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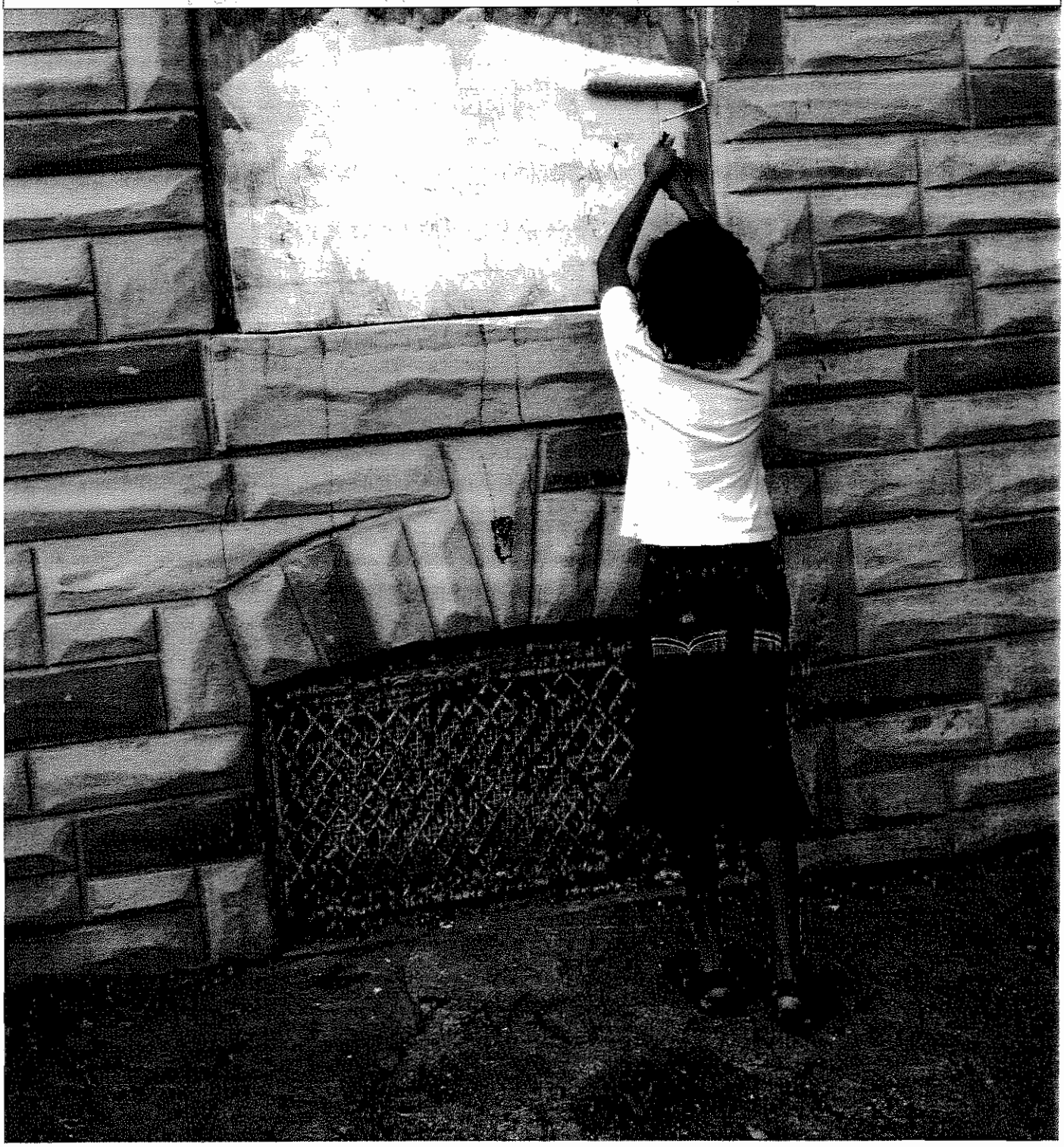

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Cover: Residents of the Shipley Hill neighborhood in Southwest Baltimore clean up and paint vacant houses on a major thoroughfare, as a way to publicize to the larger community their initiative to rid the area of vacant houses and develop a community-based physical plan for the neighborhood. Photo courtesy of Christina L. Schoppert.

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Nonsmoking Policies in Subsidized Housing Present Challenges for Owners, Tenants, and Advocates*

From prohibiting smoking in common areas to banning all smoking at subsidized developments, nonsmoking policies are becoming more widespread in federally assisted housing.[1] As of January 2011, 230 public housing agencies (PHAs) in 27 states had adopted nonsmoking policies for some or all of their buildings.[2] While medical experts acknowledge the serious health risks of secondhand smoke exposure for residents living in multiunit housing, the tension continues between the right of smoking tenants to have the full use and enjoyment of their dwellings and the right of nonsmoking tenants to live in a safe and smoke-free environment. In addition to tenants' rights concerns, nonsmoking policies could bar the homeless and the poor—groups with high smoking rates—from accessing affordable housing.[3] This article discusses nonsmoking policies in federal housing programs, Department of Housing and Urban Development (HUD) guidance on the policies, nonsmoking policies and the courts, state and local initiatives to encourage smoke-free housing, the arguments against smoke-free policies, and effective implementation of nonsmoking policies.

HUD Guidance on Nonsmoking Policies

HUD did not issue guidance on nonsmoking policies in subsidized housing until the 1990s. As PHAs instituted nonsmoking policies in their buildings, some consulted HUD about the legality of these policies. In 1996, HUD issued opinion letters to PHAs in Kearney, Nebraska, and Fort Pierce, Florida, addressing the smoke-free policies

*The author of this article is Katie Clark, J.D., a volunteer with the National Housing Law Project.

[1]*See* Katharine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing*, N.Y. TIMES, Dec. 17, 2011, http://www.nytimes.com/2011/12/18/us/public-housing-authorities-increasingly-ban-indoor-smoking.html?pagewanted=all.

[2]*Housing Authorities/Commissions Which Have Adopted Smoke Free Policies*, SMOKE-FREE ENVIRONMENTS LAW PROJECT (updated Jan. 20, 2011), http://docs.google.com/gview?url=http://www.tcsg.org/sfelp/SFHousingAuthorities.pdf [hereinafter Smoke Free Policies].

[3]Cheryl Healton & Kathleen Nelson, *Reversal of Misfortune: Viewing Tobacco as a Social Justice Issue*, AM. J. OF PUB. HEALTH, Vol. 94, No. 2 (Feb. 2004), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448227/. In 2000, Americans living below the poverty line smoked at a rate of 32% in comparison with 23% of those at or above the poverty line. *Tobacco Use and Homelessness*, THE NATIONAL COALITION FOR THE HOMELESS (July 2009), http://www.nationalhomeless.org/factsheet/tobacco.html. This 2009 report estimated that 70% to 80% of homeless adults in the United States smoke tobacco in comparison with about 20% of the general population.

in their public housing. The Kearney Housing Authority (KHA) had designated 16 of its buildings as smoke-free, two buildings as smoking and four buildings accessible to persons with disabilities as exempt from a smoking or nonsmoking designation. In addition, KHA's policy placed applicants on a waitlist based on their stated preference for a smoking or nonsmoking unit.[4] HUD approved this waitlist policy, explaining that a PHA could restrict smoking in its public housing, subject to state and local regulations. HUD's only concern was that KHA's smoking/nonsmoking building designations would illegally discriminate against residents with disabilities, since these residents could not take advantage of the smoke-free housing option offered to residents without disabilities.[5] In addition, the Housing Authority of the City of Fort Pierce (HACFP) sought HUD approval when it proposed a no-smoking addendum to its lease. HUD's local office in Jacksonville stated that the addendum was permissible as long as HACFP complied with HUD's notice and comment requirements[6] when adding the addendum to the lease.[7]

Organizations advocating for smoke-free affordable housing also have sought guidance from HUD regarding nonsmoking housing policies. In July 2003, in response to a letter from the Center for Social Gerontology,[8] HUD's chief counsel issued a memorandum addressing whether nonsmoking policies in HUD-assisted housing developments were permissible.[9] HUD explained that project owners may implement reasonable nonsmoking policies subject to state and federal law. In addition, the memo stated that there was no protected right to smoke or not smoke. The letter did impose the following conditions upon project owners who had smoke-free policies: (1) any nonsmoking policy had to meet the standard for normal house rules;[10] (2) any lease conditioned upon a nonsmoking policy had to have HUD approval;[11] and (3) current smoking residents had to be grandfathered in so that they were not bound by the nonsmoking policy.[12]

In 2006, the surgeon general released a report about the serious health risks of secondhand smoke exposure, particularly in multiunit housing.[13] In response, HUD issued notices to PHAs and owners and operators of HUD housing programs suggesting that they institute nonsmoking housing policies. HUD's Office of Public and Indian Housing issued a notice to PHAs in July 2009 strongly encouraging them to implement nonsmoking policies in their public housing units.[14] The notice cited the health risks of smoking for smokers and nonsmokers, the problem of secondhand smoke in multiunit housing and the increased health risks of secondhand smoke exposure to children and the elderly. HUD also emphasized the economic benefits of the policies, including lower maintenance and turnover costs and lower insurance premiums.[15] The notice gave PHAs the discretion to implement nonsmoking policies, subject to state and local law, and provided sample nonsmoking policies that had been implemented by some PHAs.[16] In addition, HUD directed PHAs to update their PHA plans[17] so as to reference new nonsmoking policies and encouraged PHAs to consult with their resident boards before adopting nonsmoking policies.[18]

In September 2010, HUD's Office of Housing released a notice on nonsmoking policies for its multifamily housing programs.[19] This notice encouraged owners and operators of subsidized projects to implement smoke-free policies.[20] Like the notice issued to PHAs, the notice to owners and operators outlined the health risks associated with exposure to secondhand smoke and the fire hazards associated with smoking in residences. HUD instructed owners and operators choosing to implement smoke-free

[4]Memorandum from Robert S. Kenison, HUD Associate General Counsel, to Deborah J. McKeone, Chief Counsel, Nebraska State Office (June 27, 1996).

[5]*Id.*

[6]24 C.F.R. § 966.3. ("Each PHA shall provide at least 30 days notice to tenants and resident organizations setting forth proposed changes in the lease form used by the PHA, and providing an opportunity to present written comments. Subject to requirements of this rule, comments submitted shall be considered by the PHA before formal adoption of any new lease form.").

[7]Letter from Paul K. Turner, Jacksonville Area Office of Public Housing, to Linda Dusanek, Interim Executive Director, Housing Authority of the City of Pierce (July 9, 1996).

[8]The Center for Social Gerontology, a nonprofit organization which advocates on behalf of the elderly, is a vocal proponent of limiting smoking in multiunit housing. *See* http://www.tcsg.org/.

[9]Letter from Sheila Y. Walker, HUD, to James A. Bergman, Center for Social Gerontology (July 18, 2011) [hereinafter HUD Letter].

[10]HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, at 6.1.3.9(A)(2) (stating that the decision about whether to develop house rules for a property rests solely with the owner, and HUD's review or approval is not required, but the rules "must be reasonable, and must not infringe on tenants' civil rights") [hereinafter HUD HANDBOOK 4350.3].

[11]*Id.* at 6.1.3.4(B),(D) (Owners must use one of the four model leases prescribed by HUD, and changes to the model lease may be only for documented state or local laws, or a management practice generally used by management entities of assisted projects. Before implementing lease changes, owners must obtain written approval from HUD or a contract administrator.).

[12]HUD Letter, *supra* note 9.

[13]Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General—Executive Summary (2006), *available at* http://docs.google.com/gview?url=http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf.

[14]Non-Smoking Policies in Public Housing, PIH 2009-21 (HA) (July 17, 2009) [hereinafter Notice PIH 2009-21].

[15]*Id.* at 2.

[16]*Id.*

[17]42 U.S.C. § 1437c-1 (requires PHAs to submit annual and five-year plans informing HUD, the residents and the public of its mission and strategy for serving the needs of low-income families).

[18]Notice PIH 2009-21, *supra* note 14.

[19]Optional Non-smoking Housing Policy Implementation, H 2010-21, at 2 (Sept. 15, 2010) [hereinafter Notice H 2010-21]. The programs listed in the memo are Section 8, Rent Supplement, Section 202/162 Project Assistance Contract, Section 202 Project Rental Assistance Contract (PRAC), Section 811 PRAC, Section 236, Rental Assistance Payment (RAP), and Section 221(d)(3) Below Market Interest Rate (BMIR).

[20]Notice H 2010-21, *supra* note 19.

policies to update their house rules.[21] Unlike the guidance for PHAs, the multifamily notice gave detailed instructions for implementing smoke-free housing policies according to HUD regulations and state and local laws. Specifically, HUD listed practices that were impermissible, including: (1) denying occupancy to anyone based on their smoking status if they were otherwise eligible for admission; (2) asking housing applicants whether they smoked; and (3) maintaining separate waitlists based on smoking status.[22] HUD further reversed the position it took in 2003 and did not require owners to grandfather in current smoking tenants. However, owners and operators still had the option of doing so.[23] In addition, owners and operators were required to provide the house rules and the smoke-free policies to new tenants. Owners also had to notify existing tenants of modifications to the house rules 30 days before implementing the policies, in accordance with HUD Handbook 4350.3. Furthermore, the notice stated that owners and operators could evict tenants for repeated violations of nonsmoking policies pursuant to procedures in the HUD Handbook.[24]

Nonsmoking Policies and the Courts

Since the advent of nonsmoking regulations, there have been challenges to those regulations in court. This section discusses cases restricting smoking and upholding smoking bans. These cases are relevant to nonsmoking policies in federally subsidized housing because the case law forms the foundation for housing providers, both private and public, to restrict smoking in multiunit dwellings where secondhand smoke may harm others. The following subsections discuss regulation of smoking in the home through custody orders, cases in which nonsmoking regulations were challenged on constitutional grounds, the case law discussing reasonable accommodation for nonsmokers disabled by secondhand smoke, and common law claims available to tenants harmed by secondhand smoke.

Regulating Smoking in Homes

Government regulation of smoking practices in the home is relatively rare and quite controversial. In the 1990s, family courts began regulating smoking in the home in the context of custody disputes. Given the detrimental health effects of secondhand smoke exposure on children, nonsmoking parents began asking the courts to reconsider custody decisions that placed their children in the care of smoking parents. These custody cases[25] are important to the issue of nonsmoking policies in federally subsidized housing because they are examples of instances when the law has regulated the private conduct of smokers in their homes to protect others. The cases do not attempt to force smoking parents to quit smoking entirely, but only regulate when and where they can or cannot smoke.[26] In the same way, PHAs that institute smoke-free policies in their buildings have stressed that the policies are not designed to penalize tenants for smoking but to keep tenants safe from exposure to secondhand smoke.

In several cases, the courts removed children with asthma or other respiratory problems from the home of a parent who continued to smoke in the presence of the child knowing that it compromised the child's health.[27] During a custody hearing in 2002, the Court of Common Pleas of Ohio, Juvenile Division, raised sua sponte a question of first impression: whether parents should be restricted from smoking in the presence of their children, regardless of whether the children suffer from respiratory problems.[28] After detailing the major health risks secondhand smoke poses to children, the court found that "the involuntary nature of children's exposure to secondhand smoke crystallizes the harm as egregious" and "the state has a duty of the highest order to protect the child."[29] In addition, the court deemed that a family court, which failed to restrain people from smoking in the presence of children under their care, was failing the children whom the law has entrusted to its care.[30] The court issued an order restraining both parents from allowing any person, including themselves, to smoke anywhere in the presence of the child.[31]

No Constitutional Protection for Smokers

Smokers have challenged nonsmoking policies on constitutional grounds in the contexts of employment and public spaces. However, courts have held that smoking is not a fundamental right protected by the Constitution, and smokers are not a protected class.[32] In *Grusendorf v. City of*

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[21] *Id.*
[22] *Id.* at 4.
[23] *Id.*
[24] *See* HUD HANDBOOK 4350.3, *supra* note 10, Ch. 8.
[25] *See* text accompanying note 27, *infra*.

[26] *See id.*
[27] *See, e.g.*, Daniel v. Daniel, 509 S.E.2d 117 (Ga. Ct. App. 1998) (affirming a superior court ruling transferring custody of a child with severe asthma from mother, who smoked, to father); Lizzio v. Lizzio, 618 N.Y.S.2d 934 (Family Ct. Fulton Co. 1994) (granting father custody of two children, one healthy and one suffering from respiratory ailments, where mother and stepfather continued to smoke in the child's presence despite the warning that it endangered his life); Unger v. Unger, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994) (modifying a custody consent order so that mother must ensure that there is no secondhand smoke in her home or automobile within 10 hours of the children being present); Skidmore-Shafer v. Shafer, 770 So. 2d 1097 (Ala. Civ. App. 1999) (removing child from mother's custody and calling mother's actions no less than child abuse where mother continued to smoke in the presence of the child despite the child's severe respiratory problems).
[28] In re Julie Anne, a Minor Child, 780 N.E.2d 635 (Ohio Misc. 2002).
[29] *Id.* at 652.
[30] *Id.* at 641.
[31] *Id.* at 659.
[32] *See* Public Health Institute Technical Assistance Legal Center, *There Is No Constitutional Right to Smoke* (Feb. 2004), www.phi.org/pdf-library/talc-memo-0051.pdf; Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783 (Jan. 1998).

Oklahoma City, the Tenth Circuit held that the Oklahoma City Fire Department's total ban on smoking for first-year trainees on and off duty did not violate smoking employees' constitutional rights.[33] Greg Grusendorf, a firefighter trainee who was fired because he smoked a cigarette on his unpaid lunch break, argued that both his liberty interest and his privacy interest under the Fourteenth Amendment had been violated by the smoking ban. Although the court agreed that the ban infringed upon Grusendorf's privacy, it held that smoking was not a fundamental right protected by the Constitution. Therefore, the city only needed to show that it had a rational basis for the ban.[34] The court deemed that the fire department's legitimate interest in having physically fit and healthy trainees was a rational basis for the smoking ban.[35]

In 1995, the Supreme Court of Florida upheld the constitutionality of the city of North Miami's policy of requiring job applicants to refrain from smoking for one year before employment.[36] The city had refused to hire Arlene Kurtz because she could not sign an affidavit swearing that she had not used tobacco for at least one year. Kurtz challenged the policy in court, arguing that the nonsmoking requirement impermissibly infringed upon her privacy rights under both the Florida Constitution and the U.S. Constitution. The court deemed that under the Florida Constitution, Kurtz had no legitimate expectation of privacy in revealing that she was a smoker, because smokers were often required to reveal that they smoked within greater society.[37] The court further held that smoking was not a fundamental interest protected by the implicit privacy provision in the U.S. Constitution.[38]

Lower courts across the country also have rejected arguments asserting constitutional protections for smokers in public spaces. A New York federal district court rejected a smokers' rights organization's argument that state laws banning smoking in any place open to the public violated the Equal Protection Clause of the Fourteenth Amendment.[39] The court found that smokers were not part of a protected class under the Equal Protection Clause because they lacked "characteristics such as an immutable trait, the lack of political power, and a 'history of purposeful unequal treatment.'"[40] In a similar case, another smokers' rights organization challenged the constitutionality of the Putnam County, Ohio, board of health's nonsmoking regulations under the Equal Protection Clause, the Commerce Clause and the Contracts Clause.[41] There, a federal district court found no constitutional violation, emphasizing that smoking is not a protected right. According to the court, minimizing nonsmokers' exposure to secondhand smoke was a rational basis for the regulations and outweighed any personal interest in smoking in public.[42]

Similarly, in 2001, the Arizona Court of Appeals considered constitutional challenges to a Tucson ordinance banning smoking in restaurants.[43] After a Tucson restaurant owner was cited and fined for allowing patrons to smoke in her restaurant, the owner challenged the ordinance's legality. The court rejected the owner's First Amendment argument, holding that there was no generalized right of social association such that a government regulation of smoking in a common meeting place would violate the First Amendment.[44] The court also rejected the owner's Equal Protection argument because the ordinance was rationally and reasonably related to furthering the legitimate government interest of protecting the health of restaurant customers.[45]

Reasonable Accommodation for Tenants Disabled by Secondhand Smoke Exposure

Federal Statutes

If a person is disabled by exposure to secondhand smoke because of a severe sensitivity or because secondhand smoke aggravates an existing disability, federally subsidized housing providers have a duty to provide a reasonable accommodation to that person.[46] The Fair Housing Act (FHA) prohibits housing discrimination against anyone who is disabled. The FHA defines "handicap" discrimination to include refusal to "make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[47] Section 504 of the Rehabilitation Act further requires that all programs receiving federal funding, including

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[33]Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987).
[34]*Id.* at 541-543.
[35]*Id.*
[36]City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995).
[37]*Id.* at 1028.
[38]*Id.* at 1029.
[39]NYC CLASH, Inc. v. City of New York, 315 F. Supp. 2d 461 (S.D.N.Y. 2004).
[40]*Id.* at 482. The case cited the Supreme Court's language for what traits or characteristics are usually present in order for a class to be considered a protected class under the Equal Protection Clause. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-43 (1985).
[41]Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health, 866 F. Supp 1059 (S.D. Ohio 1992).
[42]*Id.* at 1067.
[43]City of Tucson v. Grezaffi, 23 P.3d 675 (Ariz. Ct. App. 2001).
[44]*Id.* at 681.
[45]*Id.*
[46]24 C.F.R. § 966.7 ("A PHA must provide reasonable accommodation to applicants and tenants with disabilities in every aspect of occupancy, as needed to ensure that every tenant has an equal opportunity to use and occupy the property."). For guidance on reasonable accommodation in HUD-assisted housing programs, *see* HUD HANDBOOK 4350.3, *supra* note 10, at 2.4. For information on the Fair Housing Act and its application to secondhand smoke, *see* The Center for Social Gerontology, Inc., The Federal Fair Housing Act and the Protection of Persons Who Are Disabled by Secondhand Smoke in Most Private and Public Housing (Sept. 2002), www.tcsg.org/sfelp/fha_01.pdf.
[47]42 U.S.C. § 3604.

housing programs, give participants with disabilities the right to request and receive reasonable accommodations at no cost to participants.[48] Therefore, tenants with disabilities participating in federally subsidized housing programs have the right to seek reasonable accommodations from their housing providers.[49]

Furthermore, the Americans with Disabilities Act (ADA) affords the same protections as Section 504 of the Rehabilitation Act to persons with disabilities in the context of discriminatory state and local government action.[50] Tenants with disabilities seeking reasonable accommodations must be able to show that (1) they have a disability as defined by the law; (2) the accommodation is related to the disability; (3) the accommodation is reasonable and does not put an undue financial or administrative burden on the landlord; and (4) the accommodation is necessary for the tenant to be able to use and enjoy the dwelling.[51]

In 1992, HUD's general counsel issued an opinion stating that Multiple Chemical Sensitivity Disorder (MCS) and Environmental Illness (EI) could constitute disabilities under the FHA if they substantially limit a major life activity.[52] A hypersensitivity to secondhand smoke can be considered an MCS and/or an EI if it causes difficulty in breathing or substantially impairs a person's ability to function.[53] The HUD opinion cited *Vickers v. Veterans Administration*,[54] a federal district court case holding that a Veterans Administration (VA) employee who was hypersensitive to tobacco smoke was disabled under the Rehabilitation Act.[55] However, because Vickers' supervisor was required to comply with a national VA policy that allowed smoking in the workplace, the court also held that the employee was not entitled to a totally smoke-free work environment as a reasonable accommodation. Contravening a national policy allowing employees to smoke in the workplace would place an undue burden on the VA.[56] According to the court, the supervisor had done everything he reasonably could do to accommodate Vickers' handicap.[57]

[48]29 U.S.C. § 794.

[49]For more information, *see* National Housing Law Project, Reasonable Accommodation in Federally Assisted Housing Outline, http://nhlp.org/node/452 [hereinafter Reasonable Accommodation Outline].

[50]42 U.S.C. § 12132.

[51]For a more detailed analysis, *see* Reasonable Accommodation Outline, *supra* note 49.

[52]Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicap, Legal Op.: GME-0009, HUD (Mar. 5, 1992) [hereinafter HUD Opinion].

[53]*Id.* at 3. The opinion is careful to distinguish MSC and EI from ordinary allergies, explaining that there is a difference between reaching for a tissue and having to call an ambulance because you cannot breathe. Symptoms must be severe to qualify as MCS or EI.

[54]Vickers v. Veterans Administration, 549 F. Supp. 85 (W.D. Wash. 1982).

[55]HUD Opinion, *supra* note 52, at 6 (citing *Vickers*, 549 F. Supp. at 86-87).

[56]*Vickers*, 549 F. Supp. at 89.

[57]*Id.*

State Statutes

In comparison with federal antidiscrimination statutes, many state statutes contain equal or greater protections for persons with disabilities. For example, California's Fair Employment and Housing Act (FEHA) mirrors federal antidiscrimination legislation requiring reasonable accommodations in both housing and employment settings.[58] In *County of Fresno v. Fair Employment and Housing Commission*, the Fair Employment and Housing Commission (FEHC) deemed that hypersensitivity to tobacco smoke that severely limits a person's ability to breathe is considered a disability in California. In 1991, the FEHC found that the County of Fresno discriminated against two employees who were hypersensitive to tobacco smoke by failing to provide them with a smoke-free work environment as a reasonable accommodation under FEHA.[59] The county took several steps to accommodate the two employees' smoke sensitivity, including instituting some nonsmoking policies within the office building and relocating the women to their own private office with special ventilation. However, the FEHC found that the county had failed in its efforts because there was evidence of substantial secondhand smoke in the employees' new workspace.[60]

On appeal, a California court affirmed FEHC's findings. The court distinguished the county's efforts with the efforts of the VA in *Vickers*, where the employer did everything it reasonably could do to accommodate Vickers' disability without contravening the VA's national policy allowing smoking in the workplace.[61] Unlike *Vickers*, there was no large-scale policy that would have made it impossible for the county to enforce a smoking ban as a reasonable accommodation to the employees' disability.[62] Therefore, the county reasonably could have instituted a ban on smoking to accommodate the employees' disability.

FEHA's antidiscrimination provisions apply to both housing and employment.[63] Because there is case law defining hypersensitivity to tobacco smoke as a disability, California courts could extend the reasonable accommodation protection from *County of Fresno* to the housing sector under FEHA. This means that California landlords may be held liable for not providing tenants who are hypersensitive to tobacco smoke with reasonable accommodations through nonsmoking policies.[64] Similarly,

[58]Cal. Gov't Code § 12940, *et seq.*

[59]County of Fresno v. Fair Employment & Hous. Comm'n, 226 Cal. App. 3d 1541 (1991).

[60]*Id.* at 1555.

[61]*Id.*

[62]*Id.* at 1554.

[63]Cal. Gov't Code § 12940, *et seq.*

[64]Housing advocates have explored the possibility of bringing a reasonable accommodation claim on behalf of a tenant whose disability makes it difficult for him to keep from smoking. For example, if a tenant is facing eviction based on his noncompliance with nonsmoking policies due to his mental illness, an advocate could argue that the landlord or PHA must make a reasonable accommodation in enforcement of the

advocates in other jurisdictions should consider whether state antidiscrimination laws apply when assisting tenants with hypersensitivity to tobacco smoke.

Common Law Claims in Multiunit Dwellings That Allow Smoking

Residents harmed by secondhand smoke in their homes have brought common law claims against their landlords and their smoking neighbors for damages. To combat excessive tobacco smoke, tenants have used claims of nuisance[65] and breach of the warranty of habitability[66] against landlords. Residents also have sued for breach of the covenant of quiet enjoyment, battery, trespass, constructive eviction, harassment and negligence due to excessive secondhand smoke seepage.[67] Tenants in public housing who are suffering from exposure to secondhand smoke should follow the grievance procedure referenced in their lease agreement with the PHA before bringing a claim in state court.[68] Tenants in privately owned subsidized housing do not have a right to the same grievance procedures as tenants in public housing, but they may bring common law claims against private landlords or smoking neighbors in state court. As an alternative to bringing a common law claim, Section 8 voucher holders and project-based Section 8 tenants may request that their local PHA perform a Housing Quality Standards (HQS) inspection.[69] One of the "performance requirements" covered by the HQS is indoor air quality.[70] If a PHA inspector finds the indoor air quality to be sub-standard, it must issue a correction notice to the owner.[71] Failure to comply with the notice could result in owner sanctions.[72]

State and Local Initiatives Limiting Smoking in Multiunit Dwellings

Although smoke-free housing advocates are working around the country to encourage local regulations requiring nonsmoking policies in multiunit housing, California is the only state where such ordinances have been widely adopted. In California, as of October 2010, 34 municipalities instituted smoke-free housing regulations limiting smoking in multiunit dwellings.[73] Contra Costa County updated its secondhand smoke ordinance in 2010 to prohibit smoking in all new housing developments with four or more units.[74] The Sebastopol City Council went even further by adopting an ordinance in August 2010 to prohibit smoking in *all* multiunit housing complexes in the city, including smoking in indoor and outdoor common areas of such complexes, beginning in November 2011.[75] Furthermore, some ordinances require multiunit complexes to designate a percentage of their units as smoke free. For example, the Rohnert Park City Council adopted an ordinance in 2009 that required newly erected apartment buildings to designate 75% of units as nonsmoking and existing apartment buildings to designate 50% of units as nonsmoking.[76] Most of the ordinances contain enforcement provisions for administrative fines ranging from $100 to $500, and some allow private individuals to enforce the ordinances through legal action against violators. In addition, the California state legislature recently passed a law that allows landlords to prohibit smoking anywhere on rental properties, including inside dwelling units.[77] The state law does not preempt local initiatives limiting smoking in multiunit dwellings.[78] The law will go into effect January 1, 2012.

California and Maine also offer incentives to developers to designate a high percentage of the units in developments as nonsmoking by giving them an advantage when applying for Low-Income Housing Tax Credits

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policy for this tenant based on his disability. Advocates who attempt this kind of argument must be prepared to overcome the landlord's "direct threat" defense to the duty to reasonably accommodate, which says that landlords are not required to make a dwelling available to an individual whose tenancy would constitute a direct threat to the health and safety of others. *See* 42 U.S.C. § 3604(f)(9). *See also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 286-88 (1987) (defining the inquiry the court should use when considering whether granting the plaintiff's request for a reasonable accommodation would constitute a direct threat to the health and safety of others where the direct threat is the plaintiff's susceptibility to a communicable disease).

[65]*See, e.g.*, Babbit v. Superior Court, 2004 WL 1068817 (Cal. App. Dist. May 13, 2004) (holding that the trial court erred by dismissing the plaintiff's nuisance claim because drifting cigar smoke could constitute a nuisance if it rose to the level of a substantial or unreasonable invasion, and the plaintiff should have a chance to submit evidence supporting this claim).

[66]*See, e.g.*, Heck v. Whitehurst, 2004 WL 1857131 (Ohio Ct. App. 2004) (affirming a trial court's finding that landlord breached his warranty of habitability to tenant and ordering landlord to make repairs and pay back where tenant complained to landlord for several months that smoke was seeping into his apartment and landlord did nothing).

[67]*See* Technical Assistance Legal Center, Legal Options for Tenants Suffering from Drifting Tobacco Smoke (Apr. 2007), http://www.phlpnet.org/tobacco-control/products/legal-options-tenants. For a case that discusses each of these common law claims, see DeNardo v. Cornelop, 163 P.3d 956 (Alaska 2007). In *DeNardo*, a tenant alleged that cigarette smoke from a neighboring apartment was making him ill and brought claims against his landlord and neighboring tenant for breach of the warranty of habitability, negligence, breach of the covenant of quiet enjoyment, nuisance, trespass and battery. The Supreme Court of Alaska upheld dismissal of all causes of action on the basis that the tenant failed to state a claim.

[68]24 C.F.R. §§ 966.50-966.57.

[69]§ 982.401.

[70]HUD Housing Choice Voucher Program Guidebook 7420.10G, at 10.2.

[71]*Id.*

[72]*Id.*

[73]*See* The Center for Tobacco Policy and Organizing, Matrix of Local Smokefree Housing Policies (Oct. 2010) http://www.center4tobaccopolicy.org/localpolicies-smokefreehousing.

[74]*Id.* at 2.

[75]*Id.* at 3.

[76]*Id.* at 9.

[77]S. 332, 2011-2012 Sess. (Cal. 2011).

[78]S. 332.

(LIHTC).[79] LIHTC applicants must complete a competitive application process in which they are awarded points for complying with various policies.[80] The California Tax Credit Allocation Committee offers a "smoke-free point" to developers of LIHTC properties that designate 50% to 100% of units in their properties as smoke-free. In Maine, developers must designate 100% of units as smoke-free to receive the smoke-free point.[81]

Procedural Issues with Nonsmoking Policies

When implementing and enforcing smoke-free policies in federally subsidized housing, there is the potential for procedural abuses. HUD's notices explain how PHAs and owners should implement such policies. As with any change in practice or policy, HUD housing programs must comply with the agency's regulations and guidelines.

PHAs adopting a nonsmoking public housing policy may do so through a change in their lease agreement. When implementing a new nonsmoking regulation or policy through a lease change, PHAs must abide by notice and comment rules promulgated by HUD. Tenants and tenant organizations must be given 30 days to review and comment on any changes to the lease, and the PHA must consider these comments before adopting the change.[82] If the nonsmoking policy becomes a part of the lease agreement such that the PHA may evict a tenant for noncompliance, PHAs must follow the termination of tenancy and eviction procedures set forth in the regulations.[83] PHAs may terminate a tenancy only for "serious or repeated violation of material terms of the lease" and must provide 30-day written notice of a lease termination.[84]

Owners participating in HUD's multifamily housing programs must adopt nonsmoking policies by changing their house rules, which are an attachment to the lease.[85] HUD Handbook 4350.3 requires that owners give tenants written notice 30 days before implementing new house rules.[86] Because repeated violations of house rules can be considered material noncompliance with lease requirements, tenants who do not comply with the nonsmoking policies included in the house rules may be evicted.[87]

Arguments Against Nonsmoking Policies

As more PHAs and privately owned housing developments have implemented nonsmoking or smoke-free policies, reactions to the policies have varied. While most tenants seeking market-rate housing may shop around for rentals, tenants in subsidized housing often have few other housing options. Therefore, some housing advocates argue that smoke-free policies in subsidized housing are unfair to smoking tenants who cannot afford to relocate to buildings where smoking is allowed.[88] In addition, advocates argue that regulating private conduct in a dwelling opens the door to greater privacy infringement in the future.

Housing advocates also fear that the policies will lead to evictions of smokers due to noncompliance.[89] In 2009, when the Portland (Oregon) Housing Authority banned smoking on all of its properties, there were concerns that the smoke-free rule would create barriers to the city's 10-year plan to end homelessness.[90] The plan has focused on a "housing first" philosophy in which housing is used to create stability before participants are expected to conform to model tenant behavior.[91] Smoke-free subsidized housing contradicts this philosophy by requiring the homeless, a population with smoking rates as high as 80%, not to smoke on the property.[92]

Tenant reactions also have varied.[93] According to several statewide surveys, around 78% of tenants would choose to live in a smoke-free complex if given the choice.[94] One survey of tenants in public housing in Portland, Oregon, found that a majority of tenants supported a recently implemented smoke-free policy. According to this survey, 74% of all tenants were "very happy" or "somewhat happy" with the policy. Unsurprisingly, numbers varied

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[79]Jack Nicholl, *California Tax Credit Agency Supports No-Smoking Rules in Affordable Housing*, LIHTC MONTHLY REPORT, Vol. XVIII, Issue XI (Nov. 2007) *available at* http://www.scanph.org/node/278.

[80]*Id.*

[81]*Id.*

[82]24 C.F.R. § 966.3.

[83]§ 966.4. *See also* HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK (2003).

[84]24 C.F.R. § 966.4(l)(3)(C) (except that if a state or local law allows a shorter notice period, such shorter period shall apply).

[85]In a letter to the operator of five Section 811 housing projects in Grand Rapids, Michigan, a local HUD office denied a requested no-smoking modification to the PRAC lease because the model lease should not be changed unless it is necessary to comply with state law or address an issue that was customary in the real estate industry. Letter from HUD Grand Rapids Area Office to Ingrid Weaver, V.P. of Operations, Porter Hills Presbyterian Village, Inc. (July 6, 2004), available under "Related HUD Letters" section at http://www.tcsg.org/sfelp/home.htm. *See also* Notice H 2010-21, *supra* note 19 (stating that owners and operators of private subsidized housing projects must update their House Rules when adopting nonsmoking policies, but saying nothing about changes to the model lease).

[86]HUD HANDBOOK 4350.3, *supra* note 10, at 6.1.

[87]Notice H 2010-21, *supra* note 19, at 5; HUD HANDBOOK 4350.3, *supra* note 10, at 8.3 (outlining the procedure for eviction due to material noncompliance with the lease in Chapter 8).

[88]Peter Korn, *Smokin' Them Out*, PORTLAND TRIB. (May 12, 2009). http://www.portlandtribune.com/news/story.php?story_id=123680931473925000.

[89]*Id.*

[90]*Id.*

[91]*Id.*

[92]The National Coalition for the Homeless, Tobacco Use and Homelessness (July 2009), http://www.nationalhomeless.org/factsheet/tobacco.html .

[93]*See, e.g.*, Seelye, *supra* note 1; Lynne Peeples, *Should Public Housing Go Smoke-Free?*, CNN.COM, June 16, 2010, http://www.cnn.com/2010/HEALTH/06/16/smoke.health/index.html; Emily Bazar, *Public Housing Kicks Smoking Habit*, USATODAY.COM, Apr. 4, 2007, http://www.usatoday.com/news/nation/2007-04-04-public-housing-smoking_N.htm.

[94]National Center for Healthy Housing, Reasons to Explore Smoke-Free Housing (Fall 2009), http://www.nchh.org/Training/Green-and-Healthy-Housing.aspx.

drastically based on smoking status: 30% of current smokers were happy with the policy, compared with 85% of former smokers and 92% of those who had never smoked.[95] The same survey found that 62% of smokers reported that they did not comply with the policy five months after implementation. The primary objection by smokers participating in the survey was that the policy was unfair and infringed on their right to privacy in their home.[96]

Effective Policy Implementation[97]

Some housing advocates worry that smoke-free policies in HUD housing programs will act as a barrier to affordable housing. PHAs and housing providers adopting nonsmoking policies in their public or subsidized housing should consider several factors to mitigate this possibility. Although some PHAs are dedicated to achieving a 100% smoke-free environment in their public housing, many have recognized the pitfalls of immediately instituting total bans on smoking. If smoking residents see the policy as unfair, they may be less likely to comply. PHAs that implement nonsmoking policies gradually and with the support of the majority of residents may have more success. When advocating for nonsmoking policies, PHAs have found it helpful to stress the economic and health costs of smoking, while emphasizing that the policy is "not about not smoking, it's about not smoking here."[98] In other words, smokers may still live in the complex and continue to smoke as long as they comply with the nonsmoking policies that permit smoking in designated areas.

Advocates of smoke-free policies in multiunit housing have stressed the importance of implementing the policies in a non-punitive manner that will not stigmatize residents and will minimize the chance that residents will be evicted for non-compliance.[99] PHA and subsidized housing staff must be appropriately trained regarding these policies so that tenants' procedural rights are protected. Housing staff should be clear about any change in policy and should notify tenants when they are suspected of violating the policy. These notices to tenants should also state the consequences of repeated noncompliance. PHAs and other subsidized housing programs that implement nonsmoking policies should also offer access to smoking cessation resources for residents who are interested in quitting.[100] This effort could include handing out literature on smoking cessation and partnering with local smoking cessation programs to offer classes on-site. ■

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[95]Linda L. Drach et al., *The Acceptability of Comprehensive Smoke-Free Policies to Low-Income Tenants in Subsidized Housing*, PREVENTING CHRONIC DISEASE: PUBLIC HEALTH RESEARCH, PRACTICE, AND POLICY, Vol. 7: No. 3 (May 2010), *available at* www.cdc.gov/pcd/issues/2010/may/09_0209.htm.

[96]*Id.*

[97]The Association of Washington Housing Authorities has prepared a "Housing Authority No Smoking Policy Work Plan" that PHAs may find useful when deciding whether and how to implement nonsmoking policies on their properties. The plan includes conducting surveys to determine the extent of smoking practices, creating a proposed plan that may be reviewed by residents, staff and agency leadership, and following HUD guidance on implementation of the final policy. Pacific Northwest Regional Council of the National Association of Housing and Redevelopment Officials & The Association of Washington Housing Authorities, No Smoking Policy Plan Options & Talking Points for Housing Authorities (June 30, 2011), http://www.smokefreehousinginfo.com/pages/Public%20and%20Affordable%20Housing.index.html.

[98]*Id.* at 10.

[99]National Center for Environmental Health, Healthy Homes Manual: Non-Smoking Policies in Multiunit Housing 12, http://www.cdc.gov/healthyhomes.

[100]For a list of smoking cessation resources, *see* Centers for Disease Control and Prevention, Smoking and Tobacco Use: How to Quit, http://www.cdc.gov/tobacco/quit_smoking/how_to_quit/index.htm.

State Court Invalidates Decision to Release Property from LIHTC Program for Noncompliance*

In a decision concerning an issue of national first impression, the Oregon Court of Appeals held that project owners and state agency regulators cannot mutually release federal Low-Income Housing Tax Credit (LIHTC) program-prescribed use restrictions. Reversing the trial court, the decision in *Nordbye v. BRCP/GM Ellington*[1] highlights the importance of local monitoring of LIHTC compliance and the utility of tenant enforcement of the terms of the federally prescribed use agreement.

Factual Background

The plaintiffs were tenants living at Rose City Village, a 264-unit housing complex in Portland. In 1991, the original owner received an award of approximately $2.3 million[2] in tax credits from the Oregon Housing and Community Services Department (OHCS) through the federal LIHTC program.[3] Under the program, the tax credits were contingent on the execution and recording of a covenant restricting use of all of the development's units to affordable housing for eligible low-income households for 30 years at restricted rents. Pursuant to these requirements, the original owner executed an extended use agreement with OHCS and recorded a declaration of land use restrictive covenants, which acknowledged the restrictions of the use agreement. In the LIHTC statute, Congress explicitly described only two situations in which the use restrictions terminate before the end of the 30-year period: (1) conveyance of title as a result of foreclosure or deed-in-lieu; and (2) the failure of the agency to procure a purchaser at a formula price when the owner wants to exit after the 14th year of the compliance period.[4]

In response to a 1991 audit identifying several areas of noncompliance, the original owner sought to resolve the issues. Subsequent audits revealed only minimal noncompliance. However, another inspection in 2002 identified some noncompliance issue in "nearly every file."[5] In most cases, the original owner had failed to properly verify tenant income eligibility.

In 2003, without securing the approval of OHCS or the express agreement of the purchaser to assume the requirements of the declaration and the LIHTC statute, as required by the declaration, the original owner sold the property. This transaction occurred 12 years after the first tax credit was claimed and two years after the last tax credit was taken. Although this new owner made attempts to bring the project into compliance, in 2003 an OHCS staff person telephoned an IRS program analyst to ask whether "egregious noncompliance" was sufficient grounds to remove the project from the program.[6] The IRS employee told the OHCS staff person that OHCS could "kick them out of the program."[7] Despite the fact that the new owner filed a compliance certification with OHCS reporting nearly full compliance, OHCS informed the IRS of its intentions to terminate the project from the program.[8] Additionally, checking the preprinted box denoting that the "[p]roject is no longer in compliance nor participating in the [program]," OHCS submitted several noncompliance forms (IRS Form 8823) to the IRS.[9] In 2005 OHCS and this second owner entered into a release agreement. The tenants were never notified and thus never consented to the release or the elimination of the use restriction.

In 2005, BRCP (the current owner) purchased the property from the second owner for $5.4 million more than the second owner's acquisition price.[10] Later that year, after issuing 30-day no-cause eviction notices, the current owner evicted the 110 low-income households still residing in the development, including the plaintiff.[11] Subsequently, the current owner reportedly performed some additional rehabilitation and rented the units at market rates to households at various income levels, many or perhaps most in excess of LIHTC eligibility levels.

Procedural History

The tenant filed suit, seeking declaratory and injunctive relief to enforce the use restriction, as expressly authorized by the declaration.[12] The current owner and

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*The author of this article is Kenneth Laslavic, a graduate of the University of California, Hastings College of the Law and a Bridge Fellow with the National Housing Law Project.

[1]Nordbye v. BRCP/GM Ellington, __ P.3d __, 2011 WL 5067104 (Or. Ct. App. 2011).

[2]The original owner received $230,862 annually during the first 10 years after the property was placed in service under the LIHTC program.

[3]Pursuant to Section 42 of the Internal Revenue Code (IRC), the program uses tax credits, allocated to the states, which are in turn awarded to developers and claimable over a 10-year period, to incentivize the development of low-income rental housing. 26 U.S.C. § 42 (Westlaw Nov. 14, 2011). The Internal Revenue Service (IRS) regulates the LIHTC program.

[4]*Nordbye*, 2011 WL 5067104, at *5, n.11.

[5]Brief of Plaintiff-Appellant at 9, Nordbye v. BRCP/GM Ellington, No. A141698 (Or. Ct. App. Oct. 26, 2011) (on file on NHLP) [hereinafter Brief of Plaintiff-Appellant].

[6]*Id.* at 10

[7]*Id.*

[8]*Nordbye*, 2011 WL 5067104, at *3.

[9]*Id.*

[10]Brief of Plaintiff-Appellant, *supra* note 5, at 12.

[11]*Id.* These evictions also violated the three-year protections from evictions following the two termination events specified in the LIHTC statute.

[12]Section 8(b) of the declaration, like most other LIHTC Agreements, provides, "The Owner acknowledges that the primary purpose for requiring compliance by the Owner with restrictions provided in this Declaration is to assure compliance of the Project and the Owner with IRC Section 42 and the applicable regulations, AND BY REA-

OHCS moved for summary judgment on the grounds that the release was valid and enforceable. The tenant filed a cross-motion, contending that the purported release was insufficient to abrogate her right to obtain specific performance of the declaration. The trial court granted the owner's and OHCS' motion for summary judgment, holding that OHCS' decision to remove the project from the program was valid and effectively abrogated the ability of low-income tenants to enforce the declaration. This conclusion was based upon its determination that OHCS' decisions to remove the project and execute the release were entitled to deference.[13] Accordingly, the trial court dismissed the case.

Oregon Court of Appeals Analysis

The appellate court first evaluated whether *Chevron*-style deference applied to OHCS' decision to remove the project from the program. Under *Chevron*, when a federal agency has been charged by Congress with implementing a federal statute, courts should defer to that agency's interpretation of the statute, treating that interpretation as controlling as long as it is reasonable,[14] where Congress has not directly addressed the precise question at issue.[15] The defendants argued that OHCS' decision should be afforded *Chevron* deference, relying upon a 2009 Oregon Supreme Court decision holding that certain state agency interpretations of federal law are entitled to judicial deference where Congress granted the state agency rulemaking authority.[16]

However, the court held that OHCS' decision here was not entitled to judicial deference because a state agency's interpretation of federal statutes is not generally entitled to the deference afforded to a federal agency's interpretation of its own statutes. The court distinguished the present case from *Friends of Columbia Gorge v. Columbia River* because the LIHTC statute contains no grant of rulemaking authority *to state agencies* to fill gaps in the federal scheme.[17] Lastly, in dismissing the defendants' attempt to bolster their deference argument by relying on the informal IRS staff advice, the court found that "the oral advice of a federal employee, given on an ad hoc basis to a state agency, simply does not qualify" as an administrative interpretation with the force of law.[18]

The court also rejected the defendants' contention that the release abrogated the tenants' rights under the use agreement. Under Section 2(b) of the declaration, the use restrictions constitute covenants running with the land, conferring benefits on OHCS and any past, present or prospective tenant of the project.[19] Moreover, the use agreement and the declaration incorporate Oregon law, which provides that a restrictive covenant cannot be terminated without the consent of the intended beneficiary. Accordingly, the court held that the tenant was an intended third-party beneficiary entitled to enforce the use restrictions.

In its opinion, the court noted that "the private enforcement rights conferred on qualified low-income tenants are an integral part of Congress's comprehensive design."[20] The LIHTC program is "front-loaded": tax credits are claimed during the initial 10 years of the project, but the extended use period runs for at least 30 years. In the later years, recapture of a small portion of the credits alone may not provide an effective mechanism to ensure compliance. The court recognized that "Congress anticipated that the enforcement role played by the pertinent government agencies gradually would diminish and effectively end before expiration of the 30-year extended-use period."[21] Thus the tenants' private enforcement rights serve to ensure continued program compliance beyond the initial 15-year compliance period.

Moreover, citing an amicus brief submitted by the National Housing Law Project (NHLP), the court agreed that Congress, by explicitly establishing only two grounds for terminating long-term use restrictions, intended that

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SON THEREOF, THE OWNER IN CONSIDERATION FOR RECEIVING LOW-INCOME HOUSING TAX CREDITS FOR THIS PROJECT HEREBY AGREES AND CONSENTS THAT THE DEPARTMENT AND ANY INDIVIDUAL WHO MEETS THE INCOME LIMITATION APPLICABLE UNDER SECTION 42 (WHETHER PROSPECTIVE, PRESENT OR FORMER OCCUPANT) SHALL BE ENTITLED, FOR ANY BREACH OF THE PROVISIONS HEREOF, AND IN ADDITION TO ALL OTHER REMEDIES PROVIDED BY LAW OR IN EQUITY, TO ENFORCE SPECIFIC PERFORMANCE BY THE OWNER OF ITS OBLIGATIONS UNDER THIS DECLARATION IN A STATE COURT OF COMPETENT JURISDICTION."

[13]Under the framework established in *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[14]*Nordbye*, 2011 WL 5067104, at *5 (citing Friends of Columbia Gorge v. Columbia River, 213 P.3d 1164, 1172 (Or. 2009)).

[15]*Id.* (citing Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984)).

[16]Friends of Columbia Gorge, 213 P.3d at 1164.

[17]*Nordbye*, 2011 WL 5067104, at *6 (citing Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997)).

[18]*Id.*

[19]Section 2(b) of the Declaration provides: "The Owner intends, declares and covenants, on behalf of itself and all future Owners ..., that this Declaration and the covenants and restrictions set forth in this Declaration regulating and restricting the use, occupancy and transfer of the Project ([1]) shall be and are covenants running with the Project land, ... (and the benefits shall inure to the Department and any past, present or prospective tenant of the Project) .... The Owner hereby agrees that any and all requirements of the laws of the State of Oregon to be satisfied in order for the provisions of this Declaration to constitute deed restrictions and covenants running with the land shall be deemed to be satisfied in full, ... or in the alternate, that an equitable servitude has been created to insure that these restrictions run with the Project. For the longer of the period this Credit is claimed or the term of this Declaration, each and every contract, deed or other instrument hereafter executed conveying the Project or portion thereof shall expressly provide that such conveyance is subject to this Declaration, provided, however, the covenants contained herein shall survive and be effective regardless of whether such contract, deed or other instrument hereafter executed conveying the Project or portion thereof provides that such conveyance is subject to this Declaration."

[20]*Nordbye*, 2011 WL 5067104, at *10.

[21]*Id.*

noncompliance could not legally support termination. As stated by NHLP, "in specifically prohibiting purposeful foreclosure from terminating an extended use period, Congress clearly articulated its intent to ensure compliance with long-term use requirements. Congress certainly did not intend to prohibit purposeful foreclosure while simultaneously allowing noncompliance with program requirements—which is also wholly within an owner's control—to produce identical results."[22]

The court also agreed with NHLP that release of use restrictions upon a finding of noncompliance would create perverse incentives for the owner to evade those use restrictions by simply violating program requirements. The court noted that "once released from the obligation to maintain the property as low-income housing for the stated period, an owner would be free to charge market-rate rent or sell the project for a profit, thereby profiting from a public subsidy without fulfilling the conditions of that subsidy."[23] Hitting the nail on the head, the court concluded, "In sum, permitting abrogation of LIHTC program-prescribed use restrictions—and, specifically, tenants' rights to enforce those restrictions—by way of 'releases' between project owners and local housing agencies would subvert, and even invert, Congressional intent."[24]

The court therefore reversed the trial court's decision granting judgment to the agency and the owner and denying the tenant's cross-motion for summary judgment. After finding that the trial court erred in denying the tenant's cross-motion for summary judgment, the court remanded the case so that the tenant may enforce the declaration's use restrictions.

Conclusion

Nordbye underscores the challenges caused by the lack of clear federal rules and the hazards of ad hoc advice from IRS staff on major issues presented by one of the nation's largest affordable housing programs. In crafting the LIHTC program, Congress established two exclusive termination conditions, to which state agencies and owners must adhere. Regulatory agencies must establish and execute effective monitoring programs that are faithful to the statutory scheme and take advantage of the third-party enforcement rights built into the program structure. Tenants should not pay the price of lax monitoring or owner noncompliance. The Rose City experience demonstrates that vigilance and persistent enforcement of use restrictions can ensure that taxpayer funds are well-utilized for their intended purpose—meeting community needs for decent and affordable rental housing. ■

[22] *Id.*
[23] *Id.* at *11.
[24] *Id.*

Recent Updates Address Protections for Tenants in Foreclosed Properties

Several recent developments address the rights of tenants in foreclosed properties, including federal legislation introduced in the House of Representatives, guidance issued by the Office of Comptroller of Currency, and a local ordinance enacted in Merced, California.

Federal Legislation Would Extend Foreclosure Protections for Tenants

On December 8, Congressman Keith Ellison (D-MN) introduced H.R. 3619, which would make the Protecting Tenants at Foreclosure Act permanent. The Protecting Tenants at Foreclosure Act (PTFA) gives tenants the right to a 90-day notice after foreclosure and allows tenants to stay until the end of long-term leases.[1] Currently, the PTFA is set to sunset at the end of 2014.

H.R. 3619 would remove the 2014 sunset date to make the PTFA's protections permanent. The legislation would also add a private right of action to provide tenants a remedy when the PTFA is violated. Under H.R. 3619, tenants whose PTFA rights have been violated would be able to bring lawsuits to recover damages, litigation costs, and attorney's fees.

Office of Comptroller of Currency Issues Guidance on Foreclosed Properties

On December 14, the Office of Comptroller of Currency (OCC) issued a bulletin to national banks and federal savings associations on potential issues with foreclosed residential properties.[2] When financial institutions acquire title to residential properties, the bulletin explains that the institutions then assume full responsibilities of an owner, "including providing maintenance and security, paying taxes and insurance, and serving as landlord for rental properties."[3]

When financial institutions assume ownership over rental properties, the OCC bulletin explains that they must follow the Protecting Tenants at Foreclosure Act. This requires banks to "honor any existing rental agreements with a bona fide tenant" and "provide 90 days' notice to the tenant prior to eviction whether or not the tenant has a rental agreement," as well as any additional

[1] Pub. L. No. 111-22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009), *amended by* Pub. L. No. 111-203, tit. XIV, § 1484 (2010).
[2] Guidance on Potential Issues With Foreclosed Residential Properties, OCC Bulletin 2011-49 (Dec. 14, 2011), http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-49.html.
[3] *Id.*

requirements imposed by state and local law.[4] In addition, banks should first ensure that the rental agreement allows the landlord to show the property before making the property available for such showings. If a tenant decides to vacate the property, banks must return any security deposit that was paid at the commencement of the tenancy.

Merced, California Enacts Just-Cause for Eviction Ordinance

On November 21, the Merced, California, City Council, by a 5-2 vote, passed a local just-cause for eviction ordinance.[5] The law requires banks and investors who purchase foreclosed properties to have a "just cause" for evicting tenants after foreclosure.[6] The law specifies grounds for eviction, such as where the tenant failed to pay rent or if the new owner desires to move into the property. With the ordinance's passage, Merced becomes the 16th city in California to protect tenants from foreclosure-based evictions. ■

[4]*Id.*

[5]Ameera Butt, *Merced Strengthens Rights of Foreclosure Renters,* MERCED SUN STAR, Nov. 23, 2011, http://www.mercedsunstar.com/2011/11/23/2131836/merced-strengthens-rights-of-foreclosure.html.

[6]Merced, Cal., Ordinance No. 2379 (Nov. 21, 2011).

New Hampshire Supreme Court Finds Evidence Insufficient for Criminal Activity Eviction*

The Supreme Court of New Hampshire recently reversed an order evicting a Nashua public housing tenant based on evidence of drug-related criminal activity. In *Nashua Housing Authority v. Wilson,* the issue before the court was whether three criminal drug complaints and a police sergeant's testimony that a drug sale occurred in the tenant's apartment were sufficient to prove that the tenant breached her lease by engaging in drug-related activity.[1] The court held in a 5-0 opinion that the public housing agency (PHA) had not met its burden of proof and reversed the trial court's eviction order.[2]

Procedural History

On May 8, 2010, the *Nashua Telegraph* published an article naming Wendy Wilson, a public housing tenant, as one of 21 individuals arrested during a citywide sweep by the Nashua Police Department. In a list of the people arrested, the article read, "Wendy Wilson, 54, of 57 Tyler St. – three counts of sale of a narcotic drug."[3] After reading the article, the Nashua Housing Authority (NHA) sent Wilson an eviction notice on May 11, 2010, and brought a possessory action against her for breaching her lease due to drug-related criminal activity.[4]

At the eviction proceeding before the Nashua District Court, NHA introduced three criminal complaints and called Sergeant Frank Sullivan to testify. The complaints stated that on three occasions, Wilson unlawfully dispensed and sold a narcotic drug.[5] Sergeant Sullivan testified that he had been on surveillance duty in a nearby parking lot when a controlled drug sale occurred at Wilson's apartment complex. He further stated that he observed a detective and a cooperating witness enter the building and exit a few minutes later. According to Sullivan, after the sale took place, he debriefed the detective and listened to a recording of Wilson. Sullivan further stated that Wilson was later arrested and charged with the sale of a controlled substance.[6] The trial court ordered Wilson's eviction after finding that there was compelling

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[1]Nashua Hous. Auth. v. Wilson, 2011 WL 4135130 (N.H. Sept. 15, 2011). The tenant was represented by New Hampshire Legal Assistance.

[2]*Id.* at *3.

[3]*Id.*

[4]*Nashua Hous. Auth.,* 2011 WL 4135130, at *1. The tenant had not yet been tried on any of the counts when the PHA brought the eviction action against her.

[5]*Id.*

[6]*Id.*

evidence to suggest that she engaged in drug-related activity in violation of her lease with NHA.[7] Wilson appealed the eviction order, and the Supreme Court of New Hampshire granted certiorari.

The Tenant's Arguments on Appeal

Wilson argued on appeal that the evidence presented by NHA was insufficient to prove that she breached her lease by engaging in drug-related criminal activity.[8] Wilson attacked the two forms of evidence NHA introduced to prove that she had engaged in drug-related activity: Sergeant Sullivan's testimony and three criminal complaints charging Wilson with the sale of morphine.[9]

Wilson argued that Sergeant Sullivan's testimony failed to prove any of the three elements needed to make a prima facie case that she had engaged in drug-related activity: that (1) she possessed a controlled substance; (2) that she sold or conveyed a substance to someone; and (3) that the substance she sold or conveyed was a controlled drug.[10] Wilson emphasized that Sullivan's testimony never connected her with the drug sale. Sullivan did not directly witness the controlled sale and did not testify that anyone directly involved ever saw or spoke to Wilson at any time during the sale.[11] Sullivan testified that he listened to a recording of Wilson during the investigation, but he did not testify as to how the recording related to any criminal activity.[12] In his testimony, he failed to identify Wilson as the person who sold the controlled substance. Wilson also pointed out that no evidence was offered at trial to show that the substance she allegedly sold was even a controlled substance. There was no evidence that any trained personnel identified the substance as morphine, or any other controlled drug.[13]

Wilson attacked the use of criminal complaints as evidence that she engaged in criminal activity because the complaints only required probable cause, whereas the eviction proceeding required proof by a preponderance of the evidence, a higher standard than probable cause. Wilson likened the criminal complaints to criminal indictments, which also require only probable cause, and analogized her case with *Moody v. Cunningham*.[14] In *Moody*, the Supreme Court of New Hampshire held that indictments against the defendants could not be the evidentiary basis for finding in a different proceeding that the defendants had, in fact, committed the acts alleged in the indictments because of the lower standard of proof required to issue the indictments.[15] In *Moody*, the court described the indictment as "an accusation which is at best hearsay evidence of the underlying acts."[16] Wilson also discussed cases from other states that held that indictments were inadmissible in other proceedings as evidence that a defendant committed an act for which he was indicted.[17]

Supreme Court Analysis

In its opinion, the Supreme Court of New Hampshire began by establishing that a tenant would, in fact, breach his or her public housing lease if it could be shown that he or she engaged in drug-related activity[18] and that breaching the lease was grounds for eviction by the PHA.[19] The court further stated that in a civil action, NHA had to establish its case by a preponderance of the evidence, and on appeal, the court would review the evidence in the light most favorable to NHA.[20] The court then reviewed the evidence submitted by NHA to see if, taken as a whole, it was sufficient to prove by a preponderance of the evidence that Wilson engaged in drug-related activity.

The court first addressed the three criminal complaints alleging that Wilson unlawfully dispensed and sold a narcotic drug. Wilson had argued that the complaints had insufficient probative value and compared them to indictments. The court agreed that the criminal complaints were analogous to indictments and could not, by themselves, prove by a preponderance of the evidence that Wilson had engaged in drug-related criminal activity. The court relied on its decision in *Moody v. Cunningham* when comparing the probative value of an indictment and a criminal complaint.[21] Because the complaints only required probable cause to be issued, the court held that they were not sufficient to prove that the tenant breached her lease.

The court then turned to whether Sergeant Sullivan's testimony provided sufficient additional evidence to meet the preponderance of the evidence standard. The court found that Sullivan's testimony failed to show that Wilson was in any way involved in the sale of a controlled substance. Sullivan stated only that he listened to a recording of Wilson during the investigation but did not testify as to how the recording related to any criminal activity. The court found Wilson's case factually indistinguishable from

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[7]Brief of Defendant-Appellant at 3, Nashua Hous. Auth. v. Wilson, 2011 WL 4135130 (N.H. Sept. 15, 2011).
[8]*Id.* at 1.
[9]*Id.* at 2.
[10]*Id.* at 3-4.
[11]*Id.* at 5.
[12]*Id.*
[13]*Id.*
[14]Moody v. Cunningham, 503 A.2d 819 (N.H. 1986).
[15]Brief of Defendant-Appellant, *supra* note 7 at 6.
[16]*Moody*, 503 A.2d at 821.
[17]Brief of Defendant-Appellant, *supra* note 7, at 5 (citing Metro. Dade County v. Wilkey, 414 So. 2d 269, 271 (Fla. Dist. Ct. App. 1982); Arbaugh v. Dir., Patuxent Inst., 341 A.2d 812 (Md. Ct. Spec. App. 1975); Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983); Smith v. Leflore, 437 A.2d 1250 (Pa. Super. Ct. 1981)).
[18]Nashua Hous. Auth. v. Wilson, 2011 WL 4135130, at *1 (N.H. Sept. 15, 2011).
[19]*Id.* at *2.
[20]*Id.*
[21]Moody v. Cunningham, 503 A.2d 819 (N.H. 1986).

Vachon v. New Hampshire.[22] In that case, the U.S. Supreme Court reversed a store owner's conviction for contributing to the delinquency of a minor by selling her an obscene button because there was no evidence identifying the store owner as the person who sold the button.[23] In Wilson's case, Sullivan's testimony never indicated that Wilson actually possessed or sold the drugs in the controlled drug sale.[24]

The court reversed the trial court's eviction order, holding that Sergeant Sullivan's testimony, along with the criminal complaints, did not provide sufficient evidence to prove that Wilson engaged in drug-related activity in violation of her lease with NHA.[25] This case will hopefully encourage lower courts to carefully analyze the evidence according to the appropriate standard of proof in eviction proceedings. It is a victory for housing advocates who have been challenging the sufficiency of the evidence in public housing eviction cases across the country. ■

[22] *Nashua Hous. Auth.*, 2011 WL 4135130, at *3.
[23] Vachon v. State of New Hampshire, 414 U.S. 478 (1974).
[24] *Nashua Hous. Auth.*, 2011 WL 4135130, at *2.
[25] *Id.* at *3.

Study: Neighborhood Increase in Voucher Holders Does Not Increase Crime Rates

Recent publicity has suggested that an increase in Section 8 voucher holders in a given neighborhood will increase crime rates in that area.[1] Hanna Rosin's 2008 article in *The Atlantic*, titled "American Murder Mystery," connected higher crime rates to an increase in voucher holders in Memphis suburbs.[2] In response to Rosin's article, the Furman Center on Real Estate and Urban Policy released a study in October that systematically analyzes the connection between voucher households and crime in 10 cities.[3] The study finds no evidence that an increase in the number of voucher holders in a given neighborhood leads to an increase in crime.[4]

The study purports to be the first to systematically examine the link between the presence of voucher holders in a neighborhood and crime.[5] It gathers crime data at a neighborhood level, based on census tracts, from 1996 to 2008 from 10 cities: Austin, Denver, Seattle, Chicago, New York, Portland, Washington, D.C., Cleveland, Indianapolis and Philadelphia. Researchers then compared this crime data with information collected from the Department of Housing and Urban Development on subsidized households.[6] The study also used annual data at the census tract level to control for certain variables that may skew results, including the estimated annual poverty rate, homeownership rate and racial composition of a given tract.[7]

The study finds that there are higher crime rates in neighborhoods with more voucher holders, but, as researchers stated, "our interest is not in a simple association, but rather whether the presence of voucher holders actually increases crime."[8] When controlling for existing trends, researchers found that a higher number of voucher holders does not increase crime in a given tract.[9] There is, however, sufficient evidence to conclude that voucher holders are more likely to move into neighborhoods where crime rates are already increasing.[10] The study should be a helpful resource for advocates who are encountering community opposition when assisting tenants to move to neighborhoods where voucher holders typically have not resided. It also may be useful in preventing law enforcement from targeting voucher holders based on the false assumption that these residents are more likely to engage in criminal activity. ■

[1] James Bovard, *Raising Hell in Subsidized Housing*, WALL STREET J., Aug. 17, 2011, *available at* http://online.wsj.com/article/SB10001424053111903520204576480542593887906.html.
[2] Hanna Rosin, *American Murder Mystery*, ATLANTIC MAG., Aug. 2008, *available at* http://www.theatlantic.com/magazine/archive/2008/07/american-murder-mystery/6872/.
[3] Ingrid Gould Ellen et al., *American Murder Mystery Revisited*, NYU WAGNER SCHOOL & FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY (Oct. 2011) *available at* http://furmancenter.org/files/publications/American_Murder_Mystery_Revisited.pdf.
[4] *Id.* at 2.
[5] *Id.*
[6] *Id.* at 11-14. The source and amount of information for crime varied for each city. HUD household-level data contained some inconsistencies and was missing entirely for some cities in some years, with data becoming more consistent and complete in later years. The study purports to correct for these gaps.
[7] *Id.* at 13-14.
[8] *Id.* at 19.
[9] *Id.* at 20.
[10] *Id.* at 22.

Kilgore and *Davis*: The Latest Evolution of the "Innocent Tenant" Defense in Ohio*

In *Department of Housing and Urban Development v. Rucker*,[1] the Supreme Court held that federal law permits the eviction of "innocent tenants"[2] for the drug-related criminal activity of their guests or household members. After *Rucker*, innocent tenants who reside in public housing in Ohio have continued to use an equity defense in these eviction actions. This article examines the two most recent appellate court decisions on the innocent tenant equity defense.

History of the Equity Defense in Ohio

Ohio law, like the law in many other states, recognizes an equity defense in eviction actions. It has long been the rule that "equity abhors a forfeiture [of a leasehold] and will only decree it when such relief is clearly required."[3] Notwithstanding a lease violation, "the trial court, within its discretion, is entitled to weigh all equitable considerations in determining whether a forfeiture is to be declared."[4] This analysis is fact specific, "and 'no one equitable maxim provides a complete answer' to every case."[5]

Ohio courts often apply this equity defense in eviction actions against public housing or other federally subsidized tenants.[6] Innocent tenants who reside in public housing in Ohio have successfully used this equity defense, both pre-[7] and post-*Rucker*.[8]

Only one Ohio court has addressed whether the federal law, as construed in *Rucker*, preempts the state law equity defense. In *Cuyahoga Metropolitan Housing Authority v. Harris*, the Cleveland Municipal Court held that the federal law on innocent tenants does not preempt the equity jurisdiction of Ohio municipal courts in eviction actions.[9] The court relied on Department of Housing and Urban Development (HUD) guidance that explained that the "rule does not...preempt State law."[10] It thereupon held that "*Rucker* does not alter this conclusion [of HUD] and does not provide a basis for preempting or limiting this court's equity powers."[11]

Dayton Metropolitan Housing Authority v. Kilgore

In *Dayton Metropolitan Housing Authority v. Kilgore*, the housing authority commenced an eviction action against Rhonda Kilgore based on the marijuana and cocaine residue that the police found in her apartment.[12] Kilgore was not present when the police discovered the drugs. The trial court denied the eviction on equity grounds—Kilgore lacked knowledge of the criminal activity.

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[1]HUD v. Rucker, 535 U.S. 125 (2002). Previous *Bulletin* articles have discussed *Rucker* and its aftermath. *See* Jia Min Cheng, *Sweetening the Pill of* Rucker: *Recent Decisions*, 41 HOUS. L. BULL. 49, 49 (Mar. 2011); NHLP, *Post-Rucker Decisions: Six Years Later*, 38 HOUS. L. BULL. 187, 187 (Sept. 2008); NHLP, *Post-Rucker Decisions: Three Years Later*, 35 HOUS. L. BULL. 249, 249 (Nov.-Dec. 2005); NHLP, *One Strike Evictions: Post-Rucker Decisions*, 32 HOUS. L. BULL. 201, 201 (Sep. 2002).

[2]The term "innocent tenant" is used in this article (and in many court decisions) in the context of a termination of a public housing tenancy that is based on the drug-related criminal activity of a guest or a household member (other than the tenant). In this context, "innocent tenant" means a tenant who did not participate in, and neither knew nor reasonably should have known of the drug-related criminal activity.

[3]Whitmore v. Meenach, 33 N.E.2d 408, 410 (Ohio App. Montgomery County 1940). *Accord* Erie Metroparks Bd. of Comm'rs v. Key Trust Co. of Ohio, N.A., 764 N.E.2d 509, 513 (Ohio App. Erie County 2001); Zanetos v. Sparks, 468 N.E.2d 938, 941 (Ohio App. Franklin County 1984).

[4]S. Hotel Co. v. Miscott, 337 N.E.2d 660, 664 (Ohio App. Franklin County 1975). *Accord* Galier v. Feder Pontiac, Inc., 1989 WL 142397, at *3-4 (Ohio App. Cuyahoga County Nov. 22, 1989); Heritage Hills, Ltd. v. Nusser, 1986 WL 7882, at *3 (Ohio App. Ross County July 3, 1986).

[5]Esho v. Shamoon, Inc., 2007 WL 949756, ¶ 13 (Ohio App. Lucas County Mar. 30, 2007). *Accord* Portage Metro. Hous. Auth. v. Brumley, 2008 WL 4693200, ¶ 93 (Ohio App. Portage County Oct. 24, 2008).

[6]*See, e.g.*, Cincinnati Metro. Hous. Auth. v. Brown, No. C-010459 (Ohio App. Hamilton County Feb. 27, 2002); Greene Metro. Hous. Auth. v. Manning, 1999 WL 76456 (Ohio App. Greene County Feb. 19, 1999); Gorsuch Homes, Inc. v. Wooten, 597 N.E.2d 554 (Ohio App. Clark County 1992); Heritage Hills, Ltd. v. Nusser, 1986 WL 7882 (Ohio App. Ross County July 3, 1986); Cincinnati Metro. Hous. Auth. v. Harris, 1983 WL 8893 (Ohio App. Hamilton County June 15, 1983).

[7]Cincinnati Metro. Hous. Auth. v. Harris, 1983 WL 8893 (Ohio App. Hamilton County June 15, 1983) (minor children of tenant engaged in certain criminal activity); Trumbull Metro. Hous. Auth. v. Edmonds, No. 00-CVG-0030801 (Ohio Mun. Warren County Aug. 10, 2000) (when babysitting, brother of tenant sold drugs in the rental unit; tenant did not participate in or know of the drug activity); Trumbull Metro. Hous. Auth. v. Redd, No. 00-CVG-614 (Ohio Mun. Warren County July 19, 2000) (guest of tenant sold drugs in the rental unit; tenant did not participate in or know of the drug activity); Cincinnati Metro. Hous. Auth. v. Foster, No. 97-CV-06298 (Ohio Mun. Hamilton County Nov. 18, 1997) (tenant's son engaged in one drug sale; tenant neither knew nor had any reason to know it would occur).

[8]Cuyahoga Metro. Hous. Auth. v. Mundy, No. 2007-CVG-25841 (Ohio Mun., Cleveland, Hous. Div., Dec. 17, 2007) (remains of guest's handrolled cigarette contained marijuana, and tenant did not know or have any reason to know that the cigarette contained marijuana); Cuyahoga Metro. Hous. Auth. v. Taylor, No. 2007-CVG-3787 (Ohio Mun., Cleveland, Hous. Div., July 5, 2007) (two Percocet pills and drug paraphernalia were in guest's pocket, and tenant did not know or have any reason to know of the content of the guest's pocket); Cuyahoga Metro. Hous. Auth. v. Harris, 861 N.E.2d 179 (Ohio Mun., Cleveland, Hous. Div., 2006) (guest arrested on federal warrant, crack cocaine was found in guest's pocket, and tenant did not know or have any reason to know of the content of the guest's pocket).

[9]Cuyahoga Metro. Hous. Auth. v. Harris, 861 N.E.2d 179 (Ohio Mun., Cleveland, Hous. Div., 2006). *Accord* Cuyahoga Metro. Hous. Auth. v. Mundy, No. 2007-CVG-25841 (Ohio Mun., Cleveland, Hous. Div., Dec. 17, 2007).

[10]*Harris*, 861 N.E.2d at 181 (quoting 66 Fed. Reg. 28,776, 28,791 (2001) (rule on eviction for criminal activity)).

[11]*Id.*; *see also* Portage Metro Hous. Auth. v. Brumley, 2008 WL 4693200 (Ohio App. Portage County Oct. 24, 2008) (holding that trial courts may consider the equity defense in eviction actions against innocent tenants).

[12]Dayton Metro. Hous. Auth. v. Kilgore, __ N.E.2d __, 2011 WL 2583634 (Ohio App. Montgomery County June 30, 2011).

On appeal, the court reversed the trial court decision on two grounds. First, it held that a trial court may not apply the equity defense in these cases because equity does not apply to "positive statutes" and, according to the court, 42 U.S.C. § 1437d(l)(6) is a "positive statute." It explained that application of the equity defense for innocent tenants may "run the risk of preventing operation of the enforcement mechanism for which the statute provides" and "would be inconsistent with the obligation of equity to follow the law."[13]

Second, it found and relied on a distinction between Ms. Kilgore's case and *Harris*. Unlike the tenant in *Harris*, Kilgore was not an innocent tenant because she had "furthered her guests' criminal purposes" by leaving them alone in her apartment, thereby "making her apartment open and available" for them to engage in the illegal drug activity.[14]

The court did not address whether 42 U.S.C. § 1437d(l)(6) preempts the equity jurisdiction of a trial court in eviction actions and did not reject the *Harris* holding. While the *Kilgore* decision is a setback for the innocent tenant equity defense in Ohio, it can be limited to its facts. At least for courts in its appellate district, *Kilgore* likely raised the level of innocence a tenant must demonstrate to succeed on the innocent tenant equity defense.

Cuyahoga Metropolitan Housing Authority v. Davis

In *Cuyahoga Metropolitan Housing Authority v. Davis*, a different Ohio appellate court affirmed a drug-related eviction but declined to follow the broad holding in *Kilgore*.[15] In *Davis*, the tenant had allowed her guests, on two occasions, to engage in drug-related criminal activity in her apartment. On one of those occasions, the tenant lied to the police about a guest's presence in the apartment while he hid in a closet. Based on these facts, the trial court[16] denied the innocent tenant equity defense and granted the eviction.

On appeal, the court (1) briefly reviewed *Harris* and *Kilgore*, (2) noted that *Kilgore* distinguished *Harris* on the facts, and (3) found the facts in the case more akin to *Kilgore* than *Harris*.[17] The court, reviewing the facts under the competent, credible evidence standard, found sufficient evidence to support the trial court's finding that the tenant was not an innocent tenant and upheld the trial court's denial of the innocent tenant equity defense.

While *Davis* did not result in a victory for the tenant, the court's opinion reaffirmed that the equity defense may be asserted in any eviction action, including those against innocent tenants. It also affirmed that *Kilgore* is properly viewed as a case in which the tenant is not an innocent tenant. Accordingly, *Kilgore* is factually distinguishable from *Harris*, rather than a rejection of the *Harris* holding.

Conclusion

As of now, two post-*Rucker* appellate court decisions (*Davis* and *Portage Metropolitan Housing Authority v. Brumley*[18]), along with *Harris* and other trial court decisions, establish that Ohio trial courts have equity jurisdiction to consider and, where appropriate, apply the innocent tenant equity defense. Insofar as *Kilgore* relied on the positive statute theory, it remains an isolated view and is inconsistent with well-established Ohio eviction law. Advocates should continue to assert the innocent tenant equity defense, while taking care to distinguish *Kilgore*. ■

[13] *Id.* ¶ 27.
[14] *Id.* ¶ 29.
[15] Cuyahoga Metro. Hous. Auth. v. Davis, 2011 WL 5998999 (Ohio App., Cuyahoga County, Dec. 1, 2011).
[16] The trial court in *Davis* was the same trial court that issued the *Harris* decision and that regularly applies the innocent tenant equity defense.
[17] *Davis*, 2011 WL 5998999, at *5.
[18] 2008 WL 4693200 (Ohio App. Portage County Oct. 24, 2008).

Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of these opinions may be obtained from sources such as the cited reporter, Westlaw, Lexis, Google Scholar,[1] FindLaw,[2] or, in some instances, the court's website. NHLP does not archive copies of these cases.

Public Housing: Eviction for Drug-Related Activity

Hous. Auth. of Passaic v. Jackson, 2011 WL 5515306 (N.J. Super. Ct. App. Div. Nov. 14, 2011). A public housing agency (PHA) sought to evict a public housing tenant after her son was convicted of drug possession on PHA property. The trial court found that the tenant had no knowledge of her son's drug involvement, and that the drug activity never took place at the tenant's apartment or even in her building. The trial court therefore held that the PHA abused its discretion by evicting the tenant. Citing *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), as well as New Jersey state cases, the lower court stated that "violation by an innocent tenant of federally mandated lease terms does not automatically require the tenant's eviction." Rather, "a full consideration of a number of factors should be taken into account before the ultimate decision is made upon whether or not the tenant should be evicted." The PHA appealed, and insisted that it was within the PHA's sole prerogative to evict a tenant for lease violations. The appellate court reasoned that the PHA was not permitted to act in "an arbitrary or capricious fashion" and must consider the appropriate factors. The appellate court held that because the PHA declined to contribute evidence demonstrating that it had considered all factors of the tenancy, the lower court acted within reason to review all the relevant factors and conclude eviction was not warranted. Thus the appellate court affirmed the decision of the lower court to deny the PHA judgment of possession against the tenant.

Public Housing: Fraud During Application Process

Hous. Auth. of Bayonne v. Hanna, 2011 WL 5828521 (N.J. Super. Ct. App. Div. Oct. 18, 2011). A public housing agency (PHA) sued a husband and wife for eviction, fraud and breach of contract for failing to report a real property interest on their public housing and continued occupancy applications. Before the tenants applied for public housing, the husband loaned money to his brother to purchase property, and the husband's name was on the deed for the duration of the loan. The brother repaid the loan and removed the husband from the deed, but the new deed was not recorded. On their applications for public housing and continued occupancy, the tenants denied owning real property. Later, the PHA learned that the husband had an ownership interest in the brother's property, and terminated the tenants' lease, claiming they had misrepresented their property ownership in their applications. The tenants refused to vacate their unit, and the PHA sued them for judgment of possession, breach of contract, misrepresentation, fraud and unjust enrichment. At trial, the judge instructed the jury to fill out a verdict form, which asked: "(1) Has the plaintiff proven by clear and convincing evidence that the Defendants fraudulently concealed or misrepresented [the husband's] ownership interest in [the real property]?; (2) Has the Plaintiff established by a preponderance of the evidence a statutory basis for eviction of the Defendants?; (3) Has the Plaintiff established by clear and convincing evidence that it is entitled to recover monetary damages from the Defendants? (5) Do you find by a preponderance of the evidence that Defendants materially breached their lease with the Plaintiff such that the Plaintiff is entitled to compensatory damages? The six-person jury answered "yes" to question one, but "no" to the remaining questions. Accordingly, the judge entered a judgment in favor of the tenants. The PHA appealed, arguing that the verdict was inconsistent and that the jury's finding of misrepresentation automatically entitled the PHA to possession and damages. The appellate court disagreed with the PHA, and affirmed the lower court. To demonstrate fraud, the PHA was required to prove that the tenants made a material misrepresentation, the tenants knew the representation was false, the tenants intended reliance, the PHA reasonably relied and the PHA incurred damages. The appellate court held that the PHA was required to prove damages or grounds for eviction as a separate element, so a finding of misrepresentation did not entitle the PHA to damages. The court held that the verdict was not inconsistent, because the jury could have found that the PHA proved misrepresentation, but not damages or grounds for eviction.

Public Housing: Racial Segregation Claims

Stevens v. Hous. Auth. of S. Bend, Indiana, ___F. 3d___, 2011 WL 6032958 (7th Cir. 2011). A public housing tenant signed a lease with the public housing agency (PHA) listing herself and her two sons as the household members. Under the lease's "zero tolerance" provision, the PHA could terminate the lease if the tenant, a household member, guest, or other person under the tenant's control engaged in criminal activity threatening the health, safety, or right to

[1]scholar.google.com.
[2]www.findlaw.com.

peaceful enjoyment of other residents, or any drug-related criminal activity. The tenant's daughter visited the unit, and the daughter's friends had a gunfight in the parking lot. After the incident, the PHA issued a termination notice, citing the "zero tolerance" provision. The tenant refused to leave and filed suit against the PHA for violations of the Fair Housing Act (FHA). The tenant alleged that the PHA violated the FHA by locating her publicly funded apartment building in a primarily African-American neighborhood, segregating her on account of race. The PHA moved for summary judgment, and the district court granted the motion. The tenant appealed to the Seventh Circuit. The court found that there was no evidence in the record regarding the racial makeup of the area at the time the complex was built, and no demographic evidence regarding the area outside of the complex at any time. The court found that the tenant provided only conclusory allegations that the apartment complex housed mostly African-American tenants, and these allegations were insufficient to meet the tenant's burden on summary judgment.

Housing Choice Voucher Program: Termination for Failure to Report Income

Bowman v. City of Des Moines Mun. Hous. Agency, ___N.W. 2d___, 2011 WL 5248156 (Iowa Nov. 4, 2011). A mother with disabilities received a Section 8 voucher for herself and her three children. Her public housing agency (PHA) required participants to report income changes within 10 days. The voucher holder began receiving state Family Investment Program (FIP) benefits, but did not report this. The PHA discovered the FIP benefits and ordered the tenant to repay the PHA, but she missed the repayment deadline. At a meeting with the PHA, the tenant explained she no longer received FIP benefits, but she had started receiving one child support payment per month and separate Social Security disability (SSDI) payments for each of her three children. Later, the PHA notified her that it was terminating her voucher for failure to report the FIP income, the child support and the children's SSDI payments. At the termination hearing, the PHA conceded that the child support and SSDI payments would not have reduced the voucher holder's rent assistance. The tenant testified that she was disabled and could not afford her rent without assistance. The hearing officer ruled in favor of the PHA, because the tenant had failed to report the FIP income, the child support and the SSDI payments. The tenant filed a petition for a writ of certiorari in a state district court, which upheld the hearing officer's decision. The tenant then appealed to the state supreme court, which also upheld the hearing officer's decision. First, the court held that substantial evidence supported the PHA hearing officer's decision to treat the three SSDI disability benefit letters as three separate failures to report income. The tenant received the payments separately, unlike the child support payment, which was a single monthly sum. Next, the court rejected the tenant's argument that counting the disability payments as three separate failures to report income was familial status discrimination under the Fair Housing Act, because this practice was not disproportionately more burdensome on larger families than small families. Finally, the court examined whether the hearing officer abused his discretion in failing to consider the voucher holder's disability, loss of employment and otherwise clean tenancy record as mitigating circumstances. The court noted that federal regulations provide that a PHA *may* consider mitigating circumstances, but because the regulatory language is permissive and not mandatory, the PHA hearing officer had discretion to consider such mitigating factors. The court held that where, as here, the tenant testified regarding mitigating factors, the hearing officer need not expressly reference those mitigating factors in his decision, but need only state briefly the reasons for his decision.

Housing Choice Voucher Program: Termination for Failure to Satisfy Repayment Agreement

Paul v. New York City Hous. Auth., ___N.Y.S.2d___, 2011 WL 5528766 (N.Y. App. Div. Nov. 15, 2011). A Section 8 tenant challenged the New York City Housing Authority's (NYCHA) decision to terminate her voucher, invoking the state's Article 78 procedure for judicial review of an agency decision. The tenant was disabled and unable to work, and she underwent dialysis three times per week. She required safe, clean and affordable housing to reduce the chance of recurring infection and hospitalization. She also supported a minor son. In 2006, NYCHA claimed it had overpaid her rent subsidy because the voucher holder had under-reported her income for that year. The voucher holder signed a stipulation to repay NYCHA $120 per month, with terms that NYCHA could demand the entire sum and terminate her voucher if she missed a payment. In 2007, the tenant left the unit because she was a victim of domestic violence. She lived in women's shelters for the next two and a half years, but managed to retain her voucher and pay NYCHA $1,850 out of $4,800 in stipulated repayments due over that period of time. Nevertheless, in 2009 NYCHA demanded the entire remaining balance and notified the tenant that it was terminating her voucher. At an informal hearing, NYCHA testified the tenant's income was $13,728. The tenant attempted to challenge that calculation, but was rebuffed by the hearing officer, who told her the only issue was whether she had failed to make all of her stipulated payments. The hearing officer found that the tenant owed NYCHA $4,562, and NYCHA was justified in terminating her voucher. The tenant petitioned for judicial review, and attached evidence that another taxpayer had used her social security number for the 2006 tax year. The state trial court found her petition raised questions of

substantial evidence, and transferred the case to the state appellate court. The appellate court held that NYCHA's decision to terminate the voucher was not supported by substantial evidence. First, the court found that the tenant was the victim of identity theft, so the stipulation between the tenant and the PHA was made upon a mutual mistake of fact regarding the tenant's income and was therefore void. Next, even if NYCHA were entitled to repayment, termination was "so disproportionate to the offense... in the light of all the circumstances, as to be shocking to one's sense of fairness." The court observed that termination would deprive the tenant of the safe, clean and affordable housing she needed to prevent serious illness, and it would put her and her son at serious risk of homelessness or "an unstable life in the shelter system in the event of termination." Thus, the appellate court reinstated the tenant's voucher.

Housing Choice Voucher Program: Housing Quality Standards

Blechinger v. Sioux Falls Hous. & Redev. Comm'n, 2011 WL 5976308 (D.S.D. Nov. 29, 2011). A tenant received rental assistance through the Rent Supplement Program from 1997 to 2009. In 2009, the tenant's landlord opted out of the program. The local public housing agency (PHA) informed the tenant he could stay in the unit using a Section 8 voucher if he and the apartment met Housing Quality Standards (HQS). Upon inspection, the PHA found clutter hindering access in the tenant's unit and notified the tenant that he could not receive rental assistance for the unit. The tenant tried to bring the unit into compliance, but on subsequent inspections, the PHA again refused to approve the apartment. The tenant sued the PHA for an order compelling the PHA to approve him for a voucher and to pay his housing subsidy while he worked to bring his apartment into compliance. The court held the tenant was not entitled to rental assistance while his apartment was out of compliance. Under federal regulations, the unit must be "in sanitary condition" both "at the commencement of assisted occupancy and throughout the assisted tenancy," or else the PHA may not pay any rental assistance to the owner. The court reasoned that, although the tenant tried to bring his unit into compliance, the PHA was prohibited from paying him a rental subsidy while the unit failed HQS. Thus, the court granted the PHA summary judgment.

Project-Based Section 8: Denial of Writ of Certiorari

Mortimer Howard Tr. v. Park Vill. Apartments Tenants Assoc., 636 F.3d 1150 (9th Cir. 2011), *cert. denied*, No. 11-36 (Nov. 28, 2011). On November 28, the U.S. Supreme Court denied the petition for a writ of certiorari in *Mortimer Howard Trust v. Park Village Apartments Tenants Association*. A project-based Section 8 owner asked the Court to review the Ninth Circuit's decision, which held that an owner who refuses to accept enhanced vouchers may not evict tenants for nonpayment of rent that would otherwise be covered by the vouchers. In denying the owner's request, the Court let stand the Ninth Circuit's decision affirming the tenants' right to remain with enhanced vouchers if an owner decides to no longer participate in the project-based Section 8 rental assistance program.

Takings: Mortgage Prepayment

CCA Assocs. v. United States, ___F.3d___, 2011 WL 5838974 (Fed. Cir. 2011). The owner of an apartment complex sued the United States, alleging the Emergency Low Income Housing Preservation Act (ELIHPA) and the Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA) constituted a breach of contract and a taking because they deprived the owner of the right to prepay the mortgage. The Court of Federal Claims granted judgment for the owner in part, finding that the Acts constituted a taking, but not a breach of contract. Both parties appealed to the Federal Circuit. The Federal Circuit affirmed the judgment against the owner on the breach of contract claim, but reversed the lower court's decision granting judgment for the owner on the takings claim, citing *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266 (Fed. Cir. 2007), and *Cienega Gardens v. United States (Cienega IV)*, 194 F.3d 1231 (Fed. Cir. 1998). The owner was required to establish economic impact beyond "mere diminution" in value. The court found that the economic impact was 18% diminution in return on the owner's equity, but stated that it was "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." The Federal Circuit also found that the second factor of the takings analysis, interference with investment-backed expectations, did not indicate a taking because the owner failed to establish it reasonably viewed prepayment as the "primary or 'but for' reason for investment." Finally, the Federal Circuit held that the third factor weighed in favor of the owner, because the character of the governmental action in enacting ELIHPA and LIHPRHA abrogated contractual rights. However, because the other two factors weighed against a taking, the Federal Circuit reversed the finding of the lower court. Next, the court discussed the breach of contract claim. The owner appealed the lower court's holding that there was no privity of contract between HUD and the owner on the secured note, which contained the prepayment clause. In upholding the lower court's ruling, the Federal Circuit noted that there were three relevant documents: a regulatory agreement, a secured note, and the mortgage. HUD signed only the regulatory agreement, which did

not mention the right to prepayment, and did not incorporate the secured note. The owner argued that the three documents constituted one transaction. The lower court conceded that reading the three documents together gave effect to the 20-year prepayment clause in the note as a provision drafted by HUD as an inducement to participate in the program, and reading the documents as one integrated transaction indicated that HUD and the owner had privity of contract on the note. However, the lower court reluctantly held—and the Federal Circuit reluctantly agreed—that *Cienega IV* prevented it from finding privity of contract on the secured note. The Federal Circuit therefore held that binding precedent foreclosed finding privity of contract, but noted the owner could still seek en banc review to challenge *Cienega IV* or *Cienega X*.

Fair Housing Act: Disability Discrimination

Thomas v. Fairway Park Apartments, LLC, 2011 WL 5289780 (W.D. Okla. Nov. 2, 2011). A tenant was diagnosed with multiple sclerosis and subsequently needed to use a wheelchair. She requested that the owner install a ramp from her parking space to the sidewalk that ran to her apartment. The tenant alleged that the owner refused the request and told her that she was no longer wanted as a tenant. She subsequently received a notice instructing her to vacate her apartment on May 31, even though her existing lease lasted until September 30. The tenant filed a lawsuit alleging that the owner violated the Fair Housing Act (FHA). The owner filed a motion to dismiss arguing that the action was moot because the owner stipulated that the tenant could remain in her apartment until the end of her lease term. The court rejected this argument, finding that the owner's affidavit stating that it had not discriminated against the tenant and that it would allow her to remain was insufficient. The court found that the affidavit did not meet the "heavy burden" of demonstrating that there was no reasonable expectation that the alleged violation would recur.

Fair Credit Reporting Act: Tenant Screening

Taylor v. Tenant Tracker, Inc., 2011 WL 5402388 (E.D. Ark. Nov. 4, 2011). Applicants, a husband and wife, signed a release for a background check when they reached the top of a public housing agency's (PHA) waiting list for a Section 8 voucher. The PHA used Tenant Tracker, a public record reporting service, to conduct these background checks. The Tenant Tracker report for the wife listed five entries under "Public and Criminal Information." The first two entries listed an offender with a similar name, who shared the wife's birth date. The other three entries listed a convicted offender with same name and birth date as the wife, but who had a distinctive tattoo that the wife did not have. A PHA employee scrutinized the report in the applicants' presence and eventually concluded that the wife was neither of the women listed in the report. A subsequent report, using additional identifying information, revealed no criminal history. Although the applicants qualified for a voucher, they ultimately did not receive one because the wife obtained employment in the interim, so the family no longer met the income qualifications. The wife sued Tenant Tracker for violations of the Fair Credit Reporting Act, which requires a consumer reporting agency to follow "reasonable procedures" designed to "assure maximum possible accuracy" of information reported about a person. Tenant Tracker moved for summary judgment. The district court granted the motion, finding no evidence that the report was technically inaccurate or that Tenant Tracker negligently prepared the report. The district court relied on an Eighth Circuit decision, *Wilson v. Rental Research Services Inc.*, 165 F.3d 642 (8th Cir. 1999), and concluded that the statute does not provide for strict liability for inaccurate background reports. Rather, the test for negligent reporting is "to weigh the potential that the information will create a misleading impression against the availability of more accurate [or complete] information and the burden of providing such information." Applying the *Wilson* test, the district court found no evidence in the record that Tenant Tracker's procedures were negligently designed to produce inaccurate reports. Moreover, the district court found that the plaintiff had not actually been harmed, because the PHA ultimately approved her application, and the second report revealed no negative criminal history.

Procedural Due Process: Crime-Free Ordinance

Javinsky v. City of St. Louis Park, 2011 WL 5244690 (D. Minn. Nov. 2, 2011). Two landlords filed suit to challenge a city ordinance that required landlords to evict tenants who engaged in criminal activity. Landlords who did not comply were subject to a monthly fine of $750 and revocation of their landlord's license. The plaintiff-landlords had rented property to a couple whose son, who did not live on the premises, allegedly stole drugs from a drug dealer. Police later searched the couple's unit and found marijuana. The police subsequently ordered the landlords to terminate the tenants' lease because of the son's drug-related activity. The landlords submitted a Resolution Plan, a form included with the police department's notice, which did not include evicting the tenants. The police department responded that the landlords must evict the tenants or face a $750 monthly fine. Meanwhile the tenants decided to move rather than face eviction. The landlords then filed a motion for a preliminary injunction to prevent the city from enforcing the crime-free ordinance, alleging enforcement of the

ordinance violated their procedural due process rights. The court denied the motion, finding that the landlords failed to demonstrate irreparable harm since the tenants already had moved out. However, the court proceeded to discuss the other preliminary injunction factors, finding that the landlords had a probability of succeeding on the merits of their procedural due process claim. The court found that the ordinance presented a high risk of erroneous deprivation of the landlords' property interest. It was unlikely the city would have granted a hearing, it was unlikely any hearing would have been held on sufficient notice, the ordinance provided no recompense for business losses, and the court had significant doubts as to whether the city would have provided a neutral appeal. The court also found that the city had a weak interest in requiring landlords to evict their tenants without allowing the landlords a hearing.

Preemption: Mobilehome Registration and Immigration Restrictions

Central Alabama Fair Hous. Ctr. v. Magee, 2011 WL 5878363 (M.D. Ala. Nov. 23, 2011). Organizations and individuals filed a motion for a temporary restraining order against Alabama officials to enjoin enforcement of a state law prohibiting "an alien not lawfully present in the United States" from entering into a business transaction with the state. This law would have the effect of requiring mobilehome owners to prove their U.S. citizenship or lawful immigration status before paying registration fees and receiving decals for their mobilehomes. An owner who fails to pay the registration fee can be given a civil fine or face criminal charges. The court found that the plaintiffs demonstrated a substantial likelihood of success on the merits of their claim that the state law conflicted with federal law and therefore was preempted. The court noted that the power to regulate immigration is exclusively a federal power. While state agents can verify immigration status, "no independent determinations are made and no state-created criteria are applied." The court found that the state did not plan to use federal enforcement mechanisms when determining whether to allow a mobilehome owner to obtain a registration decal. Instead, the evidence reflected that the state proposed to use its own process for determining whether an individual has adequately demonstrated his or her lawful citizenship status. The court found that this process conflicted with federal law. Additionally, the court found that the plaintiffs would likely face irreparable harm if the law was not enjoined, because they would face civil and criminal liability if they were prohibited from paying their registration fees. Accordingly, the court granted a temporary restraining order enjoining state officials from requiring any person attempting to pay the registration fee to prove his U.S. citizenship or lawful immigration status. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices recently issued by the Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA's Rural Housing Service/Rural Development (RD)), Federal Housing Finance Agency (FHFA), Federal Emergency Management Agency (FEMA) and the Department of Veterans Affairs. For the most part, the summaries are taken directly from the summary of the regulation in the Federal Register or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including the Government Printing Office's website,[1] bound volumes of the Federal Register, HUD Clips,[2] HUD,[3] and USDA's Rural Development website.[4] Citations are included with each document to help you secure copies.

HUD Final Rule

Fed. Reg. 75,994-76,019 (Dec. 5, 2011)
Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless"

Summary: This final rule sets forth the regulation for the definition of "homeless" used for the Department of Housing and Urban Development's homeless assistance grant programs. The proposed rule, submitted for public comment, provided four possible categories under which individuals and families may qualify as homeless. The final rule maintains these four categories. The categories are: (1) Individuals and families who lack a fixed, regular, and adequate nighttime residence and includes a subset for an individual who resided in an emergency shelter or a place not meant for human habitation and who is exiting an institution where he or she temporarily resided; (2) individuals and families who will imminently lose their primary nighttime residence; (3) unaccompanied youth and families with children and youth who are defined as homeless under other federal statutes who do not otherwise qualify as homeless under this definition; and (4) individuals and families who are fleeing, or are attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions that relate to violence against the individual or a family member.

Dated: November 9, 2011.

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[1]http://www.gpoaccess.gov/index.html.
[2]http://www.hud.gov/hudclips.
[3]To order notices and handbooks from HUD, call (800) 767-7468.
[4]http://www.rurdev.usda.gov/Home.html.

HUD Interim Rule

Fed. Reg. 75,954-75,994 (Dec. 5, 2011)
Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments

Summary: The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act) consolidates three of the separate homeless assistance programs administered by the Department of Housing and Urban Development (HUD) under the McKinney-Vento Homeless Assistance Act into a single grant program, and revises the Emergency Shelter Grants Program and renames it as the Emergency Solutions Grants (ESG) Program. The HEARTH Act also codifies into law the Continuum of Care planning process, a longstanding part of HUD's application process to assist homeless persons by providing greater coordination in responding to their needs. This interim rule establishes the regulations for the ESG program. The ESG program builds upon the existing Emergency Shelter Grants program, but places greater emphasis on helping people quickly regain stability in permanent housing after experiencing a housing crisis and/or homelessness. The key changes that reflect this new emphasis are the expansion of the homelessness prevention component of the program and the addition of a new rapid re-housing assistance component. The homelessness prevention component includes various housing relocation and stabilization services and short- and medium-term rental assistance to help people avoid becoming homeless. The rapid re-housing assistance component includes similar services and assistance to help people who are homeless move quickly into permanent housing and achieve stability in that housing. In developing regulations for the ESG program, HUD is relying substantially on its experience with its administration, and that of HUD's grantees, of the Homelessness Prevention and Rapid Re-Housing Program (HPRP), authorized and funded by the American Recovery and Reinvestment Act of 2009.

Effective Date: January 4, 2012.

Comments Due: February 3, 2012.

HUD Proposed Rules

Fed. Reg. 78,344-78,382 (Dec. 16, 2011)
HOME Investment Partnerships Program: Improving Performance and Accountability; and Updating Property Standards

Summary: The Department of Housing and Urban Development's (HUD) HOME Investment Partnerships Program provides formula grants to states and units of local government to fund a wide range of activities directed to producing or maintaining affordable housing. This proposed rule would amend the HOME regulations to address many of the operational challenges facing participating jurisdictions, particularly challenges related to recent housing market conditions and the alignment of federal housing programs. The proposed rule would also clarify certain existing regulatory requirements and establish new requirements designed to enhance accountability by states and units of local government in the use of HOME funds, strengthen performance standards and require more timely housing production. The proposed rule would also update property standards applicable to housing assisted by HOME funds.

Comments Due: February 14, 2012

Fed. Reg. 76,917-76,927 (Dec. 9, 2011)
Homeless Management Information Systems Requirements

Summary: This proposed rule provides for the establishment of regulations for Homeless Management Information Systems (HMIS), which are the local information technology systems that Department of Housing and Urban Development (HUD) recipients and subrecipients use for homeless assistance programs authorized by the McKinney-Vento Homeless Assistance Act. The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act) codifies certain data collection requirements integral to HMIS. The HEARTH Act requires that HUD ensure operation of and consistent participation by recipients and subrecipients in HMIS. While Continuums of Care have been using HMIS for several years, this proposed rule would add a new part to the Code of Federal Regulations to regulate the administration of HMIS and collection of data using HMIS, as provided for by the HEARTH Act.

Comments Due: February 7, 2012.

HUD Federal Register Notices

Fed. Reg. 80,377-80,378 (Dec. 23, 2011)
Notice of Submission of Proposed Information Collection to OMB Additional On-Site Data Collection for the Housing Choice Voucher Program Administrative Fee Study

Summary: This request is for the clearance of on-site data collection from public housing agencies (PHAs). The purpose of the proposed data collection is to identify a sample of PHAs that are verified to be operating high-performing and efficient Housing Choice Voucher (HCV) Programs. The proposed data collection will take place through site visits to up to 30 PHAs and will include interviews with PHA staff and reviews of client files and administrative data collected by the PHA. The results of the site visits will be used to identify PHAs to participate in a national study of administrative fees in the HCV program. The national study of administrative fees will include 50 PHAs, some of which have already been identified through site visits that took place at 60 PHAs between April and September 2011. The current request is to conduct similar data collection at a new group of PHAs

to supplement the national study sample. The results of the national study will be used to estimate administrative fees and develop a new administrative fee allocation formula for the HCV program.

Comments Due: January 23, 2012.

Fed. Reg. 78,300-78,307 (Dec. 16, 2011)
Announcement of Funding Awards for Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Mortgage Modification and Mortgage Scams Assistance Housing Counseling Under the Housing Counseling Program

Summary: This announcement notifies the public of funding decisions made by the Department of Housing and Urban Development in a competition for funding under the fiscal year 2010 Notice of Funding Availability for the Mortgage Modification and Mortgage Scams Assistance. This announcement lists the names and addresses of the agencies of this year's award recipients under the Housing Counseling Program.

Dated: December 2, 2011.

Fed. Reg. 78,293-78,294 (Dec. 16, 2011)
Notice of Proposed Information Collection for Public Comment for the Resident Opportunities and Self-Sufficiency Program

Summary: The Resident Opportunities and Self-Sufficiency Service Coordinator (ROSS-SC) Program provides funding to public housing authorities, tribes/tribally designated housing entities, resident organizations, and qualified nonprofit organizations to link residents of public housing to supportive services. Section 23 of the 1937 Housing Act established the Family Self-Sufficiency (FSS) program in HUD's voucher and public housing programs. HUD operates two FSS programs, one for the voucher program and one for public housing. The purpose of both FSS programs is to promote the development of local strategies to coordinate the use of public housing assistance with public and private resources to enable families to achieve economic independence and self-sufficiency. OMB asked HUD to more closely align the two programs, which includes the application process. HUD has modified the public housing program to more closely reflect the characteristics of the HCV FSS program. In so doing, HUD is proposing to replace the ROSS-FSS form (HUD-52767) with the HCV FSS form (HUD-52651). This form, two other program specific forms, and several standard forms will be used to determine eligibility and evaluate capacity of prospective applicants for the PH FSS program. The information provided to HUD by the eligible applicants will be reviewed and evaluated by HUD. Using a comprehensive, merit-based selection process, HUD will determine which organizations should receive awards under the ROSS-SC and PH FSS programs. This notice lists all forms associated with both the ROSS-SC program and the PH FSS program. However, HUD is asking for public comment specifically on the replacement of the ROSS-FSS form with the HCV FSS form.

Comments Due: February 14, 2012.

Fed. Reg. 78,292-78,293 (Dec. 16, 2011)
Notice of Proposed Information Collection for Public Comment for the Housing Choice Voucher Program

Summary: New documents included in this submission are for the project-based voucher (PBV) program and include: (1) A notice from a public housing agency (PHA) to the field office of its intent to project-base any of its tenant-based vouchers; (2) a request from the owner of a PBV project to the field office for approval to terminate a PBV housing assistance payments contract if the owner's rent is adjusted below the initial rent; and (3) the owner's 12-month notice to the tenants of the owner's intent to terminate a PBV housing assistance payments contract. In addition, financial form HUD-52663 has been re-instated.

Comments Due: February 14, 2012.

Fed. Reg. 73,989 (Nov. 29, 2011)
Redelegation of Authority Under Section 3 of the Housing and Urban Development Act of 1968

Summary: Pursuant to 24 C.F.R. § 135.7, the Assistant Secretary for Fair Housing and Equal Opportunity (FHEO) has been delegated authority under Section 3 of the Housing and Urban Development Act of 1968 and HUD's implementing regulations at 24 C.F.R. Part 135. In this notice, the Assistant Secretary for FHEO retains those authorities and, with noted exceptions, redelegates this authority to the General Deputy Assistant Secretary for FHEO, who further redelegates certain authority to the Deputy Assistant Secretary for Enforcement and Programs and to each of the FHEO Regional Directors.

Effective Date: November 16, 2011.

HUD Notices

Notice PIH 2011-68
Extension of Notice 2010-49: Protecting Tenants at Foreclosure Act – Guidance on New Tenant Protections (Dec. 16, 2011)

Summary: This notice reinstates Notice PIH 2010-49, which will expire on December 31, 2011. Procedures contained within PIH Notice 2010-49 remain in effect until the statutory provisions sunset on December 31, 2014.

Notice PIH 2011-67
Implementation of New Cash Management Requirements for the Housing Choice Voucher Program (Dec. 9, 2011)

Summary: This notice announces the implementation of new cash management requirements and procedures for the disbursement by the Department of Housing and Urban Development (HUD) of Housing Assistance Payments (HAP) funds provided to public housing agencies (PHAs) under the Housing Choice Voucher (HCV) Program. Funding for the HCV program is provided by

Congress through annual appropriation acts to HUD, which in turn distributes it to PHAs in accordance with the appropriations acts. Commencing with calendar year 2005, when the HUD instituted budget-based funding, PHAs have received full disbursement of their HAP renewal allocations, on a 1/12th per month basis, and full disbursement of their incremental allocations, based on effective and expiration dates. PHAs have been responsible for maintaining any excess HAP disbursements in their Net Restricted Assets (NRA) account, for use only for future HAP needs that exceed any year's allocation. In the years since that time, some PHAs have accumulated significant amounts in their NRA accounts.

At Congressional direction, in 2008 and 2009, a total of almost $1.5 billion in NRA balances was offset against HAP renewal allocations, and HUD's fiscal year 2012 appropriations act requires an offset of $650 million. The cash management procedures outlined by this notice will mitigate PHA accumulation of NRA funds, reduce Treasury outlays by timing the disbursements based on actual need, and facilitate a more efficient and timely method by which to account for PHA program reserves.

Notice PIH 2011-66
Terminal Guidance on Disaster Housing Assistance Program—Ike (DHAP-Ike) and Extension Operating Requirements (Dec. 7, 2011)

Summary: This notice serves to provide public housing agencies (PHAs) with updated information on the most current extension of the DHAP-Ike program. Modifications have been made which will change the PHAs' administration of the program. The information provided in this notice will supersede the guidance provided in the following notices: PIH 2008-38, PIH 2008-45, PIH 2010-22 and PIH 2011-35. This notice also sets forth amendments to the extension operating requirements, which establish the policies and procedures for the October 2011 DHAP-Ike Extension.

Notice PIH 2011-65
Timely Reporting Requirements of the Family Report (form HUD-50058 and form HUD-50058 MTW) into the Public and Indian Housing Information Center (Nov. 30, 2011)

Summary: The purpose of this notice is to extend Notice PIH 2010-25 which established timeframes for timely reporting of the Family Report (form HUD-50058) into the Public and Indian Housing Information Center (PIC), explained PIC modifications and clarified Family Self-Sufficiency (FSS) reporting requirements. Section 4.A. has been revised to only require reporting of issuance of voucher (action code 10) for new admissions and portability move-ins. The purpose of this change is to relieve public housing agencies of the administrative burden of submitting reports on families that have been issued a voucher, but may not necessarily move.

Notice H 2011-32
Collection Procedures for Delinquent Section 202 Direct Loans (Nov. 22, 2011)

Summary: This notice provides new procedures for collecting delinquent Section 202 mortgage payments and describes the actions that must be taken to bring all Section 202 loans current. It is the Department of Housing and Urban Development's policy that any Section 202 loan that is not brought current or in a workout agreement within 90 days of a default will be recommended for foreclosure.

Notice H 2011-31
Policy for Treatment of Proceeds Resulting from the Sale of FHA-Insured or Secretary-Held Formerly Insured Multifamily Projects by Nonprofit Owners (Nov. 10, 2011)

Summary: This notice provides guidance and clarifications on the Department of Housing and Urban Development's (HUD) policy regarding the use of sale proceeds from a multifamily project sold by a nonprofit owner that has a Federal Housing Administration-insured or Secretary-held formerly FHA-insured mortgage. Many nonprofit owners of projects that have FHA-insured or Secretary-held, formerly FHA-insured mortgages are selling their properties to purchasers who will maintain the long-term affordability of the project. This notice clarifies the circumstances under which nonprofit owners may retain the proceeds from the sale of a project, and the processing oversight that will be provided by HUD.

Notice PIH 2011-62
Extension of Cost-Test and Market Analyses Guidelines for the Voluntary Conversion of Public Housing Units Pursuant to 24 C.F.R. Part 972 (Nov. 2, 2011)

Summary: This notice extends PIH 2008-35, same subject, previously extended for one-year periods by PIH 2009-42 and PIH 2010-48. The notice provides guidance to PHAs on preparing the market analyses for public housing property proposed for voluntary conversion to tenant-based assistance under 24 C.F.R. § 972.218(b). The market analysis evaluates recapitalization options, including how rehabilitation and the proposed future use of the property as public, assisted or market-rate may affect values.

Notice PIH 2011-59
Reporting of Administrative Fee Reserves (Oct. 27, 2011)

Summary: This notice reissues, with a few minor additions, PIH Notice 2010-7 (HA), provides specific guidance to public housing agencies (PHAs) on the use of the administrative fee reserves and reiterates guidance on PHA cash management and approved investment instruments. Further, this notice provides guidance on the reporting of administrative fee reserves and use when faced with insufficient funding. This notice responds to recommendations by the Office of the Inspector General to implement controls and requires reconciliation of administrative fee reserves. ■