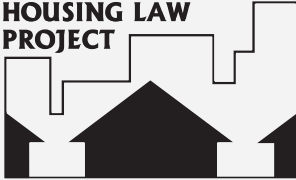


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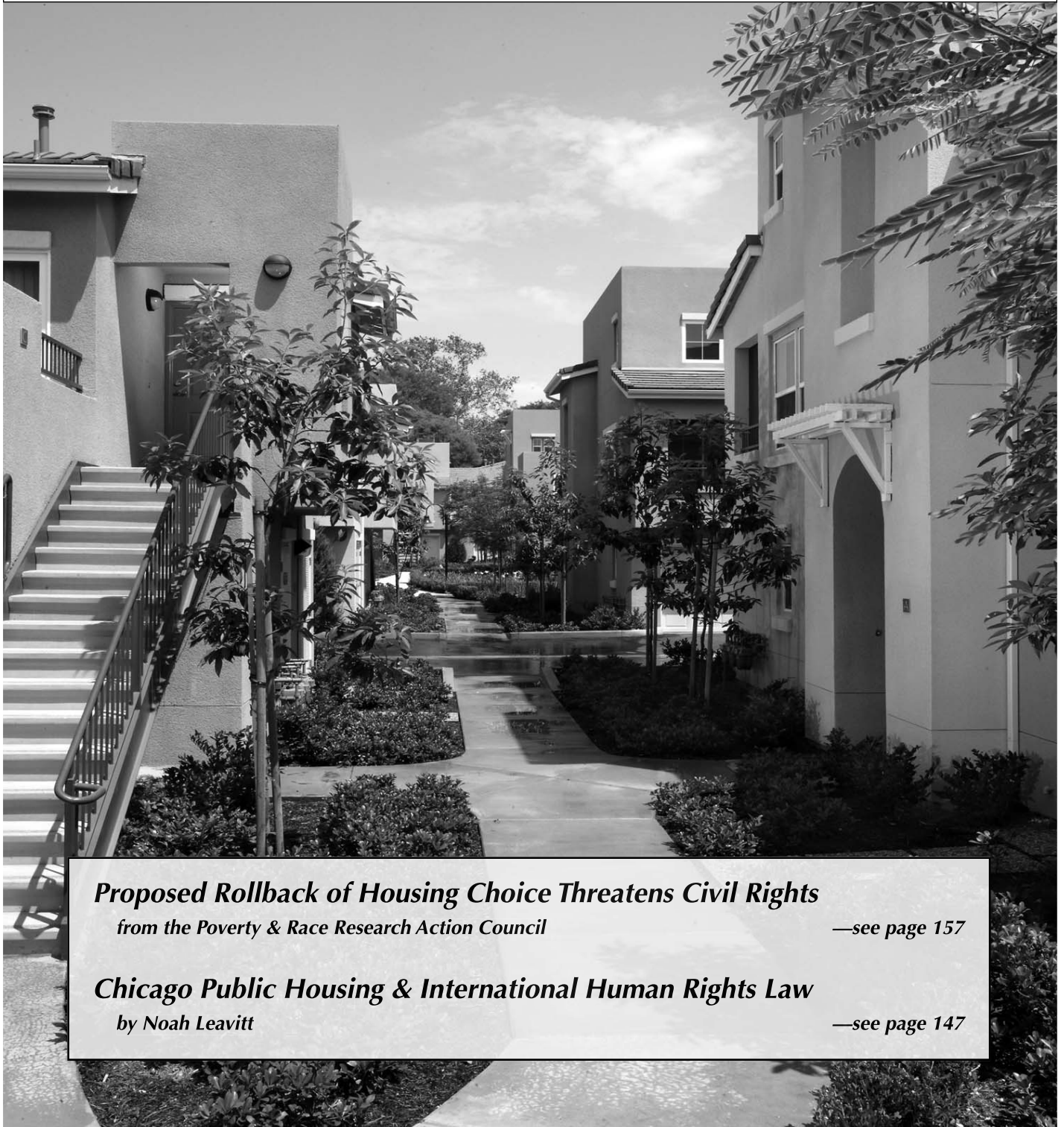


advancing housing justice

Housing Law Bulletin

Volume 35 • June 2005

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Proposed Rollback of Housing Choice Threatens Civil Rights

from the Poverty & Race Research Action Council

—see page 157

Chicago Public Housing & International Human Rights Law

by Noah Leavitt


—see page 147


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 SPECIAL
 FEATURE

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Housing Law Bulletin

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Cover: Pueblo del Sol housing development in Los Angeles, a mixed-income housing project redeveloped by the Housing Authority of the City of Los Angeles (HACLA) under the HOPE VI program. Photo courtesy of HACLA.

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Chicago Public Housing Residents Use International Human Rights Law to Fight for Their Community

By Noah Leavitt¹

Can human rights law, and the international legal system, be used to preserve the dwindling supply of housing for low-income people in the United States? A group of residents of the Cabrini-Green public housing development in Chicago thinks so. They have embarked on an innovative, multi-faceted human rights campaign to prevent their community from being demolished based on this understanding. The residents are being assisted in this effort by lawyers, community organizers and researchers working collaboratively.

The human rights campaign, while still in its early stages, has accomplished some intriguing results, and provides important lessons for housing advocates around the country.

Background

Across the United States, public housing is being demolished at a rapid pace. In Chicago, this is occurring on a vast scale. As part of a deliberate policy based in part on federal legislation, the City of Chicago and the Chicago Housing Authority (CHA) in conjunction with the United States Department of Housing and Urban Development have systematically torn down more than 14,000 public housing units since 1999. CHA refers to this effort as the "Transformation Plan."²

A few of the Plan's outcomes have been forcing more than 20,000 legal residents—primarily female-headed families with children, and almost all African-Americans—from their homes into an uncertain fate including, for some, absolute homelessness. Moreover, this massive destruction of public housing is not over. There will be a net loss of more than 13,000 low-income units by the time the Plan is complete.³

¹Director of Advocacy and Policy, Jewish Council on Urban Affairs, Chicago, noah@jcu.org. The author thanks James Pfluecke, Janet Smith, Carol Steele, and Richard Wheelock for their helpful comments on earlier drafts, and Jane Ramsey, Betty Willhoite, Pat Wright, Deidre Brewster, Raj Nayak and the Honorable Steven D. Pepe for their ongoing inspiration in the struggle to preserve housing for low-income people.

²Chicago Housing Authority, *Annual Plans*, at <http://www.thecha.org/transforplan/plans.html> (copyright 2003).

³William P. Wilen, Director of Housing Litigation, Sargent Shriver National Center on Poverty Law, Remarks at the Coalition to Protect Public Housing April Briefing (Apr. 28, 2004), available at http://www.povertylaw.org/advocacy/housing/wilen_remarks_coalitiontoprotect.cfm.

The Coalition to Protect Public Housing (CPPH) was formed in 1996, when resident leaders from several Chicago public housing developments joined together to try to halt the demolition of their buildings.⁴ The residents asked a few community organizations for support, including the Jewish Council on Urban Affairs, the Community Renewal Society, the University of Illinois at Chicago Voorhees Center, and the Chicago Coalition for the Homeless.⁵ Moreover, CPPH members have received ongoing legal assistance from the Legal Assistance Foundation of Metropolitan Chicago and the Sargent Shriver National Center on Poverty Law, among others.⁶

CPPH has consistently advanced certain key demands: halting demolition until there is a written redevelopment plan in place that allows residents to have meaningful participation in its creation; ensuring that sufficient funding is in place for Chicago's redevelopment plan; and ensuring that CHA "build first" before any further demolition occurs.

The human rights campaign is reaching an increasingly broad audience, and is bringing new life to what many thought was all-but-dead debate about low-income people and the evolution of public housing in Chicago.

To achieve these ends, CPPH has utilized litigation effectively, and has won various concessions from the city, such as that CHA had to build a certain number of units before demolishing, and there had to be a relocation plan in place before redevelopment.⁷

CPPH has fought an uphill battle, however. Since CHA now has demolished most of the larger public housing developments in Chicago, including dozens of high-rise buildings on the South Side of the city, CPPH has retreated to focus on preserving Cabrini-Green, on the

⁴Coalition to Protect Public Housing, <http://www.limits.com/cpph>.

⁵Jewish Council on Urban Affairs, <http://www.jcua.org>; Chicago Coalition for the Homeless, <http://www.chicagohomeless.org>; Community Renewal Society, <http://www.crs-ucc.org>; Nathalie P. Voorhees Center for Neighborhood and Community Improvement, <http://www.uic.edu/cuppa/voorheesctr/uic%20main.htm>.

⁶Legal Assistance Foundation of Metropolitan Chicago, <http://www.lafchicago.org/>; Sargent Shriver National Center on Poverty Law, <http://www.povertylaw.org/aboutncpl/index.cfm>.

⁷For an excellent treatment of the history of this litigation, and the larger economic forces shaping the redevelopment of public housing in Chicago, see DAVID C. RANNEY & PATRICIA A. WRIGHT, RACE, CLASS, AND THE ABUSE OF STATE POWER: THE CASE OF PUBLIC HOUSING IN CHICAGO (UIC Working Paper No. V172, 2000), available at <http://www.uic.edu/cuppa/voorheesctr/racepaper.htm>.

near North side—less than a mile away from the high-end Gold Coast and Michigan Avenue shopping district.

Then, in 2004, CPPH launched its human rights campaign, and since then, the dynamics seem to be changing.

Background in Human Rights Law

In February 2004, residents decided that they needed to step up their efforts if they were going to save their community at Cabrini-Green. They considered the possibility of launching a human rights campaign to increase the visibility of the residents' concerns to a wider audience, and to bring new pressure on CHA.

They began to study human rights law, and what they found astonished them.⁸ International legal norms speak clearly to the rights and concerns of public housing residents in Chicago and around the nation: from the Universal Declaration of Human Rights to the American Convention on Human Rights to the International Covenant on Economic, Social and Cultural Rights. (See sidebar on page 151 for an overview of international legal authorities.)

Armed with this background, residents felt confident in developing a multi-pronged strategy to assert that adequate housing is a human right, and that that right is being violated in Chicago.⁹

Background: International Law in the United States

CPPH's strategy is consistent with similar initiatives around the country. During the past few years, United States lawyers have begun advancing claims that cite treaties and other sources of international law.¹⁰

Although controversial, there is ample authority to support this practice. Article I of the United States Constitution grants to Congress the power to define and punish "offenses against the Law of Nations." Article VI says that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It also directs United States courts to hear controversies arising under treaties.

Yet, despite this seemingly solid foundation, a ratified treaty may not be able to form the basis for domestic litigation.

⁸In addition to extensive "book research," in May 2004, CPPH hosted a training featuring two internationally renowned experts with extensive experience in using human rights frameworks—the legal director of the Centre on Housing Rights and Evictions and the director of the Social Rights Advocacy Centre in Canada.

⁹For a much more extensive treatment of the sources of the right to adequate housing under international law, see Global Campaign for Secure Tenure, *Legal Sources*, at http://www.unhabitat.org/campaigns/tenure/legal_sources.asp (2003).

¹⁰Noah Leavitt, *Legal Globalization: Why U.S. Courts Should Be Able to Consider the Decisions Of Foreign Courts and International Bodies*, FINDLAW (Oct. 16, 2003), at <http://writ.news.findlaw.com/leavitt/20031016.html>.

tion. The United States Senate typically attaches declarations specifying that ratified treaties are non-self-executing and that they need additional domestic legislation to become enforceable in United States courts.

However, lawyers are asking courts to interpret domestic law claims so they are consistent with international legal norms, and not as separate causes of action. CPPH and their lawyers adopted exactly this strategy last year in a groundbreaking case, as a way of bringing human rights law into the United States court system.

CHA now is forced to go on record at press conferences to say the agency is not violating the human rights of residents of Chicago public housing—an unpleasant denial to have to make on a repeated basis.

Domestic Litigation

In June 2004, Cabrini-Green residents, with assistance from attorney Richard Wheelock at the Legal Assistance Foundation of Metropolitan Chicago, filed suit in federal court after CHA issued 180-day relocation notices without consulting residents and without a redevelopment plan for Cabrini-Green in place.¹¹ The residents' suit charges that those notices violate CHA's own contract assuring tenants of new homes at Cabrini-Green (the result of earlier litigation), as well as federal fair housing law.¹²

Moreover, the residents asked the court to consider their federal and state claims to be consistent with relevant international legal standards. In particular, they cited the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Covenant on Economic, Social and Cultural Rights.

They argued that "International law underscores the gravity of violations of CHA residents' domestic rights under federal and contract law and sets forth substantive limitations on forced relocation, particularly of persons in protected groups, and is essential to the proper interpretation and application of these domestic rights."¹³ The lawsuit—including the human rights arguments—was

¹¹Cabrini-Green v. CHA, No. 04-C-3792 (N.D. Ill. June 3, 2004) (Hibbler, J.). Although a consent decree governing redevelopment was entered as a result of previous 2000 litigation between the Local Advisory Council and the Chicago Housing Authority, that decree only governed one part of Cabrini-Green. The 2004 litigation addressed other sections of Cabrini-Green not addressed in the decree. For background, see the listings for "Cabrini-Green Local Advisory Council v. Chicago Housing Authority, et al." and "Gautreaux v. CHA," at <http://lafchicago.org/Housing%20docket.htm>.

¹²See note 7, *supra*.

¹³Complaint at ¶ 50, Cabrini-Green v. CHA, No. 04-C-3792 (N.D. Ill. 2004).

covered extensively in national media outlets, and has generated ongoing debate in the press.¹⁴

The most recent activity came on January 7, 2005, when—against the predictions of most observers—the court ruled sharply against CHA's extensive motion to dismiss. That decision finds, "the [Cabrini-Green residents] have shown by a preponderance of the evidence that [CHA's] decision to issue 180-day relocation notices to over 300 families without a redevelopment plan in place has caused actual and threatened harm."¹⁵ Parties are now preparing for future appearances before the district court.

To date, this lawsuit is the only case that CPPH members are aware of in which public housing residents have raised international law in a challenge to a local housing authority.

International Legal Activity

Complementing this domestic litigation is an intensive campaign in the Inter-American Human Rights Commission, the investigative arm of the Organization of American States (OAS), of which the United States is a member.¹⁶

On March 4, 2005, the Cabrini-Green residents, along with the United States-based Poor People's Economic Human Rights Campaign, and allies from Canada and Brazil, argued that international law provides a right to adequate housing, and that their countries' governments are moving further away from complying with their concomitant obligations.¹⁷ The hearing was the first time the OAS had considered a broad report about failing housing conditions across the hemisphere.¹⁸

One of the four people who testified was Ms. Carol Steele, a resident leader at Cabrini-Green and President of the CPPH. Ms. Steele testified that the United States government's withdrawal of a commitment to public housing has been a disaster in her city. "The facts tell a horrible story," said Steele. "Sixteen thousand units of public housing

¹⁴Jo Napolitano, *Residents of Housing Project Fighting Relocation*, N.Y. TIMES, June 4, 2004 ("Residents of a dilapidated housing project who have been told to leave it in 180 days under a redevelopment plan say the relocation violates their human rights . . .").

¹⁵Cabrini-Green v. CHA, No. 04-C-3792, slip op. at 9 (N.D. Ill. Jan. 7, 2005).

¹⁶The Commission promotes human rights in all OAS member states, prepares country reports, deals with complaints, and conducts investigations, typically leading to the issuance of reports and recommendations. These investigations can often lead to other forms of political and legal pressure on governments. Inter-American Human Rights Commission, *What Is the IAHR?*, at <http://www.iachr.org/what.htm> (n.d.).

¹⁷Poor Peoples' Economic Human Rights Campaign, *PPEHRC Travels to Washington DC for Hearing at IACHR of the OAS*, at <http://www.economichumanrights.org/updates/oashearing.htm> (n.d.).

¹⁸See Press Release, Inter-American Human Rights Commission, IACHR Analyzes Human Rights Situation In The Americas (Mar. 11, 2005), *available at* <http://iachr.org/Comunicados/English/2005/8.05.htm>.

demolished, with less than 1,500 replacement units for families built.” She pointed out that this demolition occurs at a time when the Chicago metro area has a shortage of over 153,000 units of housing for low-income city residents.¹⁹

Ms. Steele and the human rights lawyers asked the Commission for several measures so that the countries named will improve their housing policies, including an analysis of the countries’ housing conditions in their reports to the OAS.²⁰ They also asked that OAS members increase funding for housing policies and programs and, at a minimum, not cut funding in the absence of clear evidence that doing so agrees with international standards. CPPH is also currently in the process of arranging site visits to Chicago and Philadelphia by Commission members.

Bringing International Experts on Housing Rights to Chicago

The third component of the CPPH human rights campaign focuses on bringing international human rights specialists to Chicago from around the world to investigate and report on the conditions at Cabrini-Green, in particular how they measure against international norms.

For example, in April 2004, CPPH organized an historic visit by Mr. Miloon Kothari, the United Nations Special Rapporteur on Adequate Housing. Mr. Kothari is the international community’s highest-ranking expert on housing issues, and he reports directly to the United Nations High Commissioner for Human Rights.²¹ In his discussions with Cabrini-Green residents, Mr. Kothari acknowledged that there is a human rights crisis in the forced evictions of public housing tenants from their units in Chicago.²²

In addition, CPPH has recently submitted a request for an on-site visit from the United Nations Advisory Group on Forced Evictions.²³ The Group was established at the request of the Governing Council of UN-HABITAT

as a way of alleviating the plight of the urban poor by monitoring acts of forced evictions.²⁴ The Advisory Group accepted the residents’ application and is currently negotiating to arrange an on-site visit to the United States for the first time.²⁵

Community Organizing

The residents’ “housing is a human right” organizing drive is the foundation for these various legal initiatives. A campaign to keep public housing at Cabrini-Green can only be won with the active participation and leadership of residents.

Throughout the litigation in federal district court, as well as with the activities in the OAS and with the United Nations, CPPH has provided extensive organizing support to the residents. They are using these various types of litigation to educate residents at Cabrini-Green about human rights and about domestic and international law condemning forced evictions, so the residents can be well informed when speaking with city and federal policymakers.

Public housing residents believe that utilizing human rights norms will bring national and international media attention to their campaign in Chicago. The current environment of competition between major cities for investment increases the effectiveness of generating negative media coverage for the City of Chicago—Mayor Richard Daley and his beloved city simply cannot afford to look bad.

Public housing residents themselves are leading the human rights campaign, and bringing a revived energy to their critique of the Transformation Plan.²⁶ Yet, perhaps most significantly, the human rights campaign is reaching an increasingly broad audience, and is bringing new life to what many thought was an all-but-dead debate about low-income people and the evolution of public housing in Chicago.²⁷ For example, a recent article in the city’s largest weekly newspaper featured an extensive article about a group of artists that is cleverly critiquing

¹⁹CHICAGO REHAB NETWORK, HOUSING FACTS (n.d.), available at <http://www.chicagorehab.org/policy/pdf/housingfacts.pdf>.

²⁰See Letter from Cheri Honkala, Poor Peoples’ Economic Human Rights Campaign, to Paulo Sergio Pinheiro, Inter-American Human Rights Commission (Mar. 7, 2005), available at <http://www.economichumanrights.org/updates/oashearing.htm>.

²¹Office of the United Nations High Commissioner for Human Rights, *Special Rapporteur of the Commission on Human Rights: Introduction*, at <http://www.ohchr.org/english/issues/housing/index.htm> (2004). It is worthwhile to note that the Special Rapporteur had never undertaken such work in the U.S. before. CPPH continues to advise Special Rapporteur Kothari about conditions in Chicago.

²²JOHN HAGEDORN & BRIGID RAUCH, VARIATIONS ON URBAN HOMICIDE: CHICAGO, NEW YORK CITY, AND GLOBAL URBAN POLICY 15 (2004), available at http://www.uic.edu/cuppa/cityfutures/papers/webpapers/cityfuturespapers/session3_2/3_2variations.pdf.

²³Global Campaign for Secure Tenure, *Activities*, at <http://www.unhabitat.org/campaigns/tenure/taskforce.asp> (2003).

²⁴See ADVISORY GROUP ON FORCED EVICTIONS, BACKGROUND (n.d.), available at <http://www.unhabitat.org/campaigns/tenure/documents/Content%20for%20Background%20AGFE.doc>.

²⁵The residents’ petition can be accessed at <http://www.habitants.org/filemanager/download/73>.

²⁶On May 21, 2005, nearly 200 people, most of them children and teenagers, marched through Cabrini-Green in a “Housing is a Human Right” rally, and asked CHA not to demolish their homes. See CBS2 Chicago, *Demonstrators Protest Closing Of Cabrini Green* (May 21, 2005), available at http://cbs2chicago.com/topstories/local_story_141183230.html. See also Tonya Maxwell, *Save Cabrini-Green, marchers urge*, CHI. TRIB. May 22, 2005, available at <http://www.chicagotribune.com/news/local/chicago/chi-0505220487may22,1,6325887.story?coll=chi-newslocalchicago-hed>.

²⁷For example, NPR produced a March 4, 2005 feature story, which is available at http://www.chicagopublicradio.org/audio_library/848_ramar05.asp#04.

CHA's expensive public relations campaign by making fake ads describing the difficulties—and not the possible benefits—of the Transformation Plan.²⁸

Conclusion

Is the human rights campaign accomplishing the residents' goal of preventing demolition before sufficient redevelopment plans are in place? At the very least, CHA now is forced to go on record at press conferences to say the agency is not violating the human rights of residents of Chicago public housing—an unpleasant denial to have to make on a repeated basis.²⁹

Yet, more expansively, real adjustments are taking place. At a March 2005 community meeting, representatives of CHA stated that although they had originally placed eight Cabrini-Green buildings on the demolition list for 2005, they had now decided to remove five of them. It was the first time in the course of the Transformation Plan that CHA had delayed the razing of buildings on its demolition list.

The public housing residents at Cabrini-Green, together with the lawyers and organizers supporting them, are leading a national effort to bring international law and human rights norms "home" to the United States.³⁰ Their multifaceted campaign, combining domestic litigation, international legal activity, international observers and grassroots community organizing, provides a powerful new model for low-income people and their advocates to fight unlawful demolition and relocation, and possibly save the ever-shrinking supply of affordable housing in America.³¹ ■

²⁸Fighting Spin with Spin: Activists and Artists Hatch a Plot to Publicize the Failings of the CHA's Plan for Transformation, CHICAGO READER, June 10, 2005, at 20-21. The article notes that "[other litigation against CHA] was settled March 15, and the CHA agreed to overhaul its relocation programs, but that wasn't before Miloon Kothari, the UN Special Rapporteur on Adequate Housing, had flown to Chicago and declared the whole state of affairs a human rights crisis."

²⁹Suzanne Hanney, Coalition to Protect Public Housing Says CHA Demolition Plan Violates Rights, STREETWISE, Dec. 22, 2004; Anderson Burns, Cabrini Green residents refuse to be "transformed" by CHA, CHICAGO DEFENDER, Dec. 31, 2004.

³⁰Carol Steele was recently a keynote speaker at a major national conference in Washington, D.C.—Housing Rights for All: Promoting and Defending Housing Rights in the United States. National Low Income Housing Coalition, MEMO TO MEMBERS (May 6, 2005), available at <http://www.nlihc.org/mtm/mtm10-18.html>#18.

³¹Since the CPPH launched their human rights campaign, an excellent article expanding on the Cabrini-Green residents' vision for a multifaceted approach has appeared. See Maria Foscarinis et al. *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97, 97 (2004).

International Legal Authorities on Housing and Human Rights

- The Universal Declaration of Human Rights (1948), of which the United States was a principal drafter and has adopted, provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including...housing."
- The International Covenant on Civil and Political Rights (1966), which the United States signed and ratified, provides the right to protection from arbitrary or unlawful interference with one's home.
- The International Convention on the Elimination of All Forms of Racial Discrimination (effective 1969), which the United States signed and ratified, prohibits actions with respect to housing that have the effect of discriminating against persons of color.
- Article 26 of the American Convention on Human Rights (1978), signed by the United States, requires progressive measures on the part of governments to fully realize a universal goal of adequate housing for all sectors of the population.
- The 1948 American Declaration on the Rights and Duties of Man speaks of the right to life, well-being and personal security and the inviolability of the home, including the right not to be forced to leave against one's will.
- The International Covenant on Economic, Social and Cultural Rights (effective 1976), which the United States signed, "recognize[s] the right of everyone to an adequate standard of living... including adequate...housing."
- The United Nations Committee on Economic, Social and Cultural Rights has further clarified the right to housing (General Comment No. 4 (1991)), such that the right prohibits mass, planned, forced displacement of persons against their will, particularly when their displacement will result in homelessness.

Increasing Employment and Job Training for Low-Income Residents Through Section 3

Created by the Housing and Urban Development Act of 1968,¹ the Section 3 program requires recipients of certain forms of HUD funding to provide job training, employment and contracting opportunities for very-low and low-income residents and eligible businesses. Recipients of such funding must provide these opportunities “to the greatest extent feasible.”² For this program to be successful, active participation by advocates and community members is necessary. This article provides a brief overview of the Section 3 program, and then focuses on best practices for monitoring and promoting compliance with Section 3 requirements.

Funding Streams that Trigger Section 3 Obligations

The HUD funding streams to which Section 3 applies, per the regulations, are:

- Public and Indian housing assistance when used for housing development and modernization, or for operations/maintenance of existing public housing, per Section 9 of the U.S. Housing Act of 1937
- Housing and Community Development assistance when used for housing rehabilitation, housing construction or other public construction³

A now-defunct public housing modernization program is also listed as a funding stream to which Section 3 applies.

Readers should note that HUD has, in practice, attributed Section 3 obligations to a broader realm of HUD-funded public housing projects. For example, Section 3 obligations have been explicitly noted in Notices of Funding Availability (NOFA) for HOPE VI funding.⁴ The assumption is that all HUD funding to PHAs for public housing is subject to Section 3. Section 3 requirements

¹Pub. L. No. 90-448, § 3 (1968).

²12 U.S.C.A. § 1701u(b) (West 2001); 24 C.F.R. § 135.1 (2004).

³24 C.F.R. § 135.3 (2004). Also see 24 C.F.R. § 135.5 (2004), which explains that housing and community development assistance means any financial assistance through a HUD housing or community development program, including grants, loans, loan guarantees, cooperative agreements and contracts. Community Development Block Grant funds are also included, as well as loans guaranteed under Section 109 of the Housing and Community Development Act of 1974, as amended.

⁴See, for example, the Fiscal Year 2005 HOPE VI NOFA, available at <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/fy05/index.cfm>.

attach to public and Indian housing funds regardless of the amount of the assistance.⁵ The Section 3 threshold for recipients of housing and community development funds is \$200,000. For their contractors/subcontractors, the threshold is \$100,000.⁶ Examples of eligible types of projects include public works projects, such as waterfront redevelopment, retail and restaurant development, landscaping, development of entertainment facilities and other related infrastructure. Housing advocates should remember that non-housing projects also qualify, and that non-construction jobs such as administrative or office jobs also qualify, so long as the jobs arise in connection with the construction or rehabilitation.⁷

Eligible Beneficiaries of Section 3

There are two broad classes of eligible Section 3 beneficiaries: very-low and low-income residents and certain businesses. The exact terms of eligibility depend on the funding stream involved.

Residents

Priority in the program is given to four categories of very-low and low-income residents. Certain categories have priority over others, and priorities differ between projects funded with public or Indian housing funds versus those with Housing and Community Development funding.⁸ Preferences that must be implemented by recipients of funds with Section 3 obligations (such as public housing authorities) or contractors or subcontractors on projects with such funding are summarized as follows:

Public and Indian Housing

- Residents of the public housing development which receives the funding subject to Section 3⁹
- Residents of other public housing managed by the same entity that has received funding subject to Section 3¹⁰
- Participants in Youthbuild programs carried out in the metropolitan area (or nonmetropolitan county) in which funds with the Section 3 obligation are spent¹¹
- Other Section 3 residents¹²

⁵24 C.F.R. § 135.4(a)(3)(ii) (2004).

⁶*Id.*

⁷See *id.* § 135.5 (regarding definition of employment opportunities generated by Section 3 covered assistance).

⁸12 U.S.C. § 1701u(c)(1)(B), (2)(B) (2004); 24 C.F.R. § 135.34 (2004).

⁹*Id.*

¹⁰*Id.*

¹¹24 C.F.R. §§ 135.5 (definition of HUD Youthbuild Programs), 135.34 (2004). Youthbuild is funded under subtitle D of Title IV of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12899 *et seq.*

¹²“Section 3 resident” is defined as a public housing resident, or an individual living in the metropolitan or nonmetropolitan county in which

Housing and Community Development Programs

- Section 3 residents residing in the service area or neighborhood in which the Section 3 covered project is located¹³
- Participants in HUD Youthbuild programs¹⁴
- Homeless residents living in the neighborhood or service area in which the project with Section 3 obligations is located, provided the Section 3 project is assisted under the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 *et seq.*¹⁵
- Other Section 3 residents¹⁶

Recipients of funding with Section 3 obligations also have discretion to impose additional preferences. For example, participants in housing assistance programs administered by the Assistant Secretary for Housing may establish preferences for residents of the housing development receiving the Section 3 assistance within the service area or residents of the neighborhood where the Section 3 covered project is located.¹⁷ Recipients of community development funds may establish a preference for recipients of government housing assistance, such as Housing Choice Voucher holders, within the service area or neighborhood where the Section 3 covered project is located.¹⁸

Businesses

In addition to individual residents being eligible for employment and/or training, so-called “Section 3 businesses” are eligible for preference in the receipt of contracts in connection with HUD-funded projects subject to Section 3 obligations.¹⁹ As with the preferences for hiring, these

the funds with the Section 3 obligations are spent, and who is very-low or low-income. See 24 C.F.R. § 135.5 (2004).

¹³24 C.F.R. § 135.34(a)(2) (2004).

¹⁴*Id.* Also see note 11, *supra*.

¹⁵24 C.F.R. § 135.34(a)(2) (2004).

¹⁶*Id.*

¹⁷*Id.* § 135.34(a)(3). This is the section that provides for discretionary preference-setting for housing administered by the Assistant Secretary of Housing and would include properties such as Section 221(d)(3) (12 § U.S.C. 17151(d)(3)) and 236 properties (12 U.S.C. § 1715z-1). There are other mortgage insurance and loan programs which are administered by the Secretary of Housing which would also be subject to Section 3 related to the construction and rehabilitation work and thus to the possibility of a preference scheme.

¹⁸24 C.F.R. § 135.34(a)(4) (2004).

¹⁹A “Section 3 business” is defined to mean a business:

- (1) that is 51% or more owned by Section 3 residents; or
- (2) whose permanent, full-time employees include persons, at least 30% of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents; or
- (3) that provides evidence of a commitment to subcontract in excess of 25% of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth in paragraphs (1) or (2) in this definition of “Section 3 business concern.”

preferences first focus on the businesses located in the area that will be most affected by the activity and then expand to other areas. The business preferences that recipients of funding, as well as contractors and subcontractors, are responsible for implementing are summarized as follows:

Public and Indian Housing

- Businesses that are owned by at least 51% low or very low-income residents of the housing development for which Section 3 funds are spent or that employs eligible residents of such a development for at least 30% of their full-time, permanent staff.²⁰
- Businesses that are owned by at least 51% low or very low-income residents of other housing developments managed by the same PHA that has received funding with Section 3 obligations attached. Alternatively, the businesses may have at least 30% full-time, permanent staff consisting of such residents.²¹
- HUD Youthbuild programs carried out in the metropolitan (or nonmetropolitan county) in which funds with Section 3 obligations are spent.²²
- Businesses owned by at least 51% Section 3 residents, or with at least 30% of such residents in their permanent, full-time staff, or that subcontract more than 25% of the total amount of subcontracts to business concerns included in the first two bullets of this list.²³

Housing and Community Development Programs

- Section 3 businesses that provide economic opportunities for Section 3 residents in the service area or neighborhood in which the Section 3 covered project is located²⁴
- Applicants selected to carry out HUD Youthbuild programs²⁵
- Other Section 3 businesses²⁶

24 C.F.R. § 135.5 (2004).

²⁰*Id.* § 135.36(a)(1).

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.* § 135.36(a)(2). Also see note 19, *supra*, for a definition of a Section 3 business.

²⁵24 C.F.R. § 135.36(a)(2) (2004).

²⁶*Id.*

Note to Readers

The next issue of the *Housing Law Bulletin* will be a combined July-August edition.

Improving Section 3 Implementation, Local Monitoring and Compliance

HUD's regulations set specific, numerical compliance goals for all entities subject to Section 3. For recipients of public and Indian Housing Assistance subject to Section 3 and recipients of housing and community development funds subject to Section 3, 30% of the aggregate number of all new hires by the recipient or its contractors/subcontractors in any year must be Section 3 residents.²⁷ Recipients of other HUD housing assistance funds subject to Section 3 must commit to employ Section 3 residents as 10% of the aggregate number of new hires for each year over the duration of the Section 3 project.²⁸ Managing general partners or agents affiliated (in a given metropolitan area) with recipients of funds with Section 3 obligations for an aggregate of 500 or more units in any fiscal year must commit to employing 30% of Section 3 residents as new hires.²⁹

Section 3 requirements mean little if no one takes the time to monitor compliance. Even with the best of intentions, PHAs or other recipients of Section 3 funding may not understand how best to meet program requirements.

For all Section 3 covered projects and activities, recipients of funding subject to Section 3 must also provide 10% of their contracts to Section 3 businesses for building trades work for rehabilitation, modernization, construction or development work, and 3% of all other contracts to Section 3 businesses.³⁰ If the funds are for public housing, then the 10% figure for contracting also applies to maintenance and repair work.³¹

Section 3 requirements, however, mean little if no one takes the time to monitor compliance. Even with the best of intentions, PHAs or other recipients of Section 3 funding may not understand how best to meet program requirements. In addition to outreach to Section 3 residents, one of the most critically important elements of Section 3 compliance is the establishment and implementation of monitoring systems. Successful implementation and monitoring of a Section 3 plan involves a four-part process: (1) the establishment of clear goals; (2) the development of a monitoring structure; (3) the pre-development stage; and (4) the construction stage.

²⁷*Id.* § 135.30(b)(1), (2).

²⁸*Id.*

²⁹*Id.* § 135.30(b)(2).

³⁰*Id.* § 135.30(c).

³¹*Id.* § 135.30(c).

Part 1: Local Section 3 Goals

Recipients of funding with Section 3 obligations need to establish clear goals and concrete benchmarks for success as an initial step towards having a successful local Section 3 program. Recipients have some flexibility, as they may set goals that exceed the "safe harbor" minimums set forth in the regulations.³² The focus of Section 3 is on training and employment for low-income residents and on supporting businesses that employ or are owned by low-income residents. Section 3 goals should address the following issues:

Resident Training/Employment

- The types of jobs/positions covered (such as carpenter, plumber apprentice, journeyman, clerical bookkeeper, et cetera)
- Who is served by the program (we recommend that those who are very low-income, meaning 50% of area median income or less, should be targeted)
- Hiring goals (we recommend 30% of total work hours as the goal instead of just 30% of new hires)³³
- Estimated goals (goals must be met on a yearly basis but for monitoring purposes, monthly goals for each category are preferable, especially in the context of large construction projects)
- Minimum hiring goals for women and people of color (e.g. that a minimum of 30% of all hires be women, and a minimum of 50% of all hires be people of color)

Section 3 Businesses

- At least 15% of the total dollar amount of all Section 3 covered contracts for building trades work arising in connection with housing rehabilitation, housing construction and other public construction, and at least 6% of the total dollar amount of all other Section 3 covered contracts (this goal is slightly higher than the safe harbor minimum)
- Increase the number and variety of Section 3 businesses certified and available to do work

Part 2: Development of a Monitoring Structure

Having established concrete goals, recipients of funds with Section 3 obligations should focus on creating or strengthening their monitoring infrastructure. Since HUD has not enforced Section 3 requirements for approximately

³²*Id.* § 135.32 (2004). Recipients must also demonstrate why it is not feasible to meet the numerical goals.

³³See NHLP, *HUD Rules Long Beach Violated Section 3 Employment Requirements*, 34 HOUS. L. BULL. 105, 105 (2004) (HUD evaluated compliance with Section 3 by looking not only at the number of individuals hired but also at the number of hours worked by new hires). Also note that the City of San Francisco and the San Francisco Housing Authority have what they term "Section 3 plus" 30% of work force goals.

thirty-three years, it should be no surprise that many entities subject to those requirements may have done little to nothing to develop an effective structure for monitoring Section 3 implementation.³⁴ Designing a monitoring system and arranging for necessary resources to carry it out should be among the first steps a recipient makes.

The recipient may not have sufficient staff or expertise to manage monitoring on its own. Likely partners for the recipient could be other departments in the local city, local nonprofits, public housing resident organizations or the Resident Advisory Board (RAB), and other community entities. For example, a city's contract compliance department may wish to partner with local PHAs, unions, nonprofit or city-administered job training programs, and the city's local fair housing department. Each partner could manage a piece of the monitoring responsibility. If a funded project is of a sufficient size and scope, the Section 3 funded entity may need to hire an internal coordinator to focus on monitoring and compliance.

Establishing a tracking system before a project is funded will also help the recipient and its working partner(s) carry out monitoring efficiently. Such a system should collect the most important information up front, such as information needed to verify eligibility and preferences under Section 3. For example, since receipt of welfare assistance makes residents eligible for a preference under Section 3, that data could be tracked.³⁵ A system should also track contractor and subcontractor progress towards meeting hiring and training goals.

For tracking contracts with Section 3 businesses, the system should compile and maintain a list of Section 3 certified businesses, and should track key aspects of the contracts awarded to such businesses, such as the nature of the work awarded, and the total dollar amount of the contract or subcontract.

Given the enormity of the monitoring task for some projects, a collaborative approach is being used by some jurisdictions. For example, in the Seattle, Washington, region, the Office of Economic Opportunity (OEO) met in 2004 with "approximately 50 members of the Pacific Northwest Chapter National Black Chamber of Commerce to discuss employment and contracting opportunities provided by Section 3 regulations on projects receiving HUD financial assistance."³⁶ As a result of the meeting, the OEO and the Seattle Hub Office agreed to organize a regional PHA consortium to develop effective programs to achieve compliance with Section 3 and share information on how to support Section 3 businesses, conduct

outreach and develop a regional Section 3 database.³⁷ In addition, in Seattle's Consolidated Plan, responsibility for Section 3 monitoring has been situated with the city's Department of Human Services.³⁸

In San Francisco, California, monitoring responsibilities are shared by the Mayor's Office of Housing (MOH), Housing Development Corporations (HDCs), Contractors, First Source Employment Agencies, and the City's Human Rights Commission (HRC). The MOH is the über monitor, overseeing the work of its partner agencies, as well as approving and enforcing Section 3 Compliance Hiring Plans. HDCs are directly responsible for Section 3 compliance, including the development of hiring plans, compliance with pre-bid requirements, working directly with contractors/subcontractors that are not in compliance, and providing general oversight of the development project. Contractors are responsible for day-to-day implementation of Section 3 protocols and supplying information about job positions they need filled. The San Francisco plan also requires contractors to work with the MOH or the HRC prior to any contemplated disciplinary action against a Section 3 hire. First Source conducts outreach, screens workers and provides training or training referrals. HRC monitors hiring and provides information to MOH and the HDCs regarding problems on the project site.

Part 3: Pre-Development Phase

At the pre-development stage, it is incumbent upon the PHA or other entity with Section 3 obligations to impart a clear understanding of Section 3 requirements to all contractors up front, even during the bidding process. Such effort will facilitate achieving goals and may reduce the need for enforcement. The regulations require that certain language be included in the bidding documents.³⁹

³⁷*Id.* The collaborative is still in its infancy and a lack of resources has somewhat slowed its progress. For example, a collaborative idea still under consideration that would require resources is development of a database of Section 3 qualified businesses. One benefit that has already come from collaboration, however, is that Seattle and King County PHAs refer Section 3 qualified residents to each other for projects to try to ensure that residents in their respective jurisdictions who have the necessary job qualifications are able to take advantage of opportunities when local residents with a Section 3 preference are not able to do so.

³⁸CITY OF SEATTLE, SEATTLE CONSOLIDATED PLAN, 2005-2008, app. O, available at http://www.ci.seattle.wa.us/humanservices/director/ConsolidatedPlan/2005/CP_2005_Appendix_O.pdf

³⁹24 C.F.R. § 135.38 (2004).

³⁴See OFFICE OF THE INSPECTOR GENERAL, AUDIT NO. 2003-KE-0001, SURVEY OF HUD'S ADMINISTRATION OF SECTION 3 OF THE HUD ACT OF 1968 (2003) available at <http://www.hud.gov/offices/oig/reports/oiginter.cfm>.

³⁵24 C.F.R. § 135.34(b) (2004).

³⁶Section 3 Regional Consortium - Seattle Washington, Office of Economic Opportunity, at <http://www.hud.gov/offices/fheo/section3/sec3reg.cfm> (content updated July 22, 2004).

Correction

The cover photograph caption for the May 2005 issue of the *Housing Law Bulletin* incorrectly described the location of the Hillside Terrace Apartments. They are located in the state of Washington.

In addition, recipients of funding with Section 3 obligations should:

- Meet with all potential general contractors and with as many subcontractors as possible to assure their knowledge of Section 3 requirements.
- Require that all general and subcontractors submit a preliminary Section 3 Action Plan with their bid, such that the specifics of how they intend to comply are delineated. The contractor and/or subcontractor's prior experience and success with the Section 3 program should be included.
- Have all contractors specify anticipated job categories for the project in question and the projected number of jobs and projected number of new hires by job category.
- Have all contractors specify the minimum qualifications and skills required to perform the positions.
- Establish a goal within each occupational category for the number of positions to be filled by Section 3 residents.
- Have all contractors list what training opportunities the contract may create and all agreements concerning training that the contractors have.
- Have all contractors sign a document certifying their understanding of Section 3 program requirements and their agreement to comply.
- Have all contractors delineate their strategy for recruiting Section 3 residents for available positions.

If recipients of funds with Section 3 obligations establish a point system for the bid process that rewards contractors for the quality of their Section 3 plan, such an evaluation system will emphasize the importance of the program to the bidders and encourage them to take care to address the topic before they have even been awarded a contract.

After selection of a contractor, recipients may also benefit from the assistance of a local advocate or team of local experts (e.g., legal services, union staff, Resident Advisory Board, other community groups) in reviewing a contractor's proposed plan for adherence with Section 3. That review process could be used to tighten up the plan and make it more efficient and useful for the community in question.

Once a contractor has been selected, key Section 3 compliance issues should be set forth in an agreement between the PHA or other Section 3 entity and the contractor. The agreement should, at a minimum, require the contractor to:

- Report the names of permanent employees by job category prior to commencement of the work or at the

time when the bid documents are signed. (The concern is that regular employees may work routinely for the employer, but seasonally, so that if regular employees are not identified, the question of who is a new hire can be manipulated.)

- Report on a yearly basis the number of hours worked by new hires as well as by new hires who are Section 3 residents.
- Report the total number of dollars anticipated to be contracted to outside parties and the total number of dollars provided to Section 3 businesses.
- Designate who will be responsible for determining whether a new hire is an eligible low-income Section 3 resident.

With regard to Section 3 businesses wishing to become contractors or sub-contractors, entities with Section 3 obligations should plan for their engagement. Activities that the entities should be prepared to engage in include:

- Coordinating pre-bid meetings at which Section 3 businesses could be informed of upcoming opportunities
- Conducting workshops on contracting procedures and specific contract opportunities in a timely manner for Section 3 businesses
- Advising Section 3 businesses on how to obtain bonding, affordable lines of credit, financing and insurance
- When possible, breaking out contracting opportunities into elements of a size and scope that are feasible for Section 3 businesses

Outreach to community members who may qualify as Section 3 residents and Section 3 businesses is another vitally important element of implementation of Section 3 requirements. However, this article focuses primarily on monitoring and compliance issues and will not address outreach strategies.

Part 4: Construction Phase

Successful monitoring of Section 3 implementation during the construction phase requires a system of checks and balances to verify what is actually taking place on the job site. Contractors and subcontractors should be required to report regularly on their hiring for the project generally, and then specifically as to Section 3 residents and businesses. In addition, however, an independent set of eyes needs to check on the job site itself periodically, and preferably weekly.

Speaking with Section 3 hires regularly as well, to make sure that they are receiving support and appropriate supervision, will help to ensure job retention of these

hires, which results in more on-the-job experience for the hire as well as the immediacy of the steady salary.

Conclusion

A 2003 General Accounting Office report found that HUD had not implemented sufficient controls over the past thirty-seven years to ensure that Section 3 program goals are met. Though HUD requires that recipients of HUD financial assistance subject to Section 3 requirements submit an annual performance report,⁴⁰ HUD does not track agencies/localities subject to Section 3 requirements.⁴¹ Until HUD creates such a system, it is, realistically, local advocates and community groups who will be able to accomplish the most in terms of oversight and enforcement so that their communities can realize the benefit of Section 3 requirements.⁴² Advocates may turn to HUD's Office of Fair Housing and Equal Opportunity to investigate and rule on complaints filed by community members, but advocates and community members also will have to conduct their own research and take the initiative on monitoring and enforcement. With that kind of effort, advocates who want more for their clients than a roof over their heads—who want to assist clients to achieve self-sufficiency—have an opportunity to achieve a significant, positive, measurable impact on their local community. ■

⁴⁰24 C.F.R. § 135.90 (2004).

⁴¹OFFICE OF THE INSPECTOR GENERAL, AUDIT NO. 2003-KE-0001, SURVEY OF HUD'S ADMINISTRATION OF SECTION 3 OF THE HUD ACT OF 1968 (2003), available at <http://www.hud.gov/offices/oig/reports/oiginter.cfm>. See also NHLP, *HUD Rules Long Beach Violated Section 3 Employment Requirements*, 34 HOUS. L. BULL. 105, 105 (2004).

⁴²HUD is required to conduct periodic Section 3 compliance reviews but did not conduct any such reviews before the year 2002. See note 41, *supra*. See also 24 C.F.R. § 135.74 (2004).

California Supreme Court Requires 90-Day Notice for Voucher Evictions

On June 13, 2005, the Supreme Court of California unanimously affirmed the decision of the court of appeal in *Wasatch Property Management v. Degrate*, No. S112386 (Cal. June 13, 2005). The Court held that under California Civil Code § 1954.535 a landlord seeking to terminate the tenancy of a Housing Choice Voucher tenant without cause at the end of a lease term must provide 90-days written notice to the tenant. The Court's decision will be a topic in a future issue of the *Housing Law Bulletin*.

Proposed Rollback of Housing Choice Threatens Civil Rights

from the Poverty and Race Research Action Council¹

The State and Local Housing Flexibility Act of 2005, a new housing bill currently under consideration by Congress, would place new obstacles in the path of low-income and minority families seeking to move to lower-poverty communities. Not only is the bill bad housing policy, it would conflict with fair housing and civil rights goals.

Most serious is the "Flexible Voucher Program" that the bill would establish. This proposal would restrict the long-standing right of low-income Housing Choice Voucher families to "portability" across city and town lines, and cut back on the rent supports needed to make those moves. The bill would also disadvantage Black and Latino voucher applicants, by eliminating the current system of "income targeting" of vouchers towards the most needy families. If local public housing authorities (PHAs) drop their current income targeting systems, which the proposed legislation would give them strong incentive to do, hundreds of thousands of new vouchers could be shifted away from poor Black and Latino families over the next five to ten years.

Two overarching points should be made before addressing specifics of the bill. First, one of the stated purposes of this bill is to delegate decision-making to local PHAs, whom the Secretary believes are capable of making better-quality housing policy decisions, better suited to local needs, than Congress or HUD. Whatever the merits of this point of view, it is important to remember that there is at least one area where local discretion is an especially bad idea—and that is in the area of civil rights. One of the reasons that we have federal civil rights laws is the inability of local agencies, and local majorities, to police themselves.

¹The following is adapted from testimony given by Philip Tegeler, Executive Director of the Poverty and Race Research Action Council (PRRAC), on the State and Local Housing Flexibility Act of 2005, H.R. 1999, S. 771, 109th Cong. (2005), before the Housing and Community Opportunity Subcommittee of the House of Representatives Committee on Financial Services on May 17, 2005. PRRAC is a national civil rights policy organization based in Washington, D.C. and a long-time affiliate of the Housing Justice Network. PRRAC gratefully acknowledges the research assistance of Shayna Strom in the preparation of this analysis.

A number of the issues discussed here were raised in a May 10, 2005, letter to the House Financial Services Committee from the Lawyers Committee for Civil Rights, PRRAC, the National Fair Housing Alliance, and the National Housing Law Project to the House Committee on Financial Services.

For recent *Housing Law Bulletin* coverage of the proposed State and Local Housing Flexibility Act of 2005, see NHLP, *Bush Administration Proposes Radical Overhaul of Rent Rules*, 35 HOUS. L. BULL. 105, 105 (2005) and NHLP, *Administration Issues Radical Proposal to Deregulate Public Housing and Voucher Programs*, 35 HOUS. L. BULL. 125, 125 (2005).

We have seen this played out in numerous civil rights lawsuits and Department of Housing and Urban Development (HUD) investigations over the past thirty years. There are good people working in local PHAs, but they are also subject to local political pressure, and they need guidance, protection and enforcement from HUD to keep our larger civil rights goals in focus. This is why Congress, in 1968, and again in 1988, made it clear that state and local PHAs have an enforceable obligation to avoid policies that discriminate on the basis of race, and why Congress imposed the duty on HUD to “affirmatively further fair housing,”² to take steps to promote integrated housing opportunities in all HUD programs, and to demand that local PHAs do the same. These requirements are represented in regulations that are woven throughout the programs covered by this bill.

There are good people working in local PHAs, but they are also subject to local political pressure, and they need guidance, protection and enforcement from HUD to keep our larger civil rights goals in focus.

A second point relates to the other major stated goal of the bill—to save money. To the extent that this bill tries to save money by essentially forcing families into poorer and poorer neighborhoods, no money is being saved at all. The right of families to move to less impoverished, better integrated neighborhoods with better school systems should not be held hostage to budget concerns. Most families may choose to stay in higher-poverty neighborhoods, but many families who choose to move experience positive improvement in their lives,³ and the entire society benefits from having more diverse and representative communities. Families who choose to move out of poverty are not the cause of HUD’s budget problems—but it is these families who are hurt the most by this bill. They deserve the opportunity to seek out better opportunities for themselves and for their children. It cannot be our national housing policy to deny them that choice.

Recent HUD Actions Restricting Choice

The new “Flexible Voucher” proposal is the latest in a series of actions and proposals by HUD that would restrict housing choice, harm minority families, and lead

²42 U.S.C.A. § 3608 (West 2003). This duty was reaffirmed in Executive Order 12892 (January 17, 1994).

³See, e.g., Margery Turner & Delores Acevedo-Garcia, *Why Housing Mobility? The Research Evidence Today*, POVERTY & RACE (Jan./Feb. 2005).

to increased segregation in our largest assisted housing program. HUD began restricting housing choice in the fall of 2003 by cutting back on the use of Section 8 “exception payment standards,” which permit families to move to lower-poverty areas that have higher rents, and requiring that all requests go through the HUD headquarters. Previously, requests for payment standard increases could be submitted to the regional HUD office with a simple demographic analysis to justify higher rents in all or part of the PHA jurisdiction area.

In the same way, HUD’s decision in April of 2004 to retroactively cut voucher funding⁴ increased incentives for PHAs to adopt policies that discourage or prohibit families from moving to higher-rent areas, including across-the-board reductions in payment standards that restrict the choice of available neighborhoods. These policies were followed by changes in Fair Market Rents that lowered allowable rents in many parts of the country.

HUD further restricted mobility in a guidance issued in July of 2004 that would permit PHAs to restrict voucher holders’ portability rights in cases where PHAs make a showing of financial hardship.⁵ In spite of evidence that these restrictions were taking choice away from families,⁶ HUD reissued this guidance in early 2005.

At the same time, HUD has chosen not to seek funding for renewal of contracts for many small agencies doing “mobility counseling,” which is the hard work of finding housing for poor families in lower-poverty neighborhoods.

New Restrictions on Housing Choice and Mobility

The State and Local Housing Flexibility Act of 2005 would take the next step in stripping away some of the features that make the Section 8 voucher program a vehicle for opportunity for families. The bill as currently drafted would restrict the ability of families to move to communities of their choice and would impede their ability to move to lower-poverty (and higher-rent) neighborhoods in two ways.

First, the bill would continue a version of the new voucher budgeting system (begun in the 2004 fiscal year)

⁴Implementation of FFY 2004 Consolidated Appropriations Act Provisions for the Housing Choice Voucher Program, PIH 2004-7 (Apr. 22, 2004).

⁵In August 2004, several civil rights and housing policy organizations, including the National Council of La Raza, the Center on Budget & Policy Priorities, the Lawyers Committee for Civil Rights, Massachusetts Law Reform Institute and PRRAC, sent a letter to Secretary Jackson challenging this new policy on fair housing grounds and demanding that HUD be the funder of last resort for families who seek to move to lower-poverty neighborhoods—see <http://www.prrac.org/policy.php>.

⁶Initial surveys by NAHRO and the Center on Budget & Policy Priorities showed that, because of these new restrictions, PHAs around the country were denying families the right to move.

that limits PHAs to a fixed sum of funds for the year, based on the prior year's housing voucher budget, with no right to receive extra funds when costs for individual vouchers increase.⁷ This funding system, which replaced a system that paid agencies for the actual cost of vouchers in use, creates a financial conflict on the local level between the number and the quality of housing placements. In other words, because apartments in higher-poverty neighborhoods are more likely to have lower rents, a PHA will face pressure to serve more families by approving tenancies in those areas rather than paying the higher cost of subsidies for families to move to housing located in higher-opportunity areas.

This system has already led to reductions in allowable rents across the country, and denials of family moves to higher-cost areas, and it will lead inevitably to more segregation. HUD knows that the problem could be ameliorated with a special reserve fund for moves to lower-poverty areas, but such a reserve fund does not appear in the bill.

Second, the bill appears to restrict the long-standing right of Section 8 families to use their vouchers across jurisdictional lines (for example, moving from city to suburb). The language of the bill suggests that city and suburban PHAs must "agree" on a system for transferring vouchers ("portability") before families can move. If this interpretation of the bill is correct, it would give suburban government officials (or city officials) the authority to simply say "no" to additional city families seeking to rent private apartments in suburban towns. The fair housing consequences of such a rule would be very serious and could lead to extensive local litigation.

Finally, by removing the program's current focus on the poorest city residents, the proposal to eliminate income targeting would steer new vouchers away from the most deeply segregated and poverty concentrated neighborhoods, undermining the voucher program's core goal to deconcentrate poverty. Architects of the successful *Gautreaux* and "Moving to Opportunity" housing mobility programs have called for a much stronger targeting of vouchers to these severely segregated neighborhoods. Yet HUD's proposal would lead us in exactly the opposite direction, taking away an important opportunity for families in our poorest, most opportunity-deprived neighborhoods.

Loss of Vouchers for Black and Latino Families

Currently, the Section 8 program requires that PHAs distribute at least 75% of their vouchers in each fiscal year to "extremely low-income families" (earning 30% or less of the area median income). This income-targeting requirement has meant that Black and Latino families,

who are disproportionately concentrated in the extremely low-income bracket,⁸ have been successful in receiving the majority of vouchers.⁹

The bill would drastically alter the "income targeting" of vouchers to the most needy families in the Section 8 program, a step which, if adopted by Congress and implemented by local PHAs, could result in a huge loss of vouchers for Black and Latino families.

According to the proposed legislation, at least 90% of vouchers could go to families with incomes up to 60% of Area Median Income.¹⁰ This change would give PHAs the incentive and the ability to distribute vouchers to higher-income poor households rather than lower-income (largely minority) households, as the former require fewer subsidy dollars and thus enable a limited pool of funds to reach a larger number of families.

The bill would drastically alter the "income targeting" of vouchers to the most needy families in the Section 8 program.

Based on data from the 2000 Census and Area Median Income data maintained by the National Low Income Housing Coalition, we can anticipate the racial impact of these proposed changes. Currently, an average of 40.9% of all vouchers in the United States go to non-Hispanic Blacks, and 16.3% go to Hispanics.¹¹ Assuming a turnover of approximately 230,000 vouchers annually, about 94,000 Black and 37,000 Latino families would be expected to receive new vouchers annually under the current targeted system.¹² However, if income targeting were altered as proposed in the HUD bill, and if local PHAs eliminate the current system of income targeting, then only about 65,000 Black and Latino families would be expected to receive vouchers next year—about *half* the anticipated number. Over the next five to ten years these policies could shift

⁸Nationally, 30% of median income is \$16,950 for a family of four, which is roughly equivalent to the poverty threshold. CENTER ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE HOUSING VOUCHER PROGRAM 3 (2003). In 1999, Black and Hispanic households were three times more likely to live below the poverty line than White households. JOSEPH DALAKAR & BERNARDETTE D. PROCTOR, POVERTY IN THE UNITED STATES: 1999, at v (2000).

⁹DEBORAH J. DEVINE ET AL., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANTS AND NEIGHBORHOOD WELFARE (2003) (especially note Table A-3).

¹⁰The remaining 10% of vouchers could be available to any families that meet the eligibility standard for the program (incomes not exceeding 80% of area median income).

¹¹DEVINE ET AL., *supra* note 9, at 91.

¹²This also assumes that turnover is similar throughout the country and that distribution of vouchers mimics distribution of population.

⁷The new bill would base funding on each PHA's share of national voucher funding in the 2005 fiscal year.

over 300,000 vouchers away from very low-income Black and Latino families.¹³

Other Civil Rights Implications

The other sections of the bill also have important civil rights implications, which are addressed in a recent letter from the Poverty and Race Research Action Council and the Lawyers Committee for Civil Rights to the Committee on Financial Services. First, the potential for PHAs under the bill to transfer their Section 8 funds to help subsidize their public housing stock is troubling. This would give PHAs the “flexibility” to take away the only funds available for free choice throughout the city and region and transfer them to units that are often located in the most segregated urban neighborhoods. Congress should not give PHAs this flexibility.

Second, the expanded “Moving to Work” provisions of the bill—which go far beyond employment and self-sufficiency—could permit waivers of the crucial site and neighborhood standards, which prevent PHAs from clustering their units in low-income neighborhoods. These regulations were adopted pursuant to the Fair Housing Act in response to early litigation challenging the siting of public housing in already segregated neighborhoods. Local agencies need these regulations to help resist the enormous political pressure they face to choose the path of least resistance in siting assisted housing. It is important to clearly exempt such fair housing-related regulations from the Moving to Work program.

Conclusion: HUD’s Duty

It is the understanding of those in the civil rights and housing advocacy communities that this proposed housing bill was originally drafted by HUD. Yet, HUD is under a clear mandate from Congress to be the lead agency on fair housing, and to promote fair housing, housing integration and housing choice in all of its programs. HUD’s legislative proposal is simply incompatible with its civil rights mandate. ■

¹³The analysis set out in this paragraph is summarized in detail in *Civil Rights Implications of the 2005 Flexible Voucher Proposal*, available from the PRRAC Web site, at <http://www.prrac.org/policy.php>.

Supreme Court Strikes Down Takings Test Used in Oil Industry Rent Control Case

In a unanimous decision written by Justice Sandra Day O’Connor, the Supreme Court reversed the Ninth Circuit’s decision in *Lingle v. Chevron*, holding invalid the “substantially advances” test used by the Ninth Circuit to measure a regulatory taking.¹ The Supreme Court remanded the case to the federal district court in Hawaii for further proceedings.²

The subject of the litigation is Hawaii’s Act 257, which places caps on the amount of rent that lessor-owners can charge its lessee-dealers, gas station operators.³ Lessor-owners base their rents on the percentage of sales of gasoline and other products.⁴ According to the state, Hawaii enacted the measure (1) to stabilize the current structure of the retail market for gasoline and (2) to preserve the long-term consumer benefit of having multiple retail vendors from which to choose and to avert the economic harm that would follow if the retail market were to become concentrated in the hands of a few serving the state’s many islands.⁵ Plaintiff Chevron, however, maintained that legislators enacted the measure only in response to the high cost of gasoline.⁶ This, in the oil company’s view, constituted a violation of its Fifth and Fourteenth Amendment rights.⁷

The Court Clarifies Jurisprudence of the Takings Clause

The Court began its opinion by clarifying the history of Takings Jurisprudence and stated that the Takings Clause of the Fifth Amendment (made applicable to the states by the Fourteenth Amendment) does not prohibit the taking of private property, but instead conditions use of the government’s taking power by requiring just compensation.⁸ Beyond mere physical invasion of private property, the Court noted that it later began to recognize “regulatory takings” as well.⁹ However, regulatory takings have only

¹2005 WL 1200710, at *14. Justice Kennedy wrote a brief concurrence noting that the decision should not foreclose the possibility that the regulation might violate due process if it were found arbitrary or irrational.

²*Id.* For a more detailed discussion of the facts and procedural history of the case, see NHLP, *Supreme Court Agrees to Hear Oil Industry’s Rent Control Case*, 34 Hous. L. Bull. 219, 232-33 (2004).

³*Lingle* at *4.

⁴*Id.*

⁵NHLP, *Supreme Court Agrees to Hear Oil Industry’s Rent Control Case*, 34 Hous. L. Bull. 219, 232 (2004).

⁶*Id.*

⁷*Lingle* at *4.

⁸*Id.* at *6.

⁹*Id.* at *7.

been recognized when regulations go “too far.”¹⁰ How far is “too far” has remained the debated question.¹¹

The Court discussed two different types of *per se* regulatory takings.¹² The first is one that requires an owner to suffer a *permanent physical invasion*, however minor.¹³ The second applies to regulations that *completely deprive an owner of all economically beneficial uses* in which the government must pay just compensation for these total regulatory takings.¹⁴

Putative regulatory takings that fall outside of these two narrow categories are scrutinized under *Penn Central* factors.¹⁵ These factors, although not determinative, consider: (1) the economic impact of the regulation on the claimant and, in particular, the extent to which the regulation has interfered with distinct investment-backed expectations and (2) the character of the governmental action (e.g., whether it amounts to physical invasion or merely affects property interests through a public program that adjusts the benefits and burdens of economic life to promote the common good).¹⁶ In short, a *Penn Central* test greatly turns on the *magnitude* of a regulation’s economic impact and the *degree* to which it interferes with legitimate property interests.¹⁷

Misapplication of *Agins*’ “Substantially Advances” Language by the Ninth Circuit

The Court concluded that the Ninth Circuit misapplied language taken from the Court’s decision in *Agins v. City of Tiburon*. The Court began its analysis by describing the context of its decision in *Agins*.¹⁸ The Court focused on the passage in *Agins* on which the Ninth Circuit based its decision: “the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”¹⁹ Writing for the majority, Justice O’Connor explained that because the phrase is written in the disjunctive, the language “has been read to announce a stand-alone regulatory takings test that is wholly independent of the *Penn Central* or any other test.”²⁰ Although courts have often used the *Agins*

“substantially advances” test, the Court rendered it a due process test inapplicable to determining whether a state’s taking of property is constitutionally valid.²¹

The Court’s historical review of *Agins*’ origin revealed that the Court, at that time, had not reviewed a challenge to zoning regulations in a number of years.²² Therefore, its reliance on two older due process cases—*Nectow v. Cambridge*, 277 U.S. 183 (1928) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which involved city zoning ordinances where the plaintiffs complained that the ordinances deprived them of due process of law under the Fourteenth Amendment—was understandable.²³ *Euclid*, cited in *Nectow*, declared that “a municipal zoning ordinance would survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’”²⁴

The Court also noted two other reasons for the commingling of due process and takings standards in *Agins*.²⁵ *Penn Central*, in dicta, stated that “it is implicit in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow*.”²⁶ Additionally, the Court recognized that, at the time that *Agins* was decided, “there had been history of referring to deprivations of property without due process of law as ‘takings’ . . . and the Court had yet to clarify whether ‘regulatory takings’ claims were properly cognizable under the Takings Clause or the Due Process Clause”²⁷

“Substantially Advances” Called “Regrettably Imprecise”

Notwithstanding appearance of the “substantially advances” language in a number of decisions, the Court concluded that the language was “regrettably imprecise.”²⁸ However, it admitted that the means-ends nature of the test, which asks whether the challenged regulation is ultimately effective in achieving a public purpose, may be appropriate when discerning whether a regulation is so arbitrary or irrational that it violates the Due Process Clause.²⁹

The Court discussed shortcomings of a “substantially advances” test as a takings standard.³⁰ It stated that the

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

¹⁴*Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

¹⁵*Id.* (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at *9. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), involved a challenge to municipal zoning ordinances in which the plaintiff alleged a facial taking.

¹⁹*Lingle* at *9 (internal quotations omitted).

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* (punctuation omitted).

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at *10.

test failed to reveal: (1) anything about the magnitude or character of the regulatory burden, or (2) how the burden is distributed among property owners.³¹ While dismissing Chevron's argument that the regulatory burden should be borne by the public as being misplaced, the Court went on to illustrate the breadth of irrational results that could occur were the "substantially advances" test regularly applied to takings determinations:

A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.³²

In the Court's view, application of the "substantially advances" test would cause "serious practical difficulties."³³ The Court reasoned that since the test could be read to demand heightened means-ends review of virtually any private property regulation, it could require courts to scrutinize the efficacy of a vast number of state and federal regulations.³⁴ Not only would courts be ill-suited for such tasks, but the practice would effectively empower courts over the wisdom of legislators and agency officials by substituting its own predictive judgements.³⁵

³¹*Id.*

³²*Id.* (emphasis in original). The Court continued:

[A]n inquiry [into the regulation's underlying validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Id. (citation omitted, emphasis in original).

³³*Id.* at *11.

³⁴*Id.*

³⁵*Id.*

Court Rejects Chevron's Argument

The Court rejected Chevron's argument that the Hawaii act was invalid because it did not "substantially advance" legitimate state interests.³⁶ First, the Court stated that it was unclear how significantly Hawaii's rent cap burdened Chevron's property rights.³⁷ The Court observed that: (1) the parties stipulated that the cap would reduce Chevron's aggregate rental income on eleven of its sixty-four lessee-dealer stations by approximately \$207,000 per year, but that the oil company still expected to receive a return on its investment in those stations that satisfy any constitutional standard, and (2) Chevron would recoup any reductions in rent by raising wholesale gasoline prices.³⁸ The Court identified the crux of Chevron's argument—that the Act 257 rent caps would not protect consumers from high gasoline prices.³⁹ According to the Court, this argument fails to sound under the Takings Clause and illustrates that Chevron is more interested in an injunction against the regulation's enforcement than in compensation for a taking of its property.⁴⁰

The Court rejected Chevron's argument that the Hawaii act was invalid because it did not "substantially advance" legitimate state interests.

Conclusion

The Court determined that its decision in *Lingle* would not disturb any of its prior decisions because it has never found a compensable taking based on a "substantially advances" inquiry.⁴¹ In most instances, the Court noted, the test was merely assumed to be valid when referenced in dicta.⁴²

Ultimately, the Court held that the "substantially advances" test is not a valid takings test and has no place within takings jurisprudence.⁴³ ■

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at *12.

⁴²*Id.* (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and other decisions).

⁴³*Id.* at *14.

Settlement Reached in Enhanced Voucher Class Action

A federal district court has approved a proposed settlement between the Department of Housing and Urban Development (HUD) and tenants in the nationwide class action challenging HUD's failure properly to adjust voucher subsidies provided after certain mortgage prepayments during the late 1990s. *Taylor v. Jackson*, No. 02-CV-1120AA (D. Ore. filed 2002). HUD recently issued a notice advising public housing authorities (PHAs) of the proposed settlement,¹ which the court recently approved on May 16, 2005. The settlement requires PHAs to identify tenants who should have received subsidy adjustments and provide them with lump-sum reimbursements or rent credits.

Background on the Case

Taylor challenged HUD's failure to adjust voucher payment standards for certain tenants residing in certain HUD-subsidized properties prepaid during the period between Fiscal Years (FYs) 1997-1999. The named plaintiffs, tenants of prepaid properties in San Diego and Portland, represented a class of affected tenants who (1) received so-called "preservation vouchers" to subsidize the new higher post-prepayment rents, but (2) were then denied additional subsidy increases to cover *subsequent* rent increases at the property, levied after one year from the prepayment that triggered their voucher eligibility. The named plaintiffs sought to represent a class of all tenants nationwide harmed by HUD's failure to authorize public housing authorities (PHAs) to make these additional subsidy payments.

Plaintiffs' complaint under the Administrative Procedure Act had sought injunctive relief ordering restitution of those rent increases paid by tenants under HUD policies, which should have instead been covered by additional federal subsidies, as the tenants contend was required by the appropriations acts authorizing their tenant protection vouchers. Upon conversion, Congress had authorized HUD to issue tenant-based assistance to local PHAs to provide rental assistance for eligible tenants then in residence, to cover the new higher rents and thus enable them to remain in their homes.² One of the primary benefits

of these special vouchers (now called enhanced vouchers) over regular vouchers is the subsidy level: PHAs were obligated to make assistance payments to owners at any amount determined reasonable under market rent comparables, without limitation by the PHA's ordinary voucher payment standard.

In 1998, HUD issued a policy notice governing PHAs' administration of these tenant protection vouchers that limited the enhanced payment standard to the first rent increase levied by the owner during the first year after prepayment.³ Under that policy, any other rent increases levied by the owner were the tenants' responsibility: "the family must decide whether to move to a less expensive unit or pay for the increase in rent out of pocket." These tenant payments were in addition to the regular tenant voucher contribution of 30% of the tenants' adjusted income.

In *Taylor*, the tenants claimed that HUD's policy was contrary to the language of the various HUD appropriations laws providing tenant-based assistance upon conversion that were in effect from 1997 to 1999. One court had already so held, with respect to tenants in one Minnesota development.⁵ When HUD refused to correct its policy, Congress in late 1999 enacted a statutory clarification.⁶ Its legislative history plainly indicates that, in enacting the previous protections, Congress intended to "cover initial rent increases as well as subsequent rent increases, where the rent is reasonable according to the public housing authority," specifically contradicting HUD's interpretation.⁷

After Congress enacted the explicit clarifying language, HUD issued another notice to implement it, instructing PHAs to cover future rent increases.⁸ However, HUD's notice continued to ignore Congress' express intent by only providing coverage for prospective rent increases and refusing to cover any earlier rent increases improperly charged to tenants since 1997.

¹Posting of Class Action Notice (*Taylor vs. Jackson*, Civil Action No. 02-cv-1120AA)—Fairness Hearing for Proposed Settlement of Litigation Concerning Enhanced Vouchers Provided in Connection with Preservation Prepayments that Occurred in Federal Fiscal Years (FYs) 1997, 1998, and 1999, PIH 2005-10 (Mar. 23, 2005), available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

²Starting in 1996, Congress first provided these vouchers only to cover tenants in HUD-subsidized properties when owners prepaid the subsidized loans. Pub. L. No. 104-204, 110 Stat. 2874 (1996). Congress extended eligibility to Section 8 "opt-outs" and other eligibility events when it enacted unified enhanced voucher authority in October of 1999, codified at 42 U.S.C.A. § 1437f(t) (West 2003).

³Tenant-Based Rental Vouchers or Certificates for Eligible Residents of Preservation Eligible Projects Approved for Prepayment of the Mortgage or Voluntary Termination of the Mortgage Insurance in Federal FY 1998, PIH 98-19 (Apr. 3, 1998). HUD reiterated this policy in 1999. Tenant-Based Rental Vouchers for Eligible Residents of Preservation Eligible Projects Approved for Prepayment of the Mortgage or Voluntary Termination of the Mortgage Insurance in Federal FY 1999, PIH 99-16 (Mar. 12, 1999).

⁴Tenant-Based Rental Vouchers or Certificates for Eligible Residents of Preservation Eligible Projects Approved for Prepayment of the Mortgage or Voluntary Termination of the Mortgage Insurance in Federal FY 1998, PIH 98-19 (Apr. 3, 1998).

⁵215 Alliance v. Cuomo, 61 F. Supp. 2d 879 (D. Minn. 1999). See also NHLP, *Minnesota Section 8 Tenants Win Major Preservation Victory*, 29 Hous. L. Bull. 161, 161 (1999).

⁶Pub. L. No. 106-74, § 538(a), 113 Stat. 1122 (Oct. 20, 1999) (codified at 42 U.S.C. § 1437f(t)).

⁷H.R. Rep. 106-286, 106th Cong., 1st Sess., at 22 (Aug. 3, 1999).

⁸Section 8 Tenant-based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions in Federal Fiscal Year (FY) 2000, Policy and Processing Guidance, PIH 2000-09 (Mar. 7, 2000).

Because of this 1999 clarification, the only prepayment voucher tenants affected are those from FYs 1997-1999. Tenants who received a preservation voucher and remained in place should have had their assistance converted to an "enhanced voucher" at their first annual recertification following the enactment of the enhanced voucher statute on October 20, 1999, thus terminating their harm. The *Taylor* settlement does *not* affect (1) tenants who received enhanced vouchers as a result of Section 8 opt-outs; or (2) tenants who moved after receiving their "preservation voucher" but prior to such a subsequent rent increase.

After tenants unsuccessfully sought corrective action by HUD, suit was filed. The named plaintiffs had experienced various rent increases that were not compensated by subsidy adjustments—the improper rent increases ranged from a total of \$500 to \$700 during the affected period. Plaintiffs' counsel estimated that 620 properties containing almost 60,000 units were covered by the policy, with some undetermined lesser number that experienced a subsequent rent increase and improper subsidy determinations.

Shortly after the complaint was filed, HUD filed a motion to dismiss on grounds that the restitution sought by plaintiffs was barred by sovereign immunity. Despite the explicit waiver of sovereign immunity in the Administrative Procedures Act for relief "other than money damages," the court granted HUD's motion in a ruling dated June 6, 2003. It reasoned that plaintiffs' reimbursement claims are claims for substitute relief and not restitution within the APA's waiver, distinguishing other cases⁹ because voucher payments would be made not directly by HUD, but through PHAs.

Settlement Terms

Because the court had granted HUD's motion, plaintiffs negotiated a consent decree with HUD, which has now received preliminary and final approval from the court.¹⁰ HUD then issued its notice describing the proposed settlement.¹¹ Attached to HUD's notice is the Notice of Class Certification and Proposed Class Settlement, as approved by the court. By now, PHAs should have posted notice of the proposed settlement at a public place in their offices and distributed it to managers of affected properties in their jurisdiction, with a request to post it in the common area.

The settlement requires HUD to issue a second specific directive to all PHAs,¹² which in turn requires each PHA to identify those class beneficiaries still receiving voucher assistance no later than each tenant's next annual recertification, and pay their claims for reimbursement through lump sums or rent credits. Former preservation voucher tenants seeking a determination of eligibility would have to apply to the PHA that issued their preservation voucher for an eligibility determination and, if eligible, the PHA must pay the additional benefits due through a lump sum.

Local housing advocates can help affected tenants by making sure that HUD and PHAs follow the terms of the settlement.

Local housing advocates can help affected tenants by making sure that HUD and PHAs follow the terms of the settlement. A Web site¹³ will soon be operative so that all the information needed by advocates and claimants is in one place.¹⁴ The first step will be for advocates to review the best available list of affected properties, to see if there are local properties with tenants affected. Attachment B to HUD's Notice PIH 2005-10 is a list of properties whose tenants received preservation vouchers in FYs 1997-1999, sorted by project name, but the exact location of each property is often unspecified. Plaintiffs' counsel is developing its own list of affected properties by city and state, based on other data,¹⁵ to help advocates identify affected properties in specified states or cities.

However, the fact that a property received preservation vouchers during the applicable period will not alone establish tenant eligibility for reimbursements. There must have also been a second rent increase which was not covered by increased voucher subsidy payments. This second rent increase will probably have to be established by making an inquiry of the tenants, PHA and/or project

¹²Housing Choice Voucher Program—Enhanced Vouchers—Adjustment of Voucher Housing Assistance Payments for Certain Families that Received "Preservation" Voucher Assistance as the Result of an Owner Prepayment or Voluntary Termination of Mortgage Insurance for a Preservation Eligible Property in Federal Fiscal Year (FY) 1997, FY 1998, and FY 1999, PIH—(undated draft) [hereinafter Draft Notice] available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

¹³<http://www.hud-enhanced-vouchers.org>.

¹⁴For the time being, the settlement documents mentioned below may be accessed without a password from NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

¹⁵The list will be posted on NHLP's Web site at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>.

⁹*Zellous v. Broadhead Assocs.*, 906 F.2d 94 (3d Cir. 1990).

¹⁰The settlement received preliminary approval on February 18, 2005, and is available at <http://www.nhlp.org/html/pres/casedocs.cfm?id=800030>. Final approval was given May 16, 2005.

¹¹See note 1, *supra*.

management. PHAs should know because voucher owners must notify the PHA of rent increases.¹⁶

Under the draft notice, a PHA may only make payments or credits to the extent that it has sufficient budget authority available under its ACC, and cannot make any payments or adjustments if they would “jeopardize continued assistance for other current voucher participants.”¹⁷ Payments can be delayed until funds become available. This exception should thus be limited to those rare situations where making payments would require a current voucher family to be terminated.¹⁸

The *Taylor* settlement received final approval from the district court in Portland at the fairness hearing on May 16, 2005.

Lead counsel for plaintiffs is Micky Ryan of the Oregon Law Center in Portland (available by telephone at 800-898-5594, x147), assisted by the Housing Preservation Project in Minnesota, the private firms of Miller Nash LLP in Portland, and Ross, Dixon & Bell in San Diego, and the National Housing Law Project. ■

¹⁶See 24 C.F.R. § 982.308(g)(4) (2004).

¹⁷See Draft Notice, *supra* note 12, at 6-7.

¹⁸*Id.* Even if a PHA has no immediately available funding to pay reimbursements (counting reserves), the draft directive’s language (“reserves resulting from turnover”) suggests that funds freed up upon voucher turnover must be used for this purpose. For information on each PHA’s current funding levels, see the Center on Budget and Policy Priorities Web site, <http://www.cbpp.org>, or the Jan. 21, 2005, letter sent by HUD to each PHA. Information about reserves must be obtained locally from each PHA.

Recent Cases

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

Eviction — Low-Income Housing Tax Credit Program; Housing Choice Voucher Program

Vienna Forest Apts. v. Passemore, 2005 WL 1131742 (Ohio Ct. App. May 16, 2005). The Court of Appeals of Ohio affirmed a judgment of possession in favor Plaintiff-Appellee Low-Income Housing Tax Credit (LIHTC) project owner. Plaintiff-Appellee brought what appears to be a no-cause eviction action against pro-se Defendant-Appellant Housing Choice Voucher tenant. The court rejected Defendant-Appellant’s argument that he had a constitutionally protected interest in continued occupancy, as well as various state law arguments. The court did not address, and Defendant-Appellant apparently did not raise, LIHTC good cause eviction requirements imposed by 26 U.S.C. § 42(h)(6).

Eviction — Public Housing; One-Strike and Related Policies

Lowery v. Hous. Auth. of the City of Terre Haute, 826 N.E.2d 685 (Ind. Ct. App. 2005). Defendant-Appellant disabled public housing tenant appealed an order of eviction obtained by Plaintiff-Appellee public housing authority in a small claims action. Plaintiff-Appellee sought to evict Defendant-Appellant based on Defendant-Appellant’s decision to allow his eighteen-year-old stepson to stay in his public housing unit for a period of approximately one month. Plaintiff-Appellee had forbidden Defendant-Appellant from allowing the stepson to reside in Defendant-Appellant’s unit or to enter on to the public housing site. The stepson had purportedly “caused a disturbance” on two occasions at an elementary school adjacent to the public housing site, but does not appear to have been charged with or convicted of any crime. When the stepson remained, Plaintiff-Appellee terminated Defendant-Appellant’s tenancy and sought eviction. The court of appeals noted, *inter alia*,

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

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

that in light of the absence of evidence of drug-related criminal activity and the likely physical inability of Defendant-Appellant to control his stepson, it was unclear whether the “strict liability” implications of *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), were triggered. Nonetheless, the court affirmed the eviction order, referring to a lease provision obligating Defendant-Appellant “[n]ot to give accommodation to boarders or lodgers.”

Fair Housing—Disability

Bentley v. Peace & Quiet Realty 2 LLC, 2005 WL 1023279 (E.D.N.Y. May 3, 2005). In denying a motion to dismiss for lack of subject matter jurisdiction, the United States District Court for the Eastern District of New York held that a requested “swap” of an upper floor apartment for a ground floor apartment by a disabled tenant who had difficulty climbing stairs was within the scope of potential reasonable accommodations contemplated by the Fair Housing Amendments Act, 42 U.S.C. § 3604(f). The court further held that the fact that the “swap” did not include a rent increase did not automatically remove it from the scope of the act.

Fair Housing — Disability; HUD-Insured Mortgages — Foreclosure

Capitol Park Ltd. Divid. Hous. Assoc. v. Jackson, 2005 WL 1140682 (N.D. Ohio May 13, 2005). Plaintiff Section 221(d)(4) project owner filed suit against Defendants Secretary of Housing and Urban Development and management company regarding tenant admissions to the Section 221(d)(4) project. Plaintiff alleged that the application of admissions preferences had led to the “warehousing” of disabled persons at the project in violation of federal law, including the Fair Housing Act, 42 U.S.C. § 3604(f). Plaintiff alleged that, because of this illegal conduct, it refused to accept a Mark-to-Market renewal of the project’s project-based Section 8 subsidy contract. This refusal left Plaintiff unable to make adequate mortgage payments for the project and led to Defendant HUD’s eventual initiation of foreclosure proceedings. Plaintiff moved for interim injunctive relief to prevent foreclosure and Plaintiff and Defendant management company cross-moved for summary judgment. Citing, *inter alia*, specific statutory authorization for admissions preferences for disabled persons, the district court denied Plaintiff’s motions and granted Defendant management company’s motion.

Fair Housing — Gender; Fair Housing — Generally

Richards v. Bono, 2005 WL 1065141 (M.D. Fla. May 2, 2005). In this case of first impression in the Eleventh Circuit,

the United States District Court for the Middle District of Florida held that Section 804(b) of the Fair Housing Act, 42 U.S.C. § 3604(b), prohibits gender discrimination, including sexual harassment, both in the acquisition of a dwelling and *after* the dwelling has been acquired.

Federal Courts — Private Right of Action; National Housing Act; Preemption — Federal

Forest Park II v. Hadley, 2005 WL 1214328 (8th Cir. May 24, 2005). Plaintiff-Appellant Section 236 project owner appealed, *inter alia*, the federal district court’s dismissal, after remand, of its 42 U.S.C. § 1983 claim challenging the validity of a state multifamily preservation notice statute. The Eighth Circuit affirmed the dismissal of the claim. The court concluded that support by Defendant-Appellee state and municipal agencies of litigation by tenants to prevent prepayment of the insured mortgage and other statements by Defendant-Appellees regarding the legality of the prepayment under state law did not constitute state action for the purposes of Section 1983.

Housing Choice Voucher Program — Termination

Riggins v. Lannert, 2005 WL 1106602 (N.Y. App. Div. May 9, 2005). Petitioner Housing Choice Voucher tenant sought review of Respondent public housing authority’s decision, after a hearing, to terminate Petitioner’s voucher assistance based on, *inter alia*, Petitioner’s failure to pay money owed Respondent under a repayment agreement. The Appellate Division of the Supreme Court of New York granted the petition and set aside the termination. The appellate division concluded that “the punishment of termination . . . was so disproportionate to the offenses as to be shocking to one’s sense of fairness” and remitted the matter to Respondent “for the imposition of a lesser penalty.” ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in May of 2005. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

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

HUD Federal Register Proposed Rules

70 Fed. Reg. 27,008 (May 16, 2005) Semiannual Regulatory Agenda

Summary: In accordance with Section 4(b) of Executive Order 12866, "Regulatory Planning and Review," as amended, HUD is publishing its agenda of regulations already issued or that are expected to be issued over the next several months. The agenda also includes rules currently in effect that are under review, and describes those regulations that may affect small entities as required by Section 602 of the Regulatory Flexibility Act. The purpose of publication of the agenda is to encourage more effective public participation in the regulatory process by providing the public with early information about pending regulatory activities.

70 Fed. Reg. 28,748 (May 18, 2005) Certification and Funding of State and Local Fair Housing Enforcement Agencies

Summary: This proposed rule revises and updates HUD's regulation implementing Section 810(f) of the federal Fair Housing Act. This regulation establishes the criteria for certification and decertification of state and local fair housing laws that are substantially equivalent to the federal Fair Housing Act. This regulation also revises the funding criteria for agencies participating in the Fair

Housing Assistance Program.
Comment Due Date: July 18, 2005.

HUD Federal Register Notices

70 Fed. Reg. 22,668 (May 2, 2005) Housing Counseling Program; Announcement of Funding Awards for Fiscal Year 2004

Summary: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a Super Notice of Funding Availability (NOFA) competition for funding of HUD-approved counseling agencies to provide counseling services. This announcement contains the names and addresses of the agencies selected for funding and the award amounts. Additionally, this announcement provides notice of an award given for Housing Counseling Training through a competition announced in a May 12, 2004, NOFA.

70 Fed. Reg. 23,676 (May 4, 2005) Notice of Funding Availability (NOFA) for the Enhancement of Public Housing HOPE VI Communities Through Mentoring Demonstration Program Grants

Summary: HOPE VI grantees are encouraged to work cooperatively with grassroots, faith-based and other community-based organizations as part of their Community and Supportive Services programs. This NOFA will provide additional funding to HOPE VI grantees to study the development of innovative supportive service delivery through grassroots, faith-based and other community-based organizations.

70 Fed. Reg. 25,845 (May 16, 2005) HUD Regional Offices: Changes in Titles and Change in Title to Certain Field Offices

Summary: This notice advises the public of changes that HUD has made to the titles of its ten Regional Offices, and to certain field offices. No changes in the functions or responsibilities of these offices have been made by HUD.

Effective Date: April 15, 2005.

70 Fed. Reg. 29,343 (May 20, 2005) America's Affordable Communities Initiative HUD's Initiative on Removal of Regulatory Barriers: Identification of HUD Regulations That Present Barriers to Affordable Housing

Summary: On November 25, 2003, HUD published a *Federal Register* notice seeking comments from HUD's program partners and participants, as well as other interested members of the public, on HUD regulations that address the production and rehabilitation of affordable housing and that present or appear to present barriers to the production and rehabilitation of affordable housing. The November 25, 2003, notice seeking public com-

¹http://www.access.gpo.gov/su_docs.

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

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

⁴<http://www.rdinit.usda.gov/regis>.

ment on regulatory barriers is one of several efforts being undertaken as part of America's Affordable Communities Initiative, a HUD initiative that focuses on removing regulatory barriers that impede the production or rehabilitation of affordable housing. This notice responds to the public comments that were submitted in response to the November 25, 2003, notice, and advises of actions taken by HUD since November 2003 to remove HUD regulatory barriers to affordable housing or increase flexibility in program administration of those HUD programs that address affordable housing.

RHS Federal Register Final Rule

70 Fed. Reg. 29,927 (May 25, 2005)

Updating of Designated Counties for Housing Application Packaging Grants

Summary: The Rural Housing Service is amending its regulations to update the list of designated counties for Housing Application Packaging Grants. Under Section 509 of the Housing Act of 1949, grants are provided to package housing applications for loans under sections 502, 504, 514, 515, and 524 and grants under Section 533 in colonias and designated under-served counties. The intended effect is to make eligible applicants, including public and private nonprofit organizations and state and local governments, aware of the new list of designated counties, which was based on the 2000 census data.

Effective Date: May 25, 2005.

RHS Federal Register Notice

70 Fed. Reg. 24,367 (May 9, 2005)

Notice of Funding Availability: Section 515 Multi-Family Housing Preservation Revolving Loan Fund (PRLF)

Demonstration Program

Summary: The Rural Housing Service (RHS) announces the availability of funds and the time frame to submit applications for loans to private nonprofit organizations, or such nonprofit organizations' affiliate loan funds and state housing finance agencies, to carry out a housing demonstration program to provide revolving loans for the preservation and revitalization of low-income multi-family housing. Housing that is assisted by this demonstration program must be financed by RHS through its multi-family housing loan program under Section 515 of the Housing Act of 1949. This demonstration program will be achieved through loans made to intermediaries that establish programs for the purpose of providing loans to ultimate recipients for the preservation and revitalization of Section 515 multi-family housing as affordable housing.

Date: August 8, 2005. ■

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