An Advocate's Guide to Rural Housing Preservation:

Prepayments, Mortgage Maturities, and Foreclosures

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NATIONAL HOUSING LAW PROJECT

AN ADVOCATE'S GUIDE TO RURAL HOUSING PRESERVATION:
PREPAYMENTS, MORTGAGE MATURITIES, AND FORECLOSURES
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This advocacy guide is designed to assist legal services attorneys and tenant advocates in understanding and preventing prepayments, mortgage maturities, and foreclosures in U.S. Department of Agriculture Rural Development (RD) properties. This advocacy guide and other information about RD housing programs are also posted on our website at http://nhlp.org.

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I. Introduction

A. Defining "Rural" Communities

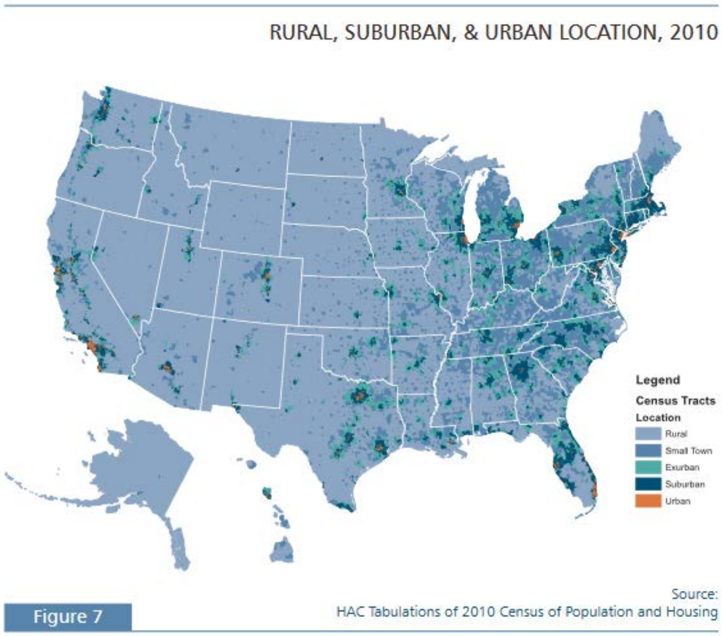
Organizations and individuals often define "rural" communities in many different ways. This handbook utilizes the federal legal definition of "rural," as stated in 42 U.S.C. § 1490 (last amended by the Agricultural Act of 2014, Pub. L. 113–79, title VI, § 6208 (Feb. 7, 2014)). This statute defines a rural community as one that is:

> any open country, or any place, town, village, or city which is not (except in the cases of Pajaro, in the State of California, and Guadalupe, in the State of Arizona) part of or associated with an urban area and which (1) has a population not in excess of 2,500 inhabitants, or (2) has a population in excess of 2,500 but not in excess of 10,000 if it is rural in character, or (3) has a population in excess of 10,000 but not in excess of 20,000,[1] and (A) is not contained within a standard metropolitan statistical area, and (B) has a serious lack of mortgage credit for lower and moderate-income families, as determined by the Secretary and the Secretary of Housing and Urban Development.

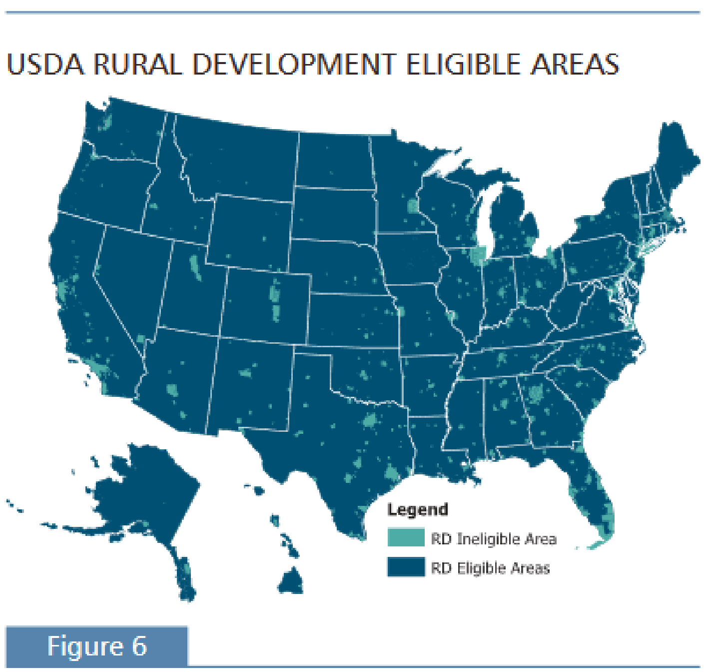
Thus, the U.S. Department of Agriculture Rural Development (RD) defines a rural community based upon two key factors: population size and community character.[2] Population size is based on the most recent decennial census. When determining whether a community is "rural in character," federal regulations direct the Under Secretary of Rural Development to consider whether the community has geographically distant boundaries and the proximity of the community to an urban area.[3]

As illustrated in the map below,[4] every state in the U.S. contains at least one rural community within its boundaries:

[1] Congress recently made an exception to this limit to allow rural communities that had less than 20,000 people according to the 1990 census to remain eligible for RD programs until the release of the 2020 census results, as long as the population of the community does not exceed 35,000 and it remains rural in character. 42 U.S.C. § 1490. Because many Section 515 developments were financed in the 1960s, 1970s, and 1980s, they may now be located in communities that are no longer rural.
[2] U.S. Dep't of Agriculture, Report on the Definition of "Rural" (2013), https://www.rd.usda.gov/files/RDRuralDefinitionReportFeb2013.pdf.
[3] 7 C.F.R. 4280.103 (2017) states: "The determination that an area is "rural in character" under this definition will apply to areas that are within: (A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or (B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within 1/4 mile of a Rural Area."
[4] Housing Assistance Council, Taking Stock: Rural People, Poverty, and Housing in the 21st Century 14 (2012), http://www.ruralhome.org/storage/documents/ts2010/ts_full_report.pdf.



This means that the service area of RD rural housing programs is very large:[5]



In fact, 87% of all U.S. counties have at least one RD Section 515 property.[6] In many of these communities, RD-subsidized housing provides the only sources of affordable and habitable

[5] *Id.*
[6] *Affordable Rural Rental Housing: Policy Background and Update: Congressional Briefing*, HOUSING ASSISTANCE COUNCIL (Sept. 8, 2017).

housing in the community. As discussed below, this reinforces the need to preserve this critically important housing.

B. Understanding Rural Communities

In order to appreciate the critical need for affordable housing in rural communities, it is important to understand the scope, demographics, and needs of rural communities.

One-fifth of people living in the United States live in rural communities.[7] In contrast, almost half (48%) of the U.S. population lives in suburban or exurban communities, while 31% live in urban areas.[8]

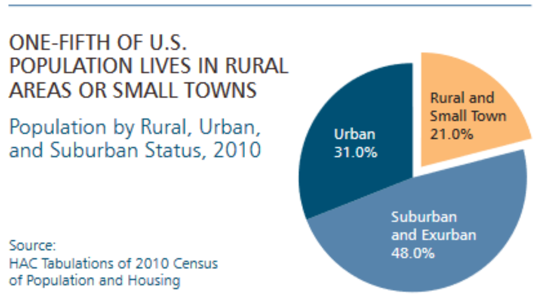


Figure 2

Between 2000 and 2010, rural population growth was greatest in the western and southern U.S., especially in Arizona, Utah, Hawaii, and Florida.[9] In contrast, Midwest states like North Dakota, Iowa, Illinois, Nebraska, and Kansas experienced significant population loss in rural communities.[10] This significant population loss in the rural Midwest, as well as in communities in Central Appalachia, the South, and the Northeastern "rust belt," are often due to a decline in agricultural employment, lack of amenities, and an inability to attract industry. While agriculture is extremely important to rural communities, education, health, and social services industries are usually the largest job sources in rural communities.[11]

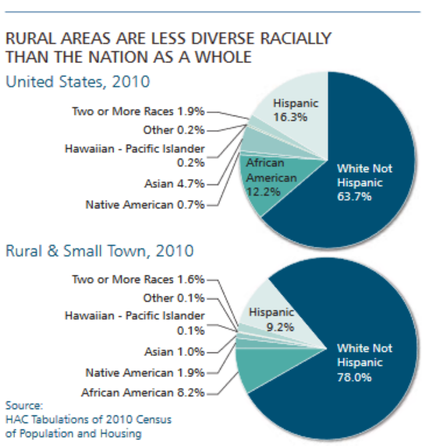


Figure 8

Demographically, rural areas are less racially diverse than the U.S. as a whole. Approximately 78% of the rural communities identify as white and non-Hispanic, compared to 64% of the country as a whole.[12] In 2010, Hispanics comprised 9.2% of the rural population, surpassing African Americans (8.2%) as the largest rural minority group.[13] While less than 2% of rural communities identify as Native American, more than half of all Native Americans reside in rural or small town areas.[14]

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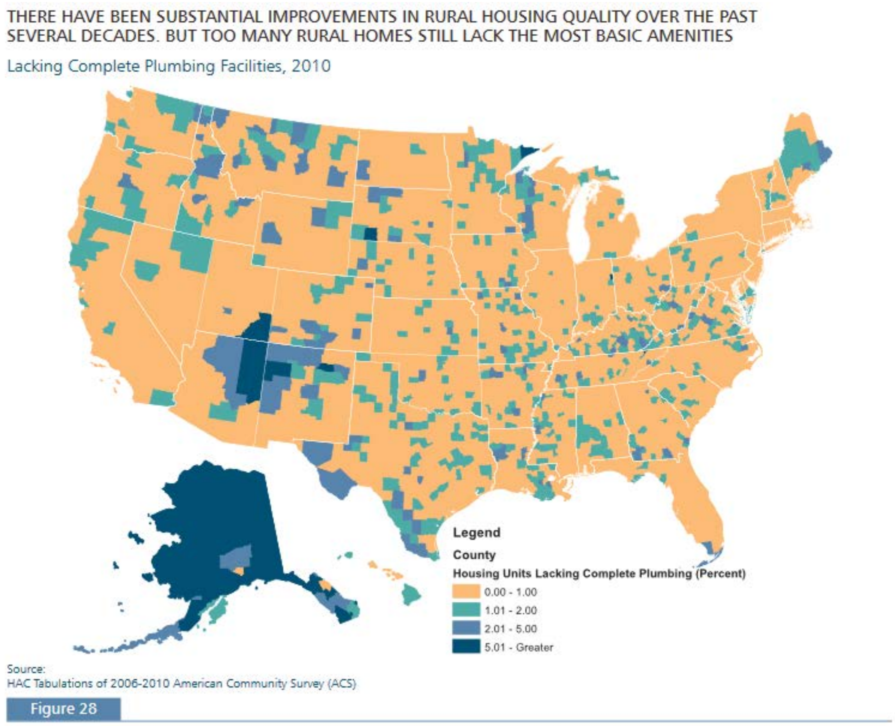
[7] HOUSING ASSISTANCE COUNCIL, TAKING STOCK: RURAL PEOPLE, POVERTY, AND HOUSING IN THE 21ST CENTURY 2, 11, 12, 14 (2012), http://www.ruralhome.org/storage/documents/ts2010/ts_full_report.pdf.
[8] *Id.* at 11.
[9] *Id.* at 12.
[10] *Id.*
[11] *Id.* at 12, 23-25.
[12] *Id.* at 16.
[13] *Id.*
[14] *Id.* at 16.

Rural communities often include affordable housing challenges that differ significantly from those in urban communities. Rural communities often experience unique challenges posed by absentee homeownership, an aging population, persistent and high poverty rates, lack of enforced state and local housing codes, extremely low housing density, and other challenges. The lack of enforced state and local housing codes can often result in low-quality or uninhabitable housing. For example, the Housing Assistance Council map below shows that many housing units in rural communities lack basic plumbing.



When this is combined with extremely low housing density, residents living in rural communities are left with few, if any, quality housing options.

Additionally, rural communities often experience high and persistent poverty rates, as shown on the next page:

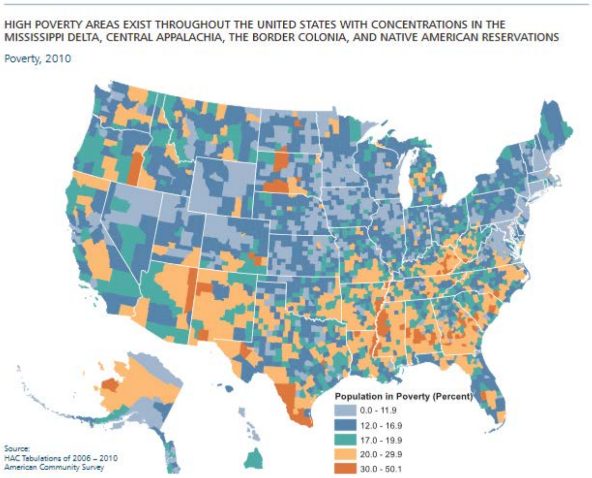


Figure 15

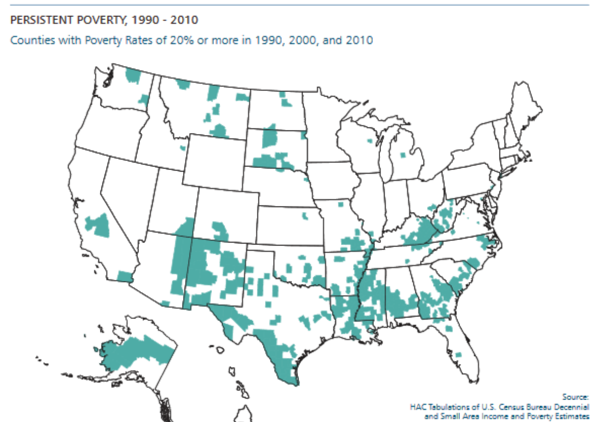


Figure 17

Rural communities experience significant challenges in accessing high quality, affordable housing. This has been exacerbated by the fact that rural areas have lending, investment, and service needs that are different from urban areas. Such differences often mean that rural communities lack private investment and access to other financial resources. In the housing context, this creates a critical opportunity for the federal government, including the U.S. Department of Agriculture, to support and invest directly into these communities.

C. About USDA Rural Development

Rural Development (RD) is a division within the U.S. Department of Agriculture (USDA).[15] RD offers loans, grants, and loan guarantees to support economic development in rural communities. RD currently has a $216 billion portfolio of loans, and administered $38 billion in loans, loan guarantees, and grants in Fiscal Year 2017.[16]

Until very recently, RD was run by an Undersecretary, who was appointed by the President and confirmed by the U.S. Senate. In 2017, Agriculture Secretary Sonny Perdue announced that RD would be run by an Assistant to the Secretary and appointed Anne Hazlett to the position, which did not require Senate Confirmation.[17] While there was significant opposition to the elimination of the undersecretary's position, Congress appears to have accepted the change because it authorized funding to the office of Assistant to the Secretary in the recently enacted Omnibus Appropriations Bill for Fiscal Year 2018.[18] The Undersecretary is supported by three Administrators (Rural Business and Cooperative Service, Rural Housing Service (RHS), and the Rural Utilities Service). RHS is responsible for the overall administration of all the USDA

[15] U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, *About RD*, https://www.rd.usda.gov/about-rd.
[16] *Id.*
[17] *See* Press Release, U.S. DEP'T OF AGRICULTURE, *Secretary Perdue Announces Creation of Undersecretary for Trade* (May 11, 2017), https://www.usda.gov/media/press-releases/2017/05/11/secretary-perdue-announces-creation-undersecretary-trade.
[18] *See* Consolidated Appropriations Act, 2018, Title I, Pub. L. No. 115-141 (March 23, 2018), *available* at https://www.gpo.gov/fdsys/pkg/CPRT-115HPRT29374/pdf/CPRT-115HPRT29374.pdf.

housing programs, including the Section 515 rental and Section 514 (loan) and 516 (grant) farm labor housing programs. Prepayment and preservation of these programs is overseen by RHS' Office of Rural Housing Preservation.

RHS staff is based solely in Washington, D.C.,[19] but RHS programs are run through RD state offices in 47 states and territories.[20] Four of those offices serve more than one state or territory.[21] Each RD state office has a multi-family housing staff member who is responsible for administering all of the RD rental housing programs, as well as overseeing the prepayment and the preservation of RD rental housing. Because the RD state directors are political appointees of the President, there may be acting state directors for a period of time after a change in the Administration.[22] Each state has one or more sub-state offices, typically referred to as local offices or area offices. These offices typically handle contacts with multi-family rental housing owners and will process initial stages of a prepayment request. To find and contact your state's RD office, including the state director and other staff members, please visit: https://www.rd.usda.gov/contact-us/state-offices.

D. Overview of Key RD Programs

Congress initially passed the Housing Act of 1949[23] to encourage the construction of single family housing in rural areas. Because private financial institutions were not operating in rural areas in 1949, USDA was authorized to make direct single family and, later, multifamily rental housing loans in rural areas.

i. Section 515 Rural Rental Housing Program

The Section 515 rural rental housing program was a key program authorized by the Senior Citizens Housing Act of 1962. The Section 515 program allows RD to make mortgage loans to private owners in order to provide affordable rental housing for very low-, low-, and moderate-income families, elderly persons, and persons with disabilities. These 30-year loans are provided at an effective 1% interest rate and are amortized over 50 years.

Every year, RD state directors establish criteria to create a list of targeted communities for these loans. RD issues a Notice of Funding Availability (NOFA) for these communities, after which owners can submit a competitive application. Owners may use the funds to purchase buildings or land, construct or renovate buildings, and to provide certain facilities such as water and waste disposal systems.

[19] U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, *Rural Housing Service Contacts*, https://www.rd.usda.gov/contact-us/national-office/rhs.
[20] U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, *State Offices*, https://www.rd.usda.gov/contact-us/state-offices.
[21] Delaware and Maryland have one office in Delaware. Florida and the Virgin Islands have one office in Florida. Vermont and New Hampshire have one office in Vermont. Massachusetts, Rhode Island, and Connecticut have one office in Massachusetts.
[22] The appointment of new permanent RD State Directors was announced by Secretary Perdue on Nov. 3, 2017 and they are now listed on the USDA website. *See* https://www.rd.usda.gov/contact-us/state-offices.
[23] 42 U.S.C. §§ 1471–1490.

This program allows an "Interest Credit" subsidy, which reduces the interest rate on the loan to an effective rate of one percent.[24] Under the Interest Credit subsidy, owners establish a "basic rent" for each unit, which is generally less than the market rate. Residents benefitting from the Interest Credit subsidy pay the higher of 30 percent of their income or the basic rent.[25]

RD and its predecessor agency, the Farmers Home Administration, have financed the development over 550,000 units of Section 515 rental housing in rural communities since the Section 515 program was created. Because of prepayments, mortgage maturities, and foreclosures, there are only 410,000 units remaining in the program.[26] As of September 2016, the average income of Section 515 tenants was $12,588, and approximately 63% of all Section 515 households were headed by an elderly person or a person with a disability.[27]

ii. Section 521 Rural Rental Assistance Program

In 1974, Congress authorized the Section 521 program, which allows RD to make Rental Assistance subsidies available to residents in Section 515 properties.[28] Rental Assistance reduces residents' housing costs, which includes rent and utilities, to 30% of the household's adjusted income. Rental Assistance is only available to very low- and low-income households. Approximately 65% of low- and very low-income residents living in Section 515 units receive Rental Assistance.[29] The remaining households are rent "overburdened," which means that they pay more than 30% of household income for shelter.

Tenants do not receive the Rental Assistance directly but receive a "pass through" benefit in lowered rents.[30] In other words, RD pays the owner the difference between the tenant's contribution (30% of the household's adjusted income) and the full rent for the unit, which is calculated based on the property's operating costs. Thus, the program allows tenants to pay no more than 30 percent of their income for rent, regardless of the basic rent amount.[31]

RD can provide Rental Assistance for a variety of reasons, including for Section 515 and 514/516 properties whose owners want to prepay their mortgages. When available, Rental Assistance can be used as an incentive for owners to keep the RD mortgage, or to help a nonprofit or public agency purchase a property and assume the mortgage. The availability of Rental Assistance is subject to annual appropriations and Congress has never funded the program

[24] *Id.* at § 1490a(a)(1)(B).
[25] 7 C.F.R. § 3560.203(a).
[26] Letter from Tony Hernandez and David Lipsetz to Rural Development State Directors, *Results of the 2016 Multi-Family Housing Annual Fair Housing Occupancy Report*, Dec. 6, 2016, http://www.ruralhome.org/storage/documents/rd_obligations/mfh-occupancy/occupancymfh2016.pdf.
[27] *Id.*
[28] 42 U.S.C. § 1490a(a)(2)(A). However, the agency did not implement the program until 1976 after its failure to make the program operational was successfully challenged. *Rocky Ford v. USDA*, 427 F.Supp.118 (D.D.C. 1977).
[29] *Affordable Rural Rental Housing: Policy Background and Update: Congressional Briefing*, HOUSING ASSISTANCE COUNCIL (Sept. 8, 2017).
[30] *See* 7 C.F.R. § 3560.256.
[31] 42 U.S.C. § 1490(a)(2)(A).

to cover all eligible households. In fact, approximately 65% of tenants living in Section 515 housing receive Rental Assistance,[32] and nearly 16% are rent overburdened.[33]

iii. Section 514/516 Farm Labor Housing Program

The Section 514/516 Farm Labor Housing program provides loans and grants for developing on-farm and off-farm housing. Section 514 provides *loans* to farmers, associations of farmers, family farm corporations, Indian tribes, nonprofit organizations, public agencies, associations of farmworkers, and limited partnerships for buying, building, or preserving farm labor housing[34]. This housing can be built on- or off-farms, and farmers can restrict 514 housing to farmworkers employed by the farmer.[35] Section 514 loans, like Section 515 loans, are direct loans from RD. These loans have a 1% interest rate for 33-year terms.[36]

Section 516 provides *grants* for up to 90% of the cost of developing farm labor housing. In the program's early years, all grants were for 90% of the cost of developing the housing. The availability of Rental Assistance has allowed RD to reduce grant amounts since the Rental Assistance subsidy allows owners to pay off Section 514 loans without having to increase shelter costs paid by the residents.

Applicants for Section 514 loans and Section 516 grants must first submit pre-applications to RD, which are used to determine preliminary eligibility and feasibility. RD then invites some applicants to submit final applications.

iv. RD Rural Voucher Program

Congress authorized RD to operate a rural voucher program similar to the HUD voucher program in 1992.[37] However, Congress did not appropriate funds for the rural voucher program until 2006. Through the 2006 federal appropriations process, Congress began making available funding for the operation of the RD rural voucher program to help eligible tenants pay their rent *after* the property's RD multifamily loan is prepaid or foreclosed upon.[38] While there have been proposals to allow tenants at properties with maturing mortgages and farm labor housing

[32] *Affordable Rural Rental Housing: Policy Background and Update: Congressional Briefing*, HOUSING ASSISTANCE COUNCIL (Sept. 8, 2017).
[33] *Results of the 2016 Multi-Family Housing Annual Fair Housing Occupancy Report*, U.S. DEP'T OF AGRICULTURE, https://www.rd.usda.gov/files/RDUL-MFHOccup.pdf.
[34] For Section 514 and 516 programs, "farm labor" is a service or services in connection with cultivating the soil or raising or harvesting any agriculture or aquaculture commodity; or in catching, netting, handling, planting, drying, packing, grading, storing, or preserving in the unprocessed stage, without respect to the source of employment (but not self-employed), any agriculture or aquaculture commodity; or delivering to storage, market, or a carrier for transportation to market or to processing any agricultural or aquacultural commodity in its unprocessed stage. RD Handbook 1-3560, Ch. 12, Att. 12-A, at 1 (Feb. 24, 2005, revised May 27, 2009).
[35] 7 C.F.R. § 3560.624 (c).
[36] *Id*. at § 3560.616(a).
[37] 42 U.S.C. § 1490r.
[38] Housing Vouchers, U.S. DEP'T OF AGRICULTURE, https://www.rd.usda.gov/files/fact-sheet/RHSHousingVouchers_1873.pdf.

properties with prepaid mortgages to receive rural vouchers,[39] at the current time, those tenants are not eligible for rural vouchers.

RD has never published regulations governing the voucher program in the twelve years that the program has been operating. Instead, it has annually published a notice in the Federal Register describing intended program operations and program eligibility for individuals.[40] RD has also published a voucher handbook to guide its staff on the operation of the voucher program.[41] RD published proposed voucher program regulations in 2013 with a request for comments.[42] However, it has not published final regulations for the program. To qualify for the RD rural program, tenants must:

- Be a tenant of the property at the time the loan is paid off;
- Have an income level at or below 80% of the area median income; and
- Be a U.S. citizen, a U.S. non-citizen national or a qualified alien.[43]

The purpose of the voucher program is to protect eligible tenants living in former Section 515 housing who may face financial hardship because of the prepayment or foreclosure of the property. The amount of the voucher is the difference between the tenant's monthly rent contribution and the comparable market rent (rents charged at similar non-subsidized properties) for that unit.[44] The voucher subsidy does not cover the cost of utilities when the resident is paying for utilities and received a utility allowance prior to the prepayment. Tenants may use the rural voucher to supplement their monthly tenant contribution to the owner or, if a property owner agrees to accept the voucher, at any non-subsidized rental unit in the U.S. that meets RD's housing quality standards. However, the voucher amount never changes. This means that rural voucher holders will be responsible for paying any amount over the subsidy amount determined at the time of prepayment or foreclosure if the owner legally increases the rent, a household member moves out or dies, or if the head of household ports the voucher to a community where rents are higher than the property that the tenant moved from.[45] These rural vouchers have a 12-

[39] *See, e.g.*, H.R. 4908, Rural Housing Preservation Act of 2016 (April 12, 2016), *available at* https://www.govtrack.us/congress/bills/114/hr4908/text; H.R. 5054, Making appropriations for Agriculture, Rural Development. Food and Drug Administration, and Related Agencies programs for fiscal year ending September 30, 2017, and for other purposes, at 33, *available at* https://appropriations.house.gov/uploadedfiles/bills-114hr-sc-ap-fy2017-agriculture-subcommitteedraft.pdf.
[40] *See, e.g.*, 81 Fed. Reg. 42309 (June 29, 2016).
[41] RURAL DEVELOPMENT VOUCHER PROGRAM GUIDE (Sept. 2010), *available at* https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf.
[42] 78 Fed. Reg. 49374 (Aug. 14, 2013).
[43] *Management of Loan Payoffs in Multi-Family Housing Properties*, Unnumbered Letter, 4-28-15, *available as of March 23, 2018 at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf. However, note that this citizenship restriction does not conform to Section 214 of the Housing and Community Development Act of 1980 in that it does not provide for proration of assistance if undocumented persons live in the household.
[44] *Housing Vouchers*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://www.rd.usda.gov/files/fact-sheet/RHSHousingVouchers_1873.pdf.
[45] 82 Fed. Reg. 21972, 21974 (May 11, 2017) (¶ IIf).

month term, and renewals are subject to Congressional appropriations.[46] To be eligible for a voucher, a resident must live in a Section 515 development as of the date of prepayment or the date of actual foreclosure, either of which must have occurred after September 30, 2005, when appropriations for the program were first made available.[47]

Funding for RD vouchers has continued, subject to the same general restrictions, every year since 2006 through the annual appropriations process.[48] In recent years, there have been concerns that RD will run out of voucher funding, as it did in Fiscal Year 2016. Such lack of rural voucher funding would put at risk the housing stability of tenants in properties that will be prepaid or foreclosed upon, as well as for tenants whose yearly rural voucher renewal occurs during a time when RD lacks rural voucher funding.

E. Understanding the History of Prepayment Threats

Prior to 1979, property owners who developed rural low income housing had a contractual right to prepay their loans and leave the program at any time, ending the owner's obligation to rent to qualified individuals.[49] Concerned that the number of owners who were exercising their prepayment option was threatening the goals of the program, Congress took several steps between 1979 and 1992, including:

- In 1979, Congress enacted legislation that placed 20-year use restrictions (15 years if rents were not subsidized with Rental Assistance) on all developments financed **after December 21, 1979**.
- In 1988, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) to stop the displacement of residents from a growing numbers of prepayments by owners who had financed developments prior to December 21, 1979.[50] ELIHPA placed prepayment restrictions on all developments financed **prior to December 21, 1979**.

[46] *Id*. at ¶ IIg.
[47] *Id.* at 21972 (¶ I).
[48] *See* Pub. L. No. 114-113, § 2, Div. A, Title III, 129 Stat. 2242, 2260 (Dec. 18, 2015) (Consolidated Appropriations Act, 2016).
[49] *See Franconia Assocs. v. United States*, 536 U.S. 129, 135 (2002); *Airport Rd. Assocs., Ltd. v. United States*, 120 Fed. Cl. 706, 708 (2015).
[50] ELIHPA was enacted in 1987 for the express purposes of preserving and maintaining "to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purposes with Federal assistance[,]" and to "minimize the involuntary displacement of tenants currently residing in such housing …" 12 U.S.C. § 1715l note, Pub. L. 100-242 § 202 (b)(1) & (2). ELIHPA was intended to prevent the displacement of low-income residents, and to ensure that long-established national housing objectives – such as "expanding housing opportunities for all Americans, particularly members of disadvantaged minorities" – are not undermined by affordable housing owners prepaying their federal loans and converting the properties to other housing uses. *See* Pub. L. 100-242 § 202 (a)(5)(C). ELIHPA's passage was based upon a Congressional finding that some "150,000 units of rural low income housing financed under Section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners." *Id.* at § 202(a)(3).

- In 1989, Congress placed use and prepayment restrictions on all properties financed **after December 14, 1989** for the full term of the Section 515 loan, thereby prohibiting prepayment on those loans. Prior to that time, all Section 515 loans were made for a term of 40 or 50 years. As a result of this legislation, RD reduced the loan terms to 30 years with an option to renew for an additional 20 years.

- In 1992, Congress extended the 1987 ELIHPA prepayment restrictions to loans financed **between 1987 and 1989**, which had not been previously covered by ELIHPA.

The ELIHPA prepayment restrictions do not *prohibit* prepayment of Section 515 loans. They simply require that RD offer *incentives* to owners who seek to prepay their loans to encourage them to remain in the program for an additional 20 years. Owners who reject the incentives have two options. First, they can offer to sell the development to a nonprofit or pubic agency for a term of six months and if no purchase offer is made or consummated, the owner can prepay the loan without restriction.[51] Second, the owners can wait for RD to make a determination of whether the prepayment will have a material impact on minority housing opportunities in the community and whether the tenants of the development can be relocated to other affordable housing.[52] If the prepayment has no impact on minority housing opportunities and there is adequate affordable housing to which the residents can be relocated as of the date of prepayment, owners can prepay their loans without any restrictions. If there is a material impact on minority housing opportunities, owners are required to offer the development for sale to a nonprofit or public agency for a period of six months. If no offer is made or the sale is not consummated, the owners may prepay the loan without any restrictions. If the prepayment does not have an adverse impact on minority housing opportunities but there is no alternative affordable housing in the community, the owners may prepay the loan subject to certain restrictions intended to protect the residents of the development as of the date of prepayment.[53]

Residents of Section 515 housing must be given notice of an owner's intent to apply to prepay the Section 515 loan. If a prepayment is approved, the residents are eligible for RD vouchers that will allow them to remain in the development or move to other housing. If the property is prepaid subject to use restrictions, the use restrictions should protect residents who wish to remain at the property without vouchers. Residents at properties with mortgage prepayments are also entitled to Letters of Priority Entitlement (LOPEs) that give them priority admission to other Section 515 housing. Residents who were receiving Rental Assistance and who move to another Section 515 property can have the Rental Assistance transferred to the new housing.

[51] 42 U.S.C. § 1472(c)(5)(A).
[52] *Id*. at § 1472(c)(5)(G)(ii).
[53] *Id.*

Due to prepayments, foreclosures, and mortgage maturities, there are currently only about 384,000 units of Section 515 housing remaining nationwide.[54] As the map below indicates, prepayments have occurred nationwide, especially in the Midwest and Southeast.[55]

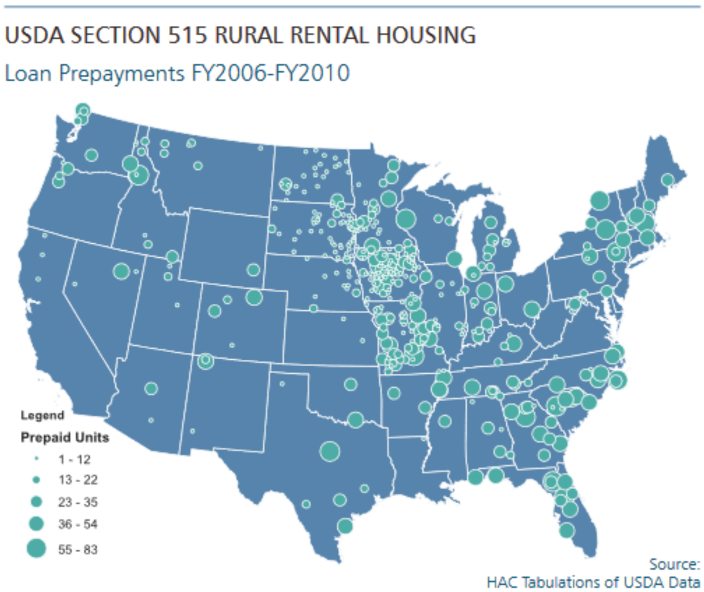


Figure 21

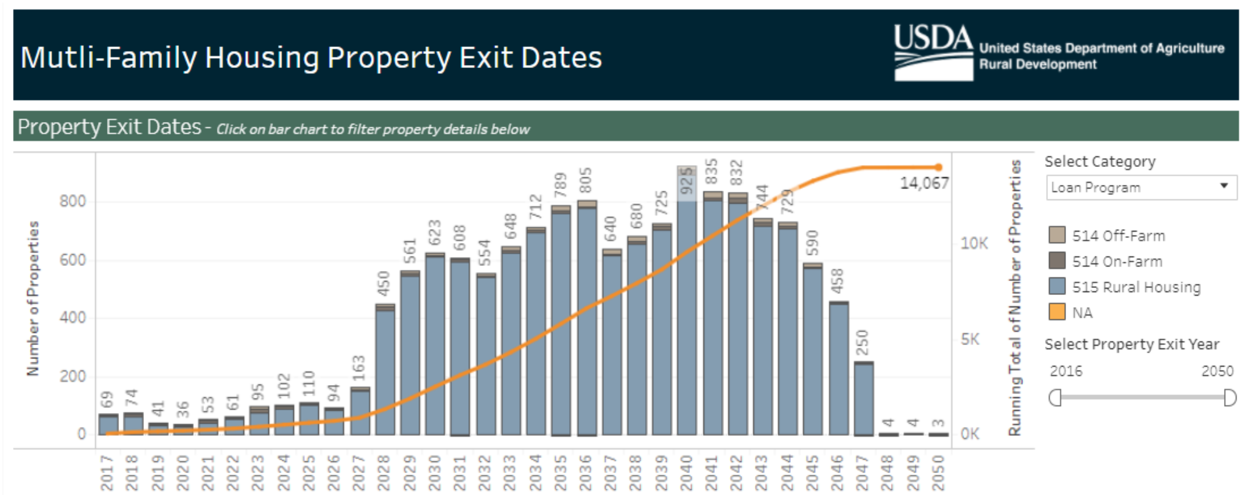
More information about the prepayment process and analysis is discussed in Section II below.

F. Understanding Mortgage Maturities

Both 50-year RD loans made in the early 1960s and 40-year RD loans made in the late 1960s and early 1970s are now maturing.[56] When these loans mature, their subsidies terminate and the owners must invariably raise rents to compensate for lost income, often leading to significant resident displacement. RD published an Unnumbered Letter in December of 2016 that urges, but does not require, landlords with maturing mortgages to send a letter advising their residents of the fact that the loan will soon be paid off, that their RD subsidies will terminate, and options that are available to the residents to secure other affordable housing.[57] While this letter has technically expired as of December 31, 2017, it is still available on the RD website as of March 2018.[58] Unfortunately, depending on when the letter is sent, tenants frequently lack a reasonable opportunity to relocate to other RD or other subsidized housing, if available. To make matters more complicated, residents in properties with maturing mortgages are statutorily ineligible for RD rural vouchers.

[54] *Affordable Rural Rental Housing: Policy Background and Update: Congressional Briefing*, HOUSING ASSISTANCE COUNCIL (Sept. 8, 2017).
[55] *Id.*
[56] In the early days, 50-year loans were typically made for elderly housing and 40-year loans were made for family housing.
[57] RD Unnumbered Letter, Management of Payoffs in Multi-Family Housing (Dec. 28, 2016), available at https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.
[58] *Id.*

As shown in the graph below, the terms of the initial mortgages will be maturing in the coming years, ramping up significantly in 2028 and peaking in 2040. By 2050, practically all RD Section 515 loans will have matured and the program will effectively end because Congress is currently only appropriating very limited funds for the construction of section 515 developments.



Additionally, data from 2016 shows that 56% of the RD properties that exited the 515 program were because of mortgage maturities.[59] Such imminent and drastic mortgage maturities threaten rural communities in many significant ways, especially where there is limited available and habitable affordable housing in the community. Low-income rural residents often rely on RD-subsidized housing as their only source of affordable and habitable housing.

G. Understanding Rural Foreclosures

Foreclosure is a legal process whereby a secured lien holder, frequently a lender, seeks to recover the balance due on the loan through a public sale of the property after the owner defaulted on the loan, usually because of missed loan payments. The foreclosure process is prescribed by state law and generally starts with a notice of default, which if not cured, is followed by an acceleration of the loan and ultimately a foreclosure sale. Foreclosure practices vary widely in the amount of time that the defaulting owner has to cure the default, length of time before the owner can notice the sale, the conduct of the sale, the rights of the defaulting owner to redeem the property after the foreclosure sale and the right of the lender to recover the full outstanding debt when the sale of the property does not yield the outstanding debt. About one-half of the states use a mortgage foreclosure process where the lien holder has to go to court to secure approval to conduct the sale. The other half of the states use a deed of trust, which allows a private trustee, often a title company, to conduct the foreclosure sale. RD follows state foreclosure law when foreclosing on its multi-family housing properties.

[59] *Affordable Rural Rental Housing: Policy Background and Update: Congressional Briefing*, HOUSING ASSISTANCE COUNCIL (Sept. 8, 2017).

H. Finding Prepayments and Mortgage Maturities in Your Community

RD publishes several types of data sources to learn where prepayments and mortgage maturities may be occurring, or have already occurred, in your community.

The RD Multi-Family Housing Rentals website[60] can be searched for RD multi-family properties by name, state, county, town, zip code, and management agency name. This data shows active properties by name and address, type of property, owner and management, number of units, bedroom configuration, the number of RA-assisted units, a photo of the property, the contact information of the applicable RD servicing office, and the local income limit that applies to the property. Unfortunately, it is unclear how often this data is updated by RD. Typically, but not always, properties that have prepaid their loans are removed from this website shortly after the prepayment.

Another important data tool is the RD Multi-Family Housing Database.[61] This database contains an "exit data" spreadsheet that includes many different data terms for Section 514/516 and 515 properties, including: property name and address, total number of units, rental type (elderly or family), number of various bedroom sizes, program type (Section 514 or 515), original loan term, prepayment eligibility year, estimated property exist year, tax credit information, and the owners' and management company's name and address.

For prepayments only, RD provides weekly mailings via the Preservation Information Exchange (PIX)[62] about owners who have requested to prepay their RD loans. These weekly mailings are extremely helpful in monitoring RD properties in your community that may be seeking to prepay. Note: this information is only included in the PIX list once RD determines that the prepayment application is complete. Policy Map also has data on prepayment-eligible properties.[63]

For mortgage maturities only, a special website[64] shows the anticipated mortgage maturity year of all Section 515 housing. The interactive clickable map allows users to zoom in to certain states and communities, and includes the property name, city, state, the number of units with Rental Assistance, the total number of units at the property, and the estimated year that the

[60] *Rural Development Multi-Family Housing Rentals*, U.S. DEP'T OF AGRICULTURE, https://rdmfhrentals.sc.egov.usda.gov/RDMFHRentals/select_state.jsp.
[61] *Rural Development Datasets*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://www.sc.egov.usda.gov/data/MFH.html.
[62] *Preservation Information Exchange (PIX)*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://pix.sc.egov.usda.gov/. To obtain the weekly PIX mailings, one needs to be a person working for a nonprofit or public agency and must register at the PIX site.
[63] *Policy Map*, https://www.policymap.com/maps.
[64] *Maturing USDA Section 515 Rural Rental Housing Loans*, ArcGIS, http://www.arcgis.com/home/webmap/viewer.html?webmap=362d12b9a06b41b1a7d76260ddd9fb00&extent=-126.6724,22.4325,-61.7651,51.945.

property's mortgage will mature ("exit date"). Additionally, RD hosts a website[65] with graphic and numerical information about mortgage maturities at the property-specific and national levels.

II. Section 515/514 Prepayments

A. Overview of Prepayment Process

A prepayment is defined broadly as "[p]ayment in full of the outstanding balance on an Agency loan prior to the note's originally scheduled maturity date."[66] In other words, any mortgage payment that retires a USDA loan prior to its original maturity date is a "prepayment." Prepayments can be caused by the owner having made extra principal payments, or by not using all of the funds that were committed to the loan and returning those funds to RD.[67] Federal law specifically regulates when and how a Section 515 loan can be paid off before its originally scheduled maturity date. All prepayments are subject to the restrictions detailed in 42 U.S.C. § 1472(c), RD regulations codified at 7 C.F.R. Part 3560, Subpart N, and Chapter 15 of RD Handbook 3-3560.

Prior to 1987, there were no restrictions limiting the rights of Section 515 property owners who financed their loans prior to Dec. 21, 1979, to prepay their mortgages and leave the program. Responding to increased prepayments of Section 515 loans in the early to middle 1980s and the negative impact of those prepayments had on residents – severely increased rents and displacement due to loss of rental subsidies – Congress enacted detailed legislation to preserve Section 515 properties as affordable housing by restricting the loan prepayment rights of owners who had entered Section 515 loans before December 21, 1979.[68] The Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of Section 515 mortgages entered into before December 21, 1979.[69] Under ELIHPA and its corresponding regulations, before the USDA can accept prepayment of a section 515 mortgage, the property owner must first comply with ELIHPA's "elaborate requirements" designed to preserve low-income housing, as shown in this graphic and further explained below.

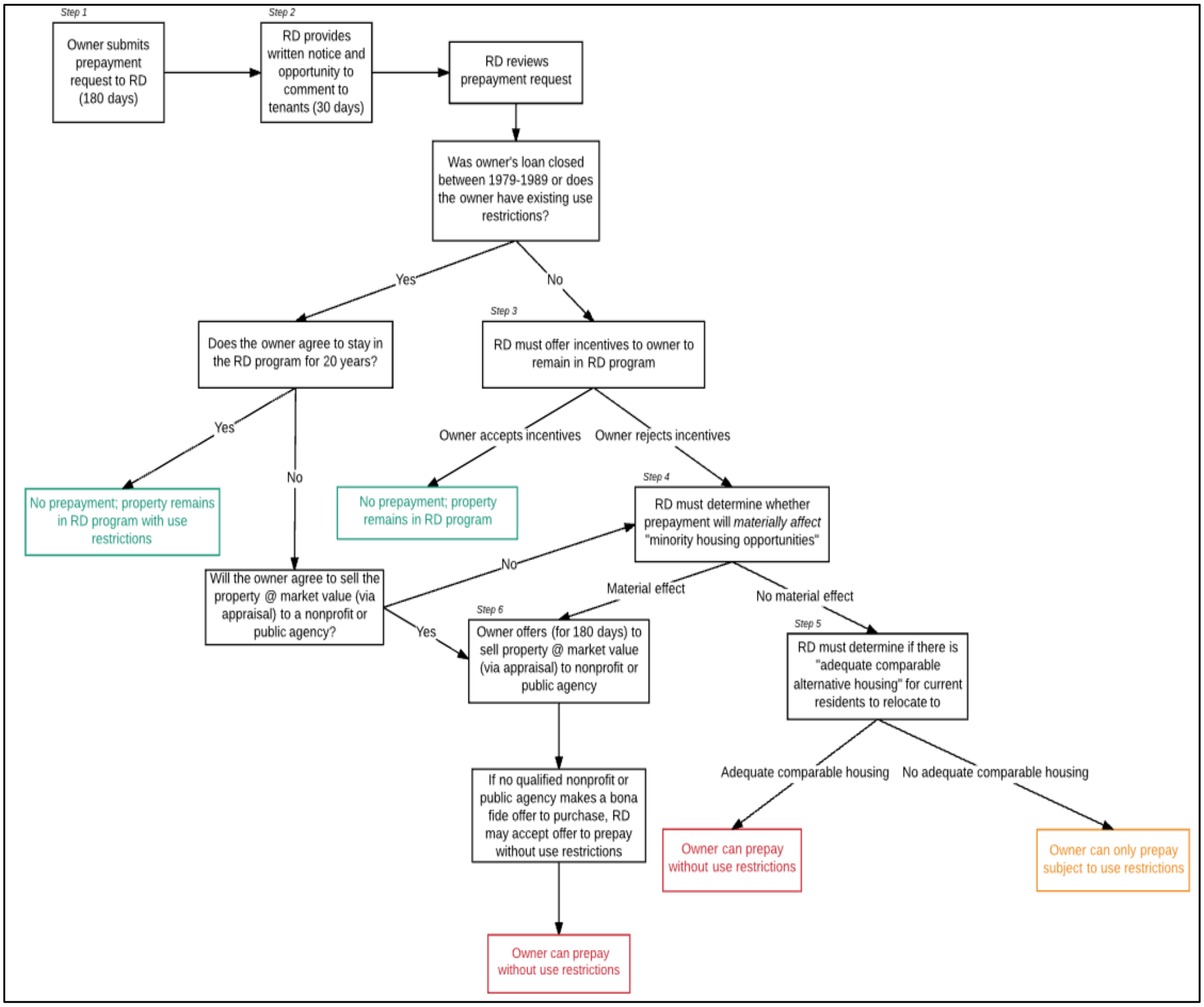
[65] *USDA Multi-Family Housing Property Preservation Tool*, TABLEAU PUBLIC, https://public.tableau.com/profile/greg.steck7461#!/vizhome/USDARuralDevelopmentMulti-FamilyHousing/Overview.

[66] 7 C.F.R. § 3560.11.

[67] *Management of Loan Payoffs in Multi-Family Housing*, RD Unnumbered Letter, at 2 (Dec. 28, 2016), *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf. *See Owens v. Charleston Housing Authority*, 336 F. Supp. 2d 934 (E.D. Mo. 2004), *reaffirmed by Charleston Housing Authority v. U.S. Department of Agriculture*, 419 F.3d 729 (8th Cir. 2005) (holding that the housing authority owner of a Section 515 development could not prepay its loan even when it owed less than $200 and that its efforts to vacate and demolish the development violated the Fair Housing Act).

[68] The Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"), P.L. 100-242 (Feb. 5, 1988), codified at 42 U.S.C. § 1472(c).

[69] The rural provisions of this act, as amended in 1992, are now codified at 42 U.S.C. § 1472(c).



B. Step 1: Owner Submits Prepayment Request to RD

The first step in the prepayment process is for the owner to submit a written prepayment request to RD at least 180 days in advance of the anticipated prepayment date.[70] "[T]he 180-day period is a minimum notice period and the borrower can provide earlier notice..."[71] The prepayment request must include:[72]

- ✓ A clear description of the loan to be prepaid, the housing property covered by the loan being prepaid, and the requested date of prepayment;
- ✓ A statement documenting the owner's ability to prepay (from the owner's own resources, with financing from a lender or other third party, or by selling the property)[73];

[70] 7 C.F.R. § 3560.653(a).
[71] 69 Fed. Reg. 69032, 69095 (Nov. 24, 2004).
[72] 7 C.F.R. § 3560.653(b); RD Handbook 3-3560, Ch. 15, Att. 15-F.
[73] RD Handbook 3-3560, Ch. 15, ¶ 15.10. *See id*. for additional information that owners must provide to show evidence of their ability to prepay.

- ✓ A certification that the owner will comply with any federal, state, or local laws or regulations which may relate to the prepayment request and a statement of actions needed to assure such compliance;
- ✓ A copy of lease language to be used during the period between the submission date and the final resolution of the prepayment request notifying tenant applicants that the owner of the housing property has submitted a prepayment request to RD and explaining the potential effect of the request on the lease;
- ✓ A signed release of information form along with the prepayment request;
- ✓ A certification that the owner has notified all governmental entities involved in providing affordable housing or financial assistance to tenants in the property and that the owner has provided a statement specifying how long financial assistance from such parties will be provided to tenants after prepayment; and
- ✓ A statement affirming that units in the property applying for prepayment will continue to be available for rent by eligible residents during the prepayment process.

Practice Tip:
RD should have a separate file on each prepayment request that includes: application, tenant notifications, property appraisal, documentation of all analysis performed, communications with the owner, and the mortgage. You should request this information via a FOIA.

If a prepayment request lacks full and complete information on any item, RD must notify the owner of the deficiency and provide the owner with 30 days to submit a revised prepayment request.[74] RD then must review the complete request to determine if (1) the loan is eligible for prepayment, (2) the owner has the ability to prepay, and (3) the owner has complied with all applicable laws related to the prepayment request.[75] If RD determines that a loan is ineligible for prepayment or the owner does not have the ability to prepay, RD will return the prepayment request to the owner with a written explanation of RD's determinations.[76]

RD is also responsible for notifying nonprofit organizations and public bodies involved in providing affordable housing or financial assistance to tenants of the receipt of an owner's request to prepay their loan(s).[77] RD does this through the Preservation Information Exchange (PIX) list, which any nonprofit or public entity can register for to receive weekly notification of all prepayment requests and potential sales to nonprofit or public entities.[78]

[74] 7 C.F.R. § 3560.653(d).
[75] *Id.* at § 3560.653(c). RD must review the prepayment request for completeness within 10 days of receiving it. If it is complete, RD has 60 days to complete its review of the prepayment request. RD Handbook 3-3560, Ch. 15, ¶ 15.9.
[76] 42 U.S.C. § 1472(c)(3); 7 C.F.R. § 3560.653(e).
[77] 7 C.F.R. § 3560.653(b)(5).
[78] *Preservation Information Exchange*, U.S. DEP'T OF AGRICULTURE, https://pix.sc.egov.usda.gov.

C. Step 2: RD Provides Prepayment Request Notice to Tenants

Once RD has received a complete prepayment request, it must provide notice of the owner's prepayment request to each tenant in the housing property within 30 days.[79] RD's prepayment request notice must also establish a date and place where tenants may meet with RD to discuss the prepayment request and will advise tenants that:

- Tenants may review all information submitted with the prepayment request, except financial information about the owner (which RD will withhold from tenant review unless the owner gives written permission for the release of that information);[80] and
- Tenants have 30 days from the date of the prepayment request notice to provide comments to RD regarding the prepayment request.[81]

Owners must post RD's prepayment request notice to tenants in public areas throughout the housing property from the date of the prepayment request notice until the final resolution of the request.[82] Owners may also choose to provide tenants with their own prepayment request notice.[83] RD recommends that owners hold a meeting early in the prepayment request process to discuss:

- The meaning of the first tenant notification letter;
- The steps in the prepayment process;
- Potential outcomes for the property;
- Alternative housing options for the tenants; and
- Tenants' eligibility for Letters of Priority Entitlement (LOPE) letters;[84]

Typically, RD staff will attend these meetings and play a major role in providing residents with an explanation of the impacts of a prepayment and the protective options that may be available to them under the various prepayment options.

Tenants are often alarmed by the prospect of prepayment and may reach out to local legal services offices or tenant advocates after receiving RD's prepayment request notice or after the meeting with the owner/ RD. Tenant advocates who wish to assist tenants in submitting comments to RD about the prepayment will likely need to become involved in the property very early in the prepayment process, in order to submit comments within the short 30-day timeframe.

[79] 42 U.S.C. § 1472(c)(3); 7 C.F.R. § 3560.654(a). If a tenant applicant signs a lease in a housing property for which a prepayment request has been submitted, the owner must provide the tenant with copies of all notifications provided to tenants by RD or the owner prior to the tenant's occupancy in the housing property. 7 C.F.R. § 3560.654(g). RD Handbook 3-3560, Ch. 15, Att. 15-C provides a sample tenant notice.
[80] 7 C.F.R. § 3560.654(a)(1).
[81] *Id.* § 3560.654(a)(2). *See* RD Handbook 3-3560, Ch. 15, Att. 15-C, Pg. 1 (2-24-05, Rev. 11-7-08).
[82] 7 C.F.R. § 3560.654.
[83] *Id.* 3560.654(b).
[84] RD Handbook 3-3560, Ch. 15, ¶ 15.6.

The RD tenant notice asks tenants for general impact of the prepayment on them and other residents in the development and community. It also advises them that they may be eligible for and RD voucher.[85]

Additionally, whenever RD provides notices to tenants regarding the prepayment process, they must also notify other interested parties, such as non-profit organizations and public entities.[86]

D. Step 3: RD Offers Incentives to Owner

If there are no restrictive use agreements or prepayment prohibitions currently in effect at the property, RD must "make reasonable efforts to enter into an agreement with the owner under which the borrower will make a binding commitment to extend the low income use of the [property] involved for not less than a 20-year period beginning on the date on which the agreement is executed."[87]

Subject to fund availability, RD can offer certain forms of assistance to incentivize the owner to remain in the rural housing program.[88] Such incentives may include an interest rate reduction, an equity loan, or additional Rental Assistance.[89] The owner has 30 days to respond to RD's incentive offer.[90] RD "may consider the incentive offer to be rejected" if no response is received within the 30-day period.[91] If there are no funds available, RD must wait 15 months before allowing prepayments under ELIHPA.[92]

If the development is subject to use restrictions, RD can offer incentives to the owner to extend those restrictions.[93] If the owner will not agree to extend existing applicable restrictive-use restrictions and still seeks to prepay the loan, the owner may do so if it agrees to extend the use restrictions by 10 years and at the end of that term sell the development to a nonprofit or public entity.[94] The owner must offer to sell to a nonprofit or public body or withdraw their prepayment request.[95] If the prepayment will have a material impact on minority housing opportunities, the owner must immediately offer to sell the development to a nonprofit or public entity.[96]

[85] *Id.* at Att. 15-c (p. 2).
[86] *Id.* at Ch. 15, ¶ 15.6.
[87] 42 U.S.C. § 1472(c)(4)(A). *See also* 7 C.F.R. § 3560.655.
[88] 42 U.S.C. § 1472(c)(4)(B).
[89] *Id.*; 7 C.F.R. § 3560.653(e).
[90] 7 C.F.R. § 3560.656(g); RD Handbook 3-3560, Ch. 15, ¶¶ 15.14-15.18 (Feb. 24, 2005, revised Nov. 7, 2008).
[91] *Id.*
[92] 42 U.S.C. § 1472(c)(5)(F). If RD is unable to fund the incentives within 15 months, the owner may offer to sell the property to a non-profit or public agency, wait for the incentive to be funded, or withdraw its prepayment request. 7 C.F.R. § 3560.657(c).
[93] *See id.* at § 3560.658(a).
[94] *Id.* at § 3560.658(a)(1).
[95] 7 C.F.R. § 3560.658(d). It is unclear from the regulations whether such a sale would be subject to existing use restrictions. Arguably, it would have to be because RD has no authority to lift those use restrictions.
[96] *Id.* at § 3560.658(a)(2).

Additionally, RD must notify nonprofit organizations and public bodies whenever an owner who has requested prepayment elects to offer their property for sale to a nonprofit or public body.[97] If an owner elects to sell a housing property involved in a prepayment request to a nonprofit organization or public body, RD must notify each tenant, in writing, of the proposed sale to a nonprofit organization or public body and will explain the timeframes involved with the proposed sale, any potential impact on tenants, and the actions tenants may take to alleviate any adverse impact.[98] Owners must post copies of RD's proposed sale notice in public areas throughout the housing property until the housing property is sold or the offer to sell is withdrawn.[99]

If the owner agrees to accept incentives and restrictive-use provisions, RD must notify each tenant, in writing, of the agreement and provide a description of the restrictive use provisions.[100]

E. Step 4: RD Evaluation of Impact on Minority Housing Opportunities

If the owner rejects the incentive offers, RD must determine the potential impact of the prepayment on two factors: housing opportunities for minorities and the supply of decent, safe, sanitary, and affordable housing in the market area. RD uses RD Form 2006-38, *Rural Development Environmental Justice (EJ) and Civil Rights Impact Analysis (CRIA) Certification*, to document this analysis.[101]

To assess the impact on minority housing opportunities, RD must determine whether the prepayment will *materially affect* housing opportunities of minorities in the property, on the waiting list, or in the market area.[102] In doing so, RD is required, at a minimum[103]:

[97] *Id.* at § 3560.653(b)(5).
[98] *Id.* at § 3560.654(f).
[99] *Id.*
[100] *Id.* at § 3560.654(e). *See* RD Handbook 3-3560, Chap. 15, Att. 2-B-1. Note the attachment focuses on the eligibility for LOPEs, Vouchers, and the transfer of Rental Assistance. It spends no time on the effect of use restrictions that may be attached to the prepayment or the effect of the prepayment on the existing lease.
[101] RD Form 2006-38, *Rural Development Environmental Justice (EJ) and Civil Rights Impact Analysis (CRIA) Certification*, https://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD2006-38.PDF. Note that this form was originally used for environmental impact analysis, which required analysis about whether the environmental impact had a disproportional impact on minorities. RD started using the form to determine prepayment impacts under ELIHPA as well without explaining its decision and without addressing the fact that the ELIHPA standard is material impact on minority housing opportunities.
[102] 42 U.S.C. § 1472(c)(5)(G)(ii); 7 C.F.R. 3560.658(b). On June 2, 2003, RD proposed new rules to consolidate and recodify the Section 515 program regulations, including those governing prepayment. 68 Fed. Reg. 32872. The initial proposal did not change the provisions for determining the effect of a prepayment on minority housing opportunities. However, with its 2004 interim final rules (69 Fed. Reg. 69032 (Nov. 26, 2004)), the agency dramatically changed the minority impact determination:

> The Agency will review relevant information to determine the availability of comparable affordable housing for existing tenants in the market area and if minorities in the project, on the waiting list or in the market area will be *disproportionately adversely* affected by the loss of the affordable rental housing units.

- ✓ To consider the percentage of minorities residing in the property and the percentage of minorities residing in the properties in the market area where displaced tenants are most likely to move;
- ✓ To consider the impact of prepayment on minority residents in the property and in the market area;
- ✓ To determine whether displaced minority tenants will be forced to move to other low-income housing in areas not convenient to their places of employment, to areas with a concentrated minority population and/or to areas with a concentration of substandard housing;
- ✓ To determine the vacancy trends and number of potential minority tenants on the waiting list at the property being prepaid and at other properties in the market area that night attract minority tenants; and
- ✓ To determine the impact prepayment will have on the opportunity for minorities residing in substandard housing in the market area to have comparable decent, safe and affordable housing, as is offered by the property being prepaid.

> ***Practice Tip:***
> The standards for determining the impact to minority housing opportunities described in RD's regulations conflict with ELIHPA. As a result, advocates should rely upon ELIHPA's statutory "material affect" standard and not RD's regulatory "disproportionately adversely affect" standard. Advocates should also contact NHLP if the regulatory standard is being used.

Despite these considerations, neither the regulations nor the RD Handbook discuss how to measure or weigh each of these considerations to determine the impact of prepayment on minority housing opportunities. This results in varying decision-making processes. Moreover, RD typically compares census data to the development's resident and waiting list data without taking into account that the census data is individually bases and the development's data is usually household based. Thus, the conclusions drawn from the comparison may be invalid.[104]

Id. at 69170 (now codified at 7 C.F.R. § 3560.658 (b) (2016)) (emphasis added). The agency justified the change as a response to comments asking for additional information on how to determine minority impact and requests that determination standards be published in the regulations and not in accompanying RD handbooks:

> The requirement regarding minority impact is statutory. While some commenters feel review criteria were too loose and others express concern that they will be too tight, the Agency strives to review relevant criteria in an objective manner….Further the Agency agreed that 'adverse impact' needed further clarification and has clarified that the adverse impact should be disproportionate. The Agency also felt that some clarification was needed for 'housing opportunities for minorities.' Therefore the Agency has clarified that an evaluation must be made of housing opportunities for minority tenants, applicants, and the market area in general....Additional details on how the Agency will review relevant information is available in Agency guidance about program procedures.

69 Fed. Reg. 69032, 69094 (Nov. 26, 2004). However, NHLP believes that *materially* affect and *disproportionately* impact are two very different standards and that RD's promulgation of those regulations violates ELIHPA, and thus should be challenged by tenant advocates.

[103] RD Handbook 3-3560, Ch. 15, ¶15.21.

[104] For example, if, according to census data, 30 percent of the local population is minority it is not correct to state, under RD's erroneous disproportional standard, that there is no disproportional effect on minorities if only 30

If RD determines that prepayment will materially affect housing opportunities of minorities, the owner must, for 180 days, offer to sell the development at its market value to a nonprofit or public agency, which would maintain the development's affordability.[105] If there is no material effect on minority housing opportunities, RD must then determine if there is adequate comparable alternative housing in the community to which the current residents of the development can relocate.[106]

> ***Practice Tip:***
> RD makes its determination regarding the impact to minority housing opportunities and adequate comparable housing via its Civil Rights Impact Analysis (CRIA) form and supporting documentation.

F. Step 5: RD Evaluation of Adequate Comparable Housing

To assess whether there is adequate comparable housing in the community, RD must use a recent[107] market study and other information[108] to consider:[109]

- ✓ Tenants' ability to stay in the property, depending on the proposed use of the property after prepayment and market rents for comparable units;
- ✓ The availability of alternative housing if the proposed use of the property or increase in rents will cause rent overburden. The alternative housing must be comparable in size, amenities, and rent to keep property tenants in the local community; and
- ✓ If the prepaying property has rental assistance, RD must identify comparable units with rural Rental Assistance or other rental subsidies, such as HUD Section 8 rental assistance.

If adequate comparable affordable housing is available as of the date of prepayment, the owner is free to prepay the loan. If RD determines that there is not adequate comparable alternative housing, the owner can only prepay the loan subject to use restrictions that protect the current residents as long as they choose to live at the property.[110]

percent of the development's *households* are minority. If a typical household consists of 4 persons, the percentage of individual minorities in that development may be as high as 60 percent.

[105] 42 U.S.C. §§ 1472(c)(5)(A), 1472(c)(5)(G); 7 C.F.R. § 3560.659.

[106] 42 U.S.C. § 1472(c)(5)(A); 7 C.F.R.§ 3560.658(b)(3).

[107] RD Handbook 3-3560, Ch. 6, ¶ 6.5, (Feb. 24, 2005) ("The Agency should obtain a market study. If the Agency has a market study covering the project area that is less than 12 months old, the Loan Servicer may use this market study and update any information as necessary.")

[108] *Id.* ("If not included in the market survey, [RD] may need to obtain local economic indicators, such as local employment and economic trends to judge the short- and long-term prospects for change. [RD] should have the project's updated budget, including a record of accounts receivable and accounts payable; [RD] may ask the borrower to prepare documentation stating the borrower's intentions for the property and the proposed rents if it becomes a non-program property; and [RD] should also seek community input to get information on the community's interest in retaining the project and the community perception of the need for the project."). Note that it is very important to define what the property's market is. In *Turner v. Vilsack*, 2013 WL 60741114, at 6 (D. Or. Nov. 18, 2013), an RD foreclosure case, the court stated that it is not a mere inconvenience for resident to move more than 35 miles from their homes, particularly when they cannot afford to pay for the move and RD does not cover the moving expense.

[109] *Id.*

[110] 42 U.S.C. § 1472(c)(5)(A); 7 C.F.R.§§ 3560.658(b)(3) and 3560.662.

Sample use restrictions that RD may impose on owners to protect current residents are set out in RD Handbook 3-3560, Chapter 15, Att. 15-E-2.[111] Under these use restrictions, rents, other charges, and conditions of occupancy should be set so that the existing residents will continue to be treated as if property remained in the Section 515 program.[112]

> ***Practice Tip:***
> If the property is offered for sale to a nonprofit or public entity, the owner must market it to local, regional, and national nonprofit and public entities. It appears that RD has stopped enforcing this regional and national marketing requirement.

G. Step 6: Owner Offers to Sell to Nonprofit or Public Agency

If RD determines that prepayment will materially affect housing opportunities of minorities, the owner must, for 180 days, offer to sell the development at its market value to a nonprofit or public agency which would maintain the development's affordability.[113] To establish a sales price when an owner is required or elects to sell a housing property to a nonprofit organization or public entity, two independent appraisals will be ordered, one by RD and one by the owner.[114] If the two appraisers fail to agree on the market value, RD and the owner will jointly select a third appraiser whose appraisal will be binding on RD and the owner.[115] Additionally, RD must notify nonprofit organizations and public bodies whenever an owner who has requested prepayment is required or elects to offer its property for sale to a nonprofit or public body.[116] This requires the owner to market the property to local nonprofit and public entities, as well as regional and national nonprofit and public entities.[117]

The owner must provide nonprofit organizations and public bodies with sufficient information regarding the housing property and its operations for interested purchasers to make an informed decision.[118] The information provided must include the minimum value of the housing property based on the market value determined by the appraisal noted above.[119]

To purchase the property, a nonprofit organization or public body must:[120]

[111] *See also* 7 C.F.R. § 3560.662.
[112] Not specifically mentioned in these sample use restrictions are tenant protections currently required by 7 C.F.R. §§ 3560.156(b) and 3560.156(c).
[113] 42 U.S.C. §§ 1972(c)(5)(A), 1972(c)(5)(G).
[114] 7 C.F.R. § 3560.659(a).
[115] *Id.* at § 3560.659(a)(2).
[116] *Id*. at § 3560.653(b)(5). In the past, RD offices mailed out notices to local, regional and national organizations advising them that a property was being offered for sale. The practice has generally stopped although some offices continue to do so. Recently, the agency has begun to post information on PIX that a development has been offered for sale. It is not clear how current that information is or whether the postings will be updated when a development whose owner has applied to prepay is required to offer the development for sale.
[117] *Id.* at § 3560.659(c).
[118] *Id*. at § 3560.659(b)(3).
[119] *Id*. at § 3560.659(b)(3).
[120] *Id*. at § 3560.659(e).

- ✓ Agree to maintain the housing property for very low- and low-income families or persons for the remaining useful life of the housing and related facilities;[121]
- ✓ Agree that no subsequent transfer of the housing property will be permitted for the remaining useful life of the housing property, unless RD determines that the transfer will further the provision of housing for low-income households, or there is no longer a need for the housing property;[122]
- ✓ Demonstrate financial feasibility of the housing property, including anticipated funding;
- ✓ Certify to RD that the purchaser does not have any identity of interest with the seller or any owner that has previously prepaid or requested prepayment of a RD multifamily loan;
- ✓ Complete an application and obtain RD approval; and
- ✓ Make a good faith offer, taking into consideration the value of the housing property as determined via the appraisals described above.

If more than one qualified nonprofit organization or public entity submits an offer to purchase the property, local nonprofit organizations and public bodies have priority over regional and national nonprofit organizations and public bodies.[123] RD may determine that no local nonprofit organizations or public bodies are available to purchase the housing property.[124] After this determination, the owner may accept an offer from a regional or national nonprofit organization or public body.[125] An owner may withdraw its prepayment request at any time prior to the sale of the property, but is responsible for any damages associated with breaking a sales contract with a nonprofit or public agency.[126]

Once the property has been sold to a non-profit or public agency,[127] the new owner of the property is subject to all applicable program requirements and use restrictions that applied to the property prior to the sale.[128] RD must ensure that the transfer of the property takes place according to RD rules and that the new owner is made subject to all applicable use restrictions.[129] RD must also monitor this property as it monitors all other program properties, and notify tenants and other interested parties that the sale will take place.[130]

If "no qualified nonprofit organization or public agency has made a bona fide offer to purchase" the property within 180 days after the offer to sell the property, then RD "may accept the offer to

[121] However, currently eligible moderate-income tenants will not be required to move. 7 C.F.R. § 3560.659(e).
[122] Language to be included in the deed, conveyance instrument, loan resolution, and assumption agreement (as applicable) is provided in 7 C.F.R. § 3560.662.
[123] 7 C.F.R. §§ 3560.659(c) & (f).
[124] *Id*. at § 3560.659(c).
[125] *Id*. at § 3560.659(c).
[126] *Id*. at § 3560.659(j).
[127] For more about financing the sale, see 42 U.S.C. § 1472(c)(5)(c).
[128] RD Handbook 3-3560, Ch. 15, ¶ 15.30.
[129] *Id.*
[130] *Id.*; RD Handbook 2-3560, Ch. 9.

prepay" without any use restrictions.[131] In that case, RD must send a notice to each tenant in the housing property explaining the potential impact of the owner's inability to sell the housing property on tenants and the actions tenants may take to alleviate any adverse impact.[132] Owners must post RD's notice in public areas throughout the housing property for a period of 60 days following the date of the notice.[133]

H. Step 7: Accepting the Prepayment

i. Owner Notice

If RD agrees to accept prepayment of a loan, RD will send a prepayment acceptance notice to the owners detailing the conditions under which RD will accept the prepayment, any restrictive use provisions that will apply, and the date by which the owner must prepay (within 180 days of RD's notice.[134] Owners must also certify that they will meet state and local laws prior to prepayment acceptance.[135]

ii. Tenant Notice

RD must send a prepayment acceptance notice to each tenant in the housing property at least 60 days prior to the prepayment date.[136] Owners must post copies of RD's prepayment acceptance notice in public areas throughout the housing property until prepayment is made.[137] If the prepayment acceptance was based on an owner's agreement to comply with restrictive use provisions, the notice must describe the restrictive use provisions that will apply to the housing property after prepayment and the tenant's rights to enforce the provisions.[138]

iii. LOPES

RD also must notify tenants if the prepayment is expected to result in increased net tenant contributions, displacements, or involuntary relocations and notify tenants of their right to request a Letter of Priority Entitlement ("LOPE").[139] LOPEs are letters provided by RD to tenants that provide tenants with priority entitlement to rental units in other RD-financed housing for 120 days from the date of the LOPE.[140] Thus, LOPEs allow tenants to move to the top of the

[131] 42 U.S.C. § 1472(c)(5)(A)(ii); *see* 7 C.F.R. § 3560.659(k) ("Prepayment with no further restriction may be accepted by the Agency when the borrower agrees to offer the housing project for sale to a nonprofit organization or public body in accordance with § 3560.659 and no good faith offer is received within 180 days from the date that the housing project was advertised for sale to a nonprofit organization or public body, or a good faith offer was received within 180 days from the advertisement date but the offeror was unable to fulfill the terms of the offer within 24 months of the offer date, provided the owner cooperated with the potential purchaser.").
[132] 7 C.F.R. § 3560.654(h).
[133] *Id.*
[134] *Id.* at § 3560.660(a).
[135] *Id.* at § 3560.660(c).
[136] *Id*. at § 3560.654 (c).
[137] *Id*.
[138] *Id*.
[139] *Id*. at § 3560.660(b). The RD form LOPE can be found in Appendix 4 of HB-2-3560, https://www.rd.usda.gov/files/3560-2appendix04.pdf.
[140] 7 C.F.R. § 3560.11.

waiting list in another RD-financed property anywhere in the U.S.,[141] which is especially important to ensure that affected tenants are able to move to units with subsidized rents that are more affordable than the market rate. Tenants must request a LOPE within one year of the prepayment acceptance notice date.[142]

a. Transfer of Rental Assistance

If tenants already receive Rental Assistance, they can also request to have the rental assistance assigned to their current unit to be transferred to another RD property.[143] Tenants who select this option have four months after the owner pays off the mortgage to transfer and begin using the Rental Assistance.[144] If the Rental Assistance is transferred, tenants' rent should not change, since their current rent is based on 30% of their income.[145] Additionally, tenants cannot use Rental Assistance in combination with a RD Voucher.[146] However, tenants can use the LOPE letter to get to the top of the waiting list, and then use the transferred Rental Assistance to help tenants pay the rent.[147]

b. RD Vouchers

Additionally if tenants live in the property *on the date of actual prepayment*,[148] they may also be eligible to receive a RD Voucher to assist in paying their rent in their current unit or elsewhere.[149] The RD Voucher Program was created to offer some protection to eligible multifamily housing tenants who may be subject to economic hardship (for example, higher rents) as a result of the loan prepayment or foreclosure.[150] The RD Voucher will help tenants by providing 12 monthly payments of rental subsidy that will supplement the tenant's rent payment.[151] Eligible tenants may use the RD voucher at the prepaid development or at any other rental unit in the U.S., including their current unit, if:

[141] *Multi-Family Housing Rentals*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, http://rdmfhrentals.sc.egov.usda.gov/RDMFHRentals/select_state.jsp.
[142] 7 C.F.R. § 3560.660(b).
[143] *Rural Development Voucher Program Guide*, U.S. DEP'T OF AGRICULTURE, Sept. 2010, https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf.
[144] *Id.* The four month restriction is arbitrary in light of the fact that residents' existing leases may be longer than four months and resident turnover in RD developments may not make it possible for a resident to transfer within that time frame. The restriction is being challenged in *McFalls v. Purdue*, 2018 WL 785866 (D. Or. Feb. 2, 2018) (order denying motion to dismiss) and *Bayview Plaza Tenants Association v. Bouma, 2:17-cv-01771-JLR* (complaint filed D. Wash. Nov. 17, 2017).
[145] *Rural Development Voucher Program Guide*, U.S. DEP'T OF AGRICULTURE, Sept. 2010, https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf.
[146] *Id.*
[147] *Id.*
[148] Note that tenants are not eligible to receive an RD Voucher if they move from the property prior to the date of the prepayment. Rural Development Voucher Program, Notice, 82 Fed. Reg. 21972 (May 11, 2017) (¶ II. a.1).
[149] *Id.*
[150] *Id.*
[151] *Id.*

- The owner of the unit will accept a RD Voucher;[152] and
- The unit is in acceptable physical condition; and
- The unit is not already subsidized by USDA Rental Assistance, HUD Section-8 or as a public housing unit.[153]

RD also has the following requirements for using an RD Voucher:[154]

- Tenants must be a citizen, United States non-citizen national or qualified alien to be eligible for the RD Voucher Demonstration Program.
- Even if the tenant was not previously receiving RD Rental Assistance, the tenant may be eligible to receive a RD Voucher. The RD Voucher will provide 12 months of payment. Note that the RD Voucher payment is decided at the time of the prepayment. Thus, if tenants' income goes down, or the rent goes up, tenants will have to make up the difference.
- Tenants may not use your RD Voucher in combination with USDA Rental Assistance, a HUD Housing Choice Voucher, or at a HUD-subsidized property.
- Tenants must use the RD Voucher within 60 days of issuance.
- The amount of the RD Voucher cannot exceed the rent for the unit. If tenants want to use this voucher at another property where the amount of the voucher exceeds the rent, the voucher will be reduced to equal the rent. The voucher amount could increase back to its original amount if tenants' rent then increased above the voucher amount.

iv. Tenants' Right to Appeal

According to federal statute and regulations, and the U.S. Constitution, residents are entitled to:

- written notice stating specific reasons why RD has approved owner's prepayment request;[155] and
- an opportunity to appeal any adverse decision (i.e. RD's prepayment approval) to a person, other than the original decision maker, with the authority to reverse the decision.[156]

Unfortunately, RD does not advise residents of the true reason that it has accepted a prepayment nor that the residents have a right to appeal the adverse decision. Typically, RD notices state that it has approved a prepayment because the owner has agreed to a certain incentive. The real reasons that RD accepts prepayment is, for example, that it has concluded that the prepayment will not have material impact on minority housing opportunities, that it has concluded that

[152] RD's use restrictions require prepaying owners to accept RD vouchers. RD Handbook 3-3560, Chap. 15, Att. 15-E-2 (¶ 3).
[153] *Id.*
[154] *Id.*
[155] 42 U.S.C. § 1480(g); 7 CFR part 11; U.S. CONST. amend. V.
[156] *Id.*

alternative affordable housing is available in the community, or that no nonprofit or public agency has made an offer to purchase the property.

USDA regulations grant residents the right to appeal *any* adverse agency decision that they will be affected by to a hearing officer at the department's National Appeals Division (NAD).[157] The regulations define an "adverse decision" as:

> ". . . an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations . . ."

Under these provisions, appellants are afforded certain procedural protections, including the opportunity to present testimony and/or other documentary evidence, are subject to a burden of proof equal to the preponderance of the evidence, and are guaranteed certain requirements regarding the conduct of the hearing.[158] Hearings are also conducted before a hearing officer who issues written decisions, which are reviewable by the NAD Director.[159]

RD gives residents' the right to participate in an appeal when an owner appeals an adverse prepayment decision.[160] It does not, however, give residents an independent right to appeal an RD decision to accept a loan prepayment. This practice could be challenged as violating the residents, statutory, regulatory and constitutional due process rights.

I. Step 8: After the Prepayment

i. Continuation of Current Leases

Resident leases that have not expired as of the date of prepayment continue to remain in force for the balance of the lease term when the owner prepays the loan and the owner is obligated to honor all provisions of the lease until its term comes to an end or the owner and resident agree to terminate the lease.[161] This means that a tenant who received Rental Assistance before the prepayment will continue to only pay 30% of adjusted income for rent and a tenant who was only assisted by Interest Credit continues to pay the higher of 30% of adjusted household income or the project's Basic Rent. Under their existing lease, tenants cannot be evicted except for good

[157] 7 C.F.R. §§ 11.1, 11.2 and 11.3.
[158] 42 U.S.C. § 1480(g), 7 U.S.C. § 6991, and USDA regulations published at 7 C.F.R. Part 11, Subpart A (§§ 11.1-11.15).
[159] *Id.*
[160] *See* RD Handbook 3-3560, Chap. 15, Att. 15-C, at 2.
[161] *See Rural Development Voucher Program Guide*, U.S. DEP'T OF AGRICULTURE, Ch. 2, ¶ 2.5 (Sept. 2010), https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf ("Prepayment regulations require that owners who prepay the RD mortgage through the prepayment process must continue to honor the leases of tenants residing in the property on the date of prepayment. In this circumstance, tenants continue to pay the net tenant contribution toward rent without the benefit of rental assistance.").

cause and they are entitled to make use of the lease and grievance process as well as other RD mandated lease provisions. Unfortunately, RD's resident notices regarding prepayment only mention the tenant's right to remain under the old lease in passing and many landlords believe that they are entitled to terminate existing leases and raise rents immediately upon prepayment, and advise residents that they must seek RD vouchers or start paying the RD approved market rent to stay in their home. RD is known to have erroneously supported the landlords' position.[162]

A resident should generally not enter into an agreement to terminate an existing lease even if RD vouchers are offered to the resident. Practically in every case, the resident is better off remaining on the old lease until its expiration than entering into a new lease and asking for voucher assistance. First, if the resident received a utility allowance prior to the prepayment, the owner must continue to extend that allowance until the expiration of the lease. Under the RD voucher program, utility allowances are not included in the voucher subsidy.[163] This means that these residents' rent is increased immediately. Second, remaining under the old lease will generally enable a resident to transition more smoothly to the voucher program than if the resident were to try to secure the voucher subsidy as of the date of the prepayment. This is because RD is frequently unable to issue a voucher, inspect the units, and enter into a Housing Assistance Payment contract with the owner without the tenant having to pay one or more months of the full market rent before voucher payments start. By delaying the transition, it is more likely that the resident will never have to pay the full market rent in the transition process. Third, if the resident seeks to move to another RD development, the resident has more time get admitted to another RD development by remaining under the old lease. Fourth, even if a resident seeks to use a voucher to move to another apartment building, the remaining period on the lease gives the resident time to look for an apartment, have RD inspect the unit and enter into a HAP contract with the owner, and give the resident time to move. A resident who enters a new lease and secures a voucher may be locked into a new annual lease term and not be able to move until the new lease expires.

ii. Effect of Use Restrictions

Once a loan is prepaid and the resident's lease expires, all subsidies that reduce the rents to residents, including Interest Credit and Rental Assistance, cease[164] as does RD's regular supervision and monitoring of most of the owner's actions. Prepayment, thus, terminates the owner's obligation to affirmatively further fair housing (although not the owner's obligation to adhere to federal civil rights law), secure approval of all rent increases, maintain the development to RD standards, follow RD lease requirements, the term of leases, and the basis upon which a lease may be terminated.[165]

[162] *See Bayview Plaza Tenants Assoc. v. Bouma*, No. 2:17-cv-01771-JLR (Complaint filed D. Wash. Nov. 27, 2017).
[163] *See* 82 Fed. Reg. 21972, 21974 (May 11, 2017) (¶ II e).
[164] 42 U.S.C. §§ 1490a(a)(1)(B) & 1490a(2)(A); 7 C.F.R. § 3560.11.
[165] *Id.*

ELIHPA requires RD to condition prepayments when the agency determines that the prepayment will not have a material impact on minority housing opportunities but that there is not sufficient affordable housing in the community to which the residents of the prepaid development can be relocated to.[166] The use restriction that RD places on the owner is intended to protect the residents of the development as of the date of prepayment against rent increases and displacement for as long as the residents choose to live in their homes.[167] This means that residents who received Rental Assistance continue to pay 30% of household adjusted income for shelter for as long as they stay in the development and that households that were assisted by only Interest Credit continue to pay the higher of 30% of income or the development's Basic Rent for at least the first year after the prepayment. The landlord can raise the rent of former Interest Credit recipients after the first year; however, the rent increase must reflect increase operating costs and cannot include any costs that were incurred as a direct result of the prepayment, such as financing a loan that was used to pay off the balance of the RD loan.[168] Unfortunately, since 2008, this is another protective provision that RD does not advise residents of except very briefly in passing and without any explanation.[169]

RD notices to residents regarding prepayments focus on the resident's right to secure Letters of Priority Entitlement, their right to move to another RD development and, if they were Rental Assistance recipients, to move that assistance to another RD development, or to secure RD Vouchers. Their right to continue to live under the prepayment use restrictions is barely mentioned, let alone explained, even though it is the best alternative for the residents.

Under the RD use restrictions, residents may continue to live in their homes as if they were continuing to live in RD Section 515 housing. Resident who received Rental Assistance continue to pay 30% of household adjusted income for shelter, while those only assisted under the Interest Credit program continue to pay the higher of 30% of household adjusted income for shelter or the development's Basic Rent, which can only be increased for operating costs not attributable to the prepayment. Moreover, all of the residents' rights under the Section 515 program continue to be available to the residents under the use restrictions. This is not the case under the voucher program, which RD promotes in the tenant notices. Lastly, the RD voucher program has been subject to annual appropriations which have been exceeded on several occasions and which RD could not issue or renew due to government shutdowns. The use restrictions are not subject to these issues.

One problem with the RD use restrictions is the fact that RD regulations and the use restrictions themselves authorize RD to lift them when assistance to the residents is terminated for reasons

[166] 42 U.S.C. §§ 1472(c)(5)(G)(II)(ii), 7 C.F.R. § 3560.658(b)(4).
[167] RD Handbook 3-3560, Ch. 15, Att. 15-E-2, Pg. 1 ¶ 6 (Feb. 24, 2005, revised Nov. 7, 2008).
[168] Handbook 3-3560, Ch. 15, ¶ 15.21 (Feb. 24, 2005, revised Nov. 7, 2008).
[169] *Id.* at Ch. 15, Att. C-2-A. at 2 ("If USDA decides that there is an inadequate supply of affordable rental housing nearby, USDA may require that the owner continues to provide low rents to you and the other current renters, even if rents go up for future tenants").

not under the owner's control.[170] There is no legislative authority for this provision in ELIHPA and it runs counter to its provisions that are intended to protect residents from displacement.

As noted earlier, under the RD voucher program, residents who received utility allowances, lose those allowances immediately when they start receiving voucher assistance. Under the RD regulations, although probably not under ELIHPA, the owner may raise rents at the end of the first year and none of the Section 515 protections remain in effect with the exception of the good cause requirement, which is maintained by the Voucher program.

The consequence of moving to the voucher program may be particularly egregious for two person elderly households. When one of the two residents passes, the voucher subsidy does not change as it is set permanently upon prepayment. Thus, a two person household that was paying 30% of household adjusted income immediately after the prepayment may have to pay as much as 60% of household income when one of the household members dies or even moves to an assisted living facility.

In short, whenever a prepayment is subject to use restrictions, residents should be urged not to apply for vouchers and, instead, choose to be protected under the use restrictions.

iii. The RD Voucher Program

RD has authority to provide residents of prepaid development with rural vouchers to help them remain in their homes or find alternative housing.[171] However, the assistance provided to residents by RD vouchers is substantially inferior to the assistance provided under the Rental Assistance program because the amount of the rural voucher subsidy is permanently set as of the date of prepayment and does not change when rents increase or household income decreases.[172] As noted above, RD's authority to issue vouchers is limited by annual appropriations, which can also put at risk tenants' ability to receive or renew rural vouchers.[173]

NHLP has become concerned that RD has offered and issued vouchers to residents of Section 515 housing without regard as to whether the household is moving from or staying in the development, or whether the prepayment was or will be subject to use restrictions. NHLP believes that RD has issued most of its vouchers to residents who stayed in their homes after prepayment, even though the owners were subject to use restrictions, thereby duplicating efforts and causing RD to run out of voucher funding in 2016 and likely again in future years. NHLP believes that RD's actions encourage Section 515 owners to prepay their loans because they are assured of getting market rate voucher funding through the period that the existing tenants remain in the development. This practice encourages owners to prepay their loans and convert developments to market rate housing. This is contrary to the purposes of ELIHPA and has caused RD to issue and renew more vouchers than are actually needed, thereby undermining individual

[170] 7 C.F.R. § 3560.662(f); RD Handbook 3-3560, Att. C-2 (¶ (6)).
[171] Rural Development Voucher Program, Notice, 82 Fed. Reg. 219721 (May 11, 2017).
[172] *Id.* at ¶ II e and g.
[173] *Id.*

voucher holders' capacity to continue to receive vouchers assistance in the future as well as the opportunity to move to other housing.[174]

Also, RD does not allow residents of Section 515 developments to apply for RD vouchers until the prepayment has occurred.[175] RD's voucher notice only requires it to advise residents of their eligibility for vouchers within 90 days following the prepayment.[176] This makes it difficult for residents to apply for and receive vouchers within 60 days of the prepayment and limits their ability to move to other housing after the prepayment. This may force residents to pay market rent for housing, which puts at risk their housing stability and can lead to homelessness.

In several instances, RD regulations and notices suggest that owners who prepay their loans do not have to follow all RD laws and regulations with respect to residents who remain in the development after the prepayment.[177] Such suggestions further put at risk tenants' housing stability and should be challenged by tenant advocates.

While no one has raised the issue in litigation, it is arguable that landlords who prepay subject to RD use restrictions may not raise the voucher holder's shelter payment after the first year, something that owners typically do, and may even have to lower the rent when household income decreases, as, for example, when one of two elderly household members dies.

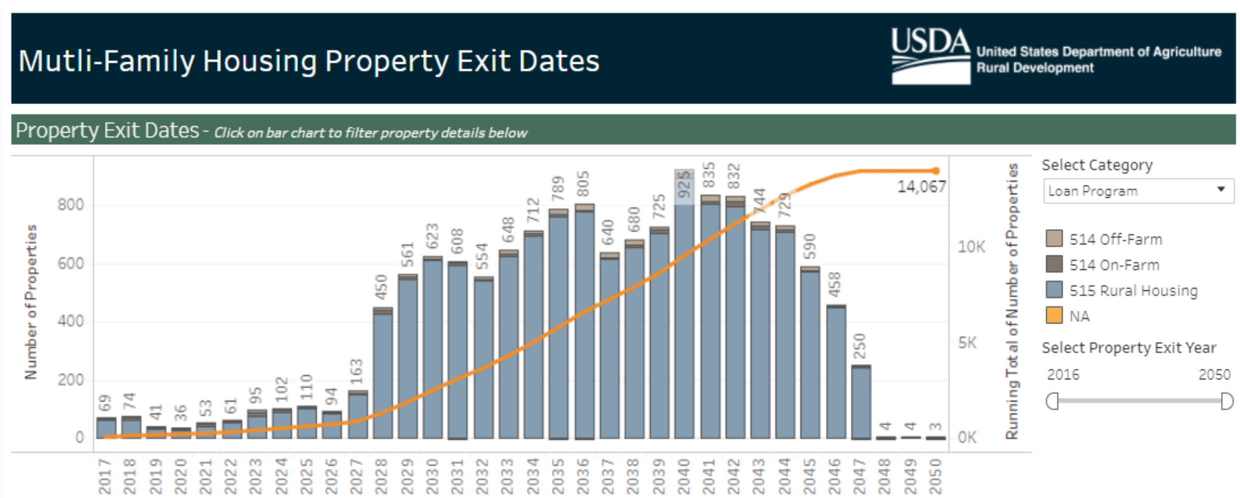
Another problem with the voucher program and the RD use restriction is the fact that RD has a regulation and a provision in the recorded use restrictions that allow it to lift the use restrictions if any tenant assistance is terminated for any reason outside the landlord's control. Presumably, this allows RD to lift the use restrictions if the RD Voucher program or the HUD project-based Section 8 assistance is terminated for reasons beyond the resident's control. NHLP is unable to find any statutory authority for this provision and believes that it contradicts the ELIHPA prepayment provisions.[178] If it is not successfully challenged, voucher holders may not be able to argue that the efforts to raise their rents after the first year are precluded by the use restrictions.

[174] RD's voucher issuance practices are being challenged in *McFalls v. Purdue,* 2018 WL 785866 (D. Or. Feb. 2, 2018) (order denying motion to dismiss).
[175] See *Rural Development Voucher Program Guide*, U.S. DEP'T OF AGRICULTURE, Ch. 3, ¶ 3.3 (Sept. 2010), https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf ("Once prepayment or foreclosure occurs, another tenant letter is issued that advises tenants of contact names and telephone numbers to obtain an RD Voucher, as well as their voucher eligibility status and the value of the voucher for those tenants who have been determined eligible to participate in the program.).
[176] 61 Fed. Reg. 42309, 42311 (June 29, 2016) (¶ II 3).
[177] *See, e.g.*, 7 C.F.R. § 3560.662(e)(4).
[178] This regulation and use restriction is currently being challenged in *McFalls v. Purdue*, 2018 WL 785866 (D. Or. Feb. 2, 2018) (order denying motion to dismiss) and *Bayview Plaza Tenants Association v. Bouma*, No. 2:17-cv-01771-JLR (D. Wash. Nov. 27, 2017).

III. Section 515/514/516 Maturing Mortgages

Most RD loans made in the 1960s and 1970s are now coming to the end of their loan term ("maturing"). When these loans mature, their RD subsidies (including rural Rental Assistance and Interest Credit subsidies) terminate and the owners will raise tenants' rents to compensate for lost income.[179] Because more than 60% of these tenants are elderly or disabled and live on fixed incomes,[180] mortgage maturities can lead to significant tenant displacement in communities that often lack adequate and decent affordable housing. To make matters more complicated, residents in properties with maturing mortgages are statutorily ineligible for RD rural vouchers.

As shown in the graph below, the terms of the initial mortgages will be maturing in the coming years, ramping up significantly in 2028 and peaking in 2040. Very few RD Section 515 developments will remain in the program by 2050. This will be a tremendous loss to low- and very-low income households and the communities in which these developments were built.



To see an interactive map of where maturing mortgages may be in your community, please visit: http://arcg.is/29638UI.

A. Mortgage Maturity Process

For owners whose loans are expected to mature within 36 months, RD must send owners a Borrower Notification Letter.[181] This letter includes information on the current status of the owner's loan account, offers options for the owner to remain in the RD program (including continuing to receive the benefits of Rental Assistance and Interest Credit), and discusses tenant notification requirements.

[179] If tenants are currently receiving Section 8 assistance or other non-RD subsidies to help tenants pay all or part of their rent, such assistance should continue. Attachment 2, "Management of Loan Payoffs in Multi-Family Housing Properties," Unnumbered Letter, 4-28-15, *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.
[180] *USDA posts list of maturing multifamily mortgages*, HOUSING ASSISTANCE COUNCIL, http://www.ruralhome.org/whats-new/menu-policy/1265-usda-posts-list-of-maturing-multifamily-mortgages.
[181] *Management of Loan Payoffs in Multi-Family Housing Properties*, Unnumbered Letter, Attachment 1, Dec. 28, 2016, *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.

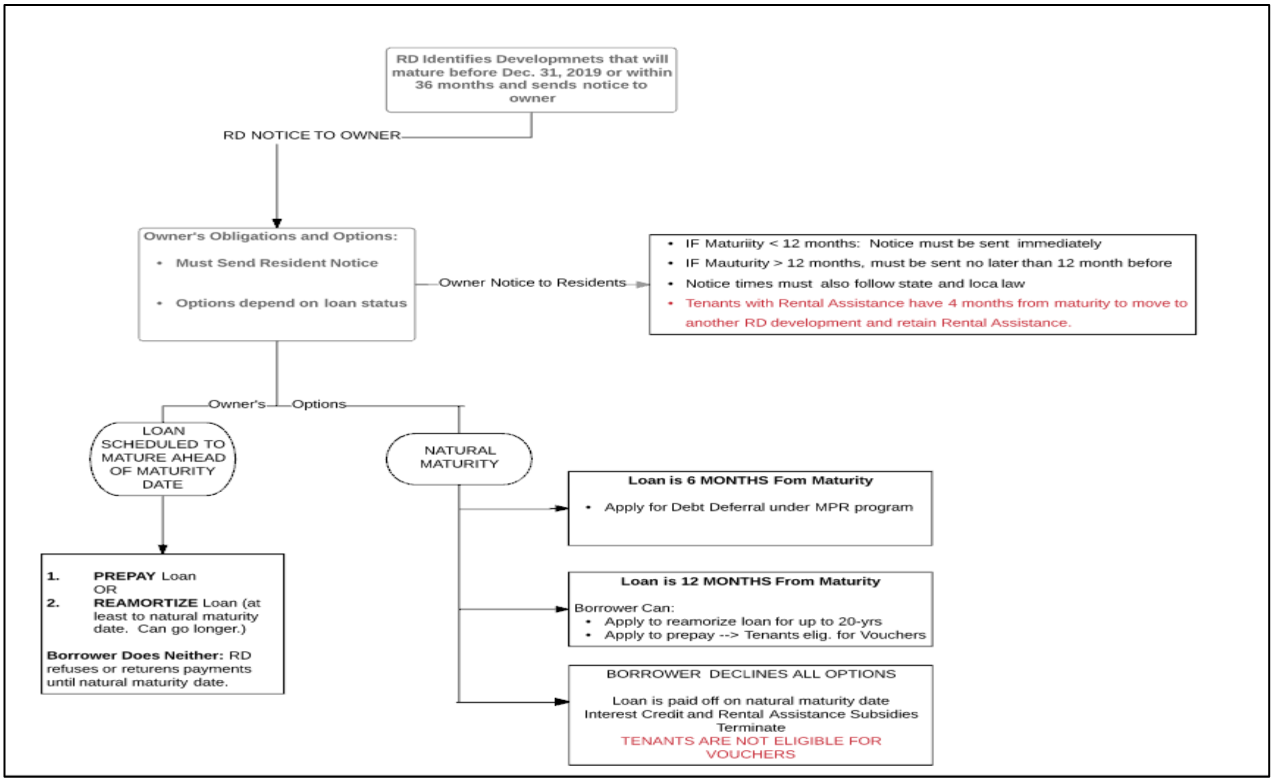
RD also requires that owners notify tenants at least 12 months in advance of the mortgage maturity date.[182] At a minimum, tenant notices should include:[183]

- Expected date of the mortgage maturity;
- Information that the end of the RD mortgage will result in the end of Rental Assistance subsidy, if applicable;
- Information regarding any potential rent increase that may be instituted after the mortgage maturity;
- Tenants receiving Rental Assistance should be informed that they may be able to transfer their Rental Assistance to another RD-subsidized property (under circumstances stated in the notification letter) for up to 4 months after the mortgage maturity date;[184]
- Location and contact information about other RD properties in the county or locality; and
- Information about other housing subsidies that may be available through federal, state, or local resources, including contact information for such agencies.

A copy of the tenant notification letter should be posted in the common areas of the property and a copy must be provided to tenants moving into the property after the date of posting and before the mortgage maturity.

The mortgage maturity process is further outlined in the graphic on the next page:

[182] *Management of Loan Payoffs in Multi-Family Housing Properties*, Unnumbered Letter, April 28, 2015, *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.
[183] *Id.* at Attachment 1.
[184] 7 C.F.R. § 3560.259(c); *Management of Loan Payoffs in Multi-Family Housing Properties*, Unnumbered Letter, Attachment 2, April 28, 2015, *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.



B. Responding to Maturing Mortgages

RD has taken some limited administrative action to address the challenges posed by maturing mortgages.[185] RD should be encouraging owners with maturing mortgages to: re-amortize and extend their loan for up to 20 years, apply for debt deferral under the Multi-Family Preservation and Restructuring program, or apply to prepay the mortgage prior to maturity. If implemented successfully, these actions could effectively extend rural Rental Assistance or access rural vouchers for tenants that would otherwise be unavailable.

Tenant advocates should consider the following activities to support tenants in properties with maturing mortgages:

- Check to see if RD has sent the Borrower Notification Letter to owners of properties whose mortgages will mature within 36 months;
- Check to see if the owner has notified tenants of the impending mortgage maturity, and assist tenants in understanding the notice and its consequences;
- Engage in advocacy with the owner to agree to re-amortize and extend the loan for up to 20 years, apply for debt deferral under the Multi-Family Preservation and Restructuring program, or apply to prepay the mortgage prior to maturity;
- Identify any local nonprofit or public agencies who may be willing to purchase and preserve the property;

[185] *Management of Loan Payoffs in Multi-Family Housing Properties*, Unnumbered Letter, April 28, 2015, *available at* https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.

- Identify if the owner has complied with any state or local laws regarding the termination of subsidies;
- Identify and support the needs of relocating tenants, including physical or financial assistance, and local service agencies who may be able to assist;
- Identify other RD- and HUD-subsidized housing in the community, and assist tenants in applying for any available housing;
- Advocate with RD to provide tenants with Rental Assistance at a new RD property; and
- Advocate with RD to provide Letters of Priority Entitlement (LOPEs) to tenants, in order to give them priority admission to other RD Section 515 housing.

IV. RD Foreclosures

A. Background

RD forecloses on multi-family housing loans for a variety of reasons.[186] This may include financial reasons, such as the owner's failure to make mortgage payments or to maintain proper reserves. More frequently, if may also start the foreclosure process when the owner fails to maintain the development as decent, safe, and sanitary housing, particularly when the owner does not make repairs that RD believes are necessary, or when the owner violates other RD regulations. Sometimes, RD will foreclose on a loan because of owner actions that are not related to the operation of a particular project, but rather the owner's actions with respect to other RD developments. Thus, for example, if the owner has committed fraud against RD at one development, it may take action on all developments that are controlled by the same owner. Under these circumstances, RD will frequently seek to appoint a receiver to operate, transfer or ultimately sell the property to another owner.[187]

RD refers to its pre-foreclosure and foreclosure process as loam liquidation. This is because there are many steps to the process, which does not always end in a foreclosure sale. Residents' interests are supposed to be considered in the liquidation process and, under certain circumstances, RD must inform the residents of the actions that it is considering. Unfortunately, RD staff does not always follow these requirements.[188]

The RD loan liquidation process is only described generally in the agency's regulations.[189] However it is set out in great detail in Chapter 6 of RD Handbook 3-3560.[190]

[186] *See generally* 7 C.F.R. § 3560.452.
[187] *See U.S. v. McKean*, 3:96-cv-05879-BHS (W.D. Wash. 1996).
[188] *See Turner v. Vilsack*, 2013 WL 60741114 (D. Or. Nov. 18, 2013).
[189] *See* 7 C.F.R. § 3560.456.
[190] Chapter 6 of RD Handbook 3-3560 is available at https://www.rd.usda.gov/files/3560-3chapter06.pdf. Generally, Handbooks are not binding on agencies and the failure to follow them is not a violation of the Administrative Procedure Act. They are, however, persuasive authority as to the proper procedures that an agency must follow. *Turner v. Vilsack*, 2013 WL 60741114 (D. Or. Nov. 18, 2013).

B. Project Suitability

The determination of project suitability is the first step in the liquidation process.[191] It is made up of three parts: an appraisal of the project's ownership, a determination of the need for the development, and whether or not it is obsolete.[192]

i. Appraisal of the Project's Ownership

The ownership review is a determination of whether the ownership entity is legally operational, dealing cooperatively with RD, and financially solvent and providing competent management. A negative determination with respect to any of these factors requires the owner to correct the deficiencies. Failure to do so results in a negative suitability determination.[193]

ii. Determination of the Need for the Development

The need determination is more elaborate and is critically important for resident in the development. It is an evaluation of the need for the development and its economic viability. Typically, RD staff has to collect the following information in order to make a need determination:

- obtain, or review a recent, a market study;
- secure local economic indicators if they are not included in the market study;
- request the owner to provide an updated project budget and a listing of accounts receivable and payable;
- request the owner to prepare documentation of its intention for the property including rent projections should the property be classified as a non-program property; and
- seek community input on its interest in retaining the development and its assessment of the need for the development.[194]

Based on this information, RD must first determine first whether a non-program designation[195] will have a negative impact on tenants and, second, whether the continued operation of the development is economically viable. The impact determination is made in the same fashion that it is made when an owner seeks to prepay the development.[196] "The objective of this analysis is to determine if tenants will lose their units, suffer from rent overburden,[197] or be unable to find comparable housing in the community."[198] Thus, RD must determine:

[191] RD Handbook 3-3560, Chap. 6, ¶ 6.2. A suitability analysis need not be conducted if the development is clearly suitable and there are no loan repayment or compliance issues that threaten its financial viability and when a matter involving the development has been referred to U.S.D.A.'s Office of General Counsel or the U.S. Attorney. *Id.*
[192] *Id.* at ¶ 6.3.
[193] *Id.* at ¶ 6.4.
[194] *Id.* at ¶ 6.5 A.
[195] *Id.*
[196] *See* RD Handbook 3-3560, Ch. 15, ¶15.22. *See also* Section II, *supra.*
[197] RD has defined rent overburden as situations where residents are required to pay more than 30% of income for shelter. *See* RD Handbook 3-3560, Ch. 4, Ex. 4.1.
[198] RD Handbook 3-3560, ¶ 6.5 (B)(1).

- the tenants' ability to stay in the development after it is categorized as a non-program, its future use and the rents at comparable conventional development in the community;
- the availability of alternative housing if the use of the project or rents will cause the tenants to experience rent overburden or displacement; and
- if the development has Rental Assistance, the identification of comparable units in the community with Rental Assistance or other rental subsidies.[199]

Economic viability is determined by evaluating whether the property can generate sufficient income to pay essential expenses, fund accounts, and make loan payments. Projects with a large number of vacancies due to depressed local economic conditions are frequently found to be not economically viable.[200] However, before coming to that conclusion, RD must determine that it cannot take appropriate and reasonable actions, such as increasing the number of units assisted by Rental Assistance or writing off part of the loan, in order to make the development economically viable.[201]

There are four possible outcomes when making a need determination. If the analysis concludes that non-program designation will have an adverse impact on tenants and the development is economically viable, the project is needed. Second, if there is no adverse impact on residents and the development is economically viable, the project is not needed. Similarly, if there is no impact on residents and the project is not economically viable, the project is also not needed. Fourth, if there is an adverse impact on residents and the development is not economically viable, the project is not needed. In this case, however, RD cannot remove the development from the program until it finds affordable comparable housing for all residents.[202]

iii. Determination of Whether the Project is Obsolete

Whether a building is obsolete is based on whether the site or building poses a health or safety hazard, has physical characteristics that cannot be addressed economically, or faces adverse local economic conditions. An environmental review must be conducted to determine if the site is contaminated. A physical inspection of the building must also be done to determine the scope of physical problems and, if repairs can be made, the cost of making them. Lastly, the borrower's intentions to repair the property must be considered and rents established if the property is designated as a non-program development. A project is deemed obsolete if there are health or safety risks to the residents that cannot be reasonably corrected, the building has structural or design characteristics that make it economically infeasible to repair or the project is not economically viable due to local economic conditions.[203]

[199] *Id.*
[200] *Id*. at ¶ 6.5 (B)(2).
[201] *Id.*
[202] *Id.* at ¶ 6.5 (C).
[203] *Id*. at ¶ 6.6 (B).

When the local RD official determines that a property is no longer suitable to remain in the program, the final suitability determinations must be made by the RD state office.[204] Other determinations may be handled by the loan servicer who is responsible for taking appropriate servicing actions.

Written notification to tenants should be sent whenever a loan servicer recommends that a property be determined unsuitable.[205] A meeting should be held with the tenants to explain the consequence of an unsuitability determination and the potential of non-program designation. Additional resident notifications should be provided when the state office has made a final suitability determination and if and when a date has been set for designating the property as non-program.[206]

The state office will only make a suitability determination if there is a need for the development and the property is not obsolete. Under all other circumstances, the property will be designated unsuitable. When the state office determines that a property is unsuitable it must make a separate decision with respect to the property's program and non-program designation. Alternative actions that the agency may take are listed in Handbook 3-3560, Ch. 6, ¶ 6.7 E.

In *Turner v. Vilsack*,[207] which sought to stop an RD foreclosure action on a 36-unit Section 515 development in Oregon, the court relied extensively on the RD Handbook to conclude that there were serious questions as to whether the RD suitability analysis was conducted in a manner that was arbitrary and capricious and contrary to law. In that case, RD had concluded that the development was needed, that its operation was not economically feasible and that the project was obsolete. The court preliminarily enjoined the foreclosure on the ground that there was "no evidence before the court that there was adequate information gathering, analysis, documentation, or notice to the tenants throughout the suitability analysis."[208] Moreover, it questioned RD's determination that the project was obsolete because RD did not provide any evidence that the cost of rehabilitating the property were greater than constructing a new development.[209] Lastly, in light of the fact that the agency made a determination that the loss of the project will adversely affect the tenants but that it is not economically viable, the court relied on the RD Handbook to conclude that before the property is removed from the program RD is obligated to find suitable housing for all subsidized tenants

Advocates who represent residents in a Section 514 or 515 rental development that is being foreclosed by RD should use a Freedom of Information Act request to determine the findings that the agency has made with respect to the development's need, economic viability, and obsolescence. They should also carefully review the residents' involvement in the suitability

[204] *Id.* at ¶ 6.7.
[205] *Id.*
[206] *Id.* at ¶ 6.7A.
[207] 2013 WL 60741114 (D. Or. Nov. 18, 2013).
[208] *Id.* at 4.
[209] *Id*.

determination. Careful review should also be made of the notices that the residents received and whether they were allowed to comment upon or appeal the final suitability determination.[210]

C. Non-Program Designation

A development can be designated non-program regardless of whether there is an adverse impact on residents. However, when there is an adverse impact, the non-program designation must be delayed until the agency has taken measures to ensure that all residents receive decent, safe and sanitary housing.[211] This is to be accomplished by working with other state and local agencies, allowing resident with Rental Assistance to relocate to other RD developments and taking the Rental Assistance with them, issuing Vouchers or Letters of Priority Entitlement to the Residents, and, in the case that the project goes into foreclosure, issuing RD vouchers to the remaining residents.

A plan for implementing the non-program designation must be established to remove the property from the program.[212] The plan must balance the agency's financial interests, protect the residents' housing interests and ensure that the designation does not provide the owner with undue rewards. Owners may be allowed to prepay developments in accordance with the RD prepayment process or to retain the property and pay off the loan on non-program rates and terms.[213]

D. Accelerating and Foreclosing on Loans

RD must decide whether liquidation is appropriate when a borrower defaults on multi-family housing loan. The final decision to liquidate a loan is vested in the State Director on advice and counsel of the Office of General Counsel.[214] To make the decision, the local loan servicer must provide the state director with

- an opinion whether the borrower is forcing the acceleration to circumvent the prepayment restrictions;
- a recommendation on the method of conducting the liquidation;
- a summary of efforts to work out a solution short of liquidation;
- a current appraisal conducted by an authorized agency official and an estimate of the net amount that the agency may recover from the sale of the development;

[210] The *Turner* Court suggested that the residents' may have been denied due process under 42 U.S.C. § 1480(g) when the agency failed to give them an opportunity to appeal the project's suitability determination. In addition it cited to the National Housing Goals, 42 U.S.C. § 1441, and the anti-displacement provision in 42 U.S.C. § 1471(g), to conclude that RD must operate its program in a manner that furthers the national housing goals and avoid resident displacement by aiding low-income persons and families obtain and remain in affordable safe and sanitary housing. *Turner* at 7.
[211] RD Handbook 3-3560, Ch. 6, ¶ 6.9.
[212] *Id.* at Ch. 6, ¶ 6.9 A.
[213] *Id.* at Ch. 6, ¶ 6.9 A and B.
[214] *Id.* at Ch. 12, ¶ 12.5 A.

- the agency's case file, most recent balance sheet from the borrower, a current statement of the status of the account and the problem case report.[215]

Unfortunately, RD has not set out any criteria for making the determination of whether the owner is forcing the acceleration to avoid the prepayment restrictions and does not seek input from residents or other persons who know or may have worked with the owner to understand the reasons for the default. In the past, RD took the position that an owner who filed a request to prepay a loan within the last year was using the liquidation process to avoid the prepayment restrictions.[216] This was not very effective when an owner familiar with RD requirements intentionally avoids filing a prepayment request. Indicia that should be considered in making the determination should include the fiscal and physical condition of the development, the owner's financial position and capacity to pay off the loan, the number of units in the development receiving Rental Assistance, the project's recent vacancy record, length of the waiting list, actions taken by the landlord to displace residents, deferral of maintenance, surrounding rental market and conditions, remaining term of any use restrictions, remaining loan term, and whether the owner has prepaid other RD loans.

RD may refuse to accept the owner's prepayment offer if it believes that the owner is using the foreclosure process to avoid the use restrictions. RD does not specify what it will do in that case, but it may offer the owner incentives to cure the default or stay in the program, force the owner to specifically perform on the contract, or seek to have a receiver appointed to operate the development.[217]

If the agency concludes that the owner is not using the default and foreclosure process to circumvent the ELIHPA prepayment restrictions, RD will accelerate the loan and allow the owner to cure the default or pay off the loan in accordance with state law. This may involve the owner agreeing to cure the default, transferring the property to another borrower, or deeding the property to RD in lieu of foreclosure. It may also involve the owner's filing of bankruptcy.

If the owner does not cure or pay off the loan, RD's foreclosures process will vary depending on whether the state has a judicial or non-judicial foreclosure practice. In non-judicial foreclosure states, where RD and others use deeds of trust to secure real estate loans, the agency will advise the trustee to notice the default and proceed to a non-judicial foreclosure as required by state law.

In states that use mortgages to secure real estate loans, RD will also commence judicial action that seeks the court's permission to proceed to a formal foreclosure sale.

Foreclosure is not the only option that RD has in dealing with owners of multi-family housing. It can sue on the contract and ask the owner to specifically enforce the owner's contract obligations. RD, however, is not known to use this option. In rare cases, it will seek to have an

[215] *Id.*
[216] *See* 7 C.F.R. § 1965.223(a)(1994).
[217] 7 C.F.R. § 3560.456(a).

owner replaced by a receiver who will continue to operate the development. This is an alternative way in which RD will deal with owners who have defrauded RD.

Foreclosure has significant consequences for residents of developments against which a foreclosure action has been commenced. This is because RD will rarely sell the development subject to use restrictions and will typically lower the bid requirements to the point that it is assured that the project will be sold to third parties instead of remaining in RD's inventory.

V. Litigation and Strategy Issues

TOPIC	KEY QUESTION	RELATED QUESTIONS
Parties Involved	Who are the plaintiffs?	How many affected tenants at the property may be willing to be plaintiffs? Are there a sufficient number to form a class and can your organization represent them to get project-wide relief?
		Do the individual tenants fear retaliation by the owner such that it is better to use pseudonyms (i.e. Pat Doe) or forming an informal Tenant Association when filing the complaint?
		If you are challenging RD, Is there a local nonprofit whose interests are injured by the prepayment, mortgage maturity, or foreclosure of the property? This may prevent mooting the action if the individual tenant claims are met before the case is resolved.
	Who are the defendants?	Has the owner and/or RD's local, state office and/or national staff violated the law? Does the owner own other RD-subsidized properties in your community in which the residents are also affected?
		Is the owner a limited partnership and if so, who do you need to name as a defendant?
Defining Harm	What is at risk for the plaintiffs?	Will the prepayment/ mortgage maturity/foreclosure lead to resident dislocation or homelessness and/or rent overburden (increase tenant rent contribution to more than 30% of income) for individual tenants? (*See Section II.I, supra)*
		If the tenants are being offered RD vouchers, did they have a utility allowance prior to prepayment? If so, are they incurring a "rent" increase by having to pay their own utilities after the prepayment?

		Will the residents incur a rent increase during the voucher term because the RD voucher subsidy is frozen (e.g. may they have an increase in family size, loss of income, or potential loss of a family member)? Is it likely that the owner will increase rents after the first year? Do the residents have other more favorable protections that they have not been advised about?
		Will the nonprofit suffer harm because it has to assist families find alternative housing or help them offset rent increases?
		How immediate is the harm? Is a temporary restraining order/preliminary injunction necessary to prevent the harm?
		If RD is foreclosing on a property, has RD delayed the foreclosure to ensure that the residents have alternative housing to which they can relocate?
		Does the owner own other RD-subsidized properties in the community/ state? Are those other properties also at risk of prepayment or mortgage maturity? Has the same owner filed other loan prepayment applications for those other properties? Has the owner already prepaid other loans?
Preservation Strategy	What are the risks of pursuing litigation or particular relief?	Is there an impending mortgage maturity? If so, could a prepayment application actually protect tenants (e.g. making them eligible for vouchers), who would otherwise receive significantly fewer protections at the time of the mortgage maturity? (*See Section III.B, supra)*
		Is there a potential nonprofit or public agency that is willing to purchase the property? If not, what are the risks of pursuing litigation to stop or set aside the prepayment? (*See Section II.G, supra)*. Should you consider more limited relief such as enforcing use restriction?
		How may RD and/or the owner seek to preemptively moot the tenants' case?

Tenant Education and Rights	Have tenants been notified or, and provided the opportunity to, enforce their rights?	Have tenants been provided adequate notices under federal, state, and local law? (*See Section II.C, supra)*
		Have tenants been provided the ability to appeal RD's adverse decisions (*e.g.* approval of prepayment)? (*See Section II.C, supra)*
		Has RD failed to adequately advise tenants of their rights under the current unexpired lease, use restrictions, RD voucher program, LOPEs, and/or transferring Rental Assistance? (*See Section II.H, supra)*
		Has RD provided written notice of the prepayment acceptance to each tenant? (*See Section II.H, supra).* Has RD notified tenants if the prepayment is expected to result in increased tenant rent?
Owner Actions	How has the owner's actions negatively affected the plaintiffs?	Has the owner taken any retaliatory action against the plaintiffs for their involvement in contemplating or carrying out the litigation? Does your state have retaliatory eviction protections?
		Are owners of developments that have prepaid RD loans abiding by use restrictions that were imposed as a condition of prepayment? (*See Section II.H&I, supra)*
		Has the owner required tenants to recently sign new leases and/or pay increased rent? Could those increases have been delayed under the tenant's existing lease?
		Has the owner violated applicable state law?
RD Actions	How has the RD state office and/or RD headquarters negatively affected the plaintiffs?	Is RD administering its programs, such as the Section 515 program, in violation of the general goal of 42 U.S.C. §§ 1441and 1471(g) National Housing Goals and obligation to act in a manner "consistent with program goals and objectives, so that the involuntary displacement of families and businesses is avoided"?
		Has RD failed to offer incentives to the owner? (*See Section II.D, supra)*

		Has RD used the regulatory "disproportionately adverse" standard instead of the conflicting statutory "material affect" standard to assess the impact of the prepayment on minority housing opportunities? (*See Section II.E, supra)*
		Has RD used the regulatory "disproportionately adverse" standard instead of the conflicting statutory "material affect" standard to assess the impact of the prepayment on minority housing opportunities? (See Section II.E, supra)Is RD requiring the owner to offer to sell the property at its market value to a nonprofit or public entity who will maintain the property's affordability? (See Section II.E, supra)
		Has RD determined that there is adequate comparable housing for tenants to move to in the community as of the date of prepayment? Is such determination accurate? (*See Section II.F, supra)*
		Is RD requiring the owner to offer to sell the property at its market value to a nonprofit or public entity who will maintain the property's affordability? (*See Section II.E, supra)*
		Has RD failed to notify local, regional, and national nonprofit organizations and public entities that the owner is offering the property for sale? (*See Section II.D, supra)*
		Has RD failed to notify each tenant in writing of the proposed sale to a nonprofit or public entity or the owner's acceptance of incentives and use restrictions? (*See Section II.D, supra)*Has RD failed to notify local, regional, and national nonprofit organizations and public entities that the owner is offering the property for sale? (*See Section II.D, supra)*
		Has RD determined that no nonprofit or public entity has provided a bona fide offer to purchase the property? (*See Section II.G, supra).*
		Has RD agreed to accept the prepayment? (*See Section II.H, supra)* Do the conditions under which a prepayment was approved by RD violate ELIHPA, RD regulations, and RD handbooks? (*See*

		Section II.E, supra). What are the terms of any applicable use restrictions and are they at risk of being terminated? (*See Section II.H, supra).*
		Has RD offered and issued vouchers to residents of Section 515 housing without regard as to whether the household is moving from or staying in the development, or whether the prepayment was or will be subject to use restrictions? Is this encouraging Section 515 owners to prepay their loans and convert developments to market rate housing?
		Has RD's practice of only allowing residents to apply for rural vouchers after the loan prepayment, negatively affected tenants' housing stability (e.g. has the tenant's rent gone up before RD has issued vouchers)? (*See Section II.I, supra)*
		Has RD's practice of requiring a household member to transfer and use its Rental Assistance within four months negatively affecting tenants' housing stability (*e.g.* are residents able to move within 4 months, are they locked into a new lease before they can move)?
		Is RD administering its programs, such as the Section 515 program, in violation of 42 U.S.C. 3601, *et seq.*, which obligates RD to administer its programs, activities, and decisions related to housing and urban development in a manner which affirmatively furthers fair housing?
		Has RD failed to issue LOPEs, RD vouchers, or Rental Assistance to tenants? (*See Section II.H&I, supra)*
Relief	What relief is needed to support Plaintiffs and prevent future unlawful action?	Consider declaratory and injunctive relief against RD and/or the owner.

VI. Conclusion

Prepayments, mortgage maturities, and foreclosures of RD-subsidized properties create significant risks and hardships for tenants in rural communities. Tenant advocates should be sure to monitor the status of RD-subsidized properties in their communities, and challenge RD and owner practices that fail to comply with local, state, or federal law.

For more information about RD housing programs, and to contact NHLP staff, please visit the National Housing Law Project's website at http://nhlp.org**.**

VII. Appendix

A. Legal Authorities

Here are the key legal authorities that that impact prepayments, mortgage maturities, and foreclosures:

- *Statutes*:
  - 42 U.S.C. § 1472(c) (Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)), Pub. L. No. 100-242, § 202 (b), 101 Stat. 1877, 1878 (1988). ELIHPA was enacted by Congress in 1988 to limit the prepayment of Section 515 loans and the displacements of occupants financed under the program.
  - 42 U.S.C. § 1471(g) ("The programs authorized by this subchapter shall be carried out, consistent with program goals and objectives, so that the involuntary displacement of families and businesses is avoided.")
  - In 2005, Congress, through an appropriations act, made available funding for the operation the RD voucher program, authorized by 42 U.S.C. § 1490r, but put severe restrictions on its operation. Authorization and funding for program has continued, subject to the same restrictions, every year since 2006 through the annual appropriations process. *See* Pub. L. 115-141, Div. A, Title III (March 23, 2018) (Consolidated Appropriations Act, 2018).
  - 42 U.S.C. § 1441 (Congressional declaration of national housing policy) ("the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family").
- *Regulations*:
  - 7 C.F.R. part 3560 (Section 515 Rural Rental Housing loan regulations); Subpart N is devoted to rental housing preservation (§§ 3560.651—3560.664).
- *Handbooks and Guidebooks*[218]
  - MFH Project Servicing Handbook 3-3560, Chapter 15 (RD handbook chapter on Section 515 preservation).
  - MFH Project Servicing Handbook 3-3560, Chapters 6 and 12 (Determining Project Suitability and Account Liquidation).

[218] *Handbooks*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://www.rd.usda.gov/publications/regulations-guidelines/handbooks.

- *Rural Development Voucher Program Guide*, U.S. DEP'T AGRICULTURE, Sept. 2010.[219]
- HB-1-3560 (Section 514 & 515 loan origination).
- HB-2-3560 (Section 514 & 515 asset management).

- *Federal Register, Administrative Notices,[220] and Unnumbered Letters[221]*
  - 82 Fed. Reg. 21,972 (May 11, 2017) (RD Federal Register notice regarding the operation and administration of the Rural Development Voucher Demonstration Program).
  - 78 Fed. Reg. 49374 (Aug. 14, 2013) (RD voucher program proposed rules that have yet to be finalized).
  - Unnumbered Letter, *Management of Payoffs in Multi-family Housing* (Dec. 28, 2016) (available as of March 22, 2018 at https://www.rd.usda.gov/files/RDUL-Payoffs.pdf.)
  - RD Unnumbered Letter (April 10, 2009) (announcing changes to Rural Voucher Program)

- *Key Cases*:
  - **Prepayment**
    - *Lifgren v. Yeutter*, 767 F.Supp. 1473 (D. Minn. 1991). In an action initiated by the residents of a Section 515 development with project-based Section 8 Assistance, the Court set aside the loan prepayment on the grounds that RD failed to offer incentives to the owner to keep the development in the Section 515 program as required by ELIHPA and for failing to include use restrictions in the release deed that would require the owner to keep the development in the 515 program past the expiration of the 20-year HUD HAP contract. In making the decision, the court determined that ELIHPA did not violated the Constitution, RD's unilateral recording of use restrictions after the prepayment was illegal and violated the owner's property rights and that RD failed to advise residents of the regulatory right to seek review of the prepayment decision.

[219] *Rural Development Voucher Program Guide*, U.S. DEP'T OF AGRICULTURE, Ch. 3, ¶ 3.3 (Sept. 2010), https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf.
[220] *Administrative Notices*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://www.rd.usda.gov/publications/regulations-guidelines/administrative-notices.
[221] *Unnumbered Letters*, U.S. DEP'T OF AGRICULTURE RURAL DEVELOPMENT, https://www.rd.usda.gov/publications/regulations-guidelines/unnumbered-letters.

- After *Lifgren* was decided, RD entered two consent decrees in cases initiated by residents of Section 515 developments by setting aside prepayments where RD also failed to make incentive offers to the owners. In the first case, *Clark v. Madigan*, 85 CV 73427 (D. Mich. May 21, 1991) (Consent Decree) RD agreed to refinance the prepayment and bring the development back into the Section 515 program and reinstate the Rental Assistance subsidy. In the second case, *Meehan v. Madigan*, C-91-1472R (W. D. Wash. Sept. 30, 1992) (Consent Decree), RD and the residents approved the sale of the development to a public housing authority with the use of Section 515 financing.

- *Parkridge Investors Ltd. v. Farmers Home Administration,* 13 F.3d 1192 (8th Cir. 1994). The Court of Appeals upheld lower court decision that ELIHPA is constitutional, application of ELIHPA to Parkridge's loan agreements did not violate the partnership's substantive due process rights, and that application of ELIHPA to the partnership's loan agreement did not result in a compensable taking under the Fifth Amendment.

- *Charleston Housing Authority v. U.S. Department of Agriculture*, 419 F.3d 729 (8th Cir, 2005). The Court of Appeals affirmed district court decision (336 F.Supp.2d 934 (E.D. Mo. 2004)), which held that the housing authority is not entitled to prepay its Section 515 loan even though it only owed a nominal amount on the loan due to earlier partial prepayments. It also held that in light of ELIHPA, the housing authority was not entitled to quiet title to the property when it proffered to pay the balance of the loan.

- *Owens v. Charleston Housing Authority*, 336 F. Supp. 2d 934 (E.D. Mo. 2004). The district court for the Eastern District of Missouri held that the housing authority owner of a Section 515 development could not prepay its loan even when it owed less than $200 and that its efforts to vacate and demolish the development violated the Fair Housing Act. The decision was affirmed in *Charleston Housing Authority v. U.S. Department of Agriculture*, 419 F.3d 729 (8th Cir, 2005).

- *Kimberly Assoc. v. U.S.*, 261 F.3d 864 (9th Cir. 2001). Court of Appeals reversed Idaho federal district court decision that owner of Section 515 development was not entitled to a state quiet title judgement and thereby nullify the ELIHPA prepayment restrictions. It agreed with the district court that the government had waived sovereign immunity to the state quiet title action but disagreed that the unmistakability doctrine applied to the case. Accordingly, it decided that the owner is entitled to quiet title voiding the government's effort to enforce the ELIHPA prepayment restrictions.

- *Goldammer v. United States*, 465 F.3d 1031 (9th Cir. 2006). Court of Appeals reversed Oregon district court decision, which, following *Kimberly, supra*, dismissed residents' effort to seek review of RD decision to accept prepayment of Section 515 loan without enforcing the ELIHPA's prepayment restrictions. (2005 WL 1307698 (D. Or. May 26, 2005)). The Court of Appeals held that residents are entitled to seek review under the Administrative Procedure Act (APA) of the agency's decision to accept prepayment of the RD Section 515 loan. The decision distinguished the Court of Appeal earlier decision in *Kimberly, supra,* and, thereby, halted all owners' efforts to bring quiet title actions to nullify the ELIHA prepayment restrictions on pre-1979 Section 515 loans. The decision also upheld the district court's decision denying the residents right to intervene in a related case between the owners of the prepaid Section 515 development and RD, holding that the residents had ample opportunity to pursue their claims in their APA case. (*DBSI/TRI V v. U.S.*).

- *Goldammer v. Veneman*, 2007 WL 1748665 (D. Or. June 14, 2007). Upon remand from the Court of Appeals, the district court held that RD accepted the prepayment of a section 515 loan in violation of ELIHPA and required that the development be brought back in to the Section 515 loan program.

- *McFalls v. Purdue,* 2018 WL 785866 (D. Or. Feb. 2, 2018) (order denying motion to dismiss). Residents of RD Section 515 development and a local nonprofit organization that assists residents on various housing matters, challenged RD's approval of an owner's prepayment request subject to use restrictions on the ground that RD regulations, requiring that determination of prepayment impact on minority housing opportunities be made on whether the prepayment had a disproportional adverse impact on minority housing opportunities, violated ELIHPA, which requires that determination be made on whether the prepayment had a material impact on minority housing opportunities. The residents also challenge RD's (1) failure to adopt standards for determining material impact of prepayments on minority housing opportunities resulting in disparate prepayment decisions in various RD state offices; (2) Oregon's state office's failure to make the prepayment decision without following its regulations and handbook; (3) failure to provide residents of prepaying development to appeal the prepayment approval and, thereby, violating the residents constitutional and statutory due process; (4) administration of the voucher program by, *inter alia* unnecessarily issuing vouchers to residents in developments that are subject to use restrictions thereby encouraging owners to prepay their loans; and (5) regulation authorizing the agency to remove prepayment restrictions when assistance provided to residents is terminated.

- In response to the Plaintiffs filing for a preliminary injunction, the government withdrew it prepayment decision believing that it did not properly consider everything the agency was required to consider and agreed to make a new prepayment decision. The agency, then, modified its decision requiring the owner to offer the development for sale to a nonprofit or public agency.

- After changing its prepayment decision, the government filed a motion to dismiss the case arguing that the plaintiffs no longer had standing to maintain their suit. The District Court rejected the government's decision on the ground that in cases where the government voluntarily ceases a challenged action due to the filing of litigation, the Voluntary Cessation Doctrine allows plaintiffs to maintain challenges to illegal actions that are likely to recur.

- **Enforcing Use Restrictions**

  - *Bayview Plaza Tenants Association v. Bouma*, 2:17-cv-01771-JLR (complaint filed D. Wash. Nov. 17, 2017). Residents and two tenant organization initiated action against RD and the owners that have prepaid the Section 515 loans for two developments subject to RD use restrictions. The action challenges the owners' termination of unexpired leases of residents in the development as of the date of prepayment and raising their rents to the RD approved market rent immediately upon prepayment. The suit also challenges RD's administration of the voucher program and its regulations authorizing the agency to lift the use restrictions should tenant voucher assistance be terminated. Temporary restraining order entered between the parties by consent.

- **Early Loan Maturation and Reamortization**

  - *Brown v. Vilsack*, No. 1:14-cv-01739-PA (D. Or., Nov. 3, 2014). Residents of Section 515 development for which the mortgage payments were ahead of schedule, making it likely that the loan was going to mature prior to the originally scheduled maturity date, brought an action against RD and the owner for RDs failure to advise the owner that its loan was maturing early and that it needed to either file a prepayment request or have the loan extended to the original maturity date, for its failure to advise the residents of the impending loan maturity and to take other steps to prevent the residents' dislocation. As a result of the litigation, the owner filed a prepayment request, making the residents eligible for RD vouchers, and then agreed to sell the development to a public housing authority that was already managing the development. To complete the sale, RD and the owner reamortized the loan to give the owner and the housing authority time to complete the sale.

- **Foreclosure**

  - *Turner v. Vilsack*, 2013 WL 60741114 (D. Or. Nov. 18, 2013). Court preliminarily enjoined RD's proceeding to foreclose on a Section 515 development which it was managing as a trustee for the agency's failure to follow its regulations and handbook in advising residents of its actions and failing to protect them against displacement or assisting them in finding alternative housing.

  - *Albany Apartments Tenants' Assoc. v. Veneman*, 2003 WL 1571576 (D. Minn. March 11, 2003). Tenants' challenge to RD's foreclosure of a Section 515 loan without the placement of use restrictions against the property and in violation of ELIHPA is rejected. The court held that ELIHPA only governed situations where owners offered to prepay loans and that a payment in response to a foreclosure is not an offer to prepay. The court also held that RD did not violate its regulation requiring the placement of use restrictions on a foreclosed property if the owner defaults on the RD loan within a year of having made an offer to prepay the loan. In this case the owner never applied to prepay the loan. Lastly, it also rejected the residents' claim that the regulation was arbitrary and capricious in light of ELIHPA.

  - *Schroeder v. United States,* 2007 WL 3028432 (D. Or., October 16, 2007). The district court held that ELIHPA precludes owner of a Section 515 development from prepaying the Section 515 loan as part of an action to quiet title to the property even though owner has proffered to pay the balance of the loan. Affirmed *Schroeder v. United States,* No. 07-36073 (9th Cir. June 22, 2009).

  - *Schroeder v. U.S.*, 683 F.Supp.2d 1129 (D. Or. 2010). In a separate proceeding Schroeder administratively challenged the RD Civil Rights Impact Analysis on the grounds that RD's finding that the prepayment would have an adverse impact on minority housing opportunities and that on affordable housing in the community were erroneous. The National

Appeals Division (NAD) hearing officer agreed with Schroeder and found that the data before the agency showed that there was no impact on either minorities or the supply of affordable housing. The hearing decision also stated that it was a final agency action. When RD failed to seek review of the decision by the Director of the NAD, Schroeder commenced and action to enforce the NAD decision. The court agreed with Schroeder and ordered RD to accept the prepayment clear of any restrictions.

- **Owners' Right to Damages**

  - *Franconia Associates v. U.S.*, 122 S.Ct. 1993 (June 10, 2002). The Supreme Court held that the ELIHPA prepayment restrictions constituted a Fifth Amendment taking of Section 515 owners' property interest and that they are entitled to damages. The Court remanded the case to the Court of Claims for the determination of the damages that the owners were entitled to.

  - As a result of *Franconia*, RD has paid well over a $100 million in damages to Section 515 owners. Cases based on *Franconia* continue to be filed against the agency in the Court of Claims and RD is continuing to pay out damages in response. *See e.g.* Sonoma Apartment Assoc. v. U.S., 134 Fed. Cl. 90 (Nov. 3, 2017), *Henry Ltd. P'ship v. United States*, 95 Fed. Cl. 250 (2010).

  - **NOTE**: owners that have been paid damages pursuant to ELIHPA and its progeny have been forced to sign a 20-year extension of their obligation to maintain the development as affordable housing. Thus, many 515 developments have been preserved as part of the litigation.

B. Example Pleadings and Case Materials

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Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

LILY HILBURN, LISA MCFALLS, MICHAEL MCFALLS, FRED WOODRING, and COMMUNITY ACTION RESOURCE ENTERPRISES, INC., an Oregon not-for-profit organization, Plaintiffs, v. THOMAS VILSACK, Secretary of the Department of Agriculture; LISA MENSAH, Undersecretary for Rural Development; TONY HERNANDEZ, Administrator Rural Housing Service; VICKI L. WALKER, Oregon Rural Development State Director; GAYLORD GEORGE & VICKY SHIVELEY REVOCABLE TRUST; and VICKY F. SHIVELEY, Trustee, Defendants.	Case No. 3:16-cv-02116-SB AMENDED COMPLAINT 5th Amendment to U.S. Constitution, 5 USC §706(1) and (2), 24 U.S.C. 3601, et seq.

PRELIMINARY STATEMENT

1. Individual plaintiffs are very low-income renters who live in federally subsidized housing in Tillamook, Oregon, at the Golden Eagle II apartment building (Golden Eagle II). Golden Eagle II is a 32-unit Section 515 rental project that is financed and deeply subsidized by defendant Rural Development (RD).[1] RD's unlawful actions are threatening plaintiffs' federal benefits, including tenant protections, and will result in the loss of Plaintiffs' homes as a subsidized housing project.

2. RD has approved the request of the defendant owner and operator of Golden Eagle II, the George Gaylord & Vicky Shiveley Trust (Shiveley Trust), to prepay the loan that financed the construction of Golden Eagle II. Prepayment of the loan would occur as part of a sale to a third party buyer. RD intends to process the prepayment on or after November 18, 2016.

3. RD's prepayment approval was granted in violation of federal law intended to preserve Section 515 rental housing and to protect its residents from displacement and in violation of plaintiffs' statutory and Constitutional due process rights. RD's actions also contravene its obligations to Affirmatively Further Fair Housing under the Fair Housing Act. [2]

4. Tillamook County Community Action Resource Enterprises, Inc. (CARE), organizational plaintiff, relies upon the few subsidized housing projects in Tillamook County as a resource for its low-income clients who need access to safe, decent, sanitary and affordable housing. Affordable housing, let alone subsidized rental housing projects, is already scarce in

[1] The Rural Housing Service (RHS) is the agency within the U.S. Department of Agriculture (USDA) that is vested with responsibility for administering the rural housing programs authorized by Title V of the Housing Act of 1949. (codified at 42 U.S.C. § 1471 *et. seq.*). Notwithstanding, all the rural housing programs, including the Section 515 rental housing program, are administered in all the states by Rural Development (RD), a USDA mission area. References throughout this complaint are made to RD instead of RHS or USDA to avoid confusion.
[2] 42 U.S.C. 3608(d)

Tillamook. Loss of another subsidized building would exacerbate the unavailability of affordable housing for low-income Oregonians and particularly for CARE's clients.

5. Plaintiffs seek injunctive and declaratory relief to ensure that before Golden Eagle II is removed from the Section 515 program by the loan prepayment, federal defendants extend to plaintiffs all the protections that Congress intended.

JURISDICTION AND VENUE

6. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1343(a) (3) and (4), and 1361, in that plaintiffs' claims arise under the Fifth Amendment to the Constitution of the United States, the Administrative Procedure Act, and the Amendments to the Fair Housing Act. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper pursuant to 28 U.S.C. § 1391 because at least one defendant is a resident of this District and a substantial part of the events, acts or omissions giving rise to plaintiffs' claims occurred here.

PARTIES

8. Plaintiff Lily Hilburn is a very low-income resident of Golden Eagle II who pays $227 per month for a one-bedroom apartment under the terms of a written rental agreement which began in 2015 and has been renewed annually since. She receives Rental Assistance, an RD rental subsidy, which reduces her portion of the rent to 30% of her income. Ms. Hilburn is 77 years old and her sole source of income is Social Security Retirement of $791 per month.

9. Plaintiffs Michael and Lisa McFall are very low-income married residents of Golden Eagle II who pay $220 per month for a two-bedroom apartment under the terms of a written rental agreement which began in March 2015 and has been renewed annually since. Prior to March 2015, they lived in a studio apartment owned by the Shiveley Trust for

approximately one year. They receive Rental Assistance. Mr. and Mrs. McFall are aged 40 and 37 respectively, and both have disabilities. Their sole source of income is Mr. McFall's Social Security Disability Income of $733 per month.

10. Plaintiff Fred Woodring is a very low-income resident of Golden Eagle II who pays $220 per month for a studio apartment under the terms of a written rental agreement that began in March 2013 and has been renewed annually since. He receives Rental Assistance. When he initially moved in, Mr. Woodring did not receive Rental Assistance. He paid $530 per month in rent; approximately 43% of his income. He was on the waitlist for Rental Assistance for twenty months before he was approved. His primary source of income is Social Security Supplemental Security Income of $733 per month.

11. Plaintiff Tillamook County Community Action Resource Enterprises, Inc. (CARE) is a non-profit service agency based in Tillamook, Oregon; its mission is to ease the effects of poverty in the county by providing housing, emergency, and limited financial assistance services to low-income households in the county. CARE's client population includes racial and ethnic minorities. CARE relies upon local subsidized housing projects, including Golden Eagle II, as a resource for its clients who need access to safe, decent, sanitary and affordable housing. Loss of a building's subsidy diverts CARE's limited financial and staff resources to provide additional assistance to that building's resident households and to attempt to place other households in more expensive market rate housing. RD's removal of Golden Eagle II from a subsidized status will frustrate CARE's mission.

12. Defendant Thomas Vilsack, the Secretary of the United States Department of Agriculture (USDA), is statutorily vested with the authority to operate the rural housing

programs authorized by Title V of the Housing Act of 1949, 42 U.S.C. §§ 1471 et. seq. Defendant Vilsack is sued in his official capacity.

13. Defendant Lisa Mensah is the Under-Secretary for Rural Development. The rural housing programs are administered and overseen by the RD mission area of USDA. Defendant Mensah is sued in her official capacity.

14. Defendant Tony Hernandez is the Administrator of the Rural Housing Service (RHS), and is responsible for the day-to-day administration of USDA rural housing programs at the national level. Mr. Hernandez also has the title of RD Administrator of Housing and Community Facilities Programs. Defendant Hernandez is sued in his official capacity.

15. Defendant Vicky Walker is the RD State Director for Oregon. She is responsible for the day-to-day administration of the RD housing programs in Oregon. On information and belief, Ms. Walker, or a RD employee under her direction and control, oversees the operation of Golden Eagle II and is responsible for processing prepayment requests submitted from Oregon owners of RD-financed rental housing. Defendant Walker is sued in her official capacity.

16. On information and belief, Defendant George Gaylord & Vicky Shiveley Trust (Shiveley Trust) is the owner of Golden Eagle II. Defendant Shiveley Trust is joined in this case as a Necessary Party under Fed. R. Civ. P. 19(a).

17. On information and belief, Defendant Vicky Shiveley is the sole current trustee of the Shiveley Trust and manages day-to-day business for Golden Eagle II. She is a resident of Tillamook, Oregon. Defendant Shiveley is joined in this case as a Necessary Party under Fed. R. Civ. P. 19(a).

FACTS

A. Golden Eagle II loan and subsidy history.

18. Golden Eagle II is a 32-unit development located in the City of Tillamook, Tillamook County, Oregon, that is financed by USDA under Section 515 of the Housing Act of 1949, 42 USC § 1485. Occupancy is limited to persons of low and moderate income. 7 C.F.R. 3560.152.

19. Golden Eagle II has twelve studio apartments, twelve one-bedroom apartments and eight two-bedroom apartments. One of these units is occupied by an on-site manager.

20. Twelve units are rented to tenants at reduced rents under the RHS Interest Credit program authorized by 42 U.S.C. § 1490a(a)(1) (B). Minimum rents for these units, called the 'basic rent,' are set by unit size by adding the cost of operating the development and amortizing the RD loan at 1% interest. Residents in these units pay the higher of the basic rent or 30% of their income. Monthly rents for these units at Golden Eagle II range from $530 to $915.

21. Nineteen of the thirty-one rental units at Golden Eagle II are deeply subsidized under the RD Rental Assistance program authorized by Section 521 of the Housing Act of 1949, allowing the tenants of to pay 30% of their income for shelter, which includes rent and utilities. 42 U.S.C. § 1490a(2)(A); *see* 7 C.F.R. § 3560.11. Individual plaintiffs each receive Rental Assistance and their monthly rents range from $220 to $227.

22. The USDA loan for Golden Eagle II was entered on February 27, 1976, for a term of 50 years, with the final loan payment scheduled for February 27, 2026. The original borrowers were George Gaylord Shiveley and Millie Shiveley. On information and belief, ownership has subsequently been transferred to defendant Shiveley Trust, of which Vicky Shiveley is the sole trustee.

B. USDA loan prepayment statutory history.

23. Any mortgage payment that retires a USDA mortgage prior to its original maturity date is a "prepayment." 7 C.F.R. §3560.11. It is then subject to the prepayment restrictions of 42 U.S.C. § 1472(c) and RD regulations codified at 7 C.F.R. Part 3560, Subpart N.

24. Prior to 1987, there were no restrictions limiting the rights of Section 515 project owners to prepay their mortgages and leave the program. Responding to increased prepayments of Section 515 loans in the early to middle 1980s and the negative impact of those prepayments had on residents – severely increased rents and displacement due to loss of rental subsidies – Congress enacted detailed legislation to preserve Section 515 projects as affordable housing by restricting the loan prepayment rights of owners who had entered Section 515 loans before December 21, 1979. The Emergency Low Income Housing Preservation Act of 1987, P.L. 100-242 (Feb. 5, 1988) (ELIHPA). The rural provisions of this act, as amended in 1992, are now codified at 42 U.S.C. § 1472(c).

C. Statutory and regulatory procedure for a pre-1979 prepayment request.

25. Within 30 days of receiving a complete prepayment request, RD must notify the residents of the development about the owner's request to prepay the loan. 7 C.F.R. § 3560.654.

26. Once a complete prepayment request has been submitted, RD has 60 days to determine the eligibility of the loan for prepayment and whether the borrower has or will comply with applicable prepayment laws and regulations. If the owner's prepayment request meets these and other requirements, RD must offer incentives to the owner to remain in the program. 42 U.S.C. § 1472(c)(3) and 7 C.F.R. § 3560.653(e).

27. If the owner rejects the incentives, RD must determine whether the prepayment will materially affect housing opportunities of minorities in the project, on the waiting list or in

the market area. 42 U.S.C. § 1472(c)(5)(G)(ii)7 C.F.R. 3560.658(b). In doing so, RD is required, at a minimum:

> 1) to consider the percentage of minorities residing in the project and the percentage of minorities residing in the projects in the market area where displaced tenants are most likely to move;
>
> 2) to consider the impact of prepayment on minority residents in the project and in the market area;
>
> 3) to determine whether displaced minority tenants will be forced to move to other low-income housing in areas not convenient to their places of employment, to areas with a concentrated minority population and/or to areas with a concentration of substandard housing;
>
> 4) to determine the vacancy trends and number of potential minority tenants on the waiting list at the project being prepaid and at other projects in the market area that night attract minority tenants; and
>
> 5) to determine the impact prepayment will have on the opportunity for minorities residing in substandard housing in the market area to have comparable decent, safe and affordable housing, as is offered by the project being prepaid.

RD Handbook 3-3560, Chapter 15, ¶15.22.

28. If RD determines that prepayment will materially affect housing opportunities of minorities, the owner must, for 180 days, offer to sell the development at its market value to a nonprofit or public agency which would maintain the development's affordability. 42 U.S.C. §§ 1972(c)(5)(A) and 1972(c)(5)(G).

29. If there is no material effect on minority housing opportunities, RD must then determine if there is adequate comparable alternative housing in the community to which the current residents of the development can relocate. If adequate comparable affordable housing is available, the owner is free to prepay the loan. If RD determines that there is not adequate comparable alternative housing, the owner can only prepay the loan subject to use restrictions that protect the current residents as long as they choose to live in the development. 42 U.S.C. § 1472(c)(5)(A) and 7 C.F.R.§ 3560.658(b)(3).

30. Sample use restrictions that RD may impose on owners to protect current residents are set out in RD Handbook 3-3560, Chapter 15, Att. 15-E-2, by statutory reference only. Under the use restrictions, rents, other charges, and conditions of occupancy should be set so that the existing residents will continue to be treated as if project remained in the Section 515 program. *Id.* ¶ (4). Not specifically mentioned in these sample use restrictions are tenant protections currently required by 7 C.F.R. §§ 3560.156(b) and 3560.156(c).

31. 42 U.S.C. § 1471(g) obligates RD to administer its programs, such as the Section 515 program, "consistent with program goals and objectives, so that the involuntary displacement of families and businesses is avoided."

32. 42 U.S.C. 3601, et seq., obligates RD to provide fair housing and not to discriminate in the conduct of the housing programs each operates. RD is therefore obligated to administer its programs, activities and decisions related to housing and urban development in a manner which affirmatively furthers fair housing. In addition, RD is required to make affirmative efforts to overcome the effects of conditions that resulted in limiting housing opportunities for

minority individuals. 42 U.S.C. §3608(d), Executive Orders 110638 and 12892, *see* RD Instructions 2000-GGG, Ex. A, ¶ 3 (Jan. 7, 1998).[3]

33. RD has not promulgated guidance and instructions for staff regarding the implementation of its obligation to affirmatively further fair housing in its programs, guidance and methods of administration. As a result, RD lacks approval criteria for prepayment requests that ensure the approval affirmatively furthers fair housing, regardless of whether the approval criteria conform to other statutory anti-discriminatory provisions.

34. RD has promulgated guidance and instructions for staff regarding the implementation and integration of environmental justice and socioeconomic considerations into all Agency programs' environmental reviews pursuant to Executive Order 12898. RD Instruction 1970-E § 1970.202 (g); RD Instruction 2006-P, "Civil Rights Impact Analysis," (issued on September 18, 2002). This guidance does not incorporate the obligation to affirmatively further fair housing.

35. Under RD authorizing statutes and regulations, once a loan is prepaid all subsidies that reduce the rents to residents, including Interest Credit and Rental Assistance, cease. 42 U.S.C. §§ 1490a(a)(1)(B) and 1490a(2)(A); *see* 7 C.F.R. § 3560.11.

D. RD's deficient prepayment impact analysis.

36. Defendants Shiveley Trust and Vicky Shiveley submitted an application to RD on or about May 27, 2015, to prepay the loan before its maturity date.

37. On or about June 22, 2015, RD advised Golden Eagle II residents that the loan will be prepaid ahead of its original maturity date but did not advise them of an opportunity to appeal the agency's decision regarding prepayment.

[3] Available at http://www.rd.usda.gov/files/2000ggg.pdf.

38. On or about November 20, 2015, RD conducted a Civil Rights Impact Analysis (CRIA), using RD Form 2006-38 (July 2007), concerning the prepayment of Golden Eagle II. In that analysis, RD calculated that 10% of Golden Eagle II households are minorities after noting that three out of thirty households occupying the project were classified as Hispanic households. Two of the eight applicant households on the waiting list as of November 2015 were classified by RD as Hispanic but were not included in the CRIA calculation. Had waitlisted households been included in the calculation, the percentage of minority households living in the project and on the wait list would have been 13%.

39. RD did not identify in the CRIA whether other non-Hispanic minority households live in Golden Eagle II or are on its waiting list. RD did not distinguish whether the Golden Eagle II minority residents were very low income recipients of Rental Assistance or low income Interest Credit recipients. RD did not identify how many persons comprised each household either living at Golden Eagle II or on its waitlist. RD also did not identify the number of individuals within the affected area (1) whose median household income is at or below Department of Health and Human Services poverty guidelines, or (2) whose median income is at or below the Department of Housing and Urban Development 80% and 50% of area median income guidelines. RD calculated the percentage of minority individuals in the county by merely adding the percentage of Hispanic people to the percentage of non-white people.

40. Golden Eagle II is within three miles of the largest employment centers in the county: Tillamook Creamery, Fred Meyer, Adventist Hospital, and the County of Tillamook. The next largest employer, Tillamook Smoker, is 8 miles away. RD failed to consider any impact of prepayment on the employment opportunities of low-income minority households within the area.

41. RD ended the CRIA analysis by comparing non-equivalent categories. It concluded there would not be a disproportionate adverse impact on minority housing opportunities because the percentage of low-income minority *households* living at Golden Eagle II was less than the percentage of minority *individuals* at any income within the county. RD did not consider the impact prepayment would have on the minority housing opportunities of low-income minorities who would qualify to live at Golden Eagle II by virtue of their low-income within the census tract, within the city, or within the county.

42. The Oregon Department of Human Services has determined that Golden Eagle II is located within a census tract with a population that is 24% minority and 35% in poverty, while the county population as a whole is 16% poverty and 14% minority. [4] 45% of the residents of this census tract are renters while 17% of the county population are renters. Within the county as a whole, 45.7% of Hispanics, 33.9% of the African-Americans and 26.7% of the Native Americans within the county are in poverty.[5]

42. The owners of Golden Eagle II, including defendants Shiveley and Shiveley Trust, are obligated under 42 U.S.C. §3601, et seq., to not discriminate in the conduct of the operation or management of the rental units at Golden Eagle II Apartments. 7 C.F.R. §3560.104(a) obligates the owners of Golden Eagle II to comply with the requirements of 42 U.S.C.§3601 et seq. and 7 C.F.R. §3560.104(b) through (d) in order to comply with their fair housing responsibilities. Pursuant to 7 C.F.R. 3560.104(b), defendants Shiveley and Shiveley Trust are obligated to prepare and maintain an Affirmative Fair Housing Marketing Plan (AFHMP) as

[4] Oregon Department of Human Services, Office of Forecasting, Research, & Analysis. May 2015 report available at http://www.oregon.gov/dhs/business-services/ofra/Documents/High%20Poverty%20Hotspots%20Tillamook.pdf.
[5] Community Action Partnership of Oregon and Oregon Department of Housing and Community Services joint report. "Moving to Posterity." November 2015. Available at https://www.oregon.gov/ohcs/pdfs/2015-Report-on-Poverty.pdf.

defined in 24 C.F.R. part 200, sub part M. Specifically, defendants Shiveley and Shiveley Trust are obligated under 7 C.F.R. 3560.104(b)(4) to design the AFHMP and marketing activities to attract applications for occupancy from all potentially eligible groups of people in the housing marketing area, regardless of protected class status and to develop methods of marketing best suited to reach those very low-income or low-income groups in the market area but who are least likely to apply for occupancy. On information and belief, the owners of Golden Eagle II, including defendants Shiveley and Shiveley Trust, intentionally or negligently failed to engage in all requirements of an Affirmative Fair Housing Marketing Plan. Because of the lack of, or inadequate, marketing and advertisements directed to potential minority applicants within or immediately adjacent to the market area, the number of low-income minority households or persons currently residing at Golden Eagle II is substantially less than the low-income minority population qualified to live at Golden Eagle II in the census tract in which it is located or the housing market area.

43. RD did not adequately review and supervise the Affirmative Fair Housing Marketing Plan for Golden Eagle II, contrary to its obligation to affirmatively further fair housing, and did not ensure minority households would receive adequate notice of housing opportunities. As a result, the percentage of minority tenants living at Golden Eagle II or minority applicants on the waitlist is substantially less than the minority population within the census tract where the project is located or even than within the county.

44. RD did not assess the impact that the Golden Eagle II prepayment will have on the housing opportunities of minority residents of Tillamook City and County, which contravened its obligation to affirmatively further fair housing.

45. Because RD concluded there would be no disproportional adverse impact on the housing opportunities of minorities, RD preliminarily authorized the prepayment of the Golden Eagle II loan and did not require the owner to offer for 180 days to sell the development to non-profit or public agencies.

46. The Northwest Oregon Housing Authority (NOHA), a non-profit corporation, owns several affordable housing projects in Tillamook City and the county. NOHA also operates a Housing Choice Section 8 Voucher program for residents of the county. The waitlist for vouchers is currently closed and the length of time for an applicant to receive a voucher is approximately one and a half years. NOHA is interested in buying Golden Eagle II at market value and operating it as affordable housing.

E. RD's failure to provide Golden Eagle II residents the due process rights accorded them by the Constitution, 42 U.S.C. §1480(g), 7 U.S.C. § 4991 *et seq.*, and RD regulations codified at 7 C.F.R. part 11 and RD's failure to offer substantially equivalent benefits to residents.

47. The prepayment has been approved and is currently scheduled to occur on or about November 18, 2016.

48. On September 19, 2016, RD sent a notice to residents advising them of its decision to allow the prepayment request to go forward. That notice failed to provide tenants with an opportunity to appeal the agency's decision to approve the prepayment request and thereby terminate tenants' rental subsidies.

49. RD has authority to provide residents of prepaid development vouchers to help them remain in their homes or find alternative housing. Rural Development Voucher Program Notice, 81 Fed. Reg. 42309 (June 29, 2016). However, the assistance provided to residents by

RD vouchers is substantially inferior to the assistance provided under the Rental Assistance program in that the amount of the voucher subsidy is set permanently as of the date of prepayment and does not change when rents increase or household income decreases. *Id.* ¶ II e and g. RD's authority to issue vouchers is limited by annual appropriations. *Id.*

50. In August of 2016, RD exhausted all voucher funding for Fiscal Year 2016. As of October 1, 2016, RD's authority to issue vouchers is governed by the Continuing Resolution passed by Congress on September 28, 2016. That Continuing Resolution expires on December 9, 2016.

51. On information and belief, RD does not advise residents of developments whose owners are about to prepay their loans of the limitations of the voucher program as compared to the Rental Assistance program, or the exact breadth of the use restrictions that it places on owners who prepay their loans.

52. In several instances, RD regulations and notices suggest that owners that prepay their developments do not have to follow all RD laws and regulations with respect to residents who remain in the development after the prepayment. *See e.g.* 7 C.F.R. § 3560.662(e)(4).

53. There is insufficient alternative comparable subsidized decent, safe and sanitary and affordable housing in Tillamook County to readily house individual Plaintiffs, other current residents of Golden Eagle II, and CARE clients who would be currently eligible to live at Golden Eagle II.

54. CARE's client population includes white individuals as well as racial and ethnic minority individuals. Most low- and very-low-income individuals in Tillamook County are eligible for CARE's services. CARE's services include subsidized rapid re-housing and permanent housing, assistance with re-housing homeless individuals, and limited assistance with

rent and utility payments. CARE depends upon Tillamook County's subsidized housing projects as a resource for its clients who need access to safe, decent, sanitary and affordable housing. Removal of a building's subsidized status in Tillamook forces CARE to divert its financial and staff resources in order to provide additional financial assistance to the building's resident households as well as to provide greater levels of assistance to other households who are no longer able to afford rental prices at that building.

55. Plaintiffs have no adequate remedy at law.

F. Plaintiffs attempted to resolve this matter without resort to litigation.

56. Plaintiffs attempted to resolve this matter without resort to litigation.

57. On August 18, 2016, plaintiffs' counsel sent a letter to federal defendants expressing concern with the Golden Eagle II prepayment approval process and requesting that approval of the prepayment be rescinded until all applicable laws had been complied with. Plaintiffs' counsel provided notice of potential litigation and requested a response before September 8, 2016.

58. On September 16, 2016, plaintiffs' counsel sent a letter to Shively Trust and Vicky Shiveley expressing concern with the prepayment approval process and requesting that request for the prepayment be rescinded until all applicable laws had been complied with. Plaintiffs' counsel provided notice of potential litigation and requested a response before September 23, 2016.

59. Defendant Hernandez responded on September 26, 2016, providing sample use restrictions that the defendant owner had agreed to implement and inviting plaintiffs' counsel to provide additional data or information regarding the civil rights impact analysis to RD Oregon staffer Wes Cochran before October 10, 2016.

60. Plaintiffs' counsel sent federal defendants a second letter on October 6, 2016, again explaining legal concerns with the prepayment approval, and repeated requests that the prepayment be delayed until the agency had modified its regulations and procedures and had properly conducted the prepayment impact analysis. Plaintiffs' counsel provided notice of potential litigation and requested a response by October 14, 2016.

61. Plaintiffs' counsel received an "Interim Response" on October 14, 2016 indicating that a full response would be forthcoming on October 28, 2016, and encouraging discussion with Mr. Cochran meanwhile.

62. Plaintiffs' counsel spoke with Mr. Cochran on October 20, 2016. Mr. Cochran expressed his inability to discuss or resolve any issues raised in plaintiffs' counsel's letters concerning the prepayment of Golden Eagle II and advised awaiting USDA's response on or by October 28, 2016.

63. As of November 3, 2016, plaintiffs' counsel had not received a response to their second letter to federal defendants or a response to their letter to Shiveley Trust.

FIRST CLAIM FOR RELIEF

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)

RD Regulations Determining Impact of Prepayment on Minority Housing Opportunities are Inconsistent with the Authorizing Statue.

64. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

65. Federal defendants have violated 5 U.S.C. § 706(1) and (2) by:

1) Adopting and following regulations that are inconsistent with the requirement of 42 U.S.C. § 1472(c)(5)(G)(ii), which only allow RD to

approve an owner's prepayment request upon a determination that the prepayment would not "materially affect" minority housing opportunities;

2) Allowing the approval of an owner's prepayment request upon a determination that the prepayment would not "disproportionally adversely affect" minorities in the development, on its waiting list, or in the community. 7 C.F.R. 3560.658(b); and

3) Adopting and following regulations that fail to incorporate consideration of the implications of its actions or inactions in permitting this prepayment. Defendants have violated their duty to administer their programs so as to affirmatively further fair housing pursuant to 42 U.S.C. 3608(d).

66. These regulations are contrary to law and must be set aside in accordance with 7 U.S.C. § 706.

SECOND CLAIM FOR RELIEF

Administrative Procedure Act, 5 U.S.C. § 706(2)

RD's Failure to Establish Standards for Determining Impact of Prepayment on Minority Housing Opportunities Resulted in Arbitrary and Capricious Prepayment Decisions and Violated its Obligation to Affirmatively Further Fair Housing.

67. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

68. RD has processed prepayment requests for over 28 years. During that time, the agency has never adopted standards or guidance by which its staff is directed on how to

determine whether a prepayment will have an impact on minority housing opportunities when determining whether to approve an owner's request for prepayment.

69. RD's processing of prepayment requests is a violation of its statutory obligation to affirmatively further fair housing, in light of its failure to establish criteria, standards, guidance and regulations to comply with this obligation.

70. RD state offices across the country use different and conflicting criteria and standards to determine the impact that a prepayment has on minority households in RD financed developments and on surrounding communities. RD's failure to adopt uniform standards and guidance has resulted in its staff acting in an arbitrary and capricious manner in violation of 42 U.S.C. § 1472(c)(5)(j), 5 U.S.C. § 706 and 24 U.S.C. § 3608(d).

THIRD CLAIM FOR RELIEF

Administrative Procedure Act, 5 U.S.C. § 706(2)

RD's Failure to Follow its Limited Guidance for Determining Impact of Prepayment on Minority Housing Opportunities Resulted in Arbitrary and Capricious Prepayment Decisions.

71. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

72. RD regulations require its staff to determine the impact of a prepayment on minorities by assessing: "the housing opportunities for minorities" and "if minorities in the project, on the waiting list or in the market area will be disproportionately adversely affected by the loss of the affordable rental units." 7 C.F.R. § 3560. 658(b).

73. RD Handbook 3-3560 states that the agency must review: the percentage of minorities residing in the project and those residing in the project's market area; the impact on

minority residents in the project and in the market area; the vacancy trends and number of potential minority tenants on the waiting list at the project being prepaid and at other projects in the market that might attract minority tenants; and the impact the prepayment will have on the opportunity for minorities residing in substandard housing in the market area to have comparable decent, safe and affordable housing as is offered by the project being prepaid. RD Handbook 3-3560, Chapter 15, ¶ 15.21.

74. The RD Oregon staff has failed to comply with RD regulations and handbooks in determining the impact of the Golden Eagle II prepayment on minorities. They completely failed to assess the impact of the prepayment on minority residents in the market area. They also did not assess the number of minority tenants on the waiting lists at other projects in the market that might attract minority tenants. Lastly, they failed to assess the impact the prepayment will have on the opportunity for minorities residing in substandard housing in the market area to have comparable decent, safe and affordable housing as offered by the project being prepaid.

75. In failing to do even the limited required analysis in RD guidance, Defendants have acted arbitrarily and capriciously, entitling plaintiffs to relief under 5 U.S.C. §706.

FOURTH CLAIM FOR RELIEF

Fifth Amendment to the U.S. Constitution (Substantive and Procedural Due Process), Administrative Procedure Act, and Declaratory Relief, 5 U.S.C. § 706(2)

RD Failed to Advise Residents of their Right to Appeal RD Decisions.

76. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

77. USDA regulations, promulgated under authorities set out at 42 U.S.C. § 1480(g), *inter alia*, and 7 U.S.C. § 6991 *et seq.* grant participants, who receive payment or other benefit in

accordance with all RD and RHS department programs, the right to appeal any agency decision by which they are affected to a hearing officer of the Department's National Appeals Division (NAD). 7 C.F.R. §§ 11.1, 11.2 and 11.3.

78. When an owner of a Section 515 development prepays a loan, these benefits terminate as does RD's regular supervision and monitoring of most of the owner's actions, including compliance with the owner's obligation to affirmatively further fair housing, approval of all rent increases, the maintenance of the development, the content of leases, the term of leases, and the basis upon which a lease may be terminated.

79. 42 U.S.C. § 1480(g), 7 U.S.C. § 6991, and USDA regulations published at 7 C.F.R. Part A require RD to give persons, including tenants, whose assistance is denied, reduced or terminated, written notice of the reasons for the denial, reduction or termination of assistance and must provide them the right to appeal the adverse decisions made by agency staff.

80. None of the individual plaintiffs have received notice from RD stating the specific reasons why the agency has approved the owner's request to prepay the loan or advising the residents of their right to appeal the decision to the National Appeals Division.

81. Federal defendants' failure to advise the residents of the reasons RD approved the prepayment and their failure to extend them the right to appeal that decision to a NAD hearing officer violates plaintiffs' constitutional, statutory, and regulatory due process rights. Federal defendants' actions are contrary to law, and must be set aside in accordance with 5 U.S.C. § 706.

FIFTH CLAIM FOR RELIEF

Administrative Procedure Act, 5 U.S.C. § 706(2)

RD's Administration of the Rural Voucher Program is Arbitrary and Capricious.

82. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

83. ELIHPA was enacted by Congress in 1988 to limit the prepayment of Section 515 loans and the displacements of occupants financed under the program. Pub. L. No. 100-242, § 202 (b), 101 Stat. 1877, 1878 (1988).

84. In 2006, Congress, through the appropriations act, made available funding for the operation of an RD voucher program, authorized by 42 U.S.C. § 1490r, but put severe restrictions on its operation. Funding for RD vouchers has continued, subject to the same restrictions, every year since 2006 through the annual appropriations process. *See* Pub. L. No. 114-113, § 2, Div. A, Title III, 129 Stat. 2242, 2260 (Dec. 18, 2015) (Consolidated Appropriations Act, 2016).

85. On information and belief, RD has offered and issued vouchers to residents of Section 515 housing without regard as to whether the household is moving from or staying in the development, or whether the prepayment was or will be subject to use restrictions.
On information and belief, RD has issued most of its vouchers to residents who stayed in their homes after prepayment even though the owners were subject to use restrictions. This caused RD to run out of voucher funding in August 2016 and RD is likely to run out of voucher funding prior to the end of the next several fiscal years unless Congress increases funding for the program.

86. RD's actions encourage Section 515 owners to prepay their loans because they are assured of getting market rate voucher funding through the period that the existing tenants remain in the development. This practice encourages owners to prepay their loans and convert developments to market rate housing. This is contrary to the purposes of ELIHPA and has

caused RD to issue and renew more vouchers than are actually needed, thereby also undermining individual voucher holders' capacity to continue to receive vouchers assistance in the future as well as the opportunity to move to other housing. RD's practices are arbitrary and capricious and in violation of Section 706 of the Administrative Procedure Act.

87. RD does not allow residents of Section 515 developments to apply for RD vouchers until the prepayment has occurred. Moreover, RD's voucher notice only requires it to advise residents of their eligibility for vouchers within 90 days following the prepayment. 61 Fed. Reg. 42309, 42311 (June 29, 2016) (¶ II 3). On information and belief, this practice makes it difficult for residents to apply for and receive vouchers within 60 days of the prepayment and decreases their capacity to move to other housing if they choose to move after the prepayment. This forces residents to pay prevailing market rent for housing for some period. None of the plaintiffs have the financial capacity to pay market rent.

88. RD's practice of only allowing residents to apply for vouchers after the loan prepayment and to only allow vouchers to pay rent retroactively for 60 days after issuance is arbitrary and capricious and subject to relief under 5 U.S.C. § 706.

SIXTH CLAIM FOR RELIEF

Administrative Procedure Act, 5 U.S.C. § 706(2)

RD's Regulations Authorizing the Termination of Use Restrictions Violate ELIPHA.

89. Plaintiffs hereby incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

90. RD's regulations authorize the agency to terminate the use restrictions imposed upon owners who prepay their Section 515 loans when financial assistance provided to the

residents of the housing will no longer be provided due to no fault, action or lack of action on the part of the borrower. 7 C.F.R. § 3650.662(f).

91. This regulation is contrary to ELIPHA and must be set aside in accordance with 7 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

1. A declaration that federal defendants' acts and omissions violate and continue to violate the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, and USDA statutes, regulations and handbooks;
2. A declaration that federal defendants have an obligation when intending to allow prepayments subject to use restrictions to notify residents of the precise obligations of the owner to continue to operate the development as if it were financed under the Section 515 program;
3. A declaration that regulations, authorizing federal defendants to release owners from their obligation to comply with previously imposed use restrictions when financial assistance to residents is terminated for reasons outside the owner's control, are contrary to law;
4. An injunction enforcing those declarations and requiring federal defendants to:
    a. disallow prepayment of Golden Eagle II by individual defendants except in full compliance with 42 U.S.C. § 1472(c) and 24 U.S.C. 3608(d);
    b. publish and adopt regulations precluding prepayment of a Section 515 loan without full consideration of whether the prepayment will materially affect minority housing opportunities, and to include specific standards therein

establishing criteria by which RD staff is to determine whether prepayments will materially affect minority housing opportunities.

c. publish and adopt regulations that conform the operation, management and methods of administration of its prepayment program to its obligation to affirmatively further fair housing pursuant to 24 U.S.C. 3608(d)

d. modify its regulations so as to inform all residents, in a development whose owner has applied for a prepayment, that they have a right to notice of the RD decision to approve or disapprove the owner's prepayment request, advise them of the reasons for the decision, advise them that they have a right to appeal the decisions approving a prepayment under USDA regulations set out at 7 C.F.R. Part 11 and, in the event that an owner appeals a decision denying the right to prepay the loan, that the residents have a right to participate in the owner's appeal of that decision;

e. refrain from issuing vouchers to residents of Section 515 developments that are being prepaid subject to use restrictions unless the residents plan to move to other private housing and allows residents to apply for vouchers before the prepayment of the loan; and

f. issue only use restrictions that require the owner and any successor in interest to operate the Section 515 development for the benefit of residents in the development at the time of prepayment as if the development was financed by a Section 515 loan and subject to all the regulations set out in 7 C.F.R. §§ 3560.1, et seq.;

5. An award of Plaintiffs' costs and reasonable attorney fees; and

6. Such other and further legal and equitable relief as this Court deems just and proper.

DATED this 23rd day of November, 2016.

OREGON LAW CENTER

/s/ Juhi S. Aggarwal

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BAYVIEW PLAZA TENANTS ASSOCIATION ET AL., Plaintiffs, vs. GENE BOUMA ET AL., Defendants.	No. PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION **Note on Motion Calendar for TRO: To be set by Court** **Note on Motion Calendar for Preliminary Injunction: Dec. 22, 2017** **<u>Oral Argument Requested</u>**

I. INTRODUCTION

Plaintiffs Paul Werth, Pat Does 1 through 5, all renter residents at Washington Plaza and Bayview Plaza apartments, and the tenant associations of both developments, move the Court for a temporary restraining order and preliminary injunction enjoining defendant Gene Bouma, Diamond Management, and the Washington Plaza and Bayview Plaza Limited Partnerships from enforcing the leases that they and the plaintiffs executed in late October and from raising the residents' rents at both developments pending the resolution of this lawsuit. The leases and rent increase are scheduled to go into effect on December 1, 2017.

Plaintiffs all live on fixed incomes in two federally financed and deeply subsidized Rural Development Section 515 developments. They are facing severe hardships, including displacement, possible homelessness and loss of access to family members and necessary services as a result of the owners of the developments having recently prepaid their federal loans. The owners are now violating the federal Emergency Low-Income Housing Preservation Act of 1987 by forcing the residents to execute illegal leases and increasing the plaintiffs' rents on December 1, 2017 to levels that the residents of the developments cannot afford. The plaintiffs seek to maintain the *status quo* as it existed prior to the loan prepayments by temporarily and preliminarily enjoining enforcement of the new leases and the scheduled rent increases. The Court should set this matter for a hearing prior to December 1, 2017 on Plaintiffs motion for temporary relief.

II. EVIDENCE RELIED UPON

Plaintiffs rely upon the declarations of Pat Does 1 through 5, Paul Werth, Charles Silverman, and Kelly Owen.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Rural Development's Section 515 Program

The Section 515 program is a rental housing loan program authorizing under Title V of the Hosing Act of 1949. Rural Development (RD),[1] which administers the Section 515 loan program, is authorized to make direct loans for the purpose of constructing affordable rental housing in rural areas throughout the United States. 42 U.S.C. § 1485. Section 515 housing may be restricted to elderly households where the head of the household is 62 years of age or older. Persons with a disability are eligible to live in Section 515 developments that are restricted to the elderly.

Section 515 housing is subsidized in two ways. First, an "Interest Credit" shallow subsidy is available for all units, reducing the interest rate on the loan to a 1per cent effective interest rate. 42 U.S.C. § 1490a(a)(1)(B). Under the interest credit subsidy, owners establish a "basic rent" for each unit, which is generally less than market rent. 7 C.F.R. § 3560.11 (definition of rent). Residents benefiting from interest credit pay the higher of 30% of their income or the basic rent. *Id.* § 3560.203(a).

The second RD subsidy, "Rental Assistance," is a direct subsidy passed through to low- and very low- income residents, requiring them to pay no more than 30% of their income for shelter, which includes rent and utilities, without regard to the development's basic rent. 42 U.S.C. § 1490a(a)(2)(A). Due to budget limitations, RD enters into special agreements with owners specifying the number of units in a development that will receive rental assistance. *See* 7 C.F.R.

[1] Legally, administration of the Section 515 program is vested in the Rural Housing Service (RHS) an agency within the U.S. Department of Agricultures' Rural Development Mission area. RHS only has offices and staff in Washington, D.C. and its programs are administered throughout the states by Rural Development. For ease of reference and to avoid confusion, the RHS housing programs will be referred to as the RD housing programs throughout this memorandum.

§ 3560.252(d)(4). Twenty three of the 24 units at Washington Plaza were eligible for Rental Assistance, and 29 of the 30 units at Bayview Plaza were also eligible for Rental Assistance.

B. ELIHPA's statutory framework

The Emergency Low-Income Housing Preservation Act of 1987 (ELIHPA) was enacted in 1988 to preserve federally financed and subsidized affordable rental housing and prevent the displacement of hundreds of thousands of low-income residents.[2] Pub. L. No. 100-242, § 202, 101 Stat. 1877. It was intended to ensure that long-established national housing goals—such as the expansion of housing opportunities for all Americans, particularly members of disadvantaged minorities—are not undermined by owners of affordable housing that was developed with federal financing prepaying their loans and converting the property to other housing uses. *Id*. In passing ELIHPA, Congress found that some "150,000 units of rural low-income housing financed under Section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners." *Id.* at § 202(a)((3); *see* 12 U.S.C. § 1715*l* note.

ELIHPA established a statutory framework intended to preserve Section 515 housing, avoid resident displacement, and ensure that housing opportunities for minorities are not materially affected. It prohibits RD from accepting any offer to prepay or refinance a Section 515 loan made before December 15, 1989, requiring it to make an incentive offer to the owners to encourage them to continue to operate the development as affordable housing for a period of at least 20 years. 42 U.S.C. § 1472(c)(4)(A). If an owner rejects the incentives, ELIHPA requires the owner to offer the development for sale, for a term of 180 days, to a nonprofit or public entity that will maintain

[2] ELIHPA addressed preservation and tenant protections in both RD and Department of Housing and Urban Development housing programs. The provisions of ELIHPA that are applicable to RD are codified at 42 U.S.C. § 1472(c). The congressional finding and the statement of purpose are not codified but are available as notes to 12 U.S.C. § 1715*l*.

the development's affordability and authorizes RD to finance and subsidize the sale. *Id.* at § 1472(c)(5).

ELIHPA contains two exceptions, which may allow RD to accept an owner's prepayment request. They require RD to make two findings: first, whether the prepayment will have a material effect on minority housing opportunities; and, second, whether there is alternative affordable decent housing available in the community to which the residents of the prepaid development can move to at the time of the prepayment. *Id.* at § 1472(c)(5)(G).

If RD determines, under the first exception, that a prepayment will have a material effect on minority housing opportunities, the owner is obligated to offer the development for sale, for a term of 180 days, to nonprofit or public entities. If no *bona fide* purchase offer is received during that period RD will allow the owner to prepay the loan without restrictions. *Id.* at § 1472(c)(5)(A).

Under the second exception, if RD determines the prepayment will not have a material effect on minority housing opportunities *and* there is adequate alternative housing available in the community to which the residents can relocate upon the prepayment, the owner may prepay the loan without restrictions. *Id.* at § 1472(c)(5)(G)(ii)(II). If there is no material effect on minority housing opportunities but also no adequate affordable housing in the community, the owner may only prepay the loan if the owner agrees to the placement of use restrictions against the property that obligate the owner to continue to operate and rent the property for the benefit of the residents of the development as of the date of prepayment as if it continued to be a subsidized Section 515 development for as long as the residents choose to live there. *Id.* at § 1472(c)(5)(G)(ii)(I).

C. RD Regulations, Handbook and Guidebook

RD last published regulations implementing ELIHPA in 2004 as part of its reorganization and consolidation of all regulations governing the RD multifamily housing programs. 69 Fed. Reg. 69031 (Nov. 26, 2004). The regulations were published on an interim basis with a request for comments. The regulations governing prepayment were codified as part of the 2004 regulations at 7 C.F.R. Part 3560, Subpart N. No revisions have been made to that part of the regulations since that time.

In 2004, RD also published three handbooks to accompany the newly revised and consolidated regulations. Chapter 15 of Handbook 3-3560 deals with the prepayment of RD multifamily housing loans. It is available at https://www.rd.usda.gov/files/3560-3chapter15.pdf.

In 2010, RD published a Voucher Guidebook which is a detailed guide to how RD operates its RD Voucher Program, which is intended to assist residents who face displacement from prepaid developments.

IV. ARGUMENT

A. Legal Standard

This Court has broad discretion to grant injunctive relief, including temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65. A temporary restraining order and preliminary injunction will maintain the *status quo* so the Court has sufficient time to consider the merits of plaintiffs' claims, which is the purpose of a preliminary injunction. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. ED 2d 175 (1981).

A plaintiff seeking a preliminary injunction generally must show that: (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) the injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). In addition to showing that they can meet all four factors, the Ninth Circuit will also issue preliminary injunctions by applying a "sliding scale" approach pursuant to which a plaintiff can secure preliminary relief by showing "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). In this case, all four factors favor granting a temporary restraining order and a preliminary injunction. Moreover, the plaintiffs are entitled to a preliminary injunction under the Ninth Circuit's "sliding scale" approach.

B. Plaintiffs are likely to prevail on the merits of their claims

Plaintiffs are not required to show they will succeed on the merits, but need only prove they have a reasonable chance of success. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991). Based on ELIHPA, RD regulations and RD's Handbook, plaintiffs will show that they are very likely to prevail on the merits of each of their claims against the private defendants; alternatively, they believe that they will have, at least, raised serious questions going to the merits of their claims that entitle them to a preliminary injunction.

The owners of Washington Plaza an Bayview Plaza have (1) violated the use restrictions contained in a Restrictive Covenant under which they prepaid their loans by forcing the plaintiffs to sign leases that abrogate their rights under the Section 515 program and illegally and significantly raised their rents; (2) forced the residents to sign new leases and occupancy rules in October of 2017 that are invalid and unenforceable because they lack consideration, violated the residents' due process rights and were signed under duress; and, (3) the rent increases imposed by the new leases also violate 42 U.S.C. § 1490a(a)(3)(C) because they increase the residents' rents by more than 10 percent.

1. **The October 2017 Leases that the Plaintiffs Were Forced to Sign and the Rent Increase that are part of the leases Violate ELIHPA, RD Regulations, RD Handbook and Voucher Guidebook and the Recorded Use Restrictions**

This Court should enjoin Mr. Bouma and Washington Plaza and Bayview Plaza Limited Partnerships from enforcing the leases that the residents were forced to sign in October (hereafter, Oct. 2017 Rental Agreement) and prevent the defendants from raising the rents at the two developments. The Oct. 2017 Rental Agreement is attached to the declarations of Plaintiffs at: Dec. of Pat Doe 2, Ex. 2; Dec. of Pat Doe 3, Ex. 2; Dec. of Pat Doe 4, Ex. 2; Dec. of Paul Werth, Ex. 1 and 2. A declaration of standing for the Washington Plaza Tenants Association is attached. Dec of Standing by Pat Doe 2. A declaration of standing for the Bayview Plaza Tenants Association is also attached. Dec of Standing by Pat Doe 5. The leases violate ELIHPA, RD regulations, RD Handbook and Voucher Guidebook, as well as the Restrictive Covenants containing use restrictions that the owners agreed to and were imposed on the operation of both developments when the RD loans were prepaid. The Restrictive Covenants signed by Defendant Bouma were recorded against the two developments on Nov. 2, 2017. Dec. of Kelly Owen, Ex. 3 and 4.

ELIHPA was enacted in 1987 for the express purpose of limiting prepayments of Section 515 housing and protecting residents against displacement from their home. In its preamble Congress found that

> some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners; [and that] the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into.

Pub. L. No. 100-242, § 202, 101 Stat. 1877.

The preamble also makes clear that the purpose of the act was

> to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance; [and] **to minimize the involuntary displacement of tenants currently residing in such housing**.

Id. At 1878 (emphasis added).

Accordingly, ELIHPA precludes RD from accepting any Section 515 loan prepayment until after RD has offered incentives to the owner to remain in the program for an additional 20 years or to offer to sell the development to a nonprofit or public agency. 42 U.S.C. §§ 1472(c)(4) and (5). As noted earlier, if an owner rejects both options RD is required to determine whether the prepayment will have a material impact on minority housing opportunities; and, whether there is adequate affordable housing in the community to which the residents can move as of the date of prepayment. 42 U.S.C. § 1472(c)(5)(G)(ii). In this case RD determined that the prepayment of Washington Plaza and Bayview Plaza will not have a material effect on minority housing. However, it did conclude that there is not sufficient affordable housing in either Blaine or Ferndale and that he owners of both developments can only prepay their loans if they agreed to have use restriction placed against the developments by which the "[owner] (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing." 42 U.S.C. § 1472(c)(5)(G)(ii)(I).

RD regulations follow the statute by only allowing the owner to prepay the loan "if the borrower agrees to sign restrictive-use provisions, as determined by the Agency, to protect tenants at the time of prepayment." 7 C.F.R. § 3560.658(b)(4). The regulations go on to enumerate these protections:

> (a) The undersigned, and any successors in interest, agree to use the property . . . in compliance with 42 U.S.C. . . . 1485 . . . an applicable regulations . . . for the purpose of housing
>
> (1) Very low-, or low-income households when required by § 3560.658(a)(3), or
> (2) Very low-, low-, or moderate-income households.
>
> * * *
>
> (b) The period of the restrictions will be inserted in accordance with the following

* * *

(2) The last existing tenant (that occupied the property on the date of prepayment) voluntarily vacates if required by § 3560.658(a)(1)

* * *

(e) The undersigned also agrees to:

(1) set rents, other charges, and conditions of occupancy in a manner to meet these restrictions;

* * *

(3) To adhere to applicable local, State, and Federal laws; and
(4) to obtain Agency concurrence for any rental procedure that deviate from those approved at the time of prepayment prior to implementation.

7 C.F.R. § 3560.662.

7 C.F.R. §3560.663 requires that after the prepayment "the owner . . . will be responsible for ensuring that the restrictive-use provisions agreed to as a condition of prepayment are observed." 7 C.F.R. § 3560.663(b). It also requires the owner to "document rent increases in accordance with subpart [E] of this part."[3] *Id.* § 3560.663(c)(1). Finally, it states that "Owners must observe Agency policies on tenant grievances as described in § 3560.160 . . . and that "Tenants may enforce the restrictive use provisions by contacting the Agency or through legal action." *Id.* § 3560.663(d).

RD has included a form copy of the Restrictive Use Covenants (RUC) that it uses in cases where an owner prepays subject to use restrictions in RD Handbook 3-3560, Chapter 15, Attachment 15-E-2. In the opening paragraph of that form it obligates "[t]he Owner, and any successors in interest . . . **to use the Property in compliance with 42 U.S.C. § 1485 . . . and 7 C.F.R. part 3560**, and any other applicable regulations and amendments, for the purpose of

[3] The regulations erroneously cross reference to Subpart G of Part 3560. That subpart deals with Financial Management of Section 515 developments. Rents and rent increase are governed by Subpart E, and the cross reference should have been to that subpart.

housing program eligible very low-, low-, or moderate-income tenants." *Id.* ¶ (1) (emphasis added).

The Restrictive Covenants signed by Defendant and recorded against Bayview Plaza and Washington Plaza contain these required use restrictions. Restrictive Covenant, Dec. of Kelly Owen, Ex. 3 and 4, ¶(1), (2), (4), and (6).

a. The October 2017 Rental Agreements Violate ELIHPA, RD Regulations and Handbook, and the Voucher Guidelines

Section 3560.156, which is a part of 7 C.F.R. Part 3560, prescribes a long and detailed list of provisions that must be included in RD Section 515 leases and provisions that may not be included in such leases. None of the critical provisions that are set out in those regulations are included in the leases that the owners of Washington Plaza and Bayview Plaza forced the residents to sign in October 2017. The new leases must, therefore be set aside because they do not conform to ELIHPA or RD regulations.

Consistent with the RD regulatory requirements, the residents' leases in effect prior to October were annual leases automatically renewable at the expiration of their term for an additional one-year term. *Id.* § 3560.156(b)(2) and (3). *See* Dec. of Pat Doe 4, Ex. 1, ¶3.a. The new leases remove the automatic annual renewal and cut the lease term after the first year down to 30 days. Oct. 2017 Rental Agreement at ¶ 3. The old leases could only be terminated for good cause, 7 C.F.R. § 3560.152 (c)(18)(xvii), and the owners were obligated to secure evictions through state court proceedings. *Id.* The new leases contain neither of these provisions. The old leases limited the residents' rents to 30 percent of income, *see* 7 C.F.R. § 3560.152(c)(11), the new leases require monthly payments of $856 for Bayview Plaza residents, and $833 for Washington Plaza residents, plus $20 for utilities, regardless of the residents' incomes. *See,* Oct. 2017 Rental Agreement at ¶ 4 and ¶ 8, found for Bayview Plaza at Dec. of Pat Doe 4, Ex. 2; for Washington Plaza at Decs. of Pat Does 2 and 3, Ex. 2 and Dec. of Paul Werth, Exs. 1 and 2. The old leases gave residents the right to pay rent late without incurring late fees, provided it is not more than 10 days late,7 C.F.R. § 3560.129(b)(1), in which case they many not incur a late fee that is more than $10 or 5% of the household rental charge, whichever is higher. *Id.* § 3560.129(b)(2). *See,* Dec. of Pat Doe 4, Ex. 1, ¶6. The old leases gave residents the right to appeal adverse landlord actions or inactions through a prescribed tenant grievance and appeals process set out at 7 C.F.R. §§ 3560.160 and 3560.156(c)(18)(xix). *See* Dec. of Pat Doe 4, Ex. 1, ¶20. The new leases make no mention of that right. The old leases prohibited lease clauses that required residents to agree to pay legal fees and court costs whenever the owner takes action against the resident, even if the court finds in favor of the tenant. 7 C.F.R.§ 3560.156(c)(9). The new leases obligate the tenant to pay attorneys' fees whenever the landlords contend that a resident breached the lease regardless of whether the matter was taken to court or the resident prevailed in arguing that there was no breach of the lease. Oct. 2017 Rental Agreement at ¶ 11. Moreover, in those cases where residents prevail against the landlord, they are not entitled to collect attorneys' fees from the landlord. In short, the leases that the residents were forced to sign in October are illegal and they must not be allowed to go into effect as of December 1, 2017. They must be enjoined.

b. The Rent Increases Also Violate ELIHPA and RD Regulations

Independent of the validity of the leases, the owners' rent increases must also be enjoined. 42 U.S.C. § 1472(c)(5)(G)(ii)(II) requires the prepaying owner to ensure "that tenants of the housing and <u>related</u> facilities financed with the loan will not be displaced due . . . to an increase in rental or other charges, as a result of the prepayment or refinancing." Notwithstanding, the owners of Washington Plaza and Bayview Plaza have increased the residents' rent and utility charges to $876 per month for Bayview Plaza and $853 for Washington Plaza.

They appear to have done so on their belief that they can raise the residents' rents to the development's basic rent or comparable market rents when the RD rental assistance and interest credit subsidies were terminated.[4] That belief is contrary to ELIHPA and is explicitly contradicted by the RD Handbook 3-3560, which states

> For prepayments that will have an adverse impact on the adequate supply of affordable housing. In projects where the prepayment does not have an adverse impact on minorities, the borrower is required to adopt use restrictions that protect the access of current tenants to adequate affordable housing. **The rent will remain at the subsidized amount even though the tenant will no longer receive RA.** These provisions prohibit the borrower from raising rents for tenants who live in the property at the time of prepayment unless the rent increase is necessary to meet the operating cost of the project. (Their rents can not [sic] be raised as a result of actions associated with prepayment.)

RD Handbook 3-3560, Ch. 15 ¶ 15.21 (Pg. 15-14, at 15-15) (emphasis added) (available, as of Nov. 15, 2017, at https://www.rd.usda.gov/files/3560-3chapter15.pdf).

The Lease Addendum, set out in Exhibit 15-G of the same handbook reaffirms that position. It requires the owner to attach the following language to any tenant lease in effect at the time of the prepayment.

> Although prepayment of the loan to the U.S. Department of Agriculture, Rural Development, occurred on ______, you are protected under 42 U.S.C. 1485. Rents, other charges, and conditions of occupancy will not differ from what would have been had the project remained in the Rural Development program. This protection continues until you voluntarily vacate your apartment."

Id. Ch. 15, Att. 15-G.

The plaintiffs' declarations make it clear that the proposed rent increase will cause the displacement and potential homelessness of all the elderly residents of both Washington Plaza and Bayview Plaza because they cannot afford the new rents. The increases must, therefore, be

[4] At a meeting that RD held with the residents of Washington Plaza and Bayview Plaza RD made a PowerPoint presentation that stated that the owners could raise the rents to the development's basic rents due to the termination of the Rental Assistance subsidy. Dec. of Charles Silverman, Ex. 1, page 2.

enjoined because they violate ELIHPA's protections intended to limit resident displacement, 42 U.S.C. § 1472(c)(5)(G)(ii)(i), and RD regulations and Handbook that implement those provisions.

c. The October 2017 Leases are Void and Unenforceable

Plaintiffs ask the Court to also enjoin the owners from enforcing the leases that are scheduled to go into effect on December 1, 2017 because they abrogated residents' existing rights without the residents receiving any consideration, were implemented in violation of the residents' due process rights, and were secured under duress.

1) The New Leases Were Secured without Consideration

Leases, under Washington law, are conveyances whose covenants are interpreted under contract law. *Lane v. Wahl*, 101 Wn. App. 878, 883 (Div. III 2000). Thus, the October 2017 lease contracts between the owners and Plaintiffs must be interpreted under contract law.

Plaintiffs contend that the October 2017 lease contracts that they were forced to sign are also void because they lack any consideration. In *Rosellini v. Banchero*, 483 Wn.2d 268, 273 (1975) (en banc) the Washington Supreme Court held that a contract modification or subsequent agreement is not supported by consideration if one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract. The October 2017, lease agreements fall precisely within this rule.

When the October 2017 Rental Agreements were executed, the Plaintiffs had existing leases in place. Stripped to their basics, these leases provided the residents the right to live in their homes by paying 30 per cent of household income for shelter. That right, which was supplemented by numerous other regulatory resident protections, could not be terminated except for good cause. *See supra* § III B 1 a.

These residents' rights were not terminated by the owners' prepaying their loans subject to use restrictions. Notwithstanding, the owners of Washington Plaza and Bayview Plaza forced the residents to sign new leases that did not extend anything of value to the plaintiffs that constitutes consideration. To the contrary, the residents of Washington Plaza and Bayview Plaza already possessed all those under far superior conditions. In fact, all the new lease provisions benefitted the owners. They increased rent and utility costs to $876 per month at Bayview Plaza and $853 per month at Washington Plaza regardless of household income and the leases could be terminated upon 30-day's notice without good cause.

Arguably, the residents benefitted from the new leases by virtue of their becoming eligible for vouchers as a result of executing the new leases. However, this is not the case. The new leases make no mention of the RD voucher program and do not state how the residents become eligible for vouchers by signing the new leases. More importantly, there was no need to execute new leases. The RD Voucher Guidebook makes it clear that new leases need not be executed upon prepayment.

> TENANTS UNDER LEASE. Continuation of Existing Leases Prepayment regulations require that owners who prepay the RD mortgage through the prepayment process must continue to honor the leases of tenants residing in the property on the date of prepayment. In this circumstance, tenants continue to pay the net tenant contribution toward rent without the benefit of rental assistance. The RD Voucher and the companion Housing Assistance Payments Contract with the landlord require a new lease with a 12-month term. Therefore, it is not possible to provide an RD Voucher during the existing lease term after prepayment.

RD Voucher Guidebook, p. 20, ¶ 2.5 (2010) (available as of 11.26.17 at https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf)[5]

Because the new leases did not provide any new rights or benefits to the residents, there was no consideration that supports the residents' execution of the leases. Accordingly, the residents ask the court to enjoin enforcement of the new leases and reinstate their old and unexpired leases.

[5]While it is not relevant to the issuance of a preliminary injunction, Plaintiffs believe that they don't need vouchers to continue to reside in their homes because the Restrictive Use Covenants already protect them for as long as they chose to live in their homes. The Vouchers, thus, do not provide the residents any benefits and only lessen the owners' burden of maintaining the existing residents' shelter payments at the previously subsidized levels.

2) The New Leases and Rent Increases Were Implemented In Violation of the Residents' Due Process Rights

Residents of RD housing are guaranteed certain due process rights under 42 U.S.C. § 1480(g). Those rights include the right to receive notice of any proposed adverse action and an opportunity to appeal the adverse action to an impartial official who was not involved in the original decision making process. These due process rights, as extended to residents of RD rental housing, are set out in the Grievance and Appeals regulations codified at 7 C.F.R. § 3560.160. These due process rights survive the prepayment of the RD loan if the prepayment is subject to Restrictive Use Covenants. 7 C.F.R. § 3560.663(d).

In this case, the owners of Washington Plaza and Bayview Plaza have violated the Plaintiff's due process rights in at least three ways. First, they did not provide the residents with any prior notice of the proposed lease changes or of the right to appeal those changes. Second, they did not provide the residents with any notice of the proposed occupancy rules that were attached to the new leases nor a right to appeal those changes. Third, they did not provide the residents with notice of the proposed rent increases, a right to review and comment on those rent increases or to appeal those increases.

> The tenant grievance and appeal procedure require that [i]n the case of a proposed action that may have adverse consequences for tenants or prospective tenants such as . . . changes in the **occupancy rules or lease**, the [owner] must notify the tenant . . . in writing. In the case of a[n owner's] proposed adverse action . . . the [owner] shall notify the applicant/tenant in writing. The notice must be delivered by certified mail return receipt requested or a hand-delivered letter with a signed and dated acknowledgement of receipt from the . . . tenant. The notice must give specific reasons for the proposed action. The notice must also advise the tenant . . . of "the right to respond to the notice within ten calendar days after date of the notice" and of "the right to a hearing in accordance with §3560.160 (f), which is available upon request."

7 C.F.R. § 3560.160 (e) (emphasis added). The owners of Washington Plaza and Bayview Plaza never provided the resident with any notice of the proposed lease or occupancy changes nor the

right to appeal those changes. Thus, they violated the residents' due process rights with respect to both changes.

RD has special notice and review rights with respect to rent increases, which must be approved by RD when the development is part of the RD Section 515 program. *See* 7 C.F.R. § 3560.205. Assuming that the owners were no longer required to submit rent increases to RD for final approval,[6] after prepayment they still had to comply with those rent increase provision that tenants are entitled to receive. In other words, they were obligated to provide residents with a notice of the proposed rent increase that is fully supported and justified, 7 C.F.R. § 3560.663(c)(1), to seek the residents' comments, *see id.* and 7 C.F.R. § 3560.205(e), and, prior to implementation, provide the residents an opportunity to appeal the rent increases under the Tenant Grievance and Appeals process. Significantly, if the residents had received prior notice of the proposed rent and utility cost increases, they could have brought the increases to RD's attention as RD loan servicers "must also investigate any complaints from tenants or other parties regarding the violation of the use restrictions." RD Handbook 3-3560, Chapter 15, ¶ 15.22 D, pgs. 15-17 and 15-18.

The owners of Washington Plaza and Bayview Plaza did not follow any of these required steps in implementing the proposed rent increases. In so doing, the owners deprived the residents of their statutory and regulatory right to appeal rent increase decisions. The rent increases must therefore be set aside.

3) The New Leases Were Entered Into Under Duress

To establish duress or coercion sufficient to repudiate a signature to a contract, a party must prove that the duress resulted from the other's wrongful or oppressive conduct. *Retail Clerks*

[6] Plaintiffs do not concede that the rent increase that were announced in October could go into effect without RD's approval because Washington Plaza and Bayview Plaza were still in the Section 515 program when the new leases setting the rent increases were signed.

Health & Welfare Tr. Fund, 96 Wn.2d 939, 944 (1982). In this case, the owners of Washington Plaza and Bayview Plaza and their agents coerced the residents of both developments to sign the October leases through intimidation, coercion, and misrepresentation of the consequences of the prepayment on their continued rights under the preexisting leases and the need to sign the new leases to maintain their residency.

Specifically, on or about October 27, 2017 Mr. Bouma, his son Mike Bouma and, at Bayview Plaza, the Assistant Manager Nancy began to contact residents at Washington Plaza and Bayview Plaza by coming to their apartments or telling them to come to the development's offices, often without any prior explanation. During the meetings, which were held with each resident individually, the owners and their agents told the residents that they must sign new leases immediately because their existing leases were terminated by the prepayments and that new leases were required in order for the residents to secure RD vouchers. The residents also knew that RD staff had told them they needed to get vouchers quickly to pay the owner's new, higher rent. The owners and their agents also intimidated some residents by threatening to evict them for failure to sign the new leases. *See,* Declarations of Pat Does 1 through 5 and Paul Werth. These actions and misrepresentations coerced the residents to sign new lease because they did not have an opportunity to verify the owners' claims and feared displacement from their homes because they could not afford the new rents or have affordable alternatives to which they could move. The new leases must, therefore, be set aside because the residents did not sign them with the requisite free will.

d. Proposed Rent Increases are Limited by Statute

For the reasons set out above, plaintiffs do not concede that the rent increases imposed by the limited partnerships are legal and enforceable. But in the event that they are, the rent increases are beyond what is statutorily authorized and must be rolled back.

42 U.S.C § 1490a(a)(3)(C) states that

> No rent for a unit financed under section 1484 or 1485 of this title shall be increased as a result of this subsection or other provision of Federal law or Federal regulation by more than 10 per centum in any twelve-month period, unless the increase above 10 per centum is attributable to increases in income which are unrelated to this subsection or other law, or regulation.

Under the Restrictive Covenants containing use restrictions executed by the defendants, they are obligated to operate Washington Plaza and Bayview Plaza as if they continued to operate as a Section 515 development. Restrictive Covenant, Dec. of Kelly Owen, Ex. 3 and 4. There is no law or regulation that authorizes defendants to increase rents to the extent that they have done in their leases. In the event, however, that the defendants claim that some statute or regulation or other RD or federal law authorizes them to increase rents, that rent increase is limited to 10 per cent per annum. Thus, for example, a plaintiff who was paying $250 dollars per month for rent and utilities may not have his or her rent changed by more than $25 dollars for the first year and $27.50 in the second year, and so on.

Accordingly, Plaintiffs ask this court to enjoin any rent increases that are being imposed by the landlords even if they were approved by RD or any other provision of law.

C. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief

The plaintiffs will suffer irreparable injury if relief is not granted. "It is well-established that the loss of an interest in [rental] property constitutes an irreparable injury." *Park Village Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011). Individual plaintiffs rely on their current RD subsidies and tenant protections to maintain safe and decent housing, and are unable to afford housing in the private market.

Prior to prepayment, the residents of Washington Plaza and Bayview Plaza were paying 30 percent of their household income for shelter, which included the cost of utilities. Because the residents are all very low income, and in most instances live on fixed incomes, they were generally not paying more than $ 400 per month, and most paid under $300 monthly for shelter. Under the new leases that were presented to the residents in October, the rents that they are asked to pay as of December 1, 2017, is $856 at Bayview Plaza and $833 at Washington Plaza, plus $20 for utilities. None of the residents of either development can afford to pay this rent because it constitutes more than or nearly their entire household income.

Although they are eligible for vouchers, few have applied for vouchers and none has received any notice that they are eligible for vouchers. Under the Voucher Notice published by RD in the Federal Register, RD has 90 days to respond to a resident's application for a voucher. 82 Fed. Reg. 21972, 21973 (May 11, 2017) (¶ II, 3 b). Moreover, RD cannot issue vouchers until it has entered into a Housing Assistance Contract with the owner. Thus it is highly unlikely that voucher payments will be made before January or February of 2018. Notwithstanding, the new leases obligate the residents of both developments to pay the new rent regardless of whether RD provides them with a voucher and without consideration of whether the vouchers, and the residents' prior shelter payments, will cover the full amount of the new rent and utility charges. Oct. 2017 Rental Agreement at ¶ 4. As the new leases take effect on December 1, 2017, the residents have to pay the full rent by the first of December, something that they are unable to do. As a result, they face significant late fees, the threat of eviction and possible homelessness for their failure to pay the December rent. Other affordable housing is very scarce and not available for any significant numbers of units, if at all. *See,* Dec. of Charles Silverman, ¶17-22; Dec. of Kelly Owen, Ex. 1, CRIA and Needs Study for Bayview Plaza, "Needs Analysis" at pp 4-5; Dec. of Kelly Owen, Ex. 2, CRIA and Needs Study for Washington Plaza, "Needs Analysis" at pp 4-5. In other words, they face extreme hardship which must be enjoined.

D. The balance of hardships tips sharply in Plaintiffs' favor

Absent injunctive relief, plaintiffs will suffer irreparable injuries. Because they are unable to pay the rent that is due as of December 1, they are very likely to face eviction and be unable to find alternative affordable decent, safe and sanitary housing. The may also become homeless and lose easy access to nearby family and necessary community support services. *See* Declarations of Pat Doe 1-5 and Paul Werth.

The defendant partnerships may face some loss of income but not sufficient to overcome the plaintiff's hardships. When "[f]aced with such a conflict between financial concerns and human suffering," the Ninth Circuit has had "little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). *See also Turner v. Vilsack*, 2013 WL 6074114 at *7 (D. Or. Nov. 18, 2013) ("[T]he threat of homelessness . . . outweighs the USDA's loss of $7,000 per month.") Significantly, the financial loss that the defendants may suffer was brought on by their prepayment of the RD loan and by their failure to investigate or understand the obligations that they undertook when they agreed to prepay the Washington Plaza and Bayview Plaza loans and execute the Restrictive Covenants. If this was brought on by RD's misrepresentation of the owners' post-prepayment obligations, their remedy may be against the agency but not the plaintiffs whom Congress sought to protect with the passage of ELIHPA.

E. Granting a Preliminary Injunction is in the Public Interest

Courts should grant preliminary injunctions when it is necessary to stop the violation or likely violation of a federal statute and to further the policy of that statute. The Ninth Circuit has held that "it is obvious that compliance with the law is in the public interest." *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust* 636 F.3d. 1150, 1159-60 (9th Cir. 2011) (citing *N.D. v. Haw. Dep't of Educ.*, 600 F.3d. 1104, 1113 (9th Cir. 2010)). Here, ELIHPA was enacted for the very purpose of protecting residents from the harm that the residents of Washington Plaza and Bayview Plaza are currently facing: increased rents, displacement and possible homelessness. As Congress stated in the preamble to ELIHPA, the purposes of the act are to preserve federally assisted affordable housing and "to minimize the involuntary displacement of tenants currently residing in such housing [that is being prepaid]." Pub. L. 100-242, 101 Stat. 1877, 1878 (Feb. 5, 1988).

Granting a preliminary injunction furthers other public interests. RD is directed to provide loans to "provide rental . . . housing . . . for persons and families of low-income in multifamily housing projects…." 42 U.S.C. §1490a. The Section 515 program, as well as other federal housing programs were enacted to further the National Housing Goals, namely, "the realization as soon as feasible the goal of a decent home and a suitable living environment for every American Family." 42 U.S.C. §1441a(a). Congress also directed RD to operate its programs in a manner that avoids involuntary displacement of families. 42 U.S.C. §1471(g). These public interests, together with the public interest of enforcing ELIHPA, are intended to aid "low-income persons and families to obtain and remain in affordable, safe, and sanitary, housing." *Turner v. Vilsack*, 2013 WL 6074114 at *6 (D. Or. Nov. 18, 2013). *See also Park Village Apts. Tenants Ass'n, v. Mortimer Howard Trust,* 636 F.3d 1150, 1159-60 (9th Cir. 2011); *Jones v. Upland Housing Authority*, 2013 WL 708540, *16 (C.D. Cal. Feb. 21, 2013); *Miller v. Vilsack*, 2011 WL 5516979, *3 (W.D. Mich. Nov. 9, 2011).

Clearly, these public interests justify the issuance of a preliminary injunction.

F. The Court Should Waive the Bond Requirement

A district court may dispense with the bond requirement under Fed. R. Civ. P. 65(c) in numerous circumstances, including where requiring security would effectively deny access to judicial review or where the plaintiff is indigent. *Featherstone v. Pac. Nw. Univ. of Health Scis*., No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713, at *20-21 (E.D. Wash. July 22, 2014). Plaintiffs are indigent renters and a non-profit organization that cannot post a bond. *See* Declarations of Pat Doe 1 through 4, Dec. of Paul Werth. Plaintiffs request the Court waive the security requirement associated with compelling defendants to fulfill their statutory, regulatory and RUC obligations.

V. CONCLUSION

Plaintiffs have shown that they have met the four requirements for the issuance of a temporary and preliminary injunction. Moreover, they have clearly shown that they have met the Ninth Circuit's sliding scale approach. The Court should, therefore, grant Plaintiffs' motion for a temporary restraining order and preliminary injunction stopping the owners of Washington Plaza and Bayview Plaza from instituting their rent increases and enforcing the October 2017 Rental Agreements.

DATED this 27th day of November, 2017

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LISA McFALLS, MICHAEL McFALLS, FRED WOODRING, and COMMUNITY ACTION RESOURCE ENTERPRISES, INC.,

Plaintiffs,

v.

SONNY PURDUE, Secretary of the Department of Agriculture; ROGER GLENDENNING, Undersecretary for Rural Development; RICH DAVIS, Administrator Rural Housing Service; and JOHN E. HUFFMAN, Oregon Rural Development State Director,

Defendants.

Case No. 3:16-cv-2116-SI

OPINION AND ORDER

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Billy J. Williams, Unites States Attorney, James E. Cox, Jr., Assistant United States Attorney, and Sean E. Martin, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF OREGON, 1000 SW Third Avenue, Suite 600, Portland, OR 97204. Of Attorneys for Defendants.

Michael H. Simon, District Judge.

Plaintiffs Lisa McFalls, Michael McFalls, and Fred Woodring (the "Individual Plaintiffs") are low-income renters who live in federal subsidized housing at the Golden Eagle II ("GE") apartment building in Tillamook, Oregon. Plaintiff Community Action Resource Enterprises, Inc. ("CARE") is a nonprofit organization based in Tillamook County, Oregon. CARE assists low-income persons in obtaining affordable housing in Tillamook County, including at GE.

GE is an affordable housing unit for low-income persons. GE was financed with a direct government loan and also receives operating subsidies from the United States Department of Agriculture ("USDA") Rural Housing Service and Rural Development ("RD") agencies. Plaintiffs sue Defendants Sonny Purdue, Secretary of the USDA; Roger Glendenning, Undersecretary for RD; Rich Davis, Administrator of the USDA's Rural Housing Service; and John E. Huffman, Oregon State Director of RD, all in their official capacities.

In their original complaint, Plaintiffs challenged RD's initial Civil Rights Impact Analysis ("CRIA I"), which concluded that prepayment of GE's loan would not materially affect minority housing opportunities and approved the request by GE's owner's to prepay the loan. This prepayment would have reduced the protections provided to GE's tenants under RD's program and might have resulted in the displacement of the Individual Plaintiffs. After Plaintiffs filed their original complaint and moved for a preliminary injunction to enjoin the approval of the requested loan prepayment, Defendants rescinded their approval. RD then issued a second Civil Rights Impact Analysis ("CRIA II"), which found that prepayment would materially affect minority housing opportunities. Based on that finding, RD required that GE be offered for sale to a nonprofit or public agency for 180 days in order to try to maintain GE as affordable housing.

Defendants state that the mandatory 180-day waiting period began on October 17, 2017, and will conclude on April 15, 2018.

After RD issued CRIA II, Plaintiffs filed a Second Amended Complaint. Plaintiffs allege: (1) Defendants violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq*., by implementing regulations inconsistent with the governing statute with respect to analyzing the effect of prepayment on minority housing; (2) RD violated the APA by failing to establish standards or guidance for determining the effect of prepayment on minority housing opportunities; (3) RD violated the APA by administering the Rural Voucher Program in an arbitrary and capricious manner; and (4) RD's regulations authorizing the termination of use restrictions violates the Emergency Low Income Housing Preservation Act ("ELIHPA"), 42 U.S.C. § 1472. Defendants move to dismiss Plaintiffs' Second Amended Complaint, arguing that Plaintiffs lack standing, the Court lacks subject-matter jurisdiction because there is no final agency action for the Court to review, and Plaintiff's First and Fourth Claims for Relief alleged in the Second Amended Complaint fail to state a claim upon which relief can be granted because they are time-barred.[1] For the reasons that follow, Defendants' motion to dismiss is denied.

STANDARDS

A. Article III Standing

The U.S. Constitution confers limited authority on the federal courts to hear only active cases or controversies brought with standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546-47 (2016); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013). Standing "limits the category

[1] In their reply and at oral argument, Defendants raised additional arguments and asserted arguments against other causes of action. The Court, however, only considers arguments that Defendants present in their opening motion. *See Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (noting that "arguments raised for the first time in a reply brief are waived"); *United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992) ("New arguments may not be introduced in a reply brief.").

of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo*, 136 S. Ct. at 1547.

To have standing, a plaintiff must have a "personal interest . . . at the commencement of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The constitutionally required personal interest must satisfy three elements: (1) an injury-in-fact, *i.e.*, an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) a causal connection between the injury-in-fact and the defendant's challenged behavior; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling. *Id.* at 180-81, 189; *see also Spokeo*, 136 S. Ct. at 1547 (reiterating that the "irreducible constitutional minimum" of standing consists of "an injury in fact . . . fairly traceable to the challenged conduct of the defendant, and . . . likely to be redressed by a favorable judicial decision").

An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). An injury is "concrete" if it is "'*de facto*'; that is, it must actually exist," meaning that it is "'real' and not 'abstract.'" *Id.* "'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, [the Supreme Court has] confirmed in many . . . previous cases that intangible injuries can nevertheless be concrete." *Id.* at 1549.

Although Article III's injury requirement cannot be displaced by statute, when a statute creates a legal right, the invasion of that legal right may create standing. *See Spokeo*, 136 S. Ct. at 1549 (noting that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements" and "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," but emphasizing that "Article III standing requires a concrete injury even in the context of a statutory violation"); *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (noting that standing can exist by virtue of "statutes creating legal rights, the invasion of which creates standing"). When a person claims standing based on a violation of a statute, that person must also show that he or she has what has been variously referred to as "statutory standing," "prudential standing," or "zone of interest standing." *See generally Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014).

The relevant question for statutory standing in this case is whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Edwards*, 610 F.3d at 517. This can be established by pleading a violation of a right conferred by statute, provided the plaintiff alleges "a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). A "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis in original). A plaintiff cannot, however, "allege a bare procedural violation [of a statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo*, 136 S. Ct. at 1549 (providing, by way of example of a procedural violation that would not likely present any material risk of harm, an allegation that a credit reporting agency disseminated a report containing an incorrect zip code). Additionally, in statutorily created causes of action, the plaintiff also must demonstrate that he or she is within the "zone of interests" protected by the law invoked in order to have standing to sue for a violation of the statute. *See Lexmark*, 134 S. Ct. at 1388-89. Whether a plaintiff has stated a basis for statutory standing is generally tested under Rule 12(b)(6) of the Federal Rules of Civil Procedure, rather than Rule 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

B. Motion to Dismiss Under Rule 12(b)(1)

Federal courts are courts of limited jurisdiction. *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quotation marks omitted). As such, a court is to presume "that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted); *see also Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A motion to dismiss under Rule 12(b)(1) for lack of "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). An objection that a particular court lacks subject-matter jurisdiction may be raised by any party, or by the court on its own initiative, at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006); Fed. R. Civ. P. 12(b)(1). The Court must dismiss any case over which it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

A motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) may be either "facial" or "factual." *See Safe Air for Everyone*, 373 F.3d at 1039. A facial attack on subject-matter jurisdiction is based on the assertion that the allegations contained in the complaint are insufficient to invoke federal jurisdiction. *Id.* "A jurisdictional challenge is factual where 'the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.'" *Pride v. Correa*, 719 F.3d 1130, 1133 n.6 (9th Cir. 2013) (quoting *Safe Air for Everyone*, 373 F.3d at 1039)). When a defendant factually challenges the plaintiff's assertion of jurisdiction, a court does not presume the truthfulness of the plaintiff's allegations and may consider evidence extrinsic to the complaint. *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012); *Robinson*, 586 F.3d at 685; *Safe Air for Everyone*, 373 F.3d at 1039. A factual challenge "can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency." *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996) (citation and quotation marks omitted).

C. Motion to Dismiss Under Rule 12(b)(6)

Lack of statutory standing requires dismissal for failure to state a claim. *See Maya*, 658 F.3d at 1067. A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). To be entitled to a presumption of truth, allegations in a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). All reasonable inferences from the factual allegations must be drawn in favor of the plaintiff. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court need not, however, credit the plaintiff's legal conclusions that are couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

A complaint must contain sufficient factual allegations to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr*, 652 F.3d at 1216. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

D. Mootness

A federal court does not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "A claim is moot if it has lost its character as a present, live controversy." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009) (quoting *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997)). To determine mootness, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)) (emphasis in original). If a course of action is mostly completed but modifications can be made that could alleviate the harm suffered by the plaintiff's injury, the issue is not moot. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). A case becomes moot "only when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (emphasis added) (citation omitted). The party alleging mootness bears a "heavy burden" to establish that a court can provide no effective relief. *Karuk*

Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1017 (9th Cir. 2012) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)).

"Standing and mootness are similar doctrines: Both require some sort of interest in the case, and both go to whether there is a case or controversy under Article III." *Jackson v. Cal. Dept. of Mental Health*, 399 F.3d 1069, 1072 (9th Cir. 2005). The doctrines, however, have important differences—standing doctrine ensures that scarce judicial resources are devoted to disputes in which the parties have a concrete stake, and "[m]ootness issues arise later in the case, when the federal courts are already involved and resources have already been devoted to the dispute." *Id.* at 1072-73. That is why the Supreme Court recognizes exceptions to mootness that are not allowed as exceptions to standing, such as the exceptions for "voluntary cessation" and "capable of repetition, yet evading review." *See Laidlaw*, 528 U.S. at 189-90.

BACKGROUND

A. Statutory Background

Sections 515 and 521 of the Housing Act of 1949 ("Housing Act"), 42 U.S.C. §§ 1485, 1490a, provide for the development of low- and moderate-income housing in rural areas. This program was originally managed by USDA Farmers Home Administration, which was later incorporated into the Rural Housing Service. *See Schroeder v. United States*, 569 F.3d 956, 958-59 (9th Cir. 2009).

Under the Housing Act, owners of housing units are given government loans at favorable interest rates and other governmental subsidies in exchange for an agreement to rent units to qualified low-income, elderly, and disabled rural residents for the duration of the loan. Among other things, the housing program allows an "Interest Credit" subsidy, which reduces the interest rate on the loan to an effective rate of one percent. 42 U.S.C. § 1490a(a)(1)(B). Under the Interest Credit subsidy, owners establish a "basic rent" for each unit, which is generally less than the market rate. Residents benefitting from the Interest Credit subsidy pay the *higher* of 30 percent of their income or the basic rent. 7 C.F.R. § 3560.203(a).

The housing program also provides a "Rental Assistance" subsidy. This is a subsidy passed through to low and very low income residents as lowered rent. The program allows such tenants to pay no more than 30 percent of their income for rent, regardless of the basic rent amount. 42 U.S.C. § 1490(a)(2)(A). RD enters into agreements with owners specifying the number of units in a development that will receive Rental Assistance. In GE, 19 of the 32 households receive the Rental Assistance subsidy, and the remaining households pay the higher of 30 percent of income or basic rent (the Interest Credit subsidy).

As originally drafted, property owners who developed rural low income housing had a contractual right to prepay their loans and leave the program, usually after a particular period of time, ending the borrower's obligation to rent to qualified individuals. *See Franconia Assocs. v. United States*, 536 U.S. 129, 135 (2002); *Airport Rd. Assocs., Ltd. v. United States*, 120 Fed. Cl. 706, 708 (2015). Concerned that the number of borrowers who were exercising their prepayment option was threatening the goals of the program, in 1979 Congress passed an amendment to the Housing Act that restricted certain prepayments to "to stem the loss of low-cost rural housing due to prepayments." *Franconia*, 536 U.S. at 135. In 1980, however, Congress again amended the Housing Act to remove any prepayment restrictions from loans made before December 21, 1979. *Id.* "By 1987, Congress had again become concerned about the dwindling supply of low- and moderate-income rural housing in the face of increasing prepayments of mortgages under § 515." *Id.* at 136. Thus, in 1988 Congress enacted ELIHPA, which "amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of § 515 mortgages entered into before December 21, 1979." *Id.*

Under ELIHPA and its corresponding regulations, before the USDA can accept prepayment of a § 515 mortgage, it "shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed." 42 U.S.C. § 1472(c)(4)(A). ELIHPA provides that the government may include incentives to reach agreement with the borrower. *See Franconia*, 536 U.S. at 136 (citing § 1472(c)(4)(B)). If the borrower and the government cannot reach an agreement after a "reasonable period," the borrower seeking prepayment must "offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers . . . ." 42 U.S.C. § 1472(c)(5)(A)(i). The government may accept prepayment if an offer to purchase by a qualified nonprofit organization or public agency is not made within 180 days, or may require refinancing in accordance with the statute. *See Franconia*, 536 U.S. at 137; *see also* 42 U.S.C. § 1472(c)(5)(A)(ii)).

B. Regulatory Background

The regulations implementing the Housing Act and ELIHPA provide that the regulations' requirements "support the Agency's commitment to the preservation of decent, safe, sanitary, and affordable multi-family housing (MFH) for very low-, low-, and moderate-income households." 7 C.F.R. § 3560.651. The regulations, following the requirements in ELIHPA, provide that before accepting an offer to prepay from a borrower, the USDA must make a reasonable effort to enter into an agreement with the borrower to extend the low-income use of the property, offering appropriate incentives. *Id.* §§ 3560.655, 3560.656. If no agreement can be reached, the USDA can accept prepayment if: (1) the borrower agrees to sign restrictive-use provisions to extend restrictive use by 10 years from the date of prepayment and after those 10 years agrees to offer to sell the housing to a qualified nonprofit organization or public agency; or (2) "[i]f housing opportunities for minorities would be lost as a result of prepayment, the borrower will offer to sell the housing to a qualified nonprofit organization or public body." *Id.* § 3560.658(a).

If the borrower does not agree to either of those two options, then the USDA must "assess the impact of prepayment on two factors: housing opportunities for minorities and the supply of decent, safe, sanitary, and affordable housing in the market area." *Id.* § 3560.658(b). Earlier versions of the implementing regulations mirrored ELIHPA's text by requiring consideration of whether "housing opportunities for minorities will not be materially affected as a result of the prepayment . . . ." 7 C.F.R. Part 1965, Subpart B, Exhibit E, ¶ IV A.2 (1988). The rules were amended in 1990, but this provision was left unchanged.

In 2003, RD proposed new rules to consolidate and recodify many § 515 regulations. 68 Fed. Reg. 32872 (June 2, 2003). The draft proposed rules did not change the provision relating to consideration of the effect on minorities of prepayment. The interim final rules, however, significantly changed the provision. The interim final rule states in relevant part: "The Agency will review relevant information to determine the availability of comparable affordable housing for existing tenants in the market area and if minorities in the project, on the waiting list or in the market area will be *disproportionately adversely affected* by the loss of affordable rental housing units." 69 Fed. Reg. 69032, 69170 (Nov. 26, 2004) (now codified at 7 C.F.R. § 3560.658(b)) (emphasis added).

The USDA explained this change by stating that comments were received asking for additional information on how the determination of minority impact is reached. The Agency responded: "[t]he Agency agreed that 'adverse impact' needed further clarification and has clarified that the adverse impact should be disproportionate. . . . Additional details on how the Agency will review relevant information is available in Agency guidance about program procedures." 69 Fed. Reg. 69032, 69094 (Nov. 26, 2004). A disproportionate adverse effect "is defined as an impact predominately born by a minority or low-income population, is suffered by the minority and/or low-income population, and is appreciably more severe or greater in magnitude than what would be experienced by the non-minority or non low-income population." USDA Nat'l Appeals Division, Appeals Determination, Case No. 2011E000625 (Sept. 12, 2011) (citing USDA Administrative Notice 4501, Att. 2, Question 5).[2]

The "additional details" referenced in the rule are contained in Exhibit E of RD Instruction 1965, Subpart E, titled "Administrative Guidance for Making Prepayment Determinations" ("Exhibit E").[3] Exhibit E provides that the analysis regarding the adverse effect on minorities must address and document: (1) the percentage of minorities in the prepaying project and in the project's market area to which displaced residents are likely to move; (2) the impact of potential prepayment on minority residents in the project and in the market area;[4] (3) the vacancies and length of waiting lists at the prepaying project and in projects with similar minority concentrations in the geographic area of the prepaying project; and (4) whether the

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[2] *Available at* https://usda-nad-local1.entellitrak.com/etk-usda-nad-prod-temp/page.request.do?page=page.highlightedFile&id=64119&query_text=&query_text2=&citation= (last visited on January 29, 2018).

[3] These considerations were originally included as a proposed rule, but ultimately were not included in the regulation. *See* 55 Fed. Reg. 29601, 29619 (July 20, 1990) (Proposed § 1965.215(b)(2)).

[4] If either the project or market area is an area of minority concentration, the agency must determine whether minority tenants and members of the community will be forced to move to areas with traditional discrimination practices. If both the project and market areas do not have minority concentration, the agency must determine whether minorities will be forced to move to an area of minority concentration if the subject housing is prepaid.

prepayment will negatively affect the opportunity for decent, safe and sanitary, and affordable housing of minority residents in the community who do not currently live at the project.

Exhibit E was published internally in RD Instructions and forwarded to all field offices in 2003.

Thus, the USDA now reviews whether minorities will be disproportionately adversely affected by the loss of the affordable rental housing unit. If the USDA "determines that prepayment will have an adverse impact on minorities, then the borrower must offer to sell to a qualified nonprofit organization or public body." *Id.* § 3560.658(b)(2). If the USDA "determines that the prepayment will not have an adverse effect on housing opportunities for minorities" and "there is not an adequate supply of decent, safe, and sanitary rental housing affordable to program eligible tenant households in the market area, the loan may be prepaid only if the borrower agrees to sign restrictive-use provisions . . . to protect tenants at the time of prepayment." *Id.* § 3560.658(b)(3). If the USDA "determines that there is no adverse impact on minorities and there is an adequate supply of [affordable] decent, safe, and sanitary rental housing," then prepayment can be accepted without further restrictions. *Id.* § 3560.658(b)(4).

Within 30 days of receiving a completed prepayment request, the USDA must send a prepayment request notice to each tenant, and borrowers must post the prepayment request notice in the public areas of the housing project from the date of the notice through final resolution of the prepayment request. The notice must state a date and place when and where tenants can meet with USDA personnel and must advise tenants that they may review all information submitted except the borrower's financial information and that they have 30 days from the date of the prepayment request to submit comments. *Id.* § 3560.654. After the USDA agrees to accept prepayment, it must then notify borrowers in writing of the conditions under which it accepts prepayment, including the specific restrictive-use provisions to which the borrower has agreed.

Id. § 3560.660(a). The USDA must notify tenants if the prepayment is expected to result in increased net tenant contributions, displacements, or involuntary relocations and notify tenants of their right to request a Letter of Priority Entitlement ("LOPE"). *Id.* § 3560.660(b).

C. Factual and Procedural Background of this Case

The loan for the development of GE was made in 1976, with a repayment term of 50 years. The loan may be prepaid, but only under the conditions set forth in ELIHPA. On June 22, 2015, RD sent a notice of prepayment letter to all GE tenants, explaining that GE's owner has requested permission to prepay the loan. ECF 23-1. The notice informed tenants that it was unclear whether GE would remain affordable housing, that rents could be increased, and that RD could determine that prepayment would require certain tenant protections.

On September 19, 2016, RD sent to GE's owner a letter confirming acceptance of prepayment on GE's financing, with conditions. ECF 23-2 at 1-5. This letter explained that RD had concluded from its "needs and impact analysis" that the proposed prepayment will not cause any adverse impact to minorities, but that there is an insufficient supply of affordable housing in the market area and thus the prepayment will be accepted with the condition of a Restrictive Use Covenant, which was attached. *Id.* at 1. This acceptance letter further explained the timing requirements for payment and that certain previously-identified repairs would need to be completed before prepayment. *Id.* at 1-2.

Also on September 19, 2016, RD sent a notice to GE tenants that RD had accepted the owner's prepayment request. ECF 23-2 at 6-8; *see also* ECF 23-3. This notice informed tenants that rents may be increased in the future, that the owner could not evict tenants without good cause, and that tenants could enforce the legal agreement made by the owner. The tenants also were notified that they may be eligible for a USDA Voucher to provide short-term rental subsidy to supplement the rent payment and allow tenants to remain in GE or move elsewhere. The notice also attached a document informing tenants that they may apply for a LOPE and may be eligible for an RD Voucher because "rents may increase thereby making the housing unaffordable to tenants." ECF 23-2 at 8.

Plaintiffs filed this lawsuit on November 4, 2016. On November 23, 2016, Plaintiffs filed an amended complaint and moved for a preliminary injunction. The Court set a hearing date of January 4, 2017, on Plaintiffs' motion. Several days before the hearing, the Court sent the parties the Court's tentative Opinion and Order granting Plaintiff's motion. At the hearing, Defendants stated that RD had decided voluntarily to rescind its approval of the prepayment request for GE's loan. Defendants acknowledged that there were flaws in its analysis in CRIA I and that RD would perform a new CRIA. Thus, Defendants argued, the preliminary injunction the Court had tentatively indicated it would order was no longer needed because the prepayment could no longer move forward until the new CRIA was completed. The Court agreed and denied Plaintiffs' motion without prejudice. The Court, however, ordered that Defendants could not accept any prepayment on GE without giving Plaintiffs 60 days' notice. The Court also ordered Defendants to comply with all statutory and regulatory notice requirements, so that Plaintiffs could timely renew their motion for preliminary injunction, if needed. ECF 30.

RD conducted its second CRIA, after which RD concluded that prepayment would have a disproportionate effect on minority housing. ECF 38-1. Accordingly, RD required GE's owner to offer GE for sale to a nonprofit or public agency for a period of 180 days. On or about May 11, 2017, GE's owner advised RD that it would comply with RD's decision and offer the development for sale after an appraisal of the property had been completed. ECF 49 ¶ 22.

There are five additional RD § 515 rental housing developments in Tillamook County. There is a 12-unit family development with all units subsidized with Rental Assistance; a 34-unit elderly development with 19 of the units subsidized with Rental Assistance; a 32-unit family development with 20 of the units subsidized with Rental Assistance; a 30-unit family development with all the units subsidized with Rental Assistance; and a 17-unit elderly development with 16 of the units subsidized with Rental Assistance. The loans for at least three of these developments are currently eligible for prepayment.

DISCUSSION

In their motion to dismiss, Defendants argue that Plaintiffs do not have standing because they do not allege sufficient facts showing injury from the regulations or alleged agency practices. Defendants also argue that the Court lacks jurisdiction because there has been no final agency action, which is a jurisdictional prerequisite to claims under the APA. Finally, Defendants argue that Plaintiffs' first and fourth causes of action are time-barred because the regulations that Plaintiffs challenge were issued more than six years ago.

Plaintiffs respond by arguing primarily that this case is justiciable for three reasons. First, the issue now before the court is one of mootness and not standing, which presents a higher burden for Defendants that has not been met. Second, RD's initial approval of CRIA I constitutes final agency action sufficient to allow suit under the APA, as does the issuance of CRIA II. Third, the first and fourth claims are not barred by the statute of limitations because the challenges are "as-applied" challenges, rather than "facial" challenges and thus the statute of limitations begins when the regulation has been applied, not when it was promulgated.

A. Standing

Plaintiffs assert that they had standing when this case was originally filed, that standing is considered as of the filing of the original complaint, and that Defendants' arguments relating to RD's rescission of the prepayment approval go to mootness and not standing. Defendants do not dispute these points, and instead argue that Plaintiffs' mootness-versus-standing argument is a distinction without a difference. Defendants contend that regardless of whether the Court considers the issue to be a question of mootness or standing, Plaintiffs cannot maintain their claims. The majority of Defendants' arguments, however, challenge Plaintiffs' standing, based on the facts as they exist as of the filing of the Second Amended Complaint.

As an initial matter, the Court agrees with Plaintiffs that Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action. *See Laidlaw*, 528 U.S. at 180 (noting that "we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation"); *Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) ("To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness)."); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint."); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) ("Importantly, in reaching this [standing] determination, we note that Article III standing must be determined as of the time at which the plaintiff's complaint is filed."); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001) ("[S]tanding does not have to be maintained throughout all stages of litigation. Instead it is to be determined as of the time the complaint is filed."); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'" and that evaluating standing when facts later change "conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter"); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) ("Standing is examined at 'the commencement of the litigation.'"); *Wadsworth v. Talmage*, 2017 WL 3271722, at *3 (D. Or. Aug. 1, 2017) (noting that standing turns on the facts as of the time of the original complaint, except when the court had allowed a supplemental complaint under Rule 15(d) of the Federal Rules of Civil Procedure to correct a defective complaint and circumvent the unnecessary steps of dismissal of one action and the filing of a new action); *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Engineers*, 2013 WL 1294647, at *7-8 (D. Or. Mar. 27, 2013) (rejecting the defendant's arguments that standing should be considered based on the facts at the time of the second amended complaint, when the government had voluntarily disbanded the challenged conduct, discussing the difference between standing and mootness); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-93 (2013) (noting that both parties had standing "[a]t the outset of this litigation" but that after Nike dismissed its claims with prejudice, the issue became one of mootness, and then analyzing the voluntary cessation exception to mootness).

The Court holds that Plaintiffs had standing at the time they commenced the action. Thus, the relevant question is whether the issuance of CSRIA II or the rescission of the prepayment agreement has rendered the case moot.

B. Mootness

Plaintiffs argue that none of Defendants' actions after the filing of this case have mooted Plaintiffs' claims that the implementing regulations on CRIAs violate the APA because they are inconsistent with the governing statute and result in arbitrary and capricious prepayment determinations, that the voucher program violates the APA because it is arbitrary and capricious, and that the regulations authorizing the termination of use restrictions violates ELIHPA.

Plaintiffs also argue that even if their claims were rendered moot, they are subject to the exception to mootness of voluntary cessation.

Defendants respond that mootness is the doctrine of standing at a certain point in time, Plaintiffs no longer have standing, and thus the case is moot. This argument, however, has been rejected by the Supreme Court. In *Laidlaw*, the Supreme Court explained in detail why the description of mootness as "standing set in a time frame"[5] is not comprehensive—primarily because of the exceptions to mootness that are not available in considering standing. 528 U.S. at 190-92. The voluntary cessation exception to mootness, argued by Plaintiffs as applying in the pending case, is one of the exceptions discussed by the Supreme Court in *Laidlaw*.

The Court assumes without deciding that Defendants' conduct in rescinding its approval of GE's prepayment, withdrawing CRIA I, and issuing CRIA II, has mooted Plaintiffs' original claims. The Court now considers Plaintiffs' argument that the voluntary cessation exception to mootness applies. The Supreme Court has explained the voluntary cessation exception as follows:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.

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[5] In *Laidlaw*, the Supreme Court explained courts' previous reliance on this description: "The confusion is understandable, given this Court's repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' *Arizonans for Official English*, 520 U.S. [43,] 68 n.22 [1997] (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), in turn quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973) (internal quotation marks omitted)." *Laidlaw*, 528 U.S. at 189-90.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). As the Supreme Court further explained, in a footnote:

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it."

Id. n.10 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-04 (1968) (alterations in original) (citations omitted); *see also Laidlaw*, 528 U.S. at 189 (describing the voluntary cessation exception, citing to *City of Mesquite* and *Concentrated Phosphate*).

Defendants voluntarily ceased part of the alleged wrongful conduct—the approval of prepayment of the loan on GE and reliance on the allegedly improper CRIA I. But Defendants did not cease much of the alleged wrongful conduct—retaining allegedly improper regulations, failing to have standards that result in allegedly arbitrary and capricious analyses, and operating an allegedly arbitrary and capricious voucher program. For example, RD has not changed its regulations more closely to mirror the statutory text with respect to CRIAs, as Plaintiffs allege it should with respect to evaluating the effect on minority housing. Instead, when faced with the Court's tentative decision on Plaintiff's motion for preliminary injunction, RD decided to withdraw its particular CRIA relating to a single property, reissue that CRIA, and then rescind the prepayment approval on that one property. Changing that single decision, however, does not change the underlying wrongful conduct that Plaintiffs' allege resulted in that allegedly wrongful decision, which Defendants appear to have conceded was a wrongful decision when they rescinded that action.

RD voluntarily agreed to reconsider its CRIA and prepayment approval relating to GE. RD did not, however, change any policy or make any procedural changes to the regulations and procedures challenged by Plaintiffs. The Ninth Circuit has found that "an executive action that is not governed by any clear or codified procedures cannot moot a claim" and falls within the voluntary cessation exception. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). Even if RD's reconsideration of GE's CRIA indicates some intention of changing its policy going forward, without a more rigorous policy statement or change to its regulations, the Ninth Circuit advises courts to be "less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (finding that this type of conduct falls within the voluntary cessation exception).

Defendants' voluntary cessation may have rendered certain aspects of Plaintiffs' originally-alleged harm no longer imminent (such as facing higher rents and eviction at GE), but Defendants have a "heavy burden" to show that it is "absolutely clear" that their allegedly wrongful behavior "could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203). This alleged wrongful behavior includes, for example, conducting CRIAs using an improper standard or operating an improper voucher program. Because the same regulations and procedures (or lack thereof) are still in place, the allegedly wrongful behavior can reasonably be expected to recur.

Defendants argue that their allegedly wrongful conduct of performing improper CRIAs or implementing improper voucher programs cannot serve to keep this case a live case or controversy because it cannot harm Plaintiffs. Defendants contend that although Plaintiffs assert there are other low income properties in Tillamook County that are eligible for prepayment, Plaintiffs "provide no evidence" that any other property is currently in the prepayment process, other than GE. Defendants also assert that whether the Individual Plaintiffs will need vouchers will not be known until after it is known whether GE is purchased by a nonprofit organization and retained as low income housing or allowed to be prepaid without use restrictions (after the 180-day waiting period expires). Even if the GE loan becomes eligible for prepayment, Defendants argue that it will still be speculative as to whether any particular Individual Plaintiff will need a voucher. Thus, argue Defendants, even if Defendants improperly perform some of the functions within the prepayment or voucher process, any argument that such impropriety would harm Plaintiffs is speculative.

The Ninth Circuit rejected similar arguments in *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169 (9th Cir. 2009). In *Rosemere*, the plaintiff originally sought a declaration that the EPA was not timely considering administrative complaints and an injunction compelling the EPA to complete its investigation into an underlying administrative complaint brought by the plaintiff. *Id.* at 1171. After the lawsuit was filed, the EPA completed its investigation and argued that the lawsuit was moot. The plaintiff filed an amended complaint and sought an injunction requiring that the EPA consider all of the plaintiff's administrative complaints going forward for the next five years within the deadlines required by the EPA's governing regulations. *Id.* at 1172. The district court dismissed the plaintiff's claims as moot. The plaintiff argued that the claims were subject to the voluntarily cessation exception to mootness. The EPA argued that because no other administrative complaints were pending, the prospect that there would be any new administrative complaint by the plaintiff and that adjudication of any new administrative complaint would be delayed was speculative. *Id.* at 1173. The Ninth Circuit rejected this argument, noting that it impermissibly shifted the burden onto the plaintiff to prove that it would file a new administrative complaint when the "heavy burden" is on the defendant (the party arguing mootness) to show that the plaintiff would *not* file a new complaint in the future, and that the defendant could not meet this burden by merely arguing that the plaintiff had not done enough to show future harm. *Id.* at 1173-74. The Ninth Circuit also noted that a plaintiff's stated intention to resume the activity that led to litigation is sufficient. *Id.* at 1174.

Plaintiffs argue in their response that if RD does not change its allegedly improper regulations or start using proper prepayment standards of review, RD will continue to violate ELIHPA, which "will continue to frustrate CARE's mission and increase CARE's financial and personnel burdens in Tillamook County. . . . CARE will have to spend more time assisting its clients in finding affordable housing, *challenging RD's illegal acceptance of prepayment requests*, and providing additional financial assistance." ECF 57 at 9 (emphasis added). Additionally, at oral argument counsel for CARE confirmed that CARE would continue to file lawsuits in the future if additional properties receive prepayment approval. This is a sufficient stated intention to resume activities by Plaintiff to satisfy the requirements set by the Ninth Circuit. *Rosemere*, 581 F.3d at 1174; *S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1134 (9th Cir. 2004).

The "heavy burden" is on Defendants to show that it is "extremely unlikely" that the Individual Plaintiffs will not be subject to RD's voucher program and that CARE will not file a future lawsuit. *Rosemere*, 581 F.3d at 1173 (stating that one way the defendant could meet its burden of showing that it is "absolutely clear" that the challenged conduct would not reoccur is "by showing that it is extremely unlikely that Rosemere will file another complaint (and thus come before the agency again)" and the other is to show that the agency would timely respond to any future complaint). Defendants have submitted a declaration from J. Wesley Cochran, the

Multi-Family Housing Program Director from the Oregon State Office of Rural Development, stating that he is aware of all prepayment applications for § 515 properties and that there are no pending applications for prepayment within Tillamook County other than for GE. The fact that no applications are currently pending, however, is insufficient evidence standing alone. In *Rosemere*, there were no pending administrative complaints by the plaintiff, but that was insufficient to show that there would not be a future complaint. 581 F.3d at 1172-73. Further, in *Barter Fair*, the plaintiff hoped to obtain funding at some point in the future to hold another fair, even though it had not been able to raise sufficient funds for many years, and the Ninth Circuit found the prospect of a future fair not to be too speculative because the barriers were not "insurmountable." 372 F.3d at 1134. Similarly, it is not an insurmountable hurdle or extremely unlikely that a property in Tillamook County will seek repayment in the future and CARE will challenge the RD's process for considering such a repayment.

Defendants offer no evidence regarding the future applicability of the voucher program to Plaintiffs, which is unknown until the 180-day waiting period expires on or about April 17, 2018. At oral argument, counsel for Plaintiffs noted that the voucher program has run out of funding for the past several years and that the funding in the most recent budget proposed by Congress (though not yet approved) was significantly decreased. Thus, argue Plaintiffs, it is a near certainty that the voucher program will run out of funds. Plaintiffs also contend that voucher funds are being mishandled and distributed in a manner contrary to the statute, which harms all Plaintiffs because it results in monies not being available that otherwise would be available to program participants. At this stage in the proceedings, Defendants have not met their "heavy burden" of showing that it is "absolutely clear" that the alleged wrongful conduct cannot reoccur.

Defendants also cite to *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), and *Cierco v. Mnuchin*, 857 F.3d 407 (D.C. Cir. 2017), to support their argument that Plaintiffs' claims are moot. Defendants' reliance on *Summers* is misplaced. In *Summers*, the Supreme Court held that the plaintiffs could not continue litigating whether agency regulations were improper after the parties *settled* their underlying dispute on a timber sale, which was the only application of the regulations that gave the plaintiffs standing in the case. 555 U.S. at 494 ("We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has *settled* that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests." (emphasis added)). That case did not involve the voluntary cessation exception to mootness because it involved a completely different context—the parties had settled their dispute. In the pending action, the parties have not settled their dispute. Defendants' reliance on *Cierco* is similarly unavailing because *Cierco*, like *Summers*, did not involve the voluntary cessation exception to mootness. The concerns giving rise to the voluntary cessation exception (that a defendant might voluntarily cease the challenged conduct to avoid judicial scrutiny but would later return to its wrongful ways after the case ended) were not present in *Ciero* or *Summers*.

Defendants' remaining arguments relate to standing, instead of mootness. Defendants argue the implications of facts as they exist at the time of Plaintiffs' filing of the Second Amended Complaint and assert that those facts demonstrate that Plaintiffs lack standing. As discussed earlier, however, that is not the proper analysis. Standing is determined based on the facts that existed when the action was commenced.

C. Final Agency Decision

The Supreme Court has reiterated the standards for evaluating whether an agency decision is "final" under the APA. In *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Supreme Court explained that there are "two conditions that generally must be satisfied for agency action to be 'final' under the APA." *Id.* at 1813. The first is that "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The second is that "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quoting *Bennett*, 520 U.S. at 178).

Defendants argue that CRIA II is not a final agency decision because denying prepayment under CRIA II does not end the decisionmaking process. First, the Court notes that the final agency decision originally challenged in this lawsuit is CRIA I. The subsequent conduct, the issuance of CRIA II, may be relevant for mootness purposes, but the Court has found that it did not serve to moot Plaintiffs' claims.

Second, even if CRIA II were the relevant agency decision, it is a final agency decision. Defendants assert that based on RD's decision in CRIA II and the requirement that GE be offered for sale, if an offer is made, the agency will have to make further decisions. Defendants contend that these additional decisions include whether the offer offeror qualifies as a "nonprofit organization or public agency" under 42 U.S.C. § 1472(c)(5)(B)(i)-(ii) and whether an offer is bona fide.[6] If an offer is found to be bona fide and from a qualified offeror, then GE's owner

[6] Defendants do not cite to any statute or regulation defining "bona fide" or discussing RD's authority or process to determine a bona fide offer. The regulation governing these types of offers does not use the term "bona fide," but instead discusses the process for obtaining market value appraisals and the requirement to inform nonprofit and public agency purchasers of the "minimum value of the housing project based on the market value determined in accordance" with those appraisals. 7 C.F.R. § 3560.659(b)(3).

must accept the offer or withdraw the request for prepayment. If there is no bona fide offer from a qualified offeror, then GE's owner can prepay the loan without any restrictions. Thus, argue Defendants, RD's final agency decision has not yet been made.

Plaintiffs argue that CRIA II is a final agency decision because it is not a tentative decision or interlocutory decision, it is a decision from which rights and obligations were determined. Plaintiffs assert that in CRIA II, RD determined that GE's owner's prepayment requested materially affected minority housing and thus could not be accepted unless GE's owner first offered the property for sale to nonprofit and public agencies, and RD then required GE's owner to offer the property for sale. Plaintiffs argue that any remaining agency decisions are "administrative" and that the primary substantive decision has already been made that affects the rights of the parties. Defendants respond that whether the GE loan can be prepaid, and thus whether the tenants of GE (including the Individual Plaintiffs) will be subject to the voucher program, are decisions that have not yet been made because they hinge on whether a bona fide offer from a qualified offeror is submitted, and thus the remaining decisions are not merely administrative.

Although there may be outstanding issues, the important ones do not turn on discretionary agency decisionmaking. They turn on the decisions of outside parties—whether any nonprofit organization or governmental agency decides it wants to purchase GE. The only agency decisionmaking left is to determine, if an offer is made, whether the offeror meets the criteria for "nonprofit organization or public agency." If no offer is made, the agency determines whether to accept prepayment or refinancing. The Court finds that these decisions are more ministerial than substantive. The agency has regulations setting forth the criteria for an eligible nonprofit organization and how to prioritize if multiple nonprofit organizations or public bodies make offers. 7 C.F.R. § 3560.659. The agency decision from which most of the rights and obligations were determined, and legal consequences flowed, was CRIA II. Notably, GE's owner had the right to administratively appeal the determination of CRIA II. If it was not a decision from which rights were determined and legal consequences flowed, GE's owner would not have had needed the right to appeal it.

Additionally, if no offers are received, the agency has no substantive decision left to make. Defendants do not argue that there is any decisionmaking remaining by the agency if no offers are submitted. Thus, CRIA II would be a final agency decision if no offer is received. It would be anomalous, to say the least, to conclude CRIA II is a final agency decision if no offer is received but is not a final agency decision if an offer were to be received, making whether it is a final agency decision turn on something that might occur 180 days after the decision is made and based on matters entirely outside of the control of the agency.[7]

Defendants' reliance on *DBSI/TRI IV Ltd. Partnership v. United States*, 465 F.3d 1031 (9th Cir. 2003), also is unavailing. *DBSI/TRI IV* held that a case is not ripe "where the existence of the dispute itself hangs on future contingencies that may or may not occur." *Id.* at 1039. In the pending case, the existence of the dispute does not depend on a future contingency. Plaintiffs' claims relating to Defendants' alleged improper CRIA procedures and termination of use restrictions do not hang on whether there are or are not any bona fide offers by qualified offerors (the only remaining "decisions" Defendants argue are left for the agency to make). Although Plaintiffs' standing relating to their voucher claim requires a prepayment approval decision, as discussed above, standing is determined as of the commencement of the action, which was based

[7] Under Defendants' argument, the Court would need to stay deciding this motion until after the 180-day waiting period, and if no offer is made then CRIA II would become a final agency decision and Defendants' motion on this ground would be rendered moot.

on CRIA I. Defendants' argument that the voucher-based claim has become moot is rejected by the Court, as discussed earlier. Regardless, Defendants' mootness argument does not determine whether CRIA II is a final agency decision.

D. Timeliness

Defendants argue that Plaintiffs' first and fourth claims are time-barred because Plaintiffs assert that regulations 7 C.F.R. §§ 3560.662(f) and 3560.658(b) are improper, but those regulations were promulgated more than six years ago. Plaintiffs respond that they are making an "as applied" challenge and thus the six-year limitation has not run. Defendants argue Plaintiffs cannot be making an "as applied" challenge because CRIA II found that GE's prepayment materially affected minority housing and thus the agency action was not an adverse application of the regulation to Plaintiffs. Again, Defendants are confusing what facts the Court considers.

For standing and timeliness, the Court looks to the facts as they existed at the time the lawsuit was commenced. *See* cases cited in Section A, *supra*. In the pending case, those facts included CRIA I and the agency's finding of no material effect on minority housing and its approval of GE's prepayment offer. That was an adverse application of the challenged regulations to Plaintiffs. It is thus an "as applied" challenge and these claims are not time-barred under the applicable statute of limitations. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (noting that a plaintiff may challenge "the substance of an agency decision as exceeding constitutional or statutory authority . . . later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger"); *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089, 1106 (E.D. Cal. 2011) (noting that one way a plaintiff can substantively challenge the validity of a regulation after the six-year statute of limitations has run is "through an 'as applied' challenge requesting judicial review of the agency's adverse application of the rule to the particular challenger" (quotation marks omitted)).

Mootness is a different question. Because the Court has concluded that the voluntary cessation exception applies, as discussed earlier, Plaintiffs' claims are not moot and, for the same reasons, have not been rendered untimely by Defendants' conduct subsequent to the filing of the lawsuit.

CONCLUSION

Defendants' Motion to Dismiss the Second Amended Complaint (ECF 53) is DENIED.

IT IS SO ORDERED.

DATED this 8th day of February, 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge