would cover PHAs with governing boards consisting exclusively of elected officials in which a city council or county commission serves as the housing authority board.

The NAHRO is seeking also to delay the effective date of the resident board member requirement until January 2002 in those states whose housing authority enabling laws don't already require resident commissioners.[6] Through a technical amendment to the FY2000 appropriations bill, HUD would be authorized to grant waivers in such instances to extend the time for compliance. Ostensibly, the purpose of the delay is to provide time for any necessary amendments to state law to authorize resident board members, as the housing authorities are concerned that they will be penalized in those instances where they make a good faith effort to obtain necessary state law changes but fail. However, the breadth of the PHA proposal cannot be justified. Extensions should be considered—if at all—on a case by case basis. ■

[6]The House Appropriations Committee declined to adopt the public housing proposed technical amendment in its bill, H.R. 2684, Making Appropriations for the Departments of Veterans Affairs, Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 2000, and for other purposes," reported to the House on August 3, 1999. As this article goes to print, no bill number has yet been assigned to the FY2000 appropriations measure for VA, HUD and Independent Agencies. Technical amendments could be included by the Senate Appropriations Committee when it takes up its bill following the August recess.

HUD PROPOSES RULE ON TENANT ORGANIZING

Tenants in developments subsidized and assisted by HUD who have attempted to organize independently of management have experienced repeated harassment from owners and managers, including threatened evictions of tenants and arrests of organizers assisting them. While Congress has recently specified a major role for tenants in the "Mark to Market" program governing Section 8 contract renewals and restructuring, HUD had expressed some doubts about its authority to protect organizing in Section 8 properties because of the lack of express statutory coverage. When HUD refused to penalize recent harassment on project-based Section 8 properties, tenants engaged in a nationwide campaign.

Ultimately, the New York State Tenants and Neighbors Coalition, a regional tenant organizing project, succeeded in persuading then-Senator Alfonse D'Amato to take action. Senator D'Amato ensured that the HUD/VA FY 1999 Appropriations bill[1] contained language expanding coverage of the existing "tenant participation" law[2] to all project-based section 8 tenants, as well as others.

[1]Pub. L. No. 105-276, §599 (Oct. 21, 1998).

[2]Section 202 of the Housing and Community Development Amendments of 1978, codified at 12 U.S.C. § 1715z-1b (West Supp. 1998).

HUD has recently issued a proposed rule to implement this expanded coverage amending 24 C.F.R. Part 245, its existing regulation on tenant participation in other multifamily housing projects, such as Section 236 properties.[3] This article briefly reviews the history of the current regulation, describes the proposed changes, and suggests some needed revisions.

History of Tenant Participation in HUD Multifamily Programs

Participation in the management of their housing offers tenants a level of control over their homes and lives that is routinely available to persons of higher incomes. In addition, it is now well-recognized that active, informed tenants can be highly effective in improving the overall quality of their homes. With HUD staff reductions posing reduced regulatory oversight, tenants form a growing part of the accountability structure ensuring the performance of assisted housing providers. In recent years Congress has devoted substantial funding to building the capacity of assisted housing residents facing major changes in how their homes are owned and operated. This federal commitment has helped tenants to learn not only the technical details of major HUD programs, but also the more fundamental skills required of any efficient organization: leadership, coordination, and strategic planning.

Unfortunately, owners and managers sometimes view these goals as threatening to their own interests. Even if owners are open to tenant organizing activity, their minds may be closed to tenant input. The same can be said of some HUD staff or other public regulators. Because of this, a strong and clear public policy, consistently enforced, is often needed to ensure that project residents will be allowed to organize and take action.

Recognition of these problems has come slowly for tenants in HUD-subsidized properties. Before 1978, only state laws and general federal civil rights protections prohibited owners from evicting or taking other retaliatory actions against tenants who organized. Finally, in the Housing and Community Development Act of 1978, Congress addressed the need for tenant participation and provided protections for tenant organizing.[4]

The 1978 Act proclaimed that the "cooperation and participation of tenants" was vital to "creating a suitable living environment and contributing to the successful operation of multifamily housing projects."[5] The law gave HUD the discretion to identify "major actions" affecting the tenants

[3]64 Fed. Reg. 32,782 (June 17, 1999) (Docket No. FR-4403-P-01). The text of the proposed rule is also available online at http://www.hudclips.org.

[4] Pub. L. No. 95-556, § 202, 92 Stat. 2088 (1978).

[5]Statement of the Committee on Conference, at p. 94-95. The full Statement of the Committee on Conference is reprinted in 1978 U.S.C.C.A.N. 4773.

requiring notice from the owner, required HUD to take account of any tenant comments produced as part of the notice procedures, prohibited evictions without good cause, and forbade owner interference with the reasonable efforts of tenants to organize. Congress extended these protections only to certain properties, principally those financed or assisted under the Section 236 or 221(d)(3) BMIR programs,

Active, informed tenants can be highly effective in improving the overall quality of their homes.

and the Rent Supplement program.

Despite a 90-day deadline for issuing rules, HUD did not issue a final rule until 1983.[6] By that time, Congress had revisited the statute, enumerating a short list of "major actions,"[7] though it left within HUD's discretion the decision whether or not to require notice and comment.

The 1983 regulation, appearing at 24 C.F.R. Part 245, tracked closely the language of the authorizing statute. In addition to prohibiting owners and their agents from impeding tenant organizing, part 245 included a small subpart guaranteeing tenants access to project meeting spaces, subject to management-imposed fees. These provisions applied only to those projects covered by the statute. HUD effectively ignored Congress' list of major actions, imposing notice and comment requirements only for rent increases.

In 1985, HUD revisited the tenant participation rules, revising the eligible properties to reflect the phase-out of the Rent Supplement program.[8] The new regulation also added guidelines for providing notices to tenants, and expanded the notice and comment process to include owner requests for conversion from project-paid to tenant-paid utilities; conversion of residential units to non-residential uses, cooperatives, or condominiums; partial releases of mortgage security; and major capital additions. These alterations made HUD's list of "major" actions similar, but not identical, to that of Congress. However, HUD did make the notice and comment procedures apply to more types of properties than those listed in the statute.

A 1988 Congressional amendment expanded the list of covered properties to include all Section 202 properties for the elderly and people with disabilities,[9] and required HUD to in turn require notice and comment procedures for all of the enumerated major actions. Although the Department again modified part 245 in 1996,[10] its changes were, for the most part, cosmetic: rewording the list of covered projects and reorganizing the notice and comment procedures section. The revisions failed to reflect the expanded coverage of all Section 202 properties and failed to require notice and comment for the full range of Congressionally required "major" changes. Specifically, although Congress had provided for tenant input for any proposed sale of a HUD-held mortgage or "conversion of use," HUD continued to impose restrictions only for conversions to non-residential uses, co-ops, or condominiums, and made no mention of note or mortgage sales at all.

During the mid and late 1990s, reported incidences of interference with and disruption of tenant organizing activities increased substantially. In a pair of particularly dramatic instances, organizers in Dallas and Los Angeles were arrested and jailed at the request of project management.

During this time, HUD also issued other directives concerning tenant organizing efforts. HUD's 1994 Management Agent Handbook, 4381.5, provides directions for HUD field staff supervision of property managers. Chapter Four outlines rules for owner and management interactions with tenants and tenant associations. Although generally very protective of tenants, the Handbook has neither been adequately circulated within HUD and management circles nor consistently enforced by HUD.

Details of the Proposed Rule

This proposed rule extends coverage of the tenant participation requirements to Section 8 and Section 202 properties, as well as to those properties receiving "enhanced vouchers" after conversion. It also seeks to establish certain requirements for tenant organizations and to enumerate protected activities.

Projects affected. All projects financed or assisted under project-based Section 8, Section 202, or Section 811 (assisted living for the disabled) would be covered by the new rule.[11] Although coverage of Section 811 properties is not explicitly authorized by statute, it was split off from Section 202 in 1990, after the 1987 amendment. HUD's introductory comments to the proposed rule properly indicate that Congress did not intend the 1990 program to supersede the protections of the 1987 amendment.[12]

In addition, the rule implements the statutory directive to extend coverage to projects that receive enhanced vouchers after prepayment.[13] Since most such projects will no longer have any regulatory or use agreement with HUD, the Department will have to develop other enforcement tools for these projects.

[6]See 48 Fed. Reg. 28,437 (June 22, 1983).

[7]Pub. L. No. 97-35, § 329F, 95 Stat. 410 (1981).

[8]50 Fed. Reg. 32,402 (Aug. 12, 1985).

[9]Pub. L. No. 100-242, §183(a) and (b), 101 Stat. 1872 (1988).

[10]61 Fed. Reg. 57,961 (Nov. 8, 1996).

[11]24 C.F.R. § 245.10, 64 Fed. Reg. 32,782 (June 17, 1999) (hereinafter, references to the proposed rule will only include the section number).

[12]64 Fed. Reg. 32,782 (June 17, 1999).

[13]§245.10(a)(5).

Provisions of current rule unchanged. The proposed rule does not alter Subparts D and E of the current part 245. These are the sections outlining mandatory tenant participation in rent increases, sales, major physical alterations, and other "major" processes. Also unchanged is Subpart C, which prohibits owners from interfering with tenants who are attempting to obtain public assistance or rent subsidies.

Right to organize. The proposed rule adds a new §245.100, confirming that tenants in covered properties "have the right to establish and operate a tenant organization for the purpose of addressing the terms and conditions of their tenancy."

Recognition of tenant groups. Another new §245.105 requires owners to "recognize properly established tenant organizations" and give reasonable consideration to their concerns. However, HUD further notes that "the proposed rule would not require that owners modify or abandon their proposals based on the recommendations made by the tenant organization."[14]

The proposed rule lacks any requirement that the tenant organization be independent of management.

Requirements for tenant organizations. Several subsections define the "properly established tenant organization." Among other things, the tenant organization must have written by-laws and democratic elections, and it must meet certain HUD-defined minimum standards for everyday procedures, voter eligibility, meeting notices, and organizational structure.[15] The rule would require written by-laws establishing three-year term limits and staggered terms for board members — standards inapplicable to most nonprofit organizations. However, the proposed rule lacks any requirement that the tenant organization be independent of management, the main criterion for legitimacy now present in the Management Agent Handbook.

Protected activities. Section 245.140 sets out a list of activities which owners and their agents must allow, although apparently these are subject to limitations set out under §245.150, "tenant organizers." Protected activities include distributing or posting information concerning tenant organizations, initiating contacts with tenants, helping tenants participate in activities of the tenant organization, convening meetings and developing responses to owner proposals. HUD's list is not exclusive, and the owner must allow any "reasonable activities related to the establishment or operation of a tenant organization."[16]

Access to meeting space. The proposed rule relocates the current section and broadens the purposes for which tenants may obtain access to meeting spaces in the project. However, the rule is still not consistent with long-standing congressional guidance that HUD should authorize use of project funds to cover owner-imposed fees.[17]

Tenant organizers. Owners must allow tenant organizers to assist tenants in setting up and operating the tenant organization.[18] However, the proposal would apparently allow owners to exclude non-resident tenant organizers under certain circumstances.[19] In particular, if the project has a consistently enforced policy against solicitation, then the owner or agent may require that any non-tenant organizer who is on the property for any purpose (even beyond "solicitation") be accompanied by a tenant. On the other hand, if no such consistently enforced policy is in place, the organizer is entitled to the same access privileges as other members of the public. Under the proposed language, the risk is that owners might begin enforcing dormant policies on solicitation more consistently or write new policies in order to exclude organizers.

Another problem with this section is that it applies to all activities, such that even a non-resident organizer participating in actions protected under §245.140 (*e.g.*, "posting information on bulletin boards") would have to be accompanied by a tenant if a consistent anti-solicitation policy was in place.

Multiple tenant organizations. Under this section, management will have to recognize the results of recall elections, or a decision by tenants to form multiple or issue-specific tenant organizations.[20]

Improvements Needed for the Final Rule

Preamble Section I(g), Enforcement Through Regulatory Agreements. HUD's introduction to the proposed rule indicates that the provisions of the regulations will be enforced through revised regulatory agreements. However, there are no explicit provisions for enforcement in post-prepayment properties with enhanced voucher holders where there is

[14] 64 Fed. Reg. 32,782, 32,784 (June 17, 1999).

[15] §§ 245.110 - 245.135.

[16] §245.150(b).

[17] *See* Statement of the Committee on Conference, at p. 96. The full statement is reprinted in 1978 U.S.C.C.A.N. at p. 4773.

[18] §245.150(b).

[19] §245.150(c).

[20] §245.160.

no longer a regulatory agreement between HUD and the owner. Although there are some fairly obvious alternatives—*e.g.*, HUD requiring the Section 8 Housing Assistance Payments contract to incorporate by reference this rule, or referencing the rule in both the multifamily form lease and the Section 8 voucher lease addendum— they are not mentioned.

Section 245.110: Properly established tenant organizations. Although some of the requirements may be reasonable, few tenant organizations would be likely to meet all of the proposed new guidelines. HUD lacks strong policy support for telling tenants how to run their associations, since most of the classic organizational problems (e.g., the runaway board, tyrannical chairman, etc.) are unlikely to be cured by HUD fiat, but only by building stronger organizations. One more flexible alternative would be to substitute the provisions in the current Management Agent Handbook, which require regular meetings, democratic operations, and representation of all residents. Another advantage of those guidelines are that they require the tenant organization to be independent of management, a key shortcoming of HUD's definition, while maintaining tenant control over the structure of their own organizations.

Section 245.140: Protected activities. There should be explicit protection for the most fundamental organizing activity, door-to-door solicitation, which, under HUD's rule, could be limited to the initial outreach. Another problem with this section could arise from the fact that HUD field offices have often allowed owners or managers to demand advance notice of any tenant meeting. To resolve this problem, the final rule should clarify that all protected activities may be carried out without prior notice to or approval of the owner or its agents.

The catchall provision in section (b), protecting only "reasonable activities," with no guidance as to what is reasonable or who defines it, also requires revisions to prevent future disputes between tenants and owners.

Section 245.145: Meeting Space. The proposed rule would allow imposition of fees for use of space. Some projects also require security deposits or additional insurance which may be beyond the reach of tenant groups. As Congress has recognized since 1978 that HUD has the authority to direct that these fees be paid out of project funds,[21] HUD should use this authority rather than allowing surcharges to tenants.

Section 245.150: Tenant organizers. This section gives recognition to any consistently enforced policy against solicitation, even though many of those policies are illegal or unconstitutional. It also unreasonably allows an anti-solicitation policy to bar non-solicitation activities. If, for example, an owner allows local restaurants to leave advertisements in the lobby, but prohibits door-to-door soliciting, the organizer should be entitled to conduct the same activities as non-organizers. Additionally, the rule as written would allow an owner to prevent an unescorted organizer from visiting a tenant who did not wish to or was physically unable to meet the organizer at the edge of the property. In nearly every jurisdiction, tenants have every right to invite whomever they wish to their apartment, and their leasehold provides their guests with an easement through the common spaces.

No enforcement standards or sanctions. The rule is silent about the specific steps that HUD must take when owners and managers violate its terms. It should specify clear and specific sanctions for these violations similar to those listed in the Managing Agent Handbook, including removal of the managing agent, civil money penalties, injunctive relief, and denials of participation in HUD programs.

Notice and Comment Rights. Although the proposed rule makes no significant changes to the notice and comment provisions, HUD should use this opportunity to remedy shortcomings in the current regulation. Most significant of these is HUD's apparently baseless limitation of Congress' directive that tenants be included in any conversion-of-use decisions. Any such activity that would result in alterations to the project's use agreement, for which the Secretary's approval is required, should be covered by the notice and comment procedures (e.g., most prepayments of Section 202 loans).

HUD has taken a similarly narrow view of its duty to provide notice and comment rights to tenants in the case of "major physical alterations."[22] The Department's present regulation limits comment procedures only to instances of "major capital additions."[23] Upgrades and replacements of existing capital components are expressly excepted from comment, despite their cost and disruption, even though these arguably fall within the plain language of the statute. Since proper capital replacements are at least as important to tenants as new capital items such as additional parking, HUD should require tenant participation, with appropriate guidelines to except ordinary repairs from notice and comment.

In addition, with one brief exception,[24] HUD has long ignored Congress' suggestion that "HUD should provide prior notice and comment rights for other major owner actions not specified in the statute where it would be useful to either tenants or the Secretary."[25] HUD should take this opportunity to institutionalize tenant participation for other major events, especially in light of its reduced oversight capacity and the impending transfer of numerous regulatory functions to new agencies.

The deadline for comments on the proposed rule was August 16, 1999. ■

[21] *See* Statement of the Committee on Conference, p. 96. The full Statement is reprinted in 1978 U.S.C.C.A.N., 4773.

[22] 12 U.S.C. §1715z-1b(b)(1) (West Supp. 1998).

[23] 24 C.F.R. §245.405(d) (1998).

[24] In 1991, HUD Notice H 91-22 encouraged field staff to create opportunities for tenant notice and comment in procedures not explicitly mentioned in part 245, but this Notice apparently expired in March of 1993.

[25] H. R. Rep. No. 100-122(1), *reprinted in* 1987 U.S.C.C.A.N. 3356.