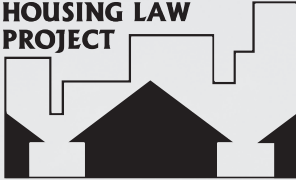


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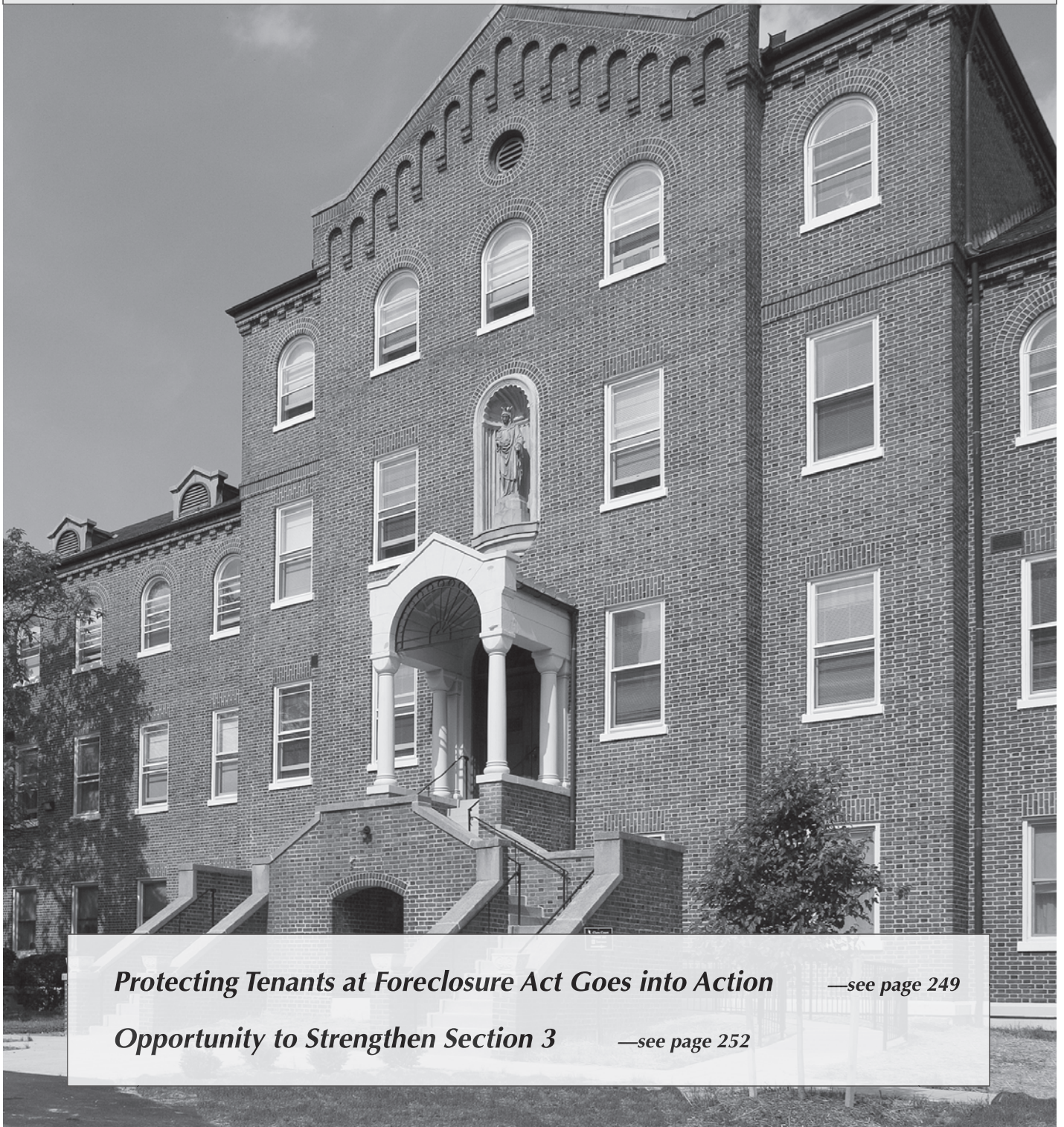


advancing housing justice

# Housing Law Bulletin

Volume 39 • October 2009

Published by the National Housing Law Project



***Protecting Tenants at Foreclosure Act Goes into Action***

—see page 249

***Opportunity to Strengthen Section 3***

—see page 252

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**Cover:** Clare Court, a 30-unit community in Baltimore City created by nonprofit Homes for America in the former convent and orphanage of the Franciscan Sisters. All residents receive rent assistance and the average household income in the community is \$11,495. Target populations include persons with disabilities and families adopting multiple siblings.

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source. A one-year subscription to the *Bulletin* is \$175. Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

## Agencies Begin Implementing the Protecting Tenants at Foreclosure Act

This article provides advocates with an update on the guidance and regulations issued by various entities since the passage of the Protecting Tenants at Foreclosure Act (PTFA). The agencies and organizations that have taken steps to implement the PTFA include the U.S. Department of Housing and Urban Development (HUD), the National Association of Realtors, the Federal Reserve, the Office of Comptroller of Currency, the National Credit Union Administration, and the Office of Thrift Supervision.

On May 20, 2009, the PTFA was enacted into law as a part of the Helping Families Save Their Homes Act.<sup>1</sup> Section 702 of the PTFA requires purchasers of foreclosed homes to take the properties subject to existing leases.<sup>2</sup> The Act also requires a minimum ninety-day notice before commencing an eviction action against a tenant arising solely because of a foreclosure.<sup>3</sup> Therefore, if the balance remaining on a lease term is more than ninety days, the successor in interest must give the tenant at least ninety days' notice to vacate prior to the end of the lease term. If the balance remaining on a lease is less than ninety days, the successor in interest must give the tenant at least ninety days' notice to vacate. Section 703 of the PTFA provides additional protections to Section 8 tenants.<sup>4</sup> No matter what the balance of the lease term, both Section 8 tenants and non-Section 8 tenants can be required to vacate on ninety days' notice if a post-foreclosure owner wishes to occupy the property as his or her primary residence.

### HUD Notice

On June 24, HUD published a summary of the PTFA in the Federal Register.<sup>5</sup> Through this notice, HUD intends to ensure that individuals or entities involved with HUD programs are aware of the PTFA's protections for tenants.<sup>6</sup>

The notice first describes the scope and main provisions of the law. It states that purchasers must preserve the tenancies under any "bona fide" leases as defined in the PTFA.<sup>7</sup> Advocates should note that the notice states that Section 702 of the PTFA applies only to foreclosures after

<sup>1</sup>Helping Families Save Their Homes Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009) (§§ 701-04 are referred to as the "Protecting Tenants at Foreclosure Act of 2009" [hereinafter PTFA]).

<sup>2</sup>PTFA § 702.

<sup>3</sup>§ 702.

<sup>4</sup>§ 703.

<sup>5</sup>Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009).

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

<sup>7</sup>*Id.* at 30,107.

May 20, 2009.<sup>8</sup> National Housing Law Project (NHLP) has interpreted the law to cover any “federally related mortgage loan” or loan on a residence occupied by a Section 8 voucher participant even if the foreclosure took place before May 20, 2009<sup>9</sup> so long as the notice to vacate was not issued before May 20. Advocates should also note that NHLP interprets the date of foreclosure to mean the date after which the successor in interest takes the title that the former mortgagor held, which, depending on state law, may be after all statutory periods of redemptions have expired.<sup>10</sup>

The HUD notice also discusses additional protections offered to Section 8 tenants in Section 703 of the PTFA. HUD emphasizes that protections provided under Section 703 to Section 8 tenants are in addition to and “not in lieu of the protections of Section 702.”<sup>11</sup> The notice also explains that foreclosure is not “other good cause” to terminate the tenancy unless the purchaser “[w]ill occupy the unit as a primary residence” and has given the tenant a ninety-day notice to terminate the lease.<sup>12</sup>

The instructions that the notice provides to public housing agencies (PHAs) on how to implement the PTFA are also worth noting. The notice instructs PHAs to provide “payments to the new owner for the remaining term of the HAP contract” unless the new owner of the property “will occupy the unit as a primary residence.”<sup>13</sup> Even in the case where the new owner will be an occupant, “the HAP contract would continue for” the ninety-day notice period.<sup>14</sup> Thus, the new owner takes subject to the lease and must give a ninety-day notice before bringing an eviction action.<sup>15</sup>

## HUD New England Office Advisory Letter

Shortly before the issuance of HUD’s notice, the New England office of HUD sent a letter regarding the PTFA to all PHA executive directors in the region.<sup>16</sup> In the letter, Donna Ayala, the director of the New England office for

<sup>8</sup>*Id.* (“Section 702 applies, commencing after May 20, 2009, the date of enactment, to “any foreclosure” on (1) a Federally related mortgage loan, or (2) any dwelling or residential real property.”)

<sup>9</sup>For a more in-depth discussion, see NHLP, *Foreclosure and Section 8 Tenancy: Federal Legislative Developments*, 39 HOUS L. BULL. 193 (2009).

<sup>10</sup>Because the mortgagor’s interest in the property had not been extinguished until the expiration of the redemption period, the new owner has not become the “successor in interest” and cannot issue a ninety-day notice until the new owner has actually succeeded to the former mortgagor’s title following the redemption period.

<sup>11</sup>74 Fed. Reg. at 30,107.

<sup>12</sup>*Id.* This particular language is necessary because Section 703 alters 42 U.S.C. § 1437f(o)(7), which prescribes certain provisions of all voucher leases which must be modified to bring that statute into compliance with Section 702.

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

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

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

<sup>16</sup>Letter from Donna J. Ayala, Director, Office of Public Housing, Boston Hub, U.S. Department of Housing and Urban Development to Executive Directors of Public Housing Agencies in the New England Region (June 15, 2009) (on file with NHLP).

public housing, informs the PHA directors about the passage of the PTFA and its protections for tenants living in homes subject to foreclosure.

The letter specifically addresses the application of the PTFA to Section 8 tenants. First, the letter clarifies that under the PTFA, the “immediate successor in interest” assumes “**both** the existing Section 8 lease and the existing Housing Assistance Payments [HAP] Contract.”<sup>17</sup> Foreclosure, the letter goes on to say, “does not constitute ‘good cause’ for termination of an existing Section 8 lease.”<sup>18</sup> Second, the letter emphasizes that the successor in interest takes subject to both the Section 8 lease and the HAP Contract “even if the foreclosure occurred prior to May 20th.”<sup>19</sup>

Ayala also directs PHAs to “identify and work with the successor in interest to ensure that their rights and obligations under the Housing Assistance Payments Contract are understood and complied with by the successor in interest.”

## National Association of Realtors Q&A

In June, the National Association of Realtors (NAR) published a “Q&A on Tenant Protections” contained in the PTFA.<sup>20</sup> This document addresses questions on the new federal law from the perspective of realtors who manage properties for lenders and servicers that hold foreclosed properties.

The Q&A does not instruct realtors to advise tenants that they have the right to remain under their existing leases. It advises realtors that “we suppose that a tenant could elect not to exercise a right granted to them in the law.”<sup>21</sup> In addition, the Q&A states that tenants may still be evicted for nonpayment of rent and lease violations.<sup>22</sup>

NAR also confirmed in the Q&A that the new owner of a foreclosed property “is the landlord and is entitled to the rights and obligations associated with being the landlord.”<sup>23</sup> This confirmation can be used by advocates to remind lenders and servicers that they have the duty to maintain the property after foreclosure. The duty of a landlord also extends to the return of security deposits, and the NAR Q&A advises realtors that they should contact the new owner after foreclosure to transfer the security deposit to “the new party.” Advocates can cite this language in asking for the return of a tenant’s security deposit from the realtor in charge of a property owned by a lender.

<sup>17</sup>*Id.* (emphasis in the original).

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

<sup>19</sup>*Id.*

<sup>20</sup>NARFAQ, *Tenant Protections Provisions Contained in Public Law 111-22*, [http://www.realtor.org/fedistrk.nsf/files/government\\_affairs\\_tenant\\_protect\\_faqs.pdf/\\$FILE/government\\_affairs\\_tenant\\_protect\\_faqs.pdf](http://www.realtor.org/fedistrk.nsf/files/government_affairs_tenant_protect_faqs.pdf/$FILE/government_affairs_tenant_protect_faqs.pdf).

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

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

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

## Federal Reserve Letter

On July 30, Sandra Braunstein, the director of the division of consumer and community affairs at the Federal Reserve Board, wrote a letter regarding the PTFA to the officers and managers of the consumer affairs section.<sup>24</sup> The letter advises Federal Reserve examiners that under the PTFA, a successor in interest must “allow bona fide tenants with leases to occupy property until the end of the lease term, except the lease can be terminated on ninety days notice if the unit is sold to a purchaser who will occupy the property.”<sup>25</sup>

The letter also states that “[t]he law does not cover tenants facing eviction in a non-foreclosed property, tenants with a fraudulent lease, tenants who enter in lease agreements after a foreclosure sale, or homeowners in foreclosure.”<sup>26</sup> This interpretation is consistent with NHELP’s position that the PTFA protects tenants as long as they entered into the lease before the change of title at a foreclosure sale and the expiration of any redemption period.<sup>27</sup>

The Federal Reserve has regulatory authority over member banks, and the letter instructs examiners conducting consumer compliance examinations “to evaluate an institution’s awareness of the law, its efforts to comply, and its responsiveness to addressing implementation deficiencies.”<sup>28</sup>

## Dodd/Kerry Floor Statements

On August 6, Senators Christopher Dodd and John Kerry spoke on the floor of the Senate to restate the intent behind the PTFA. Senator Dodd said that under the PTFA, “all bona fide tenants who began renting prior to transfer of title by foreclosure of rental property must be given 90 days’ notice before being required to vacate the property.”<sup>29</sup> In addition, bona fide tenants “are allowed to remain in place for the remainder of any leases entered into prior to the transfer of title by foreclosure.”<sup>30</sup> His statements clarified that the time of “foreclosure” stated in the PTFA refers to the time of “transfer of title by foreclosure” and is consistent with NHELP’s interpretation of the law.<sup>31</sup>

Senator Kerry agreed with Senator Dodd that the law was intended “to provide all bona fide tenants, who began renting prior to transfer of title by foreclosure of their rental property, ... at least 90 days’ notice before being required to

vacate the property.”<sup>32</sup> Kerry further stated that bona fide tenants “are allowed to remain in place for the remainder of any leases entered into prior to the transfer of title by foreclosure.”<sup>33</sup> Kerry also highlighted the notices issued by the Federal Reserve and HUD and spoke about the importance of foreclosing entities’ compliance with the PTFA.<sup>34</sup> Families in foreclosed properties, he said, are in “precarious circumstances” and “should not be forced individually to assert their rights under the law.”<sup>35</sup>

## OCC Bulletin

On August 13, the Office of Comptroller of Currency (OCC), a government entity that oversees national banks, sent out a guidance bulletin on the PTFA to CEOs of national banks. The bulletin notifies banks that under the PTFA, a “bank that takes title to a house after foreclosure” must allow existing tenants to “stay in the residence until the end of their lease” unless the new owners will make the residence their primary residence or where there is no existing lease.<sup>36</sup> Even in those situations, the bulletin emphasizes that tenants are still entitled to at least ninety days’ notice before a bank can evict them.<sup>37</sup>

The OCC advises national banks “to adopt policies and procedures to ensure compliance with these new tenant protection provisions.”<sup>38</sup> The OCC also sent the bulletin to its examiners and advised them to evaluate whether banks are complying with the tenant protection provisions of the PTFA.<sup>39</sup>

## National Credit Union Administration Regulatory Alert

In August, the National Credit Union Administration sent a regulatory alert on the PTFA to the board of directors of federally insured credit unions. The letter advises credit unions that when a credit union “takes title after a foreclosure,” it must allow “bona fide tenants with leases to occupy property until the end of the lease term” and give “90 days notice prior to eviction.”<sup>40</sup> This agrees with NHELP’s interpretation that a ninety-day notice can be given only after a foreclosure sale and the expiration of any redemption periods.<sup>41</sup>

<sup>24</sup>Letter from Sandra F. Braustein, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, to the Officers and Managers in Charge of Consumer Affairs Sections (July 30, 2009), <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>.

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

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

<sup>27</sup>See Gray, *supra* note 9, at 195-96.

<sup>28</sup>Letter from Sandra F. Braustein, *supra* note 24.

<sup>29</sup>155 CONG. REC. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

<sup>30</sup>*Id.*

<sup>31</sup>See Gray, *supra* note 9.

<sup>32</sup>155 CONG. REC. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Kerry).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

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

<sup>36</sup>OCC Bulletin, Helping Families Save Their Homes Act of 2009 – Title VII Tenant Protections, Aug. 13, 2009, <http://www.occ.gov/ftp/bulletin/2009-28.html>.

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

<sup>38</sup>*Id.*

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

<sup>40</sup>National Credit Union Administration Regulatory Alert, The Protecting Tenants at Foreclosure Act of 2009, Aug. 2009, <http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2009/09-RA-08.docx>.

<sup>41</sup>See Gray, *supra* note 9.

## Office of Thrift Supervision Memorandum

On September 2, the Office of Thrift Supervision (OTS) in the Department of the Treasury issued a memorandum on the PTFA to CEOs of institutions under OTS supervision, including federal savings banks and federal savings and loans. The short memorandum advised CEOs that tenants must be given “90 days’ advance notice” before “requiring them to vacate foreclosed property.”<sup>42</sup> The memorandum also advised member institutions that they should “implement a process to ensure compliance with” requirements of the PTFA. However, the memorandum failed to mention that bona fide tenants have the right to remain until the end of their lease terms.

### Conclusion

The PTFA has given many tenants in foreclosed properties the chance to remain in their homes until the end of their leases. As a result, their children can stay in the same school to finish the school year. Tenants with disabilities now have the time they need to locate alternative housing that meets their needs. Even tenants who are not entitled to stay until the end of their leases now have ninety days to look for a new home and make moving plans.

But rapid evictions of tenants in foreclosed properties are still being reported across the country, and tenants are forced to find legal assistance to assert their rights under the PTFA.<sup>43</sup> As Senator Kerry said, these tenants should not have to enforce their rights individually when they are faced with losing their homes. Instead, lenders and servicers should make sure that tenants’ rights are protected during and after foreclosure. Federal regulators have started the process of ensuring that their regulated entities are in compliance with the PTFA, but there remains much to be done to educate tenants of their rights and inform property managers of their obligations under the PTFA. For this relatively new law, the implementation process continues. ■

<sup>42</sup>Office of Thrift Supervision Memorandum, Tenant Protection During Foreclosure, “Helping Families Save Their Homes Act of 2009,” Sept. 2, 2009, <http://files.ots.treas.gov/25319.pdf>.

<sup>43</sup>See, e.g., Charles Oliver, *Law Helps Protect Renters of Foreclosed Property*, DAILY CITIZEN (Dalton, Ga.) (Aug. 23, 2009) (reporting that a tenant with a thirty-year lease living in a foreclosed home received a notice to vacate that allegedly violated the PTFA).

## Earnings and Living Opportunities Act Would Strengthen Section 3\*

Section 3<sup>1</sup> was enacted as part of the Housing and Urban Development Act of 1968, which had the overarching purpose of providing “a decent home and a suitable living environment for every American family.”<sup>2</sup> Section 3 is integral to the fulfillment of this purpose, because it directs training and jobs to public housing residents and other low-income residents living in areas where funds from the Department of Housing and Urban Development (HUD) are expended so as to multiply the benefit of the funds for low- and very low-income individuals. Since its creation, Section 3 has not operated to its greatest potential due to a lack of HUD oversight and the absence of enforceable rules. As a result, a multitude of projects and the expenditure of billions of dollars have failed to generate the quality and quantity of employment opportunities that Congress intended.<sup>3</sup>

Over the past several years, Representative Nydia Velázquez (D-NY), a senior member of the House Financial Services subcommittee on Housing and Community Opportunity, has demonstrated a continuing interest in strengthening Section 3. Most recently, Representative Velázquez authored the Earnings and Living Opportunities Act (ELOA), which would bolster Section 3 obligations. ELOA was the subject of hearings before the House Subcommittee on Housing and Community Opportunity in New York City on July 20, 2009. ELOA comes at a critical time for the Section 3 program, when HUD is distributing and monitoring the expenditure of roughly \$12 billion in stimulus funds<sup>4</sup> and \$14 billion in Fiscal Year 2009 appropriations that are subject to the requirements of Section 3.<sup>5</sup>

\*The author of this article is Erin Liotta, a J.D. candidate at the University of California, Berkeley, and an intern at the National Housing Law Project.

<sup>1</sup>12 U.S.C.A. § 1701u(b) (Westlaw July 13, 2009); see H.R. 2243, 107th Cong., 1st Sess. (2001), H.R. 2298, 108th Cong., 1st Sess. (2003), H.R. 5164, 109th Cong., 2d Sess. (2006), H.R. 3310, 110th Cong., 1st Sess. (2007); see also NHLP, *Proposed Legislation Signals New Hope for HUD’s Section 3 Program*, 36 HOUS. L. BULL. 109 (May 2006).

<sup>2</sup>Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476 (1968).

<sup>3</sup>For an illustrative examination of the Section 3 failings of the New York City Housing Authority, the nation’s largest housing program, and corresponding recommendations, see VICTOR BACH & TOM WATERS, COMMUNITY SERVICE SOCIETY, *MAKING THE CONNECTION: ECONOMIC OPPORTUNITY FOR PUBLIC HOUSING RESIDENTS* (2009).

<sup>4</sup>Under the Housing and Economic Recovery Act of 2008, HUD received \$3.9 billion for its Neighborhood Stabilization Program. Under the American Recovery and Reinvestment Act of 2009, HUD received \$7.8 billion in funds subject to Section 3. For more information on Section 3 funds under HERA and ARRA, see NHLP, *New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program*, 39 HOUS. L. BULL. 163 (July 2009).

<sup>5</sup>These FY 2009 Appropriations Funds consist of \$4.5 billion for the Public

This article summarizes and expands upon testimony presented in support of ELOA by the National Housing Law Project (NHLP) before the Subcommittee on Housing and Community Opportunity, and examines the major changes that ELOA proposes.<sup>6</sup>

### Mandatory Obligation Would Simplify Applicability and Close Loopholes

ELOA contains a number of provisions that would broaden the applicability of Section 3. Most significantly, it would impose a mandatory obligation on all recipients of HUD funds. The current language of the statute, calling for agencies to direct economic opportunities to low- and very-low income persons “to the greatest extent feasible,” has created confusion or inaction and thereby noncompliance.<sup>7</sup> Section 3 applicability currently depends upon the agency type, program type and end use, and imposes differing requirements for each. The statute now distinguishes between public and Indian housing programs and “other programs.” It also names certain types of assistance—three discrete types of assistance for public and Indian housing authorities, and three broad categories of activities (construction, rehabilitation and public works) for other programs—to which Section 3 applies.<sup>8</sup> Recipients have cited these nuanced exceptions as reasons why they did not know or believe they were subject to Section 3. ELOA would eliminate such confusion by speaking in broad terms about Section 3’s applicability to “recipients of funds administered by [HUD]”<sup>9</sup> and by removing all but one distinction in requirements based on whether a recipient is a public or Indian housing agency. ELOA also acknowledges that federal housing programs have expanded beyond public housing, which was most prominent at Section 3’s enactment in 1968. Rather than prioritizing individuals based on their residence in public housing, ELOA would create a top training and employment preference for low- and very-low income individuals residing in developments where the HUD assistance is expended.<sup>10</sup>

ELOA would further eliminate confusion by clarifying the manner in which Section 3 applies. Currently, the statute requires compliance “to the greatest extent feasible.”<sup>11</sup> Some courts, and undoubtedly numerous recipients, have construed this language as allowing recipients to circumvent the Section 3 obligations in certain circumstances.<sup>12</sup> Some recipients of HUD funds have claimed that an effort is sufficient even though the intended outcomes were not achieved. ELOA would remedy this by removing nearly all of the “greatest extent feasible” and “best efforts” language and plainly requiring compliance as a “condition of [HUD] assistance.”<sup>13</sup>

ELOA would also correct provisions that often undermine Section 3’s effectiveness. The Section 3 regulations set minimum numerical goals by which fund recipients can demonstrate they have met the “greatest extent feasible” standard. Recipients of Section 3-covered funds “may demonstrate compliance” by ensuring that 30% of the aggregate number of new hires annually are Section 3 residents and that 10% of the dollar amount of building trade contracts and 3% of all other contracts go to Section 3 business concerns.<sup>14</sup> One loophole to these presumptions became apparent during the course of project execution: fund recipients who hire Section 3 residents toward a project’s end can meet the numerical hiring goals without providing meaningful work hours.<sup>15</sup> ELOA would fix this aggregate hiring loophole by requiring that Section 3 contractors give 30% of all hours worked to low- and very-low income persons qualifying for the Section 3 preference.<sup>16</sup>

### Sanctions, Incentives, Private Right of Action and Reporting Would Increase Compliance

The current regulations lack teeth to enforce Section 3 requirements. The regulations do not mandate sanctions for noncompliance, stating that “debarment, suspension, and limited denial of participation *may be applied*” by HUD “where appropriate.”<sup>17</sup> For the most part, the regulations leave sanctions to be specified by the individual HUD contract or other HUD program regulations.<sup>18</sup> HUD rarely, if at all, imposes sanctions. Also, until recently, HUD did not regularly remind fund recipients of its authority to

Housing Operating Fund, \$3.9 billion for the Community Development Fund, \$2.5 billion for the Public Housing Capital Fund, \$1.8 billion for the HOME Investment Partnership Program, \$765 million for Section 202 Housing for the Elderly, \$250 million for Section 811 Housing for Persons with Disabilities, \$140 million for the Lead-Based Paint Hazard Reduction Program and \$120 million for HOPE VI. NATIONAL LOW INCOME HOUSING COALITION, FY10 BUDGET CHART FOR SELECTED PROGRAMS (2009), <http://www.nlihc.org/doc/FY10-presidents-request.pdf>.

<sup>6</sup>For the witness list and prepared written testimony, see [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/hrhco\\_072009.shtml](http://www.house.gov/apps/list/hearing/financialsvcs_dem/hrhco_072009.shtml).

<sup>7</sup>12 U.S.C.A. § 1701u(b) (Westlaw July 13, 2009).

<sup>8</sup>§§ 1701u(c)(1)(A), (c)(2)(A), (d)(1)(A), (d)(2)(A).

<sup>9</sup>Earnings and Living Opportunities Act, H.R. \_\_\_\_\_, 111th Cong. §§ 2(a)(e)(1), (f)(1) (2009) (Discussion Draft, June 25, 2009).

<sup>10</sup>§ 2(a)(3)(g)(1)(A).

<sup>11</sup>See, e.g., 12 U.S.C.A. § 1701u(b).

<sup>12</sup>See, e.g., Ramirez, Leal & Co. v. City Demonstration Agency, 549 F.2d 97 (9th Cir. 1976); Mannarino v. Morgan Twp., 64 F. Appx 844 (3d Cir. 2003).

<sup>13</sup>Earnings and Living Opportunities Act, *supra* note 9, §§ 2(a)(3)(e)(2)(A), 2(a)(3)(f)(2)(A) (emphasis added).

<sup>14</sup>24 C.F.R. § 135.30 (2009). For definitions of “Section 3 resident” and “Section 3 business concern,” see § 135.5.

<sup>15</sup>For more information on this practice, which involved the City of Long Beach, see NATIONAL HOUSING LAW PROJECT, AN ADVOCATE’S GUIDE TO THE HUD SECTION 3 PROGRAM: CREATING JOBS AND ECONOMIC OPPORTUNITY 12-14 (2009), <http://nhlp.org/files/03%20Sec.%203%20Guide.pdf>.

<sup>16</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)(3)(e)(2)(A).

<sup>17</sup>24 C.F.R. § 135.74(d) (emphasis added); see also § 135.76(g).

<sup>18</sup>§ 135.74(d).

impose sanctions.<sup>19</sup> ELOA, by contrast, would mandate strict sanctions, providing that recipients, contractors and subcontractors who do not comply with Section 3 “shall be sanctioned” by the HUD Secretary.<sup>20</sup> Sanctions include reduction of future HUD funds, debarment, suspension, limited denial of participation in HUD programs or other sanctions the Secretary deems necessary.<sup>21</sup> Clear sanctions would more than likely have the salutary effect of improving up-front compliance. At the opposite end of the spectrum from sanctions, ELOA would incentivize recipients to comply with Section 3 through performance incentives for exceeding baseline numbers.<sup>22</sup> The proposed bill would also authorize \$5 million, which may be used to fund efforts to implement and improve local Section 3 programs, such as the provision of incentives.<sup>23</sup>

ELOA would also tighten enforcement through contractor requirements. While current regulations prohibit recipients from contracting with an entity “after notification to the recipient by HUD that the contractor has been found in violation of” Section 3, ELOA would clarify this standard to require that recipients not contract with “any contractor in any case in which the recipient has *notice or knowledge* that the contractor has violated” Section 3.<sup>24</sup> ELOA would further make Section 3 compliance “part of any performance standard” in reviewing recipients and their contractors.<sup>25</sup>

Under the present system, Section 3 complaints often take years to resolve and may never result in meaningful resolutions. In one case, Section 3 residents filed a complaint with HUD in 1998 and did not obtain a determination of non-compliance until 2004.<sup>26</sup> In another example, by the time a Section 3 business concern received a favorable appellate decision on its HUD complaint filed six years prior, the company had gone out of business.<sup>27</sup> To address this, ELOA would explicitly grant a private right of action for enforcement by stating that the Administrative Procedure Act and 42 U.S.C. § 1983 are available to aggrieved parties for pursuing such actions.<sup>28</sup> This statutory

provision is particularly necessary in light of recent case law determining that Congress did not intend to create a private right of action to enforce Section 3 requirements.<sup>29</sup> ELOA recognizes that a substantial number of entities are subject to Section 3, and HUD cannot effectively oversee compliance by all recipients, contractors and subcontractors.<sup>30</sup> By adding a private right of action, ELOA would make clear that Section 3 must and will be enforced, a critical message given the failings of the current complaint procedure to afford effective and timely relief. Additionally, ELOA would specify that state and local laws that provide more expansive protections for achieving Section 3 goals are not preempted.<sup>31</sup>

A major hurdle to Section 3 enforceability under the current system is the paucity of available information. A 2003 Office of Inspector General study found that HUD had not effectively implemented its Section 3 recipient reporting system or other methods of recipient monitoring.<sup>32</sup> Currently, Section 3-covered recipients must submit information on Section 3 activities to HUD annually.<sup>33</sup> But HUD often cannot analyze Section 3’s effectiveness because recipients do not submit reports as required. And though HUD has the ability to sanction recipients who fail to submit reports, there is no indication that it does so with regularity.<sup>34</sup> ELOA, by contrast, would require reporting at least twice per year, with mandates that for “any period” in which a recipient, contractor or subcontractor fails to meet the numerical requirements, the recipient shall report on the steps it took in attempting to meet the requirement.<sup>35</sup>

Overall, ELOA aims to achieve greater accountability and transparency so that the public—and HUD—will not be left in the dark about who is or is not in Section 3 compliance. Recipients would be required to include Section 3 compliance information in their Five-Year Plans, annual plans or similar alternative plans.<sup>36</sup> The HUD Secretary would be mandated to submit annual reports to Congress summarizing Section 3 recipient report information.<sup>37</sup>

<sup>19</sup>2 C.F.R. part 2424 authorizes HUD to impose sanctions such as debarment and suspension for failure to comply with applicable regulations, but the Notices of Funding Availability (NOFAs) for various HUD programs vary widely and often do not contain information on Section 3 sanctions. HUD only added this information to the General Section of its NOFAs in FY2009. See Notice of HUD’s Fiscal Year (FY) 2009 Notice of Funding Availability (NOFA), Policy Requirements and General Section to HUD’s FY2009 NOFAs for Discretionary Programs, 74 Fed. Reg. 79,548, 79,552 (Dec. 29, 2008).

<sup>20</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3(k)(1).

<sup>21</sup>§ 2(a)3(k)(1).

<sup>22</sup>§ 2(a)3(e)(2)(A).

<sup>23</sup>§ 2(a)3(n)(1).

<sup>24</sup>§ 2(a)3(k)(2) (emphasis added).

<sup>25</sup>§ 2(a)3(h).

<sup>26</sup>Letter from Carolyn Peoples, HUD Assistant Secretary for Fair Housing and Equal Opportunity, to Heather A. Mahood, Long Beach, CA, Deputy City Attorney (Apr. 26, 2004).

<sup>27</sup>Mannarino v. Morgan Twp., 64 F. App’x 844 (3d Cir. 2003); Mannarino v. HUD, 2009 WL 918355 (W.D. Pa. Apr. 2, 2009) (slip op.).

<sup>28</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3 (k)(3).

<sup>29</sup>See *McQuade v. King County Hous. Auth.*, 203 F. App’x 823 (9th Cir. 2006); *Williams v. HUD*, 2008 WL 5111105 (E.D.N.Y. Dec. 4, 2008) (unreported); *Williams v. HUD*, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006) (unreported); *Nails Constr. Co. v. City of Saint Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007) (unreported).

<sup>30</sup>OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SURVEY OF HUD’S ADMINISTRATION OF SECTION 3 OF THE HUD ACT OF 1968 3-4 (Audit Case # 2003-KC-0001) (2003).

<sup>31</sup>Earnings and Living Opportunities Act, *supra* note 9, § 3 (k)(3).

<sup>32</sup>OFFICE OF INSPECTOR GENERAL, *supra* note 30, at 3-4.

<sup>33</sup>24 C.F.R. § 135.90.

<sup>34</sup>See 74 Fed. Reg. 79,552, *supra* note 19.

<sup>35</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3(j)(1)(A)-(B). In addition, recipients, contractors and subcontractors, if they fail to meet the requirement that 10% of all contracts go to Section 3 businesses, are required to show that they used all feasible means to achieve the goal and to explain why qualified businesses that submitted a bid were not selected. § 2(a)3(f)(2)(B)(ii).

<sup>36</sup>§ 2(a)3(h).

<sup>37</sup>§ 2(a)3(j)(2).

Finally, recipients would be obligated to conduct annual community hearings to obtain citizen input on the recipient's Section 3 performance.<sup>38</sup>

### Centralization, Capacity Building and Working with Residents Would Improve Outcomes

A hallmark of ELOA is its recognition that Section 3's success hinges on centralized support for its administration. ELOA would create the unprecedented requirement that all Section 3-covered recipients "designate, employ, or contract with" a Section 3 coordinator.<sup>39</sup> Given current limitations in obtaining adequate remedies and the mixed messages that HUD sends regarding Section 3's applicability, requiring a discrete coordinator to monitor Section 3 implementation may be ELOA's most powerful step toward fulfilling Section 3 goals. Studies of the few jurisdictions that have taken similar actions attest to the impact a Section 3 coordinator can have. The City of Kansas City, for example, has employed two full-time staffers devoted to Section 3 administration since receiving a negative HUD audit in February 2006.<sup>40</sup> Under this new structure, the city quickly turned its operations around. In 2006, it exceeded its aggressive goal of placing fifty Section 3 residents in full-time employment and awarded over two million contract dollars to Section 3 business concerns.<sup>41</sup>

ELOA proposes another significant structural change to increase centralized program oversight. ELOA would more clearly define the Section 3 organizational structure by removing the program from its current location in HUD's Office of Fair Housing and Equal Opportunity (FHEO) and creating a stand-alone Section 3 office in the Office of the Secretary.<sup>42</sup> This change has the potential to increase effectiveness and outcomes. Currently, the Section 3 office within FHEO has no line authority over the HUD departments that control and allocate the majority of the HUD funds. Moving the Section 3 office would likely result in a broader achievement of Section 3 goals and requirements.

ELOA would further improve Section 3 outcomes through its emphasis on training and long-term employment objectives. In its "Employment" subsection, ELOA states that "special consideration shall be given to persons enrolled in State-approved apprenticeship programs."<sup>43</sup> In the training arena, ELOA would require the HUD Secretary to provide incentives to those recipients and contractors whose training programs promote career

advancement.<sup>44</sup> This emphasis on meaningful, long-term outcomes is also reflected through a slight modification in individual and business priorities. In contracting priorities, for example, ELOA would create a separate category for "qualified businesses that provide significant training and job opportunities to low- and very-low income persons."<sup>45</sup> In addition, ELOA would promote long-term employment and skill development by providing that any person who qualifies for a Section 3 priority shall continue to qualify for a period of five years, "irrespective of any increase in income or other change in priority status during the period."<sup>46</sup>

In several ways, ELOA calls for citizen and resident participation and requires recipients to consider such input. ELOA would require recipients to conduct annual community hearings to obtain citizen input on their Section 3 performance.<sup>47</sup> These hearings would be required to accommodate non-English speaking residents "where a significant number of non-English speaking residents can be reasonably expected to participate."<sup>48</sup> In addition, residents would be able to provide input through the public housing (or other similar) planning process, for which ELOA would mandate a specific Section 3 component.<sup>49</sup> Finally, recipients would be held to greater public accountability standards in reporting.

Given HUD's difficulty in monitoring compliance,<sup>50</sup> resident participation can provide much-needed local monitoring and enforcement. Residents and their organizations are often in the best position to monitor whether Section 3's benefits are reaching the intended beneficiaries. Coupled with the creation of a private right of action, ELOA would tap into the currently underutilized resident potential as a compliance tool. For example, residents and the city-wide resident council for the Housing Authority of Kansas City were extensively engaged in the city's public housing redevelopment. At that time, the tenant organization had a member on an oversight committee that regularly met with the developer and public housing authority staff. The residents referred other public housing residents for jobs and training, the resident representative monitored weekly payrolls, and the resident council was involved in the creation and support of a resident business that received Section 3 contracts.

Similarly, Camden, New Jersey, used federal funds to demolish a sixty-year-old development and replace it with 172 modern townhouses. The development's resident association had a role in reviewing bid applications, the developer selection and the final construction plan. The association surveyed residents to identify skills and

<sup>38</sup>§ 2(a)3(i)(2).

<sup>39</sup>§ 2(a)3(g)(4)(A).

<sup>40</sup>AN ADVOCATE'S GUIDE TO THE HUD SECTION 3 PROGRAM, *supra* note 15, at 21-22.

<sup>41</sup>*Id.*

<sup>42</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3(c).

<sup>43</sup>§ 2(a)3(e)(2)(A).

<sup>44</sup>§ 2(a)3(d)(3).

<sup>45</sup>§ 2(a)3(g)(2)(B).

<sup>46</sup>§ 2(a)3(l)(3).

<sup>47</sup>§ 2(a)3(i)(2).

<sup>48</sup>§ 2(a)3(i)(2)(B).

<sup>49</sup>§ 2(a)3(h).

<sup>50</sup>See OFFICE OF INSPECTOR GENERAL, *supra* note 30, at 3-4.

interests in construction and management trades positions and met with the developer to match residents appropriately as job openings arose under both the general contractor and subcontractor. The association also played a key monitoring role, making site visits to confirm that public housing residents were actually on the job, consulting with residents about the substance of their work assignments, and reviewing pay ledgers every two weeks to confirm that residents were receiving full-time work comparable to other employees. This close engagement of the resident association also resulted in a wholly resident-owned painting business being hired to do the interior painting, with public housing residents then hired to perform the painting work. All such efforts helped to achieve the Section 3 goals.

In addition to involving residents, ELOA would bring in other agency support at the federal level. The current Section 3 statute requires the HUD Secretary to coordinate among federal agencies, but up until very recently that coordination did not occur. ELOA would require the HUD Secretary to enter into “formal collaborative agreements regarding training, employment, contracting, or other areas” within 180 days and to report to Congress on the changes needed in other federal agencies “to facilitate the effective implementation and outcomes of the [Section 3] program.”<sup>51</sup> This coordination is essential for a full and robust implementation of Section 3 and to improve the likelihood that the objectives of the program are fully met.<sup>52</sup>

Over the years, HUD, housing advocates and HUD funding recipients have recognized weaknesses in the Section 3 program. Efforts have been made to address these problems by recommending revising and finalizing the Section 3 regulations. In 2003, HUD committed to completing this task.<sup>53</sup> But to date, fifteen years after the interim Section 3 regulations were adopted, the rules have not been revised and finalized.<sup>54</sup> ELOA would address that issue by requiring the Secretary to issue regulations implementing the revisions to the statute within 120 days after enactment.<sup>55</sup>

## Recommendations

The proposed amendments to Section 3 would strengthen a program with substantial potential that has been long neglected. There are several minor changes to ELOA that would further strengthen and clarify Section 3 provisions.

- For maximum effectiveness, and in light of stimulus funding awards, ELOA should be expanded to apply

Section 3 to non-HUD funds. At a minimum, Section 3 should apply to all funds expended for housing work, such as weatherization, green retrofits and Low-Income Housing Tax Credit housing, regardless of the federal agency distributing or facilitating the creation of the funds.<sup>56</sup>

- To avoid confusion, ELOA should make clear that the priorities for jobs and training apply to low- and very-low income individuals, so as to avoid any confusion with the term “recipient,” which is defined in the proposed legislation as an entity that receives HUD funds.<sup>57</sup>
- The bill ought to clearly state that Section 3 applies to funds that support all kinds of housing work, including repairs, management and modernization.
- The reporting requirements for recipients of funds should be more clearly spelled out.<sup>58</sup>
- The exception of certain funds from the application of Section 3 should be limited solely to the tenant-based voucher program. Project-based vouchers or other project-based rental or subsidy programs should not be excluded from Section 3’s requirements.<sup>59</sup>

## Conclusion

Section 3 reform is needed now more than ever. In February 2009, President Obama signed the American Recovery and Reinvestment Act (ARRA), allocating \$13.6 billion in funding to HUD. With its focus on job creation and assistance to those most impacted by the recession, ARRA’s goals are patently consistent with the underlying purposes of Section 3. Since its enactment in 1968, however, Section 3 has proven difficult to implement, presenting administrative obstacles and regulatory loopholes. With ELOA, Congress has the opportunity to address current deficiencies in time to ensure that Section 3 makes a real difference as HUD distributes ARRA funds and local entities engage in and contract for the work. These changes are crucial to ensuring that HUD funds are used to assist low- and very low-income residents in obtaining economic opportunities. Additionally, ELOA will reinvigorate the public discussion of Section 3, which may lead to greater compliance and enforcement. ■

<sup>51</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3(m).

<sup>52</sup>BARBARA SARD & MICAH KUBIC, CENTER ON BUDGET AND POLICY PRIORITIES, REFORMING HUD’S “SECTION 3” REQUIREMENTS CAN LEVERAGE FEDERAL INVESTMENTS IN HOUSING TO EXPAND ECONOMIC OPPORTUNITY 12 (2009), [www.cbpp.org](http://www.cbpp.org) (noting the need for Workforce Investment Boards (WIBs) to play a formal role in Section 3 implementation).

<sup>53</sup>OFFICE OF INSPECTOR GENERAL, *supra* note 30, at 4.

<sup>54</sup>*Id.* at 8.

<sup>55</sup>Earnings and Living Opportunities Act, *supra* note 9, § 2(b).

<sup>56</sup>See Earnings and Living Opportunities Act, *supra* note 9, § 2(a)3(m), which requires the HUD Secretary to coordinate with other federal agencies.

<sup>57</sup>*Id.* § 2(a)3(l)(5).

<sup>58</sup>Compare § 2(a)3(j), which addresses the reporting requirements of recipients, with §§ 2(a)3(e)(2)(B) & 2(a)3(f)(2)(B), which explain the reporting requirements of contractors.

<sup>59</sup>See § 2(a)3(e)(2), which would cover recipients, contractors and subcontractors “except in the case of rental subsidies.”

# HUD Shifts Approach to Lifetime Registered Sex Offenders

A recent Office of Inspector General (IG) audit regarding the number of federally subsidized households that contain lifetime registered sex offenders has prompted the Department of Housing and Urban Development (HUD) to take a more aggressive stance regarding this issue. This article summarizes the IG report and the actions that HUD has taken in response. It also sets forth strategies for advocates representing HUD-subsidized tenants who are subject to lifetime registration requirements.

## Background

Under Section 578 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA), if any member of a household is subject to a lifetime registration requirement under a state sex offender registration law, the household cannot be admitted to federally assisted housing.<sup>1</sup> For the purpose of the statute, federally assisted housing refers to public housing, tenant-based Section 8, project-based Section 8, Section 8 Moderate Rehabilitation, Section 202, Section 811, Section 221(d)(3), Section 236 and Section 101.<sup>2</sup> To determine if a household is ineligible for admission under QHWRA, public housing authorities (PHAs) and private owners of housing subsidized by HUD must conduct a criminal background check on every member.<sup>3</sup> The regulations adopted by HUD to implement QHWRA became effective on June 25, 2001.<sup>4</sup>

## IG Audit Report

The Office of Inspector General (IG) conducted an audit of public housing, the Housing Choice Voucher program and project-based Section 8 to determine the number of households that contain a lifetime registered sex offender.<sup>5</sup> The IG compared Social Security numbers in HUD records to Social Security numbers in the National Sex Offender Registry maintained by the Federal Bureau of Investigation.<sup>6</sup> The IG found a possible match in 4784

households, and selected a sample of sixty-seven households for review.<sup>7</sup> Of the sixty-seven households, thirty-six included a lifetime registered sex offender.<sup>8</sup> Given its findings, the IG estimated that between 2094 and 3046 households living in HUD-subsidized housing contain a lifetime registered sex offender, at a cost of over \$12 million each year.<sup>9</sup>

The thirty-six households identified by the IG fall into three categories. Ten of the households included a lifetime registered sex offender admitted before the QHWRA regulations became effective, eight included an individual who became a lifetime registered sex offender after admission, and eighteen of the households included a lifetime registered sex offender improperly admitted.<sup>10</sup>

In the audit report, the IG noted that QHWRA bars the admission of lifetime registered sex offenders, but does not require or even mention termination of tenancy or assistance to lifetime registered sex offenders living in public or HUD-subsidized housing.<sup>11</sup> Thus, only eighteen of the thirty-six households identified by the IG were admitted in contravention of QHWRA. Nevertheless, the IG found that HUD “did not accomplish the objective of the statute to prevent admission of dangerous sex offenders” and allowed the “same offenders who were deemed too dangerous for admission” to remain in HUD-subsidized housing.<sup>12</sup> The IG concluded that HUD did not have adequate controls, monitoring and authority to ensure that PHAs and private owners prevented the admission or assistance of lifetime registered sex offenders.<sup>13</sup>

In response to the results of the audit, the IG issued a number of recommendations to HUD. Among the recommendations, the IG asked HUD to:

- Seek legislative and program rule changes to require termination of tenancy or assistance for all lifetime registered sex offenders living in subsidized housing.<sup>14</sup>
- When records must be destroyed under the law, require PHAs and private owners to document consideration of whether an applicant is subject to a lifetime registration requirement, including the date,

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

<sup>8</sup>*Id.* at 12.

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

<sup>10</sup>*Id.* at 5.

<sup>11</sup>*Id.* at 6; see Letter from John Cahill, Reg'l Counsel for N.Y./N.J., HUD, to Ellen Davidson, The Legal Aid Soc'y (Dec. 21, 2007) (on file with NHLP) (“It is clear from section 578 of QHWRA and 24 C.F.R. § 982.553(b)(2)(i) that the bar against sex offenders subject to a lifetime registration requirement applies only to ‘applicants’ seeking ‘admission’ to a federally assisted housing program.”); see also Screening and Eviction for Drug Abuse and Other Criminal Activity – Final Rule, H 2002-22 (Oct. 29, 2002) (“Neither the statutory nor regulatory requirements specifically address sex offenders currently living in federally-assisted housing.”).

<sup>12</sup>Office of Inspector General, *supra* note 5, at 1-2.

<sup>13</sup>*Id.* at 1, 6.

<sup>14</sup>*Id.* at 8.

<sup>1</sup>42 U.S.C.A. § 13663(a) (Westlaw Sept. 21, 2009).

<sup>2</sup>§ 13664(a)(2).

<sup>3</sup>§ 13663(b)(1); 24 C.F.R. § 982.553(a)(2) (2009) (“In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.”).

<sup>4</sup>24 C.F.R. § 5.850-5.905 (2009).

<sup>5</sup>Office of Inspector General, HUD, Audit Report, 2009-KC-0001, at 4 (2009), available at <http://www.hud.gov/offices/oig/reports/files/ig0970001.pdf>.

<sup>6</sup>*Id.* at 11.

type and results of any criminal history background check performed with law enforcement agencies.<sup>15</sup>

- Urge PHAs to ask households at each recertification whether any member is subject to a lifetime registration requirement.<sup>16</sup>
- Urge PHAs to check the Dru Sjodin National Sex Offender Website maintained by the Department of Justice for each household member at each recertification.<sup>17</sup>
- Urge PHAs to aggressively pursue termination of tenancy or assistance for lifetime registered sex offenders to the extent currently allowed by law.<sup>18</sup>

## HUD Response

The IG asked HUD to comment on a draft of the audit report. The Office of Public and Indian Housing (PIH) and the Office of Multifamily Housing (HUD Multifamily) each sent a response to the IG.<sup>19</sup> PIH expressed its concern that the audit report implied that PHAs and private owners are not following QHWRA, when in fact only .03% to .04% of the households that the IG assessed were improperly admitted.<sup>20</sup>

HUD rejected several of the recommendations in the audit report. Both PIH and HUD Multifamily dismissed the idea that legislative and program rule changes are needed.<sup>21</sup> HUD maintained that PHAs and private owners have sufficient power to terminate tenancy or assistance to registered sex offenders living in HUD-subsidized housing.<sup>22</sup> Under current HUD regulations, PHAs can terminate tenancy or assistance to participants for dangerous criminal activity after admission or for supplying false information on an application.<sup>23</sup> In contrast to

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

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

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

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

<sup>19</sup>*Id.* at 2.

<sup>20</sup>*Id.* at 15.

<sup>21</sup>*Id.* at 15, 21.

<sup>22</sup>*Id.* at 15, 21.

<sup>23</sup>See 24 C.F.R. §§ 982.553(b)(2) (permitting termination from Housing Choice Voucher program for violation of obligation not to engage in “criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises”), 966.4(l)(2)(iii) (permitting eviction from public housing for material false statements or fraud in connection with an application for assistance or “criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises”), 5.858 (permitting eviction from HUD Multifamily housing for “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises”).

a guidance letter issued in July, HUD did not contend that QHWRA mandates termination of tenancy or assistance to registered sex offenders improperly admitted after the QHWRA regulations became effective.<sup>24</sup>

In addition, HUD did not agree to require PHAs and private owners to document consideration of whether an applicant is subject to a lifetime registration requirement when the records must be destroyed under the law.<sup>25</sup> The statute requires that PHAs maintain the confidentiality of and destroy criminal records and information on sex offender status once the purpose for the records request is complete.<sup>26</sup> PIH agreed to seek legal advice from the Office of General Counsel regarding what records must be destroyed, and to incorporate the advice in guidance to PHAs.<sup>27</sup> Private owners must retain criminal background records for three years if the applicant is not admitted or for the term of the tenancy plus three years if the applicant is admitted.<sup>28</sup>

HUD did accept several of the recommendations in the audit report. HUD agreed to urge PHAs to ask households whether any member is subject to a lifetime registration requirement and to check the Dru Sjodin National Sex Offender Website for each household member at each recertification.<sup>29</sup> Moreover, HUD pledged to urge PHAs to aggressively pursue termination of tenancy or assistance for lifetime registered sex offenders to the extent allowed by law.<sup>30</sup> PIH noted, however, that it would alert PHAs and private owners that the accuracy of the website “is not guaranteed by the Department of Justice.”<sup>31</sup>

## HUD Notice

To follow through on its response to the audit report, HUD issued a notice in September.<sup>32</sup> HUD took a step back from its assertion that legislative and program rule changes are not needed, explaining that it is “exploring regulatory and legislative changes” to ensure that lifetime registered sex offenders “do not continue to reside in federally assisted housing, but the strong recommendations in this notice are vital to the ongoing effort to ensure the

<sup>24</sup>See Letter from Althea Forrester, Assistant Gen. Counsel, Assisted Hous. Div., HUD, to Patricia Zafiriadis, N.Y. City Dep’t of Pres. & Dev. (July 16, 2009) (on file with NHLP). HUD took the position that QHWRA mandates termination of tenancy or assistance to lifetime registered sex offenders admitted in contravention of the statute, but does not provide for termination of tenancy or assistance to tenants who became lifetime registered sex offenders after admission.

<sup>25</sup>Office of Inspector General, *supra* note 5, at 17.

<sup>26</sup>42 U.S.C.A. § 13663(f) (Westlaw Sept. 21, 2009); 24 C.F.R. § 5.903(g) (2009).

<sup>27</sup>Office of Inspector General, *supra* note 5, at 17.

<sup>28</sup>*Id.* at 22; HUD Handbook 4350.3 REV-1, CHG-3, ¶ 8-14C (June 2009), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/h/4350.3/43503c8HSGH.pdf>.

<sup>29</sup>Office of Inspector General, *supra* note 5, at 17-18.

<sup>30</sup>*Id.* at 18, 23.

<sup>31</sup>*Id.* at 18.

<sup>32</sup>State Lifetime Sex Offender Registration, PIH 2009-35(HA) (Sept. 9, 2009).

highest levels of public safety in federally assisted housing facilities.”<sup>33</sup>

The notice encourages PHAs and private owners to ask about the sex offender status of each household member and to use the Dru Sjodin National Sex Offender Website to verify the information.<sup>34</sup> In addition, the notice encourages PHAs and private owners to “aggressively pursue” termination of tenancy or assistance to the extent allowed by state or local law if the recertification screening reveals that a lifetime registered sex offender is living in HUD-subsidized housing.<sup>35</sup> PIH does, however, create an exception for households that contain a lifetime registered sex offender admitted before June 25, 2001.<sup>36</sup>

### Strategies for Advocates

The HUD notice may cause PHAs and private owners to seek out lifetime registered sex offenders for termination of tenancy or assistance. Congress, however, did not intend for QHWRA to order the eviction of families living in public or HUD-subsidized housing. There are several reasonable arguments advocates can make to support the right of a client subject to a lifetime registration requirement to remain in HUD-subsidized housing. If the family was properly admitted, advocates can remind the PHA or private owner involved that QHWRA does not require or even reference termination of tenancy or assistance.<sup>37</sup>

If the allegation is that the family was admitted in violation of QHWRA, other arguments may apply. Although a guidance letter issued by HUD in July took the position that QHWRA mandates termination of tenancy or assistance for households improperly admitted, HUD noted in the letter that a court might reject its interpretation.<sup>38</sup> In fact, a federal district court in Maine considered the issue in March and found that QHWRA does not provide for termination of assistance for lifetime registered sex offenders.<sup>39</sup>

Nevertheless, if a PHA tries to evict an individual on the basis of his or her status as a lifetime registered sex offender, advocates should ensure that the PHA is abiding by the termination criteria in its Administrative Plan for the Housing Choice Voucher program or its Admission and Continued Occupancy Policy for public housing. If the relevant plan does not allow for termination of

tenancy or assistance on the basis of status as a lifetime registered sex offender, the PHA cannot use status as grounds for termination. The PHA can, however, use dangerous criminal activity engaged in by the tenant after admission as grounds for termination.<sup>40</sup>

In addition, advocates can ensure that the PHA or owner is abiding by its written policy on the consideration of mitigating circumstances prior to termination of tenancy or assistance.<sup>41</sup> If relevant, advocates should propose that the PHA or private owner allow members of the household not subject to a lifetime registration requirement to remain in HUD-subsidized housing.<sup>42</sup>

Finally, advocates should discuss with others in the community, such as advocates for the homeless and individuals involved with the criminal justice system, especially those involved with corrections and releases from incarceration, acceptable responses to the housing of individuals who are registered lifetime sex offenders. These individuals may have concerns regarding evictions and subsidy terminations for individuals who have not engaged in criminal activity since their release, especially when the PHA or owner has discretion and is not required to evict or terminate the individual. ■

<sup>33</sup>*Id.* at 1.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 1, 4.

<sup>36</sup>*Id.* at 4.

<sup>37</sup>See Letter from John Cahill, *supra* note 11; see also Office of Inspector General, *supra* note 5, at 4 (QHWRA “established the ineligibility of dangerous sex offenders for admission to federally subsidized housing.” [emphasis added]).

<sup>38</sup>See Letter from Althea Forrester, *supra* note 24 (“We acknowledge that [24 C.F.R.] § 5.856 is not a termination of assistance regulation but rather a denial of admission regulation. We believe the courts may likely also recognize this distinction and may reject the application of § 5.856 as a grounds for termination under these circumstances.”).

<sup>39</sup>*Miller v. McCormick*, 605 F. Supp. 2d 296, 311 (D. Me. 2009).

<sup>40</sup>24 C.F.R. §§ 982.553(b)(2), 966.4(l)(2)(iii) (2009).

<sup>41</sup>§§ 5.852(a) (HUD Multifamily housing), 966.4(l)(5)(vii)(B) (public housing), 982.552(c)(2)(i) (Housing Choice Voucher program) (permitting a public housing authority or private owner to consider all relevant circumstances prior to termination).

<sup>42</sup>See §§ 5.852(b) (HUD Multifamily), 966.4(l)(5)(vii)(C) (public housing), 982.552(c)(2)(ii) (Housing Choice Voucher program) (permitting a public housing authority or private owner to require a household to exclude a member in order to remain in federally assisted housing).

# Historic Settlement Reached in Desegregation Case Against Westchester County\*

Under a landmark settlement agreement, Westchester County, New York must develop at least 750 new affordable housing units, the vast majority of which must be built in towns and villages with small minority populations. The settlement stems from groundbreaking litigation filed by the Anti-Discrimination Center of Metro New York, Inc. (ADC).<sup>1</sup> ADC brought the lawsuit under the federal False Claims Act<sup>2</sup> in a *qui tam* action, alleging that Westchester knowingly made numerous false claims and certifications to the U.S. Department of Housing and Urban Development (HUD) between April 2000 and April 2006 to secure more than \$52 million in federal housing and community development block grant (CDBG) funds. The false certifications concerned Westchester's adherence to the obligation imposed upon it by federal law to affirmatively further fair housing (AFFH) as a prerequisite for receiving CDBG funds.

## Legal Background

HUD provides housing-related funding to a variety of state and local governmental entities. Recipients of the funding are required to make several certifications to HUD, including certifications that the grant will be conducted in conformity with the Civil Rights Act of 1964<sup>3</sup> and the Fair Housing Act.<sup>4</sup> The grantee must also certify that it will AFFH, and that the projected use of funds has been developed to give "maximum feasible priority to activities which will benefit low- and moderate-income families or aid in the prevention or elimination of slums or blight."<sup>5</sup>

The False Claims Act provides that any person who knowingly makes a false statement to get a claim paid or approved by the federal government can be held liable for civil penalties plus three times the amount of damages which the government sustains because of the false statement.<sup>6</sup> Westchester applied to HUD for federal funding, including CDBG funds, each year from 2000 to 2006. As part of these applications, Westchester certified that it would AFFH. ADC sued Westchester under the False

Claims Act for making both expressed and implied false certifications regarding its obligations to AFFH.

The HUD Fair Housing Planning Guide<sup>7</sup> sets fair housing requirements of grants such as CDBG funds. With respect to AFFH, grantees must "analyze and eliminate housing discrimination in the jurisdiction and [ ] provide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability or national origin." Grantees must conduct an analysis of impediments, which includes an "assessment of conditions, both public and private, affecting fair housing choice for all protected classes." "Impediments" include "actions, omissions or decisions which restrict housing choices or the availability of housing choices or which have the effect of doing so, based on race, color, religion, sex, disability, familial status, or national origin." The HUD Guide further explains the distinction between AFFH actions and affordable housing activities:

"The two concepts are not equivalent . . . When a jurisdiction undertakes to build or rehabilitate housing for low- and moderate-income families, for example, this action is not in and of itself sufficient to affirmatively further fair housing . . . When steps are taken to assure that the housing is fully available to all residents of the community, regardless of race, color, national origin, gender, handicap, or familial status, those are the actions that affirmatively further fair housing."<sup>8</sup>

As a federal grantee, Westchester was required to certify that it would AFFH and undertake three tasks: "(i) conduct an [analysis of impediments] to fair housing choice within the area, (ii) take appropriate actions to overcome the effects of any impediments identified through that analysis, and (iii) maintain records reflecting the analysis and actions in this regard."<sup>9</sup>

## Facts

From 2000 through 2006, Westchester repeatedly certified that it met the regulatory AFFH obligations. However, the county's analysis of impediments during the relevant period did not mention race, racial discrimination or racial segregation.<sup>10</sup> Further, Westchester admitted that it did not undertake an analysis of whether the production of affordable housing between January 1, 1992, and April 1, 2006, had the effect of increasing or decreasing racial diversity in the neighborhoods in which the housing was built. Westchester failed to take these actions despite evidence that there was a high level of residential segregation in the county. According to the 2000 census,

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<sup>1</sup>United States v. Westchester County, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009). ADC litigated the case in partnership with its lead counsel, Relman & Dane, PLLC. In August 2009, the federal government filed its own complaint-in-intervention against Westchester.

<sup>2</sup>31 U.S.C.A. §§ 3729 (a)(1)(B) (Westlaw Oct. 6, 2009).

<sup>3</sup>42 U.S.C.A. § 2000a (Westlaw Oct. 6, 2009).

<sup>4</sup>§ 3601.

<sup>5</sup>§ 5304(b)(2),(3).

<sup>6</sup>31 U.S.C. § 3729(a)(1)(B).

<sup>7</sup>HUD, Fair Housing Planning Guide 2-8 (1996).

<sup>8</sup>*Id.* at 2-9.

<sup>9</sup>24 C.F.R. §§ 91.425(a)(1)(i), 570.601(a)(2).

<sup>10</sup>United States v. Westchester County, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

over half of the municipalities in Westchester had an African-American population of 3% or less.<sup>11</sup>

Additionally, Westchester's funding agreements with the federal government stated that the county was prohibited from expending CDBG funds for activities "in or in support of any local government that does not AFFH within its jurisdiction or that impedes Westchester's action to comply with its fair housing certifications."<sup>12</sup> Despite this, Westchester did not withhold any funds or impose any sanctions on any participating municipalities for failure to AFFH, even though it was clear most were in violation of their AFFH obligations. Further, Westchester did not find that any municipalities were failing to AFFH, nor did it deem that any municipalities were impeding Westchester's ability to AFFH.

### Litigation

ADC filed a lawsuit in federal district court contending that despite certifying to the federal government that it had fulfilled each of the AFFH obligations, Westchester met none of these requirements. Instead, ADC alleged that Westchester focused exclusively on increasing the stock of affordable housing, and disregarded the fact that its actions were increasing patterns of segregation. In response, Westchester contended that it had "no legal obligation" to consider race in its analysis of impediments to fair housing in connection with its certificates.<sup>13</sup> Alternatively, Westchester contended that it analyzed race and "determined that racial segregation and discrimination were not significant barriers to fair housing choice, and concluded that the most pressing impediment to fair housing was the lack of affordable housing stock."<sup>14</sup>

Westchester's argument contradicted HUD guidance stating that increasing the amount of affordable housing, standing alone, is not sufficient to AFFH. Grantees are required to conduct an analysis of impediments to fair housing choice, not to affordable housing. The court understood this distinction, finding that "providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation." The court further found that adequately addressing a pattern of segregation "would at a minimum necessitate an analysis of where the additional housing is placed."<sup>15</sup>

In addition, Westchester argued that the AFFH regulations only set forth a "low bar" for compliance. The county proffered no evidence or support, despite the AFFH obligation to do so, that it conducted analysis of race as it pertains to impediments to fair housing choice. The court understood the critical importance of AFFH, stating that "the AFFH certification was not a mere boilerplate formality,

but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring Westchester to conduct an [analysis to impediments] and take appropriate actions in response."<sup>16</sup> The court concluded that Westchester's analysis to impediments during the false claims period "utterly failed" to comply with the "regulatory requirement that Westchester perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race."

In ruling on the cross motions for summary judgment, the court granted partial summary judgment to the ADC. The court concluded that Westchester made false or fraudulent claims seeking payment from the federal treasury, but denied liability as to the knowledge element of the claim. On August 10, 2009, Westchester settled the lawsuit with ADC.

### Terms of the Settlement Agreement

The parties entered into an unprecedented settlement agreement that requires Westchester to take a number of steps to AFFH. First, Westchester must ensure the development of at least 750 new affordable housing units. At least 630 of the units must be built in towns and villages that had populations of less than 3% African American and less than 7% Hispanic during the 2000 census. Further, Westchester is prohibited from building units in any census block with a population more than 10% African American and 20% Hispanic. Second, Westchester must adopt a policy that the location of affordable housing is central to reducing and perpetuating residential segregation. Third, Westchester must recognize the need to combat residential segregation. Fourth, Westchester must confront municipal resistance to affordable housing development. Fifth, the county must conduct further analysis and take action to identify and overcome barriers to fair housing choice. Sixth, an independent monitor must be appointed to ensure Westchester meets its obligations under the settlement. Finally, Westchester must pay \$7.5 million to ADC under the False Claims Act, \$2.5 million in attorney's fees and costs to ADC's counsel, and \$900,000 to the federal government for administrative expenses.

### Westchester Leaders of Two Minds

In late September, the Westchester County Board of Legislators, by a vote of twelve to five, approved the settlement agreement.<sup>17</sup> The reaction in Westchester was split. Some, like Westchester County Executive Andy Spano, called it the "right decision" and commented that, "Westchester will be a model for the entire nation in dealing with fair and affordable housing."<sup>18</sup> Other community leaders

<sup>11</sup>*Id.* at \*24.

<sup>12</sup>*Id.* at \*34.

<sup>13</sup>*Id.* at \*3.

<sup>14</sup>*Id.* at \*34.

<sup>15</sup>*Id.* at \*37.

<sup>16</sup>*Id.* at \*50.

<sup>17</sup>Joshua Brusteine, *Westchester Board Approves a Housing-Integration Pact*, N.Y. TIMES, Sept. 23, 2009.

<sup>18</sup>Mike Jaccarino, *\$50M of Affordable Housing Set to Rise in Westchester for Minority-Group Members in Settlement*, N.Y. DAILY NEWS, Sept. 24, 2009.

strongly opposed the settlement, with county legislator George Oros describing the settlement as seriously flawed because it contains no cap on spending and destroys home rule.<sup>19</sup> In any event, by agreeing to the settlement, Westchester avoids an expensive trial that would have drawn unwanted attention to the county over its housing policies.

### Conclusion

The significance of the Westchester ruling lies in the court's awareness that affordable housing is not a substitute for *fair* housing in ameliorating segregation. Moreover, the court appreciated that the extensive application of fair housing principles promotes sustainable and integrated residential patterns, improves access to educational, economic and employment opportunities, and advances the health and welfare of all residents. The requirement to conduct analyses of impediments to fair housing applies to many federally funded programs. The awareness of the mandate of fair housing, as distinct from affordable housing, will hopefully serve as a model for local advocates across the country, and for the Justice Department on its own initiative, to challenge and alter the actions of local governments that have failed to use precious federal dollars to undo patterns of residential segregation. ■

<sup>19</sup>Gerald McKinstry, *Lawmakers OK Landmark Fed Housing Deal*, J. NEWS (Westchester County), Sept. 23, 2009.

## NHLP Launches Redesigned and Expanded Website

The National Housing Law Project (NHLP) is extremely pleased to announce the launch of our new website, accessible at <http://nhlp.org>.

Our new website offers much more than an updated look. We have planned its structure to streamline access to information. Breaking news in the housing community and NHLP's latest activities are prominently featured, and will be continually updated, on our home page. Our Attorney/Advocate Resource Center provides access to the latest information on all of NHLP's initiatives. Within each initiative are cases, articles and materials, regulations and statutes, and helpful links. Housing Justice Network members have additional access to resource materials specifically designed for advocates.

NHLP's look has changed, but our goal remains the same: to support our allies in the fight for housing justice with the best assistance and resources that we can offer. If, while visiting our site, you think of improvements to help us do that more effectively, please let us know at [nhlpweb@nhlp.org](mailto:nhlpweb@nhlp.org).

## Court Blocks HUD Contract Termination for Due Process Violations

Reacting to a fact pattern seen all too often by housing advocates, a federal district court has enjoined the Department of Housing and Urban Development (HUD) from terminating a project-based Section 8 Housing Assistance Payments (HAP) contract on a substandard property in Ocala, Florida.<sup>1</sup> Although the complaint contained numerous claims, the court's ruling focused on the tenants' due process argument, which alleged a deprivation of their property interests without adequate notice and an opportunity to be heard. The ruling demonstrates the utility of asserting, when threatened by the imminent harm of displacement, basic constitutional protections in the face of hasty governmental behavior.

### Background

Marion Manor is a 100-unit property that was developed in 1969 with a mortgage insured and subsidized by HUD under the Section 221(d)(3) Below-Market Interest Rate (BMIR) program. The program restricts occupancy to low-income families and limits rents to the amount needed to pay necessary operating expenses and the debt service on the subsidized loan. For more than twenty-five years, all of the units at the property have also received rental assistance under the project-based Section 8 program. The project-based rental assistance contract reduces tenants' rents by subsidizing the difference between the BMIR-regulated rent levels<sup>2</sup> and 30% of the family's income. Ninety percent of the families residing at Marion Manor are African American.

Both the HUD regulations and the Section 8 contract require the owner to maintain the property in decent, safe and sanitary condition, and in good repair, as defined by the regulatory physical condition standards.<sup>3</sup> HUD is the designated enforcer of these requirements, through annual inspections, audits and a variety of enforcement tools.<sup>4</sup>

In 2004, HUD entered into a Use Agreement with the owner of Marion Manor, apparently as part of a transaction under which HUD approved a prepayment of the

<sup>1</sup>Roundtree v. HUD, No. 09-234, slip op. (M.D. Fla. Aug. 28, 2009), available at <http://nhlp.org/node/1172>.

<sup>2</sup>Or such higher levels as permitted by applicable incentives, such as the Section 8 Mark Up to Market program.

<sup>3</sup>24 C.F.R. Part 886, subpart A (2009); 24 C.F.R. Part 5 (2009).

<sup>4</sup>24 C.F.R. Part 5; 24 C.F.R. Part 200, subpart P (2009); see generally NHLP, *Using HUD's Updated Physical Inspection Scores to Preserve Threatened Multifamily Properties*, 38 HOUS. L. BULL. 245 (Nov.-Dec. 2008).

BMIR mortgage before its maturity date.<sup>5</sup> The Use Agreement restricted the use of the property for ten more years, until May of 2014, and also included a covenant to maintain the premises in decent, safe and sanitary condition and in compliance with applicable codes.

In the event of breach of any covenant, the Use Agreement (a HUD form) specified that either HUD or any eligible tenant could sue to enforce the covenants by injunctive relief, damages or specific performance. Both the Section 8 HAP contract and the Use Agreement authorize HUD to take a variety of additional administrative and legal actions, including removing managing agents, taking temporary possession, seeking appointment of a receiver, filing suit, suspending or debaring the owner from participating in HUD programs, seeking civil money penalties, and recovering or abating assistance payments. Whether or not specified in the contracts, HUD can require owners of substandard properties to develop detailed and enforceable corrective action plans. Unfortunately, many of these potentially powerful remedies are rarely used by HUD.

In the case of Marion Manor, as is usually true, HUD officials were aware of deteriorating conditions for at least two years, if not longer. The property was scored at thirty-one on the Real Estate Assessment Center (REAC) 100-point scale in August 2007.<sup>6</sup> Since HUD targets properties scoring below sixty for special attention under the Departmental Enforcement Center, Marion Manor was probably in seriously deteriorated condition. The inspections noted, among other things, leaking roofs, fire code violations, broken windows, unsafe stairs and railings, and plumbing and electrical problems. On October 31, 2007, HUD issued a notice of default under the HAP contract to the owner, requesting corrective action within sixty days and warning that failure to remedy could result in contract termination. This notice was sent only to the owner, not any of the Marion Manor tenants.

About four months later, HUD conducted a follow-up inspection of the property, and scored the property at forty-eight under REAC, still far from a passing score of sixty. During much of 2008, HUD staff met with the owner to discuss compliance issues as alternatives to the extreme step of contract termination. HUD's determination was that the owner had sufficient funds, but was failing to make the necessary repairs. On February 20, 2009, HUD served another notice of default on the owner

concerning the latest REAC score and the continuation of serious physical defects, providing a fifteen-day period to cure. Once again, HUD, as per its standard practice, did not provide a copy of this notice to any of the tenants.

About one month later, on March 16, HUD sent the owner a "Notice of Intent to Abate/Suspend and Terminate Housing Assistance," informing the owner of its intent to terminate the HAP contract and relocate the tenants, presumably by using the contract funds to support relocation vouchers and moving expenses. Once again, this notice was not provided to the tenants. On May 11, the tenants received a memorandum from HUD's Jacksonville office, advising them, for the first time, that HUD had notified the owner of its intent to terminate the Section 8 contract. This memo also stated that the tenants would receive subsequent notice upon HUD's final determination, and that eligible tenants would receive vouchers to provide affordable housing elsewhere.

On July 17, HUD served the owner with a final "Notice of Abatement and Termination," terminating payments effective September 1, and stating that the tenants would be relocated. Contrary to HUD's earlier promise, apparently no similar notice of HUD's final decision was provided to the tenants.

During the summer of 2009, the owner at last began to take significant remedial steps, including hiring a new property manager, making plumbing repairs, and replacing all roofs, stairways and handrails. Most importantly, as of the time of the preliminary injunction hearing in mid-August, and perhaps even earlier, all outstanding code violations and HUD-identified health and safety issues had been corrected. The plaintiff-tenants submitted evidence that all of their units, including appliances, windows, electricity and plumbing, were in good working order.

## The Lawsuit

The tenants filed their original complaint on May 22, 2009, and filed an amended complaint on August 10, following the issuance of HUD's final termination notice. Their claims included:

- HUD's action was arbitrary and capricious, in violation of the Administrative Procedure Act;<sup>7</sup>
- HUD violated the tenants' procedural due process rights under the Fifth Amendment;
- HUD violated its duty to affirmatively further fair housing under the Fair Housing Act,<sup>8</sup> and
- the owner violated the Use Agreement.

In pursuit of an overall goal to preserve and improve the property, the tenants sought declaratory and injunctive

<sup>5</sup>Apparently, the prepayment must have been subject to Section 250 of the National Housing Act, 12 U.S.C. § 1715z-15, which mandates that, for those mortgages requiring HUD approval for prepayment, HUD make certain findings about the need for the housing and relocation of tenants before approving a prepayment. HUD has issued a notice purporting to implement the statute, the most recent version of which is Notice H 2006-11, available at <http://nhlp.org/node/961>.

<sup>6</sup>See generally NHLP, *Using HUD's Updated Physical Inspection Scores to Preserve Threatened Multifamily Properties*, 38 HOUS. L. BULL. 245 (Nov.-Dec. 2008).

<sup>7</sup>5 U.S.C.A. § 702 (Westlaw, Sept. 17, 2009).

<sup>8</sup>42 U.S.C.A. § 3608 (Westlaw, Sept. 17, 2009).

relief requiring continuation of the Section 8 HAP contract, compliance with HUD's duties under the Fair Housing Act, and compliance with the owner's duties under the Use Agreement, along with costs and attorneys' fees under the Fair Housing Act. Upon filing the amended complaint, the tenants also moved for a preliminary injunction to prohibit HUD from terminating or abating the HAP contract, until the court's decision on the merits of the case.

### The Court's Decision

The court's decision on the tenants' motion for a preliminary injunction first described the standard four-part test applicable in the Eleventh Circuit:

- a substantial likelihood of success on the merits;
- irreparable injury in the absence of the injunction;
- the balance of equities, i.e., that the threatened injury to the tenants outweighs any threatened harm to HUD; and
- that the injunction would be consistent with the public interest.<sup>9</sup>

For purposes of ruling on the motion for preliminary relief, the court chose to focus on the due process claim. Such a claim requires three elements: deprivation of a constitutionally protected liberty or property interest; governmental action; and inadequate procedural protections.<sup>10</sup> The tenants claimed that HUD's termination of the HAP contract without proper notice or opportunity to be heard would deprive them of their protected property interests in their Marion Manor Section 8 leaseholds.

On the first element, a protected property interest, the court said simply that "[t]here is no dispute that the Plaintiffs have a property interest in their leases that is protected by the Fifth Amendment's Due Process Clause."<sup>11</sup> However, because the tenants had no property interest in the Section 8 payments themselves, the court required the tenants to demonstrate that HUD's termination of the contract and the subsidy payments would deprive them of their leaseholds. At argument, HUD's counsel contended that the leaseholds themselves need not be affected by the HAP contract termination because the tenants could stay and pay the full contract rents without Section 8 rental assistance, or the tenants might be able to use their replacement vouchers to pay part of the rents at Marion Manor or elsewhere. Whatever the accuracy or feasibility of HUD's claims, the tenants submitted supplemental documents demonstrating that each Marion Manor lease (pursuant to

the HUD Model Lease form) contains a clause stating that the lease terminates automatically if the HAP contract is terminated for any reason, negating HUD's position.<sup>12</sup>

Since HUD is a government actor, much of the court's analysis discussed what process is due. A key part of this analysis focused on whether the notice and hearing requirements "at a meaningful time" must occur before the deprivation, or afterwards, in "extraordinary situations."<sup>13</sup>

The court concluded that "[t]he facts presented make clear that HUD did not provide the Plaintiffs with notice or an opportunity to be heard before it decided to deprive . . . [them] of their leasehold interests."<sup>14</sup> The May 11 notice informing tenants of the intended termination promised that HUD would subsequently notify them of the final determination, but included no request for tenant input on that decision-making process. The tenants did not receive notice of the final determination until after the lawsuit was filed. At the August 18 preliminary injunction hearing, HUD counsel submitted two notices dated the previous day, about a week after the tenants filed their amended complaint and motion. Those notices told the tenants of a meeting scheduled for August 27. Both of these notices, one from HUD's Property Disposition Center and the other from the local housing authority, simply made clear that HUD's termination decision was final and that the meeting was to discuss the application process for relocation vouchers.

The court correctly concluded that HUD's standard process of simply informing tenants of the decision to terminate after the fact cannot satisfy the Constitution:

These notices clearly did not provide the Plaintiffs with a meaningful opportunity to be heard. Rather, they make clear that HUD's mind was already made up, and that the Plaintiffs had absolutely no say in the deprivation of their tenancy rights. Instead, the Plaintiffs and other tenants were expected to attend this meeting for the sole purpose of applying for Section 8 rental vouchers. There is no indication on either notice that the Plaintiffs would have any chance to discuss HUD's termination of the HAP contract, much less an opportunity to try and change HUD's decision. Simply telling a person that their property rights are being taken away, and to come to a meeting to fill out paperwork to facilitate that deprivation does not satisfy constitutional due process.<sup>15</sup>

The court proceeded to find that the other elements of injunctive relief were easily satisfied.

<sup>9</sup>*Roundtree*, slip. op. at 10 (citing *BellSouth Telecomm., Inc. v. MCI Metro Access Trans. Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005)).

<sup>10</sup>*Roundtree*, slip. op. at 11 (citing *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)).

<sup>11</sup>*Id.* (citing, among other cases, *HUD v. Rucker*, 535 U.S. 125, 135 (2002)).

<sup>12</sup>HUD Model Lease, Form HUD-90105, ¶ 30 (Dec. 2007).

<sup>13</sup>*Roundtree*, slip op. at 13.

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

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

## Conclusion

For many years, advocates have been seeking to engage HUD staff to develop a more responsive system for bringing substandard properties into compliance, rather than witnessing terminations that precipitously displace tenants from their homes and communities, burden local neighborhoods with the remains of troubled properties and deprive some tenants of continuing housing assistance altogether. The Obama Administration and Congress have a chance to re-evaluate and reform practices and procedures that not only violate the Constitution, but that often do not work to meet tenant and community needs for decent and affordable housing. It is shocking and shameful for the government to take actions that are directly contradicted by the language of its own documents and that deprive tenants of their due process rights. Affordable housing tenants nationwide await HUD's leadership. ■

## Nonprofit Obtains Mixed Ruling on Fair Market Rents\*

A Dallas nonprofit working on behalf of Section 8 voucher holders received a mixed ruling from a federal district court in its suit challenging rental standards set by the Department of Housing and Urban Development (HUD).<sup>1</sup> Inclusive Communities Project, Inc. (ICP) sued HUD over its methodology of calculating Fair Market Rents (FMRs), which determine the maximum rental subsidies Section 8 voucher holders may receive. ICP claimed that HUD was setting Dallas FMRs too low, effectively preventing minority households from finding housing in wealthier neighborhoods occupied by whites.<sup>2</sup>

HUD uses standardized "metropolitan statistical areas" (MSAs) to calculate FMRs. The MSA HUD used for Dallas encompassed a twelve-county area.<sup>3</sup> ICP argued that this multi-county region was not representative of the much smaller rental housing markets in the Dallas area.<sup>4</sup> ICP brought suit against HUD under the Administrative

Procedure Act (APA)<sup>5</sup> for violating provisions of the United States Housing Act (USHA)<sup>6</sup> and the Fair Housing Act (FHA).<sup>7</sup>

## Factual Background

As part of the Section 8 voucher program, HUD annually sets FMRs for every housing market area in the country.<sup>8</sup> These FMRs are used by local housing authorities in calculating their payment standards, which represent the highest rents available to local participants in the voucher program. Rental units priced beyond the FMR in any given rental market are essentially unavailable to voucher holders.

To define market areas, HUD uses MSAs defined by the Office of Management and Budget (OMB).<sup>9</sup> The Dallas MSA encompasses 8990 square miles and 5.2 million people, an area and population larger than many states.<sup>10</sup> The counties differ considerably in character. For instance, the median income in Collin County is \$82,000, while that of Delta County is \$38,000.<sup>11</sup> Likewise, the median two-bedroom rent in Collin County (\$880) is twice that of Delta County (\$443).<sup>12</sup> ICP claimed these data demonstrate that Dallas is comprised of many separate housing markets, each of which should have its own FMR.<sup>13</sup>

As in many American cities, higher rents in Dallas are closely correlated with the racial composition of the neighborhood. The Dallas FMR makes available 70% of the rental units in predominantly minority neighborhoods, but only 30% of those in white neighborhoods.<sup>14</sup> ICP alleged that by including in their FMR calculations predominantly minority housing markets with lower rents, HUD lowered the overall FMR for Dallas.<sup>15</sup> According to ICP's complaint, this in turn made rental housing in white neighborhoods unavailable to Section 8 voucher holders in Dallas, the vast majority of whom are African American.<sup>16</sup>

## Summary of the Decision

ICP's suit requested an injunction requiring HUD to use smaller geographic areas in setting FMRs, to create FMRs such that the percentage of dwellings available in predominantly white neighborhoods is equal to the percentage in predominately minority neighborhoods, and to affirmatively further fair housing when setting FMRs.<sup>17</sup>

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<sup>1</sup>Inclusive Cmty. Project, Inc. v. HUD, No. 07-945 (N.D. Tex. Jul. 20, 2009) (Findings & Rec. of U.S. Mag. J.), available at [http://www.inclusivecommunities.net/documents/ICPvHUD\\_FindingsRecommendationMagistrate.pdf](http://www.inclusivecommunities.net/documents/ICPvHUD_FindingsRecommendationMagistrate.pdf).

<sup>2</sup>*Id.* at 3.

<sup>3</sup>Compl. at 3, ¶ 9, available at <http://www.inclusivecommunities.net/documents/FileMarkedCopyFMRCComplaint5-29-07.pdf>.

<sup>4</sup>*Id.* at 5-6, ¶¶ 16-19.

<sup>5</sup>5 U.S.C.A. § 701, *et seq.* (Westlaw Sept. 22, 2009).

<sup>6</sup>42 U.S.C.A. § 1437, *et seq.* (Westlaw Sept. 22, 2009).

<sup>7</sup>42 U.S.C.A. § 3601, *et seq.* (Westlaw Sept. 22, 2009).

<sup>8</sup>42 U.S.C.A. § 1437f(o) (Westlaw Sept. 22, 2009).

<sup>9</sup>24 C.F.R. § 888.113(d) (2009).

<sup>10</sup>Compl. at 3, ¶ 12.

<sup>11</sup>*Id.* at 6, ¶ 17.

<sup>12</sup>*Id.* at 6, ¶ 18.

<sup>13</sup>*Id.* at 5-6, ¶¶ 16-19.

<sup>14</sup>*Id.* at 7, ¶¶ 22-23.

<sup>15</sup>*Id.* at 2, ¶ 6 & 3, ¶ 10.

<sup>16</sup>*Id.* at 2, ¶ 6 & 3, ¶ 10.

<sup>17</sup>*Id.* at 11-12, ¶ 39.

In response to HUD's motion to dismiss, the magistrate judge issued a report and recommendation on five issues, and decided in favor of ICP on all but one. On September 29, 2009, the district court adopted the magistrate judge's report on these five issues. First, the court affirmed ICP's standing, which HUD attacked on the grounds that the remedies requested would not redress ICP's injury.<sup>18</sup> Second, it rejected HUD's contention that ICP's request for broad injunctive relief to eliminate racial disparities in FMRs was a "generalized grievance" and insufficiently targeted to redress ICP's injury.<sup>19</sup>

The third<sup>20</sup> and fourth<sup>21</sup> issues concerned sovereign immunity under Section 702 of the APA.<sup>22</sup> The APA waives sovereign immunity for actions relating to a governmental agency's regulatory action, except in cases where no meaningful standard exists for judicial review of the agency's discretion.<sup>23</sup> The magistrate found a meaningful standard for judicial review of the FHA claim, but not for the USHA claim. Lastly, the magistrate rejected HUD's contention that ICP's claim was barred by the presence of alternative remedies, because only a Section 702 suit would provide the injunctive relief sought by ICP.<sup>24</sup>

## Legal Claims

### Standing for Injunctive Relief

In its Federal Rule of Civil Procedure 12(b)(1) motion to dismiss, HUD claimed that ICP lacked standing under Article III of the Constitution. Specifically, HUD contended that the remedies requested by ICP would not redress the organization's injuries.<sup>25</sup> Plaintiffs in federal court must show that it is likely, rather than merely speculative, that their requested relief will remedy their injury.<sup>26</sup> Though HUD submitted evidence in support of its motion, the magistrate treated it as a facial attack on ICP's standing, rather than a factual attack, because HUD's affidavit did not challenge the facts related to standing.<sup>27</sup>

The magistrate rejected HUD's arguments regarding standing. A nonprofit like ICP can establish injury by showing that the alleged discrimination has frustrated its mission and caused it to divert resources to counteract the defendant's discriminatory conduct.<sup>28</sup> In this case, ICP asserted that the allegedly discriminatory effects of HUD's FMRs frustrated its mission to promote equal housing opportunity, and it has expended significant

resources to counteract that injury by counseling Section 8 voucher holders.<sup>29</sup>

The magistrate found that ICP's requested injunctive relief would help redress its injuries.<sup>30</sup> The magistrate concluded that if HUD used smaller market areas to calculate FMRs, then Section 8 voucher holders previously limited to predominantly minority neighborhoods would have access to greater equal housing opportunity, resulting in lesser demand for ICP's services.<sup>31</sup>

### Overly Generalized Injunctive Relief

HUD also claimed that ICP's requests for injunctive relief were too broad to support Article III standing.<sup>32</sup> HUD specifically objected to ICP's demand for HUD to promote "equal access to rental housing in White areas," and argued that it was nothing more than a "generalized grievance."<sup>33</sup> HUD supported this contention by citing *James v. City of Dallas*, where the court found overly broad a request for an injunction to "eradicate the effects of HUD's discriminatory practices."<sup>34</sup>

The magistrate reached the opposite conclusion in this case.<sup>35</sup> The magistrate found that ICP's injunctive request was not overly broad because it defined its meaning of "equal access" as the point at which the percentage of dwellings available in predominantly white rental markets was equal to that in predominantly minority rental markets.<sup>36</sup> The magistrate found that this injunction would provide HUD a clear roadmap for future remedial action while also redressing the injuries sustained by ICP.<sup>37</sup>

### Sovereign Immunity Under the USHA

After considering issues of standing, the magistrate considered HUD's arguments that it was insulated from ICP's lawsuit under the doctrine of sovereign immunity. Section 702 of the APA waives sovereign immunity for actions for injunctive relief relating to an agency's regulatory action.<sup>38</sup> However, the waiver does not apply to actions for which an agency is granted discretion by law.<sup>39</sup>

In its motion to dismiss, HUD claimed that Section 702 did not apply to its calculation of FMRs because that responsibility was granted to its discretion by law.<sup>40</sup> The magistrate noted that the exception to judicial review is "very narrow," and applies only in cases where there exists "no meaningful standard against which to judge the agency's exercise of discretion."<sup>41</sup> HUD argued that

<sup>18</sup>*Inclusive Cmty.*, No. 07-945, at 4-7.

<sup>19</sup>*Id.* at 8-10.

<sup>20</sup>*Id.* at 10-13.

<sup>21</sup>*Id.* at 13-14.

<sup>22</sup> 5 U.S.C.A. § 702 (Westlaw Sept. 22, 2009).

<sup>23</sup> See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

<sup>24</sup>*Inclusive Cmty.*, No. 07-945, at 14-15.

<sup>25</sup> See *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001).

<sup>26</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>27</sup>*Inclusive Cmty.*, No. 07-945, at 5.

<sup>28</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1989).

<sup>29</sup>*Inclusive Cmty.*, No. 07-945, at 5-6.

<sup>30</sup>*Id.* at 7.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 8.

<sup>33</sup>*Id.*

<sup>34</sup>*James*, 254 F.3d at 568.

<sup>35</sup>*Inclusive Cmty.*, No. 07-945, at 9-10.

<sup>36</sup>*Id.* at 9.

<sup>37</sup>*Id.* at 9-10.

<sup>38</sup> 5 U.S.C.A. § 702 (Westlaw Sept. 22, 2009).

<sup>39</sup> 5 U.S.C.A. § 701(a)(2) (Westlaw Sept. 22, 2009).

<sup>40</sup>*Inclusive Cmty.*, No. 07-945, at 10.

<sup>41</sup>*Id.* at 10-11; see *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998); see also

both of ICP's claims—the first under the USHA and the second under the FHA—had no meaningful standard for judicial review.<sup>42</sup>

For ICP's claim under the USHA, the magistrate agreed with HUD, finding no standard for judicial review of the setting of "market areas."<sup>43</sup> The court found that there was no meaningful standard primarily because there is no reviewable definition of "market area" in the relevant statute or in HUD regulations.<sup>44</sup> The magistrate rejected ICP's application of 24 C.F.R. § 888.113(a), which defines market areas as places where rental units are in competition. Instead, the magistrate relied upon 24 C.F.R. § 888.113(d), which encourages HUD, in setting FMRs, to default to the larger metropolitan statistical areas used by OMB.<sup>45</sup> As a result, the court dismissed ICP's claim against HUD under the USHA.<sup>46</sup>

### Sovereign Immunity Under the FHA

HUD made the same arguments for dismissal of ICP's FHA claim as it did for the USHA claim, but the magistrate found for ICP on the FHA claim.<sup>47</sup> Whereas Section 1437f of the USHA offered no meaningful standard for judicial review, the magistrate found just the opposite for Section 3608(e)(5) of the FHA, where a number of previous cases have reviewed HUD's responsibility to affirmatively further fair housing.<sup>48</sup> In particular, the magistrate pointed to two other suits where HUD's failure to consider the racial impacts of its programs were held reviewable under the APA.<sup>49</sup>

### Adequacy of Alternative Remedies

The magistrate also rejected HUD's contention that ICP's APA action was precluded by the presence of adequate alternative remedies.<sup>50</sup> HUD suggested two alternatives: a suit in the Court of Federal Claims for money damages and a suit against the Dallas Housing Authority.<sup>51</sup> The magistrate rejected these alternatives because neither would allow for injunctive relief against HUD, which is the remedy ICP sought in this case.<sup>52</sup>

## Conclusion

Because the district court adopted the magistrate's report and recommendation, ICP's lawsuit against HUD can proceed, but only under its FHA claim. ICP's claim

under the USHA is foreclosed. This result may prove to be a mixed blessing for ICP and other plaintiffs seeking to sue HUD for its implementation of inappropriate FMRs. On the one hand, because the court dismissed the USHA claim, questions regarding the true meaning of "rental market area" will remain unresolved. On the other hand, the FHA claim may be better suited for achieving the aim of ICP's lawsuit, which is to obtain equal access to housing opportunities for Section 8 voucher holders in Dallas. In this respect, the means with which HUD calculates FMRs are less important than the ends of obtaining FMRs which enable greater housing choice. ■

## Recent Cases

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

### Fair Housing Act: Minimum Floor Space Requirement Was Not Discriminatory

*Homebuilders Ass'n v. City of Brandon*, \_\_ F. Supp. 2d \_\_, 2009 WL 2151144 (S.D. Miss. 2009). The city adopted a zoning ordinance establishing minimum floor space and lot areas. For example, in districts zoned R-2, the minimum floor space was 1600 square feet and the minimum lot area was 8500 square feet. Several developers filed suit alleging that the ordinance violated the Fair Housing Act. The developers presented evidence demonstrating that the cost per square foot of a home with a minimum area of 1600 square feet was greater than the cost of a smaller home. The developers also presented evidence that African Americans generally had lower incomes than whites and would be less likely to be able to afford a 1600-square-foot home. The court found that this evidence failed to establish a *prima facie* case of discrimination because it was based on affordability for the general population and ignored other factors that could affect the ability of African-American households to purchase a home. The court also found that the city had proffered legitimate business reasons for the ordinance, such as that the ordinance was enacted to protect the city's tax base.

Heckler, 470 U.S. at 830.

<sup>42</sup>*Inclusive Cmty.*, No. 07-945, at 11.

<sup>43</sup>*Id.* at 11-12.

<sup>44</sup>*Id.* at 11-13.

<sup>45</sup>*Id.* at 12.

<sup>46</sup>*Id.* at 13.

<sup>47</sup>*Id.* at 13-14.

<sup>48</sup>*Id.* at 14.

<sup>49</sup>*Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *M&T Mortgage Corp. v. White*, No. 04-4775, 2006 WL 47467 (E.D.N.Y. Jan. 9, 2006).

<sup>50</sup>*Inclusive Cmty.*, No. 07-945, at 14-15.

<sup>51</sup>*Id.* at 15.

<sup>52</sup>*Id.*

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

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

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

## Housing Choice Voucher Program: Eviction Must Comply with State Law Evidentiary Requirements

*Miles v. Fleming*, \_\_ P.3d \_\_, 2009 WL 2096216 (Colo. 2009). A voucher tenant was evicted after the court found that the owner demonstrated reasonable grounds to believe that criminal activity occurred on the premises. The owner's only admissible testimony at trial was that she was suspicious that the tenant was engaging in criminal activity because she had been unable to get into the premises on several occasions, and she had seen new merchandise in the tenant's garage. The Colorado Supreme Court noted that state law requires that a landlord using a summary eviction proceeding prove the occurrence of criminal activity by a preponderance of the evidence. The court also noted that voucher regulations require that evictions for criminal activity be consistent with applicable state law, and that the regulations cannot be interpreted to permit eviction based on the owner's evaluation alone. The court reversed the district court's judgment, finding that the lower court could not have found proof of criminal activity based upon the limited evidence presented at trial.

## Fair Housing Act: Rejection of Disabled Applicant Based on Poor Credit History Upheld

*Sutton v. Piper*, 2009 WL 2341491 (6th Cir. July 30, 2009). A disabled applicant to a low-income housing tax credit complex was denied admission because his credit score was too low. The applicant suggested that he place into escrow three months' advanced rent, and also offered to provide a co-signer. When the complex still denied admission, the applicant filed suit, alleging that the complex's refusal to provide a reasonable accommodation constituted disability discrimination under the Fair Housing Act. The Sixth Circuit upheld the district court's grant of summary judgment in favor of the complex. The court found that the applicant's poor credit history resulted from financial mismanagement, not his disability. The court also found that relaxing the complex's minimum credit requirement was not a reasonable accommodation. The court noted that the applicant already had several housing-related accounts sent to collections, including one from another apartment complex. The court declined to apply *Giebler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003), in which the Ninth Circuit held that an applicant with a disability was entitled to have a co-signer as a reasonable accommodation. The court noted that unlike the plaintiff and co-signer in *Giebler*, the applicant had a history of defaulting on housing-related expenses, including rent. Further, the applicant failed to identify a co-signer or provide information about the co-signer's credit history.

## Fair Housing Act: Tenant's Testimony Alone Sufficient to Establish Disability, Request for Accommodation

*Powers v. Kalamazoo Breakthrough Consumer Hous. Coop.*, 2009 WL 2922309 (W.D. Mich. Sept. 9, 2009). A disabled tenant filed suit against the owners and managers of her apartment complex, alleging that they refused or ignored her repeated requests to accommodate her disabilities in violation of the Fair Housing Act (FHA). The defendants moved for summary judgment. First, the defendants argued that the tenant was not disabled because she had no expert reports on the issues of disability, no opinions evaluating her disability, and they could not rely on her medical records or her Social Security Administration determination of disability. The court rejected this argument, finding that a plaintiff's testimony alone may be sufficient to establish a disability under the FHA. Second, the defendants argued that the plaintiff's accommodation request was defective because she failed to submit a written request to move to a ground-level apartment. The court also rejected this argument, noting that the FHA does not require written accommodation requests and that the tenant's testimony on this issue was sufficient to overcome a motion for summary judgment.

## Project-Based Section 8: HUD Enjoined from Relocating Tenants

*Cheatham v. Donovan*, 2009 WL 2922150 (E.D. Mich. Sept. 8, 2009). Parkview Apartments is a housing complex for low-income families and contains twenty project-based Section 8 units. The complex's owners failed to maintain the property, and the mortgage was assigned to the Department of Housing and Urban Development (HUD). HUD attempted to foreclose and sell Parkview and relocate the tenants. HUD also refused to accept new tenants at the complex. In response, Congress enacted legislation allowing HUD to sell Parkview to the Ypsilanti Housing Commission (YHC) unencumbered by statutory limitations on discount sales of multifamily properties. Congressional representatives asked HUD to put its relocation plan on hold and seek an agreement with YHC to transfer the property. HUD restated its intent to abolish the Housing Assistance Payments contract, explaining that it would take several months to sell the property and two years to redevelop it, and that providing better living conditions to the tenants as soon as possible was of primary importance.

The tenants filed a motion to enjoin relocation of Parkview's residents and to stop HUD from emptying the complex by attrition. The tenants alleged that HUD violated the Multi-Family Housing Property Disposition Reform Act (MHPDRA). The court found that the tenants' chances of success on the merits of this claim were high, because

HUD failed to show a rational connection between its decision to refuse to accept new occupants at the complex and the facts upon which its decision was based. The court noted that the lack of comparable housing options in the city particularly weighed against HUD's decision to empty the complex. The court also found that the tenants were likely to succeed on their claim that HUD's decision to relocate the residents was arbitrary and capricious. The court found that HUD's data did not support its conclusion that the complex posed health and safety risks to tenants. Accordingly, the court enjoined the relocation of the residents and ordered HUD to comply with its obligations under the MHPDRA.

### **Housing Opportunities for Persons with AIDS: Eviction for Drug Possession**

*Garden View, LLC v. Fletcher*, \_\_ N.E.2d \_\_, 2009 WL 2707594 (Ill. App. Ct. Aug. 27, 2009). A tenant participating in the Housing Opportunities for Persons with AIDS (HOPWA) program was evicted for allegedly having marijuana in his apartment. On appeal, the tenant argued that the HOPWA regulations provide that tenants can be evicted only in the most severe cases, and that the quantity of drugs found in his apartment did not constitute a severe case. The court rejected this argument, noting that the tenant's lease provided that possession of illegal drugs in the apartment constituted material noncompliance, regardless of the amount of drugs at issue. Accordingly, the court upheld the eviction, citing the HOPWA regulations providing that housing may be terminated for violating conditions of occupancy.

### **Fair Housing Act: Statute of Limitations**

*Sentell v. RPM Mgmt. Co.*, 2009 WL 2601367 (E.D. Ark. Aug. 24, 2009). The plaintiff filed suit against the owner of an apartment complex for failing to ensure that the apartments were constructed in accordance with Fair Housing Act (FHA) requirements and for failing to provide reasonable accommodations to make the apartments accessible to persons with disabilities. The owner moved for summary judgment, arguing that the statute of limitations on the plaintiff's FHA claim accrued when the last certificate of occupancy was issued. Because the plaintiff's complaint was not filed until three years after the issuance of the last certificate of occupancy, the owner argued that her claim was barred by the FHA's two-year statute of limitations. The court rejected this argument, holding that the plaintiff's claim against the owner began to run from the last occurrence of discrimination. The court found that the last occurrence of discrimination occurred on October 23, 2006, when the plaintiff visited the apartments and was denied an accommodation. The court denied the owner's motion for summary judgment because the plaintiff filed

her complaint on July 23, 2008, which was within the two-year period of limitations.

### **Fair Housing Act: Establishing *Prima Facie* Case of Discrimination**

*Lindsay v. Yates*, \_\_ F.3d \_\_, 2009 WL 2568196 (6th Cir. 2009). The defendant homeowners refused to sell their house to two qualified African-American buyers, citing their alleged desire to keep the property in the family. The buyers alleged racial discrimination in the sale of real property in violation of the Fair Housing Act. The district court granted the owners' motion for summary judgment, ruling that a jury could not find from the evidence that the property "remained available" as required by a *prima facie* case for housing discrimination. The Sixth Circuit found that the district court erred in granting the motion on the ground that there was no evidence in the record that the home remained available. Instead, the court held that a plaintiff's inability to create a genuine issue of material fact over the "remained available" element is not fatal so long as there is additional evidence from which a reasonable juror could find an inference of discrimination. The court found that the suspicious timing of the termination of the purchase agreement provided evidence for inferring that the owners acted with discriminatory motives. The court noted that the owners accepted the purchase offer in writing, but canceled it just two days after discovering the prospective buyers were African American. The court also rejected the owners' argument that the buyers failed to offer evidence that the articulated reason for terminating the purchase agreement—keeping the home in the family—was a pretext for discrimination. The court noted that nobody in the family wanted the residence, and that the owners never took the property off the market or advised their realtor not to sell the property before the plaintiffs contracted to buy the property. Accordingly, the Sixth Circuit reversed the district court's decision to grant summary judgment in favor of the owners. ■

# Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency, Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs issued in August of 2009. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

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

## HUD Final Rules

### **74 Fed. Reg. 50,551-50,664 (Sept. 30, 2009) Final Fair Market Rents for Fiscal Year 2010 for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program**

*Summary:* Section 8(c)(1) of the United States Housing Act of 1937 requires the Secretary to publish FMRs periodically, but not less than annually, adjusted to be effective on October 1 of each year. The primary uses of FMRs are to determine payment standard amounts for the Housing Choice Voucher program, to determine initial renewal rents for some expiring project-based Section 8 contracts, to determine initial rents for housing assistance payment contracts in the Moderate Rehabilitation Single Room Occupancy program, and to serve as a rent ceiling in the HOME rental assistance program.

This notice provides final FY 2010 FMRs for all areas that reflect the estimated 40th and 50th percentile rent levels trended to April 1, 2010. The FY 2010 FMRs are based on 2000 Census data updated with more current survey data. For FY 2010, FY 2009 FMRs are updated using 2007 American Community Survey (ACS) data, and more recent Consumer Price Index (CPI) rent and utility indexes. HUD continues to use ACS data in different ways according to how many two-bedroom standard-quality and recent-mover sample cases are available in the FMR area or its Core-Based Statistical Area. Revised 2007 FMRs based on Census and ACS data have been updated with

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

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

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

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

CPI data through the end of 2008 and then trended to April 2010, the mid-point of FY 2010.

*Effective Date:* October 1, 2009.

### **74 Fed. Reg. 45,311-45,317 (Sept. 2, 2009) Home Equity Conversion Mortgage (HECM) Counseling Standardization and Roster**

*Summary:* This final rule amends HUD's HECM program regulations by establishing testing standards to qualify individuals as HECM counselors eligible to provide HECM counseling to prospective HECM borrowers. The rule also establishes a HECM Counseling Roster of eligible HECM counselors and provides for their removal for cause. This rule is intended to contribute to improving the quality of HECM counseling. HECM counseling enables elderly homeowners to make more informed decisions when considering mortgage options and whether to pursue an HECM loan. This final rule follows the publication of a January 8, 2007, proposed rule, takes into consideration the public comments received on the proposed rule, and makes certain changes in response to public comment and upon further consideration of certain issues by HUD.

*Effective Date:* October 2, 2009.

### **74 Fed. Reg. 45,235-45,240 (Sept. 1, 2009) Privacy Act of 1974; Amendment to an Existing System of Records, Enterprise Income Verification (EIV), HUD/PIH-5**

*Summary:* HUD is amending HUD/PIH-5 to reflect changes in the following sections, which impact participants and program administrators of the Public Housing, Disaster Housing Assistance, Housing Choice Voucher, Section 8 Moderate Rehabilitation programs, and the various rental assistance programs for the Office of Housing: Categories of Individuals Covered by the System, Categories of Records in the System, Purposes of the System, and Routine Uses of Records Maintained in the System, Including Categories of Users and Purposes of Such Users. These sections are revised to reflect the present status of the information contained in the system.

*Effective Date:* October 1, 2009.

## HUD Federal Register Notices

### **74 Fed. Reg. 48,772-48,773 (Sept. 24, 2009) Notice of Proposed Information Collection for Public Comment; Public Housing Reform Act: Changes to Admission and Occupancy Requirements for the Public Housing and Section 8 Assistance Programs**

*Summary:* The collection of information implements changes to the admission and occupancy requirements for the public housing and Section 8 assisted housing programs made by the Quality Housing and Work Responsibility (QHWRA) Act 1998 (Title V of the FY 1999 HUD appropriations Act, Public Law 105-276, 112 Stat. 2518,

approved October 21, 1998), which amended the United States Housing Act of 1937. QHWRA made comprehensive changes to HUD's public housing, Section 8 tenant-based and project-based programs. Some of the changes made by the 1998 Act (i.e., QHWRA) affect public housing only and others affect both the Section 8 tenant-based and project-based and public housing programs. These changes cover choice of rent, community service and self-sufficiency in public housing; and admission preferences and determination of income and rent in public housing and Section 8 housing assistance programs.

*Comments Due Date:* November 23, 2009.

**74 Fed. Reg. 48,583-48,584 (Sept. 23, 2009)**

**Notice of Proposed Information Collection: Comment Request; Neighborhood Stabilization Program 2 (NSP 2) Program**

*Summary:* This request identifies the reporting burden associated with information that NSP 2 grantees will report in the Disaster Recovery Grant Reporting System for NSP 2 assisted activities, recordkeeping requirements, and reporting requirements. Section 1512 of the Recovery Act requires that not later than ten days after the end of each calendar quarter, each recipient that received recovery funds from a federal agency shall submit a report to that agency that contains: (1) The total amount of recovery funds received from that agency; (2) the amount of recovery funds received that were expended or obligated to projects or activities; and (3) a detailed list of all projects or activities for which recovery funds were expended or obligated, including the name of the project or activity; a description of the project or activity; an evaluation of the completion status of the project or activity; an estimate of the number of jobs created and the number of jobs retained by the project or activity; and for infrastructure investments made by state and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under the Recovery Act and name of the person to contact at the agency if there are concerns with the infrastructure investment. Recipients must also report detailed information on any subcontracts or sub grants awarded by the recipient. Not later than thirty calendar days after the end of each calendar quarter, each agency that made Recovery Act funds available to any recipient shall make the information in reports submitted publicly available by posting the information on a website.

*Comments Due Date:* November 23, 2009.

**74 Fed. Reg. 47,599-47,614 (Sept. 16, 2009)**

**Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2009**

*Summary:* This notice contains a list of regulatory waivers granted by HUD during the period beginning on April 1, 2009, and ending on June 30, 2009.

*Dated:* September 8, 2009.

**74 Fed. Reg. 47,597-47,598 (Sept. 16, 2009)**

**Previous Participation Certification**

*Summary:* The collection of this information aids in protecting HUD's Multifamily Housing Programs by comprehensively assessing industry participants. HUD will use this form to evaluate participants' performance and compliance with contracts, regulations, and directives in order to determine if their participation poses a significant risk to the department. Respondents such as owners, managers, consultants, general contractors, and nursing home operators and administrators will be subject to review.

*Comments Due Date:* October 16, 2009.

**74 Fed. Reg. 47,016-47,017 (Sept. 14, 2009)**

**Request for Comments on Ending "Hold Harmless" Policy in Calculating Income Limits Under Section 8 of the United States Housing Act of 1937**

*Summary:* For Fiscal Year (FY) 2009, HUD has continued its policy of maintaining Section 8 income limits at the previously published level in cases where HUD's estimate of area median family income or housing cost adjustment data, or changes in calculation methodology, would lead to a lower income limit than was previously published. The policy was adopted to ensure that Multifamily Tax Subsidy Projects (MTSPs) would not be subject to income-limit and rent decreases when the data underlying income limits otherwise indicated decreases. The Housing and Economic Recovery Act of 2008 changed the tax code to protect existing MTSPs from decreases in income limits and rents, should HUD decide to discontinue this policy. However, maintaining artificially high income limits may have an adverse impact on other federal programs. HUD is requesting public comment on whether HUD should discontinue the practice with respect to Section 8 income limits such that income limits generally would be allowed to decrease.

*Comments Due Date:* October 14, 2009.

**74 Fed. Reg. 46,783-46,784 (Sept. 11, 2009)**

**Notice of National Exceptions to Section 1605 of the Recovery Act (Buy American Requirement) Applicable to Public and Indian Housing Recovery Act Funds**

*Summary:* In accordance with the American Recovery and Reinvestment Act of 2009 and implementing guidance of the Office of Management and Budget, this notice advises that certain national exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition grant funds.

*Dated:* September 4, 2009.

**74 Fed. Reg. 45,460-45,461 (Sept. 2, 2009)  
Notice of Proposed Information Collection for Public  
Comment; Public Housing Operating Subsidy—  
Stop-Loss and Appeals**

*Summary:* PHAs that will experience a reduction in subsidy will have their subsidy reduction phased in over a five-year period. PHAs that elect to stop the phase-in of the decrease in their subsidy are required to demonstrate to HUD a successful conversion to asset management, as provided in the operating fund final rule. A PHA with a reduction in subsidy may make this demonstration to HUD in order to “stop its losses” during any one of the five years over which HUD phases in the reduction. Under the operating fund final rule, PHAs that elect to file an appeal of their subsidy amounts are required to meet the appeal requirements set forth in subpart G of the operating fund final rule. The final rule establishes five grounds for appeals in 24 CFR Sec. 990.245: (a) Streamlined appeal; (b) appeal of formula income for economic hardship; (c) appeal for specific local conditions; (d) appeal for changing market conditions; and (e) appeal to substitute actual project cost data. To stop the phase-in of the reduction in the amount of subsidy a PHA receives under the new operating fund formula, PHAs submit a “stop-loss” package to HUD demonstrating conversion to asset management.

*Comments Due Date:* November 2, 2009.

## **HUD Notices**

**PIH 2009-26 (HA) (Sept. 25, 2009)  
Prohibition on Public Housing Agencies Charging  
Application Fees**

*Summary:* This Notice reiterates HUD’s long-standing policy that public housing agencies may not charge application fees to persons or families applying for the Public Housing or Housing Choice Voucher Programs.

**PIH 2009-37 (HA) (Sept. 24, 2009)  
Treatment of Income for Participants of Public Housing  
and Section 8 Programs that Qualify for Payment  
Adjustments Under the American Recovery and  
Reinvestment Act (ARRA)**

*Summary:* This Notice clarifies that the ARRA one-time \$250 recovery payment to beneficiaries of Social Security, Supplemental Security Income, certain railroad retirement programs, and Veterans retirement and disability programs are not included as income when an income determination is calculated during mandatory interim and annual reexaminations. Exclusions from annual income calculations includes temporary, nonrecurring or sporadic income pursuant to 24 CFR § 5.609(c)(9). However, the ARRA provision for a weekly \$25.00 increase in unemployment benefits is calculated as income when annual income determinations are calculated.

**H 2009-13, PIH 2009-36 (HA) (Sept. 15, 2009)  
Supplemental Information to Application for Assistance  
Regarding Identification of Family Member, Friend or  
Other Person or Organization Supportive of a Tenant for  
Occupancy in HUD Assisted Housing**

*Summary:* This Notice provides guidance to owners and management agents (O/As) and public housing agencies (PHAs) on implementation of the requirements of Section 644 of the Housing and Community Development Act of 1992. Under Section 644, O/As and PHAs must provide applicants, as part of their application for housing, the option to include information on an individual or organization that may be contacted to assist in providing any delivery of services or special care to applicants who become tenants and to assist with resolving any tenancy issues arising during tenancy. The Notice also transmits Form HUD-92006, Supplement to Application for Federally Assisted Housing, which must be included as part of the O/As and PHAs application.

**H 2009-11, PIH 2009-35 (HA) (Sept. 9, 2009)  
State Lifetime Sex Offender Registration**

A detailed review of this notice appears on page 257 of this issue of the *Bulletin*.

**PIH 2009-33 (HA) (Sept. 2, 2009)  
Capital Fund Program Awards for FY 2009**

*Summary:* This Notice describes the Capital Fund Program awards for FY 2009, including the Capital Fund Program formula grant and, where applicable, the Replacement Housing Factor (RHF) grants for public housing agencies.

## **RHS Unnumbered Letters**

**Best Practices for Community Facilities Loans for  
Childcare Projects (Sept. 24, 2009)**

*Summary:* This unnumbered letter provides guidance on best practices for making Community Facilities loans to childcare projects. The letter contains information from several states regarding their best practices in making and maintaining successful loans for childcare facilities. ■

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