



Housing Law Bulletin

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HUD ISSUES FINAL RULE IMPLEMENTING THE SECTION 8 HOMEOWNERSHIP PROGRAM

Introduction

On September 12, 2000, the Department of Housing and Urban Development (HUD) issued its final rule to permit the use of Section 8 voucher assistance for homeownership purposes. Under the new regulation, public housing authorities (PHAs) may decide to allow Section 8 voucher holders to use federal assistance to purchase a single family home,

manufactured home, condominium or interest in a cooperative. Since HUD will not provide any additional funding for this program, PHAs are not required to offer this assistance to voucher holders. In certain “hot” rental markets, however, the Section 8 Homeownership Program may provide some relief for tenants who can no longer afford high rents but can still afford a mortgage payment. For areas faced with an increasing lack of landlord participation in the Section 8 program (and therefore a growing lack of rental units), homeownership programs can also create a larger selection of housing units from which Section 8 recipients can choose. Undeniably, the program further offers lower-income families with an opportunity, on a voluntary level, to achieve their homeownership dream.

Although HUD regulations set forth mandatory requirements for PHAs implementing a Section 8 homeownership program, HUD also affords PHAs a large amount of discretion to design their own program to meet local needs. The final HUD regulations pose many issues and conflicts affecting poor families which are caused, in part, by HUD’s effort to transfer substantial control to local jurisdictions to develop their own programs. Thus, it is imperative that the lower-income community and its advocates ensure that the needs and rights of potential Section 8 homeowners are considered and preserved. In fact, since the adoption of a homeownership program involves amending both the PHA Annual Plan and the Administrative Plan, advocates have substantial opportunities to become involved in both the development and implementation of local Section 8 homeownership programs.

This article discusses the final regulations and what is required by PHAs, Section 8 voucher holders and homeowners using Section 8 assistance. It describes the mandatory, statutory and regulatory requirements that PHAs must adopt within its Homeownership Program and further provides an overview of other elements the PHA must consider. A future article will examine the problematic features of the

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2000 LALSHAC MEETING AND HOUSING TRAINING DETAILS

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homeownership program as well as provide details of how to design a successful Section 8 Homeownership Program.

Statutory and Regulatory Framework

With the enactment of the Quality Housing and Work Responsibility Act of 1998 (QHWRA)¹, Congress aspired to promote affordable housing for low-income families by, among other things, providing more flexibility to PHAs and creating incentives to, and economic opportunities for, federally-assisted tenants who work and become self-sufficient.² In keeping with this goal, Congress created a *Homeownership Option* for families receiving Section 8 tenant-based assistance.³ On September 12, 2000, HUD issued its final rule implementing the Section 8 Homeownership Program, allowing PHAs to permit Section 8 recipients to convert their voucher rental assistance to homeownership assistance in order to purchase a home.⁴ The final rule is effective October 12, 2000.

HUD published its proposed Section 8 Homeownership Program rule for public comment on April 30, 1999.⁵ Although the final rule adopts much of the proposed rule, there were significant changes made to the final regulations in response to public comment.⁶ As discussed below, the final rule extends the maximum term of homeownership assistance, adds more housing types that can be purchased with homeownership assistance, and increases the eligible household members who may meet the mandatory income and work requirements. The new regulations also require the PHA to recapture a percentage of the homeownership assistance if the home is sold or the mortgage refinanced during the first 10 years of ownership.

The regulations include several mandatory, non-discretionary program elements that must be incorporated into a local homeownership program if such a program is adopted by the PHA. In addition, HUD grants the PHA substantial discretion in developing its own program requirements and in determining the eligibility requirements of participating families. Accordingly, it is imperative that Section 8 recipients, tenant associations and housing advocates participate on a local level in the drafting and implementation of the Section 8 Homeownership Program as well as the required policy changes to the Administrative and Annual Plans.

¹Public Law 105-276, Title V, § 501 *et seq.*, 112 Stat. 2518 (approved Oct. 21, 1998). The QHWRA amended the *United States Housing Act of 1937*, 42 U.S.C.A. §§ 1437 *et seq.*

²*Id.*, Title V, § 502(b), 112 Stat. 2520 (Findings and Purposes).

³The homeownership option is authorized under § 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437f(y)(1)(B), as amended by § 555 of the QHWRA.

⁴24 C.F.R. Parts 5, 903 and 982; 65 Fed. Reg. 55,134 (Sept.12, 2000).

⁵64 Fed. Reg. 23,488 (Apr. 30, 1999).

⁶65 Fed. Reg. at 55,143.

Implementing the Section 8 Homeownership Program

It is solely the decision of the PHA to allow Section 8 voucher recipients to use their federal assistance for homeownership. Financially, there is little incentive for the PHA to adopt a homeownership program. HUD does not designate or provide any additional Section 8 administrative funding for homeownership vouchers. Rather, the PHA must use its tenant-based program funding received under the annual contributions contract between the PHA and HUD to fund any homeownership program.⁷ Furthermore, the PHA is not allowed to set aside Section 8 program funding or create special waiting list positions for homeownership vouchers. As a result, HUD provides no inherent incentives for PHAs to adopt a Section 8 Homeownership Program. Accordingly, homeownership programs will most likely be implemented by PHAs which understand, because of demonstrated need and strong advocacy efforts by tenants and their representatives, that a voluntary homeownership option is in the best interest of Section 8 tenants.

To implement the program, the PHA must include a statement of the homeownership program it administers, or intends to administer, in its Annual Plan.⁸ The governing body of the PHA must conduct a public hearing, with appropriate notice and publication, prior to adoption of the Annual Plan.⁹ Some PHAs have already stated such intentions to develop a homeownership program (by checking the applicable box in the PHA annual plan).¹⁰ If not, the PHA may amend or modify its Annual Plan at any time by adopting the amendment or modification at an open public meeting of its governing body and by obtaining HUD approval prior to implementation.¹¹

If the PHA elects to provide a homeownership program, the PHA must demonstrate in its Annual Plan its capacity to operate a successful program. The PHA can demonstrate this capacity by any of the following methods:

- requiring each family to pay a minimum downpayment of at least 3 percent of the purchase price and further

⁷*Id.*

⁸See generally 24 C.F.R. § 903.7(k). PHAs permitted to submit "streamlined" Annual Plans (i.e. high performing PHAs, "untroubled" PHAs with less than 250 public housing units and PHAs that only administer tenant-based assistance and do not operate or own public housing) are only required to include a statement of any homeownership program they administer under § 8(y) of the *Housing Act* in their streamlined plan. 24 C.F.R. §§ 903.11(b) and (c)(1). However, information must be provided in all streamlined plans regarding how the public may reasonably obtain policies contained in the standard Annual Plan that are excluded from the streamlined submissions to HUD. *Id.*

⁹24 C.F.R. §§ 903.17(a) and (b).

¹⁰The first Annual Plan must be submitted to HUD 75 days in advance of the PHA fiscal year in which it receives federal FY 2000 funds and continues annually thereafter. 24 C.F.R. § 903.3(b); see also HUD Notice PIH 2000-43 (HA) (Sept. 18, 2000) (extending Notices PIH 99-33 (HA) and PIH 99-51 (HA).

¹¹24 C.F.R. § 903.21.

requiring that at least 1 percent of such purchase price comes from the family's personal resources;¹² or

- requiring that the financing for the home purchase is provided, insured or guaranteed by the state or federal government (including FHA insurance), complies with secondary mortgage market underwriting requirements, or complies with generally accepted private sector underwriting standards; or
- otherwise demonstrating in its Annual Plan that it has the capacity, or will acquire the capacity, to successfully operate a Section 8 homeownership program.¹³

The PHA must also establish its own local homeownership policies and describe these policies in its administrative plan.¹⁴ Such mandatory policies include a determination of the amount of homeownership expenses to be allowed by the PHA.¹⁵ The PHA must also describe its policy for disbursing the homeownership assistance payments—either directly to the family or to the lender on behalf of the family—in its administrative plan.¹⁶

In addition to mandatory requirements imposed by Congress and HUD, the regulations permit the PHA to adopt any additional policies it desires to implement its program and to meet local community needs. Discretionary policies adopted by the PHA must be incorporated into the PHA's administrative plan. Such policies include:

- the maximum term the family is provided to locate and purchase a home;¹⁷
- any purchasing (including downpayment), financing and mortgage payment requirements;¹⁸

¹²30 HOUS. L. BULL. 119 (Aug. 2000) erroneously states that the final regulations establish a minimum downpayment requirement. Please note, however, that a mandatory downpayment option is optional and is not required to be implemented by the PHA.

¹³24 C.F.R. § 982.625(d). For example, the PHA may decide to partner or contract with existing experienced nonprofit organizations for consultation, implementation or administration of the homeownership program. See HUD response to *Comments Regarding the Role of Non-Profits*, 65 Fed. Reg. at 55,145.

¹⁴§ 982.626(b).

¹⁵§ 982.635(c). The regulation sets forth permissible amounts that may be covered as homeownership expenses, including mortgage debt, taxes and assessments, and repair and maintenance, for both homeowners and for owners of cooperative and condominium units. In addition, the final rule clarifies that, if the PHA determines that such an allowance is needed as a reasonable accommodation, eligible homeownership expenses may include the cost for financing to make a home accessible for a member of the family who has a disability. 24 C.F.R. § 982.635(c)(2)(vii) and (c)(3)(vii).

¹⁶§ 982.635(d).

¹⁷§ 982.629(a).

¹⁸§ 982.632. The jurisdiction is permitted to use local or state Community Development Block Grant (CDBG) funds or other subsidized financing in conjunction with the Section 8 homeownership program. See *Overview of the Section 8 Homeownership Program*, 65 Fed. Reg. at 55,135.

- whether the family will be provided Section 8 rental assistance (or placed on the waiting list) if the purchase is not completed or if the family defaults on its mortgage;¹⁹ and
- the events that will trigger the PHA to prohibit the family to move to another home or to discontinue rental or homeownership assistance.²⁰

¹⁹§§ 982.629(c) and 982.638(d).

²⁰§§ 982.637(a), (c) and (d). Although the family receiving homeownership assistance is generally permitted to move and receive continued rental or homeownership assistance in accordance with voucher program requirements, the PHA may prohibit more than one move by the family during any one year period. § 982.637(a)(3).

PHA PLANS POSTED ON WEB

HUD has begun to post on its Web site approved public housing authority (PHA) Plans. Nearly a year ago, HUD made a commitment to electronically post all approved PHA Plans (64 Fed. Reg. 56,843, 56,844 (October 21, 2000)). It appears that HUD is substantially behind schedule in these postings. A draft internal HUD guidance states that the HUD Public Housing Director is required to simultaneously notify the Public and Indian Housing (PIH) Web manager of the approval of a PHA plan and that the plans are then to be posted "on the external Plan Web site between five to 10 business days from the date of the Web master's receipt of the approval notification." Field Office Guidelines on Review of PHA Plans from PHAs with Fiscal Years beginning 1/1200 and 4/1/200 (Draft 12/3/99), page 11.

There does not appear to be any logic as to which plans are posted. As of September, for some states there are no plans posted where as in other states there may be nearly 50 plans posted. For all PHAs, the Template is posted. For others there is also posted information such as the Admissions and Continued Occupancy Plan (ACOP) for public housing and the Section 8 Administrative Plan, tenant and RAB comments, and the PHA's responses. Most of the posted plans are for smaller PHAs but not all.

Check to see what has been posted for your jurisdiction. The link is hud.gov/pih/pha/plans/phaps-approvedplans.html. A review of the approved plans should assist with an evaluation of a PHAs second-year annual plan. ■

Initial Family Eligibility Requirements

To participate in the homeownership program, families must be eligible under HUD regulations as well as meet any discretionary requirements the PHA may elect to adopt in its local program. To determine initial eligibility, the family must be either an existing recipient of the Section 8 Housing Choice voucher²¹ or be newly admitted to the program.²² The family must also qualify as a first-time homebuyer.²³ HUD revised the proposed regulations to expand the definition of first-time homebuyer to include:

- single parents;
- displaced homemakers who owned a home, or resided in a home owned by his or her spouse, while married;
- families which own cooperative membership shares;
- families in which no family member has had an ownership interest in another residence during the three years prior to the commencement of the homeownership assistance; and
- families of which a family member is a person with disabilities if homeownership assistance is needed as a reasonable accommodation.²⁴

However, HUD declined to accept several comments to the proposed rule suggesting that, among other persons, victims of domestic violence and current owners of manufactured homes or substandard housing should also be considered as first time homebuyers.

Moreover, and with the exception of cooperative members, no family member may have a present ownership interest in a residence upon commencement of homeownership assistance (or obtain any ownership interest in a second residential property while receiving homeownership assistance).²⁵ The family is not permitted to receive homeownership assistance if it previously received such assistance and defaulted on the mortgage to purchase a home.²⁶ The family must agree to attend and complete a pre-assistance and housing counseling program administered by the PHA or its designee.²⁷ The PHA may also compel post-purchase counseling as a requirement for receiving

continued homeowners assistance.²⁸ Finally, the family must satisfy both the “minimum income requirement” and the “employment requirements” discussed below to participate in a homeownership program.

The PHA must consider the income of all adult family members who will own the home upon initial receipt of homeownership assistance.

The Minimum Income Requirement

Pursuant to statutory law, a family must demonstrate a minimum gross monthly income that is equal to or more than twice the payment standard established by the PHA, or any other amount that may be established by the HUD Secretary.²⁹ After consideration of public comments, HUD established a national minimum income requirement equal to 2,000 hours of annual full-time work at the federal minimum wage.³⁰ The PHA is not authorized to establish any other minimum income requirement. Moreover, in assessing whether the family’s gross annual income meets the national minimum income requirement, the PHA must consider the income of all adult family members who will own the home upon initial receipt of homeownership assistance. The PHA must include welfare assistance in determining the annual income of disabled or elderly families; however, it may not consider welfare assistance received in determining the annual income of a non-disabled or non-elderly family’s annual income. On the other hand, welfare assistance must be considered by the PHA to determine whether the family is eligible for admission to the voucher program and to calculate the amount of the family contribution (the total tenant payment) or the homeownership assistance payment.³¹ Finally, the minimum income requirement is only considered in determining a family’s initial qualification to purchase a home with Section 8 homeownership assistance; it is not a continuing requirement and not considered again unless the family opts to purchase a subsequent home with homeownership assistance.³²

²¹Pursuant to the QHWRRA, the Section 8 tenant-based certificate and voucher programs were merged by final the rule adopted in October 1999. 24 Parts 888, 982, Fed. Reg. 56,894 (Oct. 21, 1999). The new tenant-based program is called the *Housing Choice Voucher Program*.

²²§§ 982.627(a)(1), 982.625(b).

²³§ 982.627(a)(2).

²⁴§ 982.627(b).

²⁵§§ 982.627(a)(6), 982.633(b)(7).

²⁶§ 982.627(e).

²⁷§ 982.630.

²⁸§ 982.633(b)(8).

²⁹§ 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437f(y)(1)(B)(West Supp. 2000).

³⁰§ 982.627(c); 65 Fed. Reg. at 55,149-50.

³¹*Id.* It is noted that “net family assets” as defined in 24 C.F.R. § 5.603(d) is amended to exclude the value of a home being purchased with Section 8 homeownership assistance for the first 10 years after the home is purchased. It is unclear whether this exclusion is extended if the maximum term of assistance is extended beyond 10 years. Compare § 5.603(d)(4) and § 982.634.

³²See 65 Fed. Reg. at 55,138.

The Family Employment Requirement

The QHWRA also gives HUD the authority to establish a “family employment requirement,” mandating that the family achieve a certain period of employment before receiving homeownership assistance.³³ Final regulations require the family to demonstrate that one or more adult family members who own the home upon commencement of receiving homeownership assistance meet two requirements: (1) at least one adult family member is currently employed on a full-time basis (meaning not less than an average of 30 hours per week); and (2) at least one adult family member has been continuously employed full-time (as previously defined) for the year before receiving homeownership assistance.³⁴ Although the PHA is prohibited from establishing an employment requirement in addition to the federal standard, it is given discretion to determine whether self-employment in a business, or successive employment during the previous one year period, satisfies the statutory requirement. In addition, the PHA may consider an interruption in employment, and the circumstances involved, to determine whether the family meets the employment requirement.

The employment requirement does not apply to elderly or disabled families. Furthermore, if a member of a family is a person with disability, the PHA must grant an exemption from the employment requirement if the exemption is needed as a reasonable accommodation.³⁵

Finding the Appropriate Unit

In addition to family eligibility, HUD requires that the PHA determine and require the following before a family can participate in the program:

- that the unit to be purchased is the only unit on the property or is a condominium or cooperative, and is not defined as ineligible by HUD;³⁶
- that the unit to be purchased must be inspected, and pass, an initial Housing Quality Standards set forth by HUD;³⁷

- that the unit must be inspected by an independent inspector. The third-party inspector must be designated, and paid for, by the family. The inspector must provide a copy of the inspection result to both the family and the PHA;³⁸ and
- that the family cannot purchase a house if the PHA is informed (by HUD or other sources) that the seller is debarred, suspended or subject to a limited denial of participation.³⁹

In addition to single units on single property lots, condominiums and cooperatives, the family may also use Section 8 homeownership assistance to purchase manufactured homes (either on a leased space or with the real property upon which it sits),⁴⁰ manufactured home units that are under construction⁴¹ and units being purchased through a lease-purchase agreement.⁴²

Prior to purchasing a home, the family must enter into a contract of sale with specific provisions set forth by regulation. These provisions include an agreement for the pre-purchase inspections described above and provide that the buyer is not obligated to pay for repairs or purchase the home unless the pre-purchase inspections are satisfactory.⁴³ The contract of sale must also provide a certification from the seller stating the seller has not been debarred, suspended or subject to a limited denial of participation by HUD.⁴⁴

Financing Requirements

Although the proposed rule required that homes purchased by the family without FHA mortgage insurance must comply with the basic underwriting requirements for FHA-insured single family homes, this requirement was removed from the final rule. However, if the homeowner elects to use financing with FHA mortgage insurance (or if the PHA requires FHA insured financing), the loan is subject to FHA mortgage insurance requirements.⁴⁵ In addition, the PHA may establish its own financing requirements (such as lender qualification or financing terms) and institute other requirements or restrictions regarding the debt securing the home. Any such requirements, however, must be set forth in the PHA’s Administrative Plan.⁴⁶

³³§ 8(y) of the *United States Housing Act of 1937*, 42 U.S.C.A. § 1437f(y)(1)(B)(West Supp. 2000).

³⁴§ 982.627(d).

³⁵§ 982.627(d)(3).

³⁶§ 982.628(a). *Also see generally* § 982.352. Ineligible housing units include public housing and Section 8 project-based units, nursing and board and care facilities, college dormitories, institutional housing and other specified types of housing. In determining the eligibility of housing units, paragraphs (a)(6), (a)(7) and (b) of § 982.352 do not apply to units purchased with homeownership assistance. § 982.628(a)(1).

³⁷§§ 982.628(a)(4) and (5), 982.631(a). Although the PHA may decide to do so, there is no requirement that the PHA conduct periodic HQS inspection after the home is purchased. § 982.633(b)(8).

³⁸§§ 982.628(a)(4), 982.631(b).

³⁹§ 982.628(b).

⁴⁰§ 982.601(b); 65 Fed. Reg. at 55,147.

⁴¹§ 982.628(a)(2).

⁴²§§ 982.305(b)(4), 982.317.

⁴³§§ 982.627(a)(7), 982.631(c). This requirement does not apply to existing cooperative members.

⁴⁴*Id.*

⁴⁵§ 982.632(b).

⁴⁶§§ 982.632(c), (d) and (e). Moreover, and as discussed above, the PHA may elect to make the homeownership assistance payments directly to the family or to the lender on behalf of the family. *Id.* at § 982.635(d).

Additional Terms of the Homeownership Assistance Time Limitations

The family may only receive homeownership assistance for a designated period of time. If the family qualifies as an elderly or disabled family upon commencement of homeownership assistance, there is no time limit for the family to receive homeownership assistance.⁴⁷ In all other cases, however, the family may only receive assistance for ten years — unless the initial purchase mortgage has a term of 20 years or longer which increases the family's maximum term for assistance to 15 years.⁴⁸ For families who sell and purchase another home with continued homeownership assistance, the maximum term commences upon the date of the purchase of the first home. The homeownership assistance will terminate automatically 180 calendar days after the last housing assistance payment is made.⁴⁹ The PHA, however, has the discretion to grant relief from termination if it determines that automatic termination would result in extreme hardship for the family.⁵⁰

Ability to Move/Portability

Provided that the family remains eligible under the terms of the program and the PHA has sufficient funding to continue homeownership assistance, the family is permitted to move and purchase a new home with its Section 8 assistance.⁵¹ Furthermore, the family may move outside the initial PHA jurisdiction, provided that the receiving PHA is administering a Section 8 homeownership program, is accepting new homeownership families, and the family and the unit meet the eligibility requirements.⁵²

Recapture Requirements

Under the new regulations, the PHA is required to "recapture" a percentage of the homeownership assistance that was provided to the family when the family either sells or refinances the home.⁵³ The percentage of recaptured amounts

will decrease in annual increments of 10 percent over a 10-year period. Thus, at the end of the 10-year period, the amount of homeownership assistance that is subject to recapture will be zero.

The amount to be recaptured upon sale of the property is calculated on several factors, including the amount of assistance provided to the family, the difference between the purchase and sales price of the home and the amount of capital expenditures, closing costs and real estate commissions. The PHA is not permitted to recapture more than the amount of homeownership assistance that was actually provided to the family nor more than the appreciated value of the home. In addition, proceeds of the sale that are used to purchase a new home with continued Section 8 homeownership assistance are not subject to recapture. Likewise, only cash taken out of a refinance is subject to recapture by the PHA. The PHA is required to secure its right to recapture the homeownership assistance by securing a lien on the property that is subordinate to the purchase or refinance mortgage.

Termination of Assistance

The HUD regulations provide for termination of homeownership assistance (and denial of voucher rental assistance) if the family fails to comply with its family obligations as set forth in § 982.551 *et seq.*⁵⁴ In addition, HUD requires the PHA to terminate homeownership assistance for any family that is "dispossessed" from the home pursuant to judgment or foreclosure order.⁵⁵ The PHA, however, may consider mitigating circumstances in determining whether to provide a family with voucher rental assistance after a mortgage default.⁵⁶

Conclusion

For the first time, low-income families receiving Section 8 voucher assistance have a chance for successful homeownership through the Section 8 Homeownership Program. At the same time, however, severe consequences may result for families who attempt to utilize the program and fail (either because of mortgage foreclosure or because they cannot locate a house to purchase within the time frame imposed by the PHA.) Most drastically, if the family fails to successfully become or remain homeowners, PHAs have the authority to revoke or deny the family's Section 8 tenant-based assistance or to place the family back on the waiting list. Thus, the family may lose all access to Section 8 assistance.

⁴⁷§ 982.634(c). The elderly exception only applies to families which qualify as elderly at the beginning of the term. For disabled families, the exception applies at any time the family becomes a disabled family while receiving homeownership assistance. If the family later ceases to be elderly or disabled, the maximum term becomes applicable from the date homeownership assistance was commenced. *Id.*

⁴⁸§ 982.634(a).

⁴⁹§ 982.635(e). Both the regulations and HUD's comments to the proposed rule are ambiguous about whether an assistance payment will continue automatically and what circumstances would warrant a continued assistance payment, for six months after the last housing assistance payment is made on behalf of the family. Moreover, it is unclear whether this extension applies after the expiration of the maximum term of assistance or is only applied during the that term.

⁵⁰*Id.*

⁵¹§ 982.637.

⁵²§ 982.636.

⁵³§ 982.640; *see also* 65 Fed. Reg. at 55,135, 55,143, 55,158.

⁵⁴§§ 982.638(a), (b) and (c).

⁵⁵§ 982.638(d). HUD further requires the PHA to deny continued voucher rental assistance if the family defaults on an FHA-insured mortgage and the family fails to convey title to HUD or its designee and to move from the home as required by HUD. *Id.*

⁵⁶*Id.*

Make all your reservations now!

2000 LALSHAC MEETING SET FOR NOVEMBER 19-20 PRE-LALSHAC HOUSING TRAINING SET FOR NOVEMBER 18

The 2000 meeting of the Loose Association of Legal Services Housing Advocates and Clients (LALSHAC) is scheduled to take place on Sunday and Monday, November 19 and 20, in Washington, DC. The LALSHAC meeting will be preceded by a one-day training event, set for Saturday, November 18, on the recent statutory and regulatory changes to the Public Housing, Certificate and Voucher, and the project-based Section 8 programs.

The LALSHAC meeting and the pre-meeting training will be held at the Washington Plaza, located at 10 Thomas Circle, N.W. (at Massachusetts Avenue and 14th Street), Washington, DC 20005. Special room rates for the training event and the LALSHAC meeting are: \$110 for single or double occupancy, \$130 for triple occupancy, and \$150 for quadruple occupancy per night. Room reservations must be made directly with the hotel. To receive the special rates, **RESERVATIONS MUST BE MADE ON OR BEFORE OCTOBER 15, 2000.** The hotel phone number is 1-800-424-1140 (toll free) or at 1-202-842-1300. **When making reservations, make sure to mention the following group number in order to obtain the special conference rates: 9490.**

The purpose of the 2000 LALSHAC meeting is to focus the activities of the various LALSHAC working groups on the recent changes to the federal housing programs, particularly those made to the Public Housing, Certificate and Voucher and Section 8 programs and to discuss how advocates can continue to represent low-income clients' interest in light of those changes and in light of the November elections, which will precede the meeting by less than two weeks.

The LALSHAC meeting is not designed as a training conference. Consequently, we prefer attendance by experienced housing advocates and clients who are willing to actively participate in LALSHAC's ongoing activities. These include exchanging information on effective representation of low-income tenants and community organizations in addressing local housing problems and pursuing

permissible legislative and administrative advocacy at the federal, state and local levels).

Because major regulatory changes have recently been made to the Public Housing, Certificate and Voucher and Section 8 programs, NHLP will be offering a separate one-day training event on these programs immediately preceding the LALSHAC meeting. We expect that the training will facilitate the LALSHAC meeting by providing advocates an opportunity to learn about the program changes in detail prior to the meeting and, as a result, to be better prepared to participate in the LALSHAC discussions.

The LALSHAC meeting registration fee is \$295 and includes two lunches, break refreshments, and conference materials. For legal service organizations who are paying for clients to come to the meeting a discount of \$100 is available for the client's registration.

The one-day training registration fee is \$135 for persons who do not attend the LALSHAC meeting. The registration fee includes a lunch and training materials. Persons who attend both the pre-LALSHAC training event and the LALSHAC meeting may register for both events for \$390. (For clients, whose costs are being paid by a legal services program, the combined registration fee is \$295.) The registration deadline for the meeting and the training is Friday, **October 13, 2000.** Registration checks should be made payable to the National Housing Law Project and sent to our Oakland Office at 614 Grand Avenue, Suite 320, Oakland CA 94610.

A detailed announcement setting out the meeting and training agendas has been sent to LALSHAC members and housing specialists at legal services and other programs together with registration materials. A copy of the invitation letter, meeting and training agendas as well as the registration forms are also available at our Web site, nhlp.org. If you need additional information, call NHLP at 1-510-251-9400, Ext. 111 or e-mail us at nhlp@nhlp.org. ■

Accordingly, and despite the opportunities provided by the Section 8 Homeownership Program, advocates must give careful consideration to the programmatic requirements imposed by the PHA and its governing body when drafting and adopting a homeownership plan. In addition, PHAs and advocates must ensure that all necessary participants—and all necessary safety nets—are in place to ensure that the Section 8 program is successful. These topics will be more fully discussed in a future *Bulletin* article. ■

EN BANC 9TH CIRCUIT PANEL HEARS “ONE-STRIKE” CASE

Before a standing-room-only audience, an 11-member *en banc* panel of the United States Court of Appeals for the Ninth Circuit sitting in San Francisco heard oral argument on September 19, 2000, in *Rucker v. Davis*.¹ This case involves a challenge by four public housing residents to the Department of Housing and Urban Development’s (HUD) so-called “one-strike” eviction policy, adopted pursuant to a federal statute. That policy permits eviction of innocent family members if any family member, guest or anyone under the tenant’s control engages in certain criminal activity, or in any drug-related criminal activity, on or off the project premises, whether or not the tenant had any knowledge of, or ability to control, that activity. The District Court had issued a preliminary injunction against the policy, which the initial Ninth Circuit panel later reversed in a 2-to-1 decision. In an extremely rare move, a majority of the sitting judges of the Ninth Circuit granted the tenants’ petition for rehearing and suggestion for rehearing *en banc*, setting the stage for this second look.

The *en banc* panel members appeared to be balanced between conservative and liberal justices.² However, most of their questions indicated little support for the government’s claim that such evictions were consistent with congressional intent or constitutional law, and considerable sympathy for the tenants’ position. When the Justice Department attorney noted, as a justification for the severe policy, that there is a huge waiting list for federally subsidized housing, Judge

Stephen Reinhardt questioned, “Is that a reason to evict elderly people because there is a large waiting list? I saw that in your papers and thought it must be a joke.”

Various judges peppered the government’s counsel with such questions as:

- “Suppose I had a guest who smoked a joint of marijuana an hour before (a visit) or an hour after?”
- “What if a grandchild flies to New York after the visit and smokes marijuana in Yankee Stadium?”
- “Suppose a disabled tenant hires a care giver who, without the tenant’s knowledge, smokes marijuana in the parking lot?”

One justice asked, “How can a tenant act to ensure compliance? What more could Pearlle Rucker do?” The record had revealed that she “regularly searches her daughter’s room for evidence of drug activity and has warned her and others that drug activity in the apartment could result in their eviction.”³ Judge Paez questioned the use of the term “one-strike,” implying that HUD’s policy was actually a “no-strike” rule.

Counsel for HUD and the Oakland Housing Authority (OHA) stuck to their position that there is nothing that innocent tenants can do. Federal law authorizes eviction and assumes that local managers of federally subsidized housing can be trusted to act humanely. When counsel explained that the statute did not require eviction and that the decision was up to the OHA, more than one judge expressed concern about this unfettered discretion, which the defendants argued was not subject to judicial review.

On the issue of hardship, which was key to the lower’s court’s issuance of a preliminary injunction, the government’s attorney argued that there was no hardship because tenants sought an injunction prior to receiving a state court eviction order. One judge asked what defense the tenants could have raised there, and responded with incredulity when the government suggested that the tenants should have raised the “innocent tenant” defense (unavailable under the government’s theory of the case), as some tenants have done successfully over the years. Accompanied by considerable laughter in the courtroom, the judge then speculated that the government was suggesting, if it prevails, that tenants can still find justice by seeking out a state court judge who is ignorant of the law.

The tenants’ counsel urged the court to uphold the lower court’s injunction barring the eviction of tenants who are unaware of drug use by others in their household. He argued that a proper construction of the federal statute does not authorize eviction of innocent tenants, because to do so would violate Congress’ intent and possibly other constitutional rights to due process of law or freedom of association.

Just prior to the hearing, the court requested supplemental briefs on the question of the applicable standard of

¹203 F.3d 627 (9th Cir. 2000). For background information see *Petition for Rehearing En Banc Granted in 9th Circuit Public Housing “One Strike” Case*, 30 HOUS. L. BULL. 118 (Aug. 2000); *Ninth Circuit Panel Upholds “One Strike” Evictions*, 30 HOUS. L. BULL. 24 (Feb. 2000) and *Housing Authority Enjoined From Eviction Innocent Residents for Violations of “One Strike” Lease Provisions by Household Members*, 28 HOUS. L. BULL. 119 (July 1998). The latter article is posted on our web site at www.nhlp.org.

²The panel included the Honorable Judges Sneed, Schroeder, Pregerson, Reinhardt, Fernandez, T. Nelson, Hawkins, Silverman, McKeown, Gould and Paez.

³203 F.3d 627, 650 (9th Cir. 2000)

appellate review of preliminary injunctions in the Ninth Circuit, and whether, under that standard, the lower court's order granting a preliminary injunction should be affirmed or reversed.⁴ During oral argument, the court wrestled with the issue of what it should do at this point—uphold the injunction as a valid exercise of the court's discretion, remand to the district court for further factual findings, or reconsider the case and decide the issues on the law. Most of the court's questions directed to the tenants' counsel therefore centered on the specifics of the relief being requested. Although it was hard to tell which option was favored by the majority of the panel, on the question of reasonable accommodation for one tenant under the *Americans with Disabilities Act*, it appeared that the incomplete state of the record might produce a remand.

In addition, the judges inquired about what eviction standard would properly flow from the statute and the Constitution. One judge even read from the Senate's 1990 committee report accompanying a revision to the statute, which had strongly supported an "innocent tenant" defense to be applied by public housing authorities (PHAs) and reviewing courts, asking counsel whether he would be satisfied if the court adopted that interpretation.

Some judges also appeared to question whether terminating the tenancy of an innocent tenant violated due process. The implication of the question was a reference to the "innocent owner" defense in forfeiture cases, and whether, if the housing authority had absolute discretion over evictions and innocent tenants had no defense, such dispossession would be unconstitutional.

Finally, some judges explored the court's power to make these interpretations if Congress passes a statute with gaps in its terms. The tenants' counsel responded that the court could do so, citing *U.S. v. X-Citement Video, Inc.*,⁵ so as to avoid serious constitutional concerns, and *Sorrells v. United States*,⁶ so as to avoid "injustice, oppression or an absurd result."

NHLP will continue to keep a close watch on the case and report any further developments. In the interim, remember that the Ninth Circuit Order granting the petition for rehearing *en banc* states that the three-judge panel's opinion "shall not be cited as precedent by or to this court or any district court of the Ninth Circuit..."⁷ ■

HUD ANNOUNCES THAT IT WILL RAISE SECTION 8 FAIR MARKET RENT LEVELS IN 39 METROPOLITAN AREAS

In early September 2000, the Department of Housing and Urban Development (HUD), issued a press release announcing the launch of its new Section 8 Fair Market Rent Initiative.¹ The initiative involves the increase of the Section 8 Fair Market Rent (FMR) levels in selected areas where vouchers have been difficult to use or where voucher holders are geographically concentrated. In these areas, FMRs will be calculated based on the 50th percentile of area median rents, instead of the 40th percentile as FMRs are currently calculated.

HUD has announced the first 39 metropolitan statistical areas that will be subject to the increase (see list in table 1 on page 136). According to fact sheets released by HUD,² shifting to the 50th percentile will mean an average FMR increase of \$45, or 6.2 percent for two-bedroom units, over the 40th percentile figures HUD previously proposed for Fiscal Year (FY) 2001 in these areas.³

HUD has said that 1.4 million new units will become affordable to voucher families under the new policies. However, according to the department's fact sheet,⁴ the actual figure appears to be 1,259,400 new units among the initial 39 areas. It is unclear from HUD's press release, but the 1.4 million figure may have incorporated the 120,000 new vouchers included in its FY 2001 proposed budget request.⁵ HUD's press release also named 10 additional areas (see list in table 2 on page 136) that may qualify for higher subsidy levels in the future, "should their problems persist." According to a HUD *Frequently Asked Questions* list distributed in conjunction with the FMR Initiative announcement, the new policy will not limit the ability of areas that currently have HUD approval for exception payment standards in excess of 110 percent of their current FMRs⁶ to continue to use these exception payment standards.⁷ HUD's *Frequently Asked Questions* list also emphasizes that the list of 39 areas above

¹See HUD No. 00-223 (Sept. 12, 2000), *Cuomo Expands Rental Opportunity for Hundreds of Thousands of Low-Income Families*, available at hud.gov/pressrel/pr00-223.html.

²See FMR Increases – 40th to 50th Percentile (Sept. 12, 2000).

³See 65 Fed.Reg. 25,172 (Apr. 28, 2000), *Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program—Fiscal Year 2001*.

⁴See Additional Units Made Affordable with 50th Percentile FMR (Sept. 12, 2000).

⁵See HUD No. 00-223, *supra*.

⁶e.g., Los Angeles, San Francisco, Rochester, New York, and Portland, Maine.

⁷FAQs: HUD's New Fair Market Rents Policy (Sept. 12, 2000).

⁴*Rucker v. Davis*, No 98-16542 Order (Sept. 6, 2000).

⁵513 U.S. 64 (1994).

⁶287 U.S. 435 (1932).

⁷*Rucker v. Davis*, No 98-16542 Order (Aug. 18, 2000), a copy of which is available at ce9.uscourts.gov/web/newopinions.nsf/

is not “comprehensive” and that “[a]ny area that satisfies the applicable criteria will be eligible for an increase.”⁸

How HUD Calculates FMRs

A metropolitan area’s FMRs are described in HUD regulations as “estimates of rent plus the cost of utilities, except telephone.” HUD bases its estimates on the rents charged to tenants who are “recent movers.”⁹ FMRs are intended to estimate the housing costs that voucher families searching for housing on the private market will actually encounter. Rents charged to longer-term tenants and public housing tenants are lower than the rents voucher families searching for housing will be charged and are excluded from FMR calculations.¹⁰ Rents charged for newly constructed units and substandard units are also excluded.¹¹

FMRs are set within metropolitan areas according to a percentile figure, currently the 40th percentile, intended to represent the proportion of available housing that are affordable to voucher families. For example, HUD has issued a proposed 40th percentile FMR for Albuquerque of \$592 for a two-bedroom unit. This means that, according to HUD’s estimates, 40 percent of the two-bedroom units that are currently available in the Albuquerque metropolitan area rent for \$592 per-month or less. The 50th percentile FMR for Albuquerque is \$632 for two bedroom units. This means that HUD estimates that one-half of the currently available two-bedroom units in this area rent for \$632 per-month or less.

How Areas Will Qualify for Higher Subsidy Levels Under the New Policy

HUD has not yet issued an interim rule for the new policy. HUD has, however, released a technical description of the FMR Initiative,¹² in addition to its press release. This description outlines some of the details of the policy, including eligibility criteria for the 50th percentile increase. According to HUD documents, a metropolitan area becomes eligible for FMR increases either (1) “when during a six-month period, more than a quarter of the families issued vouchers cannot find housing” in the area, or where (2) “voucher-holders are concentrated in a limited number of neighborhoods and affordable housing is not widely available throughout the metropolitan area.”¹³

⁸*Id.*

⁹24 C.F.R. § 888.113(a) (1999) (“Basis for setting fair market rents”).

¹⁰*See id.*

¹¹*See id.*

¹²Description of HUD’s *New Policy on Fair Market Rents* (Sept. 12, 2000).

¹³*See* HUD No. 00-223, *supra*.

Table 1

Following are the first 39 metropolitan statistical areas that will be subject to increased Section 8 Fair Market Rental levels:

Albuquerque, NM
 Atlanta, GA
 Austin-San Marcos, TX
 Baton Rouge, LA
 Bergen-Passaic, NJ
 Buffalo-Niagara Falls, NY
 Chicago, IL
 Cleveland-Lorain-Elyria, OH
 Dallas, TX
 Denver, CO
 Detroit, MI
 Fort Lauderdale, FL
 Fort Worth-Arlington, TX
 Grand Rapids-Muskegon-Holland, MI
 Houston, TX
 Kansas City, MO
 Las Vegas, NV
 Miami, FL
 Minneapolis-St. Paul, MN-WI
 Newark, NJ
 Norfolk-Virginia Beach-Newport News, VA
 Oakland, CA
 Oklahoma City, OK
 Orange County, CA
 Philadelphia, PA
 Phoenix-Mesa, AZ
 Richmond-Petersburg, VA
 Sacramento, CA
 Salt Lake City, UT
 San Antonio, TX
 San Diego, CA
 San Jose, CA
 St. Louis, MO
 Tampa-St. Petersburg-Clearwater, FL
 Tulsa, OK
 Ventura, CA
 Washington, DC-MD-VA-WV
 West Palm Beach-Boca Raton, FL
 Wichita, KS

Table 2

Following are the 10 metropolitan statistical areas that may qualify for higher subsidy levels in the future:

Baltimore, MD	Malden, MA
Birmingham, AL	Marin County, CA
Boston, MA	Milwaukee County, WI
Burlington, VT	Raleigh, NC
Charlotte, NC	Santa Monica, CA

Eligibility Category One: Voucher Failure Rates of More Than 75 percent Over a Six-Month Period

HUD has noted that in some cases “even the maximum 110 percent of the FMR is too low [a payment standard] to enable families to find suitable housing with a voucher.”¹⁴ HUD claims that its FMR Initiative “solves this problem.”¹⁵ According to HUD’s technical description, a public housing authority (PHA) “will be eligible to set its payment standard based on a 50th percentile rent” when:

- the PHA has set its payment standard at 110 percent of the 40th percentile FMR;
- less than 25 percent of the families issued vouchers by the PHA “cannot find housing with their vouchers,”¹⁶ despite the 110 percent payment standard; and
- this situation persists for a period of six months.¹⁷

The technical description also states that PHAs qualifying for higher FMRs, and thereby qualifying for the ability to set higher voucher payment standards, “will still retain the flexibility to vary their payment standards by area” within the 90 percent to 110 percent range.¹⁸ HUD’s Public Affairs Office has explained that the 10 additional areas that HUD identified in its press release will most likely qualify for FMR increases based on this failure rate eligibility category. According to the Public Affairs Office, HUD conducted an “unscientific, informal telephone poll” of large PHAs in areas with reputations for high failure rates in formulating the list of additional areas.

Eligibility Category Two: Geographic Concentration of Voucher Families According to HUD’s Two-Part Test

In its technical description of its FMR Initiative, HUD states that voucher families “should not be restricted by low subsidy levels to a narrow range of neighborhoods, and should especially not be restricted to areas of high poverty concentration.”¹⁹ HUD has included this second eligibility category to address these concerns. HUD will increase FMRs to the 50th percentile in areas comprised of more than 100 census tracts that meet both of the following criteria: (1) “25 percent or more of all voucher holders in the metropolitan FMR area reside in the five percent of census tracts with the greater number of program participants;” and (2) 30 percent or more of the census tracts in the FMR area have been de-

termined not to be “accessible” to voucher families.²⁰ Census tracts are “accessible” to voucher families, according to HUD’s definition, “where 30 percent or more of the two-bedroom units fell below the 40th percentile FMR in the last decennial census.”²¹ Presumably, this refers to rent for all the two-bedroom units in a census tract, not just rents paid by new movers, on which FMRs are now calculated.

PHAs that receive authority to base their payment standards on 50th percentile figures because of high voucher failure rates “will be given more than a year to raise their success rates to 75 percent.”

The Effect of Increased FMRs on SEMAP Scores

HUD has included a section in its technical description on the effect of increased FMRs on Section 8 Management Assessment Program (SEMAP) scores.²² PHAs that receive authority to base their payment standards on 50th percentile figures because of high voucher failure rates “will be given more than a year to raise their success rates to 75 percent.” If after the allotted time, PHAs fail to meet this goal or fail “to show that they are utilizing at least 95 percent of their allocated funds,” they will have their SEMAP scores reduced by five points.²³ This 95 percent figure reflects SEMAP requirements already imposed on PHAs.²⁴ PHAs that are eligible to set 50th percentile payment standards based on geographic concentration will have “the current ‘bonus’ measure of deconcentration outcomes in SEMAP outcomes ... become a part of their regular SEMAP score.”²⁵

Unsettled Questions

Presumably, HUD’s forthcoming interim rule on the new policy will resolve many questions. In the meantime, there are a number of open issues, including the following:

¹⁴Description of HUD’s *New Policy on Fair Market Rents*, *supra*.

¹⁵*Id.*

¹⁶This figure is sometimes referred to as a voucher “failure rate” or “turn-back rate.”

¹⁷Description of HUD’s *New Policy on Fair Market Rents*, *supra*.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²See 24 C.F.R. § 985, *et seq.* (1999).

²³Description of HUD’s *New Policy on Fair Market Rents*, *supra*.

²⁴See 24 C.F.R. § 985.3(n) (1999) (deducting 20 points from SEMAP scores of PHAs that lease fewer than 95 percent of the voucher units budgeted by HUD) (1999).

²⁵*Id.*

- It appears that the first eligibility category, based on voucher failure rates, involves increases to individual PHAs, not to areas generally, based on individual PHAs' failure rates. The second category, based on geographic concentration, does appear to involve increases to entire areas. HUD has not been explicit on this point.
- HUD has also not explained how the first 39 areas were selected.
- In the SEMAP portion of its technical description of the new policy, HUD appears to imply that eligible PHAs will have the option to adopt the higher FMRs. HUD has not explained whether FMR increases will be automatic or whether PHAs will have to request increases in some way. If it is not automatic, HUD has not explained how requests under the two different categories will be handled or how requests involving areas served by more than one PHA will be handled.
- HUD has not explained if or how it will reevaluate areas and PHAs that will be subject to FMR increases for continued eligibility.
- The number of units the new policy will actually make available to voucher families is unclear, but will be less than the 1.4 million suggested in HUD's press release. First, if given the option, some PHAs may decline to adopt the higher FMRs to avoid the imposition of more rigorous SEMAP evaluation criteria. Second, the per-unit dollar increases are fairly modest, less than \$50 for a two-bedroom unit. For some landlords, the increases may make the difference, but some will still be unwilling to rent to voucher families. Third, voucher families still receive no federal assistance with move-in expenses, such as security deposits, which can pose substantial barriers to successful voucher use. Fourth, in many instances, a landlord's putative reluctance to participate in the voucher program may hide an illegal, discriminatory motive. HUD's description of its new policy includes no discussion of the fair housing implications of high voucher failure rates or the geographic concentration of voucher families in metropolitan areas. ■

CONGRESS CLARIFIES TENANTS' RIGHT TO REMAIN IN HUD MULTIFAMILY CONVERSIONS

The nation has lost thousands of affordable housing units as private owners leave the Department of Housing and Urban Development's (HUD) multifamily housing programs; either by opting out of their project-based Section 8 contracts and/or by prepaying their low-interest HUD-insured loans. When an owner removes units from the HUD inventory, many tenants are eligible to receive vouchers, now called "enhanced vouchers," pursuant to legislation passed last year.¹ These new vouchers can usually cover any new higher market rent for the unit. Until recently, it was unclear whether owners were obligated to accept these vouchers to avoid tenant displacement.

Clarification of the Right to Remain

The tenants' "election to remain" was inadvertently left out of the *Appropriations Act* last year. However, HUD set forth the policy in its implementing Notice H 99-36 (Dec. 29, 1999). Many eligible tenants, owners, and PHA staff were unaware of this policy, producing involuntary displacement. When some owners ignored the policy, HUD was unwilling to take any enforcement action, pointing to the lack of explicit statutory support.

In mid-July of this year, Congress finally amended the enhanced voucher statute² and clarified the law by restoring the language inadvertently omitted last year. The Conference Report states that this is a clarification of law, not new law.³ This central clarification will be extremely helpful as HUD promulgates additional policies and rules, and as advocates request HUD to take enforcement action against noncomplying owners.

¹Pub.L. No. 106-74, §538 (Oct. 20, 1999), establishing a new Section 8(t) of the *United States Housing Act*, 42 U.S.C.A. §1437f(t) (West Supp. 2000). See HUD Issues Guidance For FY 2000 Enhanced Vouchers, 30 HOUS. L. BULL. 64 (May 2000); See FY 2000 HUD Appropriations Bill: Section 8 Renewal Provisions (Including "Mark-Up to Market"), 29 HOUS. L. BULL. 203 (Nov./Dec. 1999).

²See FY 2001 *Military Construction* and FY 2000 *Emergency Supplemental Appropriations Act*, Pub. L. No. 106-246, §2801 (July 13, 2000) (was H.R. 4425). This provision amends Section 8(t) of the *United States Housing Act*, codified at 42 U.S.C.A. §1437f(t), to state that "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event...."

³"[The report] inserts language as proposed by the House and the Senate clarifying the intent of title V, subtitle C, section 538 of Public Law 106-74." H. Rep. 106-710 (June 29, 2000).

Other Issues Requiring Resolution

Unfortunately, in several other respects, the enhanced voucher law as passed and implemented by HUD still fails to clearly protect tenants. Unresolved issues include:

- the tenant's right to remain after the first year;
- public housing authority (PHA) re-screening of tenants;
- HUD's new proposed "reasonable limit" on the value of an enhanced voucher;
- forced relocation of usually elderly "empty nesters" if no smaller units exist on the property after one year; and
- ensuring fairness for tenants still living in opt-out buildings converted prior to last year's law.

The anti-displacement principle requires that a change in the form of assistance from project-based to tenant-based (voucher) should jeopardize neither a tenant's level of assistance nor her ability to remain in her home. Appropriations legislation for Fiscal Year (FY) 2001 provides an important opportunity to address these shortcomings. Some of them require statutory changes while others could be accomplished by HUD rules or guidance, but legislation may be necessary if HUD pursues current policies.

Securing the Tenant's Option to Remain in the Building or the Neighborhood

Voucher "Stickiness": The Owner's Obligation to Accept the Vouchers

Congress has now clarified that tenants receiving enhanced vouchers for conversion events, including prepayments of HUD-subsidized mortgages or Section 8 opt outs, may elect to remain in place?⁴ This change, providing statutory support for HUD Notice H 99-36, should require owners to accept vouchers provided to tenants to prevent displacement if a tenant chooses to stay. This provision does not expire annually. Although this language apparently allows tenants to elect to remain as long as they choose to do so, (not just for the first lease following conversion), Congress should instruct HUD to clearly state that owners must accept these vouchers, and that this protection continues after the first lease term, absent good cause to terminate the tenancy.

PHA Re-Screening of Recipients

Another problem under enhanced vouchers is that HUD (pursuant to Notice PIH 2000-09) permits PHAs to re-screen prior Section 8 tenants that are prospective voucher recipients as if they were brand new Section 8 applicants. Occasionally, this results in a tenant being denied voucher benefits. There is no sound reason that a change in the form

of a subsidy should trigger a reevaluation of the recipient's eligibility for assistance when the tenant was previously assisted. Indeed, existing law apparently does not allow HUD and PHAs to establish additional eligibility conditions for tenants facing housing conversion actions.⁵ To ensure that existing tenants receive protection from displacement, Congress should instruct HUD that PHAs cannot apply their usual application criteria where housing faces conversion.

Protecting "Empty Nesters"

Tenants facing housing conversion, especially elderly tenants where household members have moved or died, sometimes reside in units that are too large for their current family size under normal program occupancy requirements. In PIH Notice 2000-9, HUD has issued a policy that enhanced voucher recipients living in inappropriately sized units must, if an appropriate unit is unavailable at the property, search for a unit elsewhere (with only a regular local payment standard). Only if an appropriate unit cannot be found can a

⁵e.g., Section 524(d) of MAHRAA, Pub. L. No. 106-74, §531(a), 113 Stat. 1113 (Oct. 20, 1999) (HUD "shall make enhanced voucher assistance ... available on behalf of [each family residing at contract expiration]").

STRENGTHENING OUR COMMUNITIES— NATIONAL RURAL HOUSING CONFERENCE 2000 SCHEDULED

The Housing Assistance Council (HAC) has scheduled *Strengthening Our Communities; National Rural Housing Conference 2000*, for December 6th through the 9th at the Hyatt Regency Washington on Capitol Hill in Washington, D.C.

The three-day conference will have four workshop tracks on Development Strategies, Organizational Effectiveness, Financial Resources, and Community Building. The featured speaker for the conference is Nicholas Retsinas, Director of the Joint Center for Housing Studies at Harvard University, who will provide an overview of the state of the nation's housing and an outlook on affordable rural housing trends. Representatives of the new administration will also be invited to share their thoughts on new housing policies for the country.

For more information about registration, conference sponsorship or exhibit opportunities, please contact HAC at (202) 842-8600, ext. 108, or by email at conference2000@ruralhome.org. Additional information is also available at HAC's Web site, ruralhome.org.

⁴*Id.*

tenant remain in his or her home, and even that is limited to one year after conversion. This policy on enhanced vouchers, however, is inconsistent with HUD's policy on project-based Section 8, which would have applied absent the conversion.⁶ No tenants facing housing conversion due to circumstances beyond their control, especially elderly tenants, should have to search for other housing beyond the property where they have made their home, or should have an arbitrary one-year limit placed upon their residency. Congress should direct HUD to reconcile the inconsistency between the Section 8 project-based and enhanced voucher programs by allowing tenants to remain in their homes until a unit of appropriate size becomes available at the property.

No tenants facing housing conversion due to circumstances beyond their control, especially elderly tenants, should have to search for other housing

Establishing Enhanced Voucher Payment Standards at Local Neighborhood Levels for Tenants That Move

In some situations, tenants will choose to move, or must move from the property (e.g., irreconcilable owner/PHA disagreement about "reasonable" rents for the voucher or seriously substandard conditions at the property). In these situations, tenants receive an "enhanced voucher," but the payment standard for that voucher equals the ordinary local voucher payment standard, which typically uses a below-median rent covering a large geographical area. Especially in tighter housing markets, where rents in the tenants' current neighborhood exceed the local payment standard, tenants may be forced into cheaper neighborhoods, often with housing in poorer condition, a higher racial and economic concentration, and less access to job opportunities. Frequently, this results in increased segregation. Separate payment standards for off-site use of enhanced vouchers, similar to those in effect were a tenant to remain in place, should be established to reflect housing costs within the neighborhood of the converted property, if higher than the local payment standard (e.g., within the zip code or the local census tract). This revision would help ensure that tenants are able use their vouchers to find affordable housing in the vicinity of the converted property, thus maintaining tenants' access to diverse neighborhoods of their choosing.

⁶HUD Handbook 4350.3, *Occupancy Requirements for Subsidized Multifamily Programs*, ¶¶ 2-19 and 5-9, states that if a unit becomes oversized as a result of changes in the household, the remaining tenants must accept an alternative unit in the property when available; but are not required to move from the property.

Ensuring That all Conversion Vouchers are Enhanced Vouchers

Enhanced vouchers are distinguished primarily by their potential higher value and their anti-displacement protection (for tenants choosing to stay). Sometimes, at the moment of conversion, housing conversion vouchers for tenants who stay do not require payment standards beyond the local payment standard. However, this does not mean that a regular voucher would always be adequate. Because both housing markets and PHA payment standards can change, higher payment standards may be required in the future. Also, for all housing conversion actions, it is vital that converting owners be required to accept the vouchers, regardless of whether a higher payment standard is required. While the enhanced voucher law apparently suggests that all housing conversion vouchers are "enhanced" and carry these features, regardless of when they are needed, HUD's Notice (PIH 2000-09, p. 5, authorizing "regular vouchers") creates some ambiguity, especially as to enforcement and disposition actions. To protect tenants against displacement upon conversion or later, Congress should direct HUD to clarify that all vouchers issued to tenants who stay in converted properties are "enhanced" vouchers, so long as rents are "reasonable" and housing quality standards are satisfied.

Eliminating Arbitrary Cost Limits: HUD's Proposed "Reasonableness" Limit on Voucher Value

The primary distinguishing feature of enhanced vouchers is that they can cover the entire amount of a new market rent level for a converted unit, so long as the PHA determines the amount is market-comparable, so that tenants can afford to stay in their homes. The pending FY 2001 VA-HUD Appropriations bill (H.R. 4635, §205), however, would allow HUD to set "other reasonable limits" on the enhanced voucher payment standard. Any additional limit, beyond the PHA's approval of the rent as market "reasonable," conflicts with the central purpose of providing enhanced vouchers in the first place—to enable tenants facing conversions to afford to remain in their homes, especially in high cost local sub-markets. Congress should therefore reject the pending proposal to establish other limits on enhanced voucher payment standards.

Fairness to Tenants Who Have Experienced Conversion

Extending Enhanced Voucher Eligibility to Previously Converted Tenants

Congress' FY 2000 law expanded eligibility for enhanced vouchers to tenants of project-based Section 8 properties facing opt-out or termination, protecting such families against rent increases. However, the law failed to protect those tenants, usually Section 8 tenants, whose properties experienced conversion in the years prior to FY 2000. Those tenants' experiences gave rise to the reform and many remain in occupancy paying higher rents with vouchers that were not enhanced. Often these tenants are seniors or people with

disabilities on fixed incomes who can ill-afford these rent burdens. Nor does the law compensate these tenants for the increase in rent paid since the conversion. Fairness requires that Congress revise the enhanced voucher language to provide enhanced voucher benefits to all tenants still in occupancy, and provide appropriate reimbursements to tenants that have paid higher rents since conversion.

Reimbursement of Tenants Receiving Enhanced Vouchers Illegally Unadjusted

As a result of HUD's former policy⁷ that enhanced voucher payment standards were not adjustable to cover rent increases occurring after the owner's prepayment, many tenants have not been able to afford to stay in their homes or have been forced to divert precious funds at the expense of other necessities of life. HUD's policy was ruled illegal by the only federal court to address it,⁸ and, in specifically revising the law, Congress recently clarified that HUD's policy was contrary to the prior law.⁹ HUD has so far refused to provide reimbursement to tenants for the benefits required by law. Congress should direct HUD to identify promptly all affected tenants and to provide reimbursements immediately, in order to prevent further hardship to tenants (including forced relocation due to unaffordable rents).

Delayed Rent Adjustments Because of Recertification Timing

Although Congress has clarified that enhanced voucher tenants should receive subsidy adjustments to cover subsequent rent increases, HUD's PIH Notice 2000-09 denies prospective rent adjustment benefits for prior enhanced voucher tenants until their next recertification on or after October 20, 1999, which could be as long as 12 months after a rent increase. Congress should direct HUD to provide adjustments effective upon the effective date of any rent increase.

Ensure Rent Adjustments for Losses in Income

Ordinarily, both project and tenant-based Section 8 subsidies are adjusted when tenants experience changes in income. The enhanced voucher law departs from that normal rule, establishing minimum rent requirements as a condition for project-based Section 8 tenants receiving en-

hanced vouchers.¹⁰ Initially applicable only to prepayment tenants paying flat Section 236 basic or market rents, these minimum rent requirements were intended to ensure that tenant rent burdens would not decrease merely because of conversion. Because some tenants experienced hardship from this requirement, in 1998 Congress clarified that the tenant's rent burden as a percentage of income should not change, and that subsidy adjustments could be provided for tenants experiencing "significant" income reductions. HUD then established a trigger for income losses of more than 15 percent. Although relatively few tenants were affected by the minimum rent requirement and the 15 percent standard when it applied only to prepayments, now the number of affected tenants will be much greater, since enhanced vouchers have been extended to all project-based Section 8 tenants facing conversion.

A mere change in the form of Section 8 subsidy should not trigger a different rule about rent adjustments; former Section 8 tenants receiving enhanced vouchers should remain on an income-based rent system.

This HUD policy, as applied to former project-based Section 8 tenants receiving enhanced vouchers, not only conflicts with the policy governing all other Section 8 assistance, but also introduces unnecessary complexity. Project-based Section 8 or ordinary voucher tenants do not have to show income reductions of at least 15 percent in order to receive a rent adjustment. There is no sound reason that a different rule should apply to former project-based Section 8 tenants receiving enhanced vouchers. A mere change in the form of Section 8 subsidy should not trigger a different rule about rent adjustments; former Section 8 tenants receiving enhanced vouchers should remain on an income-based rent system, like all other Section 8 project-based and voucher tenants, and be subject to the same rent adjustment policies. Congress should clarify that minimum rents apply only to tenants that were formerly paying Section 236 basic or market rents, not Section 8 income-based rents. These changes would ensure that tenants facing housing conversion actions through no fault of their own can remain in their homes as long as they choose, consistent with the intent of Congress in originally providing enhanced vouchers in 1999. ■

⁷See HUD Notices PIH 98-19 and 99-16.

⁸215 *Alliance v. Cuomo*, 61 F. Supp.2d 879 (D. Minn. 1999).

⁹See Pub. L. No. 106-74, Sec. 538, establishing new Section 8(t) covering subsequent rent increases (codified at 42 U.S.C.A. § 1437f(t) (West Supp. 2000)) ("as such rent may be increased from time to time," subject to PHA rent reasonableness test). The legislative history confirmed that Congress interpreted HUD's policy to be illegal. See House Rep. 106-286 ("[The FY 1997 Appropriations Act] created a special Section 8 enhanced voucher to provide a higher subsidy for residents in properties where an owner prepays the mortgage and then charges a higher rent . . . the committee intended that it cover initial rent increases, as well as subsequent rent increases . . . [T]o clarify any ambiguity, language is included . . . to ensure that subsequent rent increases, if reasonable, are covered by the enhanced voucher.").

¹⁰Section 8(t)(1) (A) and (D) (codified at 42 U.S.C.A. §§ 1437f(t)(1)(A) and (D), (West Supp. 2000)).

NEW HOUSING PRODUCTION PROPOSALS INTRODUCED IN SENATE

Some members of Congress are beginning to acknowledge that the nation needs more affordable housing than can be provided through existing programs and funding levels or through an expansion of the number of vouchers. This year, Senator Kerry (D-MA) was the first to recognize the issue with the introduction of his *Housing Trust Fund proposal* (S. 2997) to use excess Federal Housing Administration (FHA) revenues for affordable housing production and preservation. More recently, Senator Bond (R-MO), Chair of the HUD-VA and Independent Agencies Appropriations Subcommittee, has proposed a housing block grant to states for production and preservation (S. 3033), which has been folded into the Fiscal Year (FY) 2001 HUD Appropriations bill reported out of committee on September 13, 2000. In conjunction with the President's March 2000 request that HUD submit a proposed plan for how to use excess FHA revenues for affordable housing, the existence of these bills provides the first opportunity in many years for Congress, after years of retrenchment, to take an important step forward to meet the growing nationwide affordable housing needs.

S. 2997, The "National Affordable Housing Trust Fund Act of 2000"

In the face of Congress' recent reluctance to appropriate substantial new housing resources, those interested in affordable housing production or preservation have been forced to consider how to extract funding from existing sources. An innovative example is the aforementioned bill (S. 2997), introduced by Senator Kerry, ranking member of the Housing and Transportation Subcommittee of the Senate Banking Committee, to establish a National Affordable Housing Trust Fund. The Trust Fund would be an ongoing dedicated revenue source from excess revenue generated by the FHA and the Government National Mortgage Association (GinnieMae).¹ The bill would appropriate to the Trust Fund all revenue generated by the FHA's Mutual Mortgage Insurance Fund in excess of that necessary to maintain a capital ratio of 3 percent,² and all revenue generated by GinnieMae beyond that necessary for sound administration. Seventy-five percent of the Trust Fund's proceeds would be allocated as matching grants to states, while 25 percent

¹S. 2997, introduced on July 27, 2000 is formally titled the *National Affordable Housing Trust Fund Act of 2000* and is sponsored by Senator Kerry, with Senators Jeffords, Sarbanes, Leahy, Bryan, Reed, Chafee, and Wellstone signing-on as co-sponsors.

²The current FHA capital requirement is two percent.

would be awarded by HUD through a national competition. Trust Fund assistance could be used for a variety of activities, including construction, acquisition, site preparation and improvement (including demolition), substantial rehabilitation, and "continued assistance rental subsidies."³ S. 2997 is especially timely in view of the President's March request to HUD that it develop a proposal for using the FHA surplus for addressing the affordable housing crisis, and HUD's support for doing so.⁴

Matching Grants

Each state's potential share of the matching funds would be determined in accordance with a HUD-developed formula based on need. This formula would consider factors such as the number and percentage of families in the state who are living in substandard housing, paying more than 50 percent of income for housing or below the poverty level, as well as other discretionary factors. States would be eligible to receive up to the lesser of four times their current non-federal expenditures or their allocation as determined by the HUD formula. The bill would increase the potential benefits to states by characterizing half of the funds generated by certain arguably "federal source" expenditures (federal tax credits, mortgage revenue bonds, and tax-exempt bonds) as "nonfederal" for the purposes of the matching grant program. To receive matching funds, states must provide 25 percent of the federal grant from "non-federal" sources. If they fail to attain that level, other public entities (e.g. local governments) and nonprofits can apply for the allocation the state would have received, after providing a certification of the required match and an allocation plan.

The states or other entities receiving Trust Fund grants must follow certain targeting guidelines in distributing the funds to eligible housing providers (nonprofits, for-profits and public agencies). States must devote 75 percent to the development of affordable rental housing for extremely-low income families (those with incomes below 30 percent of area median income (AMI)), and 25 percent to affordable rental housing or homeownership assistance for low-income families (below 80 percent of AMI). States or other entities distributing the Trust Fund matching grants must also require recipients to certify:

³The continued assistance rental subsidy program is a new program the bill would establish. The program would allow developers to use funds for up to three years of operating subsidy, conditioned on the developers working with a local housing agency to ensure that eligible tenants pursue the units and the housing agency's agreement to provide vouchers if tenants choose to move.

⁴For HUD's recent discussion of the housing crisis, see *Rental Housing Assistance—The Widening Crisis*, available at huduser.org/publications/affhsg/worstcase00.html. Secretary Cuomo's March 2000 transmittal letter to Congress supports in principle the use of the FHA surplus for expansion of affordable housing rather than rebates to mortgagors.

- that any housing developed with the assistance will remain affordable for low-income or extremely-low-income families (as applicable) for at least 40 years;
- that tenants in the properties will not contribute more than 30 percent of their adjusted income to rent; and
- that a percentage of units (determined by the share of Trust Fund assistance to total project cost) will be made available to Section 8 voucher recipients on the same basis as other eligible families.

In addition, S. 2997 requires states to give preferences to properties based on certain factors, including: the extent of other resources leveraged, local support, the mixed-income character of the property, location in a low-poverty census tract or in a revitalizing community, the existence of employment opportunities for low-income families in the area, and the ability to maintain the units as affordable.

National Competition

In addition to authorizing federal matching grants, S. 2997 would authorize distribution of 25 percent of the Trust Funds to nonprofit intermediaries through a national competition administered by HUD. HUD would have to give preference to nonprofit applicants with demonstrated development capacity and the ability to leverage non-federal funding, whether private or public. Similar to the matching grants component, the national competition would be subject to numerous targeting requirements. Specifically, nonprofit intermediaries would have to ensure that 75 percent of the competitive grants support rental housing for extremely-low-income families, with 25 percent for low-income rental or homeownership assistance. If a development is part of a community revitalization plan in a higher poverty or lower-income census tract, these targeting requirements can be waived, as long as the assisted households have incomes below 60 percent of AMI (rental housing), or 80 percent of AMI (homeownership). Nonprofits that receive competitive funding must certify to HUD that:

- the assistance will leverage existing assistance from private and other non-federal sources (including Section 8);
- local assistance (in the form of either financial assistance or good faith efforts to work with the local government) will be provided in carrying out the activities;
- developments receiving assistance will remain affordable for at least 40 years;
- any housing assisted will be located either in a mixed-income development in a low-poverty area, or in a community undergoing revitalization;

- tenant rent contributions in assisted units will not exceed 30 percent of the family's adjusted income; and
- a percentage of units will be made available to voucher recipients on the same basis as other eligible families.

Finally, HUD would have to issue regulations within six months of enactment.

While there are no doubt numerous improvements possible in structuring an effective Trust Fund program (e.g., earmarking funds for capacity-building and use by qualified tenant-endorsed nonprofit organizations that commit to permanent affordability, tenant and applicant protections, adequate regulatory oversight, a participatory public planning process, etc.), Senator Kerry's proposal, especially its deep targeting requirements, represents an important step forward in recognizing that production and preservation are essential components of an effective national housing strategy.

S. 3033, The "Housing Needs Act of 2000"

Senator Bond demonstrated the bi-partisan nature of Congress' recognition of the problem by introducing S. 3033 around the time of a scheduled mark-up of the FY 2001 HUD-VA-IA Appropriations bill. While details and prospects for this proposal remain unclear, its basic features include the following:

- it authorizes a one-year appropriation of up to \$1 billion in "excess Section 8 reserves" to be distributed to states via block grants, with a minimum allocation of \$10 million per state;
- states must submit "affordable housing expansion plans" consistent with their other federal plans;
- no more than 20 percent of the funds can be used for preservation and rehabilitation, so that at least 80 percent of the funds must be used for production;
- all of the funds must be targeted to families below 80 percent of AMI (paying rents capped at 30 percent of median income), and at least 30 percent of the units must be occupied by families with incomes below 50 percent of AMI (paying rents capped at 20 percent of 50 percent of AMI);
- generally 40-year use restrictions would apply; and
- states must provide matching funds of at least 75 percent of the federal funds (which could not include HOME, Community Development Block Grants (CDBG), Low-Income Housing Tax Credits, or administrative expenses).

Senator Bond has included almost all of the provisions of this bill in the Senate version of the FY 2001 HUD

Appropriations bill, H.R. 4635, reported out of the Senate Appropriations Committee to the Senate floor on September 13, 2000.

Again, while there are serious problems with this proposal (e.g., weak targeting requirements, source of funds, nature of the required match, tenant and applicant protections, a cap on preservation/rehabilitation and deference to states), Senator Bond's bill represents a serious effort to bring the federal government back into the housing production arena. Prospects for progress on these proposals remain extremely unclear, but the *Bulletin* will cover any significant new developments. ■

FEDERAL DISTRICT COURT BLOCKS TEXAS TOWN'S LONG-STANDING EXCLUSIONARY ZONING SCHEME

In an August 1, 2000 decision, *Dews v. Town of Sunnyvale, Texas*,¹ the Northern District of Texas (J. Buchmeyer) struck down a town's 35-year-old zoning density restrictions on federal civil rights grounds. Sunnyvale, a small Dallas-area town of 2,000 residents, had zoning density requirements which permitted only one residential unit per acre, thereby preventing the construction of any multifamily housing within its borders. The court found that the town's zoning requirements had a racially discriminatory effect and were also motivated by a racially discriminatory intent. The effect and purpose of the town's zoning scheme, the court found, was to eliminate any affordable housing opportunities for low-income African American families within the town's borders. The *Sunnyvale* plaintiffs included a Dallas tenant counselor, a housing construction firm that was denied permission to build a multifamily development, and The Walker Project, Inc., a fair housing organization funded through the consent decree entered in *Walker v. HUD*.²

Discriminatory Effect under *Huntington*: Disparate Impact and the Perpetuation of Segregation

The court in *Sunnyvale* adopted the Second Circuit's discriminatory effect framework put forth in *Huntington Branch, NAACP v. Town of Huntington*³ which it identified "as the leading opinion on Fair Housing Act challenges to zoning

ordinances."⁴ Following *Huntington*, the court explained that a plaintiff can make out a case for racially discriminatory effect under the *Fair Housing Act*⁵ by demonstrating "either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation," regardless of any intent on the part of a defendant to discriminate on the basis of race.⁶

The *Sunnyvale* court found that the town's zoning density restrictions resulted in two kinds of adverse impact, or disparate impact, on African American families. First, the restrictions prevented the construction of apartments at a time when African Americans in the Dallas metropolitan area disproportionately resided in this type of housing. The court noted that according to the 1990 U.S. Census, "24 percent of renter occupied units in Dallas County were occupied by blacks and 65 percent of these renter occupied units were occupied by whites," even though 1989 American Housing Survey figures showed that "14.24 percent of total occupied housing units were occupied by black people and 77.01 percent were occupied by 'white & other' people."⁷ Second, Sunnyvale's zoning restrictions eliminated any housing in its borders that could be used in the federal housing subsidy programs. This disproportionately affected African American families in Dallas County because these families accounted for 52 percent of households in assisted housing even though they made up only 19.8 percent of the county's total population.⁸

The court also drew an explicit connection between race and poverty, finding that Sunnyvale's zoning scheme had a further disparate racial impact because it increased the cost of housing in the town. Pointing to 1989 data showing that "only 1,100 black households in the Dallas Metropolitan area paid \$150,000 or more for their owner-occupied homes," the court found that "[b]y raising the cost of entry into Sunnyvale, the Town has imposed a barrier that cannot be overcome except by a token number of black households."

In addition to finding discriminatory effect on the basis of the adverse impact of the town's zoning restrictions on African American families, the *Sunnyvale* court also found these restrictions to have a discriminatory effect because of their "segregative effect" on the local housing market in general. The court found that the town's single-family zoning policies perpetuated segregation and pointed to the fact that 97 percent of the town's households were white as clear evidence of this.⁹ The court compared this figure to the higher percentages of families of color in census tracts in Mesquite and Garland, towns that immediately adjoin Sunnyvale, some of which were more than 10 percent non-white.

¹2000 WL 1159244, at *37 (N.D.Tex. 2000).

²42 U.S.C.A. §§ 3601, *et seq.* (West Supp. 2000).

³*Sunnyvale* at *38 (internal quotations omitted).

⁴*Id.* at *39.

⁵*Id.* at *39-40.

⁶*Id.* at *41.

¹2000 WL 1159244 (No. CA 3:88-CV-1604-R).

²CA 3-85-1210-R (N.D.Tex., J. Buchmeyer).

³844 F.2d 926 (1988), *review denied in part and judgment aff'd in part*, 488 U.S. 15 (1988) (*per curiam*).

However, the court's characterization of harm stemming from the town's "segregative" zoning activities is unusual. In *Trafficante v. Metropolitan Life Insurance Co.*,¹⁰ the Supreme Court held that the nature of the harm from the perpetuation of segregation stems from "the loss of important benefits from interracial associations" suffered by all members of a geographic community in which segregation exists, both minorities and non-minorities, not just those who are the direct targets of racial discrimination.¹¹ The *Sunnyvale* court did not discuss the zoning restrictions in terms of an affirmative benefit that local residents were being deprived of by the town. Instead, it emphasized that Sunnyvale was failing to meet "its obligation to provide fair housing" and "compelling neighboring communities to assume its obligation."¹² Likely, this difference in the description of the harm involved in the perpetuation of segregation had to do with the town's long history of and commitment to segregative policies and the low value it placed on residential diversity and opportunities for interracial association.¹³

The Defendant's Rebuttal to a Showing of Discriminatory Effect

Under *Huntington*, once a plaintiff makes a prima facie showing of discriminatory effect, either disparate impact or the perpetuation of segregation, the burden then shifts to the defendant to rebut this showing. Following *Huntington*, the *Sunnyvale* court explained that the town's burden on rebuttal was to show "(1) its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest, and (2) no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."¹⁴ The court found the town's rebuttal deficient. The town's rebuttal was based on supposed limitations of the town's sewage system, on environmental and other regional obligations, and on interests in preserving the rural character of the town. The town's own engineer and planner contradicted the town's arguments: Sunnyvale's sewage system was capable of providing service to other than single family dwellings and a zoning arrangement of planned residential and commercial "clusters" would better preserve air

quality and open space.¹⁵ The court further found that a "clusters" plan would also permit the construction of apartment housing and thereby involve less racial discriminatory impact.¹⁶

Sunnyvale was failing to meet "its obligation to provide fair housing" and "compelling neighboring communities to assume its obligation."

Proving Purposeful Discrimination with Indirect Evidence: The Two Standards

The *Sunnyvale* plaintiffs were also successful in their claims of purposeful discrimination¹⁷ against the town. Unlike the discriminatory effect claims, which could only be brought under the *Fair Housing Act*, the plaintiffs brought their purposeful discrimination claims under the *Civil Rights Act of 1866*,¹⁸ the *Civil Rights Act of 1964*,¹⁹ 42 U.S.C.A. § 1981, and the *Fourteenth Amendment* via 42 U.S.C.A. § 1983. The plaintiffs made purposeful discrimination claims under the *Fair Housing Act*, as well. In all purposeful discrimination cases, intent to discriminate on the basis of a protected category must be shown, but this need not be done by direct evidence.

The court in *Sunnyvale* explained that slightly different standards are applied in deciding purposeful discrimination claims on indirect evidence under these statutes. On the *Fair Housing Act* claim, the court applied the Fifth Circuit's test for finding discriminatory intent in *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1556 (1996). Under *Simms*, the court stated "plaintiffs [must] establish (1) a fact issue as to whether the defendant's stated reasons for its decision are pretextual and (2) a reasonable inference that race was a significant factor in the refusal" to show discriminatory intent.

¹⁰409 U.S. 205, 210 (1972).

¹¹The court relied in part on the special legislative history of the *Fair Housing Act*. See 114 Cong. Rec. 3,422 (remarks of Sen. Walter Mondale on "the national commitment to replace the ghettos by truly integrated and balanced living patterns." (internal quotations omitted)). See also *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (1977).

¹²*Sunnyvale* at *42.

¹³Issues of standing may also be involved. The *Trafficante* plaintiffs were white residents challenging segregationist residential policies that were excluding families of color from their community. The analysis focusing on the deprivation of opportunities for interracial associations that the Supreme Court gave was a means to provide standing for plaintiffs like those in *Trafficante* who were not themselves the objects of discrimination. This does not mean that only whites are injured by the perpetuation of segregation—all members of a geographic community are harmed.

¹⁴*Sunnyvale* at *42.

¹⁵*Id.*

¹⁶*Id.* at *43. The court mentioned, but did not clearly apply, a four factor test adopted in *Huntington* for reaching a final decision on the merits in discriminatory effect cases. This test, taken from the Fourth Circuit's decision in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (1977) ("*Arlington II*"), examines (1) the strength of the showing of discriminatory effect, (2) partial evidence of intent, (3) the defendant's interests, and (4) the nature of relief sought.

¹⁷"Purposeful discrimination," "intentional discrimination," and "disparate treatment" are all synonyms for the same concept: conduct that is injurious to one or more members of a protected class and motivated by discriminatory intent.

¹⁸42 U.S.C.A. § 1982 (West Supp. 2000).

¹⁹*Id.* §§ 2000d, *et seq.*

On the intentional discrimination claims under the other civil rights acts, the court applied the Supreme Court's indirect evidence test for intentional discrimination in zoning set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 254 (1977). The *Arlington* test is a five-factor test under which courts consider evidence of the following to determine the existence of discriminatory motive: "(1) discriminatory impact; (2) the historical background of the challenged decision; (3) the specific sequence of events leading up to the decision; (4) any procedural and substantive departures from the norm; and (5) the legislative or administrative history of the decision."²⁰

The court found that the town's pattern of repeatedly ignoring the advice of its planners as to residential density was a specific sequence of events that provided indirect evidence of discriminatory intent.

The *Sunnyvale* court found evidence in four of the five categories. It had already found dramatic discriminatory impact in its analysis of the plaintiffs' discriminatory effect claims.²¹ It found that the town's pattern of repeatedly ignoring the advice of its planners as to residential density was a specific sequence of events that provided indirect evidence of discriminatory intent.²² It found several procedural and substantive irregularities in the town's treatment of a zoning application made by one of the plaintiffs, such as a retroactive determination that the plaintiff's application was not complete.²³ In regards to the historical background of the town's zoning policies, the court found that "Sunnyvale ha[d] a history of discouraging African-Americans from moving within its borders."²⁴ It found that the town's incorporation in 1953 and its zoning restrictions were accomplished with the purpose of excluding African American families.²⁵

The Defendant's Rebuttal to a Showing of Discriminatory Intent

Similar to the discriminatory effect context, once a prima facie showing of discriminatory intent has been established, a defendant will have the opportunity to rebut this showing. In a discriminatory intent case, a defendant may rebut

by showing "that the same decision would have resulted even had the impermissible purpose not been considered."²⁶ In this case, the court found that all of the town's stated motives for its zoning policies and denial of the plaintiff's application were "disingenuous" and that its actual motive was to prevent African American families from residing in the town.²⁷

Conclusion: Plaintiffs' Remedies

In ruling in favor of the plaintiffs on their discriminatory effect and purposeful discrimination claims, the court exercised the broad powers to grant relief conferred to it under the *Fair Housing Act*.²⁸ The court enjoined the town from implementing its present zoning restrictions and ordered it to adopt new policies and affirmatively to remedy its past history of discrimination. The court also ordered the town to take affirmative steps to change its reputation as a municipality hostile to multifamily housing and families of color. The court also awarded the plaintiffs costs and fees.²⁹

Sunnyvale represents a continuation of desegregation efforts surrounding the *Walker v. HUD* Dallas housing desegregation cases. While there are some differences in the law applied among the Circuits in fair housing cases, the basic legal framework, especially in exclusionary zoning cases, has been well defined in the case law. The value of the court's opinion in *Sunnyvale* is not only in its vindication of fair housing rights for Dallas County families, but also in its generally clear and careful application of fair housing statutes and case law. ■

²⁰2000 WL 1159244 at *44.

²¹*See id.* at *44-5.

²²*See id.* at *45.

²³*See id.*

²⁴*Id.*

²⁵*See id.*

²⁶*Id.* at *46. (citing *Arlington*, 429 U.S. 252 at 270, n. 21).

²⁷*See id.* The court did not explicitly classify the plaintiffs' intentional discrimination claims according to adverse effect on members of protected classes specifically and "segregative effect" the way it classified the discriminatory effect claims. Compare *Arlington*, *supra*; *Trafficante v. Metropolitan Life Insurance Co* 409 U.S. 210 (1972).

²⁸*See* 42 U.S.C.A. § 3613 (West Supp. 2000).

²⁹*See* 2000 WL 1159244, *47-8.

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 August of 2000. 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 Regulations

Public Housing Agency (PHA) Plan:

Streamlined Plans: Final Rule

65 Fed. Reg. 49,484 (Aug. 14, 2000)

Summary: This final rule adopts the amendment concerning streamlined PHA Plans that was published for public comment in an April 17, 2000 HUD proposed rule. The April 17, 2000 rule also proposed amendments to the deconcentration of poverty component of the PHA's admission policy, which is part of the PHA Plan submission. The proposed amendments concerning a PHA's policy on deconcentration of poverty, and the public comments received on these amendments, are still under consideration, and will be addressed in a separate rulemaking. No public comments were received on the proposed amendment concerning submission of streamlined PHA Plans, and therefore, this rule makes final that amendment.

Effective Date: September 13, 2000.

Initiation of Civil Money Penalty Action for Failing To Disclose Lead-Based Paint Hazards: Amendments Concerning Official To Initiate Action; Final Rule

65 Fed. Reg. 50,592 (Aug. 18, 2000)

Summary: HUD's civil money penalty regulations currently state that the Director of HUD's Office of Lead Hazard Control, or the Director's designee, may initiate a civil money penalty action against any person who knowingly violates

42 U.S.C. 4852d(b)(1). This final rule makes minor changes to the applicable provision in the civil money penalty regulations in two respects. First, the reference to the Director of the Office of Lead Hazard Control (OLHC) is changed to the Director of the new successor office to OLHC which is the Office of Healthy Homes and Lead Hazard Control. Second, this rule corrects an incorrect statutory citation in these regulations.

Effective Date: September 18, 2000.

Determining Adjusted Income in HUD Programs Serving Persons With Disabilities: Requiring Mandatory Deductions for Certain Expenses; and Disallowance for Earned Income; Proposed Rule

65 Fed. Reg. 50,841 (Aug. 21, 2000)

Summary: This proposed rule would amend HUD's regulations in part 5, subpart F, to include additional HUD programs in the list of programs that must make certain deductions in calculating a family's adjusted income. These deductions primarily address expenses related to a person's disability, for example medical expenses or attendant care expenses. The purpose of this amendment is to expand the benefits of these deductions to persons with disabilities served by HUD programs not currently covered by part 5, subpart F. Second, the proposed rule would add a new regulatory section to part 5 to require for some but not all of these same programs the disallowance of increases in income as a result of earnings by persons with disabilities. HUD believes that making these deductions and disallowance available to persons with disabilities through as many HUD programs as possible will assist persons with disabilities in obtaining and retaining employment, which is an important step toward economic self-sufficiency.

Comments Due Date: October 20, 2000.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule

65 Fed. Reg. 52,858 (Aug. 30, 2000)

Summary: This final rule provides for the enforcement of Title IX of the Education Amendments of 1972, as amended ("Title IX"), by several federal agencies including HUD. Title IX prohibits recipients of federal financial assistance from discriminating on the basis of sex in education programs or activities. The promulgation of these Title IX regulations will provide guidance to recipients of federal financial assistance who administer education programs or activities. The provisions of this common rule will also promote consistent and adequate enforcement of Title IX by federal agencies.

Effective Date: September 29, 2000.

¹At access.gpo.gov/su_docs.

²At hudclips.org/cgi/index.cgi.

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

⁴At rdinit.usda.gov/regs/.

HUD Federal Register Notices

Notice Concerning Use of Remaining Unobligated Funds Under HUD's Designated Housing and Certain Developments Funding Availability Announcements; Notice 65 Fed. Reg. 49,003 (Aug. 10, 2000)

Summary: On February 24, 2000, HUD published its Fiscal Year (FY) 2000 Super Notice of Funding Availability (Super NOFA) for HUD's Housing, Community Development, and Empowerment Programs and Section 8 Housing Voucher Assistance. The FY 2000 Super NOFA included three funding availability announcements for Section 8 voucher assistance for persons with disabilities. HUD advised that any funds remaining unobligated under two of the Section 8 voucher programs would be used to fund applications for the third program. This document notifies the public that HUD now intends to use a portion of these remaining unobligated funds to provide vouchers to non-elderly persons with disabilities who are seeking to move from nursing homes and other institutional settings to housing in their local communities. Availability of voucher assistance for this purpose will be the subject of a separate Federal Register notice.

Dates: The application due dates for funding under the three programs in the Supplementary Information section of this notice have passed.

Eligibility Restrictions on Noncitizens: Inapplicability of Welfare Reform Act Restrictions on Federal Means-Tested Public Benefits; Notice 65 Fed. Reg. 49,994 (Aug. 16, 2000)

Summary: Section 403 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (referred to as the "Welfare Reform Act") places restrictions on providing "federal means-tested public benefits" to certain legal aliens. The purpose of this notice is to advise the public that no HUD programs fall under the category of "federal means-tested public benefits" and therefore no HUD programs are subject to these restrictions.

Effective Date: This notice is effective upon publication.

HUD Notices

Procedures for Preparing, Submitting & Reviewing Rent Comparability Studies Notice H 00-12 (June 29, 2000)

Summary: this notice establishes the Office of Housing's procedures for performing, submitting and reviewing any rent analysis that Notice 99-36 or 99-17 requires owners to submit or housing staff to purchase.

Requirement to Send Section 8 Management Assessment Program (SEMAP) Certification via the Internet Notice PIH 2000-34 (Aug. 17, 2000)

Summary: This notice announces that HUD will release a new SEMAP certification system during the month of Sep-

tember 2000, and the new requirement that PHAs must submit their SEMAP certifications to HUD on-line. The SEMAP system is being further tested and will soon provide a single integrated module for HUD and PHA management of SEMAP certifications, assessments and performance ratings. This notice also announces changes in the first PHAs to be rated under SEMAP. The first PHAs to be rated under SEMAP will be PHAs with fiscal years October 1, 1999 to September 30, 2000. PHAs with a fiscal year end of June 30, 2000, should continue submit their 2000 SEMAP certifications on paper. PHAs with a fiscal year end of September 30, 2000, will be the first required to send their SEMAP certifications via the Internet.

Revitalization Area Evaluation Criteria Single Family Property Disposition Notice H-00-16 (Aug. 18, 2000)

Summary: This notice announces uniform standards for evaluating and designating revitalization areas within the Office of Single Family Housing. The criteria announced in this notice replaces those contained in Notice 94-74.

Annual Resident Survey for the Public Housing Drug Elimination Program (PHDEP) Notice PIH 00-39 (Aug. 23, 2000)

Summary: This notice provides instructions and clarification of existing policy for conducting Annual Resident Surveys for the Public Housing Drug Elimination Program (PHDEP).

Transmittal of Guidance on the Requirement for Appointment and Role of Resident Advisory Boards in the Development of Public Housing Agency Plans PIH 00-36 (HA) (Aug. 21, 2000)

Summary: This notice transmits a copy of questions and answers developed to provide guidance to HUD Field Offices; PHAs; resident councils; and public and assisted housing tenants on the requirement for appointment of and the role of Resident Advisory Boards in the development of PHA Plans. It supplements information found in the PHA Plan regulation at 24 C.F.R. Part 903.


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