Housing and Development Law Inst

THE COUNSELLOR

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Calendar of Events:

HDLI's 23rd Annual Fall CLE Conference
October 16, 2006
Atlanta, GA

Inside this Issue:

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HUD GENERAL COUNSEL ISSUES GUIDANCE ON PROHIBITION OF USE OF FY2006 FUNDS FOR EMINENT DOMAIN ACTIVITIES – Primarily CDBG Funds at Issue, and Further Legislative Restrictions on Eminent Domain Pending

By Lisa L. Walker
HDLI Executive Director

The issue of the use of eminent domain power for economic development purposes took center stage last summer when the United States Supreme Court issued its decision in *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655 (June 23, 2005) (hereafter, *Kelo*), where the majority of the Court condoned the use of eminent domain power for economic development purposes. At issue in the *Kelo* case was the city of New London Connecticut's desire to condemn the privately-owned property of certain homeowners and convey said property to a private developer as part of a comprehensive redevelopment plan designed to revitalize the city's economy. The Supreme Court held that the use of the power of eminent domain to transfer private property to private parties in furtherance of an economic development plan does

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DOMESTIC VIOLENCE IN ASSISTED HOUSING – What the Reauthorization of the *Violence Against Women Act* Means For Your Operations

By Lisa L. Walker
HDLI Executive Director

This article discusses the reauthorized Violence Against Women Act (VAWA), HUD's recently proposed victim certification forms and processes, and recent issues and case law involving domestic violence in the public housing context. If you would like to review other thoughtful analyses of these issues, I recommend that you to consider purchasing HDLI's 2006 Spring Conference materials, where these and other relevant issues are comprehensively discussed.

Background - The Violence Against Women Act (VAWA)

President Bill Clinton signed into law the original federal Violence Against Women Act (VAWA) in 1994. VAWA is, in many respects, designed to reduce homelessness. Its provisions establish new grant programs designed to create long-term services for victims of domestic violence, dating violence, or stalking (hereafter, collectively referred to as "domestic violence"). Of relevance to all of us,

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President's Message

Dear Members:

I hope that all of our members have had a very successful, but also restful summer. It is always helpful to use the summer to rejuvenate for the coming fall and winter seasons. Hopefully your goals and objectives are on track.

HDLI is forging ahead full course this Fall with an exciting Fall Conference entitled "Public Housing and Section 8: Strategies to Avoid Legal Pitfalls in a Changing Regulatory Environment." As always, we will have a line up of great speakers to help us better understand and implement the changing rules we face in the public housing and Section 8 arenas. I hope that you will be able to join us and take advantage of our useful networking opportunities. The conference continues to afford a venue for colleagues to share ideas and receive priceless advice on issues faced within the organizations they serve.

We are all operating in a difficult time fiscally. Time is money. However, investment in human resources, specifically training to counsel and administrators, has proven one of the top uses of resources to be best equip individuals to manage issues in this very volatile time within the affordable housing industry. I would also encourage the display of charity or sharing of ideas wherever possible to assist with the restoration of New Orleans and other affected cities along the gulf coast, as the issue of housing and viable communities remains a major concern in the aftermath of the hurricanes.

Throughout the next year, HDLI will be focusing on bringing you the most current information on the legal issues that you really need to know in order to operate your agency or company in the most efficient manner. Stay tuned for really interesting topics in our publications and at our conferences.

If you have any issues of particular interest, do not hesitate to let me, our Executive Director, Lisa Walker, or any other board member know. Best wishes for a truly prosperous Fall.

SAVE THE DATE!

2007 Spring Legal Conference
April 26-27, 2007
Washington Marriott Hotel
Washington, D.C.

Come and enjoy a welcome cocktail reception!
Early registration discount available through
January 15, 2007.

More details coming soon . . .

Lisa L. Walker, Esq.

A Letter from the Executive Director and General Counsel

What a busy summer! Our plate at HDLI has been full as we have been preparing for the upcoming Fall Legal CLE Conference, providing you useful publication material, submitting formal comments to HUD on recent proposed filings and protocols, and providing on-site fair housing training, among our many activities. We are thankful to be able to continue to serve your legal needs, and appreciate your on-going support. We know that you have to make difficult choices in allocating your precious resources, and we stand ready to meet and exceed your expectations!

IN THIS ISSUE! I point your attention to the lead article in this issue analyzing HUD's recent guidance on the prohibition of FY2006 funds for eminent domain activities. The article discusses the guidance and the evolution of eminent domain legislation and issues since the United States Supreme Court's June 2005 decision in *Kelo v. City of New London*.

HUD also recently issued a proposed domestic violence victim certification form. Read about it, and the reauthorized Violence Against Women Act's impact on housing operations, as well as recent domestic violence cases in our second featured article entitled "DOMESTIC VIOLENCE IN ASSISTED HOUSING –What the Reauthorization of the *Violence Against Women Act* Means For Your Operations." Access HDLI's formal comments to HUD on the proposed certification form on our website at www.hdli.org.

Also noteworthy is the recent case of *Assenberg v. Anacortes Hous. Auth.,* No. C05-1836RSL, 2006 U.S. Dist LEXIS 34002 (W.D. Wash. May 25, 2006), where a federal district court in Washington State considered whether a PHA should modify its anti-snake pet policy and drug policy to accommodate the needs of a disabled person who wanted to grow and use marijuana and carry around two snakes about the premises. Read all about this and other interesting cases in the *Case Corner* section.

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2006 SPRING LEGAL CLE CONFERENCE! HDLI's Spring Conference entitled *NAVIGATING THE NEW WORLD OF AFFORDABLE AND PUBLIC HOUSING: Legal Strategies for Conquering New Financing, Management, and Operational Rules* took place May 4-5, 2006 and was a resounding success! A detailed description of the conference may be found on page 20 of this issue. If you were not able to attend, a two-inch binder of valuable conference materials is available for purchase at a reasonable cost. See the enclosed flyer for details.

HDLI's FALL LEGAL CLE CONFERENCE will take place Monday, October 16, 2006 as part of NAHRO's annual conference at the Hyatt Regency Atlanta hotel in Atlanta, GA. This year's theme is *"Public Housing and Section 8: Strategies to Avoid Legal Pitfalls in a Changing Regulatory Environment."* As usual, NAHRO conference registrants attend our conference at no cost. Otherwise, you may register for our conference separately by contacting NAHRO directly at (202) 289-3500.

SAVE THE DATE! HDLI's *2007 Spring Legal CLE Conference* will take place April 26-27, 2007 at the Washington, D.C. Marriott hotel. We are still working on the timely theme and panel discussions, but be assured that it will address our industry's pressing legal issues. *NEW!* HDLI is resurrecting a *welcome cocktail reception* this year! We also are providing an *early registration discount by January 15, 2007*, so plan to register early!

GENERAL COUNSEL FORUM 2007! Please plan to join us in January 2007 as we convene another *General Counsel Forum* to follow-up on the topics addressed last January and to discuss and strategize on the many other pressing issues that have surfaced during 2006. The General Counsel forum is open to housing agency in-house general counsel and outside attorneys functioning in a "general counsel" role. *Stay tuned for further details. . .*

HUD GENERAL COUNSEL ISSUES GUIDANCE ON.... Continued

not violate the public use requirement of the Fifth Amendment.

The High Court's approval of this use of eminent domain power was hardly novel; although, because this case involved a relatively well-off group of homeowners, it gained nationwide attention. Previously, the Supreme Court had twice supported the use of eminent domain power to transfer private property from one private person to another when done for public purposes of redeveloping a blighted area or for reducing concentrations of land ownership. *See Berman v. Parker,* 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

Much of the national response to *Kelo* has been negative. As large numbers of homeowners began expressing their own fears to their representatives, a number of states enacted legislation limiting the power of eminent domain, and in some cases, completely restricted its use for economic development purposes. On the federal level, in June 2005 a number of Representatives submitted House Resolution 340 expressing "grave disapproval of the majority opinion in *Kelo*, stating their belief that it nullifies the Fifth Amendment "public use" protections afforded private property owners. Several state and federal bills intended to restrict the power of eminent domain followed, discussed herein *supra.*

FY2006 Appropriations Bill and the "Bond Amendment"

On November 30, 2005, President Bush signed into law the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Act for FY2006, P.L. 109-115, an appropriations bill funding HUD and other delineated federal agencies (hereafter, the "FY2006 appropriations act" or "act"). The act took effect on the date of signing. Title VII of the law contains a provision that prevents the use of FY2006 funds to support any federal, state or local project that will use eminent domain power, except for certain "public uses" that do not involve economic development to primarily benefit private entities. This provision was in direct response to *Kelo,* and was the brainchild of Senator Christopher Bond, chair of the Senate appropriations subcommittee that appropriates funds for HUD and certain other agencies. It was his amendment that appears in Section 726 of the FY2006 appropriations act (the "Bond Amendment").

The Bond Amendment (Section 726) reads as follows:

> *No funds in this Act may be used to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use;*
>
> *Provided, That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities;*
>
> *Provided further, That any use of funds for mass transit, railroad, airport, seaport, or highway projects as well as utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure), other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of blight…or Brownfields…shall be considered a public use for purposes of eminent domain;*
>
> *Provided further, That the Government Accountability Office …shall conduct a study to be submitted to the Congress within 12 months of the enactment of this Act on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.*

Accordingly, the Bond Amendment only restricts the use of FY2006 funds appropriated for HUD and other delineated agencies "to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use." In defining "public use," the act specifically excludes "economic development that primarily benefits private entities." The use of the word "primarily" begs the issue of what types of development *primarily* benefit private entities." Is it determined by who ultimately owns the real estate, or who "benefits" from the completed project? The act is vague and unclear on this issue.

The act places no restrictions on funds appropriated to other federal agencies not subject to the act, nor does it apply to funds appropriated in years prior or subsequent to FY2006. *But see* other pending bills which intend to make restrictions permanent, addressed *supra.* Note that the Bond Amendment restrictions will apply to all funds appropriated in FY2006, regardless of when they are committed or used. So, PHAs must

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HUD GENERAL COUNSEL ISSUES GUIDANCE ON.... Continued

be careful to keep track of monies appropriated out of the FY2006 budget.

The Bond Amendment also carves out certain categories of projects that will be considered for a "public use" even if they involve property taken by eminent domain. These projects automatically are eligible for FY2006 funding. These safe harbors are your traditional infrastructure-related municipal projects:

- mass transit
- railroads
- airports and seaports
- highway projects
- utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure)
- structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government
- projects involving the removal of an immediate threat to the public health and safety
- Brownfields, as defined in the Small Business Liability Relief Brownfields Revitalization Act.

With the exception of the last two categories - - projects involving the removal of an "immediate threat to the public health and safety" and Brownfields - - it does not seem likely that typical PHA development projects will fall within these exceptions in any significant ways. A PHA's success in meeting the "health and safety" exception will be fact-specific, and unless HUD staff is trained to make uniform decisions as to what constitutes an "immediate threat," there is room for a universe of inconsistent decisions as they are decided on a case-by-case basis.

It is, however, fortunate that the Bond Amendment specifically provides that "projects for the removal of blight… shall be considered a public use for purposes of eminent domain." Many PHA projects could fairly be characterized as designed for the removal of blight. But, a significant flaw in the act is that it fails to define the word "blight," paving the way for clarifying litigation. Given the variety of definitions among the various state and local laws, it would have been useful for this federal legislation to provide a specific definition of "blight" and "blighting influences." These definitions should be broad enough to encompass economic development where the primary purpose, or animating purpose, is the removal of blight or blighting influences. Of course, the enhancement of tax revenues or even a benefit to a private party might also be appropriate where the benefit is incidental and the animating public purpose is the elimination of blight or blighting influences.

If not implemented appropriately, the Bond Amendment could have significant adverse impact on successful housing programs, such as HOPE VI and other mixed income housing programs that rely heavily upon the use of eminent domain to revitalize distressed areas and create appropriate infrastructure. For example, it is customary for HOPE VI developments that additional property be acquired to adequately develop the project, particularly as street layouts change and additional real estate becomes necessary to implement the new street layouts. Moreover, to the extent that state law is construed to prevent the use of eminent domain for these purposes, it is unclear whether federal law would preempt the more restrictive state laws. For all of these reasons, federal legislation should carve out existing and future mixed finance and revitalization programs from the reach of eminent domain restrictions.

Another deficiency is that the Bond Amendment does not create an exception for voluntary condemnation proceedings. In many instances condemnation is necessary because a property owner is willing to sell but is unable to deliver clear title. The condemnation proceeding is a vehicle to clear the title defects. This is particularly true where the liens on the property exceed the fair market value of the property. Redevelopment by the property owner or any private party is impractical because of this situation. In these cases, condemnation may be the only viable way to develop the site.

Another example exists with regard to multiple ownership situations. Here, a majority of the property owners may be willing to sell but one or more heirs cannot be located or identified. This is a common problem with properties in older parts of town which have passed through several generations without any estate administration. The alternative to condemnation is a suit to quiet title. There is very little, if any, incentive for property owners to pursue such a suit unless the property is very valuable. Otherwise they will expend significant funds and possibly not recover their costs in the suit. The advantage of the condemnation proceeding is that it clears the title and the condemning authority bears the costs.

Finally, the Bond Amendment does not state the specific sanction for violating the terms of the bill. It is inappropriate for an agency to lose all of its FY 2006 federal funding, for example, should it use some relatively small amount in an eminent domain proceeding that violates the bill. There must be appropriate proportionality, which the act does not address.

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HUD GENERAL COUNSEL ISSUES GUIDANCE ON.... Continued

HDLI's White Paper to OGC and HUD OGC's July 17, 2006 Notice

On April 11, 2006, HDLI sent HUD's General Counsel a white paper that focused on the effect that the Bond Amendment could have on housing or redevelopment projects and laid out the concerns noted above concerning the deficiencies of the Bond Amendment. Three months later, on July 17, 2006, HUD's Office of General Counsel published in the Federal Register a Notice addressing the application of the Bond Amendment to HUD's programs. 71 FR 40634 (7/17/06). A copy of the Notice is available on HDLI's website at www.hdli.org.

Specifically, the Notice addresses the Bond Amendment relative to five areas:

1) funds appropriated in years other than FY2006;
2) condemnations occurring before the November 30, 2005 effective date of the act;
3) eminent domain–related actions impacted by the act;
4) specific HUD programs; and
5) staff salaries and program income.

The Notice also reveals that HUD does not intend to issue any regulations with respect to the Bond Amendment.

While the Notice is helpful in a number of respects, it regrettably does not address many of the important issues and concerns highlighted in HDLI's white paper.

HUD's Notice acknowledges that the Bond Amendment restrictions only apply to funds appropriated in FY2006, and do not apply to funds appropriated in prior or subsequent years. It also makes clear that the restrictions "will continue to follow and apply to FY2006 funds regardless of the year in which the funds are reserved, obligated or expended." The Notice also acknowledges that the restrictions only apply to the use of the power of eminent domain *after* the November 30, 2005 effective date of the FY2006 appropriations act, and clarifies that transfers of title before November 30, 2005 are not impacted by the Bond Amendment.

HDLI provided written concerns to HUD's General Counsel, which focused on the effect that the Bond Amendment could have on housing or redevelopment projects.

The Notice provides examples of activities that are impacted by the Bond Amendment, such as actions to initiate condemnation proceedings, actions to permit the continuation of condemnation activities, (regardless of when they were initiated), and actions that threaten the use of eminent domain, whether or not such actions result in a transfer of title.

The Notice opines that the Bond Amendment will largely impact programs administered by HUD's Office of Community Planning and Development (CPD), particularly the Community Development Block Grant (CDBG) program. The CDBG program allocates funds by formula to states and local governments, which presumably have eminent domain power. In this context, HUD includes within the CDBG program the Section 108 loan guarantee program, the Brownfields Economic Development Initiative (BEDI), the Indian CDBG program, and the Insular Area CDBG program.

The Notice goes on to set forth eligible uses of CDBG funds as per Section 105 of the Community Development Act of 1974, as amended, and anticipates that each of the eligible use activities may involve, in some way, the exercise of eminent domain authority at the state or local level. HDLI urges CDBG grantees to engage in "strong dialogue" with HUD field staff to analyze CDBG-funded projects that involve the use of eminent domain power. HUD is looking for "common sense solutions where CDBG funding and the exercise of eminent domain and economic development intersect." Given that a federal law is at issue, and HUD is not issuing any waivable regulations, it is unclear as to what solutions would be available, absent foregoing the use of eminent domain altogether.

Perhaps most instructive, HUD's Notice lists HUD programs that HUD does not believe are subject to the Bond Amendment restrictions. The Notice recognizes that the use of CDBG funds supporting housing development for low-to-moderate income families is generally *not* "economic development" within the meaning of the Bond Amendment. This would seem to apply to nearly all uses of CDBG funds to support public housing. However, the Notice goes further to state that CDBG funds, as well as HUD's housing assistance programs, could be used to support projects in which the sole use of eminent domain is to acquire land *exclusively* for the development of housing for low-to-moderate families. Troubling, this does not mesh with HUD's decade-long push to create mixed use/mixed-income communities. Indeed, the Notice acknowledges that such communities, even those with a relatively small amount of retail or commercial space, could invoke Bond Amendment concerns.

HUD also believes that funds appropriated

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HUD GENERAL COUNSEL ISSUES GUIDANCE ON.... Continued

for the majority of its programs are appropriated for very specific uses that typically do not involve economic development activities, and therefore, they are *not* likely to be subject to the Bond Amendment. Noted examples include: the tenant-based and project-based rental assistance programs, public housing capital and operating funds, commitments to insure FHA loans, and expenditures pending the receipt of collections under the Manufactured Housing Fees Trust fund.

Finally, the Notice calls attention to the "public health and safety" and "Brownfields" exceptions set forth in the act, opining that many CDBG funded projects could conceivably qualify for these exceptions. Here seems to be the best avenue for argument that a PHA's economic redevelopment activities are exempted from the act: that is, where these activities are necessary to protect the public health and safety or to create Brownfields.

The Notice further warns that staff time expended on projects subject to the Bond Amendment restrictions may not be paid for with FY2006 funds, and that time must be carefully allocated in accordance with OMB Circular A-87 (Cost Principles for State, Local, and Indian Tribal Governments). Regarding program income, the Notice states that any program income generated by the use of CDBG funds appropriated for FY2006 is *not* subject to the Bond Amendment restrictions.

Pending Federal Legislation

As aforementioned, the Bond Amendment's restrictions are temporary, as they only apply to one year's appropriation. However, as of this writing, there are some sixty (60) bills still pending before Congress that contain language attempting to restrict the power of eminent domain on a permanent basis. Of those pending bills, the most widely-supported bill is H.R. 4128, introduced October 25, 2005 by Representative F. James Sensenbrenner of Wisconsin, and co-sponsored by ninety-seven other Representatives. There are four versions of H.R. 4128 pending, the last of which, H.R. 4128.RFS, currently sits in the Senate Committee on the Judiciary after having been received from the House.

H.R. 4128

H.R. 4128 prohibits any state or political subdivision from exercising its power of eminent domain for economic development if that state or political subdivision receives federal economic development funds during the fiscal year. The bill defines "economic development" as taking private property and conveying or leasing it to a private entity for commercial enterprise carried on for profit or to increase tax revenue, the tax base, employment, or general economic health.

There are a number of serious problems with H.R. 4128 as currently proposed. Perhaps most distressing, the bill invokes a harsh penalty. It makes a state or political subdivision that violates such prohibition ineligible for any federal economic development funds for two fiscal years. It does, however, remove the penalty upon the return of all real property that was improperly taken and the replacement or repair of any property that was destroyed or damaged. However, it is conceivable where this might not be possible. A principal concern with this *penalty*– ineligibility for all federal economic redevelopment funds (such as important CDBG funds) for two fiscal years - is that it is not proportional to the wrongful act. A relatively small violation (say $5,000 or less) could result in the loss of millions of dollars of important and very scarce housing resources for the community.

Other key provisions of H.R. 4128:

1. Prohibit the federal government from exercising its power of eminent domain for economic development (Section 3);

2. Establish a private cause of action for any private property owner who suffers injury as a result of a violation of this Act. (Section 4);

3. Provide that a state is not immune from any such action in a federal or state court (Section 4);

4. Place the burden on the defendant to show by clear and convincing evidence that the taking is not for economic development, rather than the traditional notion of placing this burden on the plaintiff (Section 4);

5. Set an unusually long statute of limitations at seven years (Section 4);

6. Allow reasonable attorney's and expert fees (Section 4);

7. Express the sense of Congress that the use of eminent domain for economic development is a threat to agricultural and other property in rural America, seemingly without data establishing the same (Section 5); and

8. Gives an advantage to the property of religious and nonprofit organizations by prohibiting a state or political subdivision from exercising its power of eminent domain over property of a religious or other nonprofit organization because of the organization's nonprofit or tax-exempt status or any related quality if that state or political subdivision receives federal economic development funds during the fiscal year (Section 13).

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HUD GENERAL COUNSEL ISSUES GUIDANCE ON.... Continued

Amendments to H.R. 4128

A number of amendments to H.R. 4128 have been introduced. However, they do not address the flaws in the resolution. Some of the more important amendments attempt to amend the resolution by:

1. Clarify that, in any proceeding to prevent or remedy a taking, the burden is on the State or agency seeking to take property to show that it is not for economic development as defined in the Act (agreed);

2. Add Brownfield redevelopment, as specifically defined in the Small Business Liability Relief and Brownfield Revitalization Act of 2001, to the list of exemptions contained in the bill (agreed);

3. Add an additional section to the bill to ensure that religious and other nonprofit organizations are not penalized because of their tax exempt status (agreed);

4. Allowing a property owner to go to court before a property is taken in order to obtain declaratory or injunctive relief (failed);

5. Replace language in the bill defining the term "economic development"; and set a hard date of seven years that property holders can bring suit against a taking authority (failed);

6. Enumerate several harmful uses of land which constitute a threat to public health and safety and include such properties in the list of exceptions contained in the bill (failed);

One amendment sought to delete all sections of the bill and retain only the language expressing the sense of Congress recognizing the importance of property rights and that in the aftermath of the *Kelo* decision abuses of eminent domain power may occur. However, it failed.

Conclusion

In sum, recent initiatives to limit the power of eminent domain are problematic for PHAs and local governments. While only temporary, the Bond Amendment contains many key provisions that are vague, unclear, and unworkable. The penalty for violating Bond Amendment restrictions is unclear. The pending eminent domain bills before Congress appear to be even worse than the Bond Amendment - also containing vague, unclear, and unworkable provisions and imposing an unfair and unjustifiable penalty. HDLI encourages its members to stay abreast of local legislation related to eminent domain and to actively communicate your concerns to your local and national representatives. Remember to keep HDLI in the loop. Once eminent domain power is gone or watered down to uselessness, it will be nearly impossible to regain. HDLI will continue to closely monitor this issue, and will watch for the GAO report due in November 2006.

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CASE CORNER

The following recently-reported cases are full of interesting issues:

DISABILITY – Snake as service animal; Medicinal marijuana

Assenberg v. Anacortes Hous. Auth., No. C05-1836RSL, 2006 U.S. Dist LEXIS 34002 (W.D. Wash. May 25, 2006)

COURT: U.S. District Court for the Western District of Washington.

FACTS: A long-time female public housing tenant sought to add a male friend to her lease, to live with her and her two children in a three bedroom apartment. The man filled out a rental application and disclosed that he had a disability; however, he denied requiring any special equipment/needs as a result of his disability. About a month later, another tenant complained that the couple was violating the housing authority's pet policy by maintaining a gopher snake and a red tail boa snake in their unit (the pet policy prohibited snakes).

After the housing authority issued a notice to comply or vacate based on violation of the pet policy, the couple claimed that the snakes were the disabled tenant's service animals. He supplied a doctor's note stating that his snakes were "therapy pets" for his depression. The doctor later submitted another letter specifying that the snakes were "service animals." In a later declaration, the doctor added that the snakes serve as "magnets for heat" that benefit the disabled tenant. The housing authority permitted the disabled tenant to keep the snakes for their medical benefits provided they did not jeopardize the health, safety and welfare of other residents and staff. The housing authority required the tenant to provide a professional declaration of the types of snakes he had, that they were not poisonous, that they would be kept in a cage, and required the tenant to indemnify the housing authority for any injury that might result from the snakes. The tenant identified the snakes but refused to comply with the other conditions. He claimed an unlimited right to carry the snakes with him, including when he paid his rent.

In addition to the pet policy violation, the disabled tenant grew and used marijuana in the unit. The tenant did not disclose his use during the application process because he knew that he would not have been permitted to lease the premises. He provided the housing authority with documentation attesting to his need to use marijuana for medical purposes signed by his doctor. The tenant also requested a four bedroom apartment so that he could increase his marijuana crop.

The housing authority notified the couple that they could not use or possess marijuana on the premises because it was illegal under federal law. It also denied the disabled tenant's request to keep the snakes, stating that his need to use them as service animals was not readily apparent or demonstrated and he had not shown that they functioned as trained service animals. The housing authority further noted that the snakes pose a threat to others' health and property and that the tenant had refused to provide the requested information about the snakes.

After the tenants continued to maintain the snakes and use the marijuana, the housing authority served a notice to terminate their tenancy for violation of the pet policy and use and possession of a controlled substance. The couple did not file a grievance but continued to occupy the premises with the snakes and marijuana. They later sued the housing authority under the federal Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990, alleging that the PHA failed to reasonably accommodate the tenant's disabilities by failing to grant exceptions to the PHA's pet and drug policies. The PHA moved for summary judgment.

ISSUE 1: Whether the PHA was required to provide an exception to its pet policy to permit snakes.

HOLDING/RATIONALE 1: No. The disabled tenant failed to demonstrate that he trained the snakes or that they had any unique characteristics or abilities to qualify them as service animals. Moreover the PHA's request for additional information about the snakes was reasonable. The court noted that the PHA was willing to make a

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CASE CORNER CONTINUED

reasonable accommodation – i.e., permitting the tenant to keep the snakes if he provided additional information about them and kept them caged when around others - - and the tenant failed to show that those requirements were unreasonable or conflicted with his medical needs. Further, the tenant failed to show that his need to carry the snakes throughout the premises without limitation was necessary.

ISSUE 2: Whether the federal Controlled Substances Act (CSA) and other federal regulations criminalizing the use and possession of marijuana preempt state law legalizing marijuana use.

HOLDING/RATIONALE 2: Yes. Recognizing that Washington law provides an affirmative defense to state criminal prosecution for medical use of marijuana, the court found that such law was in conflict with the federal Controlled Substances Act and other federal regulations that criminalize marijuana use and prohibit illegal drug use in public housing. To find otherwise would undermine the federal laws' goal of providing drug-free public housing. The court cited *Gonzales v. Raich*, 545 U.S. 1 (2005), where the Supreme Court upheld Congress' prohibition of intrastate use of marijuana in California, even when that use complies with the state's medical marijuana law.

ISSUE 3: Whether a "medical necessity" defense exists under the CSA.

HOLDING/RATIONALE 3: No. Citing Supreme Court precedent, the court held that there is no medical necessity exception under the CSA and the fact that plaintiffs are users, and not distributors, of marijuana, was of no issue.

ISSUE 4: Whether the PHA was required to provide an exception to its drug policy to permit the use and cultivation of marijuana.

HOLDING/RATIONALE 4: No. A current user of illegal drugs is not protected under the Fair Housing Act. The PHA had not duty to accommodate an admitted illegal drug user. The court held that reasonable accommodations do not include requiring the PHA to tolerate illegal drug use or risk losing its HUD funding for doing so. Moreover, the plaintiffs' use of marijuana renders them ineligible for public housing pursuant to their lease.

RELEVANCE: This case clarifies that, in the context of public housing, recently-enacted laws that permit the use, possession, and cultivation of marijuana for medicinal purposes are preempted by the federal CSA that prohibits the use, possession, and cultivation of marijuana and other controlled substances on public housing property. The court also cites *HUD v. Rucker* for the proposition that the Supreme Court has held that a public housing authority has discretion to terminate a tenancy for *any* illegal drug use.

DUE PROCESS

Martin v. Cook County Hous. Auth., No. 05C6057, 2006 U.S. Dist. LEXIS 10845 (N.D. Ill, E. Div. Mar. 20 2006)

COURT: U.S. District Court for the Northern District of Illinois, Eastern Division.

FACTS: A 23-year employee of a PHA had a heart attack which she attributed to work-related stress in her position as a public housing manager. After she suffered a second heart attack shortly thereafter, she was fired. The parties were in an at-will employment state. She had returned to work without any work restrictions, and the PHA offered no reason for her termination. The employee sued the PHA for violations of the Americans with Disabilities Act, the state Workers' Compensation Act, the Civil Rights Act, and for retaliation and retaliatory discharge. She argued that she was entitled to due process before she was discharged. The PHA filed a response which the court construed as a motion for summary judgment. The plaintiff did not respond.

ISSUE 1: Whether the employee was entitled to notice and an opportunity to be heard on the issue of her discharge (procedural due process) before she could be discharged from her employment.

HOLDING/RATIONALE: No. The employee received nothing from the PHA indicating that she had a legitimate claim of entitlement to continued employment. Without some action by the PHA to indicate that she had a legitimate claim of entitlement, she was not entitled to a pre-termination notice and hearing. The court granted the motion for summary judgment on this issue.

RELEVANCE: This case underscores the need for caution and care in dealing with employees. Particularly, it is important to avoid the use of written "employment contracts" whenever possible. All correspondence to the employee, particularly in an adversarial context, should be approved by legal counsel, who will look to ensure that no "entitlement to continued employment" is stated or implied.

LEAD PAINT

Johnson v. City of Detroit Hous. Comm'n et al., 446 F.3d 614 (6th Cir. May 3, 2006)

continued on next page

CASE CORNER CONTINUED

COURT: Sixth Circuit Court of Appeals.

FACTS: A Section 8 tenant brought various federal claims under Section 1983 and state negligence and nuisance claims against her PHA, the city and HUD on behalf of her minor son. She sought damages for the son's lead paint illness. Plaintiff claimed that she had complained to the PHA's agents and employees about peeling, chipping, and flaking lead-based paint in and around her living unit, but that they failed to rectify the problem.

The tenant argued that children who live in federally funded low income housing are the primary intended beneficiaries of the federal Lead Based Paint Poisoning Prevent Act ("LBPPPA") and that the LBPPPA was enacted for the very purpose of protecting children in low income housing from the ravages of preventable lead paint poisoning. She further argued that it is only these residents who have a significant incentive to use the courts to obtain compliance with federal law or redress violations of the statute. Finally, she contended that the lack of a meaningful alternative enforcement mechanism underscores that, unless enforceable by private action, the LBPPPA itself, and the congressional intent it expresses, will largely be reduced to empty promises.

The trial court granted the defendants' motion to dismiss, concluding that the relevant provisions of the US Housing Act, the LBPPPA, and accompanying regulations, did not confer personal federal rights on plaintiff, as a tenant of Section 8 housing, that could be enforced pursuant to § 1983. The trial court further held that the LBPPPA does not allow for an implied private right of action.

ISSUE 1: Whether LBPPPA, or its accompanying regulations, confer a private right of action?

HOLDING/RATIONALE 1: No. the statutory and regulatory language do not contain the sort of rights-creating language which reveals Congressional intent to create a federal right for tenants to enforce the procedures mandated by the statute. The statute focuses on the Secretary of HUD, the person being regulated, and not on the tenants as beneficiaries of express rights or entitlements. The court noted that the provisions of the LBPPPA underscore the significant difference between "rights" and "benefits" in the context of post-*Gonzaga* Section 1983 claims. The LBPPPA ultimately "benefits" plaintiff without expressly creating individual rights under the statute. The LBPPPA neither speaks to individual tenant entitlement nor is there a focus on the rights of tenants. The court found that, although the subsection regarding the distribution of informational pamphlets to purchasers and tenants unquestionably provides a trickle-down "benefit" to putative plaintiffs by providing information about the hazards of lead-based paint, this provision is neither directed to the individual tenant nor contains individually focused "rights-creating" language. Rather, the text and overall structure of the statute focuses on the regulating entity's duties, which is too far removed from the interests of individual tenants to confer the kind of individual entitlement that is enforceable under Section 1983 in accordance with *Gonzaga.*

RELEVANCE: This case illustrates that, like most statutes, individual tenants do not have an individually enforceable right to sue under the LBPPPA. Very few statutes are held to confer rights enforceable under Section 1983. This case is consistent with other recent cases construing this statute. *But see* the result in the next case construing a different statute.

PERSONAL INJURY – Notice Requirements

Gaskins v. District of Columbia Hous. Auth., No. 05-CV-184 (D.C. App. July 13, 2006)

COURT: Court of Appeals for the District of Columbia.

FACTS: A grandmother sued the PHA for negligence following the death of her granddaughter arising out of a fire in one of the PHA's public housing units. State law required that, as a prerequisite to bringing suit, within six months of the incident a claimant must provide written notice of the PHA's legal responsibility for the incident to the Executive Director. The claimant failed to provide the required written notice, and relied upon the record in a prior proceeding to establish that it had given notice of the potential claim. The PHA argued that none of the referenced documents stated the cause of the fire or implicated the PHA as the cause.

ISSUE 1: Whether documents in the record of a prior action between the parties was sufficient notice of a potential claim.

HOLDING/RATIONALE I: No. The court held that the claimant's purported notice failed to clearly establish that the PHA was responsible or caused the fire. The complaint and reports were insufficient to apprise the PHA of a potential claim.

RELEVANCE: This case demonstrates a court's willingness to follow strict notice requirements, regardless of the sympathies occasioned by the facts.

continued on next page

CASE CORNER CONTINUED

TERMINATION OF HOUSING AUTHORITY

Shimkus, et al. v. Hickner, et al, 417 F. Supp.2d 884 (E.D. Mich. Feb. 28. 2006)

COURT: U.S. District Court for the Eastern District of Michigan

FACTS: After several legal transformations, a *de facto* housing commission was created to operate the county's sole public housing development. The county decided to dissolve the housing commission and terminate its executive director when it determined that the housing commission had never legally been created, that certain commission members also were holding elected positions in the county government, and that all commissioners were paid more than actual expenses for attending meetings. The Michigan Attorney General opined that the housing commission was abolished as of the date of the county's decision to adopt an "Optional Unified Form of County Government" (OUFCG). However, he also opined that the county's board of commissions could create a department to carry on the function of the former housing commission and continue to receive HUD funds. Accordingly, the duties of the *de facto* housing commission were transferred to a department of the county.

The commission's executive director and several commissioners objected to the dissolution of the commission and to the termination of the executive director's employment. They claimed that these actions violated state and federal law because a local unit of government is only able to operate a public housing project through a housing commission, with membership to include at least one tenant member. The plaintiffs sued the county under the state whistleblower act, for declaratory judgments, for mandamus to compel the recomposition of the housing commission, and for other relief.

ISSUE 1: Whether, under Michigan law, when the county opted for the OUFCG, the existing housing commission was abolished by operation of law.

HOLDING/RATIONALE 1: Yes. Under Michigan law when a county opts for the OUFCG, all boards, commissions, and authorities theretofore in existence, and not specifically excepted, are abolished by operation of law. The housing commission was not one of the specific exceptions under the law. State law requires that its functions "shall be administered by the county executive or county manager in the manner determined by the county board of commissioners." The court found no evidence that the county took any action to form a housing commission under state law after it adopted the OUFCG. Thus, the court found that the housing commission was never legally created.

ISSUE 2: Whether a county may only operate a public housing project through a housing commission.

HOLDING/RATIONALE 2: No. There is no legal requirement under state or federal law that the county operate its public housing through a housing commission. The functions of the *de facto* housing commission devolved upon the general county government.

ISSUE 3: Whether the county must have a tenant member on its public housing board.

HOLDING/RATIONALE 3: No. The court found that the Quality Housing and Work Responsibility Act (QHWRA) amended the United States Housing Act to include a provision that governing boards of public housing agencies include at least one resident member, and that Michigan law requires that a housing commission be similarly constituted. After finding that the plaintiffs had standing to bring this claim, the court nonetheless found that the statutory provision did not apply to the county. The court found that the "public housing agency" was the county itself. The court found that QHWRA contains an exception to the tenant membership requirement when "members of the board of directors or similar governing body of a public housing agency are salaried and serve on a full-time basis." The court further found that the state law tenant member requirement only applies to housing commissions established pursuant to the Housing Act.

RELEVANCE: This case is yet another in the saga of municipality attempts to dismantle housing authorities. Each outcome is fact-specific - determined by state enabling statutes and individual state law.

JULY 2006 MEDITATIONS

(A.K.A. STRESS NEUTRALIZERS)

O.K., RIGHT NOW . . . stop multi-tasking (e.g., typing, writing, eating, and talking on the phone while you're reading this), take a deep soothing breath, exhale, read the following and take heed . . .

SUCCESS

Many of us work for and aspire to professional success. We have worked hard and long to get where we are, and we deserve the rewards of our position. It is important that we periodically take time to take stock of where we are and who we are. Do we judge ourselves by our accomplishments? Does accomplishment mean worthiness in our book? How have we been able to get where we are, and do we feel good about the way we did it? Do we need to make amends to some people and express our gratitude to others? It is important to recognize that our achievements not only speak well for us, they speak well for those persons and forces, seen, unseen, and unnoticed, that have been active in our lives.

SUCCESS OFFERS US THE OPPORTUNITY TO REFLECT ON THOSE WHO HAVE GIVEN US MUCH AND TO BE GRATEFUL FOR THEIR GIFTS.

BEING TORN

Golda Meir once said, "At work, you think of the children you left at home. At home, you think of the work you've left unfinished." Such a struggle is unleashed within yourself. Your heart is rent. Being torn seems to be an accepted given for folks who run a home and also have other work. Many of us have tried to be supermen and superwomen and have almost pulled it off. Yet even when it appears that we are "making it" and are successful in both arenas, we are aware that internally we feel torn and guilty in relation to our family. Frequently, this results in our taking our frustration out on our children or spouses, which results in more guilt. We feel like a violin string pulled taut and about to break. Perhaps it is time to sit down with our families and tell them how we feel. They probably need to hear that we really *want* to be with them and that we do not know how to balance our lives. They may even feel relieved to know that our lives feel overwhelming (which everyone but us has admitted!)

JUST PLAIN HONESTY WORKS FOR SO MANY THINGS. PERHAPS WE SHOULDN'T JUST SAVE IT FOR SPECIAL OCCASIONS.

STEPS ALONG THE WAY

Mignon McLaughlin is said to have opined, "What you have become is the price you paid to get what you used to want." Was it worth it? Is it worth it? Can we look in the mirror and say to the person we see, "You are someone I trust and really admire?" We must remember that each step along the road of life is like taking a walk. It gets you somewhere and steps often leave footprints. We cannot say to ourselves, "Well, what I am doing is expedient right now, so I will go ahead and do it this way. I will deal with the consequences later," and *not* have consequences later. The denials of our life are interrelated.

WHAT WE DO BECOMES WHO WE ARE.

**The foregoing is adapted from Anne Wilson Schaef's *Meditations for Women Who Do Too Much,* Harper& Row, 1990.

DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

given the link between domestic violence and homelessness, VAWA establishes new protections for victims, *and* their household members, against being evicted or terminated *based upon* acts of such violence against any member of the household. VAWA protects these persons even in circumstances when they or others in the household otherwise may legally be subject to eviction or termination from housing assistance.

The last reauthorization of VAWA (in 2000) expired in late 2005. Accordingly, on January 5, 2006 President Bush reauthorized VAWA, with certain changes, for five more years. Violence Against Women and Justice Department Reauthorization Act of 2005", Pub. Law. 109-169, 119 Stat. 2960 (Jan. 5, 2006). The reauthorization became effective when it was signed into law. According to the group Respecting Accuracy in Domestic Abuse Reporting (RADAR), VAWA and companion laws such as the Family Violence Prevention and Services Act funnel over $1 billion a year to states. RADAR reports that VAWA also has spawned the passage of about 600 state-level laws and substantial state and private-sector funding that further extend the reach of VAWA.

VAWA's Housing Related Provisions

Sections 606 and 607 are the primary housing-related sections of VAWA. These sections amend Section 6 of the United States Housing Act of 1937, 42 U.S.C. 1437d (the Public Housing program), Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f(o) (the Housing Choice Voucher program), and 42 U.S.C. 1437f (c) and (d) (the Project Based Section 8 program). VAWA does not apply to other federal housing programs not delineated, such as the Low Income Housing Tax Credit program, or housing programs administered through the Department of Agriculture's Rural Housing Service.

Importantly, VAWA does *not* protect from eviction or termination a victim of domestic violence who also engages in criminal activity unrelated to the domestic violence. As importantly, VAWA does *not* insulate *perpetrators* of domestic violence from eviction. PHAs and landlords are entitled to bifurcate a lease to provide for eviction and/or termination of the perpetrator while allowing the victim to remain in the residence.

These new provisions prohibit public housing agencies ("PHAs") and owners participating in the Section 8 tenant-and project-based voucher programs ("Section 8 landlords"), from evicting or terminating the lease of any household containing a victim of domestic violence on the basis of their status as a victim. Importantly, VAWA does *not* protect from eviction or termination a victim of domestic violence who also engages in criminal activity unrelated to the domestic violence. As importantly, VAWA does *not* insulate *perpetrators* of domestic violence from eviction. PHAs and landlords are entitled to bifurcate a lease to provide for eviction and/or termination of the perpetrator while allowing the victim to remain in the residence. 42 U.S.C. 1437d(1)(6)(B) (public housing);42 U.S.C. 1437f(o)(7)(D)(ii) (voucher program); 42 U.S.C. 1437f(c)(9)(C)(ii) and (d)(1)(B)(iii)(II) (project based Section 8 program). Note that where state or local laws provide greater protections to a domestic violence victim, those laws supercede VAWA's provisions. The National Law Center on Homelessness and Poverty maintains a website listing state domestic violence laws at http://www.nlchp.org/FA_DV/index.cfm.

In significant respects, VAWA's eviction and termination provisions are in conflict with, or create an exception to, the federal "One Strike" eviction rule set forth in HUD *v. Rucker*, 535 U.S. 125 (2002). The U.S. Supreme Court in *Rucker* held that, when an occupant or guest of the household commits criminal activity on or near the residence, *the entire household* may be evicted – regardless of whether the head of household knew of, or could have prevented, the criminal activity. As aforementioned, VAWA immunizes victims and their other household members, while permitting eviction of the perpetrator; however, state law usually does not provide for "bifurcation" of the lease or for the eviction of select individuals from the residence. PHAs may have to seek injunctive relief to get rid of the perpetrator.

VAWA provides exceptions for "actual and imminent threats" to other tenants, employees, or others providing services to the property. 42 U.S.C. 1437d(1)(6)(E) (public housing); 42 U.S.C. 1437f(o)(7)(D)(v) and (o)(20)(D)(iv)(voucher program); 42 U.S.C. 1437f(c)(9)(C)(v) and (d)(1)(B)(iii)(V)

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DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

(project based Section 8 program). However, VAWA does not more specifically define what constitutes "actual and imminent threats," leaving it to the courts to determine on a case-by-case basis. And without the issuance of any instructive implementing regulations, this can result in wholly inconsistent outcomes across the country.

VAWA, thus, has a direct effect on how PHAs carry out their eviction and termination activities. With regard to lease violations, VAWA provides that incidents or threats of domestic violence, dating violence, or stalking by a member of the tenant's household - or by any guest or other person under the tenant's control - cannot be construed as serious or repeated violations of the lease or serve as "other good cause" that would support termination of the tenancy, assistance, or occupancy rights of the victim. Indeed, as discussed *supra*, public housing and section 8 leases must be amended to include this limitation on "other good cause." Accordingly, these provisions directly affect the administration of public housing and Section 8 programs, specifically in the areas of admissions, transfers, evictions and terminations.

However, of great use to PHAs and landlords are VAWA's certification provisions. These allow PHAs and landlords, at their discretion, to request that an individual claiming domestic violence status to certify that she/he is a victim of domestic violence, dating violence, or stalking, and that the incident(s) in question are *bona fide* incidents of the actual or threatened abuse. VAWA requires the victim to name the perpetrator. VAWA also requires that the certification be provided within 14 business days, or as extended by the PHA. The consequence for not providing the certification in a timely manner is that the PHA may evict the individual/family or terminate assistance.

What About Portability and Preferences?

VAWA amends the Section 8 voucher program to make clear that a family with a Housing Choice Voucher may port to another jurisdiction in order to protect the health or safety of an individual who is or has been the victim of domestic violence and who reasonably believes that he or she will imminently be threatened with further violence if he/she stays in the unit. 42 U.S.C. 1437f(r)(5). PHAs have an obligation to provide notice to voucher holders of the portability option. 42 U.S.C. 1437f(ee)(2)(B). Portability already is being offered to many victims in the public housing program. VAWA establishes a new grant program to fund emergency transfer programs and other assistance to domestic violence victims. Unfortunately, like nearly all the other grant programs created by VAWA, this program has not been funded.

VAWA does not create any federal statutory preference for domestic violence victims. However, many PHAs continue to offer such local preferences. Indeed, the new federal grant programs require that participating PHAs and housing providers create local preferences for domestic violence victims.

New Information Collection and Certification Requirements

On July 19, 2006, HUD issued a notice in the Federal Register publishing its proposed victim certification form and procedures, 71 FR 41039 (7/19/06) (Notice"). HUD's new Notice and the accompanying sample certification form implement the certification requirement of VAWA, setting forth a process by which PHAs and Section 8 landlords can verify whether public housing or Section 8 tenants (who may otherwise be subject to eviction or termination) are *bona fide* victims of domestic violence, dating violence, or stalking.

HUD's new Notice and the accompanying sample certification form implement the certification requirement of VAWA, setting forth a process by which PHAs and Section 8 landlords can verify whether public housing or Section 8 tenants (who may otherwise be subject to eviction or termination) are *bona fide* victims of domestic violence, dating violence, or stalking.

Mirroring the requirements of VAWA, the Notice provides that a PHA or Section 8 landlord may request that the individual claiming to be a domestic violence victim certify, via a HUD-approved certification form, that the individual is a victim of domestic violence, dating violence, or stalking. While not specifically delineated in the Notice, VAWA also subjects *managers* of Section 8 housing to the Act. *See generally* VAWA Section 606. Even though there does not appear to be a similar provision for non-PHA managers of public housing, HDLI

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DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

believes that managers of both public housing and Section 8 housing should be subject to, and benefit by, the Notice's certification requirements. HDLI submitted concerns about the certification form and process to HUD via formal comments. You may access those comments on HDLI's website at www.hdli.org.

The Notice also provides that the request may be made either at the time that the PHA/landlord provides a tenant with a notice of termination of tenancy and/or eviction, or as part of a tenant packet or other administrative process. HDLI believes that the Notice should read more clearly to permit PHAs/landlords/managers to request certification at *any* time, such as at the time of application, re-certification, lease addendum, lease violation, request for reasonable accommodation, or any other time deemed appropriate by the PHA/landlord/manager. This would enable the PHA/landlord/manager to appropriately respond to serious lease and/or program violations at the earliest possible time. Taking into account the already 14-day delay that stays the process while the tenant has time to provide the certification, it should be clear that PHAs/landlords/managers are entitled to begin the process as soon as possible.

Only one incident of domestic violence is necessary to invoke protections under the Act, and a separate certification is required for each domestic violence incident. The certification must name the perpetrator and must certify that the incident(s) in question are *bona fide* incidents of the actual or threatened abuse. It would be helpful to PHAs, in the maintenance of their barment lists and otherwise, for the certification to also require, if known, the current or last known address of the named perpetrator, his/her vehicle tag number(s), and any physical identifying characteristics. As per VAWA, the certification must be provided within 14 business days, which can be extended at the discretion of the PHA/landlord.

Confidentiality

Generally, and except in specific circumstances, all information provided by the tenant/victim must be maintained as confidential. Information provided by the victim should not be accessible in any shared database, such as the Homeless Management Information System (HMIS). 42 U.S.C. 11383(a)(8). VAWA does, however, provide circumstances where the information may be disclosed. A PHA or landlord may disclose the information provided by the victim during the certification process with the victim's written consent, in an eviction process, or as required by law. 42 U.S.C. 1437d(u)(2)(A). VAWA does not require the confidentiality of information received from other third parties. Accordingly, the Notice should have more clearly excepted such information from the confidentiality provisions.

The Notice also requires verification that a domestic violence incident was reported to a third party. Accompanying the certification, a victim must produce either a federal, state, or local police or court record (*i.e.,* police report, temporary or permanent restraining order, etc.) or submit documentation signed under penalties of perjury by an employee, agency, or volunteer of a victim service provider, an attorney, or a medical professional from whom the victim has sought assistance in addressing the domestic violence. This is good because it puts the onus on victims to actually report the violence. HDLI believes this is especially important, given that perpetrators still may be living within the unit or housing development. The PHA/landlord/manager cannot require an individual to produce official documentation, or physical proof, of their status as a victim of such violence, and must provide notice of the victim's confidentiality rights to all tenants. 42 U.S.C. 1437d(u)(2)(B).

Finally, the Notice provides a mechanism for PHAs and landlords to proceed with eviction or termination when the victim fails to certify the alleged domestic violence incident(s), and provide documentation that it was reported. The Notice provides that the consequence for the tenant not providing the certification in a timely manner is that the PHA/landlord may evict or terminate the lease of the tenant or any lawful occupant that commits violations of the lease. The Notice specifically states that, if the certification is not timely filed, "noting [sec] prohibits any PHA from evicting any tenant or terminating a lease." Consistent with *HUD v. Rucker,* the Notice should, however, be clear that the entire household may be evicted in these circumstances; not simply the "lawful occupants that violate the lease."

How Does VAWA Affect PHA/Section 8 Documentation and Policies?

Provisions consistent with VAWA must be inserted into the PHA ACC, lease, annual plan, and into your admissions, transfer, eviction, and termination policies. Likewise, these provisions must be inserted into the Section 8 lease, HAP contract, and admissions, transfer, eviction, and termination policies. 42 U.S.C. 1437d(1)(5), (6) (public housing); 42 U.S.C. 1437f(o)(7)(C) and (o)(7)(D)(voucher program); 42 U.S.C. 1437f(c)and (d)(project based Section 8 program). Additionally, the Section 8 HAP contract and lease must include new language defining" other good cause" for eviction and "termination for criminal activity" that is consistent with VAWA. While HUD has not yet provided any form provisions, HDLI will be monitoring this issue

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DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

closely and will let you know if and when they are forthcoming.

As you know, Section 5A of the U.S. Housing Act of 1937 requires PHAs to submit five-year and annual plans with various information and certifications. Per VAWA, the five-year and annual plans must now include a description of the goals, objectives, policies, or programs that will enable the housing authority to serve the needs of domestic violence victims, as well as a description of PHA activities directed toward meeting those goals, etc. 42 U.S.C. 1437c-1(a)(2) and (d)(13). Other changes must be made to the consolidated plan that communities must develop every five years. 42 U.S.C. 12705(b)(1).

These changes will, of course, require PHAs and landlords to keep better statistics, research their local domestic violence needs, and develop comprehensive plans for meeting their needs. All of this can be costly. How much money actually has been appropriated for PHAs and landlords to cover these new costs? Answer: $0. There is, however, $10 million in grant money potentially available under VAWA for each of years FY 2007 – FT 2011, which has been earmarked for use for staff training, the development of admissions and occupancy policies, etc. *See* 42 U.S.C. 14043e-4. There also is another "collaboration" grant program for developing long term housing stability for victims. *See* 42 U.S.C. 14043e-3. But note that neither of these grant programs was directly funded under the act; rather, they are part of the annual appropriations process and were not a part of President Bush's FY2007 budget. They remain unfunded.

Directly applicable to your admissions policies, VAWA prohibits the rejection of an applicant who "is or is perceived to be, or has been or has been perceived to be, a victim of domestic violence . . ." Once again, the act is silent as to what "perceived to be" means. Whose perception counts - - that of the victim, the landlord, or some other third party? This too, is an ambiguity in the statute. However, now that we have the certification form requirement, "perceived to be" might be construed as someone who as reported an incident of domestic violence as set forth in the Notice.

Domestic Violence Cases

There have been very few reported domestic violence cases involving public housing agencies or Section 8 landlords. Indeed, most of the reported domestic violence cases are criminal in nature and /or involve child custody issues or the termination of parental rights. However, the following two cases are instructive.

In the recent case of *Hamilton v. HUD*, No. 4:04-CV-01570, 2006 U.S. Dist. LEXIS 42618, (M.D. Pa. June 23, 2006), a federal district court in Pennsylvania found that a housing authority discriminated against a victim of domestic violence on account of her race by denying her reapplication to public housing while contemporaneously accepting the reapplication of a Caucasian applicant. In *Hamilton,* a female African-American Indian public housing resident was physically and verbally abused by a fellow Caucasian tenant. Several police reports demonstrated that the Caucasian woman violently attacked Hamilton and vandalized her personal property. As a result, Hamilton and her child living with her terminated their tenancy and moved into a trailer with her boyfriend. At about this same time the Caucasian woman also terminated her tenancy. After her boyfriend became abusive, Hamilton reapplied for public housing. She sought a preference as a victim of domestic violence and homeless. At approximately the same time, the Caucasian woman also reapplied for public housing.

The PHA's background checks revealed that Hamilton had no criminal record, and revealed that the Caucasian woman had a criminal background consisting of assault and harassment arrests related to the prior history involving Hamilton. Hamilton's former apartment manager also gave her a good report. Nevertheless, the PHA denied Hamilton's application on the basis of "prior criminal activity," citing the previous squirmishes that took place at her previous public housing unit. After she contested this determination, the PHA executive director requested that she provide proof that she was not the perpetrator of criminal activity at her former address. The PHA took the position that the absence of arrests or convictions did not mean that she was not involved in criminal activity, and that her prior apartment was a security concern due to the activity at that location. Due to her financial and emotional circumstances, she did not provide the requested documentation for about two months. As a last resort, she ultimately returned to the trailer with her previous boyfriend and the resulting abusive situation.

Notwithstanding her criminal record and prior abuse toward Hamilton, the PHA accepted the Caucasian woman who had assaulted and harassed the African-American woman back into public housing. The African-American woman and her daughter sued the PHA for a violation of their civil and constitutional rights, and alleged racial discrimination under the Fair Housing Act. The court found that the PHA departed from its own preference policies and procedures by denying the African-American woman and her daughter housing while contemporaneously approving the Caucasian woman for housing. The African-American woman who was entitled to two preferences for domestic violence and

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DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

homelessness was rejected, while the Caucasian woman who was entitled to no preference was approved. Moreover, the court found that the purported reason for denial, "criminal history," was untenable.

The court found that the African-American woman's only involvement with "criminal activity" was her role as a victim in the prior saga involving the Caucasian woman. She had never been arrested or convicted of any crime. The PHA was using her status as a victim against her. On the other hand, the Caucasian woman who had been arrested and charged with two crimes while living in public housing was approved. The PHA departed from "normal procedural sequences and normal substantive criteria" used to make housing decisions.

The court considered whether Hamilton's involvement in the prior activity involving the Caucasian tenant at her residence, where Hamilton was a victim of the violence, constituted "criminal activity" sufficient to deny her occupancy. The court held that, despite the PHA's characterization that Hamilton's residence was a "center of criminal activity," it was only such because of the Caucasian woman's violence. The African American woman never "engaged in" criminal activity. The court found that the PHA failed to provide a plausible, nondiscriminatory reason for its contemporaneous decisions denying housing to a crime victim while approving housing for the crime perpetrator. The court went on to award to Hamilton compensatory damages of $7,500 and punitive damages of $20,000, with the same amounts to her daughter to be held in trust. The court also directed plaintiffs' counsel to petition for fees. Better staff training with regard to domestic violence issues might have avoided this unfortunate case.

Another case involves alleged security guard brutality against a male public housing tenant who, himself, claimed to be a victim of domestic violence. It underscores the need for proper training of your housing authority police force in the area of domestic violence. In *Steele v. District of Columbia Hous. Author*, No. 02-1420 (CKK), 2006 U.S. Dist. LEXIS 8239 (D. D.C. Feb. 14, 2006), Steele, a male public housing resident living in an elderly/ disabled building, filed suit under 42 U.S.C. § 1983, the Fourth, Fifth and Sixth Amendments to the Constitution, and common law. He alleged that the housing authority violated his constitutional rights by condoning, promoting, and permitting the use of excessive force by one of its police officers while placing Plaintiff under arrest, and that the PHA was negligent by failing to maintain a manned security desk in his apartment building.

When a former girlfriend of Steele arrived at his unit, he refused to answer because he was in the apartment with another woman. After learning from the visitor log that the other woman was visiting him, the former girlfriend returned to Steele's unit, damaged the steel door with a fire extinguisher, and began shouting. Steele called the security guard's desk three times to request assistance, but received no response. He did not call the police department or 911 because he had no desire to see the former girlfriend arrested and only wanted her away from his premises. However, to end the noise that could be heard from his elderly neighbors, Steele eventually opened his door. At that point, the former girlfriend came into the apartment and hit Steele on the knee with the fire extinguisher. In return, Steele reacted by choking the former girlfriend about the neck and pushing her out of the apartment and into the hallway, locking his door. Minutes later, the former girlfriend returned to the apartment accompanied by a housing authority special police officer. The police was an experienced SPO who had taken more than 360 hours worth of training courses in areas such as crimes against persons, crimes against property, and the use of force. Concerned about the marks around the former girlfriend's neck, the police officer requested that Plaintiff open his door and step into the hallway. Steele promptly complied. Steele then claimed that the police officer grabbed him, slammed him against his next door neighbor's door, and proceeded to handcuff him. He claims that the officer had him spread his legs and cuffed him. As a result of this incident, Steele claimed back and knee injuries.

Based on the former girlfriend's account of the incident, and the red marks on her neck, Steele was arrested and later booked for assault and domestic violence. Despite the fact that Steele and his female friend argued that Steele was acting in self defense, the arresting officer refused to accept their account. After a criminal bench trial, Plaintiff was acquitted of the charges of assault and battery and domestic violence. The court found that while Steele had used significant force in expelling his former girlfriend from his apartment, injuring her neck in the process, his counter-force was reasonable under the circumstances. During the trial, one of the security guards typically stationed at the security desk in Steele's building testified that she left her station and left work when her shift ended at 11:00 p.m. on the night of the incident. However, Steele argued that the guard left her station before 11:00 p.m. because his calls during that period to the security desk went unanswered. Indeed, discovery revealed that the PHA was aware of tenant complaints that the desk went unmanned when employees left their shifts early, but was working so that such problems could be avoided.

The PHA moved for summary judgment. With regard to Steele's claim of excessive force under the Fourth Amendment, the court

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DOMESTIC VIOLENCE IN ASSISTED HOUSING Continued

noted that the housing authority could only be held liable under Section 1983 when the execution of its official policy or custom is responsible for the deprivation of constitutional rights. It further noted that courts have consistently refused to hold municipalities liable under a theory of respondeat superior.

The court held that it was clear that Steele's excessive force claim was unsubstantiated, finding that this was a routine arrest scenario. Given the red marks on the former girlfriend's neck, the court found that the officer was justified in arresting Steele if he felt it was appropriate. The court found that the officer's actions represented a typical maneuver in an arrest situation, as police officers routinely push suspects against the wall when placing handcuffs on them, and they are often not particularly gentle about it -- particularly where a suspect has been accused of violence, some evidence supports that accusation, and the threat exists that the suspect may become violent again. In response to Steele's claim that the officer's actions were unreasonable in light of the fact that he was a disabled individual living in public housing specifically designed for the disabled, the court noted that the officer's actions were objectively reasonable, and a reasonable officer could have believed in the lawfulness of his actions, given that Steele was a 38 year-old man with no visible physical problems.

The court further found that the excessive force claim against the PHA failed, given that Steele failed to identify any PHA policy, custom, or official decision that was followed by the officer which resulted in the implementation of excessive force. The court found that PHA's General Orders regarding arrests, search and seizure, and the use of force were consistent with the applicable standard of care for police officers around the country.

With regard to Steele's negligent training claim, he arged that because the officer failed to comply with the PHA's General Orders requiring a verbal warning before the use of force, he must not have been trained properly. The court found the claim wholly without merit. The court found that a government entity cannot be held liable merely because one of its employees applies a constitutional policy in an unconstitutional manner. Rather, the proper inquiry is whether the training provided -- or lack thereof- - amounted to a "deliberate indifference" to the rights of the people with whom the officer came into contact. The court found no such facts existed in this case. The focus is on the adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the PHA, since the officer's shortcomings may have resulted from factors other than a faulty training program. The evidence reflected that even Steele's own expert testified that the officer, like all SPOs employed by the PHA, received police training at the Metropolitan Police Department's Police Academy, and that this training was appropriate and consistent with his knowledge of the training of Police Officers. All of Steele's other claims were similarly dismissed.

HUD is in the process of drafting regulations that will assist housing agencies in further implementing VAWA. HDLI will continue to monitor the development of those regulations and will report back to you with updates as they develop.

SHAKESPEARE'S REVENGE

"The first thing we do, let's kill all the lawyers."

-- William Shakespeare

Did you ever want to one-up somebody who told you a bad lawyer joke? Here's the ammunition . . .

Two little squirrels were walking along in the forest. The first one spied a nut and cried out, "Oh, look! A nut!" The second squirrel jumped on it and said, "It's my nut!"

The first squirrel said, "That's not fair! I saw it first!"

"Well, you may have seen it, but I have it," argued the second.

At that point, a lawyer squirrel came up and said, "You shouldn't quarrel. Let me resolve this dispute." The two squirrels nodded, and the lawyer squirrel said, "Now, give me the nut." He broke the nut in half, and handed half to each squirrel, saying, "See? It was foolish of you to fight. Now the dispute is resolved."

Then he reached over and said, "And for my fee, I'll take the meat."

When asked, "What is a contingent fee?" a lawyer answered, "A contingent fee to a lawyer means, if I don't win your suit, I get nothing. If I do win it, you get nothing."

The foregoing was retrieved from www.lawyer-jokes.us.

HDLI HOLDS UNPRECEDENTED SPRING LEGAL CONFERENCE!

On May 4 and 5, 2006, the Housing and Development Law Institute (HDLI) held its annual Spring Legal Conference entitled *"Navigating the New World of Public and Affordable Housing: Legal Strategies For Conquering New Financing, Management, and Operational Rules"* at the Washington Marriott Hotel in Washington, D.C. The conference featured unprecedented participation from, and access to, the highest levels of the United States Department of Housing and Urban Development: Two HUD Assistant Secretaries, the HUD Inspector General, HUD's General Counsel, lead General Counsel headquarters staff, all ten HUD Regional Counsel, and notable HUD experts who served on individual substantive panels, all actively participated during the two-day conference. Indicating clear appreciation for the importance of HDLI's conference, HUD's General Counsel, his headquarters staff, and the Regional Counsel attended and participated in both days of the conference.

The conference began with opening addresses by HUD Assistant Secretary for Public and Indian Housing, Orlando Cabrera, and HUD Assistant Secretary for Fair Housing and Equal Opportunity, Kim Kendrick. Assistant Secretaries Cabrera and Kendrick shared their personal insight into the primary visions for their respective offices and responded to questions from the audience. Following the opening addresses HUD's General Counsel, Keith Gottfried, his headquarters Deputy and Associate General Counsels, and all ten HUD Regional Counsel from across the country participated in an informative two-hour session titled *"Who's Who in HUD's Office of General Counsel,"* where headquarters staff and the Regional Counsels introduced themselves and discussed hot issues within their department/region. Most exciting, perhaps, was a 30-minute "meet and greet" period where conference participants, Regional Counsel, and headquarters Counsel discussed individual issues. Following the meet-and-greet, well respected and long-time HUD attorney, Robert "Bob" Kenison, responded on behalf of HUD to a list of questions on a wide variety of legal and operational issues previously submitted by HDLI members.

For those unable to attend the Spring Conference, the 3-inch binder of written conference materials is available for purchase through the enclosed order form.

At the conference luncheon, HUD's General Counsel gave an inspirational key note address on his mission to increase *"Regulatory Transparency"* within the Office of General Counsel, where Mr. Gottfried discussed all of the initiatives that he and his staff were implementing to provide better communication and access between HUD and the housing bar. Mr. Gottfried's sincerity and enthusiasm for his charge was palpable. After the luncheon, the conference substantive panels followed. Noted industry experts delivered timely and updated information on the new *public housing operating subsidy and project based management rules.* Additionally, a panel of housing directors *who already have implemented asset based management* presented their model programs, their successes and challenges, and another panel of experts discussed how to maximize HUD's recent Final Rule on *project-based vouchering.*

Day two of the conference began with an Open Forum where HUD's new *draft notice on nonprofit affiliates* was analyzed and discussed, and a session on *important legal ethics issues* in the technological and other areas. The substantive panels included the *implications of the 2005 Violence Against Women Act* on evictions and other operations and *emergency and disaster preparedness*. The conference finale was an address by HUD's Inspector General, Kenneth Donohue, and his top legal advisor. The HUD IG graciously responded to questions from the audience.

SAVE THE DATE! HDLI's next Spring Legal CLE conference takes place April 26-27, 2007 at the Washington, D.C. Marriott. PLAN TO REGISTER EARLY: HDLI will be featuring a welcome cocktail reception and will be offering an early registration discount!