amount determination. The resident appeals may be filed with the National Appeals Division in accordance with regulations found at 7 C.F.R. Part 11. It is not clear from the notice whether tenants can, as part of the voucher payment determination, also appeal the rent comparability determination. It is also not clear whether other determinations, such as the determination that a unit may not meet the RD health and safety standards, are appealable by residents or landlords. Legally, voucher participants should be able to appeal any RD decision that denies, limits, or reduces any assistance under the program.[12]

Other Changes or Clarifications

The RD memorandum announces or reaffirms several other policies with respect to the voucher program. Specifically, it makes clear that the RD vouchers may not be used to purchase homes, as is authorized under the HUD Housing Choice Voucher program. It reaffirms the March 2006 Federal Register Notice that voucher payments may not be made retroactively to a period where the unit has not been inspected and approved by RD and a Housing Assistance Payment (HAP) contract has been signed with the owner. It also makes clear that the HAP payment amount may not exceed the rent charged at the property.

The memorandum announces that RD has hired two consultants. The first is The Signal Group, based in Portland, ME, to conduct rent comparability studies for the agency and thereby determine the market rent for the prepaid Section 515 developments. That comparable market rent is used to establish the upper limit of the voucher payment. It appears that the rent comparability study undertaken by The Signal Group is exclusively for RD's use and is treated confidentially.

The second consultant hired by RD is Quadel. The duties and activities of Quadel are not specified in the memorandum, which only states that Quadel will assist RD in delivering vouchers and monitoring the program.

Conclusion

The changes announced by RD to its voucher program are generally favorable to residents. The one exception is RD's failure to include the cost of utilities in the RD voucher subsidy calculation, something which adversely affects all voucher holders who have to pay their own utilities. It is, however, disturbing that RD is cavalierly proceeding to operate the program under the radar without publishing formal regulations and without allowing the public to comment on the manner in which the program is being administered. ■

[12] *See* 42 U.S.C. §1489(g).

Elderly Tenants Successfully Enforce Notice Requirements for Section 8 Opt-Out

A federal court in California has issued a preliminary injunction to block an owner from proceeding with threatened rent increases and evictions for nonpayment until it complies with federal statutory notice requirements to end participation in the project-based Section 8 program. *Park Village Apts. Tenants Ass'n v. Mortimer Howard Trust*, No. C 06-7389 SBA, 2007 WL 519038 (N.D.Ca., Feb. 14, 2007). This decision should be useful in cases where owners fail to provide the specific notices often required by federal or state law to convert housing to market-rate use. It should also help when owners, often with the blessing of the Department of Housing and Urban Development (HUD), seek to convert based upon a defective notice when one year has elapsed since it was issued.

Factual Background

Park Village is an eighty-four-unit complex for low-income seniors located in a stable neighborhood in Oakland, California, close to many commercial and social services. It was constructed under a conditional use permit permitting higher density and less parking so long as the property houses seniors for at least fifty years from 1978. The owner executed a project-based Section 8 contract with HUD for all of the units at initial rent-up, and the property has housed seniors ever since.

When the original term of the contract expired in 1999, the owner and HUD executed a five-year renewal until 2004. When that renewal then expired, another renewal contract was signed for a one-year term ending November of 2005, and the owner so informed the tenants.

As that one-year renewal approached its expiration, the owner engaged in negotiations with HUD's contract administrator for a two-year renewal contract at a slightly increased rent, pursuant to applicable rent adjustment rules. As those negotiations remained uncompleted, on the eve of the expiration in November of 2005, the owner sent a one-year notice to the tenants stating its intention to renew the contract. The 2004-05 contract then expired, and the tenants continued to pay the tenant contributions as if the Section 8 contract remained in place. Several weeks later, the contract administrator notified the owner that the rent increase had been approved, and tendered a proposed standard renewal contract and rent schedule.

The owner then expressed concern about certain language in the HUD form renewal contract, specifically the provision expressly acknowledging the possibility that enacted statutes might supercede the contract terms. The contract administrator stated that any such concerns should be expressed to HUD, since it lacked authority

to change any of HUD's forms. Several months later, the owner sought clarification from HUD on whether any statutes might affect the contract provisions. After another month passed, on March 6, 2006, the owner sent a notice to each tenant stating that the Section 8 contract had expired in November, and that each tenant must pay the full contract rent of $1192 or vacate the unit. A few days later, the owner sent another notice to the tenants stating that they owed an additional $12 monthly to cover a utility allowance formerly included in the housing assistance payments, which was not being paid by anyone while Section 8 assistance was not flowing.

Immediately after the owner's rent increase notices to the tenants, HUD responded to the owner's requests for clarifications twice about statutory changes, noting the few that existed (primarily income targeting requirements and definitions concerning "decent, safe and sanitary").

The owner then sent another letter to the tenants claiming that its earlier letters to the tenants satisfied the statutory notice requirements, or that the November 2005 contract expiration should be deemed notice. He also informed HUD that, while he was willing to negotiate a renewal contract, he was unwilling to submit to any arrangement that authorized grading concerning the physical conditions to determine contract compliance. Several weeks later, in April, HUD informed the owner that both the thirty-day rent-increase-or-vacate notice and the additional utility charge notice were illegal. In May, HUD sent the owner another letter essentially refusing to further negotiate the form contract provisions, and again informing him that the utility charge was illegal.

After five months passed, in October, the owner sent the tenants a ninety-day notice of termination, purportedly pursuant to state law[1] for owners seeking to terminate various Section 8 subsidies, giving them the option to enter into a new lease at $1192 or vacate the unit. HUD responded by reiterating its offer to enter into a renewal contract that would provide assistance retroactive to November 2005 when the last contract expired, subject to the same terms proposed then under a form renewal contract.

Because the owner refused to rescind the March and October notices, the tenants filed suit.

The Tenants' Complaint

In November, the tenants filed an action in state court, alleging that the owner had violated both state and federal laws establishing the required notice for owners seeking to terminate project-based Section 8 contracts. California law[2] requires a one-year notice containing specified content at least one year prior to the proposed nonrenewal of the contract, as well as a six-month notice if the owner decides to proceed. The federal statute,[3] as implemented by HUD guidelines,[4] requires notice one year prior to the termination (which includes both the owner's nonrenewal as well as an expiration) stating the owner's intention to opt-out or renew the contract. The federal statute[5] also specifies remedies for the owner's failure to provide the notice, including prohibitions on the owner's collection of additional rent or evictions until one year after notice is given. An additional claim was based upon breach of the last project-based renewal contract, of which the tenants were third-party beneficiaries. The tenants sought injunctive and declaratory relief for these violations.

The City of Oakland filed a contemporaneous action alleging violations of the California notice law and local rent control ordinances.[6] Because the tenants' complaint involved a federal claim over which a federal court would have had original jurisdiction, the owner was entitled to remove the action to federal court,[7] and did so.[8]

The Court's Ruling

The tenants' motion for preliminary relief essentially sought the relief specified by federal law[9]—that the owner be prohibited from collecting additional rents and from evicting the tenants. Helpful in establishing the violation was the owner's failure to provide a notice stating its election to opt-out, as required by HUD's guidelines that are expressly authorized by the statute.

In response to the tenants' motion, the owner made two claims: first, that he intended to renew the contract and it was HUD's failure, not his; second, that he had "substantially complied" with the requirements. The court rejected the first argument, finding that regardless of any intent to refuse to renew, an expiration is a termination requiring notice, and notice was not given. A similar fate befell the substantial compliance claim, since unlike another case where a court refused to rely on a technical violation,[10] strict compliance would have generated no confusion.

[1]Cal. Civil Code § 1954.535.
[2]Cal. Gov't Code § 65863.10.
[3]42 U.S.C.A. § 1437f(c)(8)(A) (West Supp. 2006).
[4]HUD, *Section 8 Renewal Policy*, § 11-4.
[5]42 U.S.C.A. § 1437f(c)(8)(B)(West Supp. 2006).
[6]*City of Oakland v. Mortimer Howard Trust,* No. RG-06-296078 (Cal. Super. Ct., pending, May 2007).
[7]28 U.S.C. § 1441.
[8]Although the owner also removed the city's action to federal court, after assignment to the same judge as a related case, *City of Oakland v. Mortimer Howard Trust,* No. 06-7390 SBA (N.D. Cal.2006), it was remanded to state court, as it involved no federal claim.
[9]42 U.S.C. § 1437f(c)(8)(B) provides:

> In the event the owner does not provide the notice required, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

[10]*Owens v. Charleston Housing Authority,* 336 F.Supp.2d 934, 940-41 (E.D.Mo.2004) (excusing technical noncompliance of Section 8 opt-out notice's failure to contain certification re tenants' ability to remain with replacement vouchers where project was to be demolished).

The court evaluated each of the owner's purported notices, and found none of them sufficient. None of them clearly stated the owner's intention concerning renewal or opt-out one year in advance of the proposed termination. Because of the tenants' substantial likelihood of success on this federal claim, the court found it unnecessary to decide whether the state requirements were satisfied.

Finally, the court reviewed the issue of whether the tenants faced irreparable injury from the violations, if not enjoined. The owner sought to counter any allegations of harm by pointing to the vouchers that would be made available for alternative housing. Since the owner had made clear his desire to be free of HUD entanglement or any role in providing low-income housing, the court found sufficient harm in light of plaintiffs' status as seniors on fixed low incomes, many with health problems, and the inability of damages to remedy the notice violations.

This ruling, that the statutory clock only begins upon the provision of legally sufficient notice, should prove especially useful.

For essentially the same reasons, the court waived any bond requirement.

One final aspect of the court's ruling is especially noteworthy. The owner had sought to limit the effectiveness of the injunction to March 6, 2007, contending that the tenants received notice of his intent not to renew in the March 6, 2006, letter stating that the Section 8 contract had expired and demanding rents of $1192. The court said that because that letter did not meet the statutory requirements, it did not effectively "start the clock."[11] Because both owners and even sometimes HUD contend that the statute's one-year requirement begins with the service of a defective notice, this ruling, that the statutory clock only begins upon the provision of legally sufficient notice, should prove especially useful.

The owner has appealed to the United States Court of Appeals for the Ninth Circuit,[12] while settlement discussions between the parties continue.

The Oakland rent board has also issued a decision preventing the owner from seeking any rent higher than those collected as the tenants' share under the expired housing assistance contract.

The tenants were represented by Bay Area Legal Aid, with assistance from the National Housing Law Project as co-counsel. ■

[11]*Park Village Apts. Tenants Ass'n*, 2007 WL 519038 at *8.

[12]*Park Village Apts. Tenants Ass'n v. Mortimer Howard Trust*, No. 07-15382 (9th Cir., pending May 2007).

Court Refuses Eviction Based on Children's Disability-Related Conduct

By Liam Garland*

A Ventura, California, trial court recently found in favor of a tenant who was being evicted on the bases of his children's outbursts, excessive noise, and behavior perceived by neighbors as off-putting. That landlord, the court found, was required to waive past breaches of the lease where those breaches were causally related to the mental disabilities of the tenant's children, and posed no direct threat to other tenants. *Essex Management Corp. v. McAlister*, No. CIV 245572, 2007 Extra LEXIS 4 (Cal. Super. Ct., Ventura Co., Feb. 15, 2007).

This thorough ten-page written decision is the first in several years (and possibly the first ever in California) to explore the interplay between the right of renters with mental disabilities to reasonable accommodation under the federal Fair Housing Act when their disability-related conduct is the cause for the eviction.[1] Drawing heavily on other cases addressing similar issues, the court avoided the shallow analysis often found in other opinions.

The court described the challenges posed by the tenant family's continued tenancy:

> At least by the summer of 2006, life in the McAlister apartment was, at times, tumultuous. Yelling, screaming and banging were frequently heard by neighbors coming from within McAlister's unit, sometimes after 10:30 p.m. McAlister was witnessed angrily pursuing his son in common areas of the complex. Each of the children exhibited conduct to the neighbors and their children demonstrating an intention to hurt themselves. Some of the neighbors were fearful of McAlister and his children. The residents of two units expressed an intention to leave the complex, unless the McAlisters were removed.[2]

This behavior prompted plaintiff, a large property management company serving California, Oregon, and

* This article was written by Liam Garland, who represented the McAlisters in the eviction proceedings. Mr. Garland is the litigation director for the Housing Rights Center in Los Angeles, CA.

[1]For more information on the topic of reasonable accommodation for people with mental disabilities, see Garland, *Fairer Housing for People with Disabilities*, 40 Clearinghouse Review 503 (Jan./Feb. 2007), and Bazelon Center for Mental Health Law, Fair Housing Information Sheet #8, "Reasonable Accommodations for Tenant Posing a 'Direct Threat' to Others," available at http://www.bazelon.org/issues/housing/infosheets/fhinfosheet8.html.

[2]*Essex Management Corp. v. McAlister*, No. CIV 245572, 2007 Extra LEXIS 4 at *5 (Cal. Super. Ct., Ventura Co., Feb. 15, 2007) (hereinafter *Essex).*