

Renewal Policies for Properties in Questionable Physical Condition

The following guidelines apply when a property's physical condition is substandard or marginal:

- Where inspections yield a notice of exigent health and safety violations, the contract administrator is supposed to abate the subsidy for particular units, and terminate the contract if the violations are not corrected within 72 hours.
- Where inspections find no exigent health and safety violations, but the property has a REAC score of at least 60, the contract should be renewed.
- Where inspections find no exigent health and safety violations, but the property has a REAC score of below 60, the owner must submit a repair plan, as well as an addendum to the renewal contract concerning the repairs.
- Where contracts are terminated with less than 120 days remaining on the term, HUD will notify owners and issue a short-term contract until the vouchers arrive. If an owner appeals HUD's termination decision, HUD will issue an interim contract for one year.

Incredibly, nothing in the *Guide* mentions giving tenants a notice when HUD is abating or terminating the contract.

Advocates working with tenants, tenant organizations, or nonprofits may call the NHELP staff for further assistance with the *Guide* or project-specific preservation work. Contact Jim Grow in the Oakland (CA) office or Vytas Vergeer in the Washington (D.C.) office. ■

ADMISSION AND OCCUPANCY FAQs ANSWERED BY HUD

On March 29, 2000, the Department of Housing and Urban Development (HUD) published the final regulations concerning admission and occupancy requirements in the public housing and Section 8 programs.¹ Since the issuance of those regulations, tenants, legal services providers, and public housing authorities (PHAs) have requested clarification of several issues addressed by the regulations. Therefore, HUD recently published Frequently Asked Questions (FAQs) aimed at giving further guidance on the regulations.²

¹*Changes to Admission and Occupancy Requirements in the Public Housing and Section 8 Housing Assistance Programs*, 65 Fed. Reg. 16,692 (Mar. 29, 2000). (Hereinafter all citations to the final rule will cite to the section of the regulations as it appears in the Federal Register.) See 30 HOUS. L. BULL. 33 (Mar./Apr. 2000) for an in-depth discussion of the new regulations.

²*HUD Frequently Asked Questions re:* 65 Fed. Reg. 16,692 (Mar. 29, 2000), at hud.gov/pih/legis/ao_faqs.htm, (hereinafter FAQs).

For many issues, the FAQs merely repeat the regulatory information in a question-and-answer format. However, this format is helpful because the regulations are complex and the FAQs format is simpler to understand. What follows is a summary of the new or clarifying information contained in the FAQs.

Admissions and Targeting³

The March 29 regulations made a number of changes to the targeting for admission to public housing, but the FAQs provide little additional information. One of the few clarifications includes the fact that a PHA may not set the income limits for public or Section 8 housing lower than 80 percent of area median income (AMI) (for example, at 60 percent of AMI), but may achieve the same objective by establishing preferences for tenants at income levels below 80 percent of AMI.⁴

Regarding preferences, the FAQs reaffirm that PHAs may create a local preference for people who work and add that the preference may also distinguish between those who work full-time and those who work part-time. The FAQs also include model language for achieving such preferences.⁵

For site-based waiting lists, the only new information that the FAQs provide is to clarify the provision that a PHA that establishes site-based waiting lists must submit occupancy data to HUD in an accurate, complete and timely manner. This is defined by HUD as achieving and maintaining an 85 percent reporting rate for 50058 Forms. Presumably, most PHAs will comply as the national reporting rate for 50058 Forms is now at 95 percent.⁶ If a PHA desired to establish a site-based waiting list after submitting their plan, it would be considered a substantial amendment to the plan and the PHA would have to follow the procedures for modifying a plan found at 24 C.F.R. § 903.21 (2000).⁷

Treatment of Income⁸

Some of the most significant changes in the new regulations have to do with the treatment of a tenant's income as it relates to setting rent levels, with perhaps the greatest clarifications occurring with respect to the public housing mandatory earned income disregard (EID). The FAQs correct an inadvertent omission in 24 C.F.R. § 5.609(d)(2000), which deals with the annualization of income. The C.F.R. section,

³FAQs at Section I; 24 C.F.R. § 960.202 (2000).

⁴FAQs at Section I.A. Q1.

⁵FAQs, Section I.C. Q2; see 24 C.F.R. § 960.206(b)(2)(2000). See also 30 HOUS. L. BULL. 33 (Mar./Apr. 2000) for a more detailed discussion of the working preference, including discussion of the requirement that elderly and disabled persons must be given a working preference, if a working preference is adopted.

⁶*HUD Multifamily Tenant Characteristics System (MTCS) Resident Characteristics Report*, Information as of: Feb. 2001, at hud.gov/mtcs/public/navmenu.cfm.

⁷FAQs, Section I.D. Q2.

⁸*Id.* at Section II; 24 C.F.R. § 5.609 (2000).

which only refers to PHAs, was intended to also apply to all Section 8 owners. Thus, the FAQs clarify that both PHAs and owners may take advantage of the flexibility contained in that provision.⁹ Another income-related provision makes clear that any income from children under the age of 18 is excluded from the calculation of household annual income regardless of the school that the child attends, if any, or whether the child is a full-time employee.¹⁰

During the second 12-month EID period, when only 50 percent of the increased income is disregarded, the failure of the tenant to report an increase in income may result in a retroactive rent adjustment if the tenant is required to report and failed to do so.

The mandatory EID provisions, set out in 24 C.F.R. § 5,609 (2000), have raised a great number of questions, some of which HUD addresses in the FAQs. The mandatory EID requires PHAs to exclude 100 percent of a family's increased income from earnings for a period of 12 months and 50 percent of the increased earned income for an additional 12-month period if a family member has been previously unemployed, the family received welfare or the income increased during a family member's participation in a self-sufficiency or job training program.¹¹ The income disregard is applicable only to the increased income due to earnings. Thus, for a previously unemployed member of household who did not have another source of income, all of that member's earned income would be excluded for a period of 12 months and 50 percent for an additional 12 months. Whereas, for a family member who previously received (for example) welfare benefits or child support, the amount of earned income that would be excluded would be limited to the increase in income that is attributable to earnings. The FAQs make clear that any member of a tenant household may qualify for the EID, including minors who turn 18.¹²

The FAQs explain how the EID time periods operate in relation to tenant reporting requirements and tenant actions. The FAQs include an example of a previously unemployed (for 12 months or longer) family member who becomes em-

ployed six months after having been recertified but does not report the change in income until the next recertification six months later because the PHA had no interim reporting requirements. The FAQs reason that by not reporting the income for six months, the family received the benefit of the disregard for six months prior to the recertification (because the PHA continued to base the family's rent on the income reported at the last recertification). Therefore, the FAQs conclude that the family would be entitled to only another six months of the 100 percent disregard of the increase in income. After that additional six months, the family would be entitled to a 50 percent disregard of the increase in income for another period of 12 months.¹³ The result is the same regardless of the PHA's income reporting policies. If the PHA policy required the tenant to report her income promptly but she did not, the tenant is entitled to benefit from the full 100 percent income disregard during the first 12-month period of employment and should not be adversely affected for failing to report.¹⁴

The actual date that the first 12-month period begins is when the rent increase would have gone into effect.¹⁵ Thus, if the PHA implements rent increases on the first of the month following the increase in income or after a 60-day notice period, these policies should be taken into consideration in establishing the date that the first 12-month income disregard period begins. PHAs in their PHA Plans and Admission and Occupancy Plans may want to separately address the implementation date for EIDs.

During the second 12-month period, when only 50 percent of the increased income is disregarded, the failure of the tenant to report an increase in income may result in a retroactive rent adjustment if the tenant is required to report and failed to do so. The FAQs state that the "earning disregard is effective when the rent increase would otherwise have gone into effect."¹⁶ Thus, it seems that in the second 12-month period, if the tenant's income increases and the tenant, contrary to the PHA's reporting and rent change requirements, does not report that increase for six months, the tenant could be charged retroactively for rent based on 50 percent of the increase in earned income for the period during which the increase would have gone into effect. If, however, the PHA does not require reporting of interim income increases, the tenant's rent for the second 12 months will not change until after the next annual recertification.

The FAQs clarify that a household is entitled to the EID if any member of the household currently receives or in the past six months has received welfare benefits. Thus, to qualify for the EID under the welfare provision, the individual whose income increased does not have to be the one who received welfare benefits.¹⁷ Also, the FAQs state that the tenant may

⁹FAQs, Section II.A. Q1.

¹⁰*Id.* Section II.A. Q2; see 24 C.F.R. § 5.609(c)(1)(2000).

¹¹24 C.F.R. § 960.255(b)(2000). For more discussion of how the *Mandatory Earned Income Disregard* functions see 30 HOUS. L. BULL. 33, at 38-39 (Mar./Apr. 2000).

¹²FAQs, Section II.C. Q2.

¹³*Id.* Section II.C. Q4; see 24 C.F.R. § 960.255(a)(2000).

¹⁴FAQs Section II.C. Q16.

¹⁵*Id.* Section II.C. Q17.

¹⁶*Id.*

¹⁷*Id.* Section II.C. Q20.

qualify for EID for increases in earned income while still receiving welfare assistance.¹⁸ The FAQs also clarify that to qualify for the EID as previously unemployed, there is no limit to the amount of time a tenant may have been unemployed prior to gaining work as long as the family member has been unemployed for the prior 12 months.¹⁹

A household may also qualify for the EID if the household income increases due to the increased earnings of a household member during that member's participation in job training or an "economic self-sufficiency program." The definition for such programs is set out in 24 C.F.R. § 5.603(b) (2000), and includes any program designed to assist tenants in gaining their financial independence. This encompasses a large number and a wide variety of programs, including, but not limited to: job training, English proficiency and substance abuse programs.²⁰ It may also include enrollment in general non-vocational courses at a community college or training or activities at a sheltered workshop.²¹ The fact that a tenant's welfare income is reduced or terminated due to work-related sanctions, does not disqualify the family from the benefits of the EID if one of its members, including the sanctioned member, subsequently finds work.²²

The FAQs deal with a number of questions regarding the relationship between the former EID and the new EID.²³ The most important point is that a tenant's receipt of the benefits under the former EID does not preclude an eligible tenant from also receiving EID benefits under the new program that went into effect on October 1, 1999.²⁴ The eligibility requirements for the two EIDs are not the same. For example, under the new EID, a tenant may qualify for the disregard if income increases during a training program. For the former EID, the tenant could have qualified if the income increased after completion of the training program.²⁵ If a family's rent was based on the former 18-month EID when the new policy went into effect on October 1, 1999, the former disregard remains in effect until the expiration of the original 18 months.²⁶

The FAQs also address the issues regarding the new 48-month limit on the EID.²⁷ They clarify that a family can receive only 12 months of 100 percent EID and only 12 months of 50 percent EID during their lifetime. Moreover, all of those months must fall within a four-year period from the time that the EID first goes into effect. Thus, if a family no longer

qualifies for the 100 percent EID after having received it for 10 months, the family is only eligible for another two months of the 100 percent EID, and those two months (as well as the additional 12 months of the 50 percent EID) must fall within the four-year limit.²⁸ Receipt of the old, 18-month EID does not count against the four-year limit.²⁹

Lastly, the FAQs state that someone receiving the EID cannot use the disregarded income in calculating the limitation for the child care expense deduction. Thus, the child care expense deduction is capped at the amount of earned income that the PHA includes in the annual income determination.³⁰ For example, a sole-earner tenant whose earnings are fully disregarded for the first 12 months of employment because she was previously unemployed may not be able to deduct child care expenses because the tenant's entire income would be excluded from income for purposes of rent calculation.

*Welfare sanctions are a complicating issue
in determining the annual income of a
family for rent calculation purposes.*

Welfare sanctions are a complicating issue in determining the annual income of a family for rent calculation purposes. The public housing regulation provides that if a tenant's welfare benefits are reduced for fraud or noncompliance with economic self-sufficiency, the welfare income will continue to be included in family income for rent-setting purposes.³¹ In other words, the tenant will not receive a reduction in rent due to the reduction in welfare precipitated by sanctions for fraud or noncompliance with the economic self-sufficiency requirements. The regulation requires that PHAs seek written verification of a welfare benefit reduction and the reasons for the reduction.³² The FAQs clarify that the PHA must determine in advance the reason for the sanction and then seek verification. In the event that the welfare agency does not verify the reason for the reduction in a "reasonable time," the PHA must reduce the rent. Not mentioned in the FAQs, but certainly implied, is the fact that, when a PHA is making its advance determination, it concludes that the reason for the sanction is not based upon fraud or noncompliance with the economic self-sufficiency requirements, the PHA must reduce the rent immediately.

The question of what constitutes a reasonable time for a PHA to wait for a response from the welfare agency should be defined in the PHA Plan process. Because of the potential

¹⁸*Id.* Section II.C. Q8.

¹⁹*Id.* Section II.C. Q6.

²⁰*Id.* Section II.C. Q5; see 24 C.F.R. § 5.603(b)(2000).

²¹FAQs Section II.C. Q24 and Q25.

²²*Id.* Section II.C. Q21.

²³Compare the former EID at 24 C.F.R. § 5.609(c)(13)(2000) with the new EID at 24 C.F.R. § 960.255 (2000).

²⁴FAQs, Section II.C. Q33

²⁵See 24 C.F.R. § 5.609(c)(13) (2000).

²⁶FAQs, Section II.C. Q13.

²⁷*Id.* Section II.C. Q29; see 24 C.F.R. § 960.255(b)(3)(2000). See also 30 HOUS. L. BULL. 33, at 38-39 (Mar./Apr. 2000).

²⁸FAQs, Section II.C. Q29.

²⁹*Id.* Section II.C. Q33.

³⁰*Id.* Section II.C. Q32; see 24 C.F.R. §§ 5.603(b), 5.611(a)(4)(2000).

³¹24 C.F.R. § 5.615(2000).

³²24 C.F.R. § 5.615(c)(2)(2000).

hardship for tenants who have experienced a reduction in income, a reasonable time should not exceed 30 days. Moreover, if the welfare agency fails to respond within the 30 days, the rent reduction should be applied retroactively to the date that the tenant made the request for a rent reduction.

Rent³³

The FAQs provide some clarification regarding flat rents while continuing to ignore key legislative language. They emphasize that flat rents must be based on comparable market rents and cannot be based on the imputed debt service figures previously established by HUD.³⁴ The FAQs do not mention or provide guidance to PHAs as to how to achieve the statutory objective that flat rents should be:

designed . . . so that the rent structures do not create a disincentive for continued residency in public housing by families who are attempting to become economically self-sufficient through employment or who have attained a level of self-sufficiency through their own efforts.³⁵

The FAQs note that tenants who pay flat rents are not entitled to the benefits of a utility allowance.³⁶ However, the amount of the flat rent should take into account whether the utilities are the responsibility of the PHA or the tenant. Thus, the flat rent should vary depending upon the utilities that are included in rent.³⁷

Several issues regarding ceiling rents are addressed in the FAQs. They clarify that PHAs must continue to annually verify the income of tenants paying ceiling rents even if the PHA opts to retain, for the permitted three years, ceiling rents set prior to October 1, 1999 in lieu of establishing flat rents.³⁸ If a PHA decides to retain ceiling rents after the three-year grace period, it must absorb the cost of doing so.³⁹ Presumably, this means that the PHA may not request operating subsidies based upon a rent roll that provides for ceiling rents. Instead, the rent roll must be based upon the rent that would have been collected if there were no ceiling rents.

Community Service⁴⁰

The FAQs also provide some insights regarding the community service requirement. The community service regulation provides that a tenant may be exempt from com-

munity service for a number of reasons, one of which is that the tenant is "engaged in work activities." For the purpose of defining the terms "engaged in work activities," the FAQs incorporate the definition of "work activity" set out in the federal welfare statute at 42 U.S.C.A. 607(d) (West Supp. 2000).⁴¹ The FAQs caution that by adopting this definition, HUD does not imply that the PHA should adopt other requirements of the Department of Health and Human Services which specify a number of hours required for each activity. HUD also urges PHAs to "determine what are 'reasonable guidelines' based on local circumstances for meeting" the requirement and to include these requirements in the model agreement with Temporary Assistance to Needy Families (TANF) agencies.⁴²

The FAQs provide some clarification regarding flat rents while continuing to ignore key legislative language.

With respect to stay-at-home parents, the FAQs emphasize that they are not exempt from the community service requirement.⁴³ PHAs are urged to consider how best to assist such individuals.⁴⁴ The FAQs suggest that the community service credit may be allowed for an individual who provides child care to allow others to perform community service or attend resident meetings.⁴⁵ Ultimately, however, tenants are responsible for the community service obligation and must find child care if necessary.⁴⁶

Pets⁴⁷

The FAQs also address several issues relating to pets, all of which are clearly covered in the regulations at 24 C.F.R. § 960.707 (2000).

Conclusion

In sum, the FAQs clarify some of the questions raised by the March 2000 regulations, but focus on many items that are fairly unambiguous in the regulations. As new, more complex questions arise, it will be imperative for legal services providers and tenant organizations to inform HUD of those issues in order to acquire more guidance. ■

³³FAQs, Section III; see 24 C.F.R. § 960.253(2000).

³⁴FAQs, Section III.B. Q4.

³⁵42 U.S.C.A. § 1437a(2)(B)(i)(II)(West Supp. 2000); 24 C.F.R. § 960.253(b)(3)(2000).

³⁶FAQs, Section III.B. Q3; see 24 C.F.R. § 960.253(a)(2000).

³⁷*Id.*

³⁸FAQs, Section III.C. Q1; see 24 C.F.R. § 960.253(d)(2000). In contrast, if a tenant opts for flat rents, the PHA is required to recertify tenant income only every three years.

³⁹FAQs, Section III.B. Q4 and III.C. Q2; see 24 C.F.R. § 960.253(d)(2000).

⁴⁰FAQs at Section IV; see 24 C.F.R. § 960.601 (2000).

⁴¹FAQs at Section IV. Q7.

⁴²*Id.*

⁴³FAQs at Section IV. Q9.

⁴⁴*Id.* at Section IV. Q9.

⁴⁵*Id.* at Section IV. Q9 and Q10; see 24 C.F.R. § 960.601 (2000).

⁴⁶FAQs at Section IV. Q9 and Q10.

⁴⁷FAQs at Section V; 24 C.F.R. § 960.707 (2000).