
Challenging Conversions of Federally Assisted Housing



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What's the Problem?

General Background on the Preservation Threat

Hundreds of thousands of federally subsidized units provide a vital source of affordable housing throughout the United States. Due to expiring contracts and federal restrictions, many of those units may be lost from the stock of affordable housing. Nevertheless, tenants and advocates have an important role to play in determining what choices an owner will make, and in ensuring that tenants are protected if conversion proceeds. This guide provides suggestions for taking action. Its focus is on prepayments and opt-outs, not those multifamily conversions which might occur under other HUD programs or initiatives (e.g., conversions to vouchers under the Mark to Market restructuring program or Section 8 disqualifications).

Since 1965, the federal government has supported the production of low-income rental housing primarily through the provision of subsidies to private owners of multifamily housing developments. Several subsidized mortgage insurance and rental subsidy programs currently provide affordable housing to over two million American families, most of whom have incomes below \$15,000 annually.

There are two kinds of such federal programs administered by the U.S. Department of Housing and Urban Development (HUD): HUD-subsidized mortgage programs and project-based Section 8 rental assistance programs. The primary subsidized mortgage program is the Section 236 program, while the main rental assistance program is the project-based Section 8 program. Some developments have both types of subsidies. The primary programs used were:

- the Section 236 subsidized mortgage insurance program , which provides owners with insured loans and subsidizes the interest rates on those loans down to as low as 1 percent. These benefits were provided in exchange for the owners' commitment to rent only to eligible low-income tenants and charge only HUD-approved rents that are based on the budgeted costs of owning and operating the property with the subsidized loan. Rents can be increased only as operating costs increase.
- the project-based Section 8 rental assistance program , which provides subsidies for some or all units in a development for a specific period of time. These subsidies pay the difference between the project rents and the tenants' rent contributions, which are set at 30 percent of their adjusted incomes. These funds were provided in exchange for the owners' commitment to rent only to eligible low-income tenants and charge only HUD-approved rents for the term of the assistance contract.

The affordability of these housing units is not, however, permanently assured. Many of the developments are owned by private owners whose ultimate objective is not to provide affordable housing, but to secure market-level rents and returns wherever possible. The affordability restrictions, which restrict the rent levels, tenant eligibility, and overall operations, last only for a specific period of time. These restrictions are set forth in HUD regulations and in the project's regulatory agreement or rental assistance contract.

Most of the buildings with HUD-subsidized mortgages may be converted to market-rate by a prepayment of the mortgage loan at any time after 20 years from the original endorsement of the mortgage for insurance, which terminates the affordability restrictions contained in the regulatory agreement. Those developments with a project-based Section 8 contract have a restricted use only during the specific term of that contract, which is usually

between five and 30 years, but most commonly 20 years. When the Section 8 contract expires, the owner can convert to market-rate by refusing to renew the contract or “opting out.” Where developments have both a subsidized mortgage and a project-based Section 8 contract, a conversion usually involves both a prepayment and an opt-out.

The affordability restrictions and contracts for many properties began to expire in the mid-1980s and will continue to do so throughout most of the next decade. Prior to 1995, Congress enacted restrictions to preserve most of these properties, and provided the funding to do so.

Since 1995, however, although Congress has provided some important incentives to preserve some developments as subsidized housing, these laws generally leave to the owner the ultimate decision of whether to accept these incentives or to convert to market-rate. In areas that boomed during the 90’s with strong real estate markets, many of these developments are at risk of conversion to market-rate use because owners can obtain higher returns than they can by operating the properties as subsidized housing, or because they prefer the flexibility of lesser-regulated market-rate operation. Indeed, thousands of units have already been converted. Taking actions described in this guide can help to stem the tide.

What Can Tenants, Organizers, and Advocates Do? Responding to the Challenge

Not every owner is able to convert or wants to convert to market-rate use. Sometimes their decision is restricted by something they agreed to long ago, when they obtained the original development rights or additional subsidies from federal, state or local governments. Sometimes other provisions of federal, state or local law impose additional restrictions on what can happen with a specific development. Sometimes owners are willing to continue to operate properties as affordable housing if they can receive a higher return comparable to market-rate operations. Sometimes they are stuck, because they cannot achieve a better deal by converting to market-rent operation. Sometimes it is prospective government action in response to owner misconduct that presents the most immediate threat, such as a proposed termination of a subsidy contract or the foreclosure of a mortgage.

You probably have several of these developments located within the area you serve. You first need to get more detailed information, and then begin to plan an action strategy. One way or another, you will probably be dealing with this problem, either by working with tenants and community allies to make a preservation plan for specific developments, or by ensuring that tenants whose homes are threatened by conversion receive the protection provided by law.

This booklet covers several things you can do to help preserve this housing or protect the tenants living there:

- Get information about the scope of the problem and the specific properties. If you have more than one development in your area, this information will help you decide which developments deserve attention first, either because they are at the greatest risk for conversion, or because they offer better prospects for preservation.
- Help tenants organize, get the necessary information, and make a plan. Success will invariably involve active and well-informed tenants.
- Build community support for preservation. It's usually hard to preserve a property without local allies. Community pressure and local funding are important elements of a successful strategy.
- Analyze the utility of litigation, if there appear to be legal violations. Sometimes you may be able to find existing restrictions that prevent a building from conversion to market-rate. Viable legal claims will often increase the chances for preservation.
- Ensure timely and complete tenant protections. There will be many situations where developments are not preserved. At the very least, you should work to guarantee that tenants receive the notices, the time, the replacement subsidies, and any other protections required by federal, state and local laws.

Getting Started: Information You Will Need

The primary information you will need is which properties in your area are potentially at risk of conversion. This information is available from various places.

HUD has posted a master list of all multifamily Section 8 properties in by state or area, called the Multifamily Assistance and Section 8 Contracts database, available online at www.hud.gov/offices/hsg/mfh/exp/mfhdiscl.cfm. This is a large database covering all properties with project-based Section 8 assistance (except possibly Section 8 Moderate Rehabilitation projects). The information includes subsidy, mortgage, and unit configuration, the expiration date of the contracts as well as information about the owner and management agent. The database must be opened in a spreadsheet application.

Additionally, you can get data from your state on prepayments and opt-outs on the National Housing Trust's Website at www.nhtinc.org/data.asp (as of presstime, this data was current only to December 31, 1998).

HUD has published several reports on its Web site that also provide useful information. In 1996, 1997, and 1998, HUD published A Picture of Subsidized Households,¹ a comprehensive database of HUD-assisted properties. It includes a large amount of demographic data about resident households in specific properties and the demographic characteristics of the census tracts in which properties are located.

Your local HUD office may also have important historical or recent information about the project's status and contracts, including any applicable restrictions, physical inspection reports conducted by HUD, lenders or HUD's Real Estate Assessment Center (REAC), as well as any pending actions against the owner for program violations. See Digging Deeper, *infra*.

Local HUD offices refer certain properties to HUD for "Mark to Market" mortgage restructuring, specifically to the Office of Multifamily Housing Assistance Restructuring (OMHAR). HUD maintains a fairly current list of properties with HUD-insured mortgages and above-market Section 8 rents, referred to other agencies or HUD contractors for processing under the program, available on line at www.hud.gov/offices/omhar/readingrm/assgstat.PDF. Usually updated every few weeks, this site is a good place to monitor which properties are actively going through restructuring, whether the properties are classified as full restructuring or "M2M lite," and the identities of the entities in your area that will be handling restructuring properties. Refer to NHELP's Advocates' Restructuring Guide, available online at www.nhlp.org, for more guidance about "Mark to Market"-eligible properties.

A state agency may have compiled information on the number and type of federally-assisted properties which may point you towards properties at risk of conversion. Alternatively, a regional or statewide nonprofit housing organization with whom you can collaborate may have already collected and analyzed data regarding federally-assisted housing.

Digging Deeper: Analyzing Information on Specific Properties and Investigating Further

What More Do You Need to Know?

Once you have basic information about the potentially affected properties in your area, you can begin to determine the scope of the problem and how you can make a useful contribution. If there are many potentially threatened properties, you will need to become more familiar with the specific circumstances of each property to set some priorities.

You can begin by categorizing the developments by ownership type. Generally, those properties owned by nonprofit organizations are not at risk of conversion to market-rate use due to the nature of the organization's mission and often due to restrictions accompanying the current financing. For-profit owners, however, usually have different objectives.

Another useful step may be to sort the properties by the dates when their current Section 8 contracts or other restrictions are scheduled to expire. Focusing on those properties where restrictions expire during the next two or three years may be a good idea.

After this, you may find it useful to compare the rents being charged under the current HUD program to local market rents obtainable by the owner for the units upon conversion. If current HUD-set rents are significantly below true market levels ("below-market"), then conversion may be a substantial threat. The property's amenities and physical condition are also important information for assessing risk.

Finally, it may be important to find out whether the owner has already taken actions to prepare for conversion. For example, an owner may have filed notices of prepayment or opt-out with the tenants, with HUD or with the state or local government.

Another entity already may have performed some of this risk assessment process for you. In some states, local governments are required (or may have taken the initiative) to analyze and plan for the assisted housing inventory as part of their land use planning obligations. See Building Community Support, *infra*. However, despite these efforts or requirements, you will still have to evaluate those assessments because they are often based only on generally available information (sometimes inaccurate), not the more specific information you can gather about properties, their local market settings, and the owner's plans.

Once you decide to focus on specific properties, you will need additional information to develop some possible strategies to pursue.

What's Happened So Far? Activity at the Property to Date

The owner may have recently undertaken some rehabilitation designed to make the property more marketable as market-rate rentals. New paint, landscaping, signs or other common area improvements are typical examples. The owner may have instituted new management policies to change the character of the occupancy or how the development is operated. Tougher tenant selection, house rules or eviction policies are typical. Drive by the property, and talk to the tenants and neighbors about any such changes.

An owner may have already filed notices of prepayment or Section 8 opt-out with the tenants, with HUD, or with the state or local government. See Appendix A, Checklist of Notice Requirements. These are often good clues about the imminence of the conversion threat. Ask if any notices have been received by tenants of the property, local government (Mayor, County Executive or Housing Department) and the local public housing authority (PHA), any state agency overseeing housing and community development, and HUD (particularly the Housing branch of the local field office with jurisdiction over the property).

More About the Property and the Local Market

Current HUD-approved rent levels at specific properties will vary widely, due to differences in original costs and subsequent adjustment formulas. Current market values also vary widely by locality, neighborhood and building. A significant gap between these two figures is often a strong indicator of conversion risk.

You may have already determined the relationship between the property's current rents and other "market-rent" figures. HUD's database, for example, shows the relationship to the so-called Section 8 "Fair Market Rents" (FMRs). This may not be very useful, because the FMR used in the HUD database may not be the current figure. Also, especially in hot-market areas, the FMR used to establish the local payment standard for the Housing Choice Voucher program may not fairly represent what rents are generally available in the community (it could be too low or too high). Finally, the FMR may not be a good indicator of the actual rental "street" value of the units in a specific property.

Owners facing conversion decisions want to know what rents can be obtained on the private market. Research and collect information on the average market rents by unit size being paid in the neighborhood, or ideally, in the census tract of the property. This information can be much more helpful than the FMR in determining the "street value" of the units. But it may not be enough, because it's just a figure drawn from the entire tract, not focused on the specific property you are evaluating. You may still need to find out what these units are worth by asking around the neighborhood about the rents for similar units, by checking the classifieds, or by asking realtors, property managers, or even the local housing authority. The local housing authority may know about neighborhood rents because it must approve as "reasonable" the rent paid by each participant in its housing voucher program, and some voucher holders may reside in similar units in that neighborhood. Remember, the property's amenities and physical condition must be factored into any determination of market or "street" rental value.

Another important factor is information about the property itself. You should be sure to research and analyze other restrictions that may inhibit conversion . If you can, you should research HUD's files because you may find information that bears upon the owner's ability or intentions to convert the development. Some HUD offices will just provide the information you seek upon request; others may require a formal request under the federal Freedom of Information Act (24 C.F.R. Part 15). The latter may involve more time and expense on your part, since HUD is sometimes slow to respond, interposes certain privileges against disclosure of certain project information, and often seeks to charge for providing information, taking a narrow view of what constitutes the "public interest" for providing a fee waiver. You should also check all public records , such as information in the recorder's office (local land records) or in the planning department of the local government, to evaluate the existence of any other restrictions affecting the property's use or value. Often properties cannot be converted, or can only be converted subject to certain conditions, because of restrictions imposed on the property as a condition of receiving other federal, state or local assistance. Most of these other restrictions establish covenants running with the land and can be found through a title search in the recorder's office; others may be incorporated in contracts that are part of the state, federal or local public agency's transaction files for the property.

Many such restrictions may be uncovered by running a preliminary title report. Ask if a local non-profit developer or a city agency will request a report at no charge to you. Such restrictions may be found in:

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- Federal Regulatory Agreements or Use Agreements accompanying the original financing or additional assistance provided after the property was developed (e.g., Use Agreements accompanying Flexible Subsidy funds or federal Preservation plans, riders to promissory notes);
 - Other federal restrictions on prepayment, such as those imposed on properties originally owned by a nonprofit or receiving Rent Supplement assistance;
 - Section 8 contracts (some of which contain an obligation to renew or require agency consent to terminate);
 - State or local regulatory agreements accompanying any public financing such as bond financing, HOME or CDBG funds, or local redevelopment agency funds;
 - State or local land disposition agreements executed as part of the transfer of the underlying land, usually in former urban renewal areas; and
 - Local land-use or other police power regulations, such as zoning laws, variances and use permits, local rent or conversion control ordinances, and any other possible local ordinances imposing substantive or procedural restrictions on the use of the property or its conversion.²

The Ownership and Its Plans

You're undertaking this research in order to answer the question "What is the owner going to do?" You're doing this because the rules usually leave it to the owner to decide whether to preserve the property or convert it to market-rate. There's no better source for answering that question than the owner.

You need to find out more about the current ownership by ascertaining:

- who is the owner?
- in what form is the ownership entity organized? (sole proprietorship, corporation, limited partnership)
- who represents the owner?
- how long have they owned the property?
- do they own other affordable housing properties?
- what is the status of their relationship with HUD?
- are they active on the local housing scene?
- how is the property financed? (primary, secondary and any deferred note financing)
- what are the owner's plans?

You should get some of this information from HUD data. You should double-check it with the local property records, because you may find information that is different than what is contained in HUD's records. It is also often very useful to talk with the property manager, the local HUD office asset managers, and the local government housing and planning staff to see what they know or have heard. Sometimes local public officials can obtain information about the ownership and its plans more easily than advocates. Of course, the tenants them-

selves may have found out important information on these questions.

Some local governments have the responsibility (or have taken the initiative) to evaluate and plan for the impact of the loss of these developments as affordable housing. If so, local public officials may be a good source of information. See Building Community Support, *infra*.

It is especially important to determine whether the owner has a good working relationship with HUD. Those owners that do not are typically looking for a divorce, regardless of the economic impact of the decision in the short-term. You may also find out that it is HUD who has been seeking to end the relationship, usually due to perceived shortcomings in the owner's performance, such as poor management, failing to maintain the property or misusing funds.

The Tenants

Invariably, a housing development will be preserved only when the tenants who live there strongly support that objective. Many of the current residents may not have any information about either the threat to their homes or available options and strategies under the governing rules. Tenant education and organizing is therefore an essential ingredient for developing a response, whether that response is a preservation strategy or simply ensuring adequate tenant protections upon conversion.

Tenants will need to get more of the information described in this section, and often need additional help to evaluate that information, organize themselves, and develop a responsive plan. Tenants will often have important information about the property or the owner to contribute to the analysis. They may also play an important role in gathering more of the needed information.

It is important to consider whether prospective tenants of the development can be identified and contacted, since their perspective on the preservation issue, or that of social services organizations working with them, may be different from that of the existing residents. For example, other people in the community in need of affordable housing or who have applied for occupancy in the property and have been placed on the waiting list may have a different interest in preserving the development, and stand to lose that opportunity. This position will usually not, but could, differ from that of the current tenants, since the position of current tenants might be affected by the tenant protections available to cushion the impact of conversion. In addition, the needs of other people in need of affordable housing may make them important allies in pursuing any local efforts to secure the funding to purchase the property or in pursuing a judicial challenge to any conversion.

Regional tenant education and organizing projects funded with federal, state and often private or local funds can help get this part of the job done. Funds are provided to some organizations from federal and state sources such as HUD Outreach and Technical Assistance Grants (OTAGs). You can find a list of OTAGs at HUD's website, currently at www.hud.gov/offices/omhar/tenants/otagitag.pdf. If you know of no organizing project in your area, contact the National Alliance of HUD Tenants (NAHT), 353 Columbus Ave., Boston MA 02116, (617) 267-9564.

In addition, funds are available directly to tenant groups (\$20,000 maximum, for Resident Capacity building) under the HUD Intermediary Technical Assistance Grant (ITAG) program. The ITAG program also provides predevelopment grant funding for evaluating the feasibility of a nonprofit purchase (\$70,000 maximum). Finally, also under the HUD ITAG program, nonprofit, legal services and public agencies can receive Public Entity Grants

(\$20,000 maximum) to work on developments with expiring contracts in their service areas. Contact one of the three nonprofit intermediaries for guidelines and an application. Note: Since September 2001 and until press time (March 2003), HUD has not extended contracts for these intermediaries or provided funding necessary for them to make additional ITAG subgrants. The three intermediaries administer programs by geographic jurisdiction:

- Northeast: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Washington, D.C., Vermont, West Virginia
National Center for Tenant Ownership
Harrison Institute for Public Law, Georgetown University Law Center
111 S Street NW, #102
Washington, DC 20001
Contact: Roslyn Morris-Davis, (202) 662-9601, rm89@law.georgetown.edu
- Southwest: Arizona, Arkansas, California, Louisiana, Nevada, New Mexico, Oklahoma, Texas
Southeast: Alabama, Caribbean, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia
Low-Income Investment Fund
1330 Broadway, Suite 600
Oakland, CA 94612
Contact: Abby Rowe, (510) 893-3811 x311, arowe@liifund.org or
Deanna Sandford, (510) 893-3811 x309, dsandford@liifund.org
- Northwest: Alaska, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming
Midwest: Indiana, Michigan, Ohio, Wisconsin
Amador-Tuolumne Community Action Agency
N. Hwy 49 #302
Sonoma, CA 95370
Contact: Diane Bennett, (209) 533-1397 x225, dbennett@atcaa.org

Building Community Support: Identifying and Enlisting Local Allies

It will usually be important to build additional community support for a preservation effort, either to convince an owner to preserve the development or sell to a preservation purchaser, or to secure the additional subsidy funds necessary to make a transfer feasible.

The Community

Many individuals and organizations in your community probably care about preserving affordable housing. Think broadly about educating and including:

- housing and homeless advocacy organizations;
- nonprofit housing providers;
- social service organizations providing services to low-income constituents;
- neighborhood organizations;
- churches and faith-based institutions; and
- civic organizations working on anti-poverty issues.

These organizations can add the support of their constituencies or members to the effort, or provide additional connections into the local political structure that may prove useful in advancing a particular strategy.

The Local Government

In many situations, you will also need the support of local government. This could include city housing and planning staff, members of the legislative body such as the city or county council, and those with executive authority such as the mayor, city manager, or county executive. You may need local government help to:

- get information;
- provide funding;
- take regulatory action;
- enforce existing restrictions;
- encourage the owner toward a preservation plan by leveraging its discretionary authority over local approvals sought by the owner for other development or land use decisions; or
- advocate for preservation with the federal or state government.

Because you rarely know when or how you will need this support, it is important to start this process of communication early. The local government may have collected information on this problem or made certain assumptions about the continued availability of these properties as part of their Consolidated Plan, submitted to HUD in order to receive Community Development Block Grant (CDBG) and HOME funds from the federal government. The ConPlan requires a jurisdiction (a city, urban county, or state) to identify all of its housing and community development needs, and then come up with a long-term strategy for meeting those needs. The ConPlan has to indicate what programs and resources will be used over the course of the long-term strategy. The HUD money tied to the ConPlan is targeted by law to “primarily” benefit low income people. Each year the jurisdiction must spell out in detail which activities it will carry out, and how much money it will spend on them, in order to work toward reaching its program goals. Local governments may have additional affordable housing planning duties under state or local law. These duties of local governments to assess development needs and to develop an action plan create obvious local advocacy opportunities for advancing local preservation work.

Setting Goals for the Preservation Effort

Early on in your efforts, it will be important to determine the objectives of your efforts or of others with whom you are working. In short, you will need to decide whether preservation of a particular development is feasible, or whether your efforts should instead be concentrated solely upon ensuring timely and complete tenant protections. It will often take some time and a considerable amount of information to make this decision. Other times it may be clear from the outset. Clarity will be invaluable in determining strategies and efficient planning of the work.

Is Preservation Feasible?

Preservation of a threatened development with an expiring Section 8 contract can occur as the result of an owner's decision to remain in the Section 8 program through a renewed contract (with rent levels determined by applicable laws and rules). Preservation can also result from an owner's decision to sell the development to a new owner committed to the renewal of the Section 8 contract. You need to evaluate whether either of these paths is realistic. Advocacy may play an important role in determining what is actually feasible.

Renewal by the Current Owner

This route may be far less complicated because it does not involve all of the planning and resources of a purchase and sale. It only requires a decision by the owner, which depends upon a myriad of factors (many of which may remain unclear in a particular case). These factors include:

- whether the renewal can provide rents and net income close to market-rate operations;
- the tax position of the owner (including the partners in any partnership);
- the owner's relationship with HUD;
- transaction costs or the studies and consultants required to obtain a renewal; and/or
- any leverage resulting from possible contract and legal claims (see Legal Claims, *infra*).

One drawback of owner renewal is that it may be just for a short period of time (as short as one or five years), depending on the authorities used by the owner and HUD to renew the contract. A renewed contract at higher rents under the "Mark Up to Market" program must have at least a five-year term.

Sale to a Preservation Purchaser

This route involves more complications, but may be superior in providing long-term assurances of preservation, usually by a nonprofit buyer. In considering its feasibility, consider issues such as the:

- desire and capacity of the tenant organization to establish or engage and evaluate a prospective purchaser;³
- amount and type of financial resources required to support a purchase, given the nature of the project (equity, rehabilitation and operating needs);

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- availability of those funds from federal, state, local, private and equity sources, and their timing;
 - capacity and interest of qualified nonprofit organizations for the type of transaction required;
 - amount of time available for assembling the transaction;
 - owner's inclination toward sale; and
 - ability to create sufficient political support from federal, state and local government.

What's feasible in theory may not work out in a particular case. On the other hand, developments that initially appear impossible to preserve may just end up proving feasible.

Some state or local laws now provide nonprofits and other qualified organizations the right to make or match offers to buy threatened properties. Where owners seek to sell developments for conversion to market rate, certain nonprofits or other entities that agree to continued use restrictions, including tenant groups, may have the opportunity to purchase. Some states have attempted to prevent conversion by stepping in at the time of proposed prepayment or opt-out, before the owner wants to sell, since many owners want to retain ownership and just convert the use. To accomplish this, a preservation statute could, for example, provide for notice requirements with a right of first refusal for the state housing agency or non-profits whenever the owner takes any action that would terminate a project's subsidies, not just upon a proposed sale that would do so. See Appendix A, Checklist of Notice Requirements. Find out about any applicable state or local laws.

Ensuring Complete and Timely Tenant Protections

This is the least that you can do, but is extremely important. While Congress has substantially improved both the funding and quality of tenant protection requirements starting in late 1999, the timely and complete implementation of these protections has been uneven. See Ensuring Tenant Protections, *infra*.

Federally required notices often fail to cover a full year, to contain the right information, or to be served on the right parties. State notices are often not provided at all, or fail to meet applicable legal requirements. No one entity monitors owner compliance with federal, state or local notice requirements at every property.

The transition to vouchers rarely works smoothly for all residents. HUD's local Offices of Housing (responsible for multifamily opt-outs and prepayments), Public and Indian Housing (responsible for processing replacement enhanced voucher funding), and local PHAs (responsible for certifying tenants, inspections and approving rent levels under the enhanced voucher program) are not well coordinated, especially in locations where there have not been many conversions. PHA recertifications are often delayed or inappropriate, or funding fails to arrive on time. Information about the tenants' rights, especially eligibility for the replacement vouchers and an owner's duty to accept them if the tenant wants to stay, is often inaccurate.

Organizers and advocates have an important role to ensure that tenants get timely and accurate information and benefits, and that no tenants move during the transition before receiving their vouchers.

Tools for Preservation

Background

From 1988 through 1995, owners of these developments generally had no choice but to preserve them. One reason was because they were still operating under long-term Section 8 contracts that generally could not be terminated early. Another reason was because Congress had passed laws that restricted conversions and provided additional financial incentives to owners to maintain their buildings as subsidized housing or to sell them at market value to others (generally nonprofit or tenant purchasers) who would do so, using additional federal funds. These preservation laws, Title II (the Emergency Low-Income Housing Preservation Act, or ELIHPA (1988)), and Title VI (the Low-Income Housing Preservation and Resident Homeownership Act, or LIHPRHA (1990)), were used extensively by many owners or nonprofit or tenant purchasers to preserve threatened developments throughout the early 1990s. Some developments even received preservation funding as recently as 1998. Developments preserved under ELIHPA or LIHPRHA became subject to additional use restrictions for the remaining term of the original mortgage (usually about 20 years, under ELIHPA) or for their remaining useful life (LIHPRHA). Generally, under these programs, the federal government provided virtually all of the funds necessary for predevelopment expenses and transaction costs, capital grants for acquisition costs, or the additional Section 8 rent subsidies needed to cover the additional debt service for acquisition and rehabilitation.

Starting in 1995, the picture changed dramatically. A new Congress began to lose interest in providing the necessary funds to operate the program. Owners of developments with HUD-subsidized mortgages were authorized to prepay their loans with few restrictions. However, some, but not all, eligible developments continued to receive preservation funding between 1995 and 1998, many of which were preserved through sale to nonprofit or tenant organizations.

In 1997, Congress passed another law giving owners of project-based Section 8 developments the choice of whether to renew their Section 8 contracts upon their expiration, while providing some incentives to retain them. This law was called “Mark to Market,” which established a general framework for renewing expiring subsidy contracts. While it covered all buildings with expiring contracts, its primary focus was to permit the reduction of rent subsidies in those developments with contracts carrying rents that were “above-market” through a planning process known as “mortgage restructuring.” (For more information on restructuring, see NHLP’s Advocates’ Restructuring Guide, available online at www.nhlp.org.) As originally written, it permitted—but did not require—HUD to provide increased rents and subsidies for those developments with expiring contracts carrying “below-market” rents. Because HUD dragged its feet on providing such incentives, effectively freezing rents, many owners “opted out” in favor of market-rate use when their Section 8 contracts expired.

In 1999, Congress then revisited this problem by requiring HUD to provide more incentives for many of these below-market buildings, at the same time as HUD was implementing a plan to do so administratively. This tool is called “Mark Up to Market.” Owners still have the option to reject any such offer from HUD, and convert to market-rate.

Prior to 1999, when an owner converted to market-rate, tenants previously assisted by the project-based Section 8 contract or Section 236 budget-based rents generally received replacement vouchers to cushion the economic impact of conversion. In the case of a Section 8 opt-out, the vouchers were generally regular vouchers subject to the PHA’s established local payment standard. If the market rent for the unit exceeded the local payment standard,

the tenant would have to pay the excess out of their own pocket, or move from the property to a cheaper unit. In the case of a mortgage prepayment, those vouchers were “enhanced,” meaning that their value could be set at the reasonable market rental value of the unit. Also, federal law obliged owners to accept the vouchers. In 1999, because many opt-out tenants were at risk of paying unaffordable rents or being displaced by higher rents, Congress extended eligibility for these enhanced vouchers to tenants facing any “housing conversion action,” including opt-outs. In 2000, Congress extended eligibility for this special protection to tenants whose homes were converted since October 1, 1994, and clarified the owners’ duty to accept them.

Financial Resources

Federal rules and programs

Owners of most developments with HUD-subsidized mortgages (e.g. Section 236 or 221(d)(3) BMIR) may now terminate the existing use restrictions in the Regulatory Agreement (cost-based rents, restrictions on occupancy, etc.) by “prepayment” of the loan. (Pub. L. No. 105-276, § 219 (1998)). They must usually provide a notice and are prohibited from increasing rents for 60 days following a prepayment. Owners of these developments generally have the ability to prepay their loans without HUD approval after the 20th anniversary of original endorsement for federal insurance. Almost all developments have reached this milestone. While the Title VI Preservation Program restricting prepayments and providing additional financial incentives for owners or funds for acquisition has not been repealed, it has been unfunded since FY 1998, and superceded by Congress’ authorization of prepayments. Neither Congress nor HUD has yet made available any other dedicated funds to preserve prepaying developments, unless the property also has an expiring Section 8 contract.

Many developments with HUD-subsidized mortgages cannot qualify for unrestricted prepayment because they fail to qualify as “eligible low-income housing.” Usually this is because they have another restriction on prepayment which effectively restricts them to their current use until the expiration of the full mortgage term (40 years), unless HUD approves a prepayment. These restrictions come from other subsidy contracts such as Rent Supplement or Flexible Subsidy, or because the property was originally owned by a nonprofit organization that had agreed to a full mortgage term use restriction. HUD’s approval of prepayments on these properties is governed by the standards and procedures set forth in Section 250 of the National Housing Act (12 U.S.C. §1715z-15). These require notice to tenants, an opportunity to comment, and a HUD finding that the property is no longer needed as subsidized housing.

Blocking prepayment may be especially important to preventing an owner from opting out of a Section 8 contract. If an owner cannot eliminate the affordability restrictions accompanying the HUD-subsidized mortgage, including HUD budget-based rent control, then the financial incentive to opt out may be dramatically reduced. Because HUD may not carefully review an owner’s certification of a project’s eligibility to prepay, it is especially important to double-check that a property is actually free of HUD approval requirements. Such restrictions may be an invaluable preservation tool. See *Digging Deeper*, supra.

For developments with expiring Section 8 contracts, Congress and HUD have provided a wide variety of important preservation tools for owners or qualified purchasers electing to preserve Section 8 or other affordability requirements. Most of these tools are described in HUD’s Section 8 Renewal Policy Guide (Nov. 7, 2001), available at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm, detailed below. Note however, that federal policies and funding are constantly changing. For example, while the “Mark to Market” law, discussed

infra, will continue until September 30, 2006, OMHAR itself is currently extended only until 2004. Check the OMHAR website, www.hud.gov/omhar, or NHLP's website, www.nhlp.org, for current information on the following preservation tools:

- Section 8 renewal contracts at specified rent levels, but usually at market rents for most properties. Now these contracts can be for terms up to 20 years, subject to Congress' annual appropriations;
- the Mark to Market mortgage restructuring program for developments with HUD-insured mortgages and Section 8 rents that exceed market rents (for more information, see NHLP's Advocates' Restructuring Guide, available at www.nhlp.org);
- the "Mark-Up to Market" program for developments with below-market Section 8 rents. The Section 8 law (Pub. L. No. 106-74, § 531 (1999), revising § 524(a)(1) of Pub. L. No. 105-65 (MAHRAA)), now requires HUD to offer to increase the Section 8 rents on some properties to market levels, and permits HUD to offer higher rents on others, which may be an essential preservation tool, along with local resources. HUD has implemented this authority most recently via HUD Notice H99-36 (Dec. 28, 1999) and the Section 8 Renewal Guide, Ch. 3 (Jan. 19, 2001) which authorizes HUD to offer higher "market comparable" Section 8 renewal rents to those below-market properties meeting certain specific eligibility criteria, and to waive distribution restrictions to enable owners of properties with HUD-subsidized mortgages to obtain these higher returns;
- the "Mark Up to Budget" program that permits existing nonprofit owners to obtain rent increases up to market-rent levels to support budget-based rent increases for rehabilitation and operating cost increases;
- HUD grants or loans for rehabilitation of certain qualified properties under Section 531 of MAHRAA (note, however, that as of March 2003, HUD has yet to implement this authority and has rescinded available funding several times);
- authority to refinance a Section 236 property and preserve the Section 236 Interest Reduction payments for the property, to support preservation (so-called "IRP decoupling"). See HUD Notice H 00-8, Guidelines for Continuation of Interest Reduction Payments after Refinancing: "Decoupling", under Section 236(e)(2) and refinancing of insured Section 236 (May 16, 2000) (reinstated and extended by HUD Notice H 02-15 (July 17, 2002));
- planning requirements and various funding resources for the rehabilitation of troubled properties facing foreclosure, disposition, or disqualification from Section 8 renewal (contact NHLP at (510) 251-9400 x104 for further guidance on this topic);
- the discretionary authority to provide enhanced vouchers for HUD-approved "preservation transactions" where project-based Section 8 is not maintained or unavailable (Pub. L. No. 106-74, § 531, 113 Stat. 1047 (1999)); and
- ITAG grants for predevelopment costs (see *Digging Deeper*, supra).

State and locally controlled resources

States control several other financial resources to support preservation. Federal Low-Income Housing Tax Credits, distributed by states, may be an important financial resource for making preservation sales feasible. These scarce credits may be allocated through a state-controlled competitive process that awards preference points for preserving at-risk housing. The tax credits's caps (the credit authority allocable by a state on a per-resident basis) were recently substantially increased in 2002 by 40 percent over the previous value. Below-market interest loans from state bond funds or deferred loans, also allocated by the state, provide another financial tool; these loans come with less valuable Tax Credits that provide additional equity. States may also have other grant or loan funds from their own resources or those of the state housing finance agency available to use for preservation.

Local governments also have a variety of funding sources to support preservation, although competition for these funds may be intense. Locally controlled sources include funds provided under federal programs like HOME, CDBG or project-based Section 8 vouchers, or locally generated funds such as redevelopment agency revenues.

In addition to any notice or other requirements of state law, remember that the Consolidated Plan planning requirements (see *Building Community Support*, supra) may be a useful tool for encouraging the earmarking of funds controlled by local governments for preservation, or the exercise of the local police power to regulate conversions or exercise local eminent domain powers. Check to see if the local government has adopted any procedural or substantive restrictions on conversions. Pursuing the legal claims discussed in the next section through negotiation or litigation may provide leverage, another important tool to influence owner or public agency decisions about preservation.

Legal Claims for Challenging Conversions

Generally, conversions are driven by the owner's choice. However, in many cases, the existing restrictions on some properties, and the procedural and substantive requirements of federal, state and any local laws may provide claims to delay or inhibit conversion. Legal claims may be important to achieve some or all of the tenants' objectives; alternatively, the judicial process may not be well-suited to doing so. Pursuing meritorious claims may provide essential leverage for influencing the decisions of the owner or public agencies involved, and the resolution process may provide time for the more deliberate evaluation of preservation options. For a list of recent cases raising some of the following claims to challenge conversions, see the list of cases maintained on NHLP's website at www.nhlp.org/html/pres/cases/index.cfm, especially the sections detailing "Opt-out Cases," "Prepayment Cases," and "Enhanced Voucher Cases."

Possible Plaintiffs

In every case, legal counsel must evaluate a range of possible plaintiffs depending upon the nature of the harm, the specific legal claims involved, the type of relief sought, and the practicality of representing certain types of plaintiffs. Consider several categories of possible plaintiffs, including existing tenants, families on the project waiting list, others in the community in need of affordable housing, and low-income community or housing advocacy organizations. At some point, ethical considerations may encourage or require identification and recruitment of additional counsel to represent additional types of plaintiffs.

Possible Claims

Existing restrictions on the property

Elsewhere we reviewed some of the possible restrictions which occasionally constrain the use of these properties (see *Digging Deeper*, supra). These restrictions typically come from additional federal, state or local subsidies provided to a property or local zoning or land use requirements. If they exist, they could possibly be judicially enforced in state or federal court.

Local rent control laws

Any existing local rent control laws may apply to a property after its conversion. For example, local rent control laws in many cities set the base rent for properties leaving the federal subsidy system at the last federally controlled rent, thus diminishing the short-term gain available to an owner upon conversion. Owners may fail to observe these restrictions, either in planning a conversion or after the fact, and local government may fail to enforce the requirements. A state court claim may provide important leverage.

Federal, State and Local Notice Requirements

Because of the multiplicity of notice requirements from state and federal sources, and their changing nature, tenants (and others, usually state or local governments) may also have claims for violation of the requirements to serve notices of a specific content at a specified time upon certain parties, under federal, state or occasionally local law (see Appendix A, Checklist of Notice Requirements).

Fair Housing Claims Challenging Opt-Outs and Prepayments

Federal or state fair housing laws may provide additional claims against the owner or the responsible public agency.

Opt-outs and prepayments that involve the displacement and the denial of affordable housing opportunities to families of color, families with children, or people with disabilities may be subject to challenge under civil rights laws.⁴ The federal Fair Housing Act⁵ prohibits both purposeful discrimination in housing based on race, national origin, familial status, and disability, as well as actions that have a disparate impact on these classes, regardless of the intent of the defendant.⁶ In addition, the Fair Housing Act imposes a special affirmative duty on HUD to further fair housing.⁷ While intentional discriminatory conduct against people protected by these laws occasionally may be involved, more often the claim will involve the discriminatory impact of the conversion and the failure to execute these affirmative duties.

Disparate Impact Claims Against Project Owners. A threshold disparate impact claim may be made out against a project owner if the owner's opt-out or prepayment will have a "significantly adverse or disproportionate impact" on members of protected classes.⁸ This would occur if a disproportionate number of families of color or other members of protected classes are current tenants or on the waiting list for admission to the project facing conversion. The reduction of guaranteed affordable housing opportunities would impose a disproportionately adverse effect on members of protected classes. This could also occur if members of protected classes on the waiting list have an especially severe need for affordable housing.⁹ In some cases, a disparate impact claim might also exist against HUD, if it has approved such a conversion.

Once a *prima facie* case is made by showing "adverse or disproportionate impact," the project owner will have the opportunity to offer a rebuttal and thereby escape liability. While the precise standards for rebuttal are not clear, a rebuttal will generally involve the articulation of some need or legitimate interest on the part of the owner to engage in the allegedly offending activity, notwithstanding its discriminatory effect.¹⁰ At the very least, the rebuttal must be more than a mere pretext to be sufficient.¹¹

In a multifamily conversion scenario where a Section 8 opt-out is involved, a project owner should have difficulty justifying its need or interest in removing its property from the HUD inventory because of the additional financial incentives available through HUD's preservation programs, such as "Mark-Up to Market." In addition, project owners, as participants in HUD housing programs, are subject to an affirmative duty to "to prevent discrimination on the basis of race" under HUD regulations,¹² which casts doubt on their legitimate interest in converting projects if this would impose significant discriminatory effects on families of color.

Perpetuation of Segregation Claims Against Project Owners. In addition to disparate impact claims, project owners may also be liable under the Fair Housing Act if their opt-outs or prepayments will have the effect of perpetuating residential racial segregation in a community, regardless of the owner's intent to do so.¹³ Such a situation would occur where families of color participating in the local Section 8 voucher program are concentrated in racially segregated neighborhoods. In this case, the tenant-based subsidies provided in replacement of the project-based subsidies lost by the owner's conversion may feed voucher families into existing patterns of residential segregation in the area.¹⁴

Claims Against HUD for Failure to Discharge Its Affirmative Duty to Further Fair Housing. In some instances, HUD may have failed to have properly exercised its discretion in its decisions to approve the prepayment or opt-out of an assisted development or to deny a project owner benefits under a preservation program. HUD's affirmative fair housing duties may be useful in such cases.

Before making a decision, HUD is required to study its potential racial and socio-economic effects. Failure to do so is a violation of HUD's affirmative duty to further fair housing under the Fair Housing Act.¹⁵ Presumably, under its affirmative fair housing duties, HUD must act to prevent the conversion of multifamily projects where such a conversion threatens to create a disparate or segregative effect.

Nonetheless, HUD routinely fails to conduct any such analysis prior to its decisions involving the conversion of assisted projects. This remains invariably true despite the fact that HUD knows that its decisions regarding the removal of projects from the assisted housing stock can involve fair housing issues, just as the site selection regulations in effect when these projects were developed involved a fair housing analysis.¹⁶

Ensuring Tenant Protections

In addition to notice requirements, Congress has provided other important protections for tenants facing conversion. If a preservation strategy proves inappropriate or unsuccessful, local advocates must monitor the process during the applicable notice period to ensure that tenants receive all of the protections intended by Congress in a timely fashion. First, you have to make sure that tenants know that they should not move from the property in response to any opt-out or prepayment notice until they have received all of the required protections. Doing so may deprive them of any benefits.

Since 1999, the primary protection is an “enhanced voucher,” provided for any specified housing conversion action, including HUD-subsidized mortgage prepayments and project-based Section 8 opt-outs.

Who Gets Enhanced Vouchers?

Any tenant in residence at conversion that was previously assisted under a project-based Section 8 contract, and most low-income tenants residing in a development with a HUD-subsidized mortgage facing prepayment, should be entitled to an enhanced voucher. As amended twice in late 2000, the law now requires that these vouchers be provided to any eligible tenant still in residence whose home has been converted since October 1, 1994 (October 1, 1995 in the case of prepayments). PHAs administering these vouchers will usually try to screen tenants under the criteria they use for their ordinary voucher program, as HUD (but not the statute) allows. Contact NHLP if tenants are not receiving vouchers for reasons other than income ineligibility.

What Are Enhanced Vouchers?

Tenants can use these vouchers to stay in their homes or to move to another unit with a willing landlord. Enhanced vouchers share many of the features of regular vouchers, but differ in two important respects. These two features are unavailable if the tenant chooses to move from the property with their voucher.

First, they differ in value. They can be worth more than regular vouchers if a higher subsidy is needed to permit the tenant to afford to remain in the development after conversion, either at the time of conversion or later. They have subsidies set at “enhanced” payment standards—i.e., PHA-approved “reasonable” market rent levels if necessary to enable tenants residing in place to afford the new market rents for the property. This value must be adjusted in the future to cover any subsequent rent increases imposed by the owner, so long as the PHA determines that the rent is truly a “market-value” rent for the unit. Tenants who choose to move with their enhanced vouchers are governed by ordinary PHA-set local payment standards, adjusted pursuant to other formulas.

Second, enhanced vouchers include anti-displacement protection. Generally, the current project owner must accept them, as long as a tenant wishes to remain. Owners cannot evict tenants at the end of the lease term with no cause stated, unlike under the ordinary voucher program. Many PHAs and owners do not understand this feature of enhanced vouchers.

Must Owners Accept these Enhanced Vouchers?

Yes. Congress has clarified the statute to state that the “tenant may elect to remain.”¹⁷ HUD has issued administrative guidance informing HUD and PHA staff, and owners, that

owners must accept these vouchers absent good cause to evict the tenant.¹⁸ There is no time limit, such as one year, on a tenant's right to remain. However, HUD does state that the property must be offered for rental use, a qualification not specified in the statute.

What Are the Typical Problems to Look For?

One of the greatest problems is simply ensuring that the subsidies are provided to the tenants before the effective date of the conversion. There are numerous steps required to confirm the owner's conversion decision, get the funding flowing from HUD, engage the PHA to administer the replacement subsidies, and perform all of the recertifications, inspections, lease reviews and related activities. Usually, action does not begin until the owner serves its final 120-day notice of opt-out on HUD. Thus, the available time to complete all of these steps is short, especially for large properties or PHAs with small staffs.

Beyond enforcing the owner's duty to accept the vouchers and terminate tenancies only for good cause, there are several other common problems. PHAs often screen the tenants under the tenant selection criteria used for their ordinary voucher program, so some tenants may be illegally denied assistance at conversion.

PHAs must also reach an agreement with the owner concerning "reasonable" (market) rent levels, and certify that the unit passes the Housing Quality Standards upon inspection. Substandard, former HUD-assisted units will present special problems, as owners may be unwilling to repair them and HUD and PHAs may tell tenants they must move.

Owners may charge new higher security deposits, which could cause problems for tenants remaining in place or moving. Moving expenses present an additional hardship for tenants, since relocation costs are not required by federal law.

Where tenants want to stay and owners seek to convert units to non-rental use, such as condominium or commercial uses, HUD's apparent position that the tenant has no right to remain will probably have to be litigated.

Tenants whose actual current family size does not fit the unit may encounter problems in using a voucher in their current unit, especially if the family is overcrowded. On the other hand, HUD has indicated that it will adopt policies to permit families that are currently overhoused to remain in their homes so long as there are no units of appropriate size in the development and they are searching for alternative housing.

Another problem concerns a sometimes complicated "minimum rent" provision imposed by the statute. If staying in the property, a tenant must pay at least the same absolute rent or percentage of income paid before prepayment or opt-out, which could be more than 30 percent of their income if the tenant did not receive Section 8. Current HUD policy does not impose this minimum rent on movers. Even with an enhanced voucher, some non-Section 8 tenants may have to pay much more than their prior rent contribution, in order to raise their contribution to 30 percent of income under the voucher program.

As with other vouchers, Congress must provide adequate funds to renew these vouchers every year in the appropriations process. To date, Congress has done so.

Endnotes

¹Available at huduser.org/datasets/assthsq/statedata98/index.html (1998); huduser.org/datasets/assthsq/statedata97/index.html (1997); and huduser.org/datasets/assthsq/statedata96/index.htm (1996).

²For more on preserving project-based Section 8 housing and housing subsidized under Sections 221 and 236, see Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit, 29 Hous. L. Bull. 183 (Oct. 1999), and Chapter 15 of NHLP's HUD Housing Programs: Tenants' Rights (2d. ed. 1994) and the 1998 Supplement.

³Some tenant organizations may seek a direct ownership role or to negotiate a specific but more limited role in the new nonprofit ownership entity or in project operation. For a brief review of some of the available options, see Goldberg-Gray, Deb, Resident Participation In HUD Affordable Housing Preservation Projects: What Works?, Univ. of Calif. Center for Cooperatives (Sept. 2000), available at cooperatives.ucdavis.edu/publications/housing.html.

⁴For a longer description of civil rights issues relating to low-income housing, see Florence Wagman Roisman and Philip Tegeler, Improving and Expanding Housing Opportunities for Poor People of Color, 24 CLEARINGHOUSE REVIEW 312, 325-337 (1990). See also ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION (1996).

⁵42 U.S.C. § 3601, et seq.

⁶See Pfaff v. HUD ("Pfaff"), 88 F.3d 739 (9th Cir. 1996).

⁷42 U.S.C. § 3608(e)(5).

⁸See Pfaff, 88 F.3d 745. Note that Courts of Appeals outside the Ninth Circuit sometimes apply other tests in deciding disparate impact cases under the Fair Housing Act.

⁹See, e.g., U.S. v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

¹⁰See Pfaff, 88 F.3d at 747.

¹¹See Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988)

¹²See 24 C.F.R. § 107.21 (implementing Exec. Ord. 11063 (1962)). Note that these regulations include administrative enforcement procedures. See § 107.35, et seq.

¹³See, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1988); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988, n.3 (4th Cir. 1984); Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights ("Arlington II"), 558 F.2d 1283, 1293 (7th Cir. 1977); Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

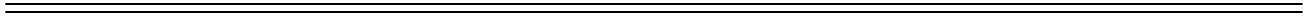
¹⁴HUD has recently noted serious geographic concentrations of Section 8 voucher families in many metropolitan statistical areas. See HUD No. 00-223 (Sept. 12, 2000) (Cuomo Expands Rental Opportunity for Hundreds of Thousands of Low-Income Families), available at hud.gov/pressrel/pr00-223.html.

¹⁵See, e.g., NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 154 (1st Cir. 1987); Shannon v. HUD, 436 F.2d 809, 816 (3rd Cir. 1970) (relying also on Exec. Ord. 11063 (1962)); Anderson v. City of Alpharetta, 737 F.2d 1530, 1538 (11th Cir. 1984).

¹⁶See, e.g., 24 C.F.R. § 882.404(b) (1984) (Section 221(d)(4) Program "Site and Neighborhood-Performance Requirement[s]").

¹⁷Pub. L. No. 106-246, § 2801 (July 13, 2000).

¹⁸Section 8 Renewal Policy Guide, Chs. 1, 8, and 11 (Nov. 7, 2001).

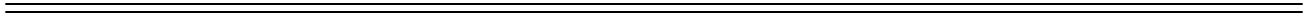


Appendices

Appendix A: Checklist of Notice Requirements for Termination or Prepayment of Federal Housing Assistance

Appendix B: Other Useful Resources

Appendix C: Basic Legal Authorities



Appendix A: Checklist of Notice Requirements for Termination or Prepayment of Federal Housing Assistance ¹

(Revised as of 3/25/03)

Advocates must evaluate whether the owner seeking to terminate federal subsidies has complied with all applicable federal, state, and/or local notice requirements. Federal law imposes such requirements, reviewed here. State and local laws may include additional requirements.

Federal Notice Requirements

Federal notice requirements for termination of project-based Section 8 contracts ²

- Did the owner provide written notice to the HUD Secretary and each tenant (by delivery or mailing)?³
- Was the notice served at least one year before termination or date of opt-out? If owner originally gave a notice of renewal, tenants must be served with a one-year notice of owner's new decision to opt out.⁴
- Did the notice include a statement of possible renewal and, if termination occurs, the residents' right to remain and continually renew leases as long as the property is offered as rental housing, the PHA continues to find the rent reasonable and there is no cause for eviction under Federal, State or local law?⁵
- Did the notice contain a clear statement of the owner's decision to opt out?⁶
- Did the owner give HUD an additional four-month notice prior to opt-out?⁷

Federal notice requirements for prepayment of a mortgage or termination of an insurance contract ⁸ (requirements are applicable only if property is "eligible low-income housing")⁹

- The owner provided written notice of intent to: (1) each tenant, (2) the HUD Secretary, and (3) the chief executive officer of the appropriate state or local government
- The owner provided notice at least 150 but not more than 270 days before the prepayment or termination.

State or Local Notice Requirements

Check state and local laws for notice requirements that differ from federal requirements.

Consequences of Noncompliance with Notice Requirements

Federal notice requirements for terminations of project-based Section 8 contracts

The federal statute provides that until the proper notice has been given and one year has elapsed, the owner cannot evict the tenants or increase their rent payments.¹⁰

Federal notice requirements for prepayment of mortgage

The relevant statute does not specify a remedy. If violations occur, advocates should pursue injunctive relief and damages.

State notice requirements for terminations and prepayments

Check the relevant statute for specific remedies or pursue injunctive relief and damages.

¹For background, authorities, and further details see the accompanying memo, entitled “Summary of Notice Requirements for Termination or Prepayment of Federal Housing Assistance.” Contact Jim Grow at NHLP’s Oakland Office, jgrow@nhlp.org, or call (510) 251-9400 x104.

²42 U.S.C. §1437f(c)(8).

³HUD, Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts, Sec. 11-4 B (Nov. 7, 2001), available at <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm>.

⁴*Id.*, Sec. 11-4 C.

⁵*Id.* and App. 11-1.

⁶This particular requirement is not expressly imposed by the statute, but has been interpreted to be required by the only court to address the issue. See *215 Alliance v. Cuomo*, 61 F. Supp.2d 879, 886 (D. Minn. 1999). As of January 19, 2001, HUD guidelines also require a clear notice. See Section 8 Renewal Policy, *supra* note 3, Sec. 11-4 (owners intending to opt-out must use notices that contain the language of HUD’s format App. 11-1, and must state that they will honor the tenants’ right to remain).

⁷See HUD, Section 8 Renewal Policy, *supra* note 3, Sec. 11-4 F.

⁸See § 219(b) of QHWRA, Pub. L. No. 105-276, 112 Stat. 2461, 2487 (Oct. 21, 1998). QHWRA is codified at various parts of 42 U.S.C §§ 1437- 13664, although § 219(b) is not codified. Requirement is not applicable where there is priority purchaser under LIHPRHA, or post-prepayment terms would be at least as good for current and future tenants. HUD issued a sample prepayment notice in HUD Notice 99-36, App. 3E (Dec. 29, 1999).

⁹As defined by the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA), Pub. L. No. 101-625, codified at 12 U.S.C. § 4101. Generally, “eligible low-income housing” includes properties with HUD-subsidized mortgages that are eligible for unrestricted prepayment (without HUD approval) within two years.

¹⁰See 42 U.S.C. § 1437(f)(c)(8)(b).

Appendix B: Other Useful Resources

Background Information on Expiring Section 8 and Prepayments

NHLP has regularly published many articles on these subjects in the Housing Law Bulletin. You may download articles that are more than one year old free of charge from NHLP's Web site at www.nhlp.org. For newer articles, please subscribe to the National Housing Law Project's Housing Law Bulletin . The order form is available on the NHLP Web site at http://www.nhlp.org/subscribe_bulletin.htm.

Data on Expiring Section 8 and Prepayments in California

See the Web site of the California Housing Partnership Corporation at chpc.net/pages/atriskdata.html. General information about the preservation issue is found at www.chpc.net/index.html.

Useful Web Sites

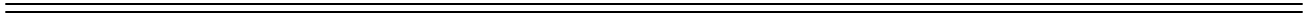
- NHLP's "Housing Preservation" Web site at www.nhlp.org/html/pres/index.cfm, an outline of authorities and information, including analytical articles, relevant cases, statutes and regulations, and HUD Notices, handbooks and guides.
- HUD's Web site at www.hud.gov.
- HUD's Office of Multifamily Housing Assistance Restructuring (OMHAR) at www.hud.gov/omhar has some data on project filings, rules and guidelines, PAEs, and other helpful information.
- the HUDClips Website has the applicable statutes, regs, Notices, and guidelines at <http://www.hudclips.org/cgi/index.cgi>.
- the National Housing Trust's Website at www.nhtinc.org has data on Section 8 Opt-Outs and Terminations through 12/31/98, updated occasionally.

Information re Tenant Organizing

Tenants and local and regional tenant coalitions should also contact the National Alliance Of HUD Tenants , a tenant-controlled national organization of local tenant organizations working to preserve and improve Section 8 housing, at 353 Columbus Ave., Boston, MA 02116, phone (617) 267-9564, fax (617) 267-4769.

Fair Housing Law

Roisman, Florence W., An Outline of Principles, Authorities and Resources for Fair Housing Litigation, updated October 27, 2000 (available from the NHLP Web site at www.nhlp.org under Fair Housing).



Appendix C: Basic Legal Authorities

Most of the authorities listed below are available on NHLP's website. The site's Housing Preservation page, available at www.nhlp.org/html/pres/index.cfm, contains the text of these authorities (and in some cases web links for further updates), as well as archives of previous statutes. The site also contains links to Housing Law Bulletin articles relevant to preservation work. Current HUD materials are available at www.hudclips.org/sub_nonhud/cgi/hudclips.cgi.

I. OPT-OUT OR RENEWAL OF EXPIRING SECTION 8 CONTRACTS

STATUTES:

42 U.S.C. 1437f(c)(8) (as amended Oct. 20, 1999) (requires one year advance notice to tenants and HUD for termination of project-based Section 8 contract, and prescribes form of notice).

Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), codified at 42 U.S.C.A. § 1437f (Historical and Statutory Notes, "Multifamily Housing Assistance"), as amended by Pub. L. No. 106-74, § 531 (Oct. 20, 1999), (MAHRAA) (Sec. 524 covers Section 8 contract renewals, statute outlines Mark to Market restructuring). MAHRAA is not codified in typical fashion, but is included as a "note" to 42 U.S.C. § 1437f, so legal reporting services do not properly reflect amendments. NHLP's web site, listed above, contains a compilation of the statute with amendments.

Pub. L. No. 106-74, § 531, 113 Stat. 1113 (Oct. 20, 1999) (MAHRAA § 524(d), as amended, requiring enhanced vouchers for all Section 8 contracts that are not renewed).

REGULATIONS

24 C.F.R. Part 402 (2001) (Project-based Section 8 Contract Renewal Without Restructuring (Under Section 524(a) of MAHRAA)).

NOTICES AND OTHER ADMINISTRATIVE ISSUANCES:

HUD, Section 8 Renewal Policy Guide (Jan. 19, 2001), available at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm. This guide explicitly supercedes notices H 99-36 and H 98-34, below, which are now relevant for past opt-outs. Chapter 8 of the Guide covers opt-outs and Chapter 11 covers "Resident Issues" including notice requirements. Appendices 11-1 and 11-2 prescribe the required form notice, which includes a certification that the owner will accept enhanced vouchers.

HUD Notice H 99-36, "Project-Based Section 8 Contracts Expiring in Fiscal Year 2000" (Dec. 29, 1999)

HUD Notice H 98-34, "Project-Based Section 8 Contracts Expiring in Fiscal Year 1999" (Oct. 16, 1998).

II. PREPAYMENT OF HUD-SUBSIDIZED MORTGAGES

STATUTES:

Pub. L. No. 105-276, § 219, 112 Stat. 2461, 2487 (Oct. 21, 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).

12 U.S.C. § 4119 (definition of “eligible low-income housing,” prepayment of which triggers eligibility for enhanced vouchers contained in 42 U.S.C. § 1437f(t)(3)(B), through Pub. L. No. 104-204).

Section 250 of the National Housing Act, codified at 12 U.S.C. § 1715z-15 (standards and procedures governing prepayments of other multifamily mortgages requiring HUD approval, usually those with other use restrictions from other authority such as flexible subsidy, a rent supplement contract, or original non-profit ownership).

Notes: While the Title VI Low-Income Housing Preservation and Resident Homeownership Act of 1990 (“LIHPRHA”, codified at 12 U.S.C. § 4101 et seq.) has not been repealed, Congress short-funded the program beginning in 1996 and zero-funded the program in FY ‘98, and this trend has continued up to the present.

While the Emergency Low-Income Housing Preservation Act of 1987 (referred to as “ELIHPA” or “Title II”), Pub. L. No. 100-242 §§ 261-263, 101 Stat. 1877 (1988), as amended by Pub. L. No. 100-628, §§ 1021-1027, 102 Stat. 3270 (1988), codified at 12 U.S.C.A. § 1715l Note (“Preservation of Low Income Housing”) was replaced by LIHPRHA, the statute remains relevant because many owners executed preservation plans pursuant to its terms.

REGULATIONS:

None issued for current prepayment as of May, 2003.

Note: Regulations were adopted for the former LIHPRHA program at 24 C.F.R. Part 248. No regulations exist for Pub. L. No. 105-276, § 219, 112 Stat. 2461, 2487 (Oct. 21, 1998) or for Section 250 of the National Housing Act, codified at 12 U.S.C. § 1715z-15.

NOTICES AND OTHER ADMINISTRATIVE ISSUANCES:

HUD, Section 8 Renewal Policy Guide (Jan. 19, 2001), available at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm. This guide explicitly supercedes Notice H 99-36.

HUD Notice H00-26, “Prepayment of Direct Loans on Section 202 and 202/8 Projects with Inclusion of FHA Mortgage Insurance Guidelines” (Dec. 11, 2000).

HUD Notice H 99-36 “Project-based Section 8 Contracts Expiring in Fiscal Year 2000”, App. 3E (Dec. 29, 1999) (explicitly superceded by Section 8 Renewal Guide, above; however, note that Attachment 3E is a sample federal notice for 150 to 270 days advance notice of prepayment).

III. AUTHORITIES RE ENHANCED VOUCHERS

STATUTES:

Section 8(t) of the United States Housing Act, codified at 42 U.S.C. § 1437f(t), enacted by Pub. L. No. 106-74, § 538, 113 Stat.1122 (Oct. 20, 1999), as amended below;

Amended by:

Pub. L. No. 106-246, § 2801, 114 Stat. 569 (July 13, 2000) (clarification of tenant's right to remain),

Pub. L. No. 106-377, §§ 205, 114 Stat. 1441A-2 (authorizing HUD to establish "reasonable limits" on EV payment standard) and 228, 114 Stat. 1441A-30 (expanded eligibility for prior opt-outs to those after FY '96) (Oct. 27, 2000),

Pub. L. No. 106-569, §§ 902 114 Stat. 3026 (changing retro eligibility date to after FY '94) and 903 (inserting "no harm" protection for tenants on HUD's authority to limit EV payment standards) (Dec. 27, 2000),

Pub. L. 107-116 § 632, 115 Stat. 2224 (Jan. 10, 2002) (including EV coverage for prepayment or voluntary termination of mortgage insurance since FY '96).

Pub. L. No. 106-74, § 531, 113 Stat. 1113 (Oct. 20, 1999) (amending MAHRAA § 524(d), requiring enhanced vouchers for all Section 8 contracts that are not renewed).

Pub. L. 107-116, § 613, 115 Stat. 2224 (Jan. 10, 2002) (adding Sec. 525 of MAHRAA, which provides for consistency in rent levels between the "market rent" determinations in project-based Section 8 contract renewals and amounts allowed as reasonable for enhanced vouchers).

12 U.S.C. § 4119 (definition of "eligible low-income housing," prepayment of which triggers eligibility for enhanced vouchers contained in 42 U.S.C. § 1437f(t)(3)(B), through Pub. L. No. 104-204).

REGULATIONS:

None issued as of July, 2002.

HUD HANDBOOKS:

HUD, Section 8 Renewal Policy Guide (initially issued Jan. 19, 2001), available at www.hud.gov/offices/hsg/mfh/exp/guide/s8guide.cfm. Section 11-3 describes tenants' right to remain with enhanced vouchers. Appendices 11-1 and 11-2 prescribe the required form of opt-out notice, which includes a certification that the owner will accept enhanced vouchers. See also Section 1-6, ¶ I (notes policy change on right to remain), Section 8-1 (requires owner to certify it will honor tenants' right to remain after opt-out, and directs HUD to offer a short term project-based contract where enhanced vouchers are delayed).

NOTICES AND OTHER ADMINISTRATIVE ISSUANCES :

PIH 2001-41, "Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions - Policy and Processing Guide" (Nov. 14, 2001 expires November 30, 2002).

PIH 2000-09 "Section 8 Tenant-Based Assistance for Housing Conversion Actions in FY 2000..." (March 7, 2000, expires March 31, 2001).

PIH 99-16 "Tenant-Based Rental Vouchers for Eligible Residents of Preservation Eligible Projects Approved for Prepayment of the Mortgage or Voluntary Termination" (March 12, 1999).



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