Housing and Development Law Inst

THE COUNSELLOR

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Calendar of Events:

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

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

Inside this Issue:

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BALTIMORE JUDGE TELLS HUD TO MAKE "REGIONALISM" A PRIORITY

HUD Liable for Failing to Place Public Housing Across Entire Baltimore Region

By Lisa Walker Scott
HDLI Executive Director & General Counsel

In perhaps one of the few major public housing reform suits where the issue of liability actually was litigated,[1] on January 6, 2006 the federal district court in *Thompson v HUD, et al.*[2] considered whether local government and/or the federal government was liable to a class of African-American public housing residents for decades-long housing segregation and alleged discrimination within the City of Baltimore. In a 322-page decision that came more than nine years after suit was filed, the local parties were victorious and HUD got a figurative "whipping" for its failure, since 1954, to *do more* to disburse public housing outside of Baltimore City and throughout the surrounding region.[3]

After considering weeks of trial testimony and thousands of pages of exhibits, the U.S. District Court for the Northern District of Maryland determined that the plaintiffs failed to prove either intentional discrimination, or liability for statistical/impact discrimination, on the part of the City of Baltimore and Housing Authority of Baltimore City. The federal defendants did not fare as well. While the federal defendants

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IMPORTANT NEW RULES FOR TENANT RELOCATION

By Lisa Walker Scott
HDLI Executive Director & General Counsel

On January 4, 2005, the Federal Highway Administration (Highway Administration) issued a long-awaited final rule revising the government-wide rules for uniform relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the URA). *See* 70 Fed. Reg. 589. (Note: the relocation rules are codified at 49 CFR Part 24). The final rule follows the proposed rule issued at the end of 2003, 68 FR 70342 (Dec. 17, 2003), and became effective February 3, 2005. The relocation rules had not been reviewed since they originally were issued in 1989, and had been criticized by many as dated, confusing, and unworkable. For the past three years, HUD and the other federal agencies have been working with the Highway Administration to reduce the burdens of the regulations while,

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Welcome Aboard!

HDLI Welcomes to Membership:

The Robinson Law Firm
Austin, Texas

Richmond Housing Authority
Richmond, Indiana

Brock, Clay & Calhoun, P.C.
Marietta, Georgia

St. Mary's County Housing Authority
Leonardtown, Maryland

Huntington Housing Authority
Huntington, West Virginia

Housing Authority of the City of Orlando, Florida

Housing Authority of Murray
Murray, Kentucky

Pierce County Housing Authority
Tacoma, Washington

Housing Authority of the City of Texarkana, Texas

Youngstown Metropolitan Housing Authority
Youngstown, Ohio

Missoula Housing Authority
Missoula, Montana

Grafton Housing Authority
North Grafton, Massachusetts

Mattox, Mattox & Wilson
New Albany, Indiana

Cordele Housing Authorty
Cordele, Georgia

Mansfield Housing Authority
Storrs, Connecticut

Ramapo Housing Authority
Suffern, New York

Bethlehem Housing Authority
Bethlehem, Pennsylvania

Salisbury Housing Authority
Salisbury, North Carolina

Ansonia Housing Authority
Ansonia, Connecticut

Davis & Davis Law Office
Uniontown, Pennylvania

EMPLOYMENT OPPORTUNITIES

The Philadelphia Housing Authority is looking to fill a position of "Special Counsel to the Executive Director." Compensation is $110,000 annually. Responsibilities include providing high level legal, operational and policy advice to the Executive Director and advising on compliance with HUD and other regulatory requirements. Selected individual must be or become a resident of the City of Philadelphia within 6 months of employment. Interested persons should contact Simone Gans Barefiled at 813-986-4441 or simone@gansgans.com

Lisa Walker Scott, Esq.

A Letter from the Executive Director and General Counsel

NEW HDLI PRESIDENT! HDLI is fortunate to have a dynamic new president – Mattye Gouldsby Jones, Vice President of the Dallas Housing Authority! Mattye has been a faithful member of the HDLI Board of Directors for more than ten years. Mattye took over the reigns at the end of last year and succeeds Susan Cohen, whose valuable leadership over the past two years is very much appreciated. We're very pleased that Sue will remain on the Board.

HDLI WELCOMES THREE NEW BOARD MEMBERS! The HDLI board elected three new board members. They are Vivian Bryant, Esq., the Executive Director of the Orlando Housing Authority, Thomas E. Lewis, Esq., counsel to the Merced Housing Authority in California, and C. Michael ("Mickey") McInnish, Executive Director of the Montgomery Housing Authority in Alabama. We are very excited about the experience and perspectives they each brings to our organization. Retired from the board are Richard Brownstein, Esq., Dov Lesel, Esq., Arthur S. Milligan, and Roland Turpin, whose service is much appreciated and who will be missed. Richard Brownstein, Esq. will continue service to HDLI in Emeritus status.

THIS ISSUE! There are two important featured articles in this issue of the *Counsellor*. The first is an analysis of the *Thompson v. HUD* decision finding HUD liable for failing to consider regional alternatives for the placement of public housing throughout the Baltimore region. The other article highlights some of the more important recent revisions to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA). We are always interested in our members sharing important information, so if you ever are interested in submitting articles for the *Counsellor*, or want to give any feedback, I look forward to hearing from you.

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! The featured luncheon speaker on May 5th is Rod Solomon, Esq. who will discuss his recent report and perspectives on the tangible effects of QHWRA since its enactment in 1998. Remember, the luncheon is included in your registration. Register on the attached Registration Form today.

PERSONNEL & EMPLOYMENT TRAINING! Come a day before the Spring Conference and take part in HDLI's next Personnel and Employment Law Training on Wednesday, May 4, 2005. There will be additional CLE credits for attorneys! You can register separately for this training on the Spring Conference Registration Form.

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 IS HOT! I am pleased to see so much useful information circulating on HDLI's list serve. It is a wonderful resource for getting timely responses to legal questions and issues from similarly situated housing professionals. Please continue to use it! Contact Tim Coyle for more information at (202) 289-3400 if you need to get connected.

I hope that you all have a happy Easter and Passover Season!

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.

ENFORCEMENT OF JUDGMENT

Joseph v. San Francisco Hous. Auth., No. A104946, A105134, 2005 Cal. App. LEXIS 293 (Cal. Feb. 24, 2005)

COURT: Court of Appeal of California, First Appellate District, Division One

BRIEF FACTS: A trial court issued a writ of mandate compelling a housing authority to pay a $12 million judgment within 60 days. The housing authority argued that it did not have the funds to satisfy the judgment, and that the only money available was funds remaining from an insurance settlement (about $2.7 million) or funds that were restricted by HUD. The trial court ordered the PHA to pay the plaintiffs the insurance proceeds and then to take "proper steps ... to appropriate the amount required to meet that obligation." The housing authority appealed, arguing that it had neither the legal obligation nor the power to raise funds to satisfy the judgment. The PHA argued that the bulk of its funds and property were received from HUD or from tenant rents, and that use of those funds to pay the judgment would interfere with its mission to provide affordable housing. The PHA also argued that it was prohibited from using such funds, since HUD retains an interest in the funds and property, and the use of the funds is restricted by law. Finally, the PHA argued that OMB Circular A-87 disallows use of the funds to pay the judgment.

KEY ISSUE 1: Whether Attachment B, section 20 of OMB Circular A-87 prohibits a PHA from using HUD funds or property to satisfy a judgment against the PHA.

HOLDING/RATIONALE 1: No. Circular A-87 establishes principles for determining allowable costs incurred by state and local governments under federal grants. Attachment B, section 20 of that Circular states that "[f]ines, penalties, damages, and other settlements resulting from violations . . . of, or failure of the governmental unit to comply with, Federal, State, local, . . . laws and regulations are unallowable . . ." The court found that although the conditions that contributed to the judgment may have been violations of local laws and regulations, the PHA's obligation to the plaintiffs is based on a judgment, and is not premised on violations of "law and regulations." Payment, therefore, is not made unallowable by Attachment B, section 20. The court further found that several other provisions in the Circular suggest that the cost of paying damages is allowable where the complained of conduct is not intentional. The court also noted a letter from HUD's Office of the General Counsel stating that, with PIH approval, the PHA could satisfy the judgment out of operating subsidy funds, or from revenues generated by selling or encumbering public housing property.

KEY ISSUE 2: Whether established federal case law prohibits such a use of federal funds.

HOLDING/RATIONALE 2: No. To support its position, the PHA cited a number of cases where courts held that federal funds could not be attached and/or garnished by creditors. The court distinguished these attachment cases, noting that the writ at issue here does not attempt to attach property. The court went on to reiterate that nothing prevented the PHA from using HUD grants or properties, or rents obtained from the properties, to pay the judgment. The court held that having to seek HUD approval to use of the funds to pay the judgment did not render the funds or properties unavailable. The court noted that the PHA had a number of options available to it: it could seek future allocations from HUD, use a portion of its operating subsidy, sell or encumber it's real property, attempt to obtain city funds, issue bonds or sell mortgage loans.

CASE RELEVANCE: This decision, and the OGC letter make clear that HUD operating subsidies, and even PHA real property, are available to satisfy judgments against the PHA. This is dangerous precedent, as it could actually encourage the filing of additional suits against PHAs resulting in potential judgments that could further reduce scarce public funds. It makes clear that PHAs are as vulnerable as private landlords, when it comes to personal injury suits. PHAs are wise to revisit their insurance coverages.

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CASE CORNER CONT'D

REASONABLE ACCOMMODATIONS

Hinneberg v. Big Stone County Hous. and Redev. Auth., 2004 Minn. App. LEXIS 1465, A04-435 (Minn. Dec. 28, 2004)

COURT: Court of Appeals of Minnesota

BRIEF FACTS: The PHA's portability policy required nonresident applicants to reside within the PHA's jurisdiction for one year. A disabled housing voucher recipient sought a modification of the housing authority's portability policy so that she could move outside the jurisdiction to be closer to her health care providers. When the PHA denied her request, she sued under the Fair Housing Amendments Act, Title II of the ADA, and the state human rights act, alleging that these laws required the PHA to modify its portability rules to accommodate her disability. The trial court found for the PHA on the basis that the PHA's portability rules did not discriminate against the plaintiff on the basis of her disability, since it was universally and uniformly applied.

KEY ISSUE: Must a PHA modify its portability rules as a reasonable accommodation to a disabled person?

HOLDING/RATIONALE: No. The court found that Title II of the ADA only requires a PHA to provide a reasonable accommodation when there is some initial showing of discrimination. The court found that since the PHA's policy was universally and uniformly applied to all residents, it did not discriminate against the plaintiff. The plaintiff failed to demonstrate that the portability rules, without modification, made housing unavailable to her, or denied her access to a dwelling because of her disability. The court also found that the PHA, as only an entity administering the vouchers, and not a direct provider of housing, does not "affect the availability of housing", as required under the FHAA.

CASE RELEVANCE: These days, many PHAs are grappling with the fiscal impact of portability. This decision is helpful to PHAs who have to restrict portability and are wondering how far they must go to provide a reasonable accommodation for a disability. Of course, this decision might not be as useful to a PHA that was a "direct provider" of housing.

Canales v. New York Hous. Auth., 787 N.YS.2d 261 (Sup. Ct. N.Y., App. Div., 1st Dept. Dec. 21, 2004)

COURT: Supreme Court of New York, Appellate Division, First Department

BRIEF FACTS: Mentally disabled son of resident who had been diagnosed with paranoid schizophrenia was excluded from her public housing unit on the ground of nondesirability. He had failed to attend his treatment programs, previously had disconnected a gas stove, and had been convicted of throwing a glass bottle at a police officer. The resident asserted that the PHA had a division that could monitor whether her son attended his treatment sessions.

KEY ISSUE: Whether the PHA should be required to monitor an individual's treatment program as a reasonable accommodation for his mental disability?

HOLDING/RATIONALE: No. The son's disabled status did not require the PHA to provide him with a residential accommodation where it would jeopardize the health, safety or property of others. Moreover, causing the PHA to monitor his treatment program would be akin to providing a supportive social service, which fundamentally alters the program.

CASE RELEVANCE: This case demonstrates what is "not" a reasonable accommodation. When a PHA does not generally provide services, such as monitoring medical care, for all residents, then requiring that the PHA do so is not a reasonable accommodation. In this case, the disabled person was also a threat to the health, safety and/or property of other residents. As a result, he was not a "qualified" disabled person.

RELOCATION

Cabrini-Green Local Advisory Council v. Chicago Hous. Auth., NO. 04 C 3792, 2005 WL 51467 (N.D. Ill. Jan. 10, 2005)

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

BRIEF FACTS: A PHA sought to demolish 15 of its public housing buildings. The PHA allegedly assured residents that they would have a choice to either remain in public housing or get a Section 8 voucher. Before a redevelopment plan was in place, and without further consultation with the residents, the PHA issued 180 day relocation notices to the residents. The residents sued to halt further redevelopment activity until a detailed redevelopment and relocation plan was approved, and ample time was given for moves to nonimpacted areas.

KEY ISSUE: Must a PHA have a detailed redevelopment and relocation plan in place before initiating relocation activities?

HOLDING/RATIONALE: Yes. The plaintiffs were easily able to prove that 180 days was insufficient time for moves into nonimpacted

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CASE CORNER CONT'D

areas, and that issuance of the 180 day notices without having a redevelopment plan in place caused actual and threatened harm to the residents. The court halted further relocation and redevelopment activities until a full redevelopment and relocation plan was in place.

CASE RELEVANCE: Sometimes, PHAs believe that they must begin relocation efforts sooner than later, and before a full redevelopment plan is in place. In some such cases, courts might allow the moves to protect the safety of the residents or property. However, as this case illustrates, where no such exigent circumstances exist courts are requiring that the full redevelopment process take place, inclusive of the tenants, before they sanction relocation.

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 vested 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: Does a housing authority enjoy governmental immunity against tort and contract claims?

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 looked at this issue on a number of fronts. First, the court noted that applicable state law provided that *cities* can waive immunity by the act of purchasing liability insurance. Noting that the term *city* did not include counties or other municipal corporations similar to housing authorities, the court declined to extend that law to the PHA. Next, 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. To this end, 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 alleged tort claim constitutes a waiver of governmental immunity. Practically, a PHA might retain its immunity in tact by excluding coverage of certain claims, such as lead paint.

DRUG RELATED ACTIVITY

New York City Hous. Auth. v. Taylor, No. 2004-511 KC, 2005 NY Slip Op. 50209U (Sup. Ct. N.Y. Feb 18, 2005)

COURT: Supreme Court of New York, Appellate Term, Second Department

BRIEF FACTS: A tenant's son sold crack cocaine to an undercover police officer inside his public housing development. The police recovered a gun, bullets, additional illegal narcotics, and a large sum of money in the boy's room. Accordingly, the housing authority sought to evict the tenant from the unit and sought possession of the apartment. The trial court ruled that the PHA could not recover possession because it did not establish that the tenant knew of or acquiesced in the criminal activity, as required by state law. The PHA appealed.

KEY ISSUE: Whether, under applicable state law, a tenant is deemed to know of and acquiesce in criminal activity that occurs in her apartment.

HOLDING/RATIONALE: Yes. The court noted that, in the tenant's lease she agreed to be responsible for any drug-related activity and to be subject to an eviction therefore. The court found that a tenant is charged with knowledge of the activity in her apartment and is deemed to have acquiesced therein. The court reversed the trial court and granted possession to the PHA.

CASE RELEVANCE: Discontent with the *Rucker* decision, a number of jurisdictions attempted to create an "innocent tenant" defense statutorily. Others already had the defense on the books. Post-*Rucker*, the question became whether state law or *Rucker* dominated. This case is good

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precedent that, despite a statutory defense or claim requirement, knowledge can be implied to tenants who allow illegal drug activity to take place in their units.

SUBJECT MATTER JURISDICTION

Sackett v. City of Des Moines Mun. Hous. Agen., No. 4:04-cv-00682-JEG, *2005 U.S. Dist. LEXIS 2057 (D. IA. Feb. 10, 2005)*

COURT: United States District Court for the Southern District of Iowa, Central Division

BRIEF FACTS: After an informal hearing, a PHA terminated the assistance of a handicapped Section 8 tenant who failed to cooperate in required inspections. The state trial court remanded the case for lack of subject matter jurisdiction, and plaintiff attempted to have the case removed to federal court.

KEY ISSUE 1: Whether a federal court can review a PHA's termination of Section 8 assistance under the Administrative Procedures Act (APA) .

HOLDING/RATIONALE 1: No. The APA does not grant federal courts jurisdiction to review actions of state or municipal agencies. The PHA is a state agency created under state law, and is not a federal agency whose actions are governed by the APA.

CASE RELEVANCE: This is another decision that makes clear that federal courts do not have subject matter jurisdiction to review the discretionary decisions of state governmental bodies under the APA.

FAIR HOUSING – Familial Status

Milsap v. Cornerstone Resid. Managem't. Inc., No. 05-60033-Civ.MARRA/ SETZER, 2005 U.S. Dist. LEXIS 1147 (D. Fla. Jan. 28, 2005)

COURT: United States District Court for the Southern District of Florida

BRIEF FACTS: A certain apartment complex had an occupancy policy that permitted adults to share bedrooms, but in most cases did not allow parents and children, or siblings, to do so. Applicable HUD occupancy guidelines contained in 74.65.1 Chapter 5, Section (b) provide that the minimum number of people permitted in a two-bedroom apartment is two (2) and the maximum is four (4); the minimum number of occupants in a three-bedroom apartment is three (3) and the maximum is six (6).

Mothers with children wanted their children to share bedrooms so that the family could qualify for a smaller and less expensive Section 8 apartment. The property management company told them that, under the occupancy policy, they were not eligible for the smaller apartments. The mothers sued, alleging that the residency standards were discriminatory based on familial status in violation of the Fair Housing Act. They sought preliminary injunctive relief ordering the company to accept applications from the families for the smaller bedrooms and to cease the discriminatory occupancy practice. The company argued that their policy was legal because it fell with HUD's articulated occupancy guidelines, and because the policy applies neutrally to limit "one heart beat" per bedroom.

KEY ISSUE 1: Whether an occupancy policy that prohibits the sharing of bedrooms when one of the occupants is a child violates the Fair Housing Act.

HOLDING/RATIONALE 1: Yes. The court granted the preliminary injunction, finding that the company's practice of refusing to rent an apartment to a tenant on the basis of the number of children in the household when the same unit would have been rented to the same sized household of adults discriminates on its face against families with children on the basis of familial status. The court found that there was no rational basis for these distinctions and no competent evidence was submitted to justify these restrictions.

CASE RELEVANCE: In many cases, local occupancy codes resolve this issue. However, where local codes do not address the issue, PHAs should be sure to have competent evidence to support their attempts to regulate who shares bedrooms.

PREMISES LIABILITY

Ramirez v. AHP Mut. Hous. Ass'n, NO. 14-04-00159-CV, 2005 Tex. App. LEXIS 1451 (Tex. Ct. App. Feb. 24, 2005)

COURT: Court of Appeals of Texas, Fourteenth District, Houston

BRIEF FACTS: A public housing tenant was stabbed repeatedly by a stranger in a vicious attack in his apartment, resulting in severe and permanent injuries that included the loss of use of an arm. He sued his PHA, claiming that the PHA failed to provide adequate security, failed to maintain its fences and gates, failed to keep itself reasonably informed of the nature and extent of crime in the surrounding area, and failed to warn its residents of the risk of crime. The tenant also alleged that the PHA's security measures were inadequate. In support of his

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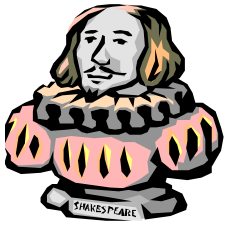
allegations, the tenant introduced police reports of eleven other crimes, including nine assaults, at the same housing development during the year preceding the attack. He also presented evidence of 136 call reports to the police originating from the development in the past year. He claimed that these incidents indicated a high degree of similarity between previously reported crimes and the attack on him, such that his attack was foreseeable to the PHA. The trial court granted the landlord's motion for summary judgment, finding that the PHA did not owe the tenant any duty because the attack was not foreseeable. The tenant appealed.

KEY ISSUE 1: Whether a PHA is liable for unforeseeable criminal violence that occurs in a PHA unit.

HOLDING/RATIONALE 1: No. The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care. Under applicable state law, to determine foreseeability the court had to consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the PHA knew or should have known about them. In this case, the court found that none of the police reports involved incidents resulting in more than a minor injury and that five were domestic violence calls, so that none were similar to a random attack from a stranger. As for the 136 phone calls to police originating from the development, the court found that none of these calls involved significant violence or alleged felonies. Further, the court noted that the call reports included hang-up calls, mistake calls, missing person calls, information calls, calls for medical assistance, and calls to report suspected criminal activity, and therefore were not necessarily probative of actual crime. The court affirmed the trial court's grant of summary judgment.

CASE RELEVANCE: This case demonstrates the generally applicable rule that, despite the seriousness of the crime that occurred, PHAs (like other landlords) are not liable for crimes directed against their tenants unless the specific type of crime was foreseeable to the PHA.



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 . . .

One day a tourist wandered into a curio shop in Hong Kong. Way in the back, amidst the clutter, he found a brass statuette of a rat. It was beautifully crafted, and the man decided he rather liked it. "How much?" he asked the elderly Chinese shopkeeper. "Five dollar," the shopkeeper replied. "Hundred dollar with story." Five dollars seemed like a good price, and the tourist decided that he could live without knowing the story of the brass rat. So he bought it. As he wandered on through the streets of Hong Kong, however, the man noticed with surprise that he was not alone. Rats were emerging from buildings, the sewers, everywhere, in ever increasing numbers, and following him. Before long there were so many that he became genuinely frightened. Finding himself at the water's edge, the now terrified man hurled the brass rat into the bay. He heaved a sigh of relief as the thousands of rats hurled themselves into the bay after it and promptly began to drown. Shaken, the man made his way back to the curio shop. The old Chinese shopkeeper looked amused. "You come back for story?" he asked. The tourist shook his head. "No," he said. "I just wanted to know if you had a brass lawyer."

Q. Why are scientists now using lawyers in laboratory experiments instead of rats?
A. Three reasons: 1) lawyers are more plentiful than rats; 2) there is no danger the scientists will become attached to the lawyers; and 3) there are some things rats just won't do.

A lawyer was out hiking with a friend when they encountered a mountain lion. The lawyer dropped his pack and got ready to run. "You'll never outrun a hungry mountain lion!" exclaimed his friend.

"I don't have to outrun him," replied the lawyer. "I just have to outrun you!"

The next day a coyote came upon that same mountain lion licking a pile of dung. "What on earth are you doing?" the coyote asked in amazement. The mountain lion looked up dolefully. "I ate a lawyer yesterday, and I'm still trying to get the taste out of my mouth."

The foregoing is courtesy of *Lawyer Jokes Etcetera*

MARCH 2005 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 . . .

FREEDOM OF FEELINGS

We have been trained to shut off and freeze our feelings. We have been told that feelings are weak and irrational and if we want to be a success in this world, we must be able to control our feelings. The models for success are persons who never have any visible feelings. Yet, when we do this, we find that we are making ourselves more vulnerable, not less. When we push feelings down, we never know when or how they will erupt, and we can rest assured that it will be with greater intensity than if we had acknowledged the original "feeling moment." Feelings are our natural, built-in alarm and information system. It is our feelings not our minds that warn us of danger, that tell us that someone is lying to us, and that tell us of subtle nuances that allow us to discern differences and make decisions. Without this internal information system, we can never truly be free.

CELEBRATING MY ABILITY TO FEEL IS A WAY TO BE FULLY FREE.

THIS NEW DAY

Ralph Waldo Emerson wrote:

"Write it on your heart that every day is the best day in the year. He is rich who owns the day, and no one owns the day who allows it to be invaded with fret and anxiety.

Finish every day and be done with it. You have done what you could. Some blunders and absurdities, no doubt crept in. Forget them as soon as you can, tomorrow is a new day; begin it well and serenely with too high a spirit to be cumbered with your old nonsense.

This new day is too dear, with its hopes and invitations, to waste a moment on the yesterdays."

LET YOUR MIND AND HEART START FROM SCRATCH EVERY DAY.

EXCELLENCE

A few learned thoughts about excellence:

"Appreciation is a wonderful thing: It makes what is excellent in others belong to us as well." Voltaire.

"If I am walking with two other men, each of them will serve as my teacher. I will pick out the good points of the one and imitate them, and the bad points of the other and correct them in myself." Confucius.

"We are what we repeatedly do. Excellence is therefore not an act but a habit." Aristotle.

"I am careful not to confuse excellence with perfection. Excellence, I can reach for; perfection is God's business." Michael J. Fox.

EXCELLENCE IS NOT A THING; IT'S A STATE OF MIND.

**The foregoing is adapted from Anne Wilson Schaef's Meditations *for Women Who Do Too Much*, Harper& Row, 1990, and from quotations listed on the *Positive Path Network*.

RECENT HUD RULES AND NOTICES

March 2005

Following are some of the important recent HUD Rules, Proposed Rules, and/or Notices that appear in the Federal Register, along with a brief description.

RECENT HUD RULES

Affected CFR(s)	Federal Register Citation	Substance	Effective Date
Part 570	70 FR 8705	Final Rule on CDBG rules for insular areas	3/24/05

RECENT HUD NOTICES

Notice	Date Issued	Subject	Substance	Expiration Date
70 FR 9737	2/14/05	Fair housing accessibility requirements	Revises accessiblity requirements for HUD assisted properties to comply with 2003 IBC	n/a
PIH 2005-9 (HA)	2/25/05	PHA Flexibility to Manage the HCV Program in 2005	Provides guidance in methods of reducing costs of voucher program (e.g., lowering payment standards and/or utility allowances, denying portability, termination etc.)	2/28/05
PIH 2005-7 (HA)	2/22/05	RIM Disallowed costs and sanctions under RHIIP (replaces PIH 2003-34)	Sets forth requirement for 50% error reduction in RIM areas and states consequences for failure to correct	2/28/06
PIH 2005-6 (HA)	2/1/05	Reinstatement of Notice on Procurement of Services	Reinstates PIH 2003-24 (HA) that, inter alia, suggests that outside legal counsel sign a new contract addendum to which HDLI objects * HDLI continues to caution PHAs in following this Notice	2/28/06
PIH 2005-5 (HA)	2/1/05	New Freedom Initiative re: community-based alternatives for the disabled	Provides guidance on President Bush's New Freedom Initiative to assist the disabled with their housing searches under HCV program	2/28/06

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RECENT HUD NOTICES CONTINUED

Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2005-4 (HA)	1/18/05	New electronic exigent health and safety (EHS) system	Details how PHAs are to certify the correction of life-threatening deficiencies revealed during UPCS inspections through on-line applications	1/31/06
PIH 2005-3 (HA)	1/13/05	Changes to Employee Benefit Plans provisions of Housing Agency Handbook	Requires PHAs to follow OMB Circular A-87 for employee benefits plan administration of forfeiture money	1/31/06
PIH 2005-2 (HA)	1/5/05	Requirements for Designation of Public Housing Projects for Elderly and/or Disabled	Reiterates streamlined requirements for desigating projects as elderly and/or disabled	1/31/06
PIH 2005-1 (HA)	12/8/04	Notice re: Implementation of the Appropriations Act for Voucher Program	Implements HCV funding provisions of 2005 Consolidated Appropriations Act (renewal funds, admin fees, reserves, etc.)	12/31/05
70 FR 9777 FR 4937-N-03	2/28/05	Revised 2005 Fair market rents	Revising certain 2005 fair market rents published 10/1/04	
H 05-06	1/27/05	Reinstatement and extension of Notice 97-31 (lead-based paint)	Provides guidance on lead-based paint disclosure requirements	1/31/06
H 05-05	1/26/05	Reinstatement and extension of Notice 96-19 (telecommunications)	Provides guidance to project owners for telecommunications service contracts	1/31/06
H 05-03	1/26/05	Bond financed Section 8 projects (H 03-28)	Extends guidance on asset management issues	1/31/06
H 05-01	1/7/05	2005 interest rate for Section 202 and 811 projects	Establishes interest rate of 5.25% and various processing factors	1/31/06

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prevailed on most of the Plaintiffs' claims, the court found that HUD violated its statutory duty to affirmatively further fair housing by failing to consider a regional approach to desegregation that would have dispersed the siting of public housing outside of the City of Baltimore and throughout the rest of the region. Whether HUD acted intentionally is left to further proceedings during the remedy phase of the case.

The Cast

You should understand the "flavor" and complexity of this lawsuit. Like other major litigation, there were a host of different parties and an army of counsel involved in this litigation. The plaintiff class was certified as current and future African-American residents of family public housing in Baltimore. The class was represented by a full cadre of lawyers from the American Civil Liberties Union of Maryland (ACLU), as well as those from the D.C. office of a large national law firm. The Plaintiffs sued the governmental entities and officials responsible for local housing policy and practice - the Mayor and City Council of Baltimore City and the Housing Authority of Baltimore City (HABC) and its Executive Director, and their predecessors (the "Local Defendants"). The Plaintiffs also sued federal entities responsible for federal housing policy and practice - HUD, its current Secretary and his predecessor (the "Federal Defendants"). The Local Defendants were represented by Baltimore law firms and the Baltimore City Solicitor.[4] The Federal Defendants were represented by a number of Justice Department and HUD lawyers.

In addition to no less than 15 lawyers involved in this litigation at any given time during its nine-year tenure, there were a host of other parties that had a hand in the mix -- the judge, a number of appointed special masters and magistrate judges, a multi-member "advisory council" made up of representatives from surrounding jurisdictions, and various intervenors in the suit.[5] The use of the word "contentious" to describe this litigation is, unfortunately, an understatement. Already, millions of dollars in attorneys' fees and litigation costs have been incurred, and paid, in this case.

"It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socioeconomic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region."

Local History and Demographics Play Key Role

This case is similar to other reform suits brought around the country in the allegations of discrimination asserted and the forms of relief sought. However, the facts giving rise to the racial segregation within Baltimore City are significantly different. The court's decision chronicles the degree of racial segregation that existed in Baltimore City and surrounding areas before and after the 1954 Supreme Court decision in *Brown v. Board of Education* that declared that "separate but equal" public schools were inherently unequal. The court points out that, unlike many other segregated municipalities at the time, Baltimore took steps to desegregate its public housing immediately after the *Brown* decision came down, rather than delaying action until the decision was judicially extended to housing. Baltimore was successful in achieving various degrees of racial mixing in all of its developments, even though efforts at integration were sometimes met with significant community opposition.

However, in the 40 years following the *Brown* decision, major demographic changes in race and income occurred in Baltimore, resulting in a city that became significantly populated by lower-income African-Americans. The African-American population in Baltimore City grew from about one-fifth of the overall population in the 1940s (19%) to nearly two-thirds by the year 2000 (64%). Over time, occupants of public housing in Baltimore were virtually all-African-American. Comparing these statistics to the African-American population of several counties surrounding Baltimore City, which average only fifteen percent (15%), demonstrates one of the central problems of "desegregating" Baltimore public housing - the articulated goal of the lawsuit. Because of these demographics, there was little, if any, opportunity for internal desegregation within Baltimore City developments.

The Claims

Since there was no dispute that today most of Baltimore's African-American residents, including public housing residents, live in majority-African-American neighborhoods, Plaintiffs blamed the Defendants for the racial segregation that exists now. They asserted a variety of claims against the Defendants grounded upon the Equal Protection provisions of the U.S. Constitu-

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tion, Title VI of the Civil Rights Act of 1964, Title VIII of the Fair Housing Act, and the certification provisions of other federal housing statutes. They sought to enforce their claims against the Local Defendants via Section 1983, and against the Federal Defendants via the Administrative Procedures Act.

The essence of the Plaintiffs' constitutional claims was that they did not receive the equal protection of the Constitution when Defendants allegedly intentionally discriminated against them prior to 1954 (*de jure* discrimination), and then failed to remedy the vestiges of past discrimination after 1954. Their statutory claims alleged that the Defendants denied them housing, discriminated against them with regard to housing conditions and services, and failed to affirmatively promote fair housing. The Plaintiffs laid forth a litany of actions and omissions in an attempt to prove discrimination over the decades. The major allegations are described within this article. While the Defendants never denied that *de jure* segregation took place at times when segregation was still legal, they strenuously argued that there was neither intentional segregation nor any form of discrimination after 1954.

The Partial Consent Decree

The evidence presented at the trial of this case was limited by the release provisions of a Partial Consent Decree that the court entered a year after the suit was filed. The Partial Consent Decree disposed of only that portion of the case that dealt with Baltimore City's four family high-rise developments and one other site. The case was partially resolved in this piecemeal fashion in order to reserve a significant amount of HUD appropriations that were in danger of being recaptured by Congress in 1996. The Decree enabled Baltimore to secure nearly $300 million in federal money for housing opportunities. With one exception, the Plaintiffs' claims including these five sites were released. Not released was evidence involving the five sites that might relate to the Plaintiffs' "continuing violation" theory, which had a direct effect on applicable statutes of limitations.

The Decree, itself, has been the source of on-going litigation among the parties, as the Local Defendants struggle to implement the complex provisions of the Decree with, in many cases, inadequate funding. As per the Decree, the Plaintiffs remain closely involved, and have a say, in every avenue of implementation.

> **" . . . [I]t is only fair to judge the actors in the context of their time. So judged, the Baltimore City leadership of the post-Brown era deserves accolades, not criticism."**

Preliminary and Procedural Issues

Administrative Procedures Act (APA)

There were two principal procedural issues that the court resolved. Plaintiffs sought to hold the Federal Defendants liable for fair housing violations under the review provisions of the Administrative Procedures Act (APA), so the first issue was whether review of HUD's policies was appropriate under the APA. Since courts will scrutinize agency discretionary acts under the APA only when there is no other adequate remedy in a court of law, this judge considered whether the Plaintiffs' claims under Titles VI and VIII provided adequate means to redress the Plaintiffs' grievances, thereby barring APA review.

The court considered Title VI and Title VIII separately. With regard to Title VIII, the court found that, since HUD is obligated to affirmatively further fair housing policies, Plaintiffs have a broad, direct, and substantial opportunity to challenge HUD's actions under the APA, and that the opportunity is greater than the remedies provided under Title VIII. However, with regard to Title VI, the court found that the "alternate remedies" provided under Title VI were adequate.

Statute of Limitations

Another preliminary issue was whether applicable statutes of limitations barred the Plaintiffs' claims. The complaint was filed in 1995; however, the claims were all based upon decades of actions that began in the 1930s. All of the Defendants asserted that the Plaintiffs' claims were time barred. One interesting factor in this case is that different statutes of limitations applied to each set of defendants, such that certain facts could be used against one set of defendants and not the other. The period of limitations for both the constitutional and statutory claims against the Local Defendants was extracted from Maryland law and was three years. However, the limitations period applicable to the Federal Defendants under the APA was the general federal six year limitations period. Thus, claims against the Local Defendants arising before 1992 were time barred, and those against the Federal Defendants arising before 1989 were time barred. The time frame not barred was referred to in the decision as the "Open Period."

As mentioned above, certain claims related

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to five of HABC's developments were released under the Partial Consent Decree, and much of the facts supporting those claims were outside of the respective Open Periods. However, because the Plaintiffs also claimed that the Defendants failed to ameliorate the effects of past race discrimination that continued into the Open Periods, the court was able to, and did, consider evidence that began in earlier years and continued into the Open Periods. The court did not, however, permit the Plaintiffs to evoke a "continuing violation" theory to establish evidence of vestiges of a past violation otherwise barred by the applicable statute of limitations, admitting only evidence of actions occurring during the Open Periods.

Private Right of Action

It is noteworthy that Plaintiffs also argued that Title VI and Title VIII both imply a *private right of action* against the Federal Defendants, independent of APA review. With regard to Title VIII, the court did not reach the issue since it found the claims redressable under the APA. With regard to Title VI, the court found lacking any intent by Congress to create a private right of action.

Resolution of the Constitutional (Equal Protection) Claims

The bases for the Plaintiffs' constitutional claims were that mayoral administrations since the 1930s engaged in a pattern and practice of intentional discrimination against African-Americans in public housing, thus violating their right to equal protection of the law. This included the assertion that, during the tenure of Baltimore's first elected African-American mayor, Baltimore City intentionally discriminated against African-Americans. Plaintiffs based their Equal Protection claims on six specific actions or omissions allegedly taken by the Defendants:

1) The erection of a fence separating one of HABC's public housing developments from an adjacent hostile majority-white neighborhood, to which HUD contributed substantial monies;

2) The demolition of public housing units at certain sites without replacing all of the units;

3) The decision not to put certain replacement housing units at a particular site located in a non-impacted area of the city;

4) The development of tenant assignment policies that permitted "too much" individual choice for residents;

"Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region including [five] counties."

5) Passing of a local ordinance that gave the Baltimore City Council "veto" authority over housing policy; and

6) A general pattern and practice of discrimination.

Considering all of the evidence, the court found that the Local Defendants had proper business purposes for the decisions they made in the public interest, and that there was no discriminatory purpose in their actions. With one important exception, described below, the court also found that HUD and its officials acted without discriminatory purpose.

Having found that none of the Defendants acted with a racially discriminatory purpose during the Open Periods, the court went on to consider whether Defendants' actions had a racially discriminatory impact. With regard to the erection of the fence, the court determined that despite the racial animus that existed among some of the adjacent homeowners, Defendants had reasonable and nondiscriminatory safety reasons to erect the fence around a crime-ridden development that was easily accessible to interstate criminal activity.

With regard to the demolition of public housing units at certain sites without replacing all of the units, the court pointed out that there is no Fifth or Fourteenth Amendment right to housing. The court further found that the Plaintiffs could not prove that there was any racially discriminatory impact stemming from the replacement housing actions; *i.e.*, that there was any state-imposed distinctions between African-American and white Baltimoreans in this regard.

With regard to Defendants' siting decisions, the court found that the Defendants had a race-neutral reason for deciding that the specific non-impacted site that the Plaintiffs favored, that formerly was adjacent to a school, was better served as a school-related, rather than housing, site.

Tenant Assignment Policies Not to Blame for Segregation

With regard to HABC's tenant assignment policies, the court considered whether HABC's decision to adopt a modified "three-strikes-and-you're-out" tenant assignment policy illegally promoted segregation by race. Plaintiffs argued that HABC should have chosen the alternate "one strike" plan to remedy vestiges of past discrimination. In

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considering this issue, the court acknowledged that HABC had a *de jure* system of housing segregation prior to the *Brown* decision. The court further found that HABC demonstrated exemplary efforts to desegregate immediately after *Brown* was decided, and even won an award for its success in bringing white and African-American families together in the same housing projects. The court went on to determine whether subsequent actions and omissions violated Local Defendant's duty to disestablish the vestiges of *de jure* segregation.

After considering the modification to the "three strikes" rule that HABC developed, as well as the problems that HABC encountered managing its waiting list, the court determined that there was no racial animus or other discriminatory purpose for HABC's conduct. The court also considered demographic information that showed that by the 1990s the Baltimore public housing population was overwhelmingly African-American, such that any flaws in the tenant assignment practices did not have substantial effects as a practical matter. The court further emasculated any paternalistic "Big Brother" type policy that served to limit resident choices, holding that Defendants had a legitimate justification for seeking to empower public housing residents to decide for themselves where they live.

Court Refused to Strike Down "Veto" Ordinance

With regard to the ordinance issue, Plaintiffs argued that this ordinance had always been used to concentrate African-Americans in impacted areas of the city and therefore was part of the Local Defendants' discriminatory conduct. The court did not agree. The court noted that, during at least the Open Period, there were no public housing proposals before the city council, other than those permitted by the Partial Consent Decree in the case. The court went on to note that it is unlikely that a city with a majority African-American population would tolerate officials who would discriminate against the majority. The court held that the balance of power effected by the ordinance was appropriate.

Finally, the court disposed of the Plaintiffs' litany of "pattern and practice" claims, by holding that housing decisions properly were made with "big picture" considerations, not by considering a one issue, dogmatic approach where racial integration trumped all other considerations. The court found that the Local Defendants actions were devoid of any intent to establish or continue a pattern or practice of racial discrimination.

"This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits."

Resolution of the Statutory Claims

Plaintiffs' Title VI claims were centered around §601, which prohibits racial discrimination in federally funded programs such as public housing. The court first determined that, procedurally, Plaintiffs could not proceed against Federal Defendants. Regarding the Local Defendants, the court found that there can only be a violation of Title VI where it can be proven that there was purposeful discrimination that violates the Equal Protection guarantees of the Constitution. Having found no Constitutional violation, the court found no Title VI violation.

Plaintiffs' claims under the remaining federal housing laws - the U.S. Housing Act and the Community Development Act - were centered on the requirements imposed by each to certify compliance with fair housing laws. The court dismissed these claims, finding that the Plaintiffs had no private right of action under the statutes.

HUD Violated Fair Housing Act by Wearing Blinders

The clear evidence in the case demonstrated that Baltimore City has shouldered, and continues to shoulder, the burden of its region's poor. The court focused on HUD's affirmative duty under §3608 of the Fair Housing Act to promote fair housing. Interpreting that the duty, the court held that HUD must "do something more than simply refrain from discriminating." Quoting from the First Circuit Court of Appeals' 1987 decision in *NAACP v. HUD*, the court elaborated that the duty includes considering the effect of a HUD grant on the racial and socio-economic composition of the surrounding area, that is, beyond Baltimore City borders. The court decided that HUD had an obligation to "take an approach to its obligation to promote fair housing that adequately considers the entire "Baltimore Region." The court defined "Baltimore Region" to include Baltimore City and six surrounding counties. Considering the placement of public housing within the Baltimore Region, the court found that HUD excessively focused its desegregation

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efforts within Baltimore City rather than the Baltimore Region as a whole, and that said focus did not further fair housing.

The court criticized HUD's reliance on rearranging the siting of public housing units within Baltimore City and its reliance on Section 8 vouchers as "inadequate" to advance the cause of desegregation, given Baltimore City's demographic composition. The court stated that had HUD fulfilled its duty, it would have increased, or not significantly decrease, the supply of housing. The court then scrutinized the housing supply during the Open Period, and found that the vast majority of public housing units in the region were concentrated within Baltimore City neighborhoods with above average percentages of African-Americans. In contrast, a meager percentage of public housing was sited outside City limits where a minority of the population is African-American. The court found that "the statistical evidence demonstrates that HUD's various housing programs, as implemented, failed to achieve significant desegregation in Baltimore City." Accordingly, the court held that HUD abused its discretion and failed to meets its duty to affirmatively further fair housing.

Given HUD's statutory duties to affirmatively further fair housing, its intraregional jurisdiction, and its ability to exert practical leverage throughout the Baltimore region, the court deemed it unreasonable for HUD not to promote housing programs that reached outside of Baltimore City. The court further found that geographic considerations, economic limitations, and population shifts rendered it impossible to effect a meaningful degree of desegregation in Baltimore's public housing by redistributing the public housing population of Baltimore City within the city limits. The court said that, "[i]n effectively wearing blinders that limited their vision beyond Baltimore City, Federal Defendants, at best, abused their discretion and failed to meet their obligations under the Fair Housing Act to promote fair housing affirmatively."

The parties will now provide further evidence relating to HUD's motivations for failing to consider a regional approach. The decision reads, "[I]t remains to be seen, in further proceedings, whether HUD's failure adequately to consider regionalization policies was motivated by an intent to discriminate based upon race, a willingness to bow to political pressure, oversight, neglect and/or other causes."

"... neither the Equal Protection Clause, nor any other Constitutional provision, empowers the Courts to redistribute wealth ..."

"Regionalism" and The Challenging Remedy Phase

The decision sets a quick timetable to begin the remedy phase of this litigation. But before the remedy phase begins, HUD is considering whether to appeal (if, in fact, an interlocutory appeal is even possible). We know from the decision that the judge's ideal remedy will be a regional one where counties surrounding Baltimore City will take on a greater share of public housing. How the judge will achieve this goal without the affected county jurisdictions being parties to the suit will be interesting.

The judge did shed light on the scope of a potential remedy. He stated that it would be "a substantial burden on Defendants to provide a remedy that would affect Defendants' discretion to allocate its resources for the public good." This could mean that the judge doesn't intend to specifically order HUD to designate additional monetary or other resources to the Baltimore region. Perhaps the remedy will attempt to place restrictions on how already allocated resources are used in the future, since the court stated that during the remedy phase, the court "shall hear evidence regarding the appropriate action to take to insure that HUD shall, in the future, adequately consider a regional approach to the desegregation of public housing in the Baltimore Region."

Housing advocates are lining up to offer support to the court and parties to fashion a workable remedy. According to Philip Tegeler, Executive Director of the DC-based Poverty & Race Research Action Council (PRRAC), "the decision promises to give new momentum to ongoing efforts to promote affordable housing in the Baltimore suburbs – including a campaign for inclusionary zoning spearheaded by the faith-based BRIDGE coalition and efforts by the Citizens Planning and Housing Association to engage civic leaders in the region in affordable housing efforts. The *Thompson* decision is an opportunity for the Baltimore region to become a national model for well-planned, racially equitable development policies."

The local parties are greatly encouraged by this decision. Plaintiffs' counsel was unable to respond to HDLI's request for their comment; however, William F. Ryan, Jr., lead counsel for the City and HABC, states that "Judge Garbis' decision is a Clarion call to our Federal Government that it cannot sit idly by on the sidelines while cities such as Baltimore struggle to house a region's poorest families. This judge was able to see clearly through the morass of unfounded accusations of discrimination levied against the City and HABC. His decision lauds the housing efforts of Baltimore's past and

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Important New Rules for Tenant Relocation Cont'd

at the same time, clarify the rules, meet modern needs, and improve services to persons relocated by governmental agencies.

This article provides an overview of many of the important changes that affect the relocation of public housing tenants. This is not intended to be an exhaustive list of the new rules, and we encourage you to read all of the new regulations and confer with local counsel as to how these changes affect your daily operations. Additionally, while not addressed within the limited confines of this Article, there are a number of new regulations pertaining to appraisals and the relocation of businesses and homeowners.

The new rules also contain an "Appendix A." While it does not impose any mandatory requirements, Appendix A provides additional guidance and information concerning the purpose and intent of a number of the new provisions. It is considered "regulatory."

And although future HOPE VI projects may be a nullity for lack of funding, you should also remember that HUD published a "HOPE VI Relocation Plan Guide" (HUD form HUD-52774 (8/2002) which can be a helpful check list and can be downloaded from HUD's website at www.hud.gov.

Following are some of the more important changes:

Permanent v. temporary relocation (49 CFR 24.2(a)(9)(ii))(D).. The drafters were concerned with persons being designated as "temporary" relocates for either long periods of time or when their actual return to a rehabilitated project is in doubt because of a reduced number of units. The new rules state that a person who is displaced for a period of more than 12 months is "displaced" and entitled to full displacement benefits. Whenever a person has been temporarily relocated for a period beyond one year, they must be contacted and offered all permanent relocation assistance, including remaining temporarily relocated for an agreed period, permanently relocating to the temporary unit, and/or choosing to permanently relocate elsewhere with full URA assistance. There are, however, provisions for longer displacement periods caused by disasters or public health emergencies.

Refundable security and utility deposits (49 CFR 301(h)(12)). One of the new rules that goes against the customary practice of some PHAs is that *refundable* security and utility deposits are not eligible moving expenses and *should not be reimbursed*. The drafters cited lack of legal authority under the Act, and declined to include them as eligible absent legislative change. This would not seem to apply to nonrefundable deposits.

No requested waiver of benefits (49 CFR 207(f)). The new rules make clear that PHAs should *not* request that tenants waive relocation benefits, and that such waivers are *invalid*. HUD has decided that, since, the URA imposes requirements on PHAs to provide relocation benefits, a tenant cannot relieve the PHA from URA requirements by agreeing to waive assistance or benefits. However, Appendix A makes clear that, after being informed of all payments and benefits to which he is entitled, a tenant may, in a *written statement*, choose not to accept some or all of such benefits. If the tenant declines, but refuses to provide the written statement, then the PHA should document the refusal in writing.

Transportation to inspect units (49 CFR 205(c)(2)(ii)(E)).. The new rules make clear that an agency must offer transportation to all displaced persons equally, regardless of need. Regarding the issue of possible liability for transporting non-governmental persons in governmental vehicles, the drafters stated that it is the responsibility of the agency to decide how they will transport a displaced person, and if liability is a concern then other means, such as taxicab or rental car, should be employed.

Overhoused families (49 CFR 24.2(a)(6)(ix)). The new rules address the issue of providing comparable replacement housing that has less bedrooms that the original dwelling. The revision makes clear that a PHA can determine the family's current needs when determining the size of the replacement unit. The revision also states that this applies to Section 8 units on the private market.

Self-moves (49 CFR 301(b)). Regarding the payment for residential self-moves, the new rules make clear that individuals cannot be paid for self-moves by using the "lower of two bid estimates" amount that business displacees are entitled to use.

Housing siblings of opposite gender (49 CFR 24.2(a)(8)(iv)). Unfortunately, although the issue was considered, the new regulations do not address the problem of how to house siblings of opposite gender. The regulations leave the issue to state housing and occupancy codes.

Lead-based paint standards (49 CFR 24.2(a)(8)). While the proposed rules included standards relating to deteriorated paint or lead based paint in the definition of "decent, safe, and sanitary dwelling," the drafters declined to include the standards in the final rule because they believed that they lacked legal authority to mandate such standards. Instead, the included a *suggestion* in Appendix A to the rules that such standards may be required by local housing and occupancy codes, and may, in any event, be desirable.

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Important New Rules for Tenant Relocation Cont'd

Federal v. local occupancy standards (49 CFR 24.2(a)(8)(iv)). The new rules make clear that local housing and occupancy codes are the primary source for defining "standard" housing. In the absence of local codes, then the federal housing quality standards apply to federally-subsidized housing. However, the regulations do not resolve the issue whether contrary or more restrictive federal requirements override local standards, leaving the issue to local courts to resolve applying state law.

Safe means of egress (49 CFR 24.2(a)(8)(vi)).. The old rules required that replacement housing units have two means of egress when they are on the second story or above and have direct access to a common corridor. The new rules remove this requirement, and leave the issue to local fire and building codes.

Disabilities (49 CFR 24.2(a)(8)(vii)). Exhibit A . The new rules address the need to accommodate the needs of a person with a physical impairment that substantially limits one or more of the major life activities, in terms of unit size, location, access to services and amenities, reasonable ingress, egress, and use. The drafters declined to extend the provisions to mental or other nonphysical impairments, and also declined to go into any more detail regarding the needs of persons with disabilities because their needs are already addressed by other federal or local statutory and regulatory requirements.

Evictions for cause (49 CFR 24.2(a)(12)). After considering whether to simplify the eviction for cause provisions found in §24.2(a)(12), the drafters decided to retain the old regulatory language. However, Appendix A contains additional language to make clear that evictions related to scheduled project development, to gain possession of the property, do not affect relocation eligibility. That is, a person in lawful possession on the date of initiations of negotiations is entitled to relocation benefits. They can only be denied relocation benefits under two circumstances: 1) if the person had received an eviction notice prior to the initiation of negotiations or 1) is evicted thereafter for serious or repeated violations of the material terms of the lease or occupancy agreement. Important to note is that an eviction resulting from a failure to move or relocate when asked, or a general failure to cooperate in the relocation process is not a "serious or repeated violation of material terms," regardless of whether the public housing lease contains provisions requiring a tenant to move or cooperate in a move.

Changes in income (49 CFR 24.2(a))(14). The drafters addressed the situation where a tenant's income changes from the date that eligibility for relocation benefits is made. They state that no changes can be made, finding a lack of any statutory basis for adjusting relocation claims or payments based on changes in income after the initial eligibility determination has been made.

American Dream Downpayment Initiative (ADDI) (49 CFR 24.2(a)(9)(ii)(M)).. The new rules make it clear that persons participating in the ADDI, a HUD funded downpayment assistance program, are not entitled to URA benefits.

Additionally several definitions have been added or amended:

Definition of "style of living" (49 CFR 24.2(a)(6)(ii)). The old rules contained the phrase "style of living," within the definition of "comparable replacement dwelling." The drafters agreed that "style of living" was confusing and sometimes was used out of context, particularly when interpreted to require identical features found in acquired dwellings. The drafters decided to remove the phrase "style of living" from the definition of "comparable replacement dwelling," and simply rely upon the usual comparability factors. This change should help PHAs be more flexible in supplying replacement units.

Definition of "dwelling site." The final rule adopts the new definition of "dwelling site" in the proposed rule, and adds some clarifying examples in Appendix A. The "dwelling site represents the area, and specifically the size of the land area, on which a dwelling is located. The 'dwelling site,' as defined, is a typical lot for similar dwellings in the neighborhood where the dwelling is to acquired is located." The drafters note that this definition would help ensure more accurate computations of replacement housing payments when a dwelling is located on a larger than normal site or when mixed-use or multifamily properties are involved, and reflects current practice.

Definition of "Household income" (49 CFR 24.2(a)(14)). A new term has been defined – "household income." They chose to define "household income " by providing a nonexhaustive list of what does and does not constitute a person's gross monthly household income for purposes of establishing a base monthly income. It includes average monthly income from all sources, but would exclude income from dependent children 18 years old or younger and full time students, and various assistance described in Appendix A The drafters state that agencies should contact HUD to resolve questions about whether something should be considered income. They also acknowledge a Highway Administration web site that contains federally mandated income exclusions and will be updated as necessary.

Definition of "utility costs" (49 CFR 24.2(a))(30). The drafters clarified the expenses that are included in utility costs by

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Important New Rules for Tenant Relocation Cont'd

replacing the reference to "heat and light" with a reference to "electricity, gas, and other heating and cooking fuels."

Notice of Relocation Eligibility (49 CFR 203(b).. The drafters considered whether to more specifically define, in numbers of day, the definition of "promptly" with regard to the requirement that tenants are promptly notified after the initiations of negotiations. The drafters declined to do so, clarifying that they consider "promptly" to mean "as soon as practicable." They encourage PHAs to further define the term in their internal operating procedures.

Business Information Requirement (49 CFR 24.205(c)(2)(i)(A). The new rules require that you obtain information from displaced business owners concerning their needs during the relocation process to enable you to assist in finding a replacement site. The drafters also considered requiring that there be an estimate of a business searching expense based upon the difficulty in locating a replacement site. Luckily, this requirement didn't make the final cut, either.

Definition of "Financial means" (49 CFR 24.2(a)(6)(viii)). There were several significant changes to the definition of "financial means." First, the drafters originally proposed allowing PHAs to consider whether a resident owes the PHA back rent when considering whether a comparable replacement unit is within a resident's financial means. However, they did not include this consideration in the final rule because they agreed with an objector's comment that state landlord/tenant laws that normally govern disputes in rent and provide certain tenant protections should not be superceded by a federal definition.

Second, the drafters proposed simplifying the definition of "financial means" from three paragraphs to a single paragraph, without changing the meaning. However, commenters believed that a consolidated definition would be confusing, so the definition was left in tact.

The drafters deleted redundant language relating to welfare assistance programs and designate amounts for shelter and utilities since these issues were addressed in new section 24.402(b)(2)(iii).

Changes the way the rental replacement housing payment is computed by revising the description of "base monthly rent" and removing the reference to 30 percent of income.

Addresses persons who do not meet length of occupancy requirements, providing that the payment shall be the amount, if any, by which the rent at the replacement dwelling exceeds the base monthly rent over a period of 42 months.

Definition of "Initiation of Negotiations" (49 CFR 24.2(a)(15). The drafters added a new paragraph to the definition of "initiation of negotiations" (ION) to address situations where acquisitions are made amicably without need for eminent domain. In this case, ION is considered to have begun when there is a *written agreement* between the agency and the owner. This way, relocation benefits would inure when a formal agreement is reached, but would not be provided where there is no real agreement for the acquisition. The regulations do not, however, address the situation where a written agreement to acquire falls through.

Definition of "mobile home" (49 CFR 24.2(a)(17). There is a new definition for "mobile home" that clarifies that "mobile home" includes both manufactured homes and recreational vehicles used as residences. Appendix A goes further to set forth the requirements that recreational vehicles must meet in order to qualify as replacement housing.

Finally, the drafters considered a number of additional concerns and declined to implement them in the new rules. Some of the more noteworthy issues that may be revived in the future are listed below:

Annual relocation/acquisition report(49 CFR 24.9). Even though a stated purpose of the amendments was to *reduce* administrative burdens, the proposed rule would have required agencies to file an annual report summarizing its relocation and acquisition activities. Fortunately, the proposal did not make the final cut. But, be aware that the regulation instructs "lead agencies" such as HUD to "explore the possibility of obtaining such additional acquisition and displacement information from other Federal agencies [such as HUD] as may result from routine Agency operations and oversight." So, this may mean that the Highway Administration could instruct HUD to get obtain and report such information as part of its "routine" operations and oversight.

Definition of "project" (49 CFR 24.2(a)(22). The drafters declined to create a more detailed definition of "project," citing the infeasibility of devising a definition which would apply to all federal and federally-assisted programs subject to the URA. However, they caution that "Federal Agencies should always interpret the term 'project' in a way that will ensure that persons who are forced to move as a result of Federal or federally-assisted activities are covered by the Uniform Act."

Definition of "personal property" (49 CFR 24.2(a)). The drafters declined to create a federal definition of "personal property" because of the varying definitions under different state laws. Accordingly, whether an item is personal property will continue to be

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Important New Rules for Tenant Relocation Cont'd

left to state law.

Definition of "noncitizen national" (49 CFR 24.2(a)(5)). The drafters declined to include a definition for "noncitizen national" within the definition of "citizen" found at 24 CFR 24.2(a)(5) since "noncitizen national" already is defined as part of the definition of "citizen" found at 64 FR 7130.

Incentives to minorities (49 CFR 205©(2)(ii)(D)). The drafters considered, but rejected, providing an option to PHAs to increase the relocation payment to facilitate a minority person's move to a nonimpacted area. They rejected including the provision so that it would not be mistaken as a requirement that agencies provide this incentive.

Baltimore Judge Tells HUD... Cont'd

present leadership as truly 'heroic,' as they have spent decades trying to improve public housing despite seemingly insurmountable odds." Mr. Ryan continues, "Judge Garbis' decision recognizes that these visionary leaders immediately embraced desegregation, and were able to create many valuable public and affordable housing opportunities, despite the loss of so many industrial jobs that originally brought large populations of low-income persons to Baltimore. They were able to find ways of paying for new public housing and improvements to public housing, notwithstanding a severe loss of revenue resulting from the steady loss, until very recently, of middle and upper income persons from the City to the suburbs since the City's population peaked in the early 1950s." In a sole comment addressed to the ACLU who brought this suit, Mr. Ryan said: "While some may seek to commend the ACLU for attempting to improve the supply of public housing, the unfortunate truth is that their zest for unfounded adversarial advocacy against the City has caused a tremendous loss of scarce public resources and made it even more difficult for Baltimore's public housing leaders to address the difficult task of furthering affordable housing opportunities for Baltimore's citizens. Housing advocates should work together to fund solutions, not add burdens to a vexing problem. We look forward to HUD providing more meaningful, substantive assistance to the City of Baltimore as it is, after all, the core of the region that the Court has determined HUD has failed to adequately address."

Lessons Learned From This Decision:

1. Don't cave in. Despite the reality of housing segregation in your jurisdiction, your agency's actions may not be to blame. Demographics and personal choice play a serious role in the equation.

2. Think "long-term' and "big picture" when considering litigation. Where housing resources are perhaps as thin as they ever have been, so many resources can be eaten away by well-intentioned fighting in court. Find the best way to gain and preserve resources for the long term.

3. You're not alone. Since HUD has a duty to consider regional solutions, make HUD bear down on your regional neighbors to assist in regional-based plans for public housing development and placement. The requirement for cooperation agreements notwithstanding, HUD has the hammer to make things happen.

As of this writing no party has appealed this decision. Perhaps the parties will be successful in working out some regional solutions to the serious public and affordable housing problems in the Baltimore Region. The rest of us will surely benefit by their process, and HDLI will continue to follow developments and report them to you. You are the soldiers fighting the war for successful affordable housing.

[1] Most public housing reform suits have been completely resolved by consent decree.

[2] 348 F. Supp. 2d 398 (Jan. 6, 2005).

[3] The entire decision is available on HDLI's website at www.hdli.org

[4] Immediately prior to joining HDLI, Lisa Walker Scott was part of the litigation team at the principal law firm handling the litigation for the Local Defendants. (Note that HDLI was listed after Ms. Scott's name within the decision. HDLI took no part in this litigation.)

[5] Attorneys representing both the Plaintiffs and Local Defendants were presenters at HDLI's last Fall Legal Conference.