Housing and Development Law Inst

# THE COUNSELLOR

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***Calendar of Events:***

**HDLI's 2005 Spring CLE Conference**
**May 5-6, 2005**
**Washington, D.C.**

**HDLI Employment Law Training**
**May 4, 2005**
**Washington, D.C.**

***Inside this Issue:***



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## SIXTH CIRCUIT HALTS CONSTRUCTION ON APARTMENT UNITS THAT DO NOT HAVE FRONT DOORS ACCESSIBLE TO THE DISABLED

### Accessible rear patio doors not good enough

*By Lisa Walker Scott*
HDLI Executive Director & General Counsel

The United States Court of Appeals for the Sixth Circuit decided *U.S. v. Edward Rose & Sons, et al*, 2004 U.S. App. LEXIS 18009, 2004 Fed App. 0279P (6th Cir. Aug. 25, 2004) - - a case that expands prior interpretations of the accessibility requirements of the Fair Housing Act (Act). At issue in this case were nineteen (19) apartment complexes to be built in Michigan and Ohio, each with ground floor units having two exterior entrances - rear patio doors accessible to the physically disabled, and front entrances that were not accessible because they only could be reached by a half flight of stairs. The inaccessible front doors were closer to the parking lot, while the accessible rear doors were farther away.

The U.S. Department of Justice (DOJ) sought a preliminary injunction against the construction and occupancy of the units, contending that the plans violate the disability portions of the Act, which DOJ contended require that landlords make the "primary entrance" (*i.e.*, front door) to a tenant's unit accessible, regardless of whether another entrance to the unit is accessible. The landlord argued that the Fair

*continued on page 2*

## MORE ON ROOF TOP LEASING

*By Steven J. Riekes, Esquire*
HDLI Board Member

As you know, during the panel which I chaired on cable television at HDLI's 2004 Spring CLE Conference, there was a lot of interest about so-called "roof-top" leasing. Some public housing authorities have been trying to earn a little extra income by allowing telecommunication companies to use space on the roof of high rise buildings for their transmission equipment. Despite the allure of this idea for entrepreneurial public housing authorities, a participant in the Conference believed that HUD had recently inserted itself in some negative way in this matter and that HUD might impose some restrictions on the income. After some research, we could not discover any official HUD position on the installation of satellite dishes or other telecommunications equipment.

Although we have not been able to discover any official HUD position, the potential for HUD involvement is present. Those public housing authorities that have entered into a Declaration of Trust with HUD are required "to refrain from transferring,

*continued on page 6*

# Sixth Circuit Halts Construction Cont'd

Housing Act did not contain such a requirement. The trial court agreed with DOJ's contention, finding that the front entrance was the "primary entrance" used by the public and guests, and as such, was a "public" or "common area" that Section 3604(f)(3)(C)(i) of the Act mandates be accessible. In reaching this conclusion, the court relied upon HUD regulations, guidelines and design manual. The trial court granted the preliminary injunction as to the ground floor units, thus prohibiting them from being constructed and occupied. The owner appealed, arguing that the court misconstrued the requirements of the Act and incorrectly weighed the elements necessary to grant a preliminary junction. On appeal, the central issue was whether the space outside the front door is a public or common use area that must be accessible to the disabled.

Relevant provisions of the Act require that "the public use and common use portions of . . . dwellings are readily accessible to and usable by handicapped persons. . ." 3604(f)(3)(C)(i). The Act also requires that all premises have "an accessible route into and through the dwelling." 3604(f)(3)(C)(iii)(I). However, neither the Act, nor HUD's regulations makes any reference or distinction between "primary" "front," or "back" doors.

The owner argued that the use of the words "an accessible route" only requires that there be one accessible route into the unit, and to require that there be more than one accessible route is outside of the scope of the Act. It also argued that neither the Fair Housing Act nor its amendments distinguish between primary, front, or back doors. DOJ argued that since the landing at the bottom of the stairs at the front doors is a "common area," Section 3604(f)(3)(C)(i) mandates that the landing be accessible. DOJ argued that the front door was the "primary" door because it is in the front and closest to the parking lot, and as such, constituted a public or common area. It also pointed out that the stair landing was shared by two apartments and thus a common area used by two tenants.

The Sixth Circuit affirmed the grant of the preliminary injunction on more narrow grounds. It held that, under the facts of this particular case, the stair landing in the front entrance is a common area that must be accessible under the Act. The court found that since the two apartments share the stair landing, the entrance is for "common use" making it a "common area." The court found that this interpretation also comports with HUD regulation 24 C.F.R. 100.201 defining "common use area." The court declined to consider the parties' "primary entrance" arguments, holding that even if not all entrances are "common areas", it still would find that the shared landing was a common area. The court found that Section would not be superfluous because it would ensure that apartments that did not have a common entrance would still have an accessible entrance. Ducking the issue of whether the court would find the same way if the stairs only led to one apartment, the court specifically "expressed no opinion" on that issue.

This decision holds that all common entrances are "common areas" under the Fair Housing Act that require accessibility. The danger of this decision is that it could be interpreted to require that virtually any and every entrance that people happen to use in common becomes a common area subject to the accessibility rules. It also might be interpreted to require that any entrance that visitors decide to use to get to a tenant's unit is a common area subject to the accessibility rules. This decision has potentially disastrous fiscal implications for PHAs in this age of dwindling funds. The owners opted not to appeal the decision, so this remains on the books. Perhaps, another circuit will point out the errors of this decision. Until then, PHAs might consider initiating a legislative response to this decision.

**Lisa Walker Scott, Esq.**

# A Letter from the Executive Director and General Counsel

**FALL CONFERENCE!** Once again, HDLI put on a successful Fall Conference last month in Baltimore, MD. This year's theme celebrated the 50th anniversary of the *Brown v. Board of Education* decision and its impact on housing desegregation and was entitled "*The Legal Effect of Brown v. Board of Education on Public Housing – 50 Years Later."* It featured nationally-recognized historians, and litigators and advocates working in the trenches since the famed 1954 decision. If you missed the conference, a copy of the program is enclosed and materials are available for purchase. At the conference, we sold out of all of our discounted copies of key note speaker Professor Sheryll Cashin's book – *The Failures of Integration: How Race and Class are Undermining the American Dream*. But good news! You may still purchase discounted copies of her book from us, and if you want it autographed before we ship it to you, we will arrange it. An order form is enclosed.

**SPRING CONFERENCE!** HDLI's next Spring Conference will be held May 5-6, 2005 at our usual location – the Washington Marriott hotel in Washington, D.C. Because many, if not most, PHAs are grappling with issues of disabilities, accessibility, and accommodations, this year's entire conference is devoted to the topic "Current Disability, Accessibility and Accommodations Issues Affecting PHA Tenants and Employees." Come and get knee-deep in your agency's responsibilities in this area and learn about recent case law and interpretations. In this age of HUD audits and disability lawsuits, you need to send your staff to this conference! Here's a preliminary sample of the program:

- Key Note Luncheon
- Annual Review of Case Law Affecting Housing and Redevelopment Agencies
- Open Forum addressing the latest industry developments
- Legal Ethics
- Requirements of relevant federal statutes: Section 504 of the Rehabilitation Act of 1973 (Section 504) , the Americans With Disabilities Act (ADA), the Fair Housing Act (FHA)
- Cost v. accommodation - the "undue burden" standard
- Admissions, occupancy standards and lease enforcement
- The verification process
- Unit modifications – PHA and Section 8 owner responsibilities
- Pre-employment inquiries and examinations
- Accessibility and scope of accommodations – when are they mandated, and how far must you go?
- Implications of union contracts
- Construction and design requirements and standards

(Note, that in response to our member survey, we have changed the format for this and subsequent Spring Conferences to Thursday and Friday. We think that this is an improvement, and will allow you to either get back home for an uninterrupted weekend, or to remain in D.C. and enjoy a full weekend).

**PERSONNEL & EMPLOYMENT TRAINING!** HDLI's last Personnel and Employment Law Training took place at the end of September in New York City and was very well attended. The speakers and materials were top-notch. A program is attached herein, and you may purchase materials with the enclosed order form. Plan now! We are planning to have employment training as an add-on to our Spring Conference on Wednesday, May 4, 2005. Stay tuned for more details.

**NEW MEMBER BENEFIT – ON-SITE FAIR HOUSING TRAINING & CLE!** In order to bolster its members understanding of fair housing responsibilities, HDLI has added a new benefit for all members. For a very reasonable cost, HDLI will come *to your site* and conduct fair housing training tailored specifically for your local staff! It is vitally important for all levels of PHA staff to be aware of their fair housing responsibilities – everyone from maintenance staff, to housing managers, to executive staff and legal counsel. Training will vary depending upon the audience, and all participants will receive a certificate of completion. Attorneys can get CLE credit. Contact HDLI at (202) 289-3400 for more information. Don't delay so you can reserve the date(s) of your choosing!

**HDLI LIST SERVE!** I want to encourage all of you to sign-up for and take advantage of HDLI's list serve. It is a wonderful resource for getting timely responses to legal questions and issues from similarly situated housing professionals. It's as easy as sending an e-mail! Contact Tim Coyle for more information at (202) 289-3400.

# CASE CORNER

## Following are summaries of recent noteworthy cases

***This month we begin a new format for Case Corner designed to more easily demonstrate the gist of the cited cases, along with the relevance to your practice. We welcome your feedback as to this new format.***

## Bankruptcy

### *In re Oksentowicz*, 314 B.R. 638 (Bankr. E.D. Mich. Sept. 23, 2004)

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

BRIEF FACTS: Oksentowicz was granted Chapter 7 bankruptcy relief in 2003. Subsequently, he applied for subsidized senior housing owned by a private entity and was denied because his credit did not meet its standards for occupancy. He then sued the private owner under 11 U.S.C. §525, the anti-discrimination provision of the federal bankruptcy code seeking approval of his application, damages, and attorney's fees.[1] The private owner moved to dismiss, claiming that it was not a "governmental unit" as required by §525, and that the debtor's application was not denied solely because of his bankruptcy filing, as required for a violation of §525, due to other adverse credit reporting.

KEY ISSUE: Can a private entity be a "governmental unit" for purposes of 11 U.S.C. §525?

HOLDING/RATIONALE: Yes, when the private entity is sufficiently regulated by HUD and, thus, is "entwined" with governmental policies, management, and control. The court found that since this owner entered into a 29-year contract with HUD to provide subsidized senior housing and was required to follow HUD guidelines as to its operation of the housing and otherwise was closely regulated by HUD, it should be construed a "governmental unit" for purposes of §525. The court reasoned that previous decisions, holding that entities that merely receive public funds and are subject to governmental regulations do not qualify as governmental units, did not properly analyze the government's involvement, and did not properly consider that the entity was carrying out a governmental function in providing low income housing. As to the argument that the owner did not deny the application solely because of the bankruptcy filing, the court found that the only adverse credit reporting consisted of the bankruptcy filing and debts that were discharged in bankruptcy. Accordingly, the court ordered the owner to accept the debtor's application and awarded attorneys' fees to be subsequently determined.

CASE RELEVANCE: The feature article of the August 1, 2004 edition of *The Counsellor* discussed *In re Valentin*, a 2004 Pennsylvania case involving the implication of §525 in the public housing context. In that case involving a PHA defendant, the court did not find a violation of §525. In contrast, this case expands the reach of §525 to private owner's and operators of HUD-subsidized housing. And by including all credit report debts that were discharged in bankruptcy within the protection of Section 525, this decision leaves PHAs and Section 8 owners with little or no discretion to screen the financial viability of persons who subsequently receive bankruptcy protection – regardless of their financial history. This creates yet another obstacle and chilling effect with regard to recruiting Section 8 landlords.

## Disability/Accessibility

### *Whitaker v. West Village Limited Ptnshp., Civ 3:03-CV-0411-P, 2004 U.S. Dist. LEXIS 18225 (N.D. Tex. Sept.4, 2004)*

COURT: U.S. District Court for the Northern District of Texas, Dallas Division

BRIEF FACTS: Tenants sued an architect, contractor, and other defendants alleging that a housing development failed to contain appropriate accommodations for disabled persons. They sued under the ADA, federal and state fair housing statutes, and other state law. The architect and general contractor filed motions to dismiss, each claiming that it could not be liable for discrimination under the ADA or fair housing statutes.

KEY ISSUE: Whether a development's architect and/or contractor can be liable for discrimination under the ADA and fair housing statutes for failing to construct appropriate accommodations for disabled persons.

*continued on next page*

# CASE CORNER CONT'D

HOLDING/RATIONALE: No. The court found that Title III expressly limits liability to owners, lessors, lessees, and operators of the disputed facility, and found that the architect and contractor did not fall within those classes of defendants. The court likewise found that in order to be liable under the FHA, the plaintiffs had to prove that the architect and/or or contractor designed or constructed the facilities at issue. Since the plaintiffs failed to make the necessary allegations, the court dismissed the claims. The court did, however, permit the state law claim against the contractor to proceed.

CASE RELEVANCE: This case leaves open the possibility that architects and/or contractors who are shown to have operated, designed or constructed facilities that fail to provide appropriate accommodations for the disabled could be liable under the ADA or fair housing law.

## Immunity

### *Evans v. Housing Authority of the City of Raleigh*, 602 S.E.2d 668 (N.C. Oct. 7, 2004)

COURT: Supreme Court of North Carolina

BRIEF FACTS: A lead paint case was filed against a housing authority alleging numerous causes of action, including a number of tort claims. In defense to the case, the housing authority claimed sovereign and governmental immunity on the basis that it was formed under state law and invested with a governmental function. The housing authority also asserted that it had not purchased insurance or participated in a risk retention pool that provided coverage for the asserted claims.

KEY ISSUE 1: Can a housing authority enjoy governmental immunity in tort and contract?

HOLDING/RATIONALE 1: Yes. The court found that the housing authority was a municipal corporation under state law, and thus was subject to the same immunity standards as cities and counties. The court found that the PHA could enjoy governmental immunity in tort and contract because it performed a governmental, as opposed to proprietary, function in providing low income housing.

KEY ISSUE 2: Can a housing authority waive governmental immunity by purchasing liability insurance?

HOLDING/RATIONALE 2: Yes. The court first determined that state law permitted *cities* to waive immunity by the act of purchasing liability insurance. However, noting that the term *city* did not include counties or municipal corporations like housing authorities, the court declined to extend that law to the PHA. However, the court looked at the PHA's enabling legislation allowing it to "sue or be sued." Noting that this statutory language does not necessarily waive immunity, the court then found that the enabling language also gives PHAs the right to purchase insurance against risks to its property or operations. Accordingly, the court found that PHAs have the power to waive tort immunity through the purchase of insurance. The court remanded the case to determine whether the insurance purchased applied to the lead-based injuries alleged.

CASE RELEVANCE: This is yet another decision where a court has held that the purchase of liability insurance that covers the tort claim alleged constitutes a waiver of governmental immunity. Practically, a PHA could keep its immunity in tact by excluding coverage of certain claims, such as lead paint.

## Section 8

### *Jeanty v. Shore Terrace Realty Ass'n*, No. 03 Civ. 8669, 2004 U.S. Dist. LEXIS 15773 (S.D.N.Y. Aug. 10, 2004)

COURT: U.S. District Court for the Southern District of New York

BRIEF FACTS: Tenants resided in a project based Section 8 housing complex until the owner exercised its right to "opt out" of the Section 8 program. While the owner accepted enhanced vouchers from some other tenants, it declined to do so for the plaintiffs who either were chronic late payers or refused to grant access to their apartments so that repairs could be made. Rather than proceed with a formal eviction process, the owner sought to get rid of the plaintiffs by simply refusing to accept enhanced vouchers from them. Plaintiffs sought preliminary and permanent injunctions to force the owners to accept enhanced vouchers from them.

KEY ISSUE: Whether an owner opting out of Section 8 assistance *must* accept enhanced vouchers from all tenants, regardless of their lease history.

HOLDING/RATIONALE: Yes. The court granted the injunctions, holding that 42 U.S.C. §1437f(t)(1) and (2) protects the rights of tenants who receive enhanced vouchers to continue to reside in their apartments upon the project's termination of project-based assistance, for so long as the tenant remains eligible for the vouchers or until the tenant is evicted. Relying upon HUD interpretations, the court found that as long as the property is offered as rental housing and the rent is reasonable, owners must continually renew the lease of an enhanced voucher family absent good cause to terminate the tenancy. The court noted with

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# CASE CORNER CONT'D

approval HUD's interpretation of §1437f in its Section 8 Renewal Policy Guidebook (Jan. 19, 2001) that a landlord must accept enhanced vouchers unless the landlord evicts the family through the court system.

CASE RELEVANCE: This case underscores the need to enforce lease provisions and prosecute lease violations at the time that they occur.

### *Baker v. Property Investors of Connecticut, Nov. CIV.3:01 CV 1839 AH, (D Conn. Sept. 21, 2004).*

COURT: U.S. District Court for the District of Connecticut

BRIEF FACTS: Section 8 tenants sued HUD and their PHA claiming, *inter alia*, that HUD's decision to allow the owner to terminate its HAP contract 17 days before the date that the owner told the tenants that the contract would expire, as well as HUD's 6-week delay in processing enhanced vouchers, violated the U.S. Housing Act, the Multifamily Assisted Housing Reform and Affordability Act (MARHA), the APA, and the Fifth Amendment. While plaintiffs never actually left, they claimed that HUD's actions caused them to lose their eligibility for housing programs, lost wages, emotional distress and other related damages. Otherwise, plaintiffs did not allege any injury in fact.

KEY ISSUE: Whether plaintiffs had standing to sue on the facts presented.

HOLDING/RATIONALE: No. In granting a motion to dismiss, the court found that the plaintiffs failed to allege that they suffered a legally cognizable injury caused by HUD. The court found that plaintiffs had failed to allege that they were ever rendered homeless or suffered a concrete harm due to HUD's conduct. The court found that inconvenience and anxiety did not constitute sufficient injury. The court also noted that the plaintiffs were permitted to stay with enhanced vouchers as long as they continued to pay 30% of income, and HUD's delay in processing the enhanced vouchers did not constitute a cognizable injury.

CASE RELEVANCE: This case demonstrates that some courts are not picky about HUD notice regulations. HUD regulations and guidelines require a full one year's notice before the opt-out, and the processing of enhanced vouchers at least 120 days before contract termination. In this case, neither deadline was met, and the court found "no harm, no foul."

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[1.] HDLI featured a substantial article on 11 U.S.C. §525 in its August 1, 2004 edition of *The Counsellor.*

# More on Roof Top Leasing Cont'd

conveying, assigning, leasing, mortgaging, pledging, or otherwise encumbering" the title to their real estate. In addition, Section 7 of the Annual Contributions Contract provides, in part: "With the exception of entering into dwelling leases with eligible families for dwelling units in projects covered by this ACC, and normal uses associated with the operation of the project(s), the HA shall not in any way encumber any such project, or portion thereof, without the prior approval of HUD."

24 C.F.R. § 970 deals with the "Demolition or Disposition" of public housing projects. § 970.2 excepts from the regulation "The leasing of dwelling or nondwelling space incident to the normal operation of the project . . ." § 970.2(4). And "Easements, rights-of-way and transfers of utility systems incident to the normal operation of the development for public housing purposes, as permitted by the ACC . . . ." § 970.2(6).

It was held by the Supreme Court of South Carolina in Sheppard v. City of Orangeburg, 442 S.E.2d 601 (1994), that it was not self-evident to the Court that cable television should be regarded as "an essential service" and, therefore, it was not a public utility under South Carolina law. Consequently, to the extent that this view is widely held, and it probably is, cable television and other electronic transmission devices for telecommunication purposes might not be considered public utilities and, therefore, not exempt from the necessity of achieving HUD's approval.

Nevertheless, times are rapidly changing and so is the technology of telecommunication. The cellular phone is becoming so ubiquitous that perhaps it will soon be regarded as an essential service. The installation of a cellular transmission tower or satellite dish, or other such device, could not be said to be "incident to the normal operation" of a project. Consequently, HUD approval would seem to be required for these matters.

On the other hand, it is possible to argue that HUD approval should not be necessary if these arrangements are handled properly. Let me explain. In my opinion, a properly structured arrangement with a telecommunications company for the installation of a transmission tower or other similar equipment would not take the form of a "lease" at all. A lease would imply that the public

*continued on page 8*

# RECENT HUD RULES AND NOTICES

Following are some of the important recent HUD Rules, Proposed Rules, and Notices that appear in the Federal Register.

| Affected CFR(s) | Federal Register Citation (All 69 CFR) | Substance |
|---|---|---|
| 203 | 65323 | 11/10/04 Proposed Rule revising default regulations under the single family mortgage insurance program<br><br>Comments due 1/10/05 |
| 5 | 65023 | 11/9/04 Final Rule requiring Data Universal Numbering System (DUNS)<br><br>Effective Date: 11/9/04 |
| 81 | 63575 | 11/2/04 Final Rule establishing Fannie Mae and Freddie Mac's housing goals for years 2005 – 2008<br><br>Effective Date: 1/1/05 |
| 7 | 62171 | 10/22/04 Final Rule revising HUD's EEO requirements to conform with EEOC management directive<br><br>Effective Date: 11/22/04 |
| 954, 1003 | 62163 | 10/22/04 Final Rule regarding participation in Native American programs by religious organizations<br><br>Effective Date: 11/22/04 |
| n/a | 59003 | 10/1/04 Notice of FY 2005 FMRs<br><br>Effective Date: 10/1/04 |
| n/a | 64135 | 11/3/04 FY 2004 HOPE VI NOFA – $120,000,000<br><br>Application due 2/1/05 |
| 903 | 64826 | 11/8/04 Notice simplifying annual plan requirements for high-performing PHAs<br><br>Effective Date: 11/8/04 |

# More on Roof Top Leasing Cont'd

housing authority was conveying a portion of its building to the exclusive legal possession of the tenant communications company. There should be no need for such an arrangement. All the telecommunication company wants to do is set up its tower and use a small portion of a roof for this purpose. A more appropriate arrangement for this type of activity would be a license. The Supreme Court of Iowa noted the distinction between a lease and a license:

> "A licensee is a person who enters upon the property of another for his own convenience, pleasure, or benefit, only for purposes of his own and not in response to an implied invitation to the public generally to make use of the premises, but solely as a matter of permission or sufferance.
>
> 62 Am.Jur.2d Premises Liability § 108, at 464-65 (1990). A licensee has – with the permission of the owner – the right to use the property. See Robert's River Rides, Inc. v. Steamboat Devel. Corp., 520 N.W.2d 294, 300 (Iowa 1994) (license grants permission to use land of another). The licensee, however, has no interest in the property. 49 Am.Jur.2d Landlord and Tenant § 5, at 45-46 (1970).
>
> In contrast, a tenant has an interest in the premises and has exclusive legal possession of it. This exclusive legal possession means the tenant, and not the landlord, is in control of the premises. Layton v. A.I. Namm & Sons, 275 A.D. 246, ____, 89 N.Y.S.2d 72, 74-75 (1949); 49 Am.Jur.2d Landlord and Tenant § 6, at 47-48 (1970)."

Bernet v. Rogers, 519 N.W.2d 808, 810-11 (Iowa 1994).

Note from the foregoing that a licensee is considered to have no interest in the property. As a corollary to this legal axiom, it has been held that if a license is revocable, then it is not an encumbrance. "Because a license is generally revocable, it is not an encumbrance upon land. It is actually a justification for acts done under the license, a sort of immunity from trespass." Chicago and North Western Transportation Company v. City of Winthrop, 257 N.W.2d 302, 304 (Minn. 1977). The Court also noted § 512 of the Restatement of Property to support its position.

The license to utilize a portion of the roof should be properly drafted. It should be an instrument that grants the telecommunications company a right to a nonexclusive but specific use of a defined portion of the roof, namely, the erection of its equipment, for a fee, and for a limited time, with the right of the public housing authority to revoke the license after a given number of days' written notice. By structuring the arrangement as a license, then, HUD's approval should not be necessary. The housing authority would not be encumbering its property as that term is properly understood.

I would not think that requesting approval from HUD for these matters would be any big deal, and, as far as I know, such requests usually are not. Yet, there are those who fear the very necessity of asking for approval since they do not know what bureaucratic mischief may lie in the hearts of those from whom permission must be asked. As stated above, a properly drafted license should remove the necessity of requiring permission. As far as the income from such an arrangement is concerned, this should be only a benefit to the public housing authority. I don't see where this income would be a part of the operating fund formula set forth in 24 C.F.R. § 990. It has nothing to do with rent for dwelling units, even used for nondwelling purposes. It does not fit within the definition of "other income", which is defined as "Income from rent billed to lessees of dwelling units rented for nondwelling purposes, and from charges to residents for excess utility consumption for PHA supplied utilities." § 990.102.

The income generated by a license should not be considered "rent", but rather a fee for the permission to use the roof-top for a specified purpose. A housing authority has statutory protection for its nonrental income. 42 U.S.C. § 1437g(l) provides:

> "A public housing agency that receives income from nonrental sources (as determined by the Secretary) may retain and use such amounts without any decrease in the amounts received under this section from the Capital or Operating Fund. Any such nonrental amounts retained shall be used only for low-income housing or to benefit the residents assisted by the public housing agency."

A properly drafted license agreement should enable the PHA to retain this income without fear that its subsidy will be proportionately decreased. Thus, HUD should not be a problem in this area. I believe that these are matters of potential benefit for those public housing authorities who are fortunate or enterprising enough to take advantage of "roof-top" licensing and other similar opportunities.

If you are interested in discussing this issue directly with this writer, please contact Steven J. Riekes at sriekes@mcrlawyers.com.