

grants. It called for more focus on prevention of fraud, abuse and waste in HUD's dealings with both the PHAs and private landlords. It encouraged HUD to come up with additional administrative reforms in this area, including a possible legislative proposal to increase rent collections. Finally, OMB urged the Department to continue with improvements to its information and financial systems.⁴⁶

The Process

Congress has commenced work toward a concurrent budget resolution which will set the parameters for spending in the Appropriations Committees that have already begun hearings. Bipartisan support for highway funding, and the President's own pet programs such as child care and education, make HUD's budget particularly vulnerable.

Among the many immediate challenges for HUD will be to keep up the momentum around the incremental voucher request. For example, some observers believe that Congress will not allow the deep cuts in the Section 202 elderly program to stand. A potential source for restored funding for the elderly and disabled programs is the proposed funding for incremental vouchers.

As the budget and appropriations process moves forward, we will report on its progress. ■

RURAL HOUSING FUNDING REQUEST

The Rural Housing Service budget announced along with the federal budget on February 2, 1998, reflects a program level increase of \$300 million over the Fiscal Year 1998 budget.

One hundred million is proposed for the Section 515 multifamily housing program for direct loans for the construction of affordable rental housing in rural areas. This represents a one-third reduction in funding from FY 1998's \$150 million level. Section 521 rental housing assistance is proposed for funding at \$583 million, an increase in budget authority of \$42 million over last year's funding levels. This program is expected to face a similar renewal challenge experienced by HUD's Section 8 programs.

A big funding boost was announced in the year-old Section 538 guaranteed multifamily loan program, designed to increase the availability of rental properties in rural areas. Proposed funding is to increase from a program level of \$20 million in FY 1998 to \$150 million for the coming fiscal year.

The Section 502 single-family direct loan program is level-funded at a program level of \$1 billion, just as last year, although this represents a dramatic decrease from levels as recently as four years ago when the program was funded at \$1.8 billion.

⁴⁶Passback at 4-5.

Both the Section 514 farm labor housing loan and Section 516 farm labor housing grant programs experienced some growth over last year's levels, the loan program increasing from \$15 million to \$32 million and the grant program increasing from \$10 million to \$13 million.

Despite the overall increases, the reduction in support for the program serving the neediest population, the Section 515 program, comes on the heels of a recent study that demonstrates a record number of rural households continue to live below the poverty line and experience housing problems, including lack of affordability and substandard conditions.¹

COURT ENJOINS PHA BAN ON UNAUTHORIZED GATHERINGS

Prompted in part by the Department of Housing and Urban Development's "one strike policies"¹ and its own views about greater flexibility being accorded to PHAs, a housing authority in Florida last year rewrote its leases to give it much more control over the lives of its tenants. In response, two tenants who had been forced to sign the new leases brought a suit in federal court challenging nine clauses of the lease as being unlawful.²

Last month, the court preliminarily enjoined the PHA from enforcing a new lease clause that forced tenants to agree not to have any unauthorized gatherings on housing authority property.³

PHA is enjoined from enforcing a new lease clause prohibiting unauthorized gatherings on housing authority property.

Background

In October 1996, the PHA's board approved a new lease to be used by the PHA and its tenants, effective January 1, 1997. Among its various clauses were nine that the tenants who brought suit alleged to be unlawful. They were:

¹Cushing Dolbeare and Leslie Strauss, *Rural Housing and Welfare Reform: HAC's 1997 Report on the State of the Nation's Rural Housing* (Washington, DC: Housing Assistance Council, Dec. 1997).

²These policies involve the so-called "One Strike and You're Out" approach to substance abuse and criminal activity in or near public housing. HUD Notice PIH 96-16 (Apr. 12, 1996).

³*Knight v. Sanford Hous. Auth.*, No. 97-1225-CIV-ORL-19B (M.D. Fla. complaint filed 1997).

³*Id.* (order entered Jan. 30, 1998).

- A clause providing that "[t]here shall be no unauthorized gatherings or other unlawful activity on Housing Authority property," with an exception for social parties or family gatherings within the apartment or on the attached cement patio.
- A provision by which the tenant waives all rights to a jury trial in any action to enforce or terminate the lease;
- A clause obliging the tenant to pay the PHA's costs and attorneys' fees in eviction actions, unless the court determines that the tenant is the prevailing party;
- Two provisions deeming late charges and repair charges that remain unpaid for 30 days to be additional rent;
- A clause authorizing the PHA to increase the security deposit from its normal \$250 level if the property is being abused, and to evict the tenant if the increased deposit is not paid within 14 days;
- A clause prohibiting anyone who is not a resident or a guest from being on PHA property after 11:00 p.m.
- A clause by which the tenant agrees that anyone under the age of 17 residing in the household or visiting cannot be outdoors between 9:00 p.m. and 6:00 a.m. unless supervised by the tenant; and
- A clause limiting the PHA's duty to abate rent when it does not repair defects that are hazardous to life, health and safety to cases in which the PHA had the ability to correct the defect.

Plaintiffs also challenged the PHA's use of a "one strike" lease violation notice that did not inform the tenants of their grievance procedure rights and other procedural protections.

In the court's view, the PHA had curtailed tenants' activities — and First Amendment rights — in light of the threatened enforcement of the lease.

After various efforts to negotiate a resolution of the case, plaintiffs sought preliminary injunctive relief on four issues: (1) the prohibition against unauthorized gatherings, (2) the waiver of jury trials, (3) the use of the "one strike" lease violation notice, and (4) the provision authorizing the PHA to treat late charges and unpaid repair charges as additional rent. The court granted a preliminary injunction against the unauthorized gathering provision and denied relief on the other issues on standing grounds.

The Court's Decision

The meat of the court's decision was its analysis of plaintiffs' standing to challenge the unauthorized gathering provision and plaintiffs' likelihood of success on that claim. The PHA contended that the tenants had no standing to challenge the unauthorized gathering clause because they had not shown or alleged that the clause would be or had been enforced against them. For the court, the issue was

whether the injury alleged by the tenants was real and immediate, not hypothetical or conjectural. However, it recognized that in First Amendment cases, which this was, there is sufficient injury if the defendants' threatened action actually chills the plaintiffs' exercise of their rights and if plaintiffs' fear of enforcement is objectively reasonable.

Continued use of an unconstitutional clause could not be in the public interest, and enjoining of its enforcement could not be considered a harm to the PHA.

Here the court found sufficient injury in the plaintiffs' affidavits and their complaint's allegations. Plaintiffs alleged and swore that they were forced to sign the lease in order to save their homes; that they had been informed that everyone, including residents and guests, had to be inside by 11:00 p.m.; that the PHA director had threatened to use local police to enforce the lease and had said that the staff and police were watching who entered and left the premises; that they were fearful of engaging in activities with friends, neighbors and relatives; that they did not know what they were allowed to do and what would be wrong; and that they often wanted to gather outside their units to socialize with their neighbors and friends on the streets and in the grassy areas. In the court's view, the PHA had curtailed their activities in light of the threatened enforcement of the lease, and that reaction was objectively reasonable.

Regarding the likelihood of success on the challenge to the unauthorized gathering clause, the court concluded that plaintiffs had met their burden. The lease did not define unauthorized gatherings and that ambiguity made it likely that the clause would be void for vagueness. In addition, without a definition or other guidelines, the lease gave the PHA unfettered discretion to enforce the provision in an arbitrary manner, further chilling plaintiffs' exercise of their associational rights. Thus, in the court's view, there was sufficient likelihood that the clause was unconstitutional on its face.

The court also rejected arguments that an injunction would frustrate the public interest and that the balance of harm favored the PHA. The premise of these arguments was that the new lease had helped reduce crime at the projects and that enjoining it would set back that progress. The court was not deterred by that argument, recognizing that continued use of an unconstitutional clause could not be in the public interest, and enjoining enforcement of an unconstitutional clause could not be considered a harm to the PHA.

The court, however, denied, for lack of standing, preliminary injunctive relief against the jury trial waiver and the PHA's use of the "one strike" notice. In the court's view, because neither plaintiff had ever received a "one strike"

notice and neither was currently subject to an eviction action, there was not a sufficient showing of injury resulting from these PHA policies. However, the court did allow the plaintiffs to show additional injury when moving for declaratory relief and a permanent injunction.

At this stage, the PHA has modified its lease in several respects, eliminating some of the provisions that plaintiffs have challenged. The rest of the dispute may be resolved through further negotiations or, if not, through a final judgment.

The plaintiffs are represented by Treena Kaye, at Central Florida Legal Services in Sanford, and Robert Hornstein of Southern Legal Counsel in Gainesville. ■

EVICITION COURT REJECTS "ONE STRIKE" PREEMPTION ARGUMENT

The emphasis on strict eviction policies is continuing to produce odd arguments around the country. In a recent case in Connecticut, a housing authority argued that HUD's "One Strike" brochure¹ had preempted the state laws regarding eviction notices.² The court, fortunately, rejected the argument, characterizing the HUD "One Strike" document as a public relations piece not capable of preempting state law.

Although federal statutes and regulations may preempt state law, public relations documents may not; in this case, no conflict even existed.

The facts were fairly simple. One of the defendant tenant's household members was arrested for kidnapping, attempted sexual assault and possession of cocaine at the tenant's apartment. The PHA sent the tenant a notice to quit and then brought the eviction action. The PHA had not sent the tenant a notice (required by state law) before the termination, specifying the violation and the right to cure, if the violation is curable. Under the state statute, the tenancy continues if curable violations are cured within 21 days. If the violation is not curable or is not cured, the landlord can bring an eviction action after 30 days.

¹HUD, "One Strike and You're Out," HUD Notice PIH 96-16 (Apr. 12, 1996).

²*East Hartford Housing Authority v. Birdsong*, No. SPH 93695 (Conn. Super. Ct., Housing Sess., Hartford, Memorandum of Decision filed Jan. 8, 1998).

In opposition to the tenant's motion to dismiss for the PHA's failure to send the pre-termination notice, the PHA filed HUD's "One Strike" booklet and argued that it conflicted with the state law giving the tenant a right to cure and the right to a 30-day notice of the violation.

The court rejected the argument for essentially three reasons. First, federal preemption of state landlord/tenant law is not the norm. In fact, federal housing law and state landlord tenant law are normally "melded to create a coherent, though at times awkward, process."³ Second, although federal statutes and regulations may preempt state law, public relations documents cannot. Third, there was no conflict between the HUD promotional materials and state law. HUD's "One Strike" booklet still recognizes that tenants must be provided with notice and a hearing and that the absolute liability clauses must be used judiciously. There is nothing in the booklet suggesting that state procedural requirements are to be affected in any way.

The tenant was represented by David Pels at Greater Hartford Legal Assistance. ■

RECENT REGULATIONS AND NOTICES

The following are housing-related regulations and notices that HUD and other federal agencies have recently issued. For the most part, the summaries are taken directly from the agency's summary of the regulation in the *Federal Register*. The Notice summaries are taken from the introductory paragraphs in the Notices.

Copies of the cited documents may be secured from various sources, including (1) the Handsnet folder at Legal Services/Substantive Law/Housing Forum, (2) the Government Printing Office's spot on the World Wide Web,¹ (3) bound volumes of the *Federal Register*, (4) HUD Clips,² and (5) HUD.³ Citations are included with each document to help you secure copies.

HUD Federal Register Notices

Notice of Delegation of Authority 63 Fed. Reg. 3,761 (Jan. 26, 1998)

Summary: This Notice delegates to the Assistant Secretary for Community Planning and Development the Secretary's authority to designate two additional urban Empowerment Zones, pursuant to 26 U.S.C. § 1391, as

³*East Hartford Hous. Auth. v. Birdsong*, slip op. at 3, citing *Jefferson Garden Assocs. v. Greene*, 202 Conn. 128, 144 (1987).

¹At http://www.access.gpo.gov/su_docs.

²At <http://www.hudclips.org/cgi/index.cgi>.

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