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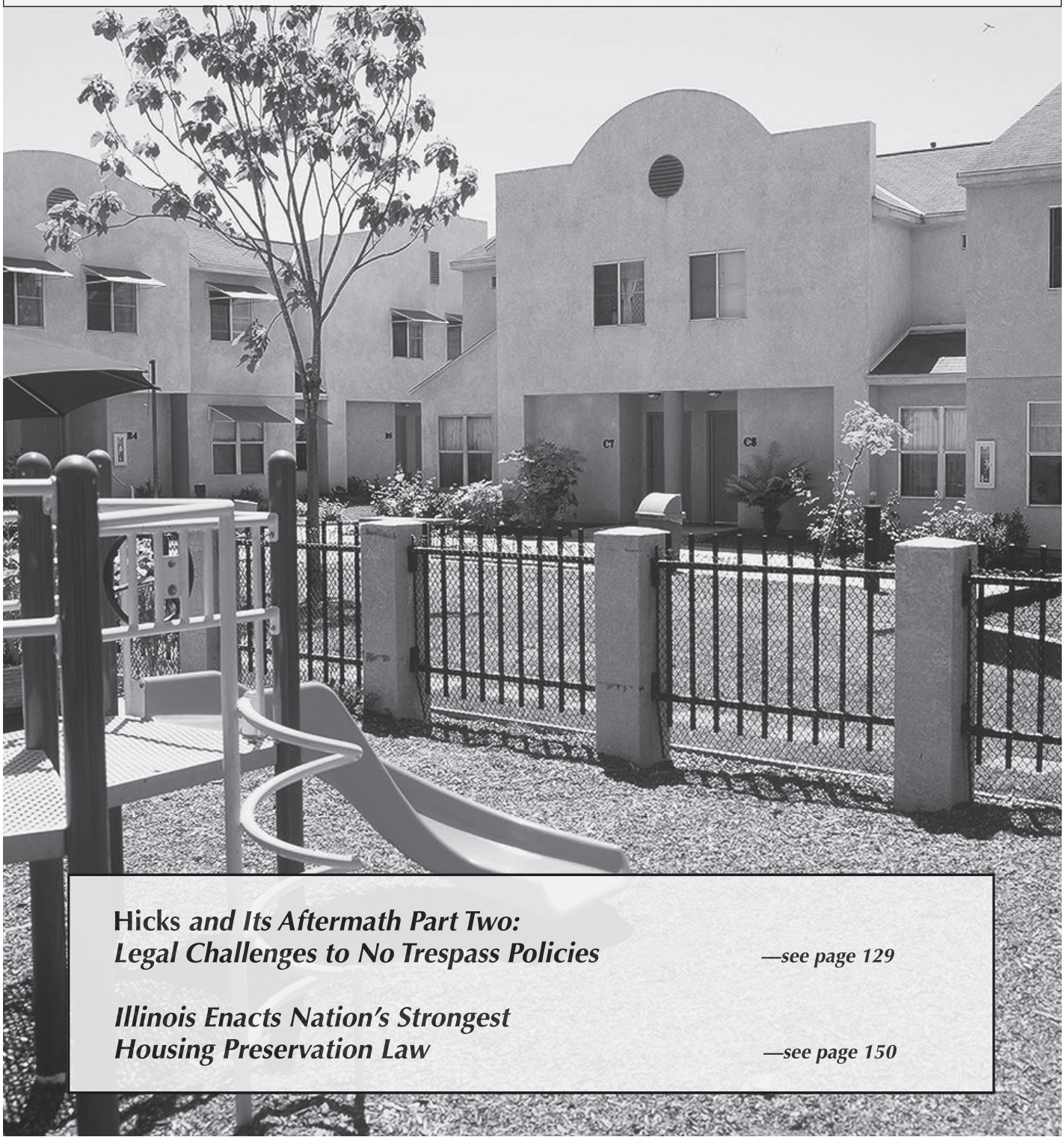

Hicks *and Its Aftermath Part Two: Legal Challenges to No Trespass Policies* —see page 129

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

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Cover: Los Adobes de Maria, Santa Maria, California. A 65-unit farmworker housing development owned and operated by Peoples' Self-Help Housing, financed by USDA's farmworker housing loan and grant program and by California's Department of Housing and Community Development. The project, completed in 1995, has 2, 3, 4 and 5-bedroom units. *Photo courtesy Charles LeNoir (LeNoir Photography) for Peoples' Self-Help Housing.*

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Inquiries or comments should be directed to Eva Guralnick, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

No Trespass Policies—*Hicks* and Its Aftermath

Part Two: Legal Challenges to No Trespass Policies

This article is the second of a two-part analysis of the recent Virginia Supreme Court decision in *Virginia v. Hicks*[1] together with no trespass policies of public housing authorities. Sometimes known as banning policies, no trespass policies generally involve the heightened use of criminal trespass sanctions to discourage visitors to public housing properties. Such policies often result in the unfair exclusion of public housing residents' guests and family members, as well as other visitors such as political canvassers.

The first part of the analysis, published in the June 2004 issue of the *Housing Law Bulletin*, focused primarily on recent developments in the *Hicks* case.[2] This second part is a discussion of legal challenges to public housing authority no trespass policies. It is intended only as a preliminary exploration of various legal claims and arguments. Its scope is limited—in particular, state law claims are addressed with little specific detail.

Overview of Virginia v. Hicks

Kevin Hicks, a non-resident of public housing, was convicted of trespassing on the premises of a public housing development owned and operated by Richmond Redevelopment and Housing Authority (RRHA) in Virginia.[3] The sidewalk on which Hicks was arrested, and the streets adjacent to the property, had been conveyed to RRHA by the City of Richmond a year earlier. Hicks' arrest followed a written notice from RRHA barring his return and his subsequent re-entry onto the property.[4] Although Hicks had tried to informally appeal his barrment from the property several times, the resident manager denied him each time. On two prior occasions Hicks had been convicted of trespassing on the property and on

[1]Virginia v. Hicks, 596 S.E.2d 74 (Va. 2004).

[2]NHLP, *No Trespass Policies—*Hicks *and Its Aftermath, Part One: The Virginia Supreme Court's Ruling on Remand*, 34 HOUS. L. BULL. 105, 109 (June 2004). The *Hicks* litigation has also been the subject of a number of other *Housing Law Bulletin* articles. *See* NHLP, *Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing*, 31 HOUS. L. BULL. 157, 182 (July-Aug. 2001); NHLP, *Supreme Court to Review PHA's Trespass Policy*, 32 HOUS. L. BULL. 31, 37 (Feb. 2002); *State Courts Revisit Public Housing Trespass Policies*, 32 HOUS. L. BULL. 169, 169 (Aug. 2002); NHLP, *Supreme Court Reverses Virginia Supreme Court's Decision Based on First Amendment Overbreadth*, 33 HOUS. L. BULL. 339, 344 (July 2003).

[3]Virginia v. Hicks, 539 U.S. 113 (2003).

[4]*Id.* at 115.

a third occasion charged with destruction of property.[5] At the time he was arrested, Hicks was delivering diapers to the mother of his child.

Hicks' conviction was affirmed by the court of appeals,[6] but on rehearing, the Court *en banc* vacated the conviction, holding based upon their determination that the streets, in spite of efforts to privatize them, remained a "traditional public forum."[7] Applying a strict scrutiny test, the *en banc* court held that the no trespass policy was not narrowly tailored to serve the city's compelling interest in preventing criminal activity at the housing project and that efforts to regulate speech in that public forum violated the First Amendment.[8] The Virginia Supreme Court affirmed the decision, but on different grounds, declaring the entire RRHA trespass policy facially overbroad and void under the First Amendment, based on its objection to the unwritten requirement that leafleteers and demonstrators obtain permission from the management before distributing materials or entering the premises.[9] The United States Supreme Court reversed and remanded the case back to the Virginia Supreme Court, holding that Hicks failed to show that RRHA's no trespass policy violated his First Amendment right of free speech.[10] Although the Virginia Supreme Court agreed to hear three issues on remand, violation of defendant's First Amendment right of association, a claim of vagueness and a challenge based on Hicks' right to intimate association, the court, by agreement of the parties, ruled only on the last two, finding against Hicks on both his claim of unconstitutional vagueness and violation of freedom of intimate association.[11]

As discussed in the first part of this analysis, the recent United States Supreme Court and Virginia Supreme Court decisions are quite narrow in their scope and are by no means the final word on the legality of all no trespass policies. However, a number of PHAs across the country have taken the recent *Hicks* decisions as encouragement to adopt new policies or to tighten policies already in place.

Recent Trends in PHA No Trespass Policies

In November 2003, the National Housing Law Project conducted an informal survey to examine the use of no trespass policies among public housing authorities (PHAs). Housing advocates across the country who regularly deal with a number of PHAs were contacted by NHLP staff regarding the use of no trespass policies in their regions.[12] The survey, although not large, revealed that several PHAs, in response to the United States Supreme Court's ruling in *Hicks*, had begun to tighten their no trespass policies or implement new policies where there were none previously. Such policies are often justified as a tool to combat crime in public housing.

While the policies differ in design and detail, many are substantially similar and include the same basic elements. Typically, a no trespass list or log is created. Often, non-residents, or guests of residents who are charged or merely suspected of criminal or "undesirable activity" such as disruptive behavior, are warned that they are trespassing and issued a no trespass notice either by a local police officer or a resident manager. The housing authority maintains logs of banned individuals and when those who are on the list return to the development, they are arrested.

All too often, these policies are unwritten or do not provide clear guidelines or time limits for barred individuals. Such policies easily lend themselves to abuse by providing wide discretion to police and resident managers. Police stop individuals and question them about their business on the property[13] and whom they are visiting,[14] and often ask for identification or escort them to their destination.[15] In many instances guests are limited to the unit of the resident they are visiting and may be banned if found elsewhere on the property unescorted.[16]

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[5]*Id.*

[6]Virginia v. Hicks, 535 S.E.2d 678 (Va. Ct. App. 2000).

[7]Virginia v. Hicks, 548 S.E.2d 249 (Va. Ct. App. 2001).

[8]*Id.* at 255.

[9]Virginia v. Hicks, 563 S.E.2d 674 (Va. 2002).

[10]*Hicks,* 539 U.S. at 124.

[11]*Hicks*, 596 S.E.2d at 74.

[12]Housing authorities surveyed include: Woonsocket Housing Authority (Conn.), DC Housing Authority, Jacksonville Housing Authority (Fla.), Housing Authority of the City of Bangor (Me.), Cambridge Housing Authority (Mass.), Housing Authority of the City of Asheville (N.C.), Housing Authority of City of Charlotte, (N.C.), Greenburgh Housing Authority (N.Y.), Housing Authority of Kansas City (Mo.), Cuyahoga Metropolitan Housing Authority (Ohio), Geauga Metropolitan Housing Authority (Ohio), Housing Authority and Community Service Agency of Lane County (Ore.), Sanford Housing Authority (Fla.), Housing Authority of the City of Tacoma (Wash.).

[13]Jacksonville Housing Authority, Admissions and Continued Occupancy Policy, Jacksonville Housing Authority Trespass Policy § XIV (2003) [hereinafter CMHA Banning/Trespassing Policy] ("[N]on-residents can be asked which resident they are a guest of when present on JHA property. If they cannot inform the JSO or management who they are the guest of, they may be given a trespass warning. If they give the name . . . the management or JSO shall attempt to . . . verify the information."); Cuyahoga Metropolitan Housing Authority, CMHA Banning/Trespassing Policy, Admin. Ord. No. 45, pt. 45.01A (2003) ("Non-residents who are on CMHA property and outside of a leased premises may be asked to identify the resident and leased premises they are visiting and may also be asked to either return to that premises or leave CMHA property.").

[14]CMHA Banning/Trespassing Policy, *supra* note 13, at pt. 45.01A.

[15]Under the policy of the District of Columbia Housing Authority, temporary or permanent bar notices may be issued for "entering DCHA property without presenting identification or signing the visitor log; being on or about DCHA property or other dwelling units other than the location identified on the guest pass or visitor log." District of Columbia Housing Authority, Public Housing Barring Policy, Resolution 04-06, ch. 96, § 9600.5 (b)(1) (2004) [hereinafter DCHA Public Housing Barring Policy].

[16]CMHA Banning/Trespassing Policy, *supra* note 13, at pt. 45.01A.

The chilling effect that such policies have on visitors, family members and guests may be significant, not to mention the adverse effect such policies have on residents' right to invite guests and loved ones into their homes. Many may be deterred from visiting friends in public housing based on anticipated harassment—especially individuals who are undocumented, under sixteen years of age or do not have adequate identification. However, a number of legal arguments may be available to challenge the adoption or implementation of unfair no trespass policies.

Legal Challenges to No Trespass Policies

The legal challenges that may be brought against no trespass policies fall into three broad categories:

- common law and contractual challenges, focusing on landlord-tenant law and lease agreements;
- statutory and regulatory challenges, relating to federal housing program requirements; and
- constitutional challenges, based on First and Fourteenth Amendment protections.

Note on Residents and Guests: Different Legal Issues

Persons challenging no trespass policies generally fall into two groups: (1) public housing residents whose visitors or guests have been denied access because of a no trespass policy and (2) criminal defendants charged with trespassing pursuant to a no trespass policy. Depending on the status of the person bringing the claim, certain challenges may or may not be available. Both tenants and criminal defendants have had success with common law and contractual challenges to no trespass laws. However, it is likely that only residents will be entitled to bring claims under the federal statutes and regulations governing public housing authority properties. Finally, both residents and criminal defendants will be able to raise constitutional challenges, so long as the person asserting the challenge has adequate legal standing under the specific constitutional doctrine being cited.

Common Law & Contractual Challenges

Common law and contractual challenges to no trespass policies can be used both by residents challenging the barrment of their guests from the property and criminal defendants facing prosecution for trespassing. Challenges under this section include claims under the common law of invitation and the right to peaceful and quiet enjoyment of the premises, and contractual claims involving lease provisions on reasonable accommodation of guests.

Invitation and the Right to Peaceful and Quiet Enjoyment of the Premises

By far the strongest argument that can be made either in the criminal defense of individuals being prosecuted under no trespass policies or in the civil context of tenants challenging no trespass policies is that of invitation. Advocates should begin with the premise that under longstanding traditions established through common law in virtually every jurisdiction in the United States, a tenant who holds legal possession of a leased premises enjoys all of the rights associated therewith including the right to the peaceful and quiet enjoyment of the property and the right to have invited guests. This right is often incorporated directly into the language of the lease. When a landlord and a tenant enter into a residential lease, possession of the property is transferred to the tenant for a limited period of time in exchange for rent, and the landlord, at the commencement of the lease, relinquishes certain rights.[17] Inherent in the tenant's right to legal possession is the ability to invite or exclude guests from the property.

It is well established in common law that residents have a fundamental right to have visitors in their homes at reasonable times and for reasonable purposes.[18] In *State of Maine v. DeCoster*, the Supreme Court of Maine held that an employer, whose employees lived in a mobile home park owned by the employer, could not prevent visitors from having access to the resident employees, in spite of the fact that they paid no rent. The court in *DeCoster* held that the "[r]ight of tenants to have visitors in their homes at reasonable times and for reasonable purposes is so fundamental that it requires no statutory authority."[19] Many state courts have weighed the tenant's possessory interest to invite guests against the landlord's desire to ban particular guests and have held that the tenant, as the one in possession of the property, has legal control over who may enter the premises and that that control can be exercised regardless of the landlord's objections. The tenant enjoys the "final word" on who may come onto the premises.[20]

All landlords who enter into a lease relationship are subject to this principle, regardless of whether they operate public or private housing, and tenants and criminal defendants in trespass cases have successfully litigated claims based on invitation.[21] In litigating no trespass policies, advocates will often face the argument that public housing is different from private housing and thus the housing authority is to be granted greater discretion to set

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[17] 5 THOMPSON ON REAL PROPERTY §§ 40.01 and 40.22(b) (David A. Thomas ed., 1994).

[18] State of Maine v. DeCoster, 653 A. 2d. 891 (Me. 1995); *see also* Branish v. NHP Prop. Mgmt, Inc., 694 A.2d 1106 (Pa. Super. Ct. 1997).

[19] *Id.*

[20] *E.g.,* Hall v. Commonwealth, 49 S.E.2d 369, 378 (Va. 1948) (commenting that each "householder and not the owner exercises the right to determine whether he will receive the visitor, be he an acquaintance or a stranger"); *see also* State v. Schaffel, 229 A.2d 552, 561 (Conn. Cir. Ct. 1966) (holding that tenants could invite housing inspectors onto property).

[21] *See* L.D.L. v. State, 569 So.2d 1310, 1312-13 (Fl. Dist. Ct. App. 1990) (reversing criminal trespass conviction where nonresident invited by public housing resident); In re Jason Allen D., 733 A.2d 351, 368 (Md.

policies concerning guests. Not only is this an incorrect assumption, but to the extent the law makes any distinction between a government and private landlord, public housing residents may, in fact, have more and not less substantive and procedural rights arising from the constitutional limitations on the exercise of government power.[22] Furthermore, federal laws now require that leases issued by housing authorities contain language involving the invitation and accommodation of guests.

Travel Across Common Areas Is Implied in the Invitation

A resident's right to have invited guests is only part of the equation, because an invitation, whether express or implied, is meaningless if guests cannot enter common areas to travel to and from a resident's leased premises. Therefore, an implicit right of invited guests to travel across the common areas of the property to reach their destination has been recognized by courts.[23]

In *City of Bremerton v. Widell*, the Supreme Court of Washington, in an *en banc* decision, ruled that "[a]n invitee or licensee of a tenant, who, even after a specific prohibition by the landlord, passes through common areas to enter a tenant's premises, is not a trespasser and does not violate a criminal trespass statute."[24] *Bremerton* involved a challenge by criminal defendants to a housing authority's no trespass policy on First Amendment intimate association and vagueness grounds. Although the court in *Bremerton* rejected the defendants' challenge of the policy on those grounds, it recognized a public housing resident's right to invite guests and a guest's right to travel through the common areas en route to the resident's apartment, even over the objection of the landlord.[25]

It is interesting to note however, that while the court in *Bremerton* overturned several trespass convictions on that basis, it upheld others where the defendants were observed far away from the homes of the residents who invited them, concluding that the defendants had exceeded the scope of their invitation.[26]

But how far is too far? If an invited guest is asked to get a soda from the soda machine unescorted by the resident, can that person be subject to the issuance of a no trespass notice? The question remains: how far outside of the actual unit or pathway to the unit does the ability to entertain guests extend and what are the limitations that a housing authority can place on that invitation in terms of regulating the movement and conduct of guests? The answers to these questions remain open.

Lease Provisions Regarding Reasonable Accommodation of Guests

In addition to the rights granted by common law, the right of public housing residents reasonably to accommodate guests in their homes has long been recognized by HUD. Federal regulations mandate that a public housing lease must itself contain language granting tenants exclusive use and occupancy of the leased unit, including the "reasonable accommodation of their guests."[27] Regulations also state that tenants are obligated to "abide by the necessary and reasonable regulations promulgated by the PHA (public housing authority) for the benefit and well-being of the housing project . . . ."[28] Plaintiff resident and criminal defendants have challenged no trespass policies under these regulations, arguing that policies that do not allow for the "reasonable accommodation" of guests are contrary to federal law and therefore invalid.

In *Diggs v. Housing. Authority of Frederick,* a federal district judge struck down the legitimacy of a public housing no trespass policy under which persons believed to be on the public housing authority property with "no apparent legitimate reason" were issued citations warning that they would be arrested and charged with criminal trespass. [29] This case was brought by a resident who claimed that the policy violated HUD's regulation requiring that public housing leases provide for the reasonable accommodation of guests.[30] The court preliminarily enjoined the policy,

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Ct. Spec. App. 1999) (holding that housing authority has no more or less right to exclude social guest of tenant than does landlord whose tenants are not recipients of a public subsidy); Messiah Baptist Hous. Dev. Fund v. Rosser, 400 N.Y.S.2d 306, 308 (N.Y. Sup. Ct. 1977) (holding that subsidized tenants may enjoy residence in manner similar to private tenants).

[22]*E.g.,* Thorpe v. Hous. Auth. of Durham, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) (quoting Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955)) ("The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.").

[23]*Schaffel*, 229 A.2d at 562 (holding that inspectors invited by tenants had the right to be in common areas); *L.D.L.*, 569 So.2d at 1312 (overturning trespass conviction where defendant was invited by tenant, stating that a "landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property. This law also applies to the common areas of the premises."); Williams v. Lubbering, 63 A. 90 (N.J. 1906) (holding that visitor, like tenant, entitled to ingress and egress); Todisco v. Tishman Realty & Constr., 62 N.Y.S.2d 458, 459 (N.Y. Sup. Ct. 1946) (holding that invitee has right to use tenant's usual means of ingress and egress); Commonwealth v. Burford, 73 A. 1064 (Pa. 1909) (holding that a right of way appurtenant to a rental unit constitutes a right of way to the lessee and any guests who visit a tenant's home with his permission for any lawful purpose).

[24]City of Bremerton v. Widell, 51 P.3d. 733 (Wash.), *cert. denied*, 537 U.S. 1007 (2002).

[25]*Id.* at 738.

[26]*Id.* at 739.

[27]24 C.F.R. § 966.4(d)(1) (2003). Note that the term "reasonable accommodation" as it is used here has a different meaning than it has in the context of disability discrimination.

[28]24 U.S.C. § 966.4(f)(4) (2003).

[29]Diggs v. Hous. Auth. of the City of Frederick, 67 F. Supp 2d. 522, 532 (D. Md. 1999).

[30]*Id.* at 531.

reasoning that the "trespass policy as currently enforced is a virtual permanent bar to a tenant's right to invite a guest into her own home, no matter how close a friend or relative that potential guest might be."[31] The court in *Diggs* concluded that the regulatory requirement that a housing authority reasonably accommodate residents' guests was not only a valid interpretation of the statute entitled to deference, but also was implicit within the statutory prohibition against unreasonable lease terms, because it would be patently unreasonable to prohibit public housing tenants from entertaining guests.[32] However, the court appeared to leave open the possibility that with clearly defined standards that do not permanently bar a tenant's right to have invited guests, a similar policy might be acceptable.

It is important to note that at least one court has held that a trespass defendant must show that he or she was expressly invited onto the property in order to assert invitation as a defense.

In *Lancor v. Lebanon Housing Authority,* residents challenged a housing authority lease policy that required them to obtain prior written approval from management for overnight guests.[33] The First Circuit held that the housing authority policy "cannot be said to provide for the reasonable accommodation of a tenant's guests or visitors" as stipulated by HUD regulations.[34] The court issued a preliminary injunction suspending the policy based on the lack of necessity and unreasonableness of the policy, which gave management "unfettered discretion to approve or disapprove the tenant's request" to have an overnight guest.[35]

In an unreported Ohio Court of Appeals case, *Ohio v. Scott*, the court came to an opposite conclusion—that the leasehold agreement granting the reasonable accommodation of guests is not without limitations and a tenant's right to have guests is derived from the housing authority and is relinquished when the guest is barred from the premises.[36] The defendant in *Scott* was convicted of criminal trespass for being present on Dayton Metropolitan Housing Authority (DMHA) property without permission from DMHA. He had previously been given two trespass notices and advised that he was not to enter DMHA premises. On the day that he was arrested he was helping his girlfriend move out of her thirteenth floor apartment. The issue was whether or not the tenant of the DMHA property had a right to invite Scott into the property over the objections of the DMHA.

The court rejected Scott's argument that the tenant's lease provided for "reasonable accommodations" of guests and the no trespass policy violated this right. The court looked at other language in the lease stating that tenants must abide by "necessary and reasonable regulations issued by DMHA." The court held that because the DMHA's no trespass policy was previously found to be reasonable and in furtherance of DMHA's statutory and contractual duty to maintain a safe dwelling,[37] tenants were subject to these policies. The court, following its own decision in *City of Dayton v. Gaessler*,[38] held that the tenant derived her rights as a tenant from DMHA and "her rights to invite guests were subject to DMHA's right to preclude certain guests by means of the criminal trespass policy."[39] Therefore, the tenant could not validly invite Scott onto the property because he had been issued no trespassing notices by DMHA.[40]

It is important to note that at least one court has held that a trespass defendant must show that he or she was expressly invited onto the property in order to assert invitation as a defense.[41] In *Thompson v. Ashe,* the Sixth Circuit concluded that a criminal defendant had to "show that he was arrested for criminal trespass on [housing authority] property when he was there by invitation."[42] It was not enough that the defendant had family members and friends residing on the property and was on the property looking for his brother when he was arrested.[43] The court held that the defendant must establish that he was on the property by express invitation.[44]

[31] *Id.* at 533.

[32] *Id.* at 531.

[33] Lancor v. Lebanon Hous. Auth., 760 F.2d 361 (1st Cir. 1985).

[34] *Id.* at 363.

[35] *Id.*

[36] Ohio v. Scott, No. 18039, 2004 WL 103175 (Ohio Ct. App. Jan. 23, 2004).

[37] *Id.* (citing Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001)).

[38] No. 18039, 2000 WL 1879103 (Ohio Ct. App. Dec. 29, 2000).

[39] *Scott*, 2004 WL 103175 at *3.

[40] In *Scott*, the court stated that the barred person's "only legal recourse was to appeal the trespass notice, which he did not do." The question then becomes, if a policy does not provide a right for a barred person to appeal the barrment, would the courts be less tolerant of such a policy? Would the lack of an appeal process make the policy unreasonable? It is also important to note that, unlike *Diggs* and *Lancor*, this cased involved a non-resident criminal trespass defendant instead of a plaintiff resident.

[41] Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2000).

[42] *Id.* at 405-6.

[43] *Id.*

[44] *Id.* The court also concluded that the criminal defendant, because he was not a resident, lacked standing to invoke federal requirements regarding reasonable accommodation of guests. *Id*. at 409.

Statutory and Regulatory Challenges to No Trespass Policies

Public housing authorities (PHAs), as governmental or quasi-governmental agencies, are subject to an extensive array of statutory and regulatory requirements which relate to their lease terms and other policies. In the statutory and regulatory arena, there are several approaches that advocates can utilize in challenging the validity of no trespass policies. These include challenges based on the housing authority's failure to establish written policies, failure to post the policies or incorporate them into the lease, failure to adopt reasonable policies, and the failure to comply with the annual plan process in adopting such policies.

These challenges are most often brought by tenants in federal court pursuant to the Civil Rights Act, 42 U.S.C. § 1983.[45] However, it remains to be seen how the Supreme Court's recent decisions regarding private rights of action to enforce federal law may affect the ability of advocates to successfully bring such claims under § 1983.

Note on Enforcement: § 1983 and Gonzaga v. Doe

Challenges made through the Civil Rights Act, 42 U.S.C. § 1983, have been made decidedly more difficult in recent years, particularly in light of the United States Supreme Court's decision in *Gonzaga University v. Doe*.[46] In *Gonzaga*, the Court ruled that "[b]ecause § 1983 provides a remedy only for the deprivation of 'rights . . . secured by the [federal] Constitution and laws, "it is rights [and] not the broader or vaguer 'benefits' or 'interests,' that may be enforced there under.'"[47] The court further held that "[e]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy."[48]

The Eighth Circuit applied this reasoning in a recent case in which a public housing resident challenged the housing authority's thirty-day termination letter as a violation of § 1983 based upon their failure to provide her with a seven-day cure period as required by state law.[49] Applying the *Gonzaga* standard in *Hunter v. Underwood*, the Eighth Circuit concluded that:

> The federal Housing Act does not specifically incorporate Iowa's 7 day notice to cure provision as a federally guaranteed right. The references to state law in the regulations cited above permit a tenant to assert and rely on state law in the state court system to defend against an eviction by a public housing authority. The regulations, however, provide no indication that Congress intended to create a new federally enforceable private right to every such additional state law procedure.[50]

While *Hunter* is not necessarily the final word on the enforceability, a detailed analysis of § 1983 and the federal housing program statutory and regulatory requirements is beyond the scope of this article. Any attempt to bring no trespass litigation against PHAs to challenge any of the program violations described below should be informed by a careful analysis of recent developments in § 1983 case law.

Failure to Develop Written Policy with Notice to Residents

Under federal regulations, housing authorities must acknowledge in writing in their leases a resident's right to reasonably accommodate guests and visitors in their homes.[51] Federal law further requires that PHAs not subject tenants to unreasonable terms and conditions in their leases.[52] These regulations require that policies, such as a no trespass policy, be in writing and that, prior to the adoption of such rules and regulations or their incorporation into a lease agreement, the policy be posted in a conspicuous manner in the public housing authority's project office.[53] The regulations are even more stringent for housing authorities seeking to change their existing policies requiring that, prior to making any changes, a copy be delivered or mailed directly to each tenant or posted in at least three conspicuous places within each building.[54] A PHA's failure to comply with these posting requirements may provide a basis to challenge its no trespass policy. In addition, the laws of particular states regarding leases may require more than mere posting.

Unreasonable Policies and Limitations on Guests: No Trespass and One-Strike

While it is clear that housing authorities may establish policies related to the health and well-being of residents, federal regulations provide that residents are only required "[t]o abide by necessary and reasonable regulations."[55]

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[45]Hunter v. Underwood, 362 F.3d 468 (8th Cir. 2004).

[46]Gonzaga University v. Doe, 536 U.S. 273 (2002) (holding that a former student who sued the university under § 1983, alleging violations of the Family Educational Rights and Privacy Act for releasing information without written parental consent, had no personal right of action under § 1983).

[47]*Id*. at 274.

[48]*Id*. at 273.

[49]*Hunter,* 362 F.3d at 471.

[50]*Id*.

[51]24 C.F.R. § 966.4(d)(1) (2003).

[52]42 U.S.C.A. § 1437d(*l*)(2) (West 2003). *See also* Richmond Tenants Org. v. Richmond Redevelopment & Hous. Auth., 751 F. Supp. 1204 (E.D. Va. 1990); 24 C.F.R. §§ 966.4(f) and 966.5 (2003).

[53]24 C.F.R. § 966.5 (2003).

[54]*Id*. at § 966.5(a)-(b).

[55]24 C.F.R. § 966.4(f)(4) (2003).

But what limitations on a resident's right to have invited guests are considered reasonable? Clearly, there are limitations on the accommodation of guests engaging in illegal activity that threatens the health, safety, or right to peaceful enjoyment by other residents or who are engaging in drug-related activity on housing authority property.[56] But the question remains: how far will the courts extend this right to exclude? Can those individuals be permanently excluded? What types of conduct and individuals can be excluded? And what factors are considered by courts in determining the reasonableness of such policies? Courts are only now beginning to answer these questions.

In *Richmond Tenants Organization, Inc. v. Richmond Redevelopment and Housing Authority*, a federal district court established a standard for determining whether or not policies would be invalidated for being unreasonable.[57] It interpreted the U.S. Housing Act provision prohibiting public housing leases from containing unreasonable terms "to require that lease terms be rationally related to a legitimate housing purpose. In applying this test, the crucible of reasonableness will be defined by the particular problems and concerns confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or under-inclusive, will be invalidated."[58]

In a recent decision involving an intersection between one-strike policies and no trespass policies, the Missouri Court of Appeals drew the line at criminal activity of a guest that occurred prior to the lease term of the resident. In *Wellston Housing Authority v. Murphy*, the court held that a housing authority could not terminate a public housing resident due to the extensive criminal record of a visitor, "where [the] guest's criminal activity and his sentences . . . occurred prior to his becoming tenant's guest."[59]

In *Murphy*, a housing authority became aware that a person with felony convictions for second degree murder, sexual assault and burglary had recently been released from prison and was visiting a resident of a development operated by the housing authority.[60] The housing authority barred the guest due to his criminal record and when the guest subsequently came to visit Murphy, he was arrested for trespassing and the housing authority sought to evict Murphy.

The court in *Murphy* ruled that "it strains construction to construe 'any criminal activity . . . of a guest' to include criminal conduct that occurred prior to the tenant's lease term."[61] It further stated: "The criminal activity that serves as the basis for the termination of the lease must not be remote in time to the lease itself, but must occur when the lease is in effect."[62]

In a recent decision involving an intersection between one-strike policies and no trespass policies, the Missouri Court of Appeals drew the line at criminal activity of a guest that occurred prior to the lease term of the resident.

Richmond Tenants Organization and *Murphy* essentially stand for the proposition that housing authority policies must be reasonable. The cases may also provide some counterbalance to the Ohio Court of Appeals decision in *Ohio v. Scott*.

Failure to Comply with PHA Annual Plan Requirements

A housing authority adoption of a no trespass policy outside of the annual public housing agency plan process may provide a basis upon which to challenge the policy. HUD regulations implementing Section 511 of the Quality Housing and Work Responsibility Act (QHWRA) require housing authorities to devise annual and five-year plans to provide a framework for local accountability and a source by which residents may locate basic policies, rules and requirements used by PHAs.[63] One of the required attachments to a PHA's annual plan is a statement of the housing authority's safety and crime prevention measures.[64] This statement should include a description of measures taken and may include any policies related to safety and crime prevention, which would be part of the Admissions and Continued Occupancy Procedures (ACOP), a supporting document to the annual plan.[65]

Arguably, a housing authority's no trespass policy, which would be part of the ACOP, is a crime prevention measure and should be a part of the crime prevention statement. The significance of tying such policies into the annual plan process is that it triggers various resident participation and HUD oversight requirements. Under the QHWRA, housing authorities may not make significant

[56] 24 C.F.R. § 966.4(f)(12) (2003) (regulation obligating tenant "[t]o assure that no…guest engages in: (A) [a]ny criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or (B) [a]ny drug-related criminal activity on the premises."); *see also* State of Washington v. Blair, 827 P.2d 356 (Wash. Ct. App. 1992).

[57] *Richmond Tenants Org.*, 751 F. Supp. at 1204.

[58] *Id.* at 1205-6.

[59] Wellston Hous. Auth. v. Murphy, 131 S.W.3d 378 (Mo. Ct. App. 2004).

[60] *Id.* at 379.

[61] *Id.* at 380.

[62] *Id.*

[63] 24 C.F.R. § 903.3 (2003).

[64] *Id.*at § 903.7(m).

[65] 42 U.S.C.A. § 1437c-1(f) (West 2003); 24 C.F.R § 903.17 (2003).

modifications to their plans until the notice, comment and hearing requirements are satisfied and HUD has given its approval.[66]

In *Baldwin v. Housing Authority of the City of Camden*, a case involving the adoption of new admissions criteria, the federal district court reiterated the importance of following the notice, comment and hearing requirements.[67] In ruling on a motion for summary judgment, it noted that while QHWRA does not preclude a housing authority from modifying or amending any policy, rule, regulation or plan, "[a] significant modification or amendment, however, may not be adopted or implemented until there is consultation with the resident advisory board, public notice, a public hearing or public meeting of the board of directors and review by HUD."[68]

Constitutional Challenges to No Trespass Policies

There are several constitutionally based challenges to no trespass policies that may be made by tenants, barred guests and criminal defendants. These include criminal defenses based on overbreadth and vagueness, challenges based on the First Amendment and freedom of speech, and challenges based on the infringement of freedom of association as protected by the Fourteenth Amendment.

Criminal Defenses Based on the Doctrines of Overbreadth and Vagueness

The United States Supreme Court has articulated two possible challenges to criminal laws that may be useful in challenging no trespass laws: overbreadth and vagueness. These are facial challenges, typically brought based upon the language of the statute or policy itself. "A facial challenge, in this context, means a claim that the law is invalid *in toto*—and therefore incapable of any valid application."[69] Overbreadth and vagueness are most likely to be used as defenses for persons being charged for violating no trespass laws. Overbreadth and vagueness are separate claims and derived from different constitutional doctrines: a law may be invalidated for overbreadth if it inhibits the exercise of First Amendment rights, while a law may be invalidated for vagueness as a violation of due process. However, they are usually invoked together.

OVERBREADTH

The overbreadth doctrine is based on the First Amendment. Its purpose is to prevent a "chilling effect" on First Amendment activities by broadly drafted laws that criminalize those activities.[70] An overbreadth challenge, if successful, suspends all prosecution under the law pending a narrower construction.[71] Under the overbreadth doctrine traditional rules of standing are sometimes relaxed to allow persons to challenge laws as unconstitutionally overbroad, even if their activity does not fall within conduct protected by the First Amendment, if the law could punish protected activity under a different set of facts.[72] Defendants may be able to challenge trespass laws by demonstrating that no trespass policies, as written, could potentially criminalize protected First Amendment activities.

Specifically, a law may be invalidated under the overbreadth doctrine if the law "inhibit[s] the exercise of First Amendment rights and if the impermissible applications of the law (or policy) are substantial when judged in relation to the statute's plainly legitimate sweep."[73] Under the doctrine of overbreadth, there must first be "a showing that a law punishes a 'substantial' amount of protected free speech, 'in relation to the statute's plainly legitimate sweep.'"[74] A successful overbreadth challenge will invalidate a law's entire application unless and until there can be a limiting instruction to remove or limit the offending provision.[75] Courts, in examining a statute under this doctrine, evaluate the "ambiguous as well as the unambiguous scope of the enactment."[76] However, courts regard this remedy as "strong medicine"[77] and use it "sparingly and only as a last resort."[78]

The recent decision by the United States Supreme Court in *Hicks* exemplifies the difficulties that criminal defendants may have in challenging no trespass policies on overbreadth grounds.[79] The court rejected Hicks' overbreadth argument, stating that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[80] Courts in a number of other cases involving overbreadth challenges to public housing no trespass policies have rejected the use of the overbreadth

[66]24 C.F.R. § 903.21 (2003). In addition, the QHWRA includes express language regarding § 1983 enforceability of PHA plan requirements. 42 U.S.C.A. § 1437c-1(i)(4)(B) (West 2003).

[67]Baldwin v. Hous. Auth. of the City of Camden, 278 F. Supp. 2d 365 (D.N.J., 2003).

[68]*Id*.

[69]Vill. of Hoffman v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 494, n.5 (1982) (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974) (quotations omitted)).

[70]*Hicks,* 539 U.S. at 119.

[71]*Id.*

[72]Broadrick v. Oklahoma, 413 U.S. 601(1973); Dombrowski v. Pfister, 380 U.S. 481 (1976).

[73]*Hicks,* 539 U.S. at 120.

[74]*Broadrick*, 413 U.S. at 615.

[75]*Id.* at 613.

[76]*Vill. of Hoffman*, 455 U.S. at 495.

[77]*Id.*

[78]*Id.*

[79]For more on *Hicks*, see note 2, *supra.*

[80]*Hicks,* 539 U.S. at 124.

doctrine as a defense.[81] In addition, even if a no trespass law was held to be invalid under the overbreadth doctrine, it is questionable as to what meaningful effect this would have because the housing authority could narrow its policy and continue to discourage visitors.

If a law does not reach constitutionally protected speech or conduct associated with speech and therefore does not satisfy the overbreadth test, the law may still be challenged as vague, in violation of due process.

VAGUENESS

If a law does not reach constitutionally protected speech or conduct associated with speech and therefore does not satisfy the overbreadth test, the law may still be challenged as vague, in violation of due process.[82]

In many cases, a claimant will raise overbreadth and vagueness together, confusing the two and not realizing that they are, in fact, separate doctrines. When both overbreadth and vagueness are brought together the court first determines whether or not the enactment of the law reaches "a substantial amount of constitutionally protected conduct" and if it does not, then the overbreadth challenge fails.[83] The court then looks at the vagueness challenge and "assuming the enactment implicates no constitutionally protected conduct should uphold the challenge only if the enactment is impermissibly vague in all of its applications."[84]

The United States Supreme Court has established two independent bases for a criminal law to be invalidated for vagueness. A law will be invalidated: (1) if it fails to define the "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or (2) if the law authorizes or encourages arbitrary and discriminatory law enforcement.[85] The court places special emphasis on whether a challenged law gives adequate guidelines to law enforcement in order to avoid arbitrary enforcement.[86] The court has stated: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[87] However, in order to be invalidated for vagueness, it must be demonstrated that the law is "impermissibly vague in all of its applications."[88]

A leading case on this doctrine is *City of Chicago v. Morales*, in which the United States Supreme Court concluded that a Chicago anti-gang loitering ordinance was void for vagueness.[89] The language of the ordinance allowed to be prosecuted individuals who, after "remain[ing] in any one place with no apparent purpose" in a group that included at least one gang member, failed to obey a police order to disperse.[90] Justice Stevens, joined by Justices Souter and Ginsburg, writing for the controlling plurality, expressed concern that this "apparent purpose" requirement did not give any guidance as to how to distinguish between legal and illegal conduct:

> It is difficult to imagine how any citizen . . . standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?[91]

In his concurrence, Justice Breyer emphasized that, because the "apparent purpose" requirement effectively made individual police officers the final arbiters as to the legality or illegality of certain conduct, "the policeman enjoys too much discretion in *every* case," rendering the ordinance "invalid in all its applications."[92]

The requirement in many housing authority trespass policies that individuals visiting the property demonstrate that they are *legitimate guests* or are on the property for some *social purpose* creates the similar interpretive difficulties as those that troubled the court in *Morales*.[93] Is a

[81] *See Scott*, 2004 WL 103175 at *4 (citing the United States Supreme Court decision in *Hicks* to hold that appellant did not show that "the RRHA trespass policy as a whole prohibit[ed] a 'substantial' amount of protected speech in relation to its many legitimate applications"); *City of Bremerton*, 146 Wash. 2d at 579 (holding that public housing anti-trespassing policy did not implicate First Amendment activity and cannot be challenged under the overbreadth doctrine); Daniel v. City of Tampa, 843 F. Supp 1445 (M.D. Fla. 1993) (holding that a statute that is directed at unprotected behavior that has terrible consequences for the public housing residents did not reach a substantial amount of constitutionally protected behavior); De La O v. Hous. Auth. of El Paso, No. EP-02-CA-0456-DB, 2004 WL 595087 (W.D. Tex. 2004) (holding that an overbreadth challenge fails when defendants cannot put forth evidence as to how no trespassing policy infringes on First Amendment rights).

[82] *Vill. of Hoffman Estates,* 455 U.S. at 493.

[83] *Id.*

[84] *Id.*

[85] Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

[86] *Id.* at 358.

[87] *Id.* (quoting Smith v. Gougen, 415 U.S. 566, 574 (1974)).

[88] *Vill. of Hoffman Estates,* 455 U.S. at 1193.

[89] Chicago v. Morales, 527 U.S. 41 (1999).

[90] *Id.* at 47.

[91] *Id.* at 56-57 (Breyer, J. concurring).

[92] *Id.* at 71 (Breyer, J., concurring).

[93] *See* CMHA Banning/Trespassing Policy, *supra* note 13 (containing a provision limiting access to authorized individuals and requiring a "written request" seeking entrance for "legitimate business or social purposes"); *See also*, Housing Authority of the City of Charlotte, Ban Policy and Procedures pt. III (2003) [hereinafter HACC Ban Policy and Procedures] ("as a general rule, residents, members of their household and their legitimate guests should not be barred").

person making an unannounced visit to a family member's apartment a legitimate guest? Does a person with a standing invitation to "stop by any time" but without a specific invitation to visit at a particular time have a legitimate social purpose? Does a person making a prearranged visit to a family member's apartment have a legitimate purpose if the family member nonetheless turns out not to be home? Is a person delivering an invitation to a political or religious meeting or a thank-you note a legitimate guest? As a result of this vagueness, tenants may not know how to conform their own conduct or how to advise their guests to modify their conduct to comply with the amorphous provisions of the policy.

Under the terms of some policies, unfettered discretion is relegated to resident managers and police[94] to decide who is banned and who is not based upon a subjective interpretation of what is "legitimate" or "social" activity.[95] On their face, the words "legitimate," "business" and "social" do not refer to specific conduct. As a result, they permit subjective enforcement based upon a wide possible range of individual interpretations.

As the Supreme Court explained in *Morales*: "The Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[96] Yet, the use of an all-encompassing "net" is precisely the strategy that many PHAs adopt in promulgating trespass policies that limit access to the property,[97] often without the express authority by the residents to do so. Such policies, by limiting access to the property, not only deter criminals, but risk excluding other individuals who may be engaging in lawful activity including those individuals who are there by *invitation of a resident*. Often, the result is the exclusion of parents, aunts, uncles and grandchildren and may serve to deprive resident children of the nurture of their parents, elderly tenants of the care and companionship of their children and grandchildren, not to mention their effect on sibling relationships, lifelong friendships, romantic partnerships, and other intimate human associations that typically occur in the privacy of one's home.

It is important to note that this precise vagueness argument was made on remand in the Hicks *case and rejected by the Virginia Supreme Court.*

It is important to note that this precise vagueness argument was made on remand in the *Hicks* case and rejected by the Virginia Supreme Court. The Virginia Supreme Court distinguished *Morales* because the Chicago ordinance regulated conduct in a public place and involved no mens rea requirement. The Virginia Supreme Court noted that, unlike the ordinance in *Morales*, "Hicks was convicted of violation of a criminal trespass statute, Code 18.2-119, which has an intent requirement."[98] It further noted that, unlike *Morale*s, the Richmond no trespass policy was not penal in nature.[99] The court pointed to Hicks' actual knowledge of the specific requirements of the no trespass policy and its applicability to him:

> Prior to the conviction that is involved in this proceeding, Hicks had been convicted of two other charges of criminal trespass on the Housing Authority's property in violation of Code 18.2-119. Hicks had also received a hand-delivered letter, which he signed and acknowledged, that directed him not to return to the Housing Authority's property. That letter also informed Hicks that if he returned to the Housing Authority's property, he would be prosecuted for trespass.[100]

Based upon these facts, the court concluded: "Hicks cannot now complain that the Housing Authority's policy is somehow vague. Certainly, as to him, the Housing Authority's trespass policy could not have been clearer."[101]

The Virginia Supreme Court also distinguished *Morales* because the Chicago ordinance involved the restriction of a person's right to remain in a *public place*.[102] In *Morales*, the court noted that the "[f]reedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process clause of the Fourteenth Amendment."[103] The

[94] *See, e.g.*, CMHA Banning/Trespassing Policy, *supra* note 13, pts. 45.01A and 45.02(E.) (allowing implementation by "the CMHA Police Department and Estate Managers" with review of regional chief of housing). *See also*, Greenburgh Housing Authority, Bar-Out Policy Statement and Lease Addendum ¶ 3 (2003) ("The executive director is authorized, upon the receipt and verification of any complaint; to determine that a non-resident shall be barred-out from housing authority property indefinitely/for limited periods.").

[95] *See* Cambridge Housing Authority, CHA Limited Access Policy (1995) ("When CHA personnel observe or receive information from residents or Cambridge police of non-resident activity on the property, CHA shall send a 'No Trespass' notice to the non-resident advising him/her that he/she will be Trespassing if he/she comes onto CHA property without a legitimate purpose."); HACC Ban Policy and Procedures, *supra* note 93, pt. III.

[96] *Morales*, 527 U.S. at 60 (citing United States v. Reese, 92 U.S. 214, 221 (1876), internal quotations omitted).

[97] CMHA Banning/Trespassing Policy, *supra* note 13, pt. 45.01A.

[98] *Hicks*, 596 S.E.2d at 79.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Morales,* 527 U.S at 54.

[103] *Id.*

Virginia Supreme Court stated

> The [Richmond] Housing Authority's policy is intended to regulate the behavior of people who appear on *private property* owned by the Housing Authority, which provides safe and affordable housing for low and moderate income individuals. The Housing Authority's trespass policy is not a penal ordinance and, indeed, one could be arrested and convicted for trespass on the Housing Authority's *privately-owned property* even if the trespass policy did not exist.[104]

Thus, *Hicks* makes a successful challenge of no trespass policies on vagueness grounds substantially more difficult for criminal defendants, but perhaps for residents as well. However, the Virginia Supreme Court's recent decision in *Hicks* does not address other constitutional challenges to such policies.

First Amendment Challenges

First Amendment challenges involving freedom of speech have been successful in challenging no trespassing laws. Different than an overbreadth challenge, which also relies on the First Amendment, these other claims are based on a policy's direct restriction of a resident or visitor's own protected speech interest.

Crucially, the First Amendment protects not only those who engage in free speech, but also the rights of those who receive the information.[105] As such, these claims have been brought by residents as well as uninvited parties seeking access to the property for legitimate reasons, such as organizing or campaigning for political office.

In analyzing a First Amendment challenge on government-owned property such as the public housing properties, the court must first decide if the activity at issue implicates the First Amendment and, if so, what level of scrutiny applies to the policy.[106] The court then analyzes the regulation according to that level of scrutiny.[107]

NOTE ON TYPE OF FORUM AND LEVEL OF SCRUTINY

Courts apply a tripartite framework for analyzing the restriction of free speech on government-owned property and three categories of property are recognized.[108] First, the right of the state to limit expressive activity is most restricted on property that is designated as a traditional public forum.[109] Examples include streets and parks or other property that has "immemorially been held in trust for the use of the public and . . . [has] been used for purposes of assembly, communicating thoughts between citizens and discussing public questions."[110] In a public forum the state must show that the regulation is necessary and narrowly drawn to serve a compelling state interest.[111] The second category involves land that has been opened up for the public to use as a place for expressive activity—although the state is not required to maintain the property for this purpose indefinitely, while the property is open, the state is bound to the same standards as apply in the traditional public forum.[112] The third category is property that is not a forum for public communication, either traditionally or by designation.[113] On this third category of property, the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable" and content-neutral.[114]

When analyzing a First Amendment challenge to no trespassing policies, the designation of the property as a public forum is an important factor in whether or not housing authority policies violate freedom of speech. Policies that apply to property that is a traditional or designated public forum must be narrowly construed to serve a compelling state interest while policies that apply to non-public forums must only be content-neutral and reasonable.[115] As discussed below, courts have reached varied conclusions regarding forums in public housing no trespass cases.

FREE SPEECH CHALLENGES TO NO TRESPASS POLICIES

Where a policy restricts a person's freedom of speech, the policy will be held to be invalid under the First Amendment either (1) if it is unreasonable, in instances where the property is determined to be a nonpublic forum, or (2) if it does not serve a compelling governmental interest, in instances where the property is determined to be a public forum.[116] The courts, however, are split as to whether public housing properties are considered public or nonpublic forums.

In a recent Fifth Circuit case, *Vasquez v. Housing Authority of the City of El Paso,*[117] a resident, Jesus De La O, and a non-resident political candidate, Roberto Vasquez, brought suit challenging trespassing restrictions barring door-to-door campaigning without prior approval.[118] The

[104]*Hicks*, 596 S.E.2d at 79 (emphasis added).

[105]Vasquez v. Hous. Auth. of El Paso, 271 F.3d 198 (5th Cir. 2001), *reh'g en banc granted*, 289 F.3d 350 (2002).

[106]*Id*. at 202.

[107]*Id.*

[108]Perry Educ. Assoc. v. Perry Local Educators Assoc., 460 U.S. 37 (1983).

[109]*Id.* at 47.

[110]*Id*. at 47 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[111]*Id.*

[112]*Id.*

[113]*Id.*

[114]*Id.*

[115]*Id*.

[116]*Vasquez*, 271 F.3d at 198.

[117]*Id.* at 201.

[118]*Id.* at 203.

court treated the housing authority property as a nonpublic forum and reviewed the policy for reasonableness.[119]

The plaintiffs challenged two policies of the Housing Authority of the City of El Paso (HACEP) that restricted "non-resident" access.[120] The first policy limited access to housing authority property to tenants, their guests, and others with legitimate business on the premises.[121] The second policy prohibited the distribution of notices and flyers without prior approval of the project's manager and allowed residents to distribute said flyers only from 9:00 a.m. to 8:00 p.m. with a prohibition not to distribute to doors of residents who did not answer the door.[122] The court found that "[t]aken together, these regulations operate to allow residents to distribute literature, political or otherwise, but prevent non-residents from doing so."[123] In the plaintiff's initial challenge of these regulations, the district court, after first granting plaintiff's temporary restraining order against HACEP, granted summary judgment in favor of the housing authority, concluding that the housing development was a nonpublic forum and that the regulations were a reasonable response to relevant safety concerns.[124] The resident appealed, asserting his constitutional right to receive oral and written presentations from political candidates or their representatives."[125]

The Fifth Circuit, on appeal, ruled that the "[c]ity housing authority trespassing regulations, which limited access to authority-owned housing development to certain specified persons, and prohibited distribution of notice and flyers without prior approval, impermissibly restricted speech in a nonpublic forum, in violation of [the] First Amendment,"[126] because the policy "isolated a significant portion of [the] community from a time-honored and effective means of political discourse."[127]

This Fifth Circuit ruling was procedurally vacated when the Fifth Circuit agreed to rehear the matter *en banc*. However, the case was never reheard, or the ruling reversed, by the *en banc* court because the plaintiff died before the rehearing. The court determined that the matter was made moot by plaintiff's death and the estate lacked standing to continue with the matter.[128] While the initial Fifth Circuit ruling is no longer authoritative, it nevertheless may be useful as persuasive authority.

However, in a nearly identical case decided several years earlier, the Eleventh Circuit reached the opposite conclusion from that of *Vasquez*.[129] This case, *Daniel v. City of Tampa, Fl.,* was brought by Mr. Daniel, a non-resident who was arrested on three occasions for violating Florida's trespass after warning statute and who challenged the law as violative of his First Amendment right to leaflet on the housing authority property.[130] The Eleventh Circuit concluded that the public housing property was a nonpublic forum and further ruled that "enforcement of the statute is a reasonable means of combating the rampant drug and crime problems within the Housing Authority property."[131] Because Daniel had unlimited access to city-owned streets and sidewalks adjacent to the property, the court explained, he had an alternative channel for distributing information to residents. [132]

At least one court has treated a public housing authority property as a public forum.

In another vein, at least one court has treated a public housing authority property as a public forum. In *Walker v. Georgetown Housing Authority,* the Massachusetts Supreme Judicial Court concluded that "[t]he streets and sidewalks of public housing development used for access to apartments fell within (the) classification of 'public forum' for purposes of determining what limits on speech may be imposed," and that the policy did not serve a compelling state interest.[133] The court reasoned that "[t]he [United States] Supreme Court's position on local regulations banning door-to-door campaigning and solicitation leaves no room for doubt. 'Freedom to distribute information to every citizen wherever he desires to receive it is so

[119]*Id.*

[120]*Id.*

[121]*Id.*

[122]*Id.*

[123]*Id.*

[124]*Id.*

[125]*Id.*

[126]*Id. See also* Walker v. Georgetown Hous. Auth., 677 N.E.2d 1125 (Mass. 1997) (finding that a housing authority's barring all door-to-door campaigning and soliciting violated tenants' First Amendment right to campaign, solicit and receive information and determine whom they will receive as visitors).

[127]*Vasquez*, 271 F.3d at 205.

[128]This information was obtained in an April 7, 2004, conversation with Fernando Chacon, counsel for the plaintiff, Jesus De la O, in *Vasquez v. Housing Authority of the City of El Paso,* and NHLP staff.

[129]*Daniel* 38 F.3d at 551.

[130]*Id*. at 548.

[131]*Id*. at 550.

[132]*Id*. at 546-547.

[133]Walker v. Georgetown Hous. Auth., 677 N.E.2d 1125 (Mass. 1997).

clearly vital to the preservation of a free society that…it must be fully preserved.'"[134] The court further stated that "[w]hether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community."[135]

Whether a property is designated as a public forum is important in determining the level of scrutiny used in analyzing no trespass policies and their restriction on free speech. Even if a property is determined to be a non-public forum, tenants and third parties can still be successful in their challenges if no trespass policies are determined to be unreasonable.

Right of Association Challenges to No Trespass Policies

Tenants, their guests and criminal defendants have challenged no trespass policies alleging that the policies violate their right of intimate association. While not specifically enumerated by the Constitution, the right of intimate association arises from the protections afforded individual liberty under the Bill of Rights and has been recognized by the United States Supreme Court.[136] The United States Supreme Court defined the right of association stating that the Bill of Rights "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[137] The relationships that should be afforded this protection were further defined as those "that attend the creation and sustenance of a family."[138] Family members of public housing residents who are barred from public housing properties, as well as residents themselves, may be able to challenge no trespass policies as violative of their right of intimate association.

In order to succeed with a claim for violation of intimate association, it must be demonstrated that the type of relationship between the tenant and the barred visitor is of a protected nature and that there is unwarranted state interference with this relationship.[139] Relationships between parents and children may be the most useful upon which to base a challenge to no trespass policies. For at least seventy-five years, the United States Supreme Court has explicitly recognized that fundamental liberty interests attach to the parent-child relationship. Parents have a constitutionally protected liberty interest in the custody and control of their children.[140] The primary role of parents in the "nurture and upbringing" of their children "is now established beyond debate as an enduring American tradition."[141] Parents and children also have a protected liberty interest in mutual "companionship" and "care."[142] If, as the court has held, parents have a fundamental right "to guide the religious future and education of their children,"[143] and if parents are constitutionally entitled to deference in their decisions about who can and cannot visit with their children,[144] then these fundamental rights ought to include a parent's right to visit his or her child in the child's home.

However, the United States Supreme Court has not yet squarely addressed whether blood relatives, namely parents or children who may not live together, have a liberty interest in merely visiting one another in the confines of their home. The appellate case law on this issue is primarily from the Sixth Circuit and is mixed. In *Thompson v. Ashe*, the Sixth Circuit held that an uninvited visitor, charged with criminal trespass and on a public housing "trespass" list, did not have a constitutional right to visit family because the "[United States Supreme] Court has not extended constitutional protection to mere visitation with family members."[145]

Thompson, however, was criticized in a later Sixth Circuit criminal case, *Johnson v. City of Cincinnati*, in which the court, while acknowledging that it was bound by *Thompson*, questioned that ruling.[146] In *Johnson*, the court recognized a grandmother's constitutional right to intimate association with her grandchildren. The grandmother, who had been arrested on drug charges, challenged her exclusion from the area of Cincinnati where her grandchildren resided. She had regularly assisted in caring for her grandchildren,[147] and argued that the city's exclusion order infringed on her right to participate in their upbringing.[148] The court recognized that "[b]oth Supreme Court precedent and our national tradition suggest that a family member's right to participate in child rearing and education is

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[134]*Id.* at 1127*; but see De la O*, 2004 WL 595087 (finding that public housing authority development streets and sidewalks deemed fortified against Fourteenth Amendment substantive and procedural due process challenges and upholding housing authority rules limiting access onto its property as a reasonable means of combating crime on its property without limiting the right of residents to invite political candidates to their residence).

[135]*Walker*, 677 N.E.2d at 1127 (quoting Martin v. Struthers, 319 U.S. 141 (1943)).

[136]Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[137]*Id.* at 618.

[138]*Id.* at 619.

[139]*Id.*

[140]*See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000).

[141]Wisconsin v. Yoder, 406 U. S. 205, 232 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

[142]Stanley v. Illinois, 405 U. S. 645, 651 (1972).

[143]*Yoder*, 406 U.S. at 232.

[144]*Troxel,* 530 U.S. at 68-70.

[145]*Thompson*, 250 F.3d 399; *but see* Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2003).

[146]*Johnson*, 310 F.3d at 489.

[147]*Id.*

[148]*Id.* at 499.

one of the most basic and important associational rights protected by the Constitution."[149] The court held that a city ordinance barring individuals who had been arrested from entering "drug exclusion zones" unconstitutionally infringed on the arrestee's right of intimate association due to the ordinance's "broad sweep" and "lack of individualized consideration prior to exclusion."[150]

The Sixth Circuit noted the difference between an uninvited guest attempting to visit a family member as was the case in *Thompson*, and an invited family member seeking to participate in the upbringing of her grandchildren:

> The issue before this court, however, is whether Johnson has a fundamental associational right to participate in the education and rearing of her grandchild. Unlike the plaintiff in *Thompson*, Johnson has been an active participant in the lives and activities of her grandchildren, with the consent and support of the children's mother.[151]

The court further stated that "to the extent that *Thompson* can be read to proclaim the absence of a fundamental right to participate in child-rearing it conflicts with [United States] Supreme Court precedent and cannot bind this court."[152] Although it is a criminal case, *Johnson* implies that a claimant's position in challenging such laws is strengthened by both the purpose of the visit, such as for childrearing or education versus mere visitation, and by a showing that the individual in question is present at the invitation or with the consent of the resident.

A decision by the Second Circuit also offers some useful discussion of intimate association rights. In *McKenna v. Peekskill Housing Authority*, the court invalidated a policy that required public housing tenants to register their guests with the housing authority.[153] In this challenge of a housing authority rule, brought by *residents*, the court recognizing that the guest registration rule "clearly limited the tenants' freedom to associate and intruded on their privacy," applied a test under which the housing authority's "legitimate interests in maintaining safe, decent housing and in keeping track of occupancy and eligibility in public housing would justify the intrusion only upon a showing that the means adopted . . . were the least restrictive in light of the interests served."[154] In *McKenna*, public housing residents were required to identify, in advance through a written registration, all overnight guests and obtain housing authority approval.[155] The court in *McKenna* stated that "[it] would be ignoring the realities of human nature and relationships to conclude that the disclosure of this highly intimate information, coupled with the necessity of registration and advance approval, did not impinge on the tenants' freedom to have whomever they wanted visit their homes."[156]

The court in McKenna stated that "[it] would be ignoring the realities of human nature and relationships to conclude that the disclosure of this highly intimate information, coupled with the necessity of registration and advance approval, did not impinge on the tenants' freedom to have whomever they wanted visit their homes."

This leads us to the recent Virginia Supreme Court decision in *Hicks*. While the court did acknowledge that "[t]he right to create and maintain certain intimate or private relationships is guaranteed under the substantive due process component of the Fourteenth Amendment of the United States Constitution," it held that Hicks' mere act of delivering "diapers to the mother of his child at a specific location, [did] not establish the existence of an intimate relationship between Hicks and his child or Hicks and his mother."[157] The court stated that "[t]he record simply does not support such conclusion."[158] The court further stated that even if Hicks had established the existence of an intimate relationship, "this right of intimate association is not without limitations. Certainly, Hicks does not have the constitutional right to visit either his mother or his child at the Housing Authority's private property where he has been barred because of his prior criminal conduct."[159] The court concluded instead that the housing authority's trespass policy did not impair Hicks' right to intimate association, because "Hicks remains free to exercise whatever rights of intimate association he may possess with his mother and his child; he simply may not do so on property owned by the Housing Authority."[160]

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[149] *Id*.

[150] *Id.* at 489.

[151] *Id.*

[152] *Id.*

[153] *See* McKenna v. Peekskill Hous. Auth., 647 F.2d 332 (2d Cir. 1981).

[154] *Id*. at 335.

[155] *Id.* at 334.

[156] *Id.* at 335 (emphasis added).

[157] *Hicks*, 596 S.E.2d at 80.

[158] *Id.*

[159] *Id.*

[160] *Id.*

The decision in *Hicks* should not dissuade advocates from pursuing freedom of association challenges to no trespass policies that prevent family members from maintaining contact—particularly in cases where the barred individuals have been active participants in the raising of their children, and whose access to the property is in some way critical to their ability to remain an active participant.

Conclusion

Unfair public housing authority no trespass policies may be challenged on a number of grounds, including common law doctrines, contract law, federal regulatory and statutory requirements, and the Constitution. The case law on no trespass policies will continue to take shape as advocates bring challenges to invalidate or restrict unfair policies. ■

SAVE THE DATES

2004 Housing Justice Network Meeting October 3-4

Housing Training October 2

The next meeting of the Housing Justice Network (HJN) is October 3 and 4 in Washington, D.C. HJN is a national association of attorneys and other advocates focusing on federal low-income housing programs. The 2004 HJN meeting will give members of the various HJN working groups—which address issues from public housing to federal relocation requirements to civil rights—an opportunity to meet in person and work on issues of concern to housing advocates and their clients.

A one-day training session will be held on October 2, immediately preceding the HJN meeting, to address recent judicial, legislative and administrative changes affecting the federal housing programs. The training and meeting are separate events, although many participants attend both.

A more detailed announcement about the 2004 HJN meeting and the training event will appear in a future issue of the *Housing Law Bulletin*. To be added to the HJN mailing list, contact Amy Siemens at NHLP, 510-251-9400 ext. 111, asiemens@nhlp.org.

One-Strike Eviction Decisions: Two Years After *Rucker*

Two years ago, the United States Supreme Court's decision in *Department of Housing and Urban Development. v. Rucker* significantly undermined the right of public housing tenants to maintain possession of their homes.[1] Relying on 42 U.S.C § 1437d(1)(6), the court in *Rucker* ruled that the tenancy of a public housing tenant could be terminated if "any member of the tenant's household, or any guest" were engaged in drug-related or certain other criminal conduct on the premises.[2] Tenants may also be subject to termination for conduct occurring off premises at federally assisted low-income housing.[3] The decision was particularly troubling in that the tenant did not need even to know about the illegal activity and could even have taken affirmative steps to prevent the activity.

A number of early post-*Rucker* decisions yielded the heartbreaking result of innocent tenants unfairly losing their homes,[4] but more recently courts have focused on certain factual elements in assessing *Rucker* eviction actions. With some exceptions, many courts appear to prefer not to order the eviction of tenants per the *Rucker* one-strike rule. Although *Rucker* imposes what amounts to a strict liability standard, courts appear interested in whether the tenant knew about the illegal activity. They have been particularly concerned with the nature of the illegal activity and have drawn distinctions between recreational drug use and drug businesses, which they regard as more likely to place other tenants in danger. They have employed a somewhat restrictive definition of what constitutes "criminal or drug related" activity for one-strike purposes. Courts have also been attentive to instructions from HUD to public housing authorities to use "common sense" in one-strike termination decisions.[5]

Recent post-*Rucker* decisions from New York, South Dakota, Massachusetts, Ohio and Missouri are discussed below.

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[1]Department of Housing & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

[2]For more on the *Rucker* decision, *see* NHLP, *U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law*, 32 HOUS. L. BULL. 95, 95-98 (April 2002).

[3]42 U.S.C. § 1437d(1)(6) (West, WESTLAW current through P.L. 108-270 (excluding P.L. 108-263 to 108-265) (End) approved 7-7-04)).

[4]*See* NHLP, *One-Strike Evictions: Post-Rucker Decisions*, 32 HOUS. L. BULL. 201, 201-205 (Sept. 2002).

[5]Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002), *available at* http://www.nhlp.org.

New York: Courts Address Knowledge and Culpability

In two cases, the civil court in New York City was reluctant to apply the *Rucker* decision strictly and assessed various factual circumstances before ordering the eviction of tenants. *ARJS Realty Corp. v. Perez* involved a tenant whose son was alleged to have engaged in illegal drug sales. New York City police officers entered Luz Perez's apartment and found her son was "conducting the proscribed illegal business or trade of narcotics on the premises."[6] In defense to her eviction proceedings, Perez asserted that she did not have "knowledge" of her son's illegal activities.[7] Relying on the *Rucker* decision, the court ruled against Perez and determined this case called for a "strict liability" standard.[8]

In contrast to the relatively narrow approach by the New York Civic Court, the South Dakota Supreme Court's ruling applied Rucker in a more expansive fashion.

Presumably, once the court declared "strict liability" for these cases, nothing more would need to be said about Perez's situation. In dicta, however, the court went to great lengths to establish that Perez actually did "know" about her son's illegal activity.[9] The court cited New York City Real Property Law Section 231, requiring that the illegal activity was not merely an isolated incident but "customarily or habitually on the premises."[10] The court emphasized that, when "the search warrant was executed, Perez was ten to fifteen feet from her son's room, one of the scales for his drug dealing business was in plain view of anyone in the 400-square-foot apartment, and she knew of her son's prior arrests."[11] The court further stated that "there comes a time when one must look, and when one looks, he must see. Convenient indifference should not be confused with pardonable ignorance."[12] The court's lengthy discussion regarding "knowledge," indicates that it was basing its decision, at least in part, on Perez's culpability, as opposed to actually mandating "strict liability" for all tenants in similar situations.

In *NYC Housing & Development, LLC v. Arias*, the civic court refused to order eviction, in spite of illegal drug activity, due to the landlord's procedural error. New York City police officers entered Altagracia Arias's apartment pursuant to a search warrant on January 30, 2003.[13] The officers found a brick of cocaine and a pistol in Arias's bedroom. Detective Frank Rivera's testimony established that the premises were used for the purpose of a "drug business."[14] NYC Housing & Development, relying on the *Rucker* decision, brought a holdover proceeding to evict Arias.[15] Arias relied on the New York City Rent Stabilization Code and made an oral motion to dismiss because NYC Housing & Development did not provide the required seven-day termination notice.[16] The court agreed and dismissed the proceeding.

Prior to addressing the Rent Stabilization Code, the court entertained the merits of the case. While relying on *Perez* to re-affirm strict liability, the court did acknowledge different levels of severity regarding drug activity. In dicta, the court emphasized that this was a "drug business . . . rather than individual or isolated drug use in the premises."[17]

Perez and *Arias* are noteworthy in that the *Rucker* one-strike rule was not applied rigidly. In both cases, the court considered the severity of the criminal behavior as well as the tenant's connection with the illegal activity.

South Dakota: Court Defers to PHA

In contrast to the relatively narrow approach by the New York Civic Court, the South Dakota Supreme Court's ruling in *Lakota Community Homes, Inc. v. Randall* applied *Rucker* in a more expansive fashion. Agnes Randall leased a home with Lakota Community Homes (LCH), a federally subsidized public housing cooperative in Rapid City, South Dakota. Police arrested Agnes's son, Daryl Mesteth, for public intoxication.[18] The officer had stopped Mesteth, who was a member of Randall's household, because he was part of a group that had recently vandalized a car. In a conversation with police officers, Randall admitted that her son had a history of alcohol abuse.[19] After detaining Mesteth, the police found a pipe that "smelled of burnt

[6]ARJS Realty Corp. v. Perez, 2003 WL 22015784 (N.Y. Civ. Ct., Aug. 14 2003).

[7]*Id*.

[8]*Id*.; 42 U.S.C.A. § 1437d (*l*)(6) (West 2003).

[9]*Perez*, 2003 WL 7891011, at *2.

[10]*Id*.

[11]*Id*.

[12]*Id*.

[13]NYC Housing & Development, LLC v. Arias, 772 N.Y.S.2d 789, 790 (N.Y. Civ. Ct. 2003).

[14]*Id*. at 791.

[15]*Id*.

[16]*Id*. at 790.

[17]*Id*. at 791.

[18]Lakota Community Homes, Inc. v. Randall, 675 N.W.2d 437, 439 (S.D. Sup. Ct. 2004).

[19]*Id*.

marijuana," and charged him with possession of drug paraphernalia.[20] The ticket for possession of drug paraphernalia was dismissed and Mesteth was never convicted of vandalism or a drug-related crime.[21]

At trial, Randall argued that she could not be evicted because her son was not convicted of a crime. She also asserted that even if her son did possess drug paraphernalia, it was neither a repeated offense nor significantly serious enough to warrant eviction.[22] Randall insisted that the court apply 24 C.F.R. § 982.553(c), a Housing Choice Voucher regulation, in her case. Randall argued that possession of "drug paraphernalia" did not fit the definition of "drug-related criminal activity" per 24 C.F.R. § 982.553(c).[23] The court rejected Randall's argument and applied 24 C.F.R. § 966.4(*l*)(5)(iii)(A), a public housing regulation, and concluded that, under § 966.4, a conviction is not necessary if the PHA determined, based on the "preponderance of the evidence," that the criminal activity occurred.[24] The court reasoned that the PHA had determined that Mesteth committed a crime and affirmed the ruling of the magistrate court that evicted the tenant from federally subsidized housing.

Massachusetts: Court Narrowly Construes "Household Member"

In *Boston Hous. Auth. v. Bruno*, a Massachusetts appellate court narrowly construed *Rucker* and refused to permit the eviction of a resident from the Old Colony housing project based on the conduct of a non-resident family member. The Boston Housing Authority (BHA) brought an action to evict Arthur Bruno because his son, Adam, was arrested for possessing drugs on the grounds of the housing development in which Bruno lived.[25] The city housing authority brought summary proceeding to evict tenant. The Housing Court Department, Boston Division, Suffolk County, entered judgment for tenant. The housing authority appealed and the Appeals court affirmed that the tenant could not be evicted on the grounds that Adam was not a member of Bruno's "household."[26]

Bruno asserted that Adam lived with his mother in a nearby city.[27] Adam's name appeared on the lease, as well as the annual Tenant Status Review (TSR) documents.[28] Bruno testified that he "didn't think it was necessary" to erase Adam's name and "didn't want to take him off anyway because in case he ever did want to come home."[29] On the night Adam was arrested, "Adam, in a random manner, stopped by on his way home from work and then, as far as Bruno knew, left to return to the mother's home."[30] Bruno submitted Adam's W-2 wage form to verify that he lived with his mother.[31] Additionally, Adam, whom the trial court found to be a "credible witness," testified that he did live with his mother.[32]

A Massachusetts appellate court narrowly construed Rucker *and refused to permit the eviction of a resident based on the conduct of a non-resident family member.*

BHA argued that Adam's name on the lease and TSR documents should have led to, as a matter of sound social policy, an irrebuttable presumption that Adam was a member of Bruno's household.[33] Additionally, the BHA argued that if Adam was not a household member, he should have been considered a "guest," and therefore subjected Bruno to the *Rucker* one-strike rule. The court ruled against BHA's irrebuttable presumption theory and declined to address the "guest theory" since it had not been previously asserted by the BHA.[34]

Bruno is particularly promising for its narrow construction of one-strike terms, such as "household member." However, the court may have reached a different conclusion had the BHA not failed to raise its guest theory earlier in the litigation.

Ohio: Courts Address Marijuana Possession

Two Ohio courts took different approaches in evaluating marijuana possession under the *Rucker* doctrine. In *Cuyahoga Metropolitan Housing Authority v. Hairston,* a Cleveland municipal court held that the housing authority waived the tenant's breach of the lease by continuing to accept rent after becoming aware of the breach. Hairston was a tenant in a public housing unit managed by the

[20]*Id.* at 440.

[21]*Id.* at 440, 443.

[22]*Id*. at 437.

[23]*Id.* at 442.

[24]*Id*.; 24 C.F.R. § 966.4(*l*)(5)(iii)(A).

[25]Boston Hous. Auth. v. Bruno, 790 N.E.2d 1121, 1122 (Mass. App. Ct. 2003).

[26]*Id*. at 1122.

[27]*Id*. at 1123.

[28]*Id*.

[29]*Id*.

[30]*Id*. at 1125.

[31]*Id.*

[32]*Id*.

[33]*Id*. at 1124.

[34]*Id*. at 1124, 1125.

Cuyahoga Metropolitan Housing Authority (CMHA).[35] Police discovered marijuana in Hairston's unit.[36] CMHA continued to accept rent for at least seven months even though they were aware that police had discovered drugs in Hairston's unit.[37] Relying on *Brokamp v. Linneman* and *Quinn v. Cardinal Foods, Inc.*, the court ruled that a landlord waives the "right to terminate a tenancy due to breach of the lease if, after learning of the breach, he takes action inconsistent with the termination of the tenancy."[38] Citing *Rucker* and the one-strike regulations, the CMHA argued that the principles in *Brokamp* and *Quinn* were inapplicable because the tenant's behavior violated public policy.

The court would not accept the CMHA's argument that drug use on the premises must necessarily lead to eviction on public policy grounds. The court relied on a now well-known letter from the Secretary of Housing and Urban Development to public housing directors emphasizing "compassion and common sense in responding to cases involving the use of illegal drugs."[39] While urging PHAs to use discretion, the court also ruled that the one-strike policy "would not constitute a waiver" of the landlord's obligations under *Brokamp* and *Quinn*.[40] Thus, even if the tenant's behavior could be a basis for termination of tenancy under *Rucker* and one-strike regulations, a tenant may still invoke generally applicable defenses to eviction, such as those based on a landlord accepting rent after becoming aware of the tenant's breach of the lease agreement. The court affirmed that the *Rucker* decision does not act as a license for the landlord to "violate the clearly established eviction procedure" and that the CMHA's behavior was "equally contrary to public policy." Hence, they ruled that the tenant's process for eviction was unwarranted.

Hairston may be useful to advocates on two accounts. First, it makes good use of the HUD letters on *Rucker*. Second, it makes clear that *Rucker* and one-strike regulations do not bar assertion of common law defenses to eviction.

Another Ohio court demonstrated no compassion for a youthful indiscretion. In *Cincinnati Metropolitan Housing Authority v. Browning*, the Ohio Court of Appeals reversed a county municipal court's ruling regarding a PHA's decision to terminate the tenant's tenancy when police found the tenant's son in possession of marijuana.[41] The tenant, Deborah Browning, resided in a publicly subsidized apartment in Cincinnati. Her son, Roderico, was stopped by police officers on CMHA property for violating curfew.[42] When police searched the 15-year-old, they found less than one-eighth of an ounce of marijuana in his pocket.[43] The officer cited Roderico for "acts that, if committed by an adult, would have constituted the crime of possession of drugs" and the PHA subsequently filed a complaint for forcible entry and detainer. Browning argued that she should not be evicted since her son was a juvenile and punishment should be "rehabilitative not punitive." The municipal court awarded Browning summary judgment. The appellate court chose to address the issue under contract principles and ruled the "lease in question makes no distinction between adult and juvenile offenders."[44] The appellate court found that the trial court's holding was erroneous since the language of the lease made no distinction between criminal activity of juveniles and that of adults. Notably, this decision stands for the proposition that juvenile offenses can be considered criminal activity under *Rucker* and one-strike rules.

Missouri: Court Rules Criminal Behavior Must Be Contemporaneous with Tenancy

A Missouri appellate court decided that a crime must be contemporaneous with the tenancy for Rucker to apply. In *Wellston Housing Authority v. Murphy*, the Missouri Court of Appeals ruled that neither 42 U.S.C. § 1437d(1)(6) nor the *Rucker* decision applied to "past criminal activity."[45] Marilyn Murphy entered into a "subsidized federal housing lease" for the rental of an apartment in January 2002. Thereafter, Murphy asked the Wellston Housing Authority to have Morris Lockett added to her lease.[46] This inquiry led to the housing authority's discovery that Lockett had a criminal record for acts committed prior to 2002. Upon this discovery, Lockett was prohibited from being added to the lease and permanently forbidden from the grounds.[47] On July 28, 2002, Lockett visited Murphy.[48] The housing authority had Lockett arrested for

[35]Cuyahoga Metropolitan Housing Authority v. Hairston, 790 N.E.2d 828, 829 (Ohio Mun. Ct. 2003).

[36]*Id*.

[37]*Id*.

[38]Brokamp v. Linneman, 20 Ohio App. 199, 202 (Ohio App. 1923) (Holding that a landlord waives the right to terminate a tenancy due to a breach of the lease if, after learning of the breach, he takes action inconsistent with the termination of the tenancy); Quinn v. Cardinal Foods, Inc., 20 Ohio App.3d 194 (Ohio App. 3d 1984) (Holding that the *Brokamp* principle is not applicable only to situations involving nonpayment of rent; waiver may be deemed to have occurred in cases involving the breach of a nonmonetary obligation).

[39]Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors, (April 16, 2002), *available at* http://www.nhlp.org.

[40]*Hairston*, 790 N.E.2d at 831.

[41]Cincinnati Hous. Auth. v. Browning, 2002 WL 63491 (Ohio Ct. App. Jan. 18, 2002).

[42]*Id*.

[43]*Id*.

[44]*Id*.

[45]Wellston Hous. Auth. v. Murphy, 131 S.W.3d 378, 381 (Mo. Ct. App. 2004).

[46]*Id*. at 379.

[47]*Id*.

[48]*Id*.

trespassing and served Murphy a notice of termination of her lease.[49]

While declining to comment on a housing authority's right to bar a person from entering a leased dwelling based on past criminal activity, the court ruled that the one-strike rule only applied to guests' contemporaneous—as opposed to past—behavior.[50] The housing authority argued that "any criminal activity of a guest" applied to one's past record, but the court concluded that "it strains construction to construe 'any criminal activity . . . of a guest' to include criminal conduct that occurred prior to the tenant's lease term."[51] By narrowly construing the definition of the "criminal activity" sufficient to trigger application of one-strike rules, the court rejected the housing authority's bid to substantially expand its one-strike authority.

Conclusion

Two years after the issuance of the Supreme Court's decision, it is difficult to detect clear patterns in courts' interpretation of *Rucker*. The decision and 42 U.S.C. § 1437d(*l*)(6) still loom over HUD-assisted tenants and the leases they must sign. Courts, however, have seemed prepared to apply a certain degree of common sense and discretion in deciding eviction cases initiated under one-strike authority. In some cases, residents have unfairly lost their homes, but, in a number of others, courts have declined to adopt the broad interpretations of one-strike urged by public housing authorities. ■

HUD Announces FY 2003 HOPE VI Awards

On June 3, 2004, the Department of Housing and Urban Development (HUD) announced its Fiscal Year (FY) 2003 HOPE VI public housing revitalization grant awards.[1] These awards, together with HOPE VI demolition grant awards, were made pursuant to an October 2003 Notice of Funding Availability (NOFA).[2]

The HOPE VI program is a multi-billion dollar competitive grant program that funds the demolition or redevelopment of so-called "severely distressed" public housing sites.[3] The program has been criticized for the net loss of thousands of urgently needed public housing units and the involuntary displacement of thousands of families.[4]

Overview of Awards

HUD has awarded FY 2003 revitalization grants to twenty-four public housing authorities (PHAs) out of a total of fifty-six that applied for funding.[5] As indicated in the accompanying table, most of the revitalization awards were at or near the $20 million maximum set forth in the NOFA.[6]

As for previous years, HUD has published a collection of one-page fact sheets on the FY 2003 revitalization awards on its Web site.[7] The fact sheets include brief descriptions of the grants and some statistics on occupancy, additional funding sources, and unit profiles.[8] According to the national fact sheet, 6844 public housing units will be demolished at the FY 2003 revitalization grant sites, with 3297 public housing rental units planned after redevelopment, for a net loss of 3547 public housing rental units.[9]

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[49]*Id*.

[50]*Id*. at 380.

[51]*Id*.

[1]*See, e.g.,* Press Release, HUD, HUD No. 04_053, HUD Awards $20 Million Hope VI Grant to Washington, DC to Transform Public Housing, Help Residents (June 6, 2004), http://www.hud.gov/news/release.cfm?content=pr04_053.cfm [hereinafter June 6 Press Release].

[2]68 Fed. Reg. 60,178 (Oct. 21, 2003). *See also* NHLP, *HUD Issues FY [2003] HOPE VI NOFA*, 33 Hous. L. Bull. 441, 456 (Nov.-Dec. 2003) [hereinafter *HUD Issues FY 2003 HOPE VI NOFA*] (The title of this article erroneously referred to the FY 2004 NOFA.).

[3]*See generally* 42 U.S.C.A. §1437v (West 2003). For more on the HOPE VI program, see NHLP, HUD Housing Programs: Tenants' Rights ch. 15.2.2 (3d ed. 2004).

[4]*See generally* NHLP, et al., False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program (2002), *at* http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf [hereinafter False HOPE]. According to HUD's June 6, 2004, press release, 145,300 public housing units have been demolished or slated for demolition to date. June 6 Press Release, *supra* note 1.

[5]HUD, *FY 2003 Hope VI Revitalization Grants*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/03/2003rev_grantlist.cfm (updated June 15, 2004) [hereinafter *FY 2003 Hope VI Revitalization Grants*]; HUD, *FY 2003 HOPE VI Revitalization Applications*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/fy03/fy2003rev_applicants.pdf (undated).

[6]68 Fed. Reg. at 60,178.

[7]*FY 2003 Hope VI Revitalization Grants*, *supra* note 5.

[8]As with FY 2002 fact sheet, many of the FY 2003 fact sheets state that PHAs will "enforce strict lease agreements" at redeveloped sites. *See, e.g.*, HUD, *Benton Harbor, MI: FY 2003 HOPE VI Revitalization Grant Awards*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/03/bentonharbor.pdf (undated); HUD, *Allegheny County, Pennsylvania: FY 2002 HOPE VI Revitalization Grant Awards*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/02/2002rg_fact_allegheny.pdf (undated).

[9]HUD, *National Fact Sheet: FY 2003 HOPE VI Revitalization Grant Awards*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/03/nationalfactsheet.pdf (undated) (hereinafter *FY 2003 National Fact Sheet*). The fact sheet also lists the planned development of 5430 additional rental and homeownership units. However, none of those can be expected to have the same level of guaranteed affordability as public housing units. In addition, HOPE VI redevelopment plans often change significantly during implementation. *See* False HOPE, *supra* note 4, at 19.

FY 2003 HOPE VI Revitalization Grants

PHA	Development	Award Amount
Atlanta, GA	McDaniel Glenn	$20,000,000
Benton Harbor, MI	Whitfield I	$15,947,404
Birmingham, AL	Tuxedo Court	$20,000,000
Camden, NJ	Franklin D. Roosevelt Manor	$20,000,000
Charlotte, NC	Piedmont Courts	$20,000,000
Chester, PA	Chester Towers	$20,000,000
Columbia, SC	Hendley Homes	$10,755,952
Cuyahoga, OH	ValleyviewHomes	$17,447,772
Daytona Beach, FL	Martin Luther King Jr. Apts.	$7,639,191
Fresno, CA	Yosemite Village	$20,000,000
Indianapolis, IN	Brokenburr Trails	$16,778,288
Louisville, KY	Clarksdale Phase II	$20,000,000
Memphis, TN	Lamar Terrace	$20,000,000
Meridian, MS	Victory Village	$17,281,075
Milwaukee, WI	Scattered Sites	$19,500,000
Mobile, AL	Albert Owens/Jesse Thomas	$20,000,000
Nashville, TN	John Henry Hale Homes	$20,000,000
New Orleans, LA	William J. Fischer Homes	$8,127,632
Raleigh, NC	Chavis Heights	$19,959,697
Spartanburg, SC	Phyllis Goins	$20,000,000
St. Louis, MO	Cochran Gardens	$20,000,000
Stamford, CT	Fairfield Court	$19,579,641
Washington, DC	Eastgate Gardens	$20,000,000
Yonkers, NY	Mulford Gardens	$20,000,000

Source: HUD, *FY 2003 Hope VI Revitalization Grants, at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/03/2003rev_grantlist.cfm (updated June 15, 2004).

FY 2003 HOPE VI Demolition Award Recipients

Americus, GA
Atlanta, GA
Champaign County, IL
Charlotte, NC
Chattanooga, TN
Chicago, IL
Clark County, NV
Clearwater, FL
Columbus, OH
Cuyahoga, OH
Decatur, AL
Dunedin, FL
Flint Area, GA
Galveston, TX
Jackson, MS
Jersey City, NJ
Knoxville, TN
Lake Wales, FL
Marietta, GA
Memphis, TN
Menard County, IL
Milwaukee, WI
Pittsburgh, PA
Raleigh, NC
Shreveport, LA
Spartanburg, SC
Philadelphia, PA
Tallahassee, FL
Virgin Islands
Washington County, PA
Wilmington, DE

Source: HUD, *FY 2003 Hope VI Demolition Grants, at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/demolition/03/2003demo_grantlist.cfm (updated June 4, 2004).

The FY 2003 revitalization grant sites had a 74% level of occupancy overall.[10] This is an increase from the 63% level for FY 2002 sites.[11] The increase in occupancy is noteworthy because NOFAs in recent years have appeared to indicate that HUD favored application for sites with lower levels of occupancy.[12]

In addition to the revitalization grants, HUD also announced the awarding of forty-five FY 2003 HOPE VI demolition grants to thirty-one PHAs.[13] The average demolition grant amount is approximately $1 million, but there is wide variation between awards.[14] According to HUD's HOPE VI Web site, the FY 2003 grants will fund the demolition of 5954 public housing units.[15] HUD has provided little specific information about individual demolition grant sites.

Status of the HOPE VI Program

The President's proposed FY 2004 and 2005 HUD budgets requested no funds for HOPE VI.[16] Despite this, Congress did continue funding for HOPE VI in FY 2004, but at a greatly reduced level: $150 million, approximately one-third of previous funding levels.[17] It appears that Congress will provide for another $150 million appropriation for FY 2005.

Lastly, HOPE VI has recently been the subject of some modest, but significant, statutory reforms.[18] These include new selection criteria focusing on the needs of public housing residents and a prohibition on awarding funds where residents have not been involved in the application planning process. The FY 2003 grants were the first made after the enactment of these reforms. To the extent that HUD has not complied with the new statutory provisions in making these grants, this non compliance may provide an opportunity for advocates to challenge FY 2003 funded HOPE VI redevelopment projects that threaten to harm public housing residents. ■

What will actually be constructed on FY 2003 grant sites cannot be known for certain.

[10]*FY 2003 National Fact Sheet*, *supra* note 9. The FY 2003 national fact sheet also appears to indicate that 39% of public housing families to be displaced from FY 2003 revitalization sites are expected to return to the sites after redevelopment. Based on the track record of the program, this appears to be significantly overstated. *See* False HOPE, supra note 4, at 23-4.

[11]HUD, *National Fact Sheet: FY 2002 HOPE VI Revitalization Grant Awards*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/02/2002rg_fact_national.pdf (undated).

[12]*See, e.g.*, 68 Fed. Reg. at 60,197.

[13]HUD, *FY 2003 HOPE VI Demolition Grants*, *at* http://www.hud.gov/offices/pih/programs/ph/hope6/grants/demolition/03/2003demo_grantlist.cfm (updated June 4, 2003).

[14]*Id*.

[15]*Id*.

[16]HUD, Fiscal Year 2004 Budget Summary 21 (2003), *at* http://www.hud.gov/about/budget/fy04/budgetsummary.pdf; HUD, Fiscal Year 2004 Budget Summary app. A (2004), *at* http://www.hud.gov/about/budget/fy05/budgetsummary.pdf.

[17]Pub. L. No. 108–199, div. G, tit. II, 118 Stat. 3, 375 (2004).

[18]Pub. L. No. 108–186, tit. IV, 117 Stat 2685, 2693 (2003) (amending 42 U.S.C. § 1437v).

House Appropriations Committee Sets FY 2005 Rural Rental Housing Funding at Last Year's Level

Departing from the administration's proposed budget of $60 million,[1] the full House Appropriations Committee voted to fund the Department of Agriculture's (USDA) Rural Rental Housing program (known as Section 515 housing) at $116 million for Fiscal Year (FY) 2004.[2] This larger level is equal to the FY 2004 appropriations level.[3]

Similarly, other USDA Rural Housing Service (RHS) programs received committee appropriations at or near FY 2004's funding level. Programs that received appropriations noticeably below last year's levels include: 502 Single Family Direct Loans (at $1110 million, compared to previous $1366.5 million funding); Water/Wastewater Grants (at $453.2 million, compared to previous $566 million funding) and the Rural Development Loan Fund (at $34 million, compared to previous $40 million funding).[4]

[1]NHLP, *Administration's FY 2005 Budget Once Again Threatens Federal Housing Programs*, 34 Hous. L. Bull. 33, 37 (Feb./March 2004).

[2]Housing Assistance Council, Section 515 Rural Rental Program Restored to $116 million, after earlier cut, *at* http://www.ruralhome.org/announce/sect515slashed.htm (last visited June 28, 2004).

[3]*Id*.

[4]*Id*.

Illinois Establishes Tenant Purchase Option for Properties Terminating Federal Programs

Culminating a two-year effort, Illinois preservation advocates have achieved passage of reforms to their state's preservation and right of first refusal law that will make Illinois law the strongest such state law in the country. With advocacy led by the Chicago Rehab Network, the Federally Assisted Housing Preservation Act, S.B. 2329, passed both the Illinois Senate and House in April and May and now awaits the Governor's signature. Last year's bill had passed the Senate, but failed to gain House approval prior to adjournment of the session. This year's amendment to the existing statute would change the current law in two significant respects: first, it would give tenants the right to purchase the properties when owners intend to convert to market-rate use or terminate subsidies or affordability restrictions, not just upon intended sale of the property; and second, it would greatly expand coverage of Illinois preservation law to include buildings supported through numerous additional affordable housing programs.

Background on State and Local Right of First Refusal Laws

Right of first refusal laws address the threat that owners will choose to convert properties to market-rate use when governmentally imposed use restrictions or subsidy contracts expire, thereby eliminating affordable housing. State and local right of first refusal laws, or similar laws, provide important tools for preservation advocates in the absence of an active federal preservation program.[1] In 1990, Congress enacted a mandatory federal preservation program designed to preserve affordable developments with HUD-subsidized mortgages by providing additional financial incentives to owners and supporting purchases by nonprofits and tenant organizations.[2] However, starting in 1996, Congress retreated from this commitment, authorizing owners to prepay mortgages and convert to market-rate use.[3] Although the federal preservation program has not been repealed, Congress eliminated preservation funding starting in Fiscal Year 1998, providing only replacement vouchers for tenants.[4] The laws governing properties with project-based Section 8 contracts permit most owners to withdraw from the program when their fixed-term contracts expire.[5] Similarly, units supported under the Low-Income Housing Tax Credit program also contain time-limited rent and occupancy restrictions, although most units produced after 1989 carry restrictions of at least thirty years.[6] For all of these federal affordable housing programs, at the end of the assistance contract or the original restricted use period, most owners can now convert properties to market-rate operations, absent other restrictions imposed by federal, state or local laws or agreements. State or local right of first refusal laws institute such restrictions, although they vary widely in scope, requirements, and mechanics.

The purchase opportunity created by current state or local right of first refusal laws comes in many different forms—from a true "right of first refusal," which permits a designated purchaser to match another sale offer and thereby acquire title, to a "right to make an offer," with no obligation on the owner's part to sell. A few jurisdictions are considering a right to purchase via a statutory option, triggered by an owner's proposal to convert to market-rate use, similar to the purchase authority given the state housing agency in Maine to prevent conversions.[7] These laws can cover any federally assisted, restricted-use property or only, for example, prepayments of HUD-subsidized mortgages. They may be triggered by various events—from a planned sale or other disposition of the property to any action that would affect its current low-income use, such as expiration or termination of use or affordability restrictions or any subsidies. Such laws may provide rights to tenant organizations, to nonprofits and public agencies, or to other preservation purchasers including for-profit entities that commit to specified preservation terms. They utilize a variety of procedural requirements and enforcement mechanisms that give tenants, nonprofits or other interested parties important tools to advance the preservation objective.

The Federally Assisted Housing Preservation Act, S.B. 2329

The Illinois Federally Assisted Housing Preservation Act, S.B. 2329, which awaits the governor's signature,

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[1]NHLP, *Rights of First Refusal in Preservation Properties: Worth a Second Look*, 32 HOUS. L. BULL. 1, 1 (Jan. 2002).

[2]Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), Pub. L. No. 101-625, tit. VI, 104 Stat. 4079, 4249 (Nov. 28, 1990), *codified at* 12 U.S.C.A. §§ 4101 *et seq.* (West 2001).

[3]Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996); Pub. L. No. 104-134, § 101(e), tit. II, 110 Stat. 1321 (1996) (paragraph entitled "Annual Contributions for Assisted Housing"); Pub. L. No. 104-204, 110 Stat. 2874 (1996); Pub. L. No. 105-65, 111 Stat. 1343 (1997); Pub. L. No. 105-276, § 219, 112 Stat. 2487 (1998) (authority for prepayments of "eligible low-income housing" upon giving HUD, tenants and local government at least 150 days, but no more than 270 days' written notice).

[4]*See* Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997).

[5]*See* Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997, as amended, 42 U.S.C.A. § 1437f note (West 2003) ("Multifamily Housing Assistance").

[6]26 U.S.C.A. § 42 (West, WESTLAW through P.L. 108-236, approved 6-15-04).

[7]Me. Rev. Stat. Ann., Title 30-A, §4972 & 4973 (West, WESTLAW though end of 2003 session).

would amend the Illinois statute in two important respects, by expanding: (1) the events that trigger purchase rights, and (2) which properties the law covers. S.B. 2329 also contains some other less significant, but still important, changes to the current law.

The "Triggering Event"

S.B. 2329 would expand the events that trigger its provisions governing the sale of properties. The primary existing Illinois law addressing preservation of HUD-subsidized properties is triggered only by an intended sale or disposition of the property.[8] It thus operates only as a right of first refusal on sale, leaving uncovered those buildings facing termination of subsidies and restrictions whose owners retain title. Current law allows owners to convert the property to market-rate first and escape the statutory purchase rights either by retaining ownership of the property or delaying any sale until the property has been converted to market-rate and is no longer covered by the law.

S.B. 2329 would expand the trigger events under the current law, adding coverage for intended prepayment and termination,[9] thereby requiring owners proposing to convert or terminate to offer the opportunity for tenants to purchase their buildings at market value to preserve affordability. This change is significant because it would close a loophole in preservation—any proposed removal of a property from an affordable housing program would trigger the option for tenants to purchase at appraised market value.

Types of Housing Covered

S.B. 2329 would greatly expand the coverage of the law to include many other federally supported properties currently left out. Current law covers the intended sale of properties with HUD-subsidized mortgages,[10] but not many others. For example, current law does not cover properties with HUD project-based Section 8 contracts, even where a sale is contemplated. S.B. 2329 would extend coverage to buildings supported with project-based Section 8 rental assistance, federal Low-Income Housing Tax Credits, and various HUD mortgage insurance programs.[11] This is significant because broadening the coverage of the statute creates the possibility that more units can be preserved.

Other Changes

S.B. 2329 also contains a number of small but significant changes in the state law. It would lengthen the required notice period for any proposed sale or conversion from six months to twelve months,[12] thus significantly increasing the time for a preservation purchase of the property. The bill would also authorize tenants to enter into agreements with nonprofit corporations or private purchasers to preserve the property,[13] allowing tenants to partner with other experienced entities with the capacity and access to the financial resources for acquisition and rehabilitation. Tenants would also have ninety days after receiving the required offer of sale from the owner, instead of the previous thirty, to notify the owner of their intent to purchase.[14]

Conclusion

If signed into law by the governor, S.B. 2329 will result in important changes to the housing preservation laws in Illinois. Through the expansion of events that trigger the laws, the coverage of additional properties, and other changes, this bill can provide an opportunity for increased housing preservation. The many challenges ahead include identifying the necessary funding sources for acquiring and rehabilitating threatened properties, identifying the properties most appropriate for preservation, identifying and building the capacity of tenants and preservation partners, and providing the necessary technical assistance for transactions. These steps would be necessary to realize the full promise of the Illinois bill, if it becomes law.

Update

On July 14, 2004, Illinois Governor Blagojevich signed the Federally Assisted Housing Preservation Act (S.B. 2329) into law, making Illinois state preservation law the strongest in the country. With these additional tools, Illinois housing advocates now turn their efforts to educating and mobilizing tenants and their allies and finding resources to implement the law's preservation goal. ■

[8] 310 Ill. Comp. Stat. § 60/4 (West, WESTLAW through P.A. 93-672 of the 2004 Reg. Sess.).

[9] S.B. 2329, 93rd Gen. Assem., Reg. Sess. (Ill. 2004).

[10] 310 Ill. Comp. Stat. § 60/3 (West, WESTLAW through P.A. 93-672 of the 2004 Reg. Sess.).

[11] S.B. 2329, 93rd Gen. Assem., Reg. Sess. (Ill. 2004).

[12] *Id.*

[13] *Id.*

[14] *Id*

Recent Housing Cases

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

Eviction—Section 8 Programs; Landlord-Tenant Law—Succession of Tenancy

Carter v. Meadowgreen Assocs., 597 S.E.2d 82 (Va. Sup. Ct. 2004). Appellee project-based Section 8 landlord filed an unlawful detainer action against Appellant resident. Appellant's deceased mother was the former head of household for the assisted unit in which Appellant resided. Appellant contended that he was entitled to succeed his mother's rights under the lease with Appellee. The Virginia Supreme Court rejected Appellant's argument. It concluded that because, under Virginia law, a deceased tenant's leasehold interest passes to her estate at death, Appellant could not succeed her. The court affirmed judgment in favor of Appellee.

Eviction—Section 8 Programs; Preemption—Federal

Manhattan Plaza Assocs., L.P. v. Dep't of Hous. Pres. & Dev., 778 N.Y.S.2d 164 (N.Y. App. Div. 2004). In affirming the denial of a petition for a certificate of eviction, the Appellate Division of the New York Supreme Court upheld a New York City regulation allowing a family member who was not listed in "annual certifications" to rebut the presumption that the family member did not reside in the assisted unit. The court concluded that the city regulation did not conflict with Section 8 of the United States Housing Act, 42 U.S.C. § 1437f, or the applicable regulations, 24 C.F.R. pt. 983.

Federal Courts—Intervention

Gautreaux v. Chicago Hous. Auth., 2004 WL 1427107 (N.D. Ill. June 23, 2004). A federal district court again denied a motion by residents of the ABLA Homes public housing site to intervene in the *Gautreaux* Chicago public housing desegregation litigation. An ABLA resident organization, Concerned Residents of ABLA, sought to challenge a HOPE VI redevelopment plan. The residents' first attempt was an independent suit that was dismissed by the district court in 1999 without prejudice to the residents filing a motion to intervene in *Gautreaux*. The residents' subsequent motion to intervene was denied by the district court in 2000 as premature. In this most recent order, the court denied the residents' motion to intervene because it concluded that the motion was filed too late.

National Historic Preservation Act

Bus. & Residents Alliance of E. Harlem v. Martinez, 2004 WL 1335903 (S.D.N.Y. June 14, 2004). Plaintiff unincorporated neighborhood organization and several individuals

[1]http://www.westlaw.com.

[2]http://www.lexis.com.

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

Russell T. Davis Named as New Rural Housing Service Administrator

The Secretary of the U.S. Department of Agriculture (USDA) Ann Veneman, has named Russell T. Davis as the new Rural Housing Service (RHS) Administrator as of July 12, 2004.[1] Davis replaces Art Garcia, who served as the agency's head until May 14, 2004.[2] John Chris Alsop served as RHS's Interim Administrator from May 14 to July 12, 2004.

According to USDA, Davis comes to his new position with both private and public sector experience.[3] Most recently, he served as the senior policy advisor for the Office of Sallie Mae Oversight, a division of the U.S. Department of Treasury. His other public experience includes service during the first Bush administration as the Acting Deputy Assistant Secretary for Housing Operations at the U.S. Department of Housing and Urban Development. In the private sector, he previously worked for a New York bond firm.

RHS is an agency within USDA's Rural Development division. It administers housing grants, loans and technical assistance to rural communities, including the Section 515 Rural Rental Housing program.

[1]Press Release, USDA, No. 0284.04, Veneman Names Russell T. Davis as Rural Housing Service Administrator (July 12, 2004), available at http://www.usda.gov/Newsroom/0284.04.html.

[2]See NHLP, Art Garcia Leaves Rural Housing Service, 34 HOUS L. BULL. 85, 91 (May 2004).

[3]USDA, supra note 1.

filed suit against Defendants HUD and various state and federal agencies to block the construction of a shopping center pending review under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f). Granting Defendants' motion for summary judgment, the federal district court ruled, *inter alia*, that federal financial assistance alone is insufficient to trigger Section 106 review requirements—"some form of federal approval, supervision, control, or at least a certain level of consultation" is also necessary.

One-Strike and Related Policies

Garrido v. Cook County Sheriff's Merit Bd., 2004 WL 1292006 (June 9, 2004) (not yet released). In this decision reversing a decision by a merit board to terminate a deputy sheriff's employment under a zero tolerance drug policy, the Illinois Appellate Court cited *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 133-34 (2002). The deputy sheriff had tested positive for cocaine metabolites due to his unwitting consumption of a controlled substance. The court cited *Rucker* for the proposition that the merit board, like public housing authorities, has the discretion to pursue termination, either of employment or tenancy, but that automatic termination is not required. ■

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 June of 2004. 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.

[1]*At* http://www.access.gpo.gov/su_docs.

[2]*At* http://www.hudclips.org/cgi/index.cgi.

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

[4]*At* http://www.rdinit.usda.gov/regs.

HUD Federal Register Final Rule

69 Fed. Reg. 34,262 (June 21, 2004)
Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Housing Receiving Federal Assistance and Federally Owned Residential Property Being Sold, Conforming Amendments and Corrections

Summary: This final rule makes conforming amendments to HUD's lead based paint regulations, and certain technical corrections and clarifying changes. Among other things, this rule clarifies HUD's definitions and standards for dust-lead and soil-lead hazards to make them consistent with the final rule of the U.S. Environmental Protection Agency (EPA) on Identification of Dangerous Levels of Lead, as required by Title X of the Housing and Community Development Act of 1992.

Effective Date: July 21, 2004.

HUD Federal Register Interim Rules

69 Fed. Reg. 32,774 (June 10, 2004)
Community Development Block Grant Program; Small Cities and Insular Areas Programs

Summary: This interim rule establishes regulations to implement a statutory change moving Community Development Block Grant (CDBG) program assistance for insular areas from Section 107 (Special Purpose Grants) to Section 106 (Allocation and Distribution of Funds) of the Housing and Community Development Act of 1974.

Effective Date: July 12, 2004.

Comment Due Date: August 9, 2004.

69 Fed. Reg. 34,020 (June 17, 2004)
Extension of Minimum Funding Under the Indian Housing Block Grant Program

Summary: This interim rule provides authority for Indian tribes to receive a minimum grant amount under the need component of the Indian Housing Block Grant (IHBG) formula in Fiscal Year (FY) 2004. The minimum funding provision currently in effect in HUD's regulations limited authority for receipt of a minimum grant amount to FY 2003. The reinstatement of the authority for minimum grant amounts in FY 2004 will avoid hardship to the affected tribes.

Effective Date: July 19, 2004.

Comment Due Date: August 16, 2004.

HUD Federal Register Proposed Rules

69 Fed. Reg. 34,544 (June 21, 2004)
Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants

Summary: This proposed rule would remove barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations implementing the Indian HOME Program, the Indian Community

Development Block Grant Program, the Indian Housing Block Grant Program, the Title VI Loan Guarantee Assistance Program, and the Section 184 Loan Guarantees for Indian Housing Program. These proposed changes are consistent with revisions of program regulations being undertaken on a department-wide basis. In general, no group of applicants competing for HUD funds or seeking to participate in HUD programs should be subject to greater or fewer requirements than other organizations solely because of their religious character or affiliation or absence of religious character or affiliation.

Comment Due Date: August 20, 2004.

69 Fed. Reg. 37,624 (June 28, 2004)
Semiannual Regulatory Agenda

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

HUD Federal Register Notices

69 Fed. Reg. 31,055 (June 2, 2004)
Negotiated Rulemaking Advisory Committee on the Operating Fund; Notice of Meeting

Summary: This document announces a meeting of HUD's Negotiated Rulemaking Advisory Committee on the Operating Fund. The purpose of the committee is to provide advice and recommendations on developing a rule for effectuating changes to the Public Housing Operating Fund Program in response to the Harvard University Graduate School of Design's "Public Housing Operating Cost Study."

Dates: The committee meeting was held on June 8 and June 9, 2004.

69 Fed. Reg. 33,399 (June 15, 2004)
69 Fed. Reg. 33,400 (June 15, 2004)
Notice of Submission of Proposed Information Collection to OMB; Affordable Communities Initiative

Summary: HUD has submitted proposed information collections to the Office of Management and Budget (OMB) for emergency review and approval. The information collections relate to the Affordable Communities Initiative announced by HUD in June 2003. The initiative focuses on breaking down regulatory barriers that impede the production or rehabilitation of affordable housing.

Comments Due Date: June 22, 2004, and August 16, 2004.

69 Fed. Reg. 34,685 (June 22, 2004)
Notice of Proposed Information Collection for Public Comment; Homeownership Voucher Program Survey

Summary: HUD has submitted a proposed information collections to the Office of Management and Budget (OMB) for emergency review and approval. The information collection is a Homeownership Voucher survey that will give HUD the ability to measure the usage of this program and to determine the extent to which technical assistance and/or training is needed for program implementation.

Comments Due Date: July 6, 2004.

HUD Housing Notice

Notice H 2004-09 (June 29, 2004)
Compliance with Section 504 of the Rehabilitation Act of 1973 and the Disability/Accessibility Provisions of the Fair Housing Act of 1988

Summary: Notice H 01-02, issued February 6, 2001, which was previously extended by Notice H 03-10, is being reinstated and extended to June 30, 2005.

Expires: June 30, 2005

HUD PIH Notice

Notice PIH 2004-10 (HA) (June 1, 2004)
Certification Reviews of Public Housing Agencies by the Office of Public and Indian Housing

Summary: This notice is to inform you of the Department's intention to begin a series of certification reviews of public housing agencies (PHAs). These reviews will seek to confirm the accuracy and veracity of items to which PHAs have self-certified in their Public Housing Assessment System (PHAS) assessments. The Department will issue a score of zero to any self-certified item on the PHAS that cannot be verified by supporting documentation and/or other appropriate evidence.

Expires: June 30, 2005.

RHS Administrative Notice

Revitalizing the Multi-Family Housing (MFH) Portfolio Using Rental Assistance Transferred from Prepaid MFH Projects, RD AN No. 3987 (1930-C) (June 10, 2004)

***Summary*:** This Administrative Notice provides guidance on using the Agency's regulatory authorities to transfer Rental Assistance (RA) from projects that have gone through the prepayment process to projects that need to be revitalized and preserved. Recent funding shortages require the shift of funding decisions to the National Office to assure that RA is directed to projects meeting program-wide criteria.

Expires: June 30, 2005. ■

Publication Order Form

National Housing Law Project
614 Grand Avenue, Suite 320, Oakland CA 94610
(510) 251-9400; fax: (510) 451-2300

	PRICE	QTY.	TOTAL
HUD Housing Programs: Tenants' Rights (3d ed. 2004)	$350.00	_____	$ _____
RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights (2d ed. 1995)	$55.00	_____	$ _____
Combined *HUD Housing Programs* (3d ed.) and *RHCDS (FmHA) Housing Programs* (add $10.00 postage/handling)	$380.00	_____	$ _____
Housing Law Bulletin (annual subscription, 10-12 issues)	$150.00*	_____	$ _____
Welfare and Housing—How Can the Housing Assistance Programs Help Welfare Recipients? (2000)	$5.00*	_____	$ _____
Congress' New Public Housing and Voucher Programs (1998)	$10.00**	_____	$ _____
Housing for All: Keeping the Promise (1995)	$5.00*	_____	$ _____
The Family Self-Sufficiency Program: An Advocate's Guide (1994)	$10.00*	_____	$ _____
Let's Choose a New Owner! What Residents Need to Know When an Owner Wants to Sell an Expiring-Use Project Under Title VI (1993) (master for duplicating)	$10.00*	_____	$ _____
A Passage from Poverty: Self-Sufficiency Policies and the Housing Programs (1991)	$10.00*	_____	$ _____

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