J. RECEIVED [illegible] received Ben Kaplan's letter, [illegible] my response

SAN FRANCISCO
NEIGHBORHOOD LEGAL ASSISTANCE FOUNDATION
HOUSING UNIT
49 POWELL STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 627-0220

July 23, 1985

John Kosloske
Trial Attorney
Office of General Counsel, Room 10258
Dept. of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Re: Levy v. HUD

Dear Mr. Kosloske:

Enclosed is a letter that I received from a local attorney concerning advice apparently given by Madeline Hastings concerning the scope of the injunction in Levy. The case involved is a local unlawful detainer in which an owner entered into a Section 8 lease on February 1, 1985. A new owner purchased the premises on June 7, 1985 and is now attempting to evict the tenant, without cause. The tenant raised Levy as a defense, and the owner's attorney, a Mr. Willian Worthington, contacted Madeline Hastings for advice. The letter indicates that Ms. Hastings informed Mr. Worthington that the Levy injunction does not apply to a tenant who has been in occupancy for longer than one year, and that it does not apply to an owner who was not an original party to the lease and HAP contract.

I recognize that this letter from Mr. Worthington is hearsay "of the rankest sort." It may not reflect what Ms. Hastings said, and Mr. Worthington may not have given a proper version of the facts to her. However, assuming for purposes of discussion that the representation is correct, I want to address the matter.

Any suggestion that the Levy injunction does not apply to a tenant after the first year of occupancy is incorrect. The question left open in the injunction, in our stipulation, and in Judge Schwarzer's opinion, is whether business and economic reasons are good cause for termination after the first year of the lease term. Examination of the terms of the injunction dis-

closes that it uses the phrase "first year of the lease" in each pertinent portion, and never refers to the first year of "occupancy" or "participation in the Section 8 program." (See Order Granting Permanent Injunction, p. 2. line 17; p. 3, line 7.) Furthermore, this was not dictum, but was a finding necessary to enable the court to grant the injunction. Anna Levy herself was in the first year of her lease term, but was in her third yearly lease under the Section 8 program, and had occupied the premises for some time before receiving Section 8 assistance. These facts are a matter of record in the case.

Second, there is no authority for the proposition that a purchaser of a property leased under Section 8 is not bound by these same requirements. The injunction applies to any "termination of tenancy" (p. 2 line 16; p. 3, line 5.), and does not distinguish between the original signer of the lease and a subsequent owner. Under every state's law (that I know of), a new owner who purchases from a lessor/owner takes subject to the requirements of the existing lease. (You might also recall that Anna Levy's landlord, David Hudson, had not originally signed the lease or HAP contract, yet was bound by the provisions of the statute.)

Finally, the fact that the lease may have contained language contrary to the statutory requirement and the injunction simply renders the lease language contrary to law and unenforceable. Otherwise, every owner could simply write a provision into the lease completely contradicting the injunction.

As you know, the injunction prohibits HUD from enforcing or implementing the regulation in the designated respect. I think giving advice to a Section 8 owner constitutes "enforcement" or "implementation," and if the advice was given as stated in Mr. Worthington's letter, would violate the injunction.

Please let me know if the letter from Mr. Worthington is accurate, and your position on this matter.

Thank you for your cooperation.

Sincerely yours,

EDWARD G. WEIL
Attorney at Law

EGW/sas

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE GENERAL COUNSEL

Edward G. Weil, Esq.
San Francisco Neighborhood Legal
Assistance Foundation
49 Powell Street
San Francisco, California 94102

Dear Ed:

Subject: Levy, et al. v. HUD, et al.,
Civ. No. C084-7983-WWS

We appreciate the opportunity to respond to your letter of July 23, 1985 by presenting HUD's position on the applicability of the Levy injunction to a situation where a purchaser of a Section 8 Existing unit who declines to assume an existing HAP contract or to execute a new one initiates an eviction action in state court. It appears this is the fact situation which Mr. Worthington may have presented to Madeline Hastings. His letter of July 18, 1985, as you suspected, does not accurately reflect Ms. Hastings' statements or the position of HUD.

As an initial matter, there is no dispute that the length of a tenant's occupancy of a unit is irrelevant to the injunction's provisions contained in paragraphs 3-5. We agree with you that the "first year of the lease" is the operative language governing the application of good cause. In other words, during the first year of any Section 8 Existing lease other good cause could be only "other malfeasance or nonfeasance of the tenant."

Turning to the question of the application of the good cause provision, raised in the second paragraph on page two of your letter, it appears that you are making three separate points: 1) there is no statutory authority for a purchaser of property who chooses not to participate in the Section 8 program to disregard the good cause requirement; 2) the injunction makes such a purchaser subject to the good cause requirement; and 3) since state law requires the purchaser to assume the lessor's obligations under an existing lease, a purchaser assumes the good cause requirements of an existing Section 8 lease.

Insofar as the statutory issue is concerned, we construe, from the absence of any analysis or explanation in your letter,

that you have not been able to find any support for your view that the statute prohibits a purchaser not participating in the Section 8 program from evicting a tenant without good cause. The reason for the absence of support is that Congress did not intend that result. As you know, Section 8 is a grant program that offers rental assistance payments to landlords who volunteer to participate. The key to this scheme is the assistance contract (HAP) between the PHA and the owner, the document that Congress has employed to effectuate the program.[1/] It is the mechanism by which landlords agree to participate and constitutes the only legal basis under which a PHA can make the Section 8 payments. It is the means Congress has chosen to regulate the landlords' conduct, i.e. to extract regulatory obligations in return for the receipt of federal funds.[2/] From this scheme a congressional intent is plain and explicit - namely, that the regulatory obligations are to be imposed only on those landlords who will receive the benefits of the program. Since a PHA legally cannot make payments to an owner unless he executes a HAP or assumes an existing one, it follows that a non-participating owner is not subject to the Section 8 program's obligations.

This concept is supported by the conference report, accompanying the 1981 amendments to the Housing Act. It provides that a participating owner who terminates his participation in the program is not subject to the good cause requirement:

> [I]t is not the intention of the Conferees that these statutory provisions govern the relationship between a landlord and a tenant after a landlord has in good faith terminated his participation in the Section 8 Existing program. H. Rep. 97 - 208, 97th Cong., 1st Sess. 695, reprinted in 1981 U.S. Code Cong. & Ad. News 1010, 1053-54.

Since good cause does not apply when an owner who had been participating in the program leaves, it follows by parity of reasoning that the federal standard for termination of tenancy does not apply to a landlord who never volunteered to be in the program in the first place, has not contracted or assumed the obligations of a HAP contract and has not received the federal payments.

1/ The whole Section 8 statutory scheme is predicated on the authority to make assistance payments pursuant to contracts with owners of dwelling units. See e.g. Section 8(b)(1).

2/ The statutory standard for termination of tenancy is one of many obligations that are to be included in the terms of a HAP contract. Compare Section 8(d)(1) ("Contracts . . . shall ... provide . . . the owner shall not terminate" except in accordance with the statutory standard) with Section 8(c)(1) - and (8)(d)(2).

A further reason exists for this result. In the case of the good cause requirement of Section 8(d)(1) we are not dealing with a law, such as Section 601 of the Civil Rights Act of 1964 or Section 804 of the Fair Housing Act of 1968, which is binding of its own force. The good cause requirement is binding only by virtue of its inclusion in the contract. Under established contractual principles the obligations in a contract are personal to the party who executes the contract. Consequently, the good cause language in a HAP contract would not be enforceable against one who has neither executed it nor was willing to assume it. (The statute does not create or assume that the HAP contract contains covenants running with the land which are binding on a successor to the realty).

Your contention that the injunction holds otherwise is incorrect. The lawsuit you brought was basically a very narrow one. With regard to HUD, it challenged the definition of good cause contained in Section 882.215(c)(2) of the regulations as being illegal during the first year of the lease. You contended that because of the one year requirement in Section 8(d)(1)(B)(i) of the Housing Act only tenant malfeasance or nonfeasance could constitute other good cause; and thus business or economic reasons and other similar owner justifications were not valid. The court agreed with you and limited good cause during the first year of the assisted lease term to tenant conduct.

Since your challenge was simply to the breadth of Section 882.215's definition of other good cause, since the issue of the applicability of the statutory grounds for termination of tenancy or of Section 882.215 to a purchaser of real property who has never executed a HAP contract for the unit was never raised, let alone litigated, and since it is much too important to have been decided without any consideration by the parties or the court, it cannot be presumed that the court intended to decide it sub silentio. Moreover, the injunction itself does not contain any language to support your contention that it binds a purchaser to comply with the federal standard on termination of tenancy.[3/] The basis presented in your letter that the injunction does apply is the reference to "termination of tenancy." The context in which the phrase appears, however, does not support your view that it applies to every termination of tenancy, including one initiated by a subsequent owner. The injunction states in pertinent part that HUD shall suspend and not enforce or implement "24 C.F.R. §882.215 . . . insofar as it permits termination of tenancy . . ." See p. 2, lines 14-16 and p. 3

3/ Indeed, the language on p. 3, lines 13-14, which states that "[t]he court's order does not address the obligations . . . of landlords . . . in the program, after one year from the beginning of the lease term", suggests that the injunction only addresses obligations of landlords in the Section 8 program during the first year of leases.

lines 2 - 5. This language indicates the order only applies to situations where HUD's regulation authorizes or approves of a termination of tenancy. But Section 882.215 does neither in a fact situation where a purchaser seeks to end the tenancy. It was not written to address the obligations of such a purchaser. What Section 882.215(c) does is to spell out language for incorporation into the HAP contracts and leases that are to be executed at the beginning of the tenancy.

That brings us to your third point -- the obligations of a purchaser under state law. HUD agrees with you that, if state law mandates that a purchaser is bound by the terms of an outstanding lease, then the purchaser would be obligated to comply with the grounds for termination of tenancy that have been incorporated into the lease. Assuming you are correct about California law, the question of the applicability of the Levy injunction to a purchaser has no practical significance, because the Section 8 lease containing the federal standards for termination of tenancy would protect the tenant from an eviction without other good cause.

While we do not, therefore, see a need to bother the court with this matter, if you continue to believe that the Levy injunction, itself, requires a purchaser not participating in the Section 8 program to observe the good cause termination requirement, please let us know so we can petition the court for clarification of the injunction in this respect.

Sincerely yours,

Howard M. Schmeltzer
Special Assistant to the
Associate General Counsel
for Litigation