations were baseless. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Board, Federal Emergency Management Agency (FEMA) and the Veterans Administration issued in October and November of 2008. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

HUD Interim and Final Rules

73 Fed. Reg. 68,203 (Nov. 17, 2008)

Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs

Summary: This final rule amends HUD's regulations to further RESPA's purposes by requiring more timely and effective disclosures related to mortgage settlement costs for federally related mortgage loans to consumers. The changes made by this final rule are designed to protect consumers from unnecessarily high settlement costs.

Effective Date: January 16, 2009.

73 Fed. Reg. 70,928 (Nov. 24, 2008)

Public Housing Evaluation and Oversight: Changes to the Public Housing Assessment System (PHAS) and Determining and Remediating Substantial Default: Reopening of Public Comment Period

Summary: On August 21, 2008, HUD published a proposed rule entitled "Public Housing Evaluation and Oversight: Changes to the PHAS and Determining and Remediating Substantial Default." The comment period for this proposed rule ended on October 20, 2008. This Notice reopens the comment period for the proposed rule to allow for additional public comment.

Comment Due Date: January 8, 2009.

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regs>.

73 Fed. Reg. 72,203 (Nov. 26, 2008)

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

Summary: This final rule modifies HUD's policies and practices regarding responses to subpoenas and other demands for testimony of HUD employees, or for production of documents by HUD. This rule delegates authority to additional officials within HUD's Office of General Counsel and revises the criteria used to evaluate such demands. Finally, this rule eliminates unnecessary provisions covering HUD's response to demands in cases in which the United States is a party to the case in which testimony or documents are requested. This rule follows publication of an August 12, 2008, proposed rule, but makes no changes at this final rule stage.

Effective Date: December 26, 2008.

73 Fed. Reg. 72,336 (Nov. 26, 2008)

HUD Programs: Violence Against Women Act Conforming Amendments

Summary: This interim rule conforms HUD's regulations to the self-implementing provisions of the statutory protections for victims of domestic violence, dating violence, sexual assault, and stalking provided by the Violence Against Women Act (VAWA), as recently amended. These new protections apply to families applying for or receiving rental assistance under HUD's public housing and tenant-based and project-based Section 8 programs. The primary objectives of VAWA are to reduce violence against women and to protect the safety and confidentiality of victims of domestic violence and abuse.

Effective Date: December 29, 2008.

Comments Due Date: January 27, 2009.

73 Fed. Reg. 61,350-61,352 (Oct. 16, 2008)

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts

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

Effective Date: November 17, 2008.

Comment Due Date: December 15, 2008.

73 Fed. Reg. 63,609 (Oct. 24, 2008)

Design and Construction Requirements; Compliance with ANSI A117.1 Standards

Summary: This final rule updates the references to the ANSI A117.1 to adopt the 2003 edition of the standard, and clarifies that compliance with the appropriate requirements of the 1986, 1992 and 1998 editions also remains sufficient to meet the design and construction requirements of the Fair Housing Act and its amendments. This final rule follows a July 18, 2007, proposed rule and takes into consideration the public comments received on that rule. This final rule makes no substantive changes to the proposed rule.

Effective Date: November 24, 2008.

73 Fed. Reg. 63,833 (Oct. 27, 2008)

Pet Ownership for the Elderly and Persons With Disabilities

Summary: This final rule amends HUD's regulations governing the requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities. Specifically, this final rule conforms these pet ownership requirements to the requirements for animals assisting persons with disabilities in HUD's public housing programs, other than housing projects for the elderly or persons with disabilities. This final rule follows publication of an October 15, 2007, proposed rule, and takes into consideration the public comments received on the proposed rule.

Effective Date: November 26, 2008.

HUD Proposed Rules

73 Fed. Reg. 61,757 (Oct. 17, 2008)

State Community Development Block Grant Program: Administrative Rule Changes

Summary: This proposed rule would make changes to several sections of the regulations for the Community Development Block Grant (CDBG) program for states (State CDBG). This proposed rule would streamline and update the regulations to reflect statutory changes, clarify the program income requirements, provide other clarifications to the State CDBG regulations, and make a conforming change to the regulations applicable to the CDBG Entitlement program. This proposed rule would also provide states additional flexibility in their administration of the program.

Comment Due Date: December 16, 2008.

HUD Federal Register Notices

73 Fed. Reg. 66,665 (Nov. 10, 2008) Notice of Certain Operating Cost Adjustment Factors for 2009

Summary: This Notice establishes, for 2009, operating cost adjustment factors (OCAFs). OCAFs are annual factors used to adjust Section 8 rents renewed under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA).

Effective Date: February 11, 2009.

73 Fed. Reg. 67,424 (Nov. 14, 2008) Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Disaster Housing Assistance Program—Ike (DHAP-Ike)

Summary: HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the fact that HUD and the Federal Emergency Management Agency (FEMA) have executed an Interagency Agreement establishing a grant program called the Disaster Housing Assistance Program—Ike (DHAP-Ike), and that the operating requirements for the DHAP-Ike have been issued through HUD Notice PIH 2008-38. DHAP-Ike is a HUD-FEMA initiative to provide monthly rental assistance, case management services, security deposit and utility deposit assistance for certain families displaced from their homes by Hurricanes Ike or Gustav.

Comments Due Date: November 28, 2008.

73 Fed. Reg. 67,540 (Nov. 14, 2008) Public Housing Capital Fund Program

Summary: HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Public Housing Capital Fund. Each year, Congress appropriates funds to approximately 3200 public housing authorities (PHAs) for modernization, development, financing and management improvements. The funds are allocated based on a complex formula. The forms in this collection are used to appropriately disburse and utilize the funds provided to PHAs. Additionally, these forms provide the information necessary to approve a financing transaction in addition to any Mixed-Finance and Capital Fund Financing transactions. Respondents include the approximately 3200 PHA receiving Capital Funds and other PHAs wishing to pursue financing.

Comments Due Date: December 15, 2008.

73 Fed. Reg. 71,388 (Nov. 24, 2008) Semiannual Regulatory Agenda

Summary: To encourage more effective public participation in the regulatory process, HUD is publishing its agenda of regulations already issued or that are expected

to be issued during the next several months. The agenda also includes rules currently in effect that are under review and describes those regulations that may affect small entities.

73 Fed. Reg. 71,030 (Nov. 24, 2008) Notice of Funding Availability for Fiscal Year (FY) 2008 Family Unification Program (FUP)

Summary: This Notice of Funding Availability (NOFA) announces the availability of approximately \$20 million for incremental voucher assistance to provide adequate housing as a means to promote family unification through the FUP.

73 Fed. Reg. 71,030 (Nov. 24, 2008) The Housing and Economic Recovery Act of 2008 Applicability to HUD Public Housing, Section 8 Tenant- Based Voucher and Section 8 Project-Based Voucher Programs

Summary: This Notice provides information about the applicability to HUD's public housing and Section 8 tenant-based and project-based voucher programs of certain provisions of the Housing and Economic Recovery Act of 2008. This Notice provides an overview of key provisions that affect HUD's public housing programs, identifies those provisions that are self-implementing and require no action on the part of HUD for participants to commence taking action to be in compliance, those provisions that require implementing regulations on the part of HUD, and advises of efforts underway within HUD to further facilitate compliance with this new law, including rules and guidance that as may be necessary or appropriate. Provisions of this new law that affect project-based assisted housing programs administered by HUD's Office of Housing are also identified. This Notice solicits comments, questions or proposals that HUD should take into consideration in developing more detailed guidance or rules to implement those provisions of the new law that require more detailed guidance or rulemaking.

Comment Due Date: December 24, 2008.

73 Fed. Reg. 72,071 (Nov. 26, 2008) Proposed Information Collection: Family Unification Program (FUP)

Summary: HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to public housing authorities' application for funding of new Housing Choice Vouchers to promote family unification. The FUP is a program under which vouchers are provided to families for whom the lack of adequate housing is a primary factor in the imminent placement of the family's child, or children, in out-of-home care; or the delay in the discharge of the child, or children, to the family from out-of-home care. Youths at least eighteen years old and not more than twenty-one

years old (have not reached twenty-second birthday) who left foster care at age sixteen or older and who do not have adequate housing are also eligible to receive housing assistance under the FUP. A FUP voucher issued to such a youth may only be used to provide housing assistance for the youth for a maximum of eighteen months.

Comments Due Date: December 26, 2008.

73 Fed. Reg. 72,507 (Nov. 26, 2008)
Notice of Funding Availability (NOFA) for Rental Assistance for Non-Elderly Persons With Disabilities Related to Certain Types of Section 8 Project-Based Developments and Sections 202, 221(d)(3), and 236 Developments (Certain Developments)

Summary: This NOFA announces the availability of approximately \$15 million in one-year budget authority for Housing Choice Vouchers for non-elderly disabled families in support of certain developments that provide preferences for, or restrict occupancy to, certain units for occupancy for elderly families only.

73 Fed. Reg. 72,513 (Nov. 26, 2008)
Notice of Funding Availability (NOFA) for Rental Assistance for Non-Elderly Persons with Disabilities in Support of Designated Housing Plans

Summary: This NOFA announces the availability of approximately \$15 million in one-year budget authority for Housing Choice Vouchers for non-elderly disabled families.

73 Fed. Reg. 57,379 (Oct. 2, 2008)
Notice of Proposed Information Collection: Home Equity Conversion Mortgage Counseling Client Survey

Summary: HUD is submitting to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to the Home Equity Conversion Mortgage (HECM). As a condition of the program, consumers must participate in reverse mortgage counseling. As part of HUD's evaluation of its HECM counseling program, performance reviews are conducted at the HUD-approved counseling agencies by HUD staff. HUD staff mails or e-mails, when an e-mail address is available, the HECM client survey to consumers who have recently received counseling through the agency. This survey is completed by the consumer and mailed or e-mailed back to HUD. It provides valuable feedback to HUD regarding customer service and counseling quality provided by the HECM counseling agency being reviewed. HUD uses this information to evaluate the counseling agency and, further, to make any policy or procedural changes as necessary.

Comment Due Date: December 1, 2008.

73 Fed. Reg. 57,380 (Oct. 2, 2008)
Notice of Proposed Information Collection: Comment Request Procedures for Appealing Section 8 Rent Adjustments

Summary: HUD will be submitting to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to owners' rent adjustments. Because rent adjustments are considered benefits to project owners, HUD must provide some means for owners to appeal the decisions made by the Department or the Contract Administrator. This appeal process, and the information collection included as part of the process, play an important role in preventing costly litigation and in ensuring the accuracy of the overall rent adjustment process.

Comment Due Date: December 1, 2008

73 Fed. Reg. 57,381 (Oct. 2, 2008)
Notice of Proposed Information Collection: Telecommunications Services in Multifamily Housing Projects

Summary: HUD will submit to the OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to telecommunication services in multi-family housing. The purpose of this information collection is to ensure that owners/agents and telecommunications providers comply with HUD requirements when providing telecommunications services to tenants in multifamily housing projects.

Comment Due Date: December 1, 2008.

73 Fed. Reg. 58,253 (Oct. 6, 2008)
Moving to Work Demonstration

Summary: HUD has submitted to OMB an information collection requirement for review and is soliciting public comments on the subject proposal. The information collected relates to PHAs with Moving to Work demonstration agreements (twenty-nine at the time of submission of this request). The annual MTW plan and annual MTW report are submitted by MTW PHAs in lieu of the standard annual and five-year PHA plans. Revisions are being made to this 50900 form so that the department is able to better respond to congressional and other inquiries regarding outcome measures obtained and promising practices learned throughout the duration of the demonstration.

Comments Due Date: November 5, 2008.

73 Fed. Reg. 58,329 (Oct. 6, 2008)

Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008

Summary: This Notice advises the public of the allocation formula and allocation amounts, the list of grantees, alternative requirements, and the waivers of regulations granted to grantees under Title III of Division B of the Housing and Economic Recovery Act of 2008, for the purpose of assisting in the redevelopment of abandoned and foreclosed homes under the Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes heading, referred to throughout this Notice as the Neighborhood Stabilization Program.

Effective Date: September 29, 2008.

73 Fed. Reg. 58,256 (Oct. 6, 2008)

Privacy Act; Notification of an Amendment to an Existing Privacy Act System of Records; Inventory Management System (IMS) (Formerly—The Public and Indian Housing Information Center (PIC))

Summary: HUD proposes to amend one of its Privacy Act record systems. The amendment is to reflect changes in the system name, location, new system managers and current updates to the “Purpose” and “Systems Security Measures” statements. This system is managed and operated by HUD’s Office of Public and Indian Housing. IMS replaces the former Public and Indian Housing Information Center (PIC) system. The Notice for the PIC system was published at 67 Fed. Reg. 20,986. This record system supports the administration of programs for families receiving housing assistance for those entities that administer HUD’s Office of Public and Indian Housing rental assistance programs. The entities that administer PIH’s rental assistance programs are the public housing authorities (PHAs). Additionally, as part of HUD’s oversight responsibility, the collected data maintained in IMS is used to calculate the amount of subsidy authorized and disbursed to PHAs and to monitor PHAs’ overall performance and use of HUD funds. The existing scope, objectives, and business processes in place for this program remain unchanged.

Comment Due Date and Effective Date: This action shall be effective without further notice on November 5, 2008, unless comments are received by that date that would result in a contrary determination.

73 Fed. Reg. 63,188 (Oct. 23, 2008)

Privacy Act of 1974; Notice of Matching Program Between the United States Department of Housing and Urban Development (HUD) and the United States Department of Agriculture Rural Housing Service (RHS)

Summary: Pursuant to the Computer Matching and Privacy Protection Act of 1988 and the Office of Man-

agement and Budget’s Guidance on the statute, HUD is announcing a new matching program involving comparisons between data provided by participants in HUD’s assisted housing programs and applicants for RHS’s rural housing programs. The matching program will be carried out to identify individuals who are receiving excess or duplicate housing assistance as a result of Hurricanes Katrina and Rita.

Effective Date: The program is expected to begin November 24, 2008, unless comments are received which will result in a contrary determination, or forty days after copies of the underlying matching agreement are signed, approved by HUD and RHS Data Integrity Boards, and sent to both Houses of Congress, whichever is later.

Comments Due Date: November 24, 2008.

73 Fed. Reg. 63,990 (Oct. 28, 2008)

Final Fair Market Rents for Fiscal Year 2009 for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program

Summary: On September 29, 2008, the department published its FY 2009 Final FMRs for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program. In that Notice, HUD incorrectly identified Schedule B as proposed FY 2009 FMRs when the rents published were in fact the final FY 2009 Final FMRs. Today’s Federal Register Notice corrects the title of Schedule B to “FY 2009 Final Fair Market Rents For Existing Housing.”

Effective Date: October 1, 2008.

HUD Notices

H 08-07 (Sept. 30, 2008)

Implementation of the Violence Against Women and Justice Department Reauthorization Act of 2005 for the Multifamily Project-Based Section 8 Housing Assistance Payments Program

Summary: This Notice provides guidance to owners and management agents (O/As) administering one of Multifamily Housing’s project-based Section 8 programs on the implementation of the Violence Against Women Act (VAWA) and Department of Justice Reauthorization Act of 2005. In summary, the VAWA provides legal protections to victims of domestic violence, dating violence or stalking. These protections prohibit O/As from evicting or terminating assistance from individuals being assisted under a project-based Section 8 program if the asserted ground for such action is an instance of domestic violence, dating violence or stalking. This Notice transmits the Certification of Domestic Violence, Dating Violence or Stalking, Form HUD-91066. The VAWA provides that O/As may request a tenant to certify that he/she is a victim of domestic violence, dating violence or stalking and that the incidence(s) of threatened or actual abuse are bona

vide in determining whether the protections afforded under the VAWA are applicable. This Notice also transmits the HUD-approved Lease Addendum (Form HUD-91067) for use with the applicable HUD model lease for the covered project-based Section 8 program. This addendum revises the lease to reflect the statutory requirements of the VAWA that are related to the project-based Section 8 assistance programs.

Notice PIH 2008-36 (HA) (Oct. 1, 2008)

Extension of the Disaster Voucher Program (DVP)

Summary: This Notice informs DVP administering public housing agencies that the DVP has been extended beyond the previously projected end date of September 30, 2008, for all pre-disaster public housing, project-based and pre-disaster homeless and special needs housing families currently receiving DVP assistance.

Notice PIH 2008-38 (Oct. 14, 2008)

Disaster Housing Assistance Program—Ike (DHAP-Ike) Operating Requirements

Summary: These operating requirements set forth the policies and procedures for the Disaster Housing Assistance Program-Ike (DHAP-Ike). DHAP-Ike is a HUD-FEMA initiative to provide monthly rental assistance, case management services, security deposit and utility deposit assistance for certain families displaced from their homes by Hurricanes Ike or Gustav.

Notice PIH-2008- 40 (Nov. 4, 2008)

Income Exclusion of Kinship Care Payments When Foster Children Are Placed with Relatives

Summary: This Notice clarifies the exclusion of kinship care payments. Payments made on behalf of a related child to the tenant household are excluded from income certifications pursuant to 24 C.F.R. §5.609(c)(2).

Notice PIH 2008-41(HA) (Nov. 13, 2008)

Public Housing Agency (PHA) Five-Year and Annual Plan Process for all PHAs

Summary: This Notice announces the availability of a revised PHA Five-Year and Annual Plan template (form HUD-50075 approved April 2008), a PHA Certifications of Compliance with the PHA Plans and Related Regulations (form HUD-50077), a revised Annual Statement/Performance and Evaluation Report (form HUD-50075.1) and a revised Capital Fund Program Five-Year Action Plan (form HUD-50075.2). It clarifies the transition to new project numbers that took place in April of 2008 in accordance with PIH Notice 2007-28; and Implements Title VII of the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, H.R. 3221) (HERA).

Rural Development/Rural Housing Service (RHS) Final and Interim Rules

73 Fed. Reg. 65,505 (Nov. 4, 2008)

Direct Multi-Family Housing Loans and Grants

Summary: RHS is revising its existing regulation governing Rural Rental Housing loans and grants. This action is necessary to provide editorial corrections to 7 C.F.R. Part 3560, subpart N, "Housing Preservation." The intended effect is to ensure the Agency's field offices have correct guidance on processing prepayment requests.

Effective Date: November 4, 2008.

73 Fed. Reg. 65,503 (Nov. 4, 2008)

Income Limit Modification

Summary: RHS is amending its existing income limit structure for the Single Family Housing Guaranteed Loan Program (SFHGLP). The effect of this action is to provide more efficient service to lenders, investors and agency staff by modifying the existing Rural Development eight-tiered income structure into a simplified two-tiered structure. This modification will simplify program requirements and the qualification process.

Comment Due Date and Effective Date: This rule is effective January 20, 2009, unless written adverse comments or written notices of intent to submit adverse comments are received on or before January 5, 2009.

Rural Development/Rural Housing Service Federal Register Notices

73 Fed. Reg. 63,188 (Oct. 23, 2008)

Privacy Act of 1974; Notice of Matching Program Between the United States Department of Housing and Urban Development (HUD) and the United States Department of Agriculture Rural Housing Service (RHS)

Summary: See HUD Federal Register Notices.

73 Fed. Reg. 72,444 (Nov. 26, 2008)

USDA Section 538 Guaranteed Rural Rental Housing Program 2009 Industry Forums—Open Teleconference and/or Web Conference Meetings

Summary: This Notice announces a series of teleconference and/or Web conference meetings regarding the USDA Section 538 Guaranteed Rural Rental Housing Program, which will take place during the months of January, April, July and October in 2009. This Notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or Web conference meetings.

Dates: The dates and times for the teleconference and/or Web conference meetings will be announced via e-mail to parties registered.

Rural Development/Rural Housing Service, Administrative Notices

RD AN No. 4394 (1980-D) (Oct. 23, 2008) Single Family Housing Guaranteed Loan Program, Liquidation Value Appraisals, Definition of Value Type and Procedure

Summary: This Administrative Notice (AN) renews guidance on the definition of a liquidation value type appraisal and outlines the steps taken in obtaining a report from a Qualified State Licensed or Certified Appraiser in conjunction with Real Estate Owned guaranteed under the Single Family Housing Guaranteed Loan Program. The intended outcome of this AN is to establish a consistent understanding nationwide of the terminology utilized with this value type, and outline general acceptable appraisal procedures for developing and reporting an appraisal for liquidation value.

Rural Development/Rural Housing Service, Unnumbered Letters

Underwriting Guidance for Multifamily Housing Revitalization Transactions (Oct. 23, 2008)

Summary: The purpose of this Unnumbered Letter is to discuss the key underwriting principles that Rural Development has adopted for underwriting Multi-Family Housing Revitalization Transactions, which include transfer of ownership transactions and Multifamily Portfolio Revitalization demonstration transactions.

Federal Housing Finance Agency, Interim Rule

Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority

Summary: The Federal Housing Finance Agency (FHFA) is issuing and seeking comment on an interim final rule to implement Section 1218 of the Housing and Economic Recovery Act of 2008, which requires the FHFA to allow the Federal Home Loan Banks until July 30, 2010, to use Affordable Housing Program (AHP) homeownership set-aside funds to refinance low- or moderate-income households' mortgage loans. This rulemaking relocates the AHP regulation to the FHFA rules, and adds new provisions that allow the banks to use AHP set-aside funds to provide direct subsidies to low- or moderate-income households who qualify for refinancing assistance under the HOPE for Homeowners Program established by the Federal Housing Administration under Title IV of the Recovery Act.

Effective Date: October 17, 2008.

Comments Due Date: December 16, 2008.

Federal Housing Finance Agency, Proposed Rule

73 Fed. Reg. 60,198 (Oct. 10, 2008)

Flood Insurance

Summary: The Federal Housing Finance Agency (FHFA) is requesting public comments on issuance of a proposed Flood Insurance regulation. The proposed regulation would codify the authority and responsibility of FHFA to oversee and enforce the statutory requirements affecting the operations of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation under the Flood Disaster Protection Act of 1973, as amended, and to effect congressionally mandated adjustments to the civil money penalties applicable to violations of that law.

Comment Due Date: December 9, 2008.

73 Fed. Reg. 60,192 (Oct. 10, 2008)

Freedom of Information Act

Summary: The Federal Housing Finance Agency is proposing a regulation and soliciting comments on implementation of the Freedom of Information Act (FOIA) (U.S.C. 552), establishing procedures for public disclosure of information required to be disclosed under the FOIA, and procedures to protect from disclosure business confidential and trade secret information, as appropriate.

Comments Due Date: November 10, 2008. ■

NATIONAL HOUSING LAW PROJECT | PUBLICATION ORDER FORM



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

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