

Rural Housing in the Crosshairs: How USDA Affordable Housing Is Targeted for Market Rate Conversion and What Advocates Can Do to Preserve It

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Rural communities are losing affordable housing at an alarming rate. The United States Department of Agriculture (USDA) finances and subsidizes a large portfolio of privately owned low-income housing throughout the rural United States, often providing the only low-income affordable housing in these communities. As owners prepay their loans, they leave the USDA program, resulting in a loss of affordable housing in rural communities. The country's total number of USDA multifamily rental properties decreased by 1.4–2% each year between 2017 and 2020, with 947 USDA multifamily projects totaling 17,804 units lost during that four-year period.¹ In addition to prepayments, units are lost due to loans maturing, which is expected to increase rapidly after 2028. While this housing is decreasing, most states lack a preservation strategy to address the preventable loss of units through prepayment of loans.

This essay outlines the crisis of losing rural affordable housing, the difficulties of preservation, and the success stories that have led to the preservation of several developments of affordable housing in the Pacific Northwest. Specifically, the essay focuses on the work necessary to

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1. U.S. DEP'T OF AGRIC., RESULTS OF THE 2020 MULTI-FAMILY HOUSING ANNUAL FAIR HOUSING OCCUPANCY REPORTS 1 (Nov. 21, 2020), <https://www.rd.usda.gov/sites/default/files/RDUL-Occupancy.pdf> [hereinafter 2020 REPORT]; U.S. DEP'T OF AGRIC., RESULTS OF THE 2019 MULTI-FAMILY HOUSING ANNUAL FAIR HOUSING OCCUPANCY REPORTS (Dec. 5, 2019), <https://www.rd.usda.gov/sites/default/files/RDUL-MFHannual1.pdf> [hereinafter 2019 REPORT]; see also HOUSING ASSISTANCE COUNCIL, MULTI-FAMILY FAIR HOUSING OCCUPANCY REPORTS, [HTTP://RURALHOME.ORG/SCT-INFORMATION/USDA-HOUSING-PROGRAM-DATA/USDA-HISTORIC](http://ruralhome.org/sct-information/usda-housing-program-data/usda-historic) (last visited Apr. 19, 2021) (providing reports for FY 2018 and FY 2017).

preserve specific properties at risk of prepayment and what advocates can do to prevent projects being lost through prepayment of loans. In presenting this information, this essay draws on the experiences of the attorneys at Northwest Justice Project, a Washington-based LSC-funded nonprofit law firm that uses litigation and non-litigation strategies to preserve these developments, the expertise of the National Housing Law Project and Gideon Anders, as well as experiences of those advocating for policymakers to invest in rural housing.

Part I of this essay describes the housing developed by USDA and the tenant populations that live there.² Part II discusses what it means for an owner (called a “borrower” by USDA) to prepay their USDA loan. Part III shows how both litigation and non-litigation strategies should be used in concert to help preserve these properties. Part IV details the progress needed to guarantee that these properties are not lost to the private market.

I. USDA Housing Provides Affordable Housing to a Diverse Array of Low-Income People Around the Country

USDA’s multifamily housing is crucial for the well-being of very-low-income rural residents. For more than 80% of USDA units, rents and landlord-provided utility costs are set at 30% of the tenant’s income, with those units receiving deep federal subsidies in the form of unit-based rental assistance, project-based Section 8 assistance or HUD vouchers. Because rents are based on the tenant’s income—in contrast to rents in Low Income Housing Tax Credit units that do not receive other federal subsidies, which are based on area median income—USDA apartments are truly affordable for very-low-income people, such as those living on Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and minimum-wage or seasonal work. The average annual income for all USDA tenants is approximately \$14,000, with average incomes of under \$12,000 for those living in rental assistance units.³

Additionally, USDA housing has federal rules that create strong tenant protections, including an opportunity to cure lease violations before eviction⁴, and a bar on eviction or refusal to renew leases except for good cause.⁵ These protections have enabled tenants to remain in their homes for many years, creating family stability. In our representation of USDA tenants, we often meet tenants who have been in their homes for a decade, or

2. USDA finances and subsidizes housing under two programs. The Section 515 program, authorized by 42 U.S.C. § 1485, finances affordable rental housing for families, elderly persons, and persons with disabilities in rural areas. The Section 514/516 Farm Labor Housing program, authorized by 42 U.S.C. §§ 1484 and 1486, finances on- and off-farm labor housing. Nearly two-thirds of the housing financed under these programs is deeply subsidized by a Rental Assistance program, authorized by 42 U.S.C. § 1490a(a)(2). This article addresses prepayment in Section 515 housing.

3. 2020 REPORT, *supra* note 1, at 1.

4. 7 C.F.R. § 3560.159 (a).

5. *Id.* § 3560.159 (a), (b).

even two. When we ask tenants, most of them elderly, single women living on SSI or Social Security, what they would do if their rents increased, they often explain that they would have to move into their cars. These tenants do not have another affordable housing option.

USDA housing also serves as a crucial asset for fair housing. Nationally, non-white households make up about nine-tenths of tenants in Farm Labor housing. Among all USDA households in the country, two-thirds are white non-Hispanic, a fifth are Black, and a bit more than a tenth are Hispanic.⁶ These overall figures somewhat obscure the reality that, in many states, USDA complexes that are not Farm Labor provide crucial housing for families of color. In nine states and one territory, Black households are 40–75% of total households in non-Farm Labor housing, and, in five states, Hispanic households are 25–57% percent of the total households in non-Farm Labor housing.⁷ A large majority of the non-Farm Labor households, 71%, are female-headed, and elderly and disabled households make up nearly two-thirds of non-Farm Labor households.

For many of these households, there is simply no other option to USDA housing. Rural communities face extremely tight housing markets. In Washington State, vacancy rates are below 1% in some counties.⁸ The affordable housing that does exist is aging and often in need of significant rehabilitation.⁹ The reality is that the pace of creating new housing in rural counties has simply not kept up with losses.

II. USDA's Regulations Governing Preservation of Its Housing and USDA's Failure to Enforce These Regulations

USDA housing is usually privately owned, constructed with federal loans, and operated with ongoing federal subsidies. USDA provides long-term loans, generally for terms between thirty and fifty years, to private, non-profit, or public entities that construct housing for low-income households. In Washington, as well as nationally, most projects are developed by and remain in private ownership, as opposed to nonprofit or public ownership, due to the favorable terms of the USDA's federal loans and very favorable income-tax treatment. Most USDA developments also receive a subsidy, which further reduces the interest paid on the loan, allowing the interest reduction to be passed onto residents who pay a below-market rate rent.

6. 2020 REPORT, *supra* note 1, at 1.

7. *Id.* at 19.

8. UNIV. OF WASH. WASHINGTON CENTER FOR REAL ESTATE RESEARCH, WASHINGTON STATE APARTMENT MARKET REPORT—SPRING 2019, <http://realestate.washington.edu/wp-content/uploads/sites/6/2019/06/2019SpringApartmentMarketReport.pdf> (last visited Apr. 19, 2021).

9. *The Affordable Housing Crisis in Rural America: Assessing the Federal Response: Hearing Before the H. Subcomm. on Hous., Cmty. Dev. & Ins.*, 116th Cong. (Apr. 2, 2019), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg37396/html/CHRG-116hhrg37396.htm> [hereinafter Subcomm. Hearing].

Rental assistance lowering individual tenants' rents and utilities to 30% of income creates a stable base from which owners receive rent.

A complex web of federal statutes, regulations, and guidance governs the prepayment process for USDA mortgages.¹⁰ Recognizing that the nation faced a substantial loss of available affordable housing and record numbers of homeless citizens, Congress enacted detailed legislation in 1987 and 1992 to preserve affordable housing, including USDA multifamily projects, starting with Title II of the Housing and Community Development Act of 1987, Pub. L. 100-242, 101 Stat. 1815, 1877-91 (1988), entitled the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). ELIHPA sought to discourage project owners from prepaying their loans through the use of detailed prerequisites for approval of any prepayments of loans made before December 21, 1979.¹¹ Since 1992, preservation restrictions have been extended to pre-1989 projects, while post-1989 projects cannot be prepaid and must be maintained as low- and moderate-income housing for the full term of the loan.¹²

Despite these restrictions, there are three ways in which an owner may prepay its loan: (1) immediate release from all regulations and obligations; (2) marketing for sale to a nonprofit or public agency; or (3) imposition of Restrictive Use Covenants (RUC) written to protect current tenants from improper rent increases and displacement for other than good cause. As discussed below, the path by which an owner is allowed to prepay a loan is controlled in part by the owner's choice and whether USDA properly adheres to statutes and competently performs its work. Of great concern is the fact that in spite of all the protections built into the law to preserve affordable USDA housing, all these paths to prepayment often result in the actual immediate release of the owner from all obligations simply because the owner manipulates the process and/or USDA fails to enforce its statutes and regulations.

To prepay a USDA loan, owners must first file a request to prepay the loan. In response, USDA is required to offer financial incentives to the owner to stay in the program.¹³ Should the owner turn down the incentives, the owner may voluntarily offer the project for sale to a nonprofit or public body.¹⁴ Otherwise, the owner's right to prepay is governed by the result of a Civil Rights Impact Analysis (CRIA)¹⁵ conducted by USDA to determine two factors: (1) whether prepayment will materially affect

10. A comprehensive overview of the law and regulations surrounding the USDA rural housing prepayments and sample pleadings is available in the National Housing Law Project's *An Advocate's Guide to Rural Housing Preservation: Prepayments, Mortgage Maturities, and Foreclosures* (2018), <https://www.nhlp.org/wp-content/uploads/2018/05/Rural-Preservation-Handbook.pdf> [hereinafter NHLP GUIDE].

11. See 42 U.S.C. § 1472(c).

12. See *Kimberly Assocs. v. United States*, 261 F.3d 864, 867 (9th Cir. 2001).

13. 42 U.S.C. § 1472(c)(4).

14. 7 C.F.R. § 3560.658(a)(2), (d).

15. 42 U.S.C. § 1472(c)(5)(G)(ii); 7 C.F.R. § 3560.658(b).

housing opportunities of minorities in the development or community at large, and (2) whether an adequate supply of “safe, decent and affordable housing” exists in the market area, and sufficient actions have been taken to ensure that such rental housing will be made available to each tenant upon displacement. If USDA determines that the prepayment will have a material impact on minority housing opportunities, the owner is required to offer the property for sale, for a six-month term, to a nonprofit or public agency at its appraised market value.¹⁶ During that 180-day period, if a nonprofit or governmental agency makes a good-faith purchase offer for the property, the owner must accept that offer, and the property remains in the USDA program.¹⁷ An offer is considered bona fide if it is at the full appraised price and the party making the offer has identified a reasonably likely source of funding for the purchase.¹⁸ The owner must work with the nonprofit for up to an additional two-year period to complete the sale.¹⁹ If no purchase offer is made, or the sale is not consummated, the owner is free to prepay the loan without any restrictions.

When USDA determines that there is no material impact on minority housing and that there is adequate affordable housing in the community to which the residents can relocate, the owner can prepay the loan and increase the rents to the remaining residents.²⁰ However, if USDA finds that such housing is not available, the owner can only prepay the loan after agreeing to the imposition of use restrictions that protect the remaining residents by requiring the owner to operate the units that they occupy as if the continued to operate as a USDA subsidized development. In other words, the owner cannot increase the residents’ rents or evict them except for good cause for as long as they choose to remain in their homes. This result is accomplished by the owner having to record a Restrictive Use Covenant (RUC) that shields existing tenants from rent increases and no-cause evictions.²¹

Unfortunately, USDA has adopted regulations that substantially weaken the standard for making the first CRIA determination. Statutorily, USDA is required to determine whether the prepayment will have “a material effect” on minority housing opportunities.²² Since 2005, however, the agency has required its staff to only determine whether the prepayment will “disproportionally adversely affect” minorities in the development, on its waiting list, or in the community. The difference in the two determinations is significant. Under the statutory standard, RD staff are required to look solely at the impact of the prepayment on minorities at the

16. 42 U.S.C. § 1472(c)(G)(i); 7 C.F.R. §§ 3560.658(b)(2), 3560.659(b).

17. 7 C.F.R. § 3560.659(b), (e).

18. *Id.* § 3560.659; *see also* 69 Fed. Reg. 69,032-01 (Nov. 26, 2004) (discussion of defining *bona fide offer*).

19. 7 C.F.R. § 3560.659(k).

20. *Id.* § 3560.658(4).

21. *Id.* § 3560.658(b)(3), (c); *id.* § 3560.662(e).

22. *See id.* § 3560.658(b).

development, on the waiting list, and in the community. Under the regulatory standard, the determination is made by comparing the impact on minorities as against non-minorities and, notwithstanding the fact that the impact on minorities is material, if the impact on both is the same, the owner is not required to offer the development for sale.

When USDA allows an owner to prepay a loan subject to use restrictions, the agency does not review whether the owner follows the use restrictions. Moreover, even if it is advised that the owner is not operating the restricted units in accordance with the RUC, it will take no action to enforce them. When it published the current regulations, it claimed that it did not have the staffing to do so and, instead, granted enforcement rights to residents.

Gideon Anders from the San Francisco-based National Housing Law Project (NHLP) has been involved in many lawsuits against the agency for improperly approving the prepayment of USDA affordable housing loans and not protecting residents who live in them. According to Anders, Congress enacted legislation in 1987 that was supposed to preserve these USDA properties and protect their residents against displacement. "Unfortunately," he stated,

in thirty-three years that these protections have been in place, USDA has not properly implemented the law. It is approving prepayments that should not be approved, not adequately funding nonprofit and public agencies seeking to purchase and preserve housing that owners are selling, and it is failing to properly explain, to both landlords and tenants, or enforce the obligations that landlords have under recorded post-prepayment-use restrictions that are intended to protect resident living in these developments as of the date of prepayment against displacement. This has resulted in thousands of households, many of them elderly, being illegally evicted from their homes or having their rents increased to the point of causing severe hardships.²³

USDA's failures are causing the RD-financed affordable housing to disappear slowly. In testimony before Congress, Anders stated that over 100,000 affordable units have already been lost, and all units will be lost by 2050 without congressional action to stem prepayments and develop mechanisms to preserve mortgages that are maturing.²⁴ In Washington, prepayment removed 533 USDA units at 19 complexes from the affordable housing supply between 2012 through 2019.²⁵ These numbers show that this type of affordable housing is endangered.

In this process, USDA has made missteps at each point from determining whether the housing is needed, to determining minority impact, to ensuring good-faith marketing and acceptance of a bona fide offer of

23. E-mail from Gideon Anders, Senior Attorney, National Housing Law Project, to Kelly Owen (Feb. 12, 2021).

24. Subcomm. Hearing, *supra* note 9 (statement of Gideon Anders).

25. Data was developed by the authors and reviewed by Washington State USDA officials, based on review of USDA notices of prepayment and other USDA records during that time period.

purchase of a project once marketing is ordered and to ensuring RUCs actually protect tenants. The missteps are caused not by individual USDA staff on the ground, but systematically by the agency as a whole because it has neither enacted appropriate regulations and procedures, nor are its staff given legal support for enforcement of existing protections.

III. Advocacy to Preserve Developments in Washington

When NJP began helping tenants facing USDA prepayments a decade ago, affordable housing advocates told NJP that USDA had repeatedly determined that projects in prepayment were not needed and that their communities had adequate affordable housing. This decision allowed owners to simply prepay and exit the USDA program despite the acute shortage of affordable housing in every county in the state. USDA's determination is counterintuitive to what is, now, an axiom for everyone on both sides of the political aisle: there is an acute shortage of affordable housing in every county in the state. NJP's advocacy with USDA over the years was essential to changing USDA's repeated conclusion that there is an adequate supply of housing.

In the subsections below, stories have been recounted of successful litigation and non-litigation-based advocacy to preserve USDA housing. These subsections also include relevant practice tips that NJP has learned over the years fighting to preserve this housing.

Practice Tip: The first step in protecting USDA housing is finding out what is at risk from prepayment. The simplest way to do this is to sign up for and regularly check USDA's database of properties for which the owners have applied to prepay their loans.²⁶ The second step in any prepayment case is to make a request under the Freedom of Information Act (FOIA) for the documents involved in prepayment and submit comments on the need for the affordable housing. The FOIA process also can be used to discover what documents USDA produced on previous prepayments as findings on affordable housing need and CRIA analyses. The third step is to inform and educate tenants on their rights in the prepayment process.²⁷

A. Would prepayment materially affect housing opportunities for minorities?

The CRIA analysis is a very powerful tool to preserve affordable housing and affirmatively further fair housing. Under this analysis, USDA should assess both the current minority tenant demographics and the minority low-income demographics in the complex's market area. Advocates should be successful in arguing that USDA must find minority impact even

26. Properties in prepayment can be found by registering on USDA's Preservation Information Exchange website, <https://pix.sc.egov.usda.gov/PIX/index.html>.

27. Sample tenant education handouts appropriate for the initiation of prepayment, in the event of marketing to a nonprofit, and where restrictive use covenants are recorded, are available online. National Housing Law Project, USDA Rural Housing Programs (2017), <https://www.nhlp.org/resource-center/usda-rural-housing-programs>.

if a particular complex is at a lower ratio than its housing market area's minority low-income population, a distinct possibility due to housing discrimination and widespread failure to affirmatively further fair housing.

It is important to find out whether a nonprofit is interested in purchasing the prepaying development when considering a CRIA challenge. If a nonprofit is not likely to purchase the property, the owner who was forced to market the complex will be allowed to prepay without use restrictions that will protect the existing tenants. While vouchers may be available to existing tenants, in the experience of the authors this is not enough to preserve affordable housing in those communities for renters to come. NHLP and others have also argued that USDA operates the voucher program out of compliance with federal law.²⁸ Early in its prepayment advocacy, NJP successfully pushed USDA to make a CRIA minority-impact finding, but no nonprofit could be found during the marketing period. It was a difficult way to find out how few nonprofits were then able or willing to purchase these buildings.

USDA's CRIA determinations historically have been erratic, in some cases applying a tortuously narrow definition of minority impact. In 2014, USDA found no minority impact for the Harbor Heights apartment complex in Oak Harbor, Washington, after determining that minorities were not treated in the prepayment any differently from non-minorities.²⁹ The agency found that all tenants would face rent increases and that all low-income community members would have less access to affordable housing. In other words, the agency found that in the absence of racial discrimination that would violate the Fair Housing Act, the protection of 42 U.S.C. § 1472(c)(5)(G)(ii) did not apply.³⁰ In that case, half the apartment complex's tenants were minority, compared to a third of the city residents and just 16% of residents in the housing market area. USDA allowed the owner to prepay the loan with only RUCs to protect the existing tenants. Tenants, frightened by the landlord's verbal threats of rent increases, simply moved out after prepayment. The CRIA lack of impact on minority housing determination was not legally challenged in this case because no nonprofit was willing to purchase USDA-financed properties in the Harbor Heights area.

In another matter, NHLP and Oregon Law Center sued on behalf of low-income tenants and a nonprofit organization to preserve a USDA property in Tillamook County, Oregon.³¹ Among the plaintiffs' claims was that USDA's CRIA finding of no adverse impact to minority housing

28. For litigation challenging USDA's administration of the voucher program in the context of prepayments, the authors suggest reviewing NHLP and Oregon Law Center's pleadings, <https://www.nhlp.org/resource-center/usda-rural-housing-programs>.

29. Environmental Justice and Civil Rights Impact Analysis, Harbor Heights Apartments, Oak Harbor, WA, at 11–13 (Mar. 31, 2014), <https://www.nhlp.org/resource-center/usda-rural-housing-programs>.

30. *Id.*

31. *McFalls v. Purdue*, No. 3A:16-cv-2116-SI, 2018 WL 785866 (D. Or. Feb. 8, 2018).

opportunities was based on an improper legal standard, bad math, and failure to comply with the governing statute.³² After plaintiffs filed their original complaint and moved for a preliminary injunction to enjoin the approval of the requested loan prepayment, USDA rescinded prepayment approval and issued a second CRIA that found that prepayment would materially affect minority housing opportunities. Based on that finding, USDA required the owner of the property to market the project for sale to a nonprofit or public agency to try to maintain it as affordable housing.³³

Plaintiffs then defeated USDA's motion to dismiss for mootness, based on the court's finding that the regulations and practices plaintiffs challenged had not changed; this was despite USDA reversing its conclusion and finding minority impact for that property.³⁴ At the time this article went to press, the parties agreed to a stay of litigation, pending completion of the purchase of the building for preservation by a local nonprofit.

Practice Tip: Obtain census data on the housing market areas for buildings in prepayment and provide written comment to USDA on the impact on minority housing opportunities. Do this early in the process, before USDA issues a negative CRIA. Include data of the tenant population's racial and national original makeup, if possible. File a formal written comment on the prepayment using that data and need for the housing. Having local housing agencies and advocates comment as well is helpful.

B. What happens when USDA requires marketing to a nonprofit, or an owner chooses to do so?

Successful purchase by a nonprofit offers the sole way to preserve affordable housing in the RD program if a private owner is determined to prepay the USDA loan. Marketing for nonprofit purchase is required following a determination of an impact on minority housing opportunity in the CRIA.

In Washington, owners have also voluntarily marketed to a nonprofit, generally because they did not want to have to sign RUCs, and, if no nonprofit stepped up with a full-price offer with a reasonable funding source, the property came out of USDA program with no limits on the owner's rent increases for existing tenants. The owners' subsequent interesting actions made clear that they neither wanted to sell to a nonprofit at an appraised price nor be subject to the two-year period allowed by regulation to close the deal. The owners, however, had learned that nonprofits could rarely come up with the funding or possess the technical knowledge to make a good faith purchase offer in 180 days.

Eight Washington properties totaling 246 units were marketed from 2012 through 2019 and did not receive a bona fide purchase offer. These units were thus lost as affordable housing without any tenant protections,

32. Plaintiffs' Amended Complaint is available online. See NHLP GUIDE, *supra* note 10, at 57–82.

33. *McFalls*, 2018 WL 785866, at *1, *8.

34. *Id.* at *10–12.

aside from vouchers to individual tenants.³⁵ NJP staff worked to find non-profits to purchase most of those properties but could find none willing to do so. Impacts on tenants were stark: in one senior and disabled buildings in Gig Harbor, Washington, half the residents had moved out within a year after the owner prepaid in 2018 after unsuccessful marketing and immediately raising rents by \$100 a month.

What did owners who marketed do to avoid a sale to a nonprofit? In many cases, they did not advertise and offer to sell the property to non-profits and government agencies in a commercially reasonable way as required by regulation.³⁶ More than one owner's marketing efforts were to place a small sales ad in a local newspaper. When advocates called the contact telephone number in one such ad, it turned out to be the home phone number of the local USDA agent assigned to that project. This was an error that USDA staff were not able to explain.

The tide started to turn in Washington in 2017, when an owner began prepayment marketing of a USDA apartment complex on San Juan Island, Washington. The San Juan Islands are known nationally as a stunning set of islands near the Canadian border with Washington, accessible solely by plane or boat, and replete with expensive vacation homes and tourist enclaves. Yet very little permanent rental housing exists in this part of the state, and even less rental housing serves low-income residents.³⁷

In response to this particular owner marketing their property, NJP advocates informed tenants of their rights and on their behalf, approached a local community action agency based in Bellingham, Opportunity Council (OC). OC's director was either moved by the plight of the islanders or worn down by NJP's repeated requests for OC to buy other buildings undergoing prepayment. In this case, OC's director agreed to purchase the property and pursued the purchase as a high priority.

Despite deciding to pursue the property and recruiting the help of an experienced consultant, OC struggled. First, OC could not find sufficient funding to purchase the property as there were limited resources made available to states from USDA. After eventually lining up funding, OC faced an owner who was reluctant to negotiate the details of a sale despite OC offering the appraisal price. OC learned from local residents that the owner had another potential buyer willing to pay above the appraised value of the property.

35. This information is based on analysis by authors, with data reviewed by USDA staff. See NHLP GUIDE, *supra* note 10, at 57.

36. 7 C.F.R. § 3560.659(b)(1); see also USDA RURAL DEVELOPMENT HB-3-3560 MULTIFAMILY HOUSING PROJECT SERVICING HANDBOOK HB-3-3560, at 15-2, <https://www.rd.usda.gov/sites/default/files/3560-3chapter15.pdf> (last visited May 3, 2021) [hereinafter RD HANDBOOK 3-3560].

37. Charles Hitchcock, Office of Rural and Farmworker Housing, Case Study: Harbor View, Friday Harbor, San Juan Cnty. (Jan. 17, 2020), <https://www.nhlp.org/resource-center/usda-rural-housing-programs>.

A few days before the 180-day offer window expired, the party negotiating for the owner left the country and discontinued conversations. USDA had taken a completely hands-off position on the negotiations, despite a regulatory mandate that USDA determine when a bona fide purchase offer is made.³⁸ On behalf of tenants, NJP formally communicated to USDA that its regulations require the agency to facilitate purchase and preservation of such properties and stated that it would represent tenants in the transaction.³⁹ As NJP was readying to fax a pre-filing demand letter to USDA over its failure to require the owner to accept the good-faith offer, the owner finally accepted OC's full-price offer.

NJP and OC's collective efforts saved a twenty-unit affordable complex in a small, ferry-served community that had already lost several affordable complexes and with high barriers to constructing new affordable housing. This case also had an important ripple effect. The prepaying owner later marketed a larger USDA complex for sale elsewhere in the state. NJP advocates made sure when that marketing started, relevant nonprofits knew about it. This time, the prepaying owner cooperated to sell to a nonprofit. The days of sham marketing were over.

Practice Tip: Because the 180-day marketing period passes quickly, contact potential nonprofit purchasers as soon as it is determined that the property should have an affirmative CRIA finding, or if upon reviewing other prepayments, it is clear that owners in the state are voluntarily agreeing to market. NHLP has been available to connect parties with technical experts to assist nonprofits seeking to purchase. Be prepared to assist with knowledge about how regulations support the purchase.

C. USDA fails to enforce restrictive covenants meant to protect existing tenants after prepayment

Where USDA finds that affordable housing is needed, but the CRIA finds no minority impact, USDA must require the owner sign a RUC to protect existing tenants' rights to affordable rent and USDA-type protections such as good-cause evictions after prepayment.⁴⁰ On paper, these covenants are powerful. Designed to protect the current residents at time of prepayment, they require that rent and conditions of housing indefinitely remain for those tenants as they would have been in the USDA program.⁴¹ For those in units that previously had rental assistance, rent should stay at 30% of adjusted income, and good-cause eviction protections continue.

38. 7 C.F.R. § 3560.659(e)(6).

39. RD HANDBOOK 3-3560, *supra* note 36, §§ 15.24–29.

40. 7 C.F.R. § 3560.658(b)(3).

41. The standardized Restrictive Use Covenant, titled Restrictive Use Covenant—The Last Existing Tenant Use If No Impact on Minorities but There Is Not an Adequate Supply of Housing (7 C.F.R. § 3560.662(b)(2)), appears in the RD Handbook 3-3560, *supra* note 36, Attachment 15-E-2.

USDA in Washington historically has done nothing to enforce RUCs entered at prepayment. NJP in one case called the local USDA office asking for data on rent increases over time for a client in a RUC-protected tenancy. The agency responded that it kept no such data, despite the regulatory requirement that USDA approve all rent increases for these tenants.⁴² The agency flatly ignored the requirement. The client was too afraid of eviction to bring a complaint to the landlord. A few years later, a USDA state-level manager called NJP seeking help for tenants of another prepaid complex, after tenants called the USDA official complaining that the owner threatened immediate rent increases after prepayment. The USDA staffer told NJP that, though the complex had RUCs, she had no ability to do anything to enforce the RUCs, nor could she get help doing so from USDA's legal counsel.

*D. Advocates sue USDA and an owner
to protect two projects in rural Washington*

In 2016, an owner of two USDA properties in Whatcom County, Washington, prepaid on its loans on two properties, totaling fifty-four units of senior/disabled housing, all with rental assistance. Their tenants included mostly very-low-income residents and nearly all elderly single women. USDA determined that the prepayment would not have minority impact but required the owner sign RUCs to protect existing tenants.

NJP attended the meetings that USDA held for each building's tenants shortly before prepayment. NJP found that the agency did not inform tenants of the RUC or the rights that it confers on tenants. USDA's presentation stated that the landlord could raise tenant rent and could decline to continue to house tenants, which was in clear contradiction of the RUCs. Shortly after prepayment, the owner raised utilities in violation of the RUC, and the owner forced the tenants to sign new leases with onerous terms that violated USDA regulations and lacked good-cause eviction requirements. Confused and scared, these tenants sought legal assistance from NJP. The tenants ultimately formed two tenant associations and sought representation from NJP to roll back the new leases and stop rent increases.

Having previously seen tenants threatened with rent increases move out in fear of eviction, NJP and NHLP quickly filed a lawsuit against USDA and the owner. It sought a temporary restraining order (TRO) and an injunction to enforce the RUCs, rescind the new leases, prevent rent increases, and require USDA to comply with federal law when advising renters and owners about the requirements of the RUC.⁴³ The RUCs specifically give tenants the right of enforcement.⁴⁴ After entry of an agreed TRO, plaintiffs engaged in protracted negotiation with USDA, and the owner, as

42. 7 C.F.R. § 3560.662(e)(4).

43. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is available online. See NHLP GUIDE, *supra* note 10, at 83.

44. See Restrictive Use Covenant, *supra* note 41, ¶ 2.

to what leases the RUCs would require. It became clear that USDA had no RUC-compliant model lease, no written information for owners or tenants on how RUCs affected tenancies, and no procedures to facilitate or encourage owners' compliance with RUCs. It appeared that USDA had rarely, if ever, acted to encourage RUC compliance or enforcement.

Counsel for USDA and the owner soon agreed that the RUCs prevented rent increases on the tenants, all of whom received rental assistance and rent set at 30% of income. The parties eventually reached agreements to resolve the complaint that resulted in the return of both properties to the USDA program until the end of their original loans in 2032, thereby preserving the affordable housing and the federal rental assistance going to these rural communities.

Although NJP and NHLP sought to negotiate with USDA to improve RUC enforcement nationwide, no settlement was reached on those proposals, despite the evident interest of USDA staff in improving RUC compliance. The case against the building owner was dismissed by agreement, and the federal court dismissed the case against USDA as moot due to the buildings returning to the USDA program.⁴⁵ Work remains to be done nationally with USDA in this area; possibly, with a new administration, it may be more fruitful.

The enforcement of RUCs in this one case rippled outward. After settlement of this case, a RUC-protected tenant at the Harbor Heights complex, who received a rent increase notice sought NJP's help. The Harbor Heights building had a new owner, whose attorney said he had been told by USDA prior to purchase that the RUCs would not impact his operation of the building. When shown the Whatcom County litigation, this attorney rolled back the rent increase and negotiated a RUC-compliant lease.

Practice Tip: Enforcement of RUCs may take litigation because their impact on rents is so economically consequential. If needed, it is important to act quickly because tenants afraid of rent increases may move out quickly—even if they lack other affordable, sanitary housing—to avoid eviction and damage to their rental history.

IV. Washington State Steps in to Preserve USDA Housing

After the litigation in Whatcom County, NJP met several times with affordable housing advocacy groups, presenting the stark numbers on unit loss described above. Many of the units were lost after interested nonprofits could not make a purchase offer in the 180-day marketing period without a reliable source of funding for acquisition. Spurred on by the successful reintroduction of the Whatcom properties, and OC's successful purchase of the San Juan Island property, advocates in the affordable housing community, such as the Washington Low-Income Housing Alliance's policy director Michele Thomas, successfully lobbied the legislature to include

45. Bayview Plaza Tenants Ass'n v. Bouma, Case No. C17-17771, 2020 WL 1330637 (W.D. Wash. Mar. 23, 2020).

ten million dollars in funding to help housing providers acquire and rehabilitate properties, particularly USDA properties, at risk of being converted to market-rate housing. Without the partnership of knowledgeable advocates in the legislative arena like Thomas, and willing nonprofit community partners to invest in these properties like Opportunity Council, it is unlikely that Washington would have been able to create a fund specifically targeted at preserving these units.

Decision makers seemed greatly influenced by the cumulative statewide unit loss, which was not clearly visible until NJP gathered the data because USDA had not publicized or even tabulated it, although USDA did ultimately confirm NJP's calculation. They also responded strongly to two ideas: (1) that the affordable housing crisis cannot end if we keep digging the hole through the loss of existing affordable housing, and (2) that USDA housing brings federal subsidies into Washington that are lost forever with each prepayment. For example in the case of the previously described USDA building in the San Juan Islands, preservation of that property would keep \$2 million in federal rental subsidies coming to state tenants over a twenty-year period.⁴⁶ Legislators understood the value of keeping federal funds coming in to support low-income residents in the state.

After the legislature approved these funds for preservation, the state's Department of Commerce (Commerce) requested that NJP advise the agency on how the prepayment process would interact with the funding requirements. This request allowed the agency to adapt its normal site-control requirements to allow awards to fund purchase of properties in active prepayment where the nonprofit would not have site control prior to receiving the award. Nonprofits applied for funds to purchase all USDA buildings then being marketed in prepayment, as well as to purchase several other complexes at risk of prepayment.

Commerce ultimately granted \$12.5 million in preservation funds for seven buildings. The agency used additional housing funds to approve all applicants, which resulted in the permanent preservation of 150 USDA units. For one property in prepayment, NJP staff quickly helped find a nonprofit to apply for funding and make a purchase offer on the property, providing expertise to the nonprofit on prepayment processes to support the purchase offer.

The state preservation funds were further key to efforts to save two buildings that offer essential housing for Latinx families in two remote towns in rural Okanogan County. Since 2017, NJP staff had worked closely with a housing authority director dedicated to preserving the two complexes owned by the same party and deemed crucial for affordable housing for Latinx residents. NJP commented on the prepayment requests, tracked their progress, and consulted regularly with the housing authority on prepayment requirements.

46. WASH. STATE, OFFICE OF RURAL AND FARMWORKER HOUSING (Jan. 20, 2020), *available at* <https://www.nhlp.org/resource-center/usda-rural-housing-programs>.

The owner first listed the buildings for prepayment in 2017. NJP commented to USDA on the request, particularly pointing out the extreme housing scarcity for low-income Latinx families in the area. In 2019, the owner marketed one of the buildings following an affirmative CRIA finding. When the housing authority began negotiating purchase of the building, the owner resisted making a sale, going so far as to pull both buildings out of prepayment once the housing authority made a purchase offer. The housing authority persisted, applying for the new state preservation funding. The owner finally signed purchase agreements on both buildings with the housing authority, after the housing authority made clear that it was not ever going to let the buildings go out of the program via prepayment.

In April, 2021, the Washington legislature approved another \$10 million for housing preservation over the next two years, following Governor Jay Inslee's request to continue funding for the effort.⁴⁷ This support will allow Washington's innovative USDA preservation work to continue.

V. Putting the Pieces for Preservation Together

Preserving USDA housing requires strategic planning by parties with capacity to preserve this valuable housing. It takes collaboration between tenants, advocates, and affordable housing providers. It also requires increased funding from states and the federal government to enable non-profit and public entities to quickly access funds that will enable them to purchase housing threatened by prepayment and conversion to higher-income housing. Enforcing USDA regulations and statutes, which have historically been ignored, is also essential to this process. As all parties learned over time in Washington, if tenants are willing to enforce their rights, they become critical players in preserving the USDA housing stock under current laws. However, preservation of USDA housing should not be dependent upon residents bringing lawsuits but by the proper administration of existing law and partnerships with the nonprofit sector to keep these properties in the affordable portfolio for years to come.

47. See Christine Pae, *Washington Legislators Approve \$59 Billion Budget, Adjourn 105-Day Session*, KING-TV (Apt. 26, 2021), <https://www.king5.com/article/news/politics/state-politics/washington-democrats-present-59-billion-spending-plan/281-9baeccdb-e53c-49d7-8834-39c3b4752199>.