Strategies for Opposing Termination of Subsidized Housing

Friday, September 16, 2016

Albany Marriott

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and the Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Strategies for Opposing Termination of Subsidized Housing
Friday, September 16, 2016 | New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Strategies for Opposing Termination of Subsidized Housing

Program Code: FRIHOUB2

Program Location: Albany Marriott - Albany, NY

Program Date: September 16th 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
John Herrmann	☐	☐	☐	☐	☐	☐	☐	☐
David Kagle	☐	☐	☐	☐	☐	☐	☐	☐
Addrana Montgomery	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

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_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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NYSBA 2016 LEGAL ASSISTANCE PARTNERSHIP CONFERENCE

Albany, New York September 16

Preserving Subsidized Housing CLE

1.5 MCLE credits in Areas of Professional Practice for both experienced and newly-admitted attorneys

Panelists: John Herrmann, David Kagle, and Addrana Montgomery

I. Preserving Project-Based Section 8 (PBS8) Buildings (Presented by John Hermann and Addrana Montgomery

Sources: Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA) & HUD Section 8 Renewal Policy Handbook

A. The importance of subsidized housing to low-income individuals and families

B. Overview of Subsidized Housing Models
   a. HUD Subsidy Programs (Below Market Interest Rate (Section 221(d)(3) and (5), 202 of the National Housing Act); Interest reduction payments Under Section 236; Section 8 (42 USC § 1437, New Construction, Substantial Rehab); Rural Housing financed multi-family housing (Section 515 and 521); Loan Management Set Aside; Housing Choice Vouchers
   b. Public Housing
   c. Low Income Housing Tax Credit (LIHTC)

C. Preservation Risks
   a. Opt Outs
   b. Prepaid Mortgages
   c. Congress & HUD may fail to appropriate sufficient funds to fulfill contract obligations
   d. Conversion from Project-Based to Mark to Market restructuring
   e. Substandard Housing (Habitability Issues)
      i. Loss of units due to substandard and systemic maintenance conditions
         1. Failing HUD REAC scores
   f. Elderly/Handicapped

D. Tenant Advocacy and Organizing
   a. Right to Organize
      i. Tenants & Organizers have right to organize in building
      See, 24 CFR § 245.5115 (attached as Appendix 1)
      ii. Building owners suppress tenant organizing

E. Legal Toolkit
   a. Opt-Outs Prevention
      i. Owner refusal to renew expiring PBS8 Contract
      ii. Challenge Section 8 Opt-outs
         1. Substantive and procedural requirements

a. Reference: Chapter 8, **HUD Section 8 Renewal Policy Guidebook (attached as Appendix 2)**

2. Tenants & Advocates must rely on patchwork of restrictions and incentives in laws, policies and guidelines
   a. Additional federal, state, local subsides
   b. Local zoning or land use requirement
3. Violation of Federal notice requirements
   a. 1-year notice to tenants
      See, 42 USC § 1437(c)(8)(A) (attached as Appendix 3)
   b. Deficient notice is grounds for opt-out preclusion
      i. Prospect Heights Brooklyn apartment building http://www.law360.com/articles/575498/brooklyn- tenants-sue-landlord-hud-in-section-8-row; H:\NYSBA Partnership Confernce 2016\CLE Articles\Article_BK Tenants Sue LL.pdf

      http://nypost.com/2014/09/09/landlord-trying-to-swap-renters-for-rich-white-tenants-suit/; H:\NYSBA Partnership Confernce 2016\CLE Articles\Article_LL trying to swap renters for rich white tenants.pdf

   c. Sample 1-year notice letter to tenant
      See, Sample Notification Letters excerpted from HUD Section 8 Renewal Policy Guidebook (attached as Appendix 4)

b. Tenant/Organizer Advocacy
   i. Demand letters
      1. Tenant empowerment
      2. Repair conditions/habitability issues
      3. **See, Sample Demand letter (attached as Appendix 5)**
   ii. Tenants Right of Purchase
      1. Title 6 Program: Tenants collectively buy the building from the owner **(See, NHLP *A Guide for Residents About the First Nine Months of the Title 6 Program*, available at http://nhlp.org/files/08%20On%20Your%20Mark.pdf)**
      2. New York City Local Law 79 See, NHLP Bulletins on LL79 **(attached as Appendix 6)**

c. Community Benefits Agreements (CBA)
   i. Multiparty agreement between tenants and landlord/developer where tenants agree to development in exchange for tenants/community benefits

See, Laura Flanders, *#Communitybenefits: A Bronx Tale* (attached as Appendix 7)
See, Caribe Gardens Community Benefits Agreement (attached as Appendix 8)

   ii. Identify tenant/community leverage

Anti-Eviction Strategies and Defenses for Section 8 Voucher Holders

I. Procedural Defenses to Terminations
   A. Defective termination notices / procedures
      i. Regulations set out permissible grounds to terminate specific types of subsidized housing.
         a. Spreadsheet
         b. HUD Handbook 4350.3, Chapter 8
         c. USDA RD Handbook 2-3560 Chapter 6.32 et seq.
      ii. These regulations and handbooks also establish rules for content of termination notices and specific procedural protections.
      iii. Summary proceedings for subsidized premises, which are based on defective notices, should be dismissed because termination of HUD subsidized housing requires compliance with both HUD regulations and handbook:
         a. Valley Dream Housing Co., Inc. v. Albano, 28 N.Y.S.3d 585 (Dist. Ct. Nassau 2016):

> In the case at bar, Petitioner's Notice to Terminate fails to comply with the Model Lease, HUD Handbook, and 24 C.F.R. Sec. 247.4. The Notice to Terminate only informs the Respondent that the Petitioner will commence removal of Respondent's property which would be placed in storage. The Notice to Terminate fails to inform the Respondent that Respondent may present a defense to Petitioner's commencement of a summary proceeding to terminate the Lease in court.
>
> As such this action is dismissed without prejudice. Petitioner may commence another proceeding in compliance with the foregoing.

         b. See also, Southeast Grand Street Guild HDFC, Inc. v. Holland, 27 Misc.3d 809 (Civ. Ct. NY County 2010)

c. Sample Pleading I: Landlord gave termination notice based on claim that client allowed individual who is on "Barred List" onto the premises. However, after a conference with the landlord, we learned that the Barred List was not established pursuant to the protocol set out in the "House Rules," which requires communications from the Local Police Department to determine who is barred from the premises. The property manager disclosed that she determined the contents of the list in her sole discretion, and insists that she has the right to do so, despite the fact that there is not written lease term or rule permitting this. Filed suit alleging breach of contract, violation of federal regulations and due process deprivations in "Barred List" procedures. We hope that this will allow us to void both the termination notice and the overbroad "Barred List" procedure as it is written. As noted above, landlords must comply with all regulatory requirements, and may only terminate a lease where there is an enumerated ground for doing so. As will be discussed under "Yellowstone injunctions," this approach also allows us to litigate the issue in Supreme Court rather than the local justice court, which is less technically oriented with regard to regulatory requirements.

B. Acceptance of rent

i. Acceptance of rent after effective date of termination notice but before initiation of proceeding waives termination notice and reinstates tenancy. ATM Four, LLC v. Doe, 37 Misc.3d 1208(A) (Dist. Ct. Nassau 2012); Associated Realties v. Brown, 146 Misc.2d 1069 (NYC Civ. Ct. 1990); B.G. Smith Real Estate v. Byrne, 3 Misc.2d 559 (App. Term 1st Dept. 1952); Roxborough Apt. Corp. v. Becker, 176 Misc.2d 503 (Civ. Ct. New York City 1998).

ii. Initiation of proceeding is service of pleadings. 92 Bergenbrooklyn, LLC v. Cisarano, 50 Misc.3d 21 (Sup. Ct. App. Term 2d, 11th, 13th 2015)

iii. Acceptance of rental subsidy may constitute acceptance of rent, invalidating termination notice.

a. Greenwich Gardens Assoc. v. Pitt, 126 Misc.2d 947 (Dist. Ct. Nassau 1984):

> In accordance with the relevant statute, regulations and case law as cited above, this court finds that housing assistance payments made by HUD on behalf of a section 8 tenant must be considered to be payments of rent. A landlord cannot accept the major share of the rent from HUD, reject the tenant's share, yet maintain that rent has not been accepted. Consequently, the petitioner's acceptance of the housing assistance payment made on behalf of the

> respondent for the month of September 1984, which constituted approximately 80% of the total rent for the unit, must be deemed a waiver of the notice of termination because it was accepted after the termination date set forth in the notice and before the commencement of this proceeding.

b. *See also*, Woodridge Homes, Ltd. Partnership v. Gregory, 205 N.C. App. 365 (NC 2010).
c. *But see*, Macleay Woods Housing Co., Inc. v. Franks, 16 Misc.3d 1136(A) (Cty. Ct. New Rochelle 2007):

> In the instant case, it is undisputed that the Tenant's May Payment, both tendered by Tenant herself and Section 8, that pertained to the post termination period were promptly returned once identified by Petitioner a process that took roughly 14 days. Under the circumstances described above and in the motion papers, the Court finds that such a delay was not unreasonable, and that the Petition should not be dismissed on that ground.

d. *But see*, Midland Management Co., v. Helgason, 630 N.E. 2d 836 (IL 1994), holding that Sec 8 payments are not rent so acceptance of payment does not vitiate notice.

C. Yellowstone Injunction
   i. Where a residential tenant is entitled to an opportunity to cure an alleged default, the tenant may seek an injunction extending the time to cure the alleged defect and also allowing an opportunity to challenge the basis of the alleged default. Hopp v. Raimondi, 51 A.D.3d 726 (2nd Dept. 2008).
   ii. Sample pleading 2: Subsidized landlord gave termination notice to client, alleging violations including claim that client had unauthorized occupant, and was in rent default. The client's boyfriend had been living in the unit, but had not been permitted to join the lease, due to allegedly poor credit history. Further, the landlord had been refusing current rent payments from Social Services, and not told client, thereby leading to most of the rent arrears. Obtained a Temporary Restraining Order on request for Yellowstone injunction, which allowed us to challenge the merits of the notice outside of Town Court and outside of the time constraints inherent in a summary proceeding. The landlord's attorney took the time to review the relevant statute and ultimately counseled his client that they had to allow the challenged occupant to remain in the home. This allowed settlement of the rent issue as well.
      a. Yellowstone cases may be effective because

1. They allow more time to develop substantive legal challenges to landlord's conduct;
2. They allow more time to cure any actual default;
3. They offer you an opportunity to litigate your case in in Supreme Court; and
4. They allow you to frame your case as an offensive one, challenging your landlord's wrongful conduct.

II. Presenting substantive defenses to terminations

A. Terminations based on alleged criminal activity

i. Subsidized housing regulations always permit terminations for specific criminal or drug-related activity.

a. Drug related:

1. 24 C.F.R. § 5.858: The lease must provide that drug-related criminal activity engaged <u>in on or near the premises by any tenant, household member, or guest,</u> and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for you to terminate tenancy. In addition, the lease must allow you to evict a family when you determine that a <u>household member is illegally using a drug or when you determine that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents</u>.

b. Other criminal allegations:

1. 24 C.F.R. § 5.859: Threat to other residents. The lease must provide that the owner may terminate tenancy for any of the following types of criminal activity by a <u>covered person</u>:
    1) Any criminal activity that threatens the <u>health, safety, or right to peaceful enjoyment</u> of the premises by other residents (including property management staff residing on the premises); or
    2) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises.

c. The landlord does not need an arrest or conviction to terminate a tenancy 24 C.F.R. § 5.861

1. Landlords often think this means that an arrest is sufficient to terminate subsidized housing.
2. But evidence of an arrest is insufficient to prove the crime occurred: <u>220 West 42 Associates v. Cohen, et al.</u>, 60

Misc.2d 983 (Sup. Ct. App Term 1969) ("The arrests did not establish the crimes").

3. Tenants may be accountable for the conduct of others:
    1) 24 C.F.R. § 5.100: Guest, only for purposes of 24 CFR part 5, subparts A and I, and parts 882, 960, 966, and 982, means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. The requirements of parts 966 and 982 apply to a guest as so defined.
    2) 24 C.F.R. § 5.100: Covered person, for purposes of 24 CFR 5, subpart I, and parts 966 and 982, means a tenant, any member of the tenant's household, a guest or another person under the tenant's control.

d. But note that victims of domestic violence have specific protections (e.g. 24 C.F.R. § 5.2005)

B. Discovery procedures under C.P.L.R. § 408:
    i. C.P.L.R. § 408: Notice to admit permitted as of right
    ii. Other disclosure by motion, must show "ample need" for disclosure, see New York University v. Farkas, 121 Misc.2d 643 (N.Y. Civ. Ct. 1983) and Smilow v. Ulrich, 11 Misc.3d 179 (Civ. Ct. NYC 2005) for standard:

> [T]his court finds that respondent has established ample need to obtain the requested documents. The information sought relates directly to respondent's defense: petitioner's lack of good faith. The issue of "good faith" is often in dispute and constitutes a tenant's main defense. That an owner's subjective intent is within the owner's sole possession is critical in granting disclosure under CPLR 408 to delineate material facts.
>
> The documents respondent requests bear directly on the disputed facts and are carefully tailored in scope to address those facts. For example, respondent's document request relates to plans for the building renovations, and petitioner's other properties are relevant on the issue of good faith—whether he will convert the building into a single-family home. As such, respondent's request does not constitute a "fishing expedition," as petitioner characterizes it.

III. Defending Housing Choice Voucher terminations
    A. Right to an informal hearing 24 C.F.R. § 982.555, http://www.nyshcr.org/Publications/Section8AdminPlan/

B. Proper party to be hearing officer:
   i. 24 C.F.R. § 982.555(e)(4)(i): The hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.
   ii. The hearing officer is required to provide a written decision setting out the basis for her decision, which must be based on the preponderance of the evidence. 24 C.F.R. § 982.555(e)(6).

C. Hearsay
   i. Hearsay may provide substantial evidence in a Section 8 administrative hearing, provided there are factors assuring "the underlying reliability and probative value of the evidence. . . " Bosco v. Machin, 514 F.3d 1177 (11th Cir. 2008), *quoting* U.S. Pipe and Foundry Company v. Webb, 595 F.2d 264 (5th Cir. 1979).
   ii. The determination of reliability of hearsay statements must be based on "whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable." Id., quoting J.A.M. Builders Inc. v. Herman, 233 F.3d 1350, 1354 (11th Cir. 2000). Id.
   iii. Statements contained in police reports and arrest records are particularly problematic.
   iv. *See also*, Woods v. Willis, 515 Fed. Appx. 471 (6th Cir. 2013); Ervin v. Housing Authority of Birmingham Dist., 281 Fed. Appx. 938 (11th Cir. 2008); Sanders v. Sellers-Earnest, 768 F.Supp.2d 1180 (Dist. Ct. Florida 2010); Miles v. Housing Authority of Cook County, 2015 IL App (1st) 141292, (Ill App. Ct. 2015).

IV. Other issues in preserving Housing Choice Vouchers

A. Conditions problems
   i. PHA is required to enforce Housing Quality Standards: 24 C.F.R. § 982.404(a)(2), (3), *but see*, 24 C.F.R. § 982.407 ("Part 982 does not create any right of the family, or any party other than HUD or the PHA, to require enforcement of the HQS requirements by HUD or the PHA, or to assert any claim against HUD or the PHA, for damages, injunction or other relief, for alleged failure to enforce the HQS.")
   ii. Clients should not withhold rent, but should instead advise PHA of conditions needing repair.
   iii. Agency may abate payments or terminate HAP contract 24 C.F.R. § 982.404(a)(2),(3).

iv. Landlord cannot evict tenant for agency's failure to pay 24 C.F.R. § 983.353(b)(4) and HAP agreement form Part C(5)(d).

V. Consequences of eviction or termination and how to avoid them

A. Evictions from subsidized housing may result in future denials

i. Project-based: 24 C.F.R. § 5.854 (household member evicted from federally subsidized housing in the past three years for drug-related criminal activity.

ii. Housing choice vouchers: 24 C.F.R. § 982.552 (e.g. eviction from federally subsidized housing in the last five years)

iii. If housing or subsidy is not likely to be preserved, seek resolution which will not result in actual eviction.

Strategies for Opposing Termination of Subsidized Housing

Biographies

John Herrmann

John is a volunteer community organizer with the Greater Syracuse Tenants Network. He began organizing in Project Based Section 8 Housing by joining the VISTA Affordable Housing Preservation Project for one year as an AmeriCorps VISTA and has continued to volunteer with the Tenants Network following completion of service on the project. He has aided in empowering tenants by connecting them with local elected officials and national HUD officials to assure their voices are heard. He is a graduate of Mercyhurst University in Erie, Pa.

David Kagle

David Kagle has been a Staff Attorney with Legal Assistance of Western New York since 2013. He was admitted to practice law in New York in 2009. His practice is focused on housing law issues, including evictions, subsidized housing and land contracts. David is also admitted to practice in the District Court for the Western District of New York, as well as the Bankruptcy Court of the same jurisdiction.

Prior to working at LawNY, David was an attorney for the Chemung County Department of Social Services, where he practiced primarily in Child Support Law. David is originally from the New York City Area, and now lives with his wife and two children in rural Caton, New York.

Addrana Montgomery

A native New Yorker, Addrana is a staff attorney with the housing team at the Community Development Project at the Urban Justice Center. She has championed local, NYC-wide, national and global social justice movements, including in South Africa, where she served as one of the youngest overseas election monitors for that country's first democratic election. During her clerkship at the Constitutional Court of South Africa, she worked on critical housing and land use cases which continue to inform her advocacy for affordable and decent housing for every New Yorker. As a 2015 AmeriCorps VISTA fellow, Addrana worked alongside tenant associations, advocates and organizers on preserving Project based Section 8 housing in New York City.

Addrana is a co-chair of the New York Chapter of the National Conference of Black Lawyers and is one of the organizers for the Law for Black Lives convening which took place in New York City last August. She is a graduate of Boston University and Howard University School of Law.

PRESERVATION ISSUES IN HUD SUBSIDIZED HOUSING

OUTLINE

I. OVERVIEW

A. US Department of Housing and Urban Development (HUD)

1. Since the 1970s, HUD has assisted low income housing through a combination of project based Section 8 subsidies and mortgage subsidies and insurance. Many projects have both Section 8 and federal mortgage subsidies; others participate only in one program. The affordability of tens of thousands of these units is now threatened by the expiration of Section 8 contracts, and owners' decisions to prepay their federally insured or subsidized mortgages. Once the Section 8 subsidy or subsidized mortgage is terminated, rents rise to market levels, and tenants are protected only by the issuance of "enhanced" Section 8 vouchers.

2. Although enhanced vouchers enable existing tenants to remain in their apartments indefinitely, as these tenants move, the apartments become unaffordable, and the community loses an essential housing resource. In addition, tenants in distressed projects may be required to move because their apartments do not meet federal Housing Quality Standards. The removal of federal restrictions also facilitates the sale of the properties to speculators, including private equity firms, who undermine the long term financial viability of the project by paying unrealistic prices, and incurring unaffordable debt which is then resold to unsuspecting investors as mortgage backed securities.

3. And although enhanced vouchers are less desirable than project based assistance, today tenants are faced with the prospect of expiring mortgages that may result in tenants receiving no additional assistance or additional rights to remain in their homes.

B. Advocacy

1. Advocates for HUD subsidized tenants therefore have three goals:

   a. to protect the long term affordability of the projects by extending Section 8 contracts and preventing prepayments wherever possible;

   b. to prevent speculators from purchasing the properties and promote transfers to responsible not-for-profits and other preservation purchasers; and

   c. to prevent displacement during the transition to enhanced vouchers, where it is impossible to preserve the project based subsidy.

C. Rental Assistance Demonstration Program ("RAD")

1. HUD has introduced a new preservation project known as the Rental Assistance Demonstration Program.

   a. RAD may have the potential to preserve projects as affordable through Project Based Vouchers ("PBVs")

   b. However, RAD is fairly new and advocates around the country are still discovering ways in which PBV protect tenants and preserve projects as affordable.

II. GENERAL STATUTORY MANDATES

A. Types of Federally Subsidized Housing Distinguished

1. **Tenant-Based Subsidies**: The Section 8 Housing Choice Voucher Program provides portable rent subsidies (i.e., if the tenant moves, the subsidy follows the tenant) funded by HUD, but administered by local housing agencies. Governing law: 42 U.S.C. § 1437f(o); 24 C.F.R. Part 982; HUD Guidebook 7420.10G.

2. **Public Housing:** Units owned directly by local public housing agencies that administer the subsidies and receive payments from HUD. In NYC, public housing is owned by NYCHA. Governing law: 42 U.S.C. § 1437 et seq.; 24 C.F.R. Part 960 (Admissions and Occupancy) and Part 966 (Lease Requirements); NYCHA's TSAP (Tenant Selection Application Plan) and Management manual can be found on http://www.probono.net/.

3. **Project-Based Subsidies:** All HUD multifamily housing developments have rents payable by the occupants that are set lower than normal market rents because the rents are approved by HUD or a state agency because these developments have an "indirect" subsidy through a HUD financing program. Examples of the indirect subsidy (financing) programs are the "Section 202" program; the "Section 221" program, the "Section 236" program, and the "Section 811" program.

   a. In addition, each housing development will generally have *one or more* separate contracts for additional "direct" subsidies available to tenants in some or all of the units in the development.

   b. The Direct Subsidy Program

      i. The "direct" subsidy programs include:

         a) The Section 8 "project-based" programs (New Construction; Substantial Rehabilitation; and the Set-Aside program), as well as

         b) The Rental Assistance Program ("RAP" in Section 236 developments);

         c) The Rent Supplement Program (often in Section 221 developments);

         d) The Project Assistance Payment ("PAC" in Section 202 or Project Assistance Contract developments); and the Project Rental Assistance Contracts ("PRAC") subsidy (in Section 202 and 811).

      ii. If a tenant in a HUD multifamily development has a "direct" subsidy the household rent will *always* be based on the household income. If the tenant does *not* have a direct subsidy the rent will be based on a rent schedule approved for the development -- but as described below, in one case, namely Section 236 developments, the household income *may* affect the tenant share for the rent.

      iii. The "direct" subsidies are attached to the unit; tenants lose the subsidy if they move, but the subsidy is available to the next tenant. Subsidies are administered by the private landlords who receive payments directly from HUD.

B. Governing Law: 42 U.S.C. § 1437. HUD Handbook 4350.3
(http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4350.3**)**

1. Applies to all programs below except units subsidized under the Moderate Rehabilitation program.
2. Handbook 4350.3 does *not* apply to the subsidy of tenants in units assisted through a separate Public Housing Agency ("PHA") under the Housing Choice Voucher program.
3. Section 8 Moderate Rehabilitation 24 C.F.R. Part 882
4. Section 8 Substantial Rehabilitation 24 C.F.R. Part 881
5. Section 8 New Construction 24 C.F.R. Part 880
6. Section 236 17 U.S.C. 1701 et seq.; 24 C.F.R. Part 236
7. RAP and Rent Supplement subsidies 24 C.F.R. 236.701 et seq.

C. Identifying The HUD Program of a Project-Based Housing Subsidy

1. To determine which HUD program a particular project-based housing development is subsidized under, there are a couple of places this data is kept.
   a. The most up to date is on HUD's website: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/mfdata Download the database called Multifamily Assistance and Section 8 Contracts Database.
   b. Further, there is a newish database called National Housing Preservation Database created by the Public and Affordable Housing Research Corporation and the National Low Income Housing Coalition. http://preservationdatabase.org/
   c. Lastly, you can try The Empire Justice Center's Excel Database which will allow you to identify the specific housing program and direct subsidies applicable to individual housing developments (listed by county).
      i. The database, which also includes further program descriptions and a separate page identifying New York State Mitchell-Lama developments, is called "**HUD MULTIFAMILY HOUSING DEVELOPMENTS IN NEW YORK STATE**," and is available at: http://www.empirejustice.org/issue-areas/housing/state-federal-assisted-housing/online-database.html
2. In addition, there is a hybrid-program called the "Project-Based Voucher" program in which subsidies are allocated to a particular development by the PHA running the Voucher program. Tenants who move from the development, with certain limitations, can be issued a new voucher by the PHA. The general Housing Choice Voucher regulations found at 24 C.F.R. Part 982 apply with the exception of special provisions found at 24 C.F.R. Part 983.

III. MANAGEMENT AND DISPOSITION OF MULTIFAMILY PROJECTS

A. All HUD decisions regarding management and disposition of multifamily housing projects owned by HUD or subject to a HUD mortgage are at least arguably subject to the

standards and goals in the Housing and Community Development Act of 1978, 12 U.S.C. § 1701z-11:

1. The Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects that are owned by the Secretary or that are subject to a mortgage held by the Secretary in a manner that ...

a. [(3)] will, in the least costly fashion among reasonable available alternatives, address the goals of—

i. [(A)] preserving certain housing so that it can remain available to and affordable by low-income persons;

ii. [(B)] preserving and revitalizing residential neighborhoods;

iii. [(C)] maintaining existing housing stock in a decent, safe, and sanitary condition;

iv. [(D)] minimizing the involuntary displacement of tenants;

v. [(E)] maintaining housing for the purpose of providing rental housing, cooperative housing, and homeownership opportunities for low-income persons;

vi. [(F)] minimizing the need to demolish multifamily housing projects;

vii. [(G)] supporting fair housing strategies; and

viii. [(H)] disposing of such projects in a manner consistent with local housing market conditions.

2. 12 U.S.C. § 1701z-11(a).

a. *See*, *Dean v. Martinez*, 336 F. Supp. 2d 477 (D. Md 2004), the District Court nullified HUD's disposition of a housing project based on HUD's failure to consider the goals set forth in 12 U.S.C. 1701z-11, including "preserving certain housing so that it can remain available to and affordable by low-income persons," "preserving and revitalizing residential neighborhoods," "maintaining existing housing stock in a decent, safe, and sanitary condition," "minimizing the involuntary displacement of tenants." Finding that HUD permitted demolition of the project by focusing on costs to the complete exclusion of other factors, the Court annulled HUD's determination and remanded the matter to the agency.

b. *See* also, *Cheathem v. Donovan*, 2009 WL 2922150 (E.D. Mich 2009), HUD enjoined from relocating tenants and ordered to comply with the Multifamily Housing Property Disposition Reform Act ("MHPDRA") where HUD had an obligation under the MHPDRA to maintain full occupancy to the "greatest extent possible" and had failed to do so.

c. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980), HUD's sale of project would constitute an abuse of discretion if it contravened the goals of the National Housing Act;

d. *United States v. Winthrop Towers*, 628 F.2d 1028, 1034 (7th Cir. 1980), HUD must act consistently with the national housing policy declared by the Housing Act;

e. *Walker v. Pierce*, 665 F. Supp. 831, 843 (N.D. Cal. 1987), HUD enjoined from sale of mortgages that may violate Administrative Procedure Act ("APA").

3. However, HUD has successfully argued that it has been given blanket discretion to disregard its obligations under Section 1701z and other statutes by the 1996 enactment of the "flexible authority" provision, 12 U.S.C. § 1715z-11a, which states that:

a. "the Secretary may manage and dispose of multifamily properties owned by the Secretary .... and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law."

b. At least two courts have agreed with HUD. *Chicago ACORN v. HUD*, 05 Civ. 3049 (N.D. Ill. Oct. 5, 2005); *GP UHAB HDFC v. Jackson*, 05 Civ. 4830 (E.D.N.Y. Feb. 7, 2006).

c. But *see*, *Cheatham v. Jackson*, 2007 WL 4572482 (E.D. Mich. 2007), flexible authority provision does not divest court of power to review HUD's actions as mortgagee-in-possession; *Massie v. HUD*, 2007 WL 674597 (W.D. Pa. 2007), HUD's discretion is circumscribed by duty to follow its own regulations.

d. And see *Ku v. HUD*, 508 Fed Appx. 14, 2013 WL 263034 (2d Cir. 2013), In *Ku*, HUD sold a Section 202/Section 8 assisted senior rental property in Newburgh, NY at a restricted foreclosure auction. At the sale, eligible purchasers were restricted to Housing Development Corporations ("HDCs"), public entities, and lienholders (including HUD). HUD was the high bidder (for the mortgage balance), and took title for immediate re-sale to the City of Newburgh, which then transferred the property to a preservation purchaser. Ku was ineligible to bid under these conditions, and sued HUD after the sale, arguing that HUD had illegally restricted the sale and disqualified him from bidding. The District Court dismissed Ku's case, accepting HUD's broad argument that the flexible authority statute made HUD's action unreviewable by the court and the Ku's claim was otherwise barred by sovereign immunity.

i. On Ku's appeal, HUD once again argued that its decision was unreviewable by any court. Tenant groups, represented by Legal Services NYC, filed an amicus supporting HUD's use of restricted auctions under its existing statutory authority. However, the amicus sought to ensure that the Second Circuit did not ratify the reasoning of the District Court or HUD – that the Flexible Authority statute precludes judicial review, which would damage future preservation efforts whenever HUD makes bad decisions. Thankfully, the court wisely did not endorse such broad reasoning and held that HUD's exercise in discretion in restricting the auction was entirely reasonable.

IV. SECTION 8 OPT-OUTS

A. <u>Contract Renewals</u>

1. Federal law generally does not require owners to renew project-based Section 8 contracts after their 20 or 30 year terms. However, owners are required to give notice to their tenants that they do not intend to renew the expiring contract.

2. "Not less than one year before termination" of a project-based Section 8 subsidy, an owner who elects not to renew an expiring contract is required to "provide written notice to [HUD] and the tenants involved of the proposed termination." 42 U.S.C. § 1437f(c)(8).

3. The notice must be served by delivery directly to each unit in the project or mailed to each tenant. "Section 8 Renewal Policy," HUD, January 15, 2008, § 11-4(B)(2).

a. HUD is mandated to review the notice to ensure that the owner provided "an acceptable one-year notification to the tenants" and HUD. "Section 8 Renewal Policy," HUD, January 15, 2008, § 11-4(B)(2).

b. If the owner's notice is not adequate for any reason, the owner must provide an acceptable one-year notice to HUD and the tenants. During the one year period after adequate notice is provided tenants may not be evicted and tenants' rent shares may not be increased. 42 U.S.C. § 1437f(c)(8).

c. If a new notice is required, HUD must offer the owner a short-term renewal contract to cover the notice period. "Section 8 Renewal Policy," HUD, January 15, 2008, § 8-1(A)(3)(b)(ii).

i. However, if the owner does not accept a short-term project based renewal, the tenants' remedy is unclear.

a) The owner cannot be forced to renew the project based contract, but can be required to bear any loss resulting from its inability to collect more than 30 percent of tenants' income as rent until one year after a proper notice is issued.

b) In *Park Village Apartments Tenants Ass'n v. Mortimer Howard Trust*, 2007 WL 519038 (N.D. Cal. 2007), *aff'd* in unpublished decision, the court issued a preliminary injunction barring the owner from evicting tenants, or increasing rents from their subsidized levels, where the owner had failed to give tenants the mandatory one year notice.

c) In *People to End Homelessness, Inc. v. Develco Singles Apartments Assoc.*, 339 F.3d 1 (1st Cir. 2003), however, the Circuit Court held that regardless of the owner's violation of notice requirements, HUD was mandated to issue vouchers upon the expiration of the project based contract, even though the landlord would reap the reward for its illegal conduct.

d) In *215 Alliance v. Cuomo*, 61 F. Supp. 2d 879 (D. Minn. 1999), the court ruled that HUD had a duty to enforce the notice requirement, but did not reach the issue of what relief is appropriate based on inadequate notice.

1) *See* also, *Brighton Village v. Malyshev*, 2004 WL 594974 at *5 (D. Mass. 2004), holds that HUD must follow mandate of Section 8 notice statute, but tenants were not seeking continuation of project-based contract.

e) The only case to restore a project to the subsidy program based on inadequate notice is *Lifgren v. Yeutter,* 767 F. Supp. 1473 (D. Minn. 1991).

f) Litigation under the notice requirement therefore may obtain relief for tenants who are ineligible for enhanced vouchers, but is otherwise unlikely to prevent the conversion of the project.

V. RESTRICTIONS ON PREPAYMENT AND/OR TRANSFER OF TITLE

A. Prepayment Approval

1. Where owners are, for any reason, required to obtain HUD approval for prepaying their mortgages, the protections of Section 250 of the National Housing Act apply. That statute provides:

a. "During any period in which an owner of a multi-family rental housing project is required to obtain the approval of the Secretary for prepayment of the mortgage, the Secretary shall not accept an offer to prepay the mortgage on such project or permit a termination of an insurance contract pursuant to section 229 of this Act [12 USCS § 1715t] unless—

i. [(1)] the Secretary has determined that such project is no longer meeting a need for rental housing for lower income families in the area;

ii. [(2)] the Secretary (A) has determined that the tenants have been notified of the owner's request for approval of a prepayment; (B) has provided the tenants with an opportunity to comment on the owner's request; and (C) has taken such comments into consideration; and

iii. [(3)] the Secretary has ensured that there is a plan for providing relocation assistance for adequate, comparable housing for any lower income tenant who will be displaced as a result of the prepayment and withdrawal of the project from the program." 12 U.S.C. § 1715z-15(a).

2. HUD's failure to follow the Section 250 procedures could violate the APA. *Brighton Village Nominee Trust v. Malyshev*, 2004 WL 594974 (D. Mass. 2004); *Rubanenko v. Martinez*, 2002 WL 2008107 (E.D. Cal. 2002).

3. Unfortunately, however, most federal programs generally do not include restrictions on mortgage prepayment. *See*, Housing Opportunity and Extension Act of 1996 ("HOPE"), Pub. L. 104-120, 110 Stat. 834; Pub. L. 104-134, 110 Stat.1321-267; Pub. L. 105-276, 112 Stat. 2486. The main exceptions are Section 236 or 221(d)(3) projects owned by not-for-profit developers, and properties with Rent Supplement or RAP contracts. *See*, former 24 C.F.R. § 221.524; HUD PIH Notice 06-11. Prepayment restrictions may also be set forth in the mortgage note, Rent Supplement Contract, or

Financial Assistance Contract, which may be obtained from HUD through an FOIA request. *Cf., Kukui Gardens Assoc. v. Jackson*, 2007 WL 128857 (D. Hawaii 2007).

4. Arguably, approval for prepayment may be implicitly required where the funds for prepayment will come from a proposed sale of the property. Although the landlord and HUD may argue that the sale requires no approval because it will be contemporaneous with the prepayment, the prepayment could not be contemplated without a pre-existing contract of sale, which is subject to HUD approval.

5. Many mortgages and regulatory agreements provide that the property may not be conveyed without the prior written approval of the Secretary of HUD. Land Disposition Agreements and other recorded instruments may also prohibit owners from conveying the property without the consent of HUD or of the City of New York. Such instruments may be enforceable by tenants as Third Party Beneficiaries. *Noble Drew Ali Plaza Tenants v. Noble Drew Ali Plaza Housing*, N.Y.L.J. April 2, 2003, p. 23 c.3 (Sup. Ct. Kings Co.); *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1980); *Zamiarsky v. Kozial*, 18 A.D.2d 297, 301, 239 N.Y.S.2d 221 (4th Dep't 1963); N.Y. Jur. Deeds, § 154. But *see, Mendel v. Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783, 811 N.Y.S.2d 294 (2006) (LDA explicitly negates 3rd party enforcement). *See* also *Branch v. Riverside Park Community LLC*, 74 A.D.3d 634, 903 N.Y.S 2d 390 (1st Dep't 2010) (Tenants failed to establish that they qualified as third-party beneficiaries of the ground lease but even if they could show standing, the ground lease lacked language requiring that publicly assisted housing be provided for entire term of lease).

6. HUD "may not approve the sale of any subsidized project that is subject to a mortgage held by the Secretary unless such sale is made as part of a transaction that will ensure that the project will continue to operate, at least until the maturity date of the loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the proposed sale of the project." 12 U.S.C. § 1701z-11(k)(2).

7. In addition, HUD's regulations on "Transfers of Physical Assets" require a prospective purchaser to certify that, in the last ten years, he has not been a principal in a project that has defaulted in its obligations to HUD. 24 C.F.R. § 200.219(2)(I).

   a. Previous mortgage defaults, violations of Regulatory Agreements, or noncompliance with any other obligation to HUD that has not been corrected, are cause for HUD to disapprove the applicant unless mitigating factors permit the agency to make a favorable risk determination. 24 C.F.R.§ 200.230.

8. State law may also require approval of sales by local government entities. P.H.F.L. § 122, for example, provides that a redevelopment company organized pursuant to Article 5 of the Private Housing Finance Law shall not "have the power to sell the real property constituting the project ... without the consent of the local legislative body."

9. Section 511 of the N.Y. Not-for-Profit Corporation Act, provides that a Not-for-Profit corporation may dispose of substantially all of its assets only with the permission of the Supreme Court. In order to approve such an application, the Supreme Court must

determine that "the consideration and the terms of the transaction are fair and reasonable," and that "the purposes of the corporation will be promoted." *Matter of Manhattan Eye, Ear & Throat Hospital (MEETH),* 186 Misc.2d 126, 715 N.Y.S.2d 575 (Sup. Ct. N.Y. Co. 1999).

10. Mortgage prepayments may therefore sometimes be prevented either by stopping the proposed sale which will generate the funds for prepayment, and by arguing that HUD's approval authority for the sale amounts to authority over the prepayment as well, implicitly triggering the requirements of Section 250.

11. Owners must always give notice at least 150 days prior to proposed mortgage prepayment. Section 219 of the National Housing Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998).

VI. ENHANCED VOUCHERS ("EVs")

Tenants in projects that have successfully opted out of subsidy contracts are issued "enhanced vouchers" that they may use to move or to remain in their current apartments. If used in place, the voucher will cover the actual apartment rent, even if in excess of the usual payment standard utilized by the local PHA. Federal law guarantees that families renting at the time of the termination of the project-based subsidy contract have the right to remain in their units, using enhanced vouchers, for so long as the apartments qualify for assistance and the tenants remain eligible for the vouchers.

A. *See*, 42 U.S.C. § 1437f(t)(1)(b):

1. "enhanced voucher assistance under this subsection for a family shall be voucher assistance under subsection (o), except that under such enhanced voucher assistance ... (B) the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project ..."

B. *See*, HUD Notice PIH 2001-41, November 14, 2001, part II (B):

1. "[a] family that receives an enhanced voucher has the right to remain in the project as long as the units are used for rental housing";

2. In February 2008, HUD issued Notice PIH 2008-12, which reversed the position HUD on overhoused families set forth PIH Notice 2001-41. PIH Notice 2008-12 clearly establishes that a family is entitled to remain at the same project where the family lived when the eligibility event occurred without an arbitrary time limit on enhanced voucher assistance at the dwelling unit rent level, so long as no appropriate size unit is currently available in the project. Paragraph 5 of PIH 2008-12 states:

a. If there is no appropriate size unit currently available for the family in the project, the PHA [Public Housing Authority] executes a voucher HAP [Housing Assistance Payment] on behalf of the family for the oversized unit, provided the rent is reasonable and the unit complies with all other voucher program requirements such as the housing quality standards. The enhanced voucher housing subsidy is based on the gross rent for the oversized unit. The subsidy calculation will continue to be based on the gross rent (including subsequent rent

increases) for the oversized unit until an appropriate size unit in the project becomes available for occupancy by the family.

C. *See*, HUD Notice H 2012-3, February 24, 2012

1. "a family that receives an EV has the right to remain in a Multifamily housing project in which the family was residing on the date of the eligibility event, as long as the housing is offered as rental housing and is otherwise eligible for Housing Choice Voucher assistance (e.g. the rent is reasonable, the unit meets Housing Quality Standards ("HQS"), etc.")

D. *See*, HUD Section 8 Renewal Policy Guidebook, Ch. 11, § 3:

1. "tenants who receive an enhanced voucher have the right to remain in their units as long as the units are offered for rental housing when issued an enhanced voucher sufficient to pay the rent charged for the unit, provided that the rent is reasonable. Owners may not terminate the tenancy of a tenant who exercises this right except for cause under Federal, State, or local law."

E. Letter to Owners of Tenants' Rights

1. Recently HUD issued a letter reminding owners that the tenant's right to remain continues past the first year. http://portal.hud.gov/hudportal/documents/huddoc?id=EnhancedVoucherReminder.pdf

F. Enhanced Voucher Provisions

1. When an owner prepays an FHA-insured loan, EVs may be provided to tenants in units not covered by rental assistance under certain circumstances.

2. If a mortgage matures without prepayment, such assistance will not be provided to unassisted units. In these circumstances it might make sense to encourage owners to prepay the mortgages to provide assistance to tenants who would otherwise be left unprotected.

   a. To determine whether prepayment would trigger EVs, look at HUD Notice H 2012-3 Section III.

3. Tenants with project based Section 8 HAP contracts are entitled to EVs when the contract is terminated due to an opt-out.

4. Tenants with Rent Supp or RAP contracts may also be entitled to EVs but in more limited circumstances.

5. If a property has both Section 8 HAP contract and a Rent Supp contract and both contracts expire on the same day, the Rent Supp tenants will be entitled to EVs.

   a. *See* HUD Notice 2012-3 Section IV.

   b. However, Rent Supp and RAP tenants may be eligible for regular vouchers, subject to appropriations.

G. Cases Upholding Tenants' Rights

1. Courts have upheld tenants' rights to enforce Section 1437f(t) against recalcitrant landlords.

   a. *Estevez v. Cosmopolitan Assocs. L.L.C.*, 2005 U.S. Dist. LEXIS 29844, 2005 WL 3164146 (E.D.N.Y. 2005); *Jeanty v. Shore Terrace Realty Ass'n*, 2004

U.S. Dist. LEXIS 15773, 2004 WL 1794496 (S.D.N.Y. 2004). *Accord, Feemster v. BSA Limited Partnership*, 471 F.Supp.2d 87 (D.D.C. 2007), landlord must accept vouchers even if it plans to discontinue use as rental housing in future;

b. *Barrientos v. 1801-1825 Morton LLC*, Index No. 06-6437 (C.D. Cal. October 24, 2007, owner cannot refuse vouchers for "business reasons."

i. But *See Park Village Apartments Tenants Ass'n v. Mortimer Howard Trust*, 636 F. 3d 1150 (9th Cir. 2011), Section 1437f(t) provides tenants a right to remain in their previously subsidized apartments in the absence of just cause for eviction and that tenants with enhanced vouchers cannot be required to pay more than their portion of the rent as defined by the applicable statutes and regulations. However, as long as owner is barred from evicting tenants and barred from raising their rents to market, the owner cannot be ordered to sign HAP contracts with PHA and thus accept enhanced vouchers.

2. Despite the guarantees of Section 1437f(t), tenants are sometimes precluded from receiving enhanced vouchers if they cannot comply with PHA eligibility criteria, e.g. a criminal background check. In addition, tenants may be unable to use the voucher in their current apartments if the apartment fails a housing quality inspection. Landlords may be precluded from collecting rent in excess of 30 percent of tenant income where the apartment does not comply with HQS.

H. Additional Information

1. Congress established Enhanced Vouchers as tenant protection vouchers in properties that pre-paid assisted mortgages or opted out of HAP contracts. However, there is no similar program for unassisted units in projects facing mortgage maturities or expiration of Use Restrictions. HUD has set aside in the last two fiscal years, funds to provide either EVs or Project Based Vouchers for tenants who meet the criteria of this program. There is five million dollars available nationwide for properties maturing in or prior to FY 14 (September 30, 2014). See HUD Notice H 2014-13. The owners must apply to HUD for these vouchers.

2. Tenants are eligible if the property they live in experience a qualifying event before or during FY 14. Qualifying events are the maturity of a HUD insured, HUD held or Section 202 loan that required HUD's approval prior to prepayment, the expiration of a rental assistance contract for which tenants were not eligible for EV or tenant protection assistance under other laws, or the expiration of affordability restrictions accompanying a HUD administered mortgage or preservation program. Additionally, the building must be located in a low vacancy area.

a. According to HUD, the low vacancy areas in NY State are: Albany County, New York City, Clinton County, Columbia County, Dutchess County, Nassau County, Orange County, Putnam County, Rockland County, Saratoga County, Suffolk County, Tompkins County, Ulster County, Westchester County, Wyoming County. Please look at HUD Notice H 2014-13 to determine whether there is a property where the tenants might benefit for this program.

VII. CONTRACT RENEWALS: OWNER INDUCEMENTS AND TENANT RIGHTS

A. Multifamily Assisted Housing Reform and Affordability Act (MAHRAA)

1. MAHRAA, Public Law 106-76, 113 Stat. 1110, created several programs designed to induce owners to renew their project based contracts. Under the Mark-to-Market (M2M) and Mark-Up-to-Market programs, HUD will restructure the project's mortgage to insure that the budget will balance at market rents.

2. Tenants have the right to participate in the M2M process, and violation of these rights may give rise to a cause of action. MAHRAA requires HUD to "establish procedures to provide an opportunity for tenants of the project, residents of the neighborhood, the local government, and other affected parties to participate effectively and on a timely basis in the restructuring process..." MAHRAA, Section 514(f).

3. "MAHRAA further requires HUD to "facilitate the voluntary sale or transfer of a property as a part of a mortgage restructuring ... with a preference for tenant organizations and tenant-endorsed community-based nonprofit and public agency purchasers..." MAHRAA, Section 516(e); 24 C.F.R. § 401.480.

4. Pursuant to HUD's implementing regulations, tenants must be given a notice that the owner intends to restructure under Mark to Market and be afforded an opportunity to provide comments. 24 C.F.R. § 401.500. Notices must be sent to each tenant and to any tenant organization for the project, as well as to the recipient of any Outreach and Training Grant (OTAG), and to other appropriate neighborhood representatives and affected parties. A notice must also be posted in the project. 24 C.F.R. § 401.501; HUD M2M Program Operating Procedures Guide, Section 3-9(C)(2). *See also*, M2M Operating Procedures Guide, Section 4-14 "Transfers of Physical Assets," (available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_19452.pdf)

5. If the restructuring plan "will not move forward for any reason, notice must be provided [to the tenants] that describes the reasons for the failure to move forward and the availability of tenant based assistance to tenants ... if project-based assistance is not renewed." 24 C.F.R. § 401.500(f)(2); Operating Procedures Guide, Section 3-9 (E). Tenants and other affected parties must also be afforded an opportunity to submit comments and to review documents related to the failed restructuring, including a market analysis and evaluation of the project's physical condition. 24 C.F.R. § 401.502.

6. In addition to the notice requirements, HUD's procedures mandate that at least two meetings be held with the tenants. The first must be scheduled at the inception of the Mark to Market process. 24 C.F.R. § 401.500(b)(2). The second meeting must be held after a draft restructuring plan has been prepared, or after a decision has been made that the "property be found ineligible or that development of the restructuring plan be discontinued." Operating Procedures Guide, Section 3-9 (C) & (D).

7. Where a project is ineligible for restructuring, HUD's procedures require the PAE to "prepare as complete a Restructuring Plan as possible, identifying problem areas and briefly identifying what, if anything, would resolve the problem [emphasis in original]." Operating Procedures Guide, Section 6-8 (A). Copies of this plan must be provided to tenants and other "stakeholders." *Id.* The purpose of promulgating such a provisional

plan is to "permit the owner, possible purchasers, and other stakeholders to identify issues and possible solutions more readily." *Id.*

B. <u>Owner's Right to Contract Renewal</u>

1. Particularly where a project is owned by a not-for-profit or by the tenants themselves, tenants may seek to enforce the owner's right to renew the project based subsidy contract in cases where HUD prefers a voucher conversion.
2. Section 524(a) of MAHRAA, provides that:
    a. upon termination or expiration of a contract for project-based assistance under section 8 ... the Secretary of HUD **shall**, at the request of the owner ... use amounts available for the renewal of assistance under section 8 ... to provide assistance for the project. [emphasis added]
    b. HUD may elect not to renew the contract only under circumstances delineated in Section 516(a) of MAHRAA and Chapter 13 of the HUD Section 8 Renewal Guide, e.g.: the Owner "has engaged in material adverse financial or managerial actions or omissions" at any of his projects, or "the project does not meet the physical condition standards for HUD housing that is decent, safe, sanitary, and in good repair, unless HUD determines the project will meet the standards within a reasonable time after renewal." HUD's decision not to renew the contract may be appealed by the owner. Renewal Guide, Section 13-1. During the pendency of the appeal, HUD must offer the owner a one year contract renewal. *Id.*, Section 12-1 (D)(3)(a).

C. <u>Preservation of 236 Interest Reduction Payments Mortgage Contracts through HUD's decoupling process.</u>

1. The 236 program is a mortgage subsidy or "Interest Reduction Payment" (IRP) which reduces the debt service payment by the project to approximately a 1% loan. The "decoupling" program allows the IRP to be retained and continued after the Section 236 mortgage is prepaid and refinanced. Decoupling is authorized under Section 236(e)(2) of the National Housing Act. After a decoupling, the development mortgage is HUD subsidized and often will also receive low income housing tax credits. Because the mortgage is prepaid during the refinancing, enhanced vouchers are triggered.
2. The owners must enter into a new Agreement for the IRP and a Use Agreement to maintain the project as low-income housing. The term of the Use Agreement must be at least 5 years beyond the term of the original contract. The rent structure will be maintained with Basic and Market rents. However, the project will also have Section 8 rents. The basic rents will be increased based on a budget-based increase methodology. The Section 8 rent will increase based on the procedures for Section 8 increases used by the PHA. *See* HUD Notice H 2013-25.

VIII. EXPIRING USE

A. <u>Project Based Vouchers</u>

1. The Project Based Voucher ("PBV") program is a program that is administered by a PHA that already administers a tenant based program. The PBV program's regulations

are found at 24 CFR part 983. In general, a PHA may use amounts provided under its tenant based annual contributions contract ("ACC") to enter into a housing assistance contract (HAP) and to attach assistance to a building (as opposed to providing purely tenant based assistance). Under the PBV program, no more than 20 percent of the funding available for tenant-based assistance under a PHA's ACC may be attached to buildings as PBV assistance. *See* PIH Notice 2013-27. Additionally not more than 25% of the apartments in the development may be assisted under a HAP for PBV unless the HAP contract is for single family properties or is for housing for elderly and/or disabled families or families receiving supportive services. *Id*.

B. <u>Rent Demonstration Project</u>

1. In 2012, Congress passed legislation to create a Rent Assistance Demonstration ("RAD") Project that would allow the conversion of public housing projects, certain multifamily HUD projects to either Project Based Section 8 or Project Based Vouchers. FY 2012 HUD Appropriations, Pub.L. No. 112-55, 125 Stat. 673. The primary justification the demonstration is to establish a more reliable funding base and to raise funds by mortgaging the property. RAD also allows the conversion of tenant protection vouchers or enhanced vouchers to PBV at certain privately-owned multifamily developments. HUD's current implementing Notice is HUD Notice PIH 2012-32 (HA), Rev-1 (July 2, 2013).

2. RAD has two components, the first component allows public housing and Moderate Rehabilitation properties to convert to long term Section 8 rental assistance contracts, the second component addresses HUD's legacy programs, Mod Rehab, Rent Supp and RAP. Mod Rehab, Rent Supp, and RAP need a new program Rent Supp and RAP contracts generally cannot be renewed on a long term basis and Section 8 Mod Rehabs, if they are renewed, cannot receive market rents so the properties need RAD for rehabilitation and preservation. These developments may convert to PBV, if any time after Oct. 1, 2006 or before December 31, 2014 (unless extended), tenants were or will be awarded tenant protection vouchers because of a termination of the rental assistance or the loss of affordability restrictions. RAD and Rent Supp are concentrated in a few states and 29% of the assistance in found in New York State.

3. If a multifamily HUD subsidized development converts, there are no caps on the number of units, no competitive selection, subject to availability of tenant protection vouchers. Residents must be consulted and comments solicited. No more than 50% of the vouchers may generally be project-based; up to 100% if the remaining units are for elderly or disabled or provide supportive services. A PHA must agree to administer the PBV contract and the contract will be for 15 years with renewal options. No household will be displaced or made to relocate due to conversion. No household will be subject to a rent increase due to conversion.

4. Additionally, it is possible to convert enhanced vouchers to PBVs. However, a tenant with an enhanced voucher cannot be required to relinquish the enhanced voucher for a PBV. If a tenant entitled to an enhanced voucher decides to remain in the unit with the enhanced voucher, the unit is not eligible for PBV assistance. The owner cannot refused

to accept an enhanced voucher under these circumstances. Similar to EV's tenants must live in the right sized unit. However, the family may remain in their apartments until an appropriate sized unit becomes available. Where the underoccupied individual is not elderly, disabled or displaced, the individual cannot receive a PBV but instead will be provided with a tenant protection voucher.

5. There are advantages to PBV's. Tenants pay 30% of their income toward rent. Additionally, if a tenant leaves, the unit remains affordable. Additionally, unlike EV's, when a tenant's income decreases, the tenant is entitled to a decrease in rent.

6. **Additional Information**

a. HUD website: http://portal.hud.gov/hudportal/HUD?src=/RAD

b. PIH 2012-32, REV-1 (July 2, 2013), Rental Assistance Demonstration – Final Implementation, Revision 1

IX. MISCELLANEOUS ISSUES

A. Foreclosures

1. Ironically, the best opportunities for long term preservation of project based subsidies may arise in deteriorated projects subject to HUD foreclosure. These projects may be transferred to preservation purchasers at auction, or transferred by the owner prior to auction under the pressure of the impending foreclosure.

2. The Multifamily Mortgage Foreclosure Act (MMFA), enacted in 1981, created a uniform Federal non-judicial procedure by which HUD may foreclose on its mortgages. 12 U.S.C. § 3701 et seq. Foreclosure may be based either on failure to make payments (monetary default) or failure to maintain the project in good repair (regulatory default). Under the MMFA, HUD has the choice of proceeding to foreclosure under a non-judicial procedure, a Federal judicial procedure or under State procedures. For obvious reasons, HUD prefers the non-judicial procedures. Pursuant to the MMFA, where an owner defaults on its mortgage, either by falling into arrears, or by violating other terms, such as the owner's duty to maintain the premises in habitable condition, HUD can appoint a commissioner who conducts a foreclosure sale after giving notice to the owner and the tenants. 12 U.S.C. § 3701 et seq.

3. The commissioner must give the owner 21 days notice by mail, and must post notice of the foreclosure sale at the property at least 7 days in advance. 12 U.S.C. § 3708. HUD generally posts a "bid package" on its website prior to the sale.

B. Supporting HUD enforcement – Preventing owner reinstatement

1. Owners frequently seek to avoid the foreclosure by working out a last minute deal with HUD, often involving a sale of the property. HUD is sometimes receptive to such proposals, but tenants may challenge HUD action under the MMFA and regulations governing sale of HUD properties.

2. MMFA provisions: Tenants may oppose last minute foreclosure cancellations based on MMFA provisions that restrict cancellation of foreclosure sales to certain limited circumstances.

a. Monetary default

i. Where the foreclosure involves a monetary default, the owner must tender only the principal and interest that "would be due if the mortgage had not been accelerated." 12 U.S.C. § 3709(a)(3)(A). Arguably, this provision precludes HUD from allow the owner to fully prepay the mortgage and use foreclosure as a way to avoid otherwise applicable prepayment restrictions.

b. Regulatory Default

i. Where the foreclosure involves a non-monetary default, such as failure to repair the premises, the owner must not only tender the mortgage arrears and costs, but must also satisfy the commissioner that the non-monetary default is cured, i.e. **that the repairs have been made**. 12 U.S.C. § 3709(a)(3)(B). HUD may argue that the owner must only achieve a passing score of 60 on the REAC scale, but tenants may insist that the owner fully comply with the terms of the mortgage, which requires that the project be in safe and sanitary condition.

3. Transfer of Physical Assets (TPA) restrictions

a. HUD sometimes will approve a sale of a distressed property prior to the initiation of a foreclosure proceeding, or after the commencement of the proceeding but prior to the auction. Such sales are governed by HUD regulations on "Transfers of Physical Assets," 24 C.F.R. §§ 200.100 et seq. *See* also, HUD Handbook 4065.1. The TPA regulations require purchasers and their principals to certify that they have never defaulted on a HUD mortgage or subsidy contract, either by missing payments or failing to maintain the property.

C. <u>Preventing auction sales to undesirable purchasers</u>

1. Bid restrictions

a. HUD may be persuaded to use its limitless discretion to place restrictions upon the potential bidders at the auction. HUD is mostly likely to do so where use or ownership of the project is already restricted in some way: e.g. not-for-profit owner, elderly or disabled residents. *See Ku v. HUD*, 508 Fed Appx. 14, 2013 WL 263034 (2d Cir. 2013), holding that HUD's decision to restrict the auction was entirely reasonable.

2. Section 219

a. Section 219 of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199, approved January 23, 2004) required HUD to institute a policy "to prevent the sale of HUD properties, from HUD, or from state and local governments, to people with demonstrated patterns of severe housing code violations." Section 219 requires the Secretary of HUD to issue a proposed rule to ensure that a potential purchaser of a multifamily project that is HUD-owned or secured by a HUD-held mortgage is in substantial compliance with applicable state or local government housing statutes, regulations, ordinances, and codes with regard to other properties owned by the purchaser. Further, under the proposed rule, any

state or local government that exercises its right of first refusal to acquire the project must ensure that any person or entity that subsequently acquires the project from the state or local government is subject to the same standards that would otherwise apply if the person or entity had purchased the project directly from HUD. HUD promulgated proposed regulations in August 2005. 24 C.F.R. § 290.16.

3. U.S. Housing Act

a. Prior to foreclosing on any mortgage, HUD must notify both the unit of general local government in which the property is located and the tenants of the property of the proposed foreclosure sale; and dispose of a multifamily housing project through a foreclosure sale "only to a purchaser that the Secretary determines is capable of implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and repair expenses to ensure that the project will remain in decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary." Multifamily Housing Property Disposition Reform Act of 1994, 12 U.S.C. § 1701a-11(c)(3).

b. However, at least one court has ruled that these requirements do not apply where HUD employs the non-judicial foreclosure mechanism of the MMFA. *Guity v. Martinez,* 2004 WL 1145832, 2004 U.S. Dist. LEXIS 9158 (S.D.N.Y. 2004).

D. <u>Preservation Plans</u>

1. With the cooperation of HUD and local government, tenants and CBOs may formulate plans for preservation of projects as affordable housing. HUD will often agree to a transfer of property to local governments which will then transfer title to a not-for-profit owner. Financing for repairs can be obtained through tax credit financing, local government loans, and sometimes through Federal grants.

2. The long-term stability of the project is usually best served by the preservation of the project-based subsidy contract. HUD's discretion to convert the project to vouchers is restricted by the Schumer amendment, Pub.L. 109-115 November 10, 2005, Section 311, which requires that:

a. "in managing and disposing of any multifamily property that is owned or held by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payments under Section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property. To the extent the Secretary determines that such a multifamily property owned or held by the Secretary is not feasible for continued rental assistance payments under Section 8, based on consideration of the costs of maintaining such payments for that property or other factors, the Secretary may, in consultation with the tenants of that property, contract for project based rental assistance with

an owner or owners of other existing housing properties or provide other rental assistance."

E. Preventing Foreclosures

1. Tenants may sometimes seek to prevent a foreclosure where the building is already owned by a not-for-profit or CBO, or where the tenants fear that the auction sale will not be restricted to appropriate purchasers. Tenants may bring actions to oppose the sale under the MAHRAA provisions cited in Point IV(A), above. Owners have also successfully opposed sales based on HUD's failure to issue appropriate subsidies or otherwise follow its own procedures. *See* e.g., *Christopher Village v. Retsinas*,190 F.3d 310 (5th Cir. 1999). Compare, *United States v. Prince Hall Village, Inc.*, 789 F.2d 597, 600 (7th Cir. 1986); *Pleasant East Associates v. Martinez*, 2004 U.S. Dist. LEXIS 6751, 2007 WL 4572482 (S.D.N.Y. 2004).

F. Bankruptcy Issues

1. Bankruptcy may be used by owners, including not-for-profits and tenant-controlled entities to prevent foreclosure. HUD will often agree to a preservation plan within the framework of the bankruptcy proceeding. Tenants may intervene in bankruptcy court to advocate for the preservation of their rights under their leases and the subsidy contract.

2. Courts have rejected landlord attempts to use bankruptcy to override the requirements of the Housing Act or HUD regulatory agreements. In *re T.L.Welker*, 163 B.R. 488, 489 (N.D. Tex. 1994): "the Bankruptcy Code does not authorize the court to employ § 363 to supersede or preempt this Congressional requirement or the compelling public policy interests behind the housing acts. According, the trustee may only sell the property after compliance with the HUD procedure." *See also*, In *re EES Lambert Associates*, 62 B.R. 328 (N.D. Ill. 1986); In *re Capital West Investors*, 186 B.R. 497 (N.D. Calif. 1995), In *Re Garden Manor Associates*, 70 B.R. 477 (N.D. Cal. 1987)

Appendix 1

24 C.F.R. § 245.115

§ 245.115 Protected activities.

Currentness

(a) Owners of multifamily housing projects covered under § 245.10, and their agents, must allow tenants and tenant organizers to conduct the following activities related to the establishment or operation of a tenant organization:

(1) Distributing leaflets in lobby areas;

(2) Placing leaflets at or under tenants' doors;

(3) Distributing leaflets in common areas;

(4) Initiating contact with tenants;

(5) Conducting door-to-door surveys of tenants to ascertain interest in establishing a tenant organization and to offer information about tenant organizations;

(6) Posting information on bulletin boards;

(7) Assisting tenants to participate in tenant organization activities;

(8) Convening regularly scheduled tenant organization meetings in a space on site and accessible to tenants, in a manner that is fully independent of management representatives. In order to preserve the independence of tenant organizations, management representatives may not attend such meetings unless invited by the tenant organization to specific meetings to discuss a specific issue or issues; and

(9) Formulating responses to owner's requests for:

(i) Rent increases;

(ii) Partial payment of claims;

(iii) The conversion from project-based paid utilities to tenant-paid utilities;

(iv) A reduction in tenant utility allowances;

(v) Converting residential units to non-residential use, cooperative housing, or condominiums;

(vi) Major capital additions; and

(vii) Prepayment of loans.

(b) In addition to the activities listed in paragraph (a) of this section, owners of multifamily housing projects covered under § 245.10, and their agents, must allow tenants and tenant organizers to conduct other reasonable activities related to the establishment or operation of a tenant organization.

(c) Owners of multifamily housing projects and their agents shall not require tenants and tenant organizers to obtain prior permission before engaging in the activities permitted under paragraphs (a) and (b) of this section.

SOURCE: 48 FR 28437, June 22, 1983; 50 FR 32402, Aug. 12, 1985; 61 FR 57961, Nov. 8, 1996; 65 FR 36281, June 7, 2000, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1715z–1b; 42 U.S.C. 3535(d).

Notes of Decisions (1)

Current through July 21, 2016; 81 FR 47312.

End of Document

Appendix 2

Chapter Eight

Option Six - Opt-Outs

8-1. OVERVIEW.

HUD is committed to preserving affordable housing and the Regional Office should make every effort to inform owners of all available options. However, if an owner has satisfied the relevant requirements and ultimately chooses to opt-out of the Section 8 contract, it may request to opt-out of the Section 8 program by providing the Contract Renewal Request Form, (Form HUD-9624) and elect Option Six. Owners should be aware of their obligation to honor the right of tenants to remain and all notification requirements.

HUD will renew the contract up until the day the contract expires should the owner change its mind on opting out. It is important to note that HUD has no authority to enter into a new contract after the owner has opted-out of the Section 8 contract.

8-2. OWNER REQUIREMENTS *FOR TENANT NOTIFICATION.*

The owner ***must*** provide a one-year notification to the tenants and the AE/CA of the intent to opt-out of the Section 8 project-based contract (See Appendix 11-1.)

8-3. PROCESSING INSTRUCTIONS.

A. AE/CA Review. The AE/CA must complete the review to provide enough time to obtain tenant-based assistance and to make sure tenants have adequate search time to locate another unit should they desire to relocate. The AE/CA should:

1. Determine that the owner elected to opt-out under Option Six;
2. Make sure that the owner has provided all required documentation including the Contract Renewal Request Form (HUD-9624);
3. Make sure that the owner is eligible to opt-out of the Section 8 contract.

a. Are there any restrictions stated in the Section 8 HAP contract or Use Agreement that prohibit the owner from opting-out?

b. Did the owner provide an acceptable one-year notification to the tenants and AE/CA that it intended to opt-out of the Section 8 project-based contract? Does the letter state that the owner will honor the right of tenants to remain?

Note: If proper notification was not provided, the owner must provide acceptable one-year written notification to tenants and the AE/CA.

During this one-year period:

1) The families' contribution to the rent can *only be increased during* the period of time necessary to fulfill the full notification time frame *for reasons of increases in household income and/or changes resulting from an annual income recertification.*

2) The AE/CA will offer the owner a short-term contract. See Section 2-8 for information on rent setting for the short-term renewal.

a) If the owner renews the contract when it ends in the middle of the month, and the owner has submitted a voucher for the full month, nothing further is needed.

b) If the owner does not renew the contract when it ends in the middle of the month, and the owner has submitted a voucher for the full month, the owner is required to pay back the funds for the period not covered by the contract. *The CA will determine the amount to be repaid and HUD will process any recovery action.*

c. Does the owner certify that it will honor the tenant's right to remain at the project as long as the project continues to be offered for rental housing (if the PHA approves a rent equal to the new rent charged for the unit), unless the owner has grounds for eviction under State or local law?

4. Log the owner's request as indicated on the Contract Renewal Request Form (Form HUD-9624) and any other relevant information in iREMS.

B. *Four months (120 days) prior to the contract expiration date, and upon receipt of the written notice provided by the owner, the AE should again contact the owner to explore alternatives to opting out.*

C. It is imperative that the AE coordinate this effort with Public and Indian Housing (PIH) staff *in the Regional Center/Satellite Office with jurisdiction*. If there is a delay in the provision of tenant-based assistance, *the CA and the owner may enter into a short-term contract, not to exceed a term of one year, at current contract rents using the Basic Renewal Contract (HUD-9636)*. Refer to PIH Notice 2001-41(HA) for detailed guidance on the conversion process.

D. Recap Projects. If an owner has decided to opt-out while the project is assigned to Recap for a rent reduction or debt restructuring, see Section 5-4.D. of this Guide for detailed processing instructions.

Appendix 3

§1437f. Low-income housing assistance

(a) Authorization for assistance payments

For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.

(b) Other existing housing programs

(1) In general.-The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) The Secretary is authorized to enter into annual contributions contracts with public housing agencies for the purpose of replacing public housing transferred in accordance with subchapter II–A of this chapter. Each contract entered into under this subsection shall be for a term of not more than 60 months.

(c) Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental (A) by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a housing strategy as defined in section 12705 of this title, or (B) by such higher amount as may be requested by a tenant and approved by the public housing agency in accordance with paragraph (3)(B). In the case of newly constructed and substantially rehabilitated units, the exception in the preceding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Each fair market rental in effect under this subsection shall be adjusted to be effective on October 1 of each year to reflect changes, based on the most recent available data trended so the rentals will be current for the year to which they apply, of rents for existing or newly constructed rental dwelling units, as the case may be, of various sizes and types in the market area suitable for occupancy by persons assisted under this section. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative. The Secretary shall establish separate fair market rentals under this paragraph for Westchester County in the State of New York. The Secretary shall also establish separate fair market rentals under this paragraph for Monroe County in the Commonwealth of Pennsylvania. In establishing fair market rentals for the remaining portion of the market area in which Monroe County is located, the Secretary shall establish the fair market rentals as if such portion included Monroe County. If units assisted under this section are exempt from local rent control while they are so assisted or otherwise, the maximum monthly rent for such units shall be reasonable in comparison with other units in the market area that are exempt from local rent control.

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula. However, where the maximum monthly rent, for a unit in a new construction, substantial rehabilitation, or moderate rehabilitation project, to be adjusted using an annual adjustment factor exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent only to the extent that the owner demonstrates that the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type, and age in the same market area, as determined by the Secretary. The immediately foregoing sentence shall be effective only during fiscal year 1995, fiscal year 1996 prior to April 26, 1996, and fiscal years 1997 and 1998, and during fiscal year 1999 and thereafter. Except for assistance

under the certificate program, for any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0. In the case of assistance under the certificate program, 0.01 shall be subtracted from the amount of the annual adjustment factor (except that the factor shall not be reduced to less than 1.0), and the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type, and age in the market area. The immediately foregoing two sentences shall be effective only during fiscal year 1995, fiscal year 1996 prior to April 26, 1996, and fiscal years 1997 and 1998, and during fiscal year 1999 and thereafter. In establishing annual adjustment factors for units in new construction and substantial rehabilitation projects, the Secretary shall take into account the fact that debt service is a fixed expense. The immediately foregoing sentence shall be effective only during fiscal year 1998.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A). The Secretary shall make additional adjustments in the maximum monthly rent for units under contract (subject to the availability of appropriations for contract amendments) to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption. Where the Secretary determines that a project assisted under this section is located in a community where drug-related criminal activity is generally prevalent and the project's operating, maintenance, and capital repair expenses have been substantially increased primarily as a result of the prevalence of such drug-related activity, the Secretary may (at the discretion of the Secretary and subject to the availability of appropriations for contract amendments for this purpose), on a project by project basis, provide adjustments to the maximum monthly rents, to a level no greater than 120 percent of the project rents, to cover the costs of maintenance, security, capital repairs, and reserves required for the owner to carry out a strategy acceptable to the Secretary for addressing the problem of drug-related criminal activity. Any rent comparability standard required under this paragraph may be waived by the Secretary to so implement the preceding sentence. The Secretary may (at the discretion of the Secretary and subject to the availability of appropriations for contract amendments), on a project by project basis for projects receiving project-based assistance, provide adjustments to the maximum monthly rents to cover the costs of evaluating and reducing lead-based paint hazards, as defined in section 4851b of this title.

(C) Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original

contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months that the reduced maximum monthly rents were in effect.

(3) The amount of the monthly assistance payment with respect to any dwelling unit shall be the difference between the maximum monthly rent which the contract provides that the owner is to receive for the unit and the rent the family is required to pay under section 1437a(a) of this title. Reviews of family income shall be made no less frequently than annually.

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty days (A) in the event that a family vacates a dwelling unit before the expiration date of the lease for occupancy or (B) where a good faith effort is being made to fill an unoccupied unit, and, subject to the provisions of the following sentence, such payments may be made, in the case of a newly constructed or substantially rehabilitated project, after such sixty-day period in an amount equal to the debt service attributable to such an unoccupied dwelling unit for a period not to exceed one year, if a good faith effort is being made to fill the unit and the unit provides decent, safe, and sanitary housing. No such payment may be made after such sixty-day period if the Secretary determines that the dwelling unit is in a project which provides the owner with revenues exceeding the costs incurred by such owner with respect to such project.

(5) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

(6) Redesignated (5).

(7) Repealed. Pub. L. 105–276, title V, §550(a)(3)(C), Oct. 21, 1998, 112 Stat. 2609

(8)(A) Not less than one year before termination of any contract under which assistance payments are received under this section, other than a contract for tenant-based assistance under this section, an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that, if the Congress makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any number or years, with payments subject to the availability of appropriations for any year.

Appendix 4

ONE-YEAR NOTIFICATION LETTER – *OWNER DOES NOT INTEND TO RENEW*

_____(*Date*)_____

Dear Tenant:

The Department of Housing and Urban Development subsidizes the rent of your apartment through the project-based Section 8 program. Federal law requires that owners provide tenants with a one-year notification before the expiration of a Section 8 contract. The Section 8 contract that pays the government's share of your apartment rent at _____(*name of project*)_____ expires on _____(*one year from date of this letter*).

Although there will be no immediate change in your rental assistance, we are required to inform you of our intended actions when the contract expires one year from now.

THIS LETTER IS TO NOTIFY YOU THAT WE DO NOT INTEND TO RENEW THE CURRENT SECTION 8 CONTRACT WHEN IT EXPIRES.

Since we do not intend to renew this project-based contract upon its expiration, it is our understanding that, if Congress makes funds available (which it has in the past and is expected to in the future), the Department of Housing and Urban Development will provide all eligible tenants currently residing in a Section 8 project-based assisted unit with tenant-based assistance. Unlike the current project-based Section 8 contract, Section 8 vouchers are issued to the tenants and allow them to choose the place they wish to rent. The Section 8 voucher program is administered by the local Public Housing Authority. Federal law allows you to elect to continue living at this property provided that the unit, the rent, and we, the owners, meet the requirements of the Section 8 tenant-based assistance program. As an owner, we will honor your right as a tenant to remain at the property on this basis as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law.

You will also have the opportunity to choose another development or single family house in which to move provided that the new landlord will accept the voucher and the owner and the unit meet Section 8 tenant-based program requirements.

Please remember that project-based Section 8 rental assistance will continue to be provided on your behalf for one year. In addition, we may agree to a renewal of the project-based contract with HUD, thus avoiding contract termination altogether.

Approximately four months (120 days) before the expiration of the Section 8 contract, HUD requires that we confirm our final decision to not renew this contract. Following this confirmation, you will be contacted by the local Public Housing Authority (PHA) to determine your household's eligibility for tenant-based assistance. If you intend to apply for Section 8 tenant-based rental assistance you should not move from your current unit until you have consulted with the local PHA about your eligibility for tenant based assistance.

If you have any questions or would like information on the Section 8 Program, the following sources may be of assistance:

Contract Administrator (*if applicable*)

Name: _____

Telephone Number: _____

HUD Regional Center

Name: _____

Telephone Number: _____

HUD Web

http://www.hud.gov - click on "I want to" and the on "Find Rental Assistance."

Sincerely,

_____(*Owner*)_____

_____(*contact info*)_____

cc: Local HUD Office/_____(*Contract Administrator*)_____

ONE-YEAR NOTIFICATION LETTER – *OWNER INTENDS TO RENEW*

(Date)

Dear Tenant:

The Department of Housing and Urban Development subsidizes the rent of your apartment through the project-based Section 8 program. Federal law requires that owners provide tenants with a one-year notification before the expiration of a Section 8 contract. The Section 8 contract that pays the government's share of your apartment rent at *(name of project)* expires on *(one year from date of this letter)*.

While there will be no immediate change in your rental assistance, we are required to inform you of our intended actions when the contract expires one year from now.

THIS LETTER IS TO NOTIFY YOU THAT WE INTEND TO RENEW THE CURRENT SECTION 8 CONTRACT WHEN IT EXPIRES.

If Congress makes funds available, which it has in the past and is expected to in the future, we will renew the Section 8 contract. However, in the unlikely circumstance that we cannot renew our contract, it is our understanding that, subject to the availability of funds, HUD will provide all eligible tenants currently residing in a Section 8 project-based assisted unit with tenant-based assistance. If we later decide not to renew the current Section 8 contract when it expires, we will provide you with at least one year of advance notification of this decision.

If you have any questions or would like information on the Section 8 Program, the following sources may be of assistance:

Contract Administrator *(if applicable)*

Name: _____

Telephone Number: _____

HUD Regional Center

Name: _____

Telephone Number: _____

HUD Web

http://www.hud.gov - click on "I want to" and the on "Find Rental Assistance."

Sincerely,

(Owner)

(contact info)

cc: Local HUD Office/ *(Contract Administrator)*

RECAP SECOND NOTICE of OPT-OUT – 120- DAYS

(*Date*)

Dear Tenant:

This letter is to notify you that we are continuing with our intent ***not*** to renew the current Section 8 contract when it expires as stated in the one-year notification letter provided to you on (insert date of one-year notification letter).

Since we do not intend to renew this project-based contract upon its expiration, it is our understanding that, if Congress makes funds available (which it has in the past and is expected to in the future), the Department of Housing and Urban Development will provide all eligible tenants currently residing in a Section 8 project-based assisted unit with tenant-based assistance. Unlike the current project-based Section 8 contract, Section 8 vouchers are issued to the tenants and allow them to choose the place they wish to rent. The Section 8 voucher program is administered by local Public Housing Authorities. Federal law allows you to elect to continue living at this project provided that the unit, the rent, and we, the owners, meet the requirements of the Section 8 tenant-based assistance program. As an owner, we will honor your right as a tenant to remain at the project on this basis as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law.

You will also have the opportunity to choose another development or single family house in which to move provided that the new landlord will accept the voucher and the owner and the unit meet Section 8 tenant-based program requirements.

Please remember that project-based Section 8 rental assistance will continue to be provided on your behalf until (one year from date of one-year notification letter). In addition, we may agree to a renewal of the contract with HUD, thus avoiding contract termination altogether. However, if we do not agree to a renewal, and if we continue with our intent not to renew the current Section 8 contract, as stated above, you will be contacted and provided with additional information.

If you have any questions or would like information on the Section 8 Program, the following sources may be of assistance:

Contract Administrator (*if applicable)*

Name: _____

_____

Telephone Number: _____

HUD Regional Center

Name: _____

_____

Telephone Number: _____

HUD Web

http://www.hud.gov - click on "I want to" and the on "Find Rental Assistance."

Sincerely,

(*Owner*)

(*contact info*)

cc: Local HUD Office/*Contract Administrator)*

Appendix 5

URBAN
JUSTICE
CENTER

February 5, 2016

DEMAND LETTER

Dear Mr. Fleisher:

I am an attorney with the Community Development Project at the Urban Justice Center and I work with Joanna Paulino and Cea Weaver and the Urban Homesteading Assistance Board (UHAB) team on their organizing efforts in Project-Based Section 8 buildings in New York City.

About two weeks ago, we became aware that many tenants at 972 and 976 Leggett Avenue have been without heat or hot water for most of the past couple of months, including a couple of weeks ago during the below-freezing temperatures and record blizzard. We also understand that both the tenant association and the UHAB organizers have tried to contact you and your office to seek an immediate resolution to the ongoing and persistent boiler issue but you have not responded to their emails or calls.

In addition, a few of the tenants received a "turn off of service" letter from ConEd stating that because BSP Leggett Avenue has not paid its past due bills for over $9,000, electricity in the common areas, like the hallways and elevators, will be shut off on February 18th.

As you know, New York's Real Property Law §235-b requires that a landlord maintain the premises in safe and habitable condition for the tenants. Accordingly, it is the owner's responsibility to maintain services and provide repairs in the building. Further, under federal law, HUD obligates Project-based Section 8 building owners to maintain the units and projects in decent, safe and sanitary conditions. 42USCA §1437d(l)(3) (West 2012).

Finally, per 24CFR §245.115, federal law requires that owners of multifamily housing projects and their agents must allow tenants and tenant organizers to convene tenant organization meetings in a space on site and accessible to the tenant that is fully independent of management representatives. Therefore, with reasonable notice given to your office, the tenant bodies at both 972 and 976 Leggett Avenue must be allowed access to the community room for tenant organizing purposes. Denying tenants their right to meet in the community space without attendance or supervision of a community organizer like UHAB is against the law.

123 WILLIAM STREET, 16th FLOOR, NY, NY 10038
P: 646 602 5600 • F: 212 533 4598 • W: URBANJUSTICE.ORG

On behalf of the tenants association, we demand that your office take immediate steps to fix or replace the boiler and test all the unit radiators that are not emanating heat. We expect your office to initiate access appointments to the apartments affected. These appointments should be with at least one-week notice and be confirmed in writing with the tenant.

Second, we demand that you make an immediate payment on your ConEd bill to prevent the building's electricity from being interrupted on February 18th.

And finally, we demand that you stop the obstruction of the tenants' right to organize and make the community room available to the tenant association for organizing purposes.

Please do not hesitate to call or email me if you have any questions. We look forward to your prompt cooperation.

Thank you.

Sincerely,

Addrana Montgomery, Esq.
Staff Attorney
Community Development Project

Appendix 6

Although HUD is willing to accept comments on the interim rule, it is implementing the Section 302 pilot program without the formal solicitation of public comment or issuance of a proposed rule, citing good cause "to omit advance notice and public participation" because "prior public procedure is 'impracticable, unnecessary, or contrary to the public interest.'"[48] HUD made its determination of good cause based on the assertion that the regulatory language is largely a reiteration of the statutory provisions mandated by Congress under Section 302. HUD also declared that immediate implementation of Section 302 will permit disabled families to expeditiously access the homeownership program.

Lastly, as noted above, the interim rule makes several additional technical or clarifying changes to the existing Section 8 homeownership option. These changes include:

- clarification of the term "present homeownership interest;"[49]
- clarification that the PHA cannot require a participant to secure financing from any specific lender;[50]
- a highlighting of the efforts PHAs must make to constrict predatory lending and abusive loan practices, including an expansion of the examples of the ways by which borrowers can be protected against predatory loans;[51]
- clarification that under the existing recapture requirement, the PHA, rather than HUD, is responsible for preparing lien documents that are consistent with state and local requirements and protect the PHA's recapture interest in the property;[52] and
- a relaxation of the requirements that must be met before a family participating in the Section 8 homeownership program will be allowed to return to tenant-based assistance following default on a FHA-insured mortgage.[53] ■

[48]*See id.* at 33,612 (June 22, 2001).

[49]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.4(b).

[50]*Id.* to be codified at § 982.632(a).

[51]*Id., see also* 65 Fed. Reg. at 55,159 (Sept. 12, 2000) (Section 8 Homeownership Program Final Rule).

[52]*Id.* at 33,613 (June 22, 2001) to be codified at § 982.640(b). As noted above, however, this clarification is inconsistent with the DAG Program Proposed Rule which provides for removal of the entire recapture requirement under the existing Section 8 Homeownership Program.

[53]*Id.* to be codified at § 982.638(d)(2).

Opt-Out and Prepayment of Four Section 8 Projects Preliminarily Enjoined

Tenants in four Department of Housing and Urban Development (HUD)-insured and project-based Section 8 assisted properties located east of Sacramento, California, recently obtained a preliminary injunction that prevents the owners from selling the properties and terminating their Section 8 contracts. The injunction was issued by a federal district court on the grounds that the owners failed to comply with California law requiring notice to the tenants and others and failed to grant a right of first refusal to purchase the properties to specified public and private entities. *Kenneth Arms Tenant Association v. Martinez.*[1]

The properties, which are insured and subsidized in part by HUD under the Section 236 program, are all owned by separate limited partnerships controlled by Apartment Investment Management Company (AIMCO).[2] Collectively, they proposed to prepay their loans and to sell the four developments, containing a total of 351 units, to U.S. Housing Partners (Bridge Partners).[3] As part of the transaction, the parties involved contemplated that the project-based Section 8 contracts, covering 168 of the units, would not be renewed upon expiration. In addition, Bridge Partners proposed to accept enhanced vouchers for eligible tenants and, in an effort to comply with California law, agreed to an affordability restriction limiting occupancy to families earning less than 80 percent of area median income (AMI) through a restrictive-use agreement entered into with HUD.

Plaintiffs, consisting of four low-income disabled residents in each of the developments, tenant associations composed of residents in each of the developments and the California Coalition for Rural Housing Project, brought suit against HUD and the owners seeking to enjoin the proposed prepayment and termination of the project-based Section 8 assistance (opt-out). The plaintiffs claimed that the owners failed to comply with state law by giving the residents and others adequate notice of their intent to opt-out[4] and by fail-

[1]No. Civ. S-01-832 LKK/JFM (E.D. Cal. order July 3, 2001). A scanned version of the opinion is available *at* www.nhlp.org.

[2]In 1997, AIMCO purchased a controlling interest in the National Housing Partnership (NHP) and subsequently merged NHP into AIMCO, giving it control over all former NHP properties. *See* www.aimco.com.

[3]The general partner for U.S. Housing Partners is "Bridge Partners II, LLC," a real estate investment and development company headquartered in Walnut Creek, California.

[4]Cal. Gov't Code § 65863.10. The owners' notices failed to do the following: give nine months advanced notice of the intent to prepay; state the rent at the time the notice was given and the resulting rent after prepayment; advise tenants that the state and county officials were receiving such notices; advise tenants of the contact information for the state and county officials; or advise tenants of the possibility of remaining in the federal program after prepayment. Plaintiffs also alleged failure by the owners to send notices to public entities, and failure to include information that must be provided to those entities.

ing to grant qualified purchasers a right of first refusal to purchase the properties prior to the sale to Bridge Partners.[5] Further, the plaintiffs claimed that HUD violated various federal laws by failing to require the owners to:

- comply with the state notice requirement;
- require more stringent affordability restrictions as part of the prepayment and sale of the projects; and
- enforce its obligations to affirmatively further fair housing.

The court dismissed all the plaintiffs' claims against HUD with prejudice. It found that since 1996 there is no federal statute or HUD regulation, other than certain notice requirements which the owners had met, that restricts owners' right to prepay their mortgage or opt-out of the Section 8 program. The court rejected the plaintiffs' contention that a HUD notice,[6] which states that the owner has an obligation to comply with state notice requirements, placed an affirmative obligation on HUD to enforce state laws. It concluded that the statements in the HUD notice do not place any obligations on HUD but are mere reminders to the owners of their obligations to follow state law.[7]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law.

The court also rejected the plaintiffs' claim that HUD could place restrictions on the sale by virtue of its statutory power to place conditions on the sale of subsidized projects. The court reasoned that the owners in this case intended to first prepay their mortgages and then sell the projects. Since, at the time of sale, the projects will no longer be subsidized, the court concluded that HUD has no authority to place restrictions on the sale.[8] It used similar reasoning to reject the plaintiffs' other claims (including their fair housing claims), finding that HUD had no approval authority over either the prepayment or opt-out, thus limiting its authority to impose any restrictions with respect to the owners' decision.

In considering the plaintiffs' state claims against the owners and weighing whether the plaintiffs are likely to succeed on the merits of their claims to warrant issuance of a preliminary injunction, the court first addressed the owners' contention that with respect to prepayments the California statute was explicitly preempted by a provision in the *Low-Income Housing Preservation and Resident Homeownership Act of 1990*[9] (LIHPRHA) and that the statute was, by implication, preempted by virtue of its frustrating the Congressional determination to move from project-based to tenant-based subsidies. The court rejected both arguments. It rebuffed the express-preemption argument based on the fact that Congress abandoned the preservation scheme set out in LIHPRHA when it adopted the *Housing Opportunity Program Extension Act of 1996 (1996 Act)*.[10] Since the owners never participated in the LIHPRHA preservation program and were following the prepayment scheme authorized by the *1996 Act*, the court concluded that LIHPRHA's did not explicitly preempt the California statute.[11] The court also found that the doctrine of implied or conflict preemption was inapplicable to the case because no federal law restricts prepayments or requires HUD approval. Accordingly, the court concluded that there is no inconsistency or competition between federal and state requirements. In addition, regardless of the merit of the owners' argument that federal law favors tenant-based vouchers, the court ruled that California law does not favor tenant-based assistance over project-based assistance but attempts "to insure that any transfer preserves affordable housing, however achieved."[12]

The owners did not dispute the plaintiffs' claims that they failed to give proper notice to the tenants and others as required by California law. However, they argued that they materially complied with the law and that that was sufficient. The court rejected the argument, finding that the California statute is a "notice statute" which "explicitly requires the communication of detailed information to specified persons and entities."[13] Under those circumstances, the court concluded that substantial performance requires actual compliance with every reasonable objective of the statute. A notice that contains only major ideas or concepts is not sufficient.[14] Thus, the court held that the plaintiffs established a probability of success on the merits due to the owners' failure to comply with the state law notice requirements to tenants and public entities.[15]

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[5] *Id.* § 65863.11.

[6] HUD Notice H 99-36. See ¶ XVI-G. The notice is available *at* www.hudclips.org/sub-nonhud/cgi/pdfforms/99-36h.doc. It expired in 2000 and was replaced by the *Section 8 Renewal Guide*, which contains similar language. See Section 11-4, ¶ E. The guide is available *at* www.hud.gov/fha/mfh/exp/guide/s8guide.html.

[7] Slip op. at 10.

[8] *Id.* at 11.

[9] Preemption language is contained at Section 232 of LIHPRHA, codified at 12 U.S.C. § 4122 (West Supp. 2000).

[10] Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (Mar. 28 1996).

[11] Slip op. at 19. The court's conclusion was buttressed by a HUD letter to the court stating that, with the exception of properties that were involved in the LIHPRHA preservation program prior to its partial repeal by HOPE, HUD no longer has the authority to administer the LIHPRHA program.

[12] Slip op. at 21.

[13] *Id.* at 24.

[14] *Id.* at 24.

[15] *Id.* at 24-25.

The owners also conceded that they had not given a right of first refusal to the entities specified in the statute. They argued, however, that they were not required to do so because they had entered into a purchase agreement with Bridge Partners which, in their view, was a "qualified purchaser" under the statute and thus specifically exempted them from having to offer the right of first refusal to anyone else. The owners based their claim on the use agreement which they had executed with HUD[16] and which obligated them to rent the units to tenants whose incomes did not exceed 80 percent of AMI for the areas in which each of the properties is located and to charge no more than 30 percent of that 80 percent figure for rent. The plaintiffs countered that while the agreements would protect current tenants who were eligible for enhanced vouchers, they effectively convert the properties to moderate-income properties with respect to new, incoming tenants who were not eligible for vouchers. The plaintiffs maintained that the agreements thus violate the statutory provision that requires buyers to maintain the developments as affordable housing for either moderate and very low-income families or low-income families. The court agreed and found that the use agreement executed by Bridge Partners did not appear to protect either class of tenants. Thus, the court concluded that the plaintiff met their burden for the issuance of a preliminary injunction.[17]

It is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Whether the owners will proceed with the prepayment, opt-out, or sale of the properties is unclear. Regardless of the outcome, it is expected that the affordability protections adopted for these properties will be more favorable than the protections that the owners had entered into and which the court preliminarily enjoined.

Anne Pearson and Mona Tawatao of Legal Services of Northern California co-counseled the case together with The Minnesota Housing Preservation Project. Both were assisted by the National Housing Law Project. ■

[16]Although HUD signed the use agreements with Bridge Partners, HUD claimed, during the litigation, that the official who signed the use agreements did not have authority to enter into such agreements and that consequently the agreements were void *ab initio*. The court, having found ground to dismiss HUD from the action altogether, declined to reach this issue. *Id.* at 12.

[17]*Id.* at 31.

Virginia Court Reverses Conviction for Trespass on Privatized Streets Surrounding Public Housing

The Decision

A deeply split Virginia Court of Appeals, upon a rehearing *en banc*, recently reversed the trespass conviction of a visitor barred from entering "privatized streets" surrounding a Richmond public housing development. *Hicks v. Commonwealth of Virginia.*[1] In doing so, the court struck down an effort by the City of Richmond and the Richmond Redevelopment and Housing Authority (RRHA) to bar unauthorized access to the development, Whitcomb Court, by privatizing heretofore public streets around the development and authorizing the city police department to cite anyone who trespasses on the streets after receiving a notice of barment.

Whitcomb Court is owned by the RRHA. In 1997, the City of Richmond deeded the streets surrounding Whitcomb to the RRHA in an attempt to prevent criminal activity at the development. After the transfer, the RRHA posted red and white "private property, no trespass" signs every one hundred feet on each block. However, the streets were in no way closed or physically restricted to public, vehicular or pedestrian traffic. The RRHA next authorized the Richmond police to serve notice of permanent barment to any unauthorized person, defined as "all nonresidents who cannot demonstrate that they are on the premises visiting a lawful resident or conducting legitimate business." A barred person who returns to the property is deemed to be a trespasser regardless of whether she has a legitimate purpose or an invitation from a resident.

Hicks, the convicted defendant in this case, had been previously convicted of trespassing and damaging property at Whitcomb Court. In April of 1998, he was barred from the streets surrounding Whitcomb Court. On two subsequent occasions he sought permission to return to the project explaining that his mother, baby, and the baby's mother were all residents of the development. His requests were denied. In January of 1999, Hicks was on the privatized streets when a police officer issued the trespass summons that gave rise to the present case. At the time, Hicks and his baby's mother explained to the officer that he was there only to bring diapers to his baby.

Hicks' conviction on trespass charges in a general district court was affirmed by a circuit court despite the fact that Hicks sought to dismiss the charge on the ground that the RRHA's trespass-barment policy violated the *First* and *Fourteenth Amendments* of the Constitution. When the conviction was also affirmed by a panel of a Virginia Court of Appeals, Hicks sought and obtained a rehearing *en banc*.

[1]2001 WL 744,170, 548 S.E.2d 249, (Va. App., July 3, 2001).

- Working with the tenants, advocates can determine the viability of a strategy that emphasizes preservation. If contract termination or foreclosure is not imminent, this strategy may include taking action against the owner to enforce compliance with the lease and housing quality standards. Preservation should also include investigating the possibility of transferring the property to a new owner that has the capacity to undertake rehabilitation while retaining the assistance contract. If preservation proves undesirable or infeasible, advocates should work to ensure adequate tenant protections for all currently assisted households, such as replacement vouchers and other relocation benefits.

For further information on addressing troubled properties in your area, please contact Jim Grow at NHLP's Oakland office at jgrow@nhlp.org. ■

State Court Hands Down Disappointing Preemption Ruling

A New York state appellate court recently invalidated a New York City local preservation law that gives tenants the first right to purchase a building in which an owner is opting out of a project-based Section 8 contract.[1] The court based its decision on an improper analysis of federal preemption law. While this decision sets back the New York City preservation law, its reach need not extend further than New York state and should be limited for reasons further discussed below.

Background

Federal law governing properties with project-based Section 8 contracts permits most owners to withdraw from the program when their fixed-term contracts expire.[2] This framework allows the owner to convert the property into a market-rate operation. Recognizing that the unregulated ability to withdraw from the program could lead to a severe reduction in affordable housing, several localities have passed laws designed to induce preservation of the building's affordability. In 2005, New York City Council enacted one such law—Local Law 79.[3] This law enables a tenant association to exercise a right to purchase or a right of first refusal to purchase a building when an owner intends to sell or take other action that would result in the owner withdrawing from an assisted rental housing program.[4] If tenants assert and execute their right to purchase the property, it will remain affordable.

In March 2006, the owner of Mother Zion Apartments issued notice of its intent to opt out of the project-based Section 8 program, thus triggering Local Law 79. A month later, in April 2006, the Mother Zion Tenant Association invoked its right to purchase the property. Instead of convening a panel to appraise the value of the property as required by the local law, the New York City Department of Housing Preservation and Development (HPD) and the owners of Mother Zion challenged the tenants' right in

[1]Mother Zion Tenant Ass'n v. Donovan, 865 N.Y.S.2d 64 (2008) (hereinafter Mother Zion).
[2]*See* Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), codified at 42 U.S.C.A. § 1437f (Historical and Statutory Notes, "Multifamily Housing Assistance") (West, Westlaw through P.L. 110-449 approved 11-21-08).
[3]Local Law 79, N.Y.C. Admin. Code 60.4, *et seq.* (1990); *see also* NHLP, *New York City Enacts Preservation Purchase Law*, 36 HOUS. L. BULL. 45, 45 (Feb. 2006).
[4]*Id.*

state court. The state trial court ruled in favor of HPD and owners.[5] The court reasoned that because the NYC law requires property owners to either remain in the federal housing program or sell the property to the tenants, it conflicts with Congress' scheme for the program which allows owners to withdraw after a certain term. The court thus ruled that the local law was preempted by federal law. The tenants appealed the decision, but the intermediate state court affirmed the lower court ruling.[6] The tenants have filed a motion for leave to appeal with the State of New York Court of Appeals.

Preemption

Congress may preempt state or local law either expressly or impliedly. Local Law 79 is not expressly preempted by any federal law. Implied preemption occurs when a local law conflicts with federal law or when federal law occupies a field completely. Conflict preemption can either result from an actual conflict that makes complying with both laws impossible or when the local law impedes the achievement of a federal objective.[7]

Trial Court Ruling

The initial trial court decision in Mother Zion based its reasoning on an Eighth Circuit case, *Forest Park II*.[8] In *Forest Park II*, the Eighth Circuit held that a Minnesota preservation law dealing with notice requirements for the prepayment of mortgages on Section 236 housing was preempted expressly by the Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA) and impliedly by conflict preemption. It reasoned that the local law stood as an obstacle to Congress's objective of involving private developers in a housing subsidy program to provide low-income housing because prepayment was created as an incentive to enter the program.[9] Thus, the state notice laws interfered with the framework by which Congress set up the subsidy program. This conclusion was reached without using a traditional preemption analysis because the Court asserted that the "unique federal laws and programs involved in [*Forest Park II*] make it difficult to apply a traditional preemption analysis."[10] No reasoning for such a bold assertion is given. LIHPRHA does not apply to project-based Section 8 and thus that portion of *Forest Park II* is irrelevant to *Mother Zion*. However, the trial court extended *Forest Park II*'s reasoning on implied preemption to the project-based Section 8 at issue in *Mother Zion*. It ruled that Local Law 79 conflicts with Congress' intent to allow an owner to withdraw from the project-based Section 8 program and interferes with the framework that Congress prescribed for such opt-outs.

Appellate Division Ruling

The Appellate Division, First Department of the New York Supreme Court affirmed the lower court ruling regarding conflict between the local and federal law. It stated that because Local Law 79 "actually conflicts with the federal regime of an entirely voluntary program with inducements to encourage owner to remain in Section 8" it is invalid.[11] The court supported this statement with the contention that Local Law 79 was enacted partly to nullify the federal provision allowing for an owner's withdrawal from the program and with the characterization that the local law turns a voluntary federal program into a mandatory one.[12] The opinion further states that "Local Law 79 would have the effect of discouraging owners from embarking on new Section 8 housing developments, which would also run afoul of congressional goals."[13] Thus, the court relied on *Forest Park II*'s analysis which ignored the presumption against preemption and instead focused on whether the local law conflicts with the methods by which Congress chose to implement its objective. Using this analysis, the Appellate Division upheld the lower court ruling.

The decision offers little explanation of its rejection of petitioners' arguments. It quickly dismissed *Rosario v. Diagonal Realty*, a case also decided by the New York Court of Appeals, by stating that the law at issue there was expressly contemplated by legislative and regulatory language.[14] It then distinguishes state cases relied upon by the tenants as dealing with antidiscrimination laws and thus not relevant to the instant case.[15] These antidiscrimination laws dealt with source of income issues that provided state and local protections to Section 8 voucher holders. With regard to *Kenneth Arms*,[16] a case that conflicts with *Forest Park II*, the court simply stated that it found the reasoning in the latter case to be more persuasive.[17]

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[5]Mother Zion Tenant Ass'n v. Donovan, 2007 WL 2175521 (N.Y.Sup. Apr. 11, 2007).
[6]*Mother Zion*, 865 N.Y.S.2d 64 (2008).
[7]Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
[8]Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003); *see also* Jason Lee, *New York City's Preservation Law Preempted by Federal and State Law*, 37 HOUS. L. BULL. 88 (Apr.-May 2007).
[9]*Forest Park II* at 733.
[10]*Id.* at 731.
[11]*Mother Zion* at 67.
[12]*Id.*
[13]*Id.*
[14]Rosario v. Diagonal Realty, 8 N.Y.3d 755 (2007).
[15]*Mother Zion* at 67, *citing* Commission on Human Rights & Opportunities v. Sullivan Assoc., 739 A.2d 238 (Conn. 1999); Attorney General v. Brown, 511 N.E.2d 1103 (Mass. 1987); Franklin Tower One, LLC v. N.M., 725 A.2d 1104 (NJ 1999).
[16]Kenneth Arms Tenant Assoc. V. Martinez, 2001 U.S. Dist. LEXIS 11470, No. Civ. S-01-832 LKK/JFM (E.D.Ca. order July 3, 2001) (enjoining preliminarily proposed prepayment of HUD Section 236 mortgages and termination of Section 8 project-based contracts based primarily on violation of state law that was not federally preempted).
[17]*Mother Zion*, at 68.

Critique

The court's ruling is flawed for a number of reasons. First, as explained in the tenants' brief, any analysis of federal preemption must begin with the strong presumption against preemption admonished by both federal and state courts.[18] As noted earlier, the court in *Forest Park II*, and in turn *Mother Zion*, ignored this presumption. To find a state or local law preempted, there must be a "clear demonstration of conflict."[19] This clear demonstration cannot rely on a conjecture regarding congressional intent. In *Mother Zion*, both the lower and intermediate courts acknowledged that the Local Law 79 may comport with Congress' objective of creating affordable housing, but claimed that it conflicted with an intent the court imposed upon Congress—that an owner must be allowed to withdraw from the project-based Section 8 program without any restrictions. Nothing in the federal statute points toward such an intent.

Bolstering the tenants' argument that Congress did not intend to preempt state and local preservation laws is the fact that both states and localities have always had a hand in regulating housing. When Congress created laws regulating affordable housing, it did so knowing that an extensive system of housing regulation existed and designed such laws to work in conjunction with state and local law. In fact, a number of courts have specifically found that even when local laws regulate entities also regulated by the federal government, those laws are not preempted.[20] Furthermore, when Congress has wanted to preempt local law, it has expressly stated as much.[21] Congress revised the statute numerous times over a twenty-year period and only twice sought to expressly preempt any local preservation law. The first, found in LIHPRHA, does not apply to project-based Section 8. The second, in MAHRAA, prohibits local laws that restrict the return on investment earned by Section 8 landlords, but does not at all address withdrawal from the program. The lack of express preemption on preservation laws relating to project-based Section 8 opt-outs is strong evidence that Congress did not intend to do so.

Moreover, the court's ruling dismissed the tenants' position that another New York Court of Appeals case, *Rosario v. Diagonal Realty, LLC* should be persuasive.[22] That case addressed a local law that imposed a rule that a Section 8 voucher lease must be renewed after the initial lease term absent good cause—after Congress had removed such a requirement from federal law.[23] In *Rosario*, the court held that Congress did not intend to "remove state and local law protections afforded to Section 8 participants" when it removed the "endless lease rule."[24] While the court in *Mother Zion* simply dismissed this case as distinguishable, it provided no explanation. In fact, the reasoning in *Rosario* supports the tenants' argument in *Mother Zion*. As explained in the Petitioners' Motion for Leave to Appeal, the laws governing the project-based Section 8 program are analogous to the statutes governing the voucher program that were at issue in *Rosario* in that they "merely refrain from imposing any federal obstacles to their withdrawal."[25] Owners do not have an affirmative and absolute right to withdraw from the project-based Section 8 program under the statute. Thus, under the State of New York Court of Appeals' prior analysis in *Rosario*, Local Law 79 should be upheld.

Implications

The effects of the *Mother Zion* decision should be limited for a few reasons. First, the tenants have moved to appeal the decision. Given prior state decisions, such as that in *Rosario*, the tenants may prevail in the New York Court of Appeals. Second, other state courts have already considered the law and reasoning of *Forest Park II* and, unlike the Appellate Division in New York, rejected it. Finally, Congress may well address the preemption issue in pending legislation in the upcoming legislative session. Therefore, while the *Mother Zion* decision is certainly negative, its effects may be limited and very possibly reversed by legislative action. ■

[18]Brief of Petitioner-Appellants at 14, Mother Zion Tenant Ass'n. v. Donovan, No. 402239/06 (N.Y.Sup., App. Div., Nov. 19, 2007), *citing* Medtronic v. Lohr, 518 U.S. 470, 485 (1996), Madeira v. Affordable Housing Foundation, Inc, 469 F.3d 219, 238 (2d Cir. 2006); Balbuena v. IDR Realty, LLC, 6 N.Y.3d 338, 356 (2006); Holtzman v. Oliensis, 91 N.Y.2d 488, 494 (1998); and General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990).

[19]*Id.*

[20]*See* College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp., No. 03AM03563, slip. Op. (Cal. Super. Ct. Nov. 19, 2003); Independence Park Apts. v. U.S., 449 F.3d 1235, 1243 (D.C. Cir. 2006); TOPA Equities, Ltd. v. City of L.A., 342 F.3d 1065 (9th Cir. 2003).

[21]*See* Low Income Housing Preservation and Resident Homeownership Act (hereinafter LIHPRHA), 12 U.S.C.A. § 4101 (West, Westlaw through P.L. 110-449 approved 11-21-08).

[22]*Mother Zion* at 67.

[23]Rosario v. Diagonal Realty, 8 N.Y.3d 755 (2007).

[24]*Id.* at 762.

[25]Motion for Leave to Appeal of Petitioner-Appellants, Mother Zion Tenant Ass'n. v. Donovan, No.402239/06 (N.Y. Nov. 2008).

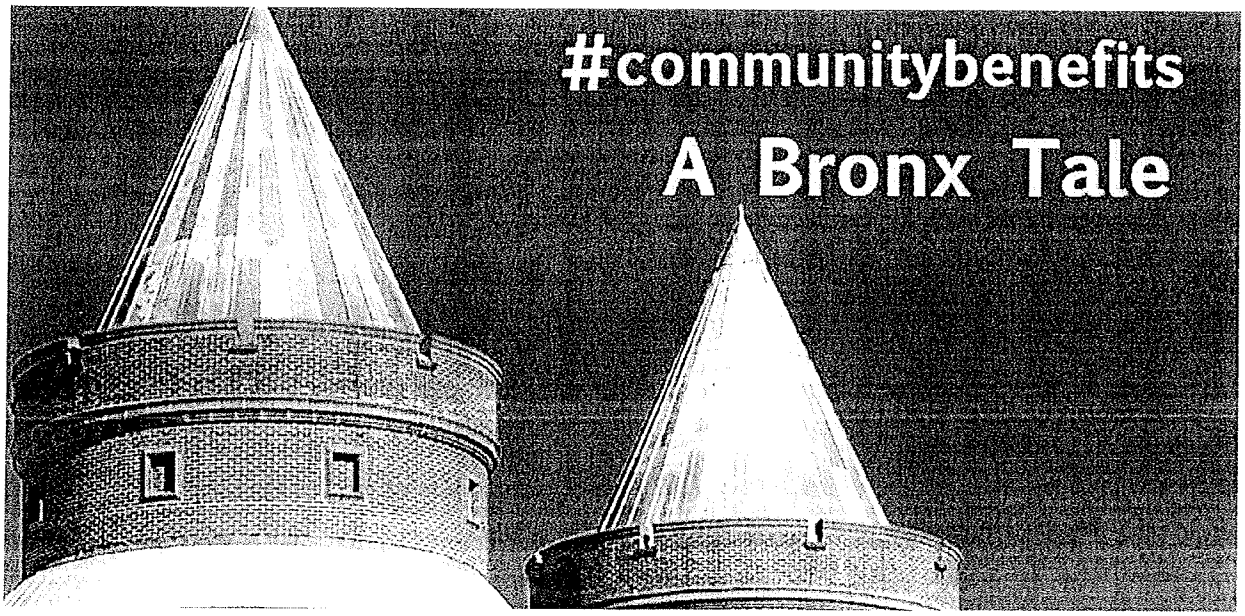
Appendix 7

Commonomics
Laura Flanders on strong local economies

YES! special coverage in collaboration with GRITtv

After 20-Year Fight, Bronx Community Wins Big on Development Project Committed to Living Wages and Local Economy

The people of New York's poorest borough fought to ensure that redevelopment of its castle-like landmark will benefit those who live there. Will it be a gamechanger?
by Laura Flanders
posted Jan 03, 2014



The Bronx's Kingsbridge Armory. Photo by Pro-Zak.

Desiree Pilgrim-Hunter never dreamed she'd become an activist. "I was just a mom concerned about school overcrowding," she says, until a neighbor invited her to a meeting of a local community organization, the Northwest Bronx Community and Clergy Coalition (NWBCCC). "I was used to people complaining about what was missing in our community," she recalls. "It was at NWBCCC that I first heard people talking about how to bring about solutions."

Public schools in the Bronx were overflowing, she learned, because the population was growing. And although the shopping options in the area were multiplying, investment in public services like schools wasn't keeping up.

When she joined the board of the Coalition in 2005 and discovered that the local armory was lying empty, Pilgrim-Hunter found herself engaged in a deep public process of imagining what might be brought in to fill the building: not another low-wage mall or a big box store to benefit some far-off owner, but a project that offered real opportunities for her children and her grandchildren; something that would lift the spirits and boost the economy of local people.

"We knew we didn't need a mall," she says. "More poverty wages in this, the poorest urban district in the country? Just to send another generation into poverty?"

This fall—more than a decade later—Hunter-Pilgrim gazed past the chain-link fence that still surrounds the block-long Kingsbridge Armory, and peered into what was once the National Guard Drill Hall. At 180,000 square feet, the cavernous

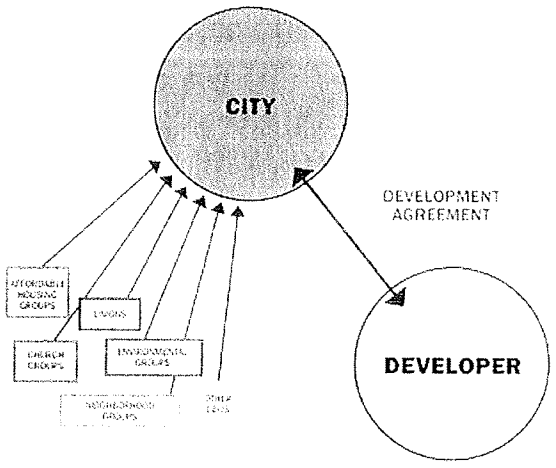
room is big enough to contain a world of dreams—and right, now it's holding hers. "What we need in the Bronx isn't just jobs. It's a new economy," she said.

"Our new economy: this is it. This is where it starts."

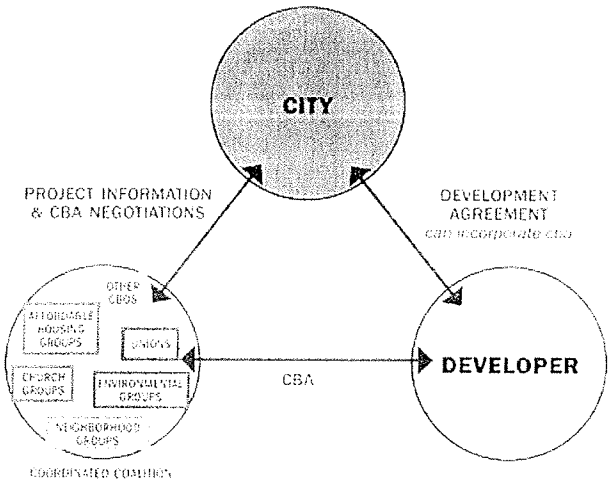
The Bronx on ice

A long-empty landmark building in the Northwest Bronx is set to become what is being billed as the largest indoor ice-skating center in the world, according to a plan approved by the New York City Council this December in a 48-1 vote. The 750,000-square-foot Kingsbridge National Ice Center will feature a suite of nine rinks, including a 5,000-seat rink for international competitions. It will attract the world's greatest athletes, say its backers, who include former New York Rangers star Mark Messier and figure skating Olympic gold medalist Sarah Hughes.

HOW DEVELOPMENT WORKS WITHOUT A CBA



HOW DEVELOPMENT WORKS WITH A CBA



Research from Community Benefits Agreements: Making Development Projects Accountable by Good Jobs First. Graphic designed by Michelle Ney/YES! Magazine.

The Bronx Armory development will also be a highly visible test of a new tool that's in vogue in development circles: Community Benefits Agreements, or CBAs. These are private cooperation agreements between developers and community organizations, drawn up with the purpose of securing benefits for the community from the development project; and, for the developer, ensuring community support—or at least acquiescence—during the city's official approval process.

In 2009, a plan to turn the same armory into a shopping center failed largely because the NWBCCC and local unions protested that it would promote low-paying jobs and displace local businesses.

The ice center promises to bring far fewer jobs than the proposed mall, but it won support nonetheless—in no small part because the developer spent months in negotiations with a group of community and labor organizations (including the NWBCCC). These groups agreed to put their picket signs away and support the plan. In return, they got the developer's pledge to set aside $1 million annually for 99 years to pay for free ice time for local kids, 50,000 square feet of "community space," green construction, and a promise to pay the facility's estimated 260 permanent workers at least $10 an hour.

The official agreement includes 27 pages bearing the signatures of church leaders, business owners, labor unions, and community organizers, including Pilgrim-Hunter, who signed on as board president of her local housing association.

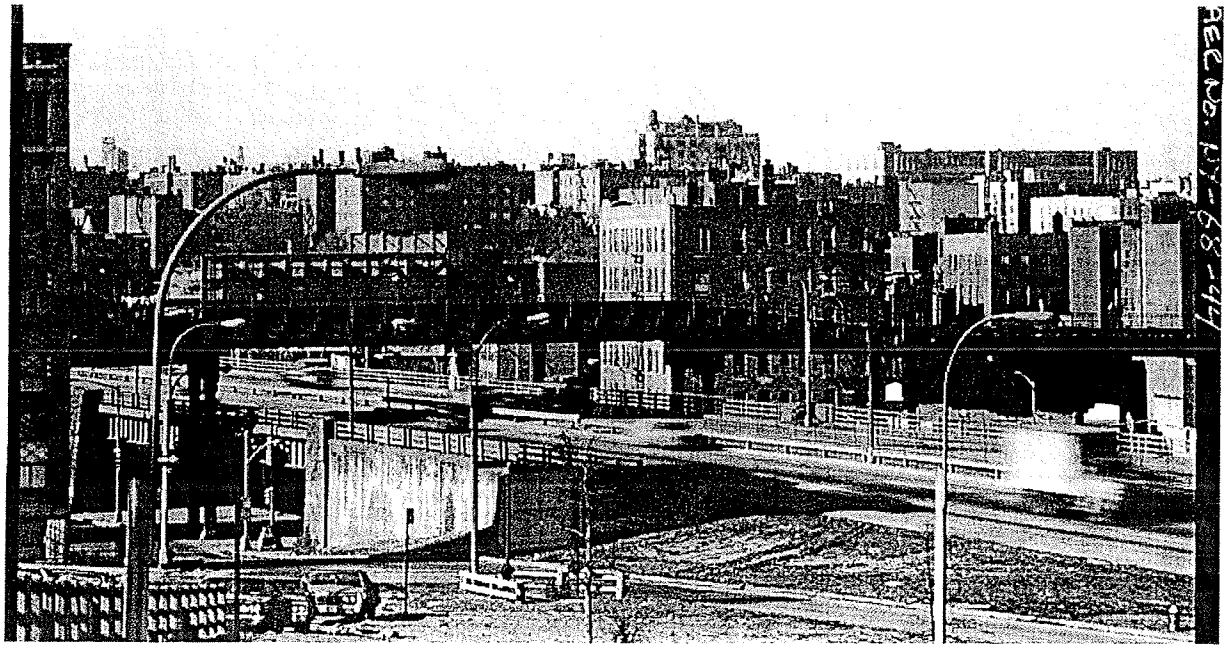
Kevin Parker, founder and chairman of KNIC Partners (the developers), says the new Center will solve an ice shortage. The Bronx has no year-round rink, and New York, his studies show, suffers from a lack of available ice time for ice sports fans. A self-described "hockey dad," (and former Deutsche Bank hedgefund manager), Parker says he's just happy to solve a problem for his kids.

Pilgrim-Hunter is looking for way more than that. "I see this as the center of the revitalization of the Northwest Bronx," she says. "More than that, I see it as the hub of the community."

Will it work? Will this quiet Bronx community, where shop owners sweep their sidewalks and shoppers mostly drive by on their way elsewhere, become a thriving hub of visitors seeking figure skating, ice-racing, and hockey? More importantly, are individual private agreements really the best way to reform a city's planning process?

Community groups from Los Angeles to New York are hailing CBAs as the way for local residents to have a voice in city planning. They're certainly an improvement over being shut out of the process altogether. But it'll be no easy task for other communities to mimic what the activists in the Bronx have achieved this time—and the Bronx is littered with developers' pledges that have been broken, long after the development's done.

Can organizers be sure that won't happen again?



This photo of the Cross Bronx Expressway was taken by Jack E. Boucher in December 1973 or January 1974. Photo courtesy of the Library of Congress.

"The Bronx is building"

Sitting at the intersection of Kingsbridge Road and Jerome Avenue, the Kingsbridge Armory looks like a medieval castle. Get off the elevated subway platform just 40 minutes north of Downtown Manhattan and you find yourself eye-to-eye with a turret.

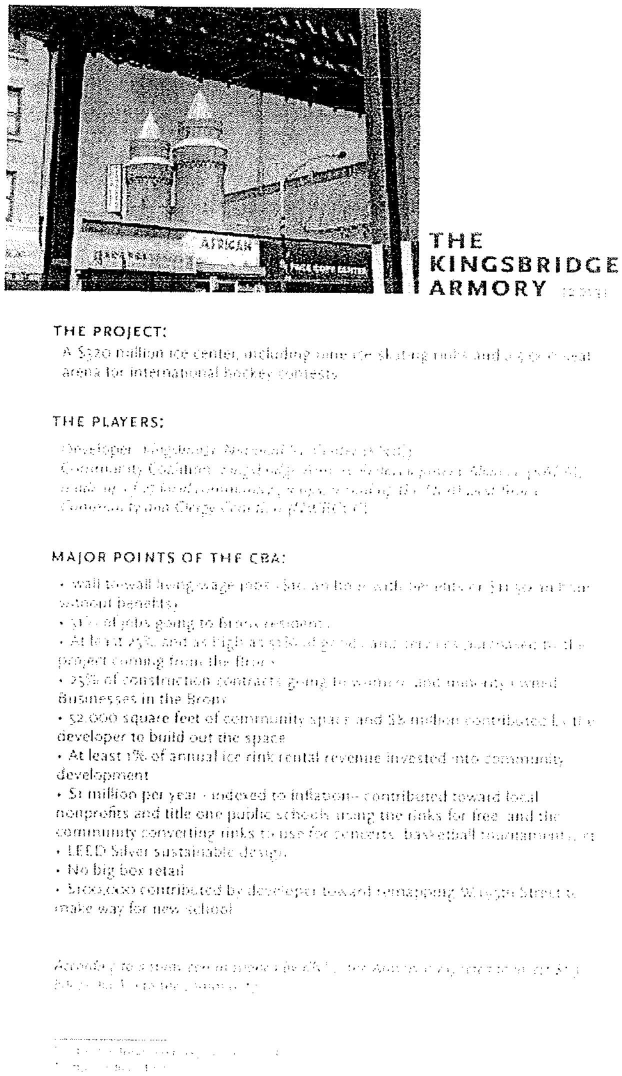
Yorman Nunez, who got involved in the community campaign around the Armory when he was just 13 years old, grew up a few blocks from here and would pass by on his way to school. "I always wondered," he said, "how is there a castle there, out of nowhere?"

Opened in 1917 to house the National Guard, at least half of the sprawling building looks like something out of Camelot, with turrets and terracotta and slits in the brick battlements for archers. The other half looks more like a classical railway station,

complete with vaulted steel girders, skylights, and an iron and copper roof. Standing in the gaping space, one half expects to see Anna Karenina or Sir Lancelot emerge from the shadows.

When New York Mayor Michael Bloomberg announced his support for the ice center proposal this spring, he stood with developers, politicians and skaters Hughes and Messier inside the Drill Hall and declared, "Allowing this armory to remain empty and stand as a symbol of the abandonment that once plagued the borough was simply unthinkable."

And then he quipped, "The Bronx is building."



CLICK TO ENLARGE

He was recalling the one phrase that's haunted the Bronx since 1977, when sports commentator Howard Cosell uttered it during a World Series baseball game at nearby Yankee Stadium. To explain the fire and smoke caught on a live camera scanning the run-down neighborhood, Cosell said, "The Bronx is burning."

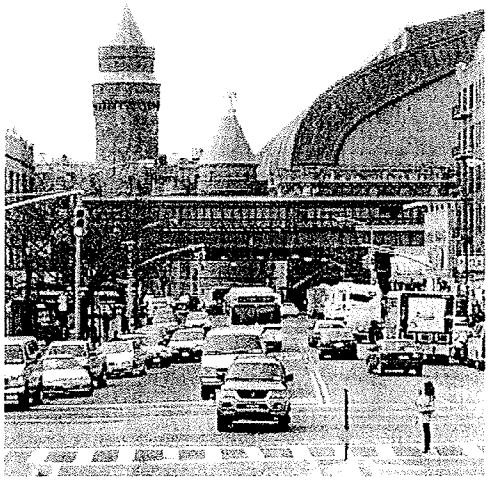
Years of repetition and media stereotyping have ensured that the borough's consistently been associated in the public mind with burnt-out buildings, abandoned lots, and "urban blight".

But the Bronx is a big, diverse place. The Northwest, where the Armory is, always stood in leafy, relatively well off contrast to where the ballpark sits, some four miles to the south. "Blight" was never the borough's problem so much as poor policy choices by far-off decisionmakers, including redlining by government, disinvestment by banks, and "slum clearance" by master planners like Robert Moses.

Of the Armory, urban journalist and author Roberta Gratz says, "It's a miracle that Moses didn't put a road through it." After redesigning much of the city (with an emphasis on parks and beaches, but also high-speed highways and slum clearance), Moses forced an expressway through the southern part of the Bronx that was completed in the 1960s.

In one mile-long stretch, the Cross Bronx Expressway demolished 1,530 apartments housing 5,000 people (by Moses' own estimate). Of the community's opposition—led by local mothers and grandmothers—Moses told his biographer, it was nothing but "A political thing that stirred up the animals." To his critics, he scoffed: "I raise my stein to the builder who can remove ghettos without removing people... the chef who can make omelets without breaking eggs."

Since Moses' day, the Bronx has gradually re-emerged, brought back, as Gratz likes to say, "block by block" by local residents. While progress is still uneven, in the last decade the Bronx increased in population at a rate which ranks the borough near the top in growth. It's still the county with the highest unemployment, highest infant mortality and highest obesity rate in the city, but around the Armory especially, on the east side of the Harlem River, real estate prices and rents have been rising.



The massive armory stands like a castle among local businesses. Photo by Jim Henderson.

The Bronx is no longer burning, but it is heating up.

Local businesses know that change is coming. On Kingsbridge Road, small family-owned stores huddle low against construction cranes that are rising all around. Across the street from the Armory, a family-owned Morton Williams is one of the few unionized grocery stores in the area. The Retail Wholesale and Department Store Union (RWDSU) hiring hall is just next-door.

A few blocks south of here lies Fordham Road, one of New York City's busiest shopping areas, where local businesses struggle to keep competitive against huge national chains that typically hire low-wage workers and keep out unions. A few blocks north sits Target, sucking bargain-seeking customers from local shops.

Gene Bass, whose store, Forever Young Healthy Food, directly faces the Armory's main entrance says she'll be glad to see something other than emptiness in the building across the street. Still, she's worried: Development nearby has rarely brought good news for union workers like those of the RWDSU or small commercial renters like Bass.

"My sister and I founded this business 22 years ago," she said. "We want to stay."

"Community benefits" means community buy-in

Community Benefits Agreements grew out of a frustration in cities like this one, where development, often subsidized by local taxes, has ended up profiting far-off corporations while displacing local businesses and leaving public coffers depleted.

In the late 1990s, when the first CBAs were being developed, states, counties, and cities in the United States were spending close to $50 billion in public dollars on sports stadiums, entertainment centers, big box retail malls, and upscale property development every year. Local residents could do little but protest and try to sway the city's approval process. Benefits agreements were developed as a way to not necessarily stop development, but try to benefit from it.

> Related had influence, Bloomberg's backing, and the city's building frenzy running in its favor. What the firm hadn't bargained on was an organized community.

Generally, CBAs take the form of private agreements between developers and community organizations that detail the benefits a developer will provide in order to secure the cooperation, or at least tolerance, of community groups regarding the developer's application to the city for permission to develop a particular project. The first major CBA, the Los Angeles Staples agreement, was signed in 2001. Since then, scores of CBAs have been negotiated across the country, in Atlanta, Chicago, Denver, Milwaukee, Minneapolis/St. Paul, but not, until now, successfully in New York City.

"The Armory CBA is really pivotal for New York City, for the Bronx, and for CBAs," said Julian Gross, an attorney who has worked with dozens of groups on Community Benefits Agreements—including the Staples agreement—and who consulted with the NWBCCC early on in the process.

The deal takes the form of a "cooperation agreement" between the directors of KNIC Partners and the Kingsbridge Armory Redevelopment Alliance (KARA), a team of community and labor institutions that the NWBCCC helped to found 17 years ago with the specific purpose of being a negotiating partner for developers—whenever such a developer came along.

"It's New York City's first real CBA," says Gross of the eventual deal that was reached. The deal was "driven by a legitimate community coalition, with no successful attempt by the city to control or manipulate it. It's a real agreement with real legal language."

There was good reason for KNIC to seek community "cooperation." The last plan to develop the Bronx Armory went down to defeat when the developers of a proposed mall refused to come to agreement with the community over living wages. Related Companies, a major developer in New York, had secured Mayor Bloomberg's support to buy the building for just $5 million with nearly $50 million in taxpayer subsidies and exemptions to build a mall. Related had influence, Bloomberg's backing, and the city's building frenzy running in its favor.

> With members who were Irish, Latino, Jewish, Italian, African-American, and Caribbean, the Coalition also drew on the Bronx's hefty population of organized, socialist, and immigrant families who'd moved north from Manhattan's Lower East Side tenements.

What the firm hadn't bargained on was an organized community. NWBCCC and the RWDSU organized a year's worth of rallies, each larger than the the one before, complete with churchleaders, celebrities, and local politicians, and the final vote in the city council was 48-1 with all the Bronx delegation voting against.

When KNIC Partners came in with the ice center deal, "We knew from the beginning that this project would only work if the community wanted it," developer Kevin Parker told Commonomics in an email. "So we sat down with them early on to determine how we could create a worthy vision that would benefit everyone involved."

The people of the Northwest Bronx had made themselves a credible force to be reckoned with. That's lesson number one for groups seeking to mimic what happened in the Bronx deal, says Bettina Damiani, project director of Good Jobs New York. The community groups in the area had developed a very clear agenda for the armory years before the developers arrived.

Like most observers, Damiani singles out the Coalition: "NWBCCC didn't just convene the players around the negotiating table; they built the table," she said.

The roots of the Coalition reach deep. Roger Hayes (father of MSNBC's Chris Hayes) co-founded the group in 1974, inspired by clergy who'd moved north from the southern part of the borough hit by Moses' Expressway. Parish-priests are place-based organizers by definition; those eggs in the developers' omelet are their parishioners.

The Bronx clergy had seen what happened when people moved en masse, leaving buildings empty and blocks vacant. With members who were Irish, Latino, Jewish, Italian, African-American, and Caribbean, the Coalition also drew on the Bronx's hefty population of organized, socialist, and immigrant families who'd moved north from Manhattan's Lower East Side tenements. "People came from very different places," said Hayes, "but the church leadership was very sophisticated; they'd sit down with anyone and talk."

In the years when landlords stayed away and banks and government divested, "NWBCCC was there," says Hayes. (By the mid-2000s, the group had 4,000-5,000 active members with experience providing services, occupying and managing buildings, protesting banker bias, and electing representatives to office.)

> Millions of dollars in public subsidies for more poverty-level wages and more people needing food stamps were not on the community's list of priorities.

So in the mid-1990s, when the NWBCCC held mass meetings to imagine a new future for the Kingsbridge Armory, hundreds of people attended. When they invited local politicians to sign on to their list of priorities for the building (which became the basis for the CBA), those politicians signed on.

In the run up to the vote on the Related company's mall, NWBCCC members marched from a local church to the armory and wrapped the entire building in yellow caution tape. Ava Farkas, who was the NWBCCC armory organizer at the time, recalls: "The tape read, 'It's our Armory', and that's really how it felt. The community felt ownership over it. It was our space."

After the City Council rejected the mall, Mayor Bloomberg blamed small groups of people "out to feather their own nests and extort money from the developer."

But hurled at NWBCCC, that charge didn't stick.

CLICK TO ENLARGE

In Brooklyn, signatories to a CBA negotiated with the developers of the Atlantic Yards redevelopment hailed that agreement as a great achievement, too. Opponents saw those signatories as pawns, and the CBA as a tool the developers had used to manufacture the appearance of consent and co-opt local politicians.

In the Bronx, another Related Companies plan to redevelop the Bronx Terminal Market into a retail complex was approved after a CBA, negotiated by local politicians, was finalized just before the City Council voted. Almost immediately questions were raised about kickbacks to the politicians involved. And 17 months after a similar deal was reached around construction of a new Yankee Stadium, the *New York Times* reported that community groups had still not received any of the promised funds from the New York Yankees (see sidebar further down).

Even though the NWBCCC is massively popular in the Bronx, some residents still wonder how KNIC got chosen over an alternative proposal.

Legendary DJ Afrika Bambaataa and an alliance of Hip Hop stars backed a different developer, Youngwoo and Associates, whose plan for the armory included a "Mercado Mirabo"—a community "plaza"-style market—and "town square" with a mix of food, entertainment, cultural space, and $10/month gym access for Bronx residents.

The Youngwoo proposal also included a Hip Hop Museum. "An international museum of Hip Hop, located in the Bronx where the movement started, will attract worldwide recognition and bring visitors from around the globe" said Bambaataa at the time.

Pilgrim-Hunter says the Youngwoo company wouldn't commit to all of the points of KARA's proposed CBA. Sources close to Youngwoo say the CBA process encourages developers to promise more than they can actually deliver. Youngwoo still believes its plan more closely reflected the community's expressed priorities than world-class ice skating.

At the end of the day, the benefits promised under the CBA hang on the success of the KNIC business model.

"We wish the best for the community. The armory project is a very visible place and this is a very big project," said Adam Zucker, Director of Business Development at Youngwoo. "The community made itself a strong player and they deserve something great."

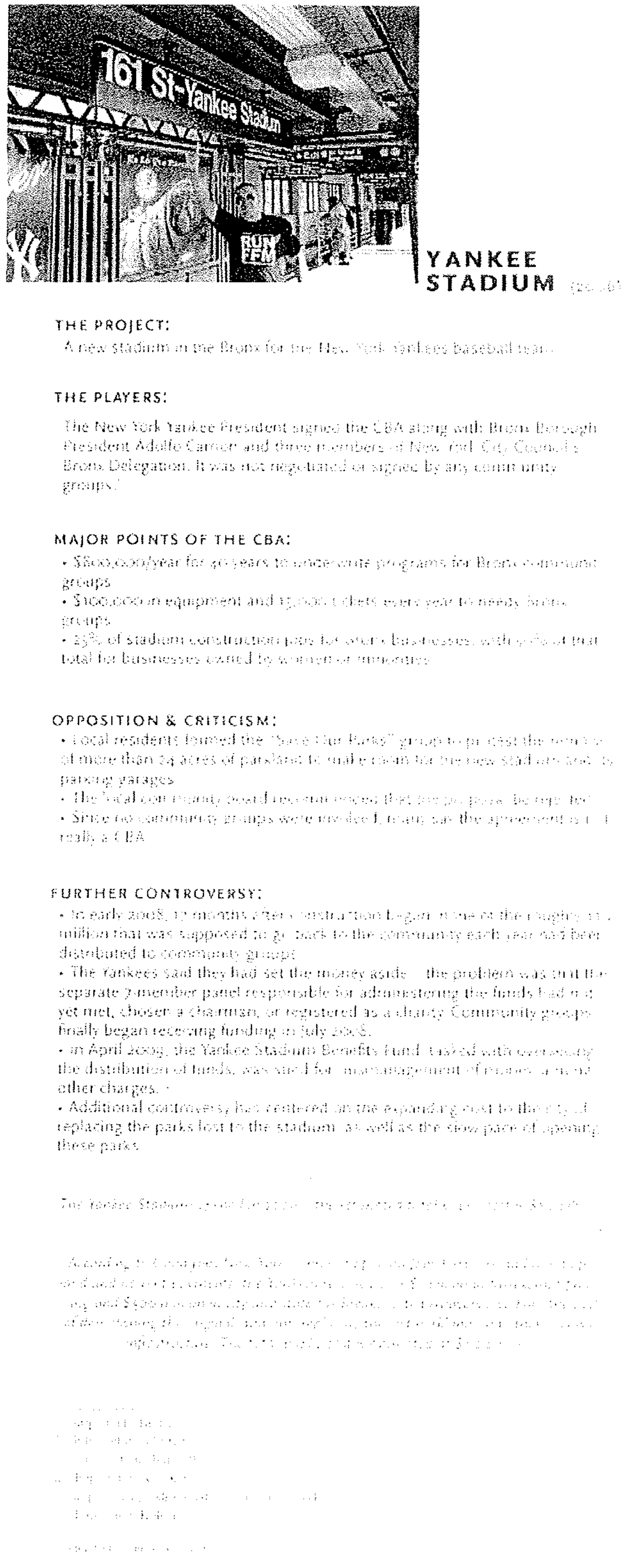
> "CBAs are a community's next best alternative to getting what they actually wanted."

Less charitably, others wonder if KNIC's goal of attracting 2 million visitors annually to the Bronx is realistic. After an initial contribution of $8 million for construction of community space and support for local business developments, the benefits KNIC will contribute to the community hang on the success of the overall project. Most of the benefits are in-kind, and while there will be many different ice sports on offer, none is particularly associated with the urban people of color and immigrants who dominate the Northwest Bronx community. Perhaps the KNIC will change the hue of the NHL.

Still, a lot is riding on the ice.

The best tool in town?

You can almost feel the neighborhood's residents actively willing the ice center development to be successful. Asked if he was a skater, the security guard minding the armory's massive loading door this November beamed broadly and exclaimed, "No. But I'm going to be."



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Gabriel Vangelatos, son of the owner of the New Capital Diner across the street, is considering adding special dishes to his menu for visiting Canadians. Referring to the former New York Rangers Hockey star who's agreed to serve as CEO of the Center, Vangelatos says, "Mark Messier was my childhood hero. What' s not to like?"

Nonetheless, in calling the armory deal the city's first "real" CBA, supporters sidestep the poor record of area CBAs until now.

"New York's past CBAs weren't enforceable. This one is," says attorney Gross.

Sure enough, KNIC and KARA are signatories to a legal pact. Still, Tom Angotti, who teaches urban affairs at Hunter College, says if the Center fails to deliver, "KARA can sue but they've got to find a lawyer and take them to court. Good luck with that."

Angotti served on a citywide task force on CBAs in 2010 that concluded that the process needed to conform to clear, uniform standards. Even then, he adds, "CBAs are a community's next best alternative to getting what they actually wanted."

Roberta Gratz, author of *The Battle for Gotham*, is even more skeptical: "Real estate power still owns the city," she says. "When a community's strategy to get what it really wants has failed, CBAs are a way to get the best out of a bad situation." (The Coalition's original proposal for the armory, drawn up after lots of community meetings, included three 800-seat schools to address school overcrowding, a sports complex, a green market, a bookstore, a community center, and a park. Not skating.)

Ideally, cities would have strong policies on the books, covering affordable housing, local hiring, and living-wages (that are really livable)—in which case, communities wouldn't have to work though these deals on a case-by-case basis.

"If community groups had confidence that cities would negotiate and enforce those things, they wouldn't need CBAs" says Gross.

Similarly, if the public process through which development proposals were approved was reliable, accountable, and adequately funded, public bodies (like community boards, in New York City) could do their own research on the kind of development that would truly benefit neighborhoods, and community organizations like the NWBCCC wouldn't have to hire their own consultants and run the risk of being called "unrepresentative."

> "One of the things we're looking forward to is people in our community becoming the developers. That will be the testament to what started here: [If], 20 years from now, we have given birth to other folks from the Bronx owning their own businesses."

"As a practical matter, the best place for the planning to go on is at community board level," says professor Angotti.

New York City residents ostensibly have a say in the planning process through community boards that vote on land use and development proposals. But board members are appointed volunteers with little to no staff. They struggle—especially in working-class neighborhoods—to deal with day-to-day business, let alone planning for the long-term, and with public resources always stretched board budgets are on the chopping block.

"They're the community planning institution and they're a failed institution," says Agnotti.

In a developer-driven process, CBAs may be the best tool in town. But they're not the end of the story for communities seeking a say in their own future.

Next steps to community wealth

"One of the things we're looking forward to [in the Bronx]," says Pilgrim-Hunter, "is people in our community becoming the developers. That will be the testament to what started here: [If], 20 years from now, we have given birth to other folks from the Bronx owning their own businesses."

Pilgrim-Hunter's not alone in seeing the Kingsbridge Armory CBA as just the first step in a longer journey for the borough. To get where she wants the Bronx to go, she says, "It's going to take community partnerships with development and businesses; it's going to take leaders actively advocating; and its going to take legislation, and all of us being able to understand and pass laws to support community ownership..."

The Initiative includes local business leaders, organized labor, and anchor institutions, including Montefiore Medical Center, Fordham University, Hostos Community College, Bronx Community College, the New York Botanical Garden, and the Bronx Zoo, as well as local nonprofits like the Northwest Bronx Community and Clergy Coalition, Mothers on the Move, the Northern Manhattan Coalition for Immigrant Rights, and others.

Pilgrim-Hunter considered a run for state senate in 2010. She says she's ruled out another run. For now, she says she's looking forward to the armory setting a new standard for development in communities across the country: Development in which "community, businesses, government, and politicians come together to plan community redevelopment—not in opposition but together."

Reached on the day after the city council vote, she said that she intends to take some time off—to celebrate the armory win with her grandchildren.

"It's my younger Daughter Cassandra and [her son] Cole's faces that keep me going," she explained. Pilgrim-Hunter recently heard that her daughter's family were moving to North Carolina.

Cassandra has two jobs—one in mid-town Manhattan and the other upstate. "[Cassandra] has spent her whole life commuting to school and now trying to piece together work," Pilgrim-Hunter told me.

"I'm heartbroken to be losing my daughter to another state. By the time my grandson Cole is old enough my hope is establishing these kind of living-wage development projects will mean my daughter won't have to hear the same thing from him. He can stay close to home because he'll be able to find work he can thrive on."

Laura Flanders wrote this article for YES! Magazine's Commonomics project. Laura is YES! Magazine's 2013 Local Economies Reporting Fellow and is executive producer and founder and host of "GRITtv with Laura Flanders." Follow her on Twitter @GRITlaura.

Graphics designed by Michelle Ney. Research by Natalie Lubsen.

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Appendix 8

COOPERATION AGREEMENT

This Cooperation Agreement is made and entered into as of this 10th day of May 2016, by and between the Tenants Association, the Owner, and the Developer (each as defined below). Tenants Association, Owner, and Developer are the parties to this Cooperation Agreement, and each is referred to individually as a "**Party**" and they are referred to collectively as the "**Parties**".

RECITALS

A. In 1969, the City of New York established the Lindsay-Bushwick Community Development Plan. In furtherance of the Urban Renewal Plan, in 1980, the City Planning Commission approved the proposed development of a rental housing project on Lindsay-Bushwick Avenue Urban Renewal Area Site 3 and Site 5 located in the Borough of Brooklyn on Block 3072, Lot 1 and Block 3071, Lot 10 for U.S. Department of Housing and Urban Development ("**HUD**") Section 8-eligible tenants. Owner developed the Existing Buildings under the name Caribe Gardens and entered the HUD Project Based Section 8 program. The current Section 8 Housing Assistance Payments Contract with HUD expires on February 1, 2017.

B. Owner represents that it is seeking from the New York City Department of Finance, Property Division – Tax Map Division apportionment of two (2) sites presently on Block 3072, Lot 40 and Block 3071, Lot 40 (the "**Development Sites**") into two (2) new tax lots for residential use. The Block 3072, Lot 40 parking lot is presently located on Johnson Avenue between Humbolt Street and Bushwick Avenue. The Block 3071, Lot 40 parking lot is presently located on Boerum Street between Graham Avenue and Humbolt Street. Owner represents that it is seeking extension of tax exemption pursuant to Article 5 of the New York State Private Housing Finance Law for approval by the New York City Council.

C. Developer has proposed to build two (2) new multi-family apartment buildings containing approximately 220 units in total on the Development Sites. The Development Sites consist of unimproved land used for parking vehicles, at least for a time, presently located on Block 3072, Lot 1 and Block 3071, Lot 10 designated as part of Caribe Gardens.

D. The Parties agree that it is in their mutual interests to attempt to resolve the concerns of the Tenants Association through cooperation.

E. The Parties desire that any potential dispute be settled according to the terms set forth in this Cooperation Agreement and that the Parties undertake the Community Benefits Program attached hereto as Exhibit A, which is incorporated by reference and made a part hereof (the "**Community Benefits Program**").

DEFINITIONS

As used in this Agreement, the following capitalized terms shall have the following

meanings. All definitions include both the singular and plural form.

"**City**" shall mean the City of New York in the State of New York.

"**Community Benefits Program**" shall have the meaning set forth in the recitals.

"**Cooperation Agreement**" shall mean this Cooperation Agreement as well as all appendices, schedules, exhibits and attachments hereto and thereto, all of which are incorporated herein by reference and made a part hereof.

"**Developer**" shall mean SPG Johnson LLC and SPG Boerum LLC, the prospective owner of the Development Sites presently located on Block 3072, Lot 1 and Block 3071, Lot 10, on which a new development is being proposed. Included in the defined term Developer are any partners, investors, agents, members, joint ventures, or other parties involved in the development of the Development Sites. Should Developer not move forward with the Project, any future developer which enters into an agreement with Owner to develop the Development Sites is included in this defined term.

"**Development Sites**" shall have the meaning set forth in the recitals.

"**Effective Date**" shall mean the date this Cooperation Agreement is fully executed by the Parties.

"**Existing Buildings**" shall mean the following six buildings: 185 Johnson Avenue, Brooklyn, New York 11206; 190 Johnson Avenue, Brooklyn, New York 11206; 161 Boerum Street, Brooklyn, New York 11206; 193 Boerum Street, Brooklyn, New York 11206; 148 Humboldt Street, Brooklyn, New York 11206; 144 Humboldt Street, Brooklyn, New York 11206. Each building is three stories high with the exception of one building with two stories. Existing Buildings contain a total of 120 units developed between the corners on the westerly side of Bushwick Avenue with the southerly side of Johnson Avenue. Existing Buildings are HUD Project Based Section 8 buildings presently occupied by tenants who are members of the Tenants Association.

"**HUD**" shall have the meaning set forth in the recitals.

"**New Buildings**" shall mean the improvements defined in the Project and submitted for approval of the New York City Council and any modifications approved by the New York City Council or permitted by law.

"**Owner**" shall mean Lindsay-Bushwick Associates L.P., the owner of the land on which the Existing Buildings and Development Sites are located, otherwise known as Caribe Gardens, presently located on Block 3072, Lot 1 and Block 3071, Lot 10.

"**Party**" shall have the meaning set forth in the preamble.

"**Project**" shall mean the development of New Buildings on the Development Sites, subject to approval of the New York City Council. The New Buildings shall be deemed complete upon issuance of a temporary certificate of occupancy of the second of the two New Buildings. The term "Project" shall include any changes, modifications or amendments to the Project that do not materially change the nature or character of the Project as described in the Proposal.

"**Project Approvals**" shall mean any and all actions relating to the New York City Council approval of the Project, that, in order for the Project to be built and become fully operational, are required to be taken by any governmental agency, including without limitation the City and all City departments, boards, commissions and agencies.

"**Proposal**" shall have the meaning of the text and documents annexed hereto at Exhibit B.

"**Tenant**" shall mean any individual that resides now and in the future in the Existing Buildings pursuant to a Lease Agreement.

"**Tenants Association**" shall mean Caribe Gardens Tenants Association, Inc., a New York not-for-profit corporation, including officers acting in their official capacity.

"**Tenants Association Excluded Matters**" shall mean (a) any right to seek judicial enforcement of this Cooperation Agreement, including the Community Benefits Program; (b) any right to enforce this Cooperation Agreement, the Community Benefits Program and any other or future contracts between the Parties, any of the Owner's affiliates or successors-in-interest, and/or any of the Developer's affiliates or successors-in-interest; (c) any right to challenge future changes to the Project that substantially deviate from the description of the Project in the Proposal; (d) any right to challenge material deviations from the conditions of Project Approvals; and (e) any right to challenge violations of law by Owner and/or Developer, any of the Owner's affiliates or successors-in-interest, and/or any of the Developer's affiliates or successors-in-interest with respect to Project.

"**Termination Date**" shall have the meaning set forth in paragraph 6.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, promises and undertakings set forth herein and other consideration, the receipt and adequacy of which the Parties hereby acknowledge, the Parties agree as follows:

1. Commitments and Obligations of Owner. Owner covenants that it shall, at such time as the Effective Date, or such later time as indicated in this Agreement, including the Exhibits hereto, carry out its commitments and obligations under the Community Benefits Program, and ensure that managing agents, nominees, and successors-in-interest take all actions necessary to fulfill terms set forth in the Community Benefits Program. The commitments and obligations of Owner, its managing agents, nominees, and successors-in-interest, transferees and assigns, if any, under this Section 1 and the Community Benefits Program shall terminate on the

Termination Date or such earlier or later time as may be specified for any particular commitment or obligation in the Community Benefits Program. Without limiting the generality of the foregoing the Parties acknowledge that Owner has commitments and obligations pursuant to its agreement with the Developer. Owner represents, warrants and covenants that it is not, nor shall it become, a party to any agreement that contravenes, conflicts with or prevents Owner's execution of this Cooperation Agreement or performance of its commitments and obligations as set forth herein or in the Community Benefits Program.

2. Commitments and Obligations of Developer. Developer covenants that it shall, at such time as the Effective Date, or such later or earlier time as indicated in this Agreement, including the Exhibits hereto, carry out its commitments and obligations under the Community Benefits Program, and ensure that managing agents, nominees, and successors-in-interest take all actions necessary to fulfill terms set forth in the Community Benefits Program. The commitments and obligations of Developer, its managing agents, nominees, and successors-in-interest, transferees and assigns, if any, under this Section 2 and the Community Benefits Program shall terminate on the Termination Date or such earlier or later time as may be specified for any particular commitment or obligation in the Community Benefits Program. Without limiting the generality of the foregoing the Parties acknowledge that Developer has commitments and obligations pursuant to its agreement with the Owner. Developer represents, warrants and covenants that it is not, nor shall it become, a party to any agreement that contravenes, conflicts with or prevents Developer's execution of this Cooperation Agreement or performance of its commitments and obligations as set forth herein or in the Community Benefits Program.

3. Commitments and Obligations of Tenants Association. Tenants Association covenants that it shall, upon execution of this Cooperation Agreement or at such later time as set forth herein or in the Community Benefits Program, undertake the following actions. The Tenant Association Board may act on behalf of the Tenants Association in carrying out its affirmative commitments and obligations under the Cooperation Agreement.

(a) The Tenants Association agrees not to oppose the approval of the Project and the Project Approvals by the City. The Tenants Association shall not interfere with construction of the New Buildings.

(b) If requested by the Parties, the Tenants Association, in collaboration with the Owner and the Developer, shall prepare a joint press release or statement announcing Owner and Developer's commitments to the Community Benefits Program and the Tenants Association's non-opposition to the Project.

(c) The Tenants Association's commitments and obligations under this Section 3 shall terminate with regard to any component of the Project at such time as a certificate of occupancy is issued for such component.

(d) Changes in Project Scope. The commitments and obligations of the Tenants Association set forth in this Section 3 not to oppose the Project and Project Approvals as well as the Tenant Association's covenant not to bring an administrative action set forth in Section 4, shall not apply if the Project plans substantially deviate from the plans set forth in the Proposal,

except where such substantial deviation is explicitly envisioned in this Cooperation Agreement or otherwise approved in writing by the Tenants Association in its reasonable discretion.

(e) The Tenants Association shall cooperate with Owner and Developer to execute documents reasonably necessary in obtaining financing for the Existing Buildings and to construct and own the Project as set forth in the Proposal consistent with this Cooperation Agreement.

4. Covenant Not to Bring Administrative Action. The Tenants Association covenants not to administratively challenge or contest the Project or the Project Approvals, except with respect to Tenants Association Excluded Matters. The provisions of this Section 4 are effective with regard to each component of the Project from the Effective Date until the Termination Date unless Owner and/or Developer has breached any of the terms set forth in this Cooperation Agreement or the Community Benefits Program.

5. Enforcement.

(a) A Party that believes that another Party is in breach of this Cooperation Agreement shall, prior to taking action to enforce this Cooperation Agreement or declaring the other Party to be in breach, request in writing the opportunity to meet and confer in a good-faith effort to resolve the issue. This meet and confer obligation shall take place in a timeframe that is reasonable under all of the circumstances, time being of the essence.

(b) This Cooperation Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of New York and this Agreement is fully enforceable.

(c) This Cooperation Agreement may be the basis for a request for injunctive relief with respect to performance of any term of this Agreement. The Parties hereto agree that money damages would be an inadequate remedy for any breach (or threatened breach) of this Cooperation Agreement, and agree that this Cooperation Agreement may be enforced by an application for a preliminary or permanent injunction, only by a decree of specific performance from a court of competent jurisdiction. The agreed remedies set forth herein shall not be construed to limit or derogate any legal or equitable remedy authorized by applicable law or a court's ability to determine facts, weigh evidence, and exercise its own discretion with respect to enforcement of any term or condition of this Agreement.

6. Termination.

(a) This Cooperation Agreement shall automatically terminate without any action of any Party on January 31, 2037 (the "**Termination Date**"). Parties recognize that certain provisions in the Community Benefits Program shall cease prior to the Termination Date. Paragraphs 3(a), 3(b), 3(e), 4, 5(d), 6, of the Community Benefits Agreement shall survive until the Termination Date. Section 7(e) of the Community Benefits Agreements shall survive for one (1) year following temporary certificate of occupancy with respect to each project.

(b) This Cooperation Agreement shall not terminate nor shall any

commitment or obligation of any Party set forth herein be suspended in the event that any action or claim is commenced, whether by filing an action or claim or by way of defense, by any person, with the exception of occupants of the Existing Buildings, or entity not a Party to this Cooperation Agreement challenging the Project, the Project Approvals, or otherwise seeking to enjoin or invalidate the construction or financing of the Project.

(c) In the event of (i) a bona fide default (i.e. a default made in the absence of collusion, or appearance of collusion) on any mortgage affecting the Property or Project held by a third-party institutional investor (e.g. Fannie Mae, Freddie Mac or their successors and/or assigns) and (ii) the principal sum secured by such mortgage have become immediately due and payable, whether by acceleration or otherwise, the defaulting party, either Owner or Developer, or both, shall notify the Tenants Association in writing within thirty (30) days, and should a third-party institutional investor seek to foreclose on a defaulted mortgage or to take title by deed in lieu of foreclosure, the commitments of the mortgagee, Owner or Developer respectively, shall cease regarding the third-party institutional investor and its successors and/or assigns. This Cooperation Agreement shall automatically terminate and be of no further force and effect upon a foreclosure of the Property or Project by such third-party institutional investor.

7. Notices. All notices shall be in writing and shall be mailed via first class mail to the affected parties at the addresses set forth below. Any Party may change its address, its facsimile machine number, or the name and address of its attorneys by giving notice in compliance with this Cooperation Agreement. Notice of such a change shall be effective only upon receipt. Notice given on behalf of a Party by any attorney purporting to represent a Party shall constitute notice by such Party if the attorney is, in fact, authorized to represent such Party. The addresses and facsimile machine numbers of the Parties are:

(i) If to Owner:

Abram Shnay
98 Cutter Mill Road
Suite 240-S
Great Neck, New York 11021

with a copy to:

John L. Kelly, Esq.
Nixon Peabody LLP
437 Madison Avenue
New York, New York 10022

(ii) If to Developer of 222 Johnson:

SPG Johnson LLC
38 East 29th Street, 9th Floor
New York, New York 10016
Attn: Stephen S. Krasman, Esq.

If to Developer of 159 Boerum:

SPG Boerum LLC
38 East 29th Street, 9th Floor
New York, New York 10016
Attn: Stephen S. Krasman, Esq.

(iii) If to Tenants Association:

Caribe Gardens Tenants Association, Inc.
175 Boerum Street, Suite A
Brooklyn, New York 11206

with a copy to:

Edward W. De Barbieri, Esq.
Urban Economic Development Clinic
BLS Legal Services, Corp.
1 Boerum Place, 3rd Floor
Brooklyn, New York 11201

with a copy to:

Addrana Montgomery, Esq.
Community Development Project
Urban Justice Center
123 William Street, 16th Floor
New York, New York 10038

8. Implementation through Relevant Contracts. Where this Cooperation Agreement requires an entity to impose responsibilities on another party, such entity shall ensure that relevant contracts: (i) impose such responsibilities on the other party; (ii) require such party to impose such responsibilities on subcontractors or other parties involved in the Project through the contract in question; and (iii) state with regard to such responsibilities imposed on any such parties that the Tenants Association is the intended third party beneficiary with enforcement rights. Any entity that imposes a commitment or obligation required by this Cooperation Agreement on another entity shall, in event of failure by that other entity to comply with such commitment or obligation, enforce that commitment or obligation against the other entity or terminate the contractual relationship in question.

9. Documents to be Filed or Executed. The Parties agree to cooperate to execute any documents reasonably required to effectuate the intent of this Cooperation Agreement. Owner

shall cause to be recorded in the Office of City Register, Kings County, this Cooperation Agreement for the instant block and lots.

10. Legal Fees and Costs. Except as provided herein, each Party shall bear its own legal fees and costs resulting from the preparation, negotiation and execution of this Cooperation Agreement and the potential litigation.

11. Waiver. The waiver of any provision or term of this Agreement shall not be deemed as a waiver of any other provision or term of this Agreement. The mere passage of time, or failure to act upon a breach, shall not be deemed as a waiver of any provision or term of this Agreement.

12. Successors and Assigns. Subject to Section 6(c), this Agreement shall bind, and inure to the benefit of, the parties and their respective successors, assigns and legal representatives as follows:

(a) Commitments Binding on Agents and Successors of Owner. Any agents, assigns, or successors-in-interest of the Owner will comply with the Owner's responsibilities under this Agreement. Any contracts related to the Project between the Owner and such entities will include this Agreement as a material term, with a statement that such inclusion is for the benefit of the Tenants Association.

(b) Commitments Binding on Agents and Successors of Developer. Any agents, assigns, or successors-in-interest of the Developer will comply with the Developer's responsibilities under this Agreement. Any contracts related to the Project between the Developer and such entities will include this Agreement as a material term, with a statement that such inclusion is for the benefit of the Tenants Association.

(c) Commitments Binding on Agents and Successors of Tenants Association. Any agents, assigns, or successors-in-interest of the Tenants Association will comply with the Tenants Association's responsibilities under this Agreement.

(d) Commitments For Benefit of Successors. This Agreement shall inure to the benefit of the agents, assigns, and successors-in-interest of each Party. Any reference in this Agreement benefiting a Party shall be deemed to benefit to any agents, assigns and successors in interest of that Party.

(e) Covenants Run With the Land. All terms set forth in this Cooperation Agreement, including the Community Benefits Program, are covenants that run with the land and bind all grantees, lessees, or other transferees thereto for the benefit of and in favor of all Parties.

13. Construction. Each of the Parties has been represented by counsel in the negotiation and drafting of this Cooperation Agreement. Accordingly, this Cooperation Agreement shall not be strictly construed against any party, and the rule of construction that any ambiguities be resolved against the drafting party shall not apply to this Cooperation Agreement.

14. Interpretation. When a reference is made in this Cooperation Agreement to a section, schedule or exhibit, such reference shall be to a section of, or schedule or exhibit to, this Cooperation Agreement unless otherwise indicated. The headings contained in this Cooperation Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Cooperation Agreement. Whenever the words "include", "includes" or "including" are used in this Cooperation Agreement, they shall be deemed to be followed by the words "without limitation". The words "hereof", "herein" and "hereunder" and words of similar import when used in this Cooperation Agreement shall refer to this Cooperation Agreement as a whole and not to any particular term or provision of this Cooperation Agreement. References to "this Agreement" shall include the schedules and exhibits hereto. The inclusion of any item in the schedules and exhibits hereto shall not be deemed to be an admission or evidence of materiality of such item, nor shall it establish any standard for materiality for any purpose whatsoever. All terms defined in this Cooperation Agreement shall have the defined meanings when used in any certificate or other document made or delivered pursuant hereto unless otherwise defined therein. The definitions contained in this Cooperation Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as the feminine and neuter genders of such term. Any law defined or referred to herein or in any contract or instrument that is referred to herein means such law as from time to time amended, modified or supplemented, including by succession of comparable successor laws. References to a person are also to such person's permitted successors and assigns.

15. New York Law. This Cooperation Agreement shall be construed in accordance with the laws of the State of New York, and jurisdiction and venue for any disputes arising hereunder shall be in any court empowered to enforce this Cooperation Agreement in the State of New York.

16. Entire Agreement. This Cooperation Agreement contains the entire agreement between the Parties and supersedes any prior agreements, whether written or oral.

17. Authority of Signatories. The individuals executing this Cooperation Agreement represent and warrant that they have the authority to sign on behalf of the respective Parties.

18. Binding Upon Signature. As to any Party, this Cooperation Agreement shall be binding upon, and as of the date of, such Party's execution of this Cooperation Agreement.

19. Amendments. This Cooperation Agreement may not be altered, amended or modified, except by an instrument in writing signed by the Parties.

20. Counterparts and Additional Signatories. This Cooperation Agreement may be executed in two or more counterparts, each of which may be deemed an original, but all of which shall constitute one and the same document. Faxed or scanned signature pages shall have the same force and effect as the original.

IN WITNESS WHEREOF, the Parties here caused this Cooperation Agreement to be duly executed by their respective authorized officers.

Lindsay-Bushwick Associates, L.P.

Dated: _____

By: _____

Name: _____

Title: _____

SPG Johnson LLC
SPG Boerum LLC

Dated: _____

By: _____

Name: _____

Title: _____

Caribe Gardens Tenants Association, Inc.

Dated: 5/10/2016

By: [signature]

Name: YAMILLETTE LEBRON

Title: PRESIDENT

Dated: 5/10/2016

By: [signature]

Name: ANGELA ALICEA

Title: VICE PRESIDENT

Dated: 5/10/2016

By: [signature]

Name: DAISY ALICEA

Title: SECRETARY

Dated: 5/10/2016

By: [signature]

Name: EVELYN PEREZ

Title: TREASURER

EXHIBIT A

COMMUNITY BENEFITS PROGRAM

EXHIBIT A

COMMUNITY BENEFITS PROGRAM

1. Purpose. The purpose of this Community Benefits Program for the Caribe Gardens residential housing complex located in Brooklyn is to provide for a coordinated effort between the Tenants Association, Owner, and Developer to provide benefits to the Caribe Gardens and surrounding community and for the community to support the Project. This Community Benefits Program is agreed to by the Parties in connection with, and as a result of, the Cooperation Agreement to which it is attached. This Community Benefits Program will, among other things, provide an extension to the current HUD Section 8 Contract; provide a variety of quality of life improvements for existing tenants at Caribe Gardens; and provide a first source hiring program for construction and permanent jobs at the Project.

2. Definitions. As used in this Community Benefits Program, the following capitalized terms shall have the respective meanings set forth in Section 2. All definitions include both the singular and plural form. Any capitalized term not specifically defined herein shall have the respective meaning set forth in the Cooperation Agreement.

"**Cooperation Agreement**" shall mean the Cooperation Agreement between the Tenants Association, Owner, and Developer, to which this Community Benefits Program is attached.

"**Integrated Pest Management**" shall mean the process of reducing the use of hazardous pesticides and promoting the use of safer and more effective pest control practices referred to in Local Law 37 adopted by the New York City Council in May 2005.

3. Maintenance and Existing Building Quality of Life Issues.

(a) As of the execution of the Cooperation Agreement, Owner shall provide all tenant notifications in English and Spanish as required by HUD guidelines. Owner shall respond to any issues with notifications that may arise and communicate these matters with the Tenants Association in a reasonable manner.

(b) Owner shall hire a landscape architect to design a Landscape Architecture Plan which will include, the following: an attractive garden/tenant green space; a playground with commercial children's play equipment, including a seasonal children's water feature; an outdoor seating area with updated benches and tables; and stationary seating for the exclusive use and benefit of the Tenants. Annexed at Schedule B is a map showing areas where Owner shall install lighting, security cameras, as well as the water feature. Landscape architect shall meet and confer with Tenants Association in developing plan for said green space, playground, and seating area. Such landscaping plan shall be completed by Project construction completion, subject to weather and other reasonable restrictions. A community garden area with individual planting boxes shall be built, at Owner's cost and expense, along Johnson Avenue between Humboldt Street and Graham Avenue. Owner shall install a gate with lock around the community garden area with access available to Tenants. Owner shall replace current cyclone,

chain-link fencing with a heavy-gauge black aluminum fencing. Garden and green space shall be maintained by Owner.

(c) Owner shall install gates at a height to be agreed in consultation with Tenants Association with locks that restrict access to interior courtyard areas to Tenants and their guests, and emergency personnel including FDNY.

(d) Owner shall hire a lighting design specialist to create a plan for the layout of new lampposts to light the path along the interior courtyard between the Existing Buildings only on property of the Owner. The number of lampposts shall be reasonable to light the interior courtyard pathways to permit Tenants to pass during nighttime hours with visibility necessary to feel reasonably secure.

(e) Owner shall conduct an Integrated Pest Management and rodent abatement program in full compliance with all applicable New York City Department of Health guidelines thirty (30) days after full execution of this Agreement.

(f) Air Conditioner Replacement Program. By thirty (30) days prior to the commencement of Project construction, Owner shall provide new air conditioning units with adequate BTUs for apartment size to tenants in units identified in the attached Schedule A for the duration of the construction. Tenants shall be responsible for any damage caused to air conditioning units aside from wear and tear, or damage caused during maintenance. After construction air conditioning units become property of the Tenant in whose apartment the air conditioning unit was installed. Owner shall provide ongoing, monthly maintenance to the air conditioning units located in all apartments of the Existing Buildings for the duration of the Project construction. Maintenance shall include replacing air filters, cleaning moving parts, etc., Owner shall consult with an energy auditor and provide a monthly utility credit to tenants listed in the attached Schedule A for the duration of the Project construction. Credit shall be the difference between what Tenant paid last year in a given month and what Tenant pays this coming year. Credit shall be applied thirty (30) days of the close of the previous month. Owner shall replace exterior air conditioner grates as necessary (i.e. where missing). Receipt of an air conditioning unit, maintenance, or utility credit shall not be factored into any increase in Tenant rent.

(g) Laundry Facility Improvement. Within sixty (60) days of execution of the Cooperation Agreement, Owner shall request that the third party laundry room operator upgrade the existing washer and dryer, and if possible, install additional dryers. Owner shall provide laundry carts for moving cleaned clothes to dryers, in consultation with the Tenants Association. Owner shall provide Tenants key fob access to the laundry room thereby permitting tenants to access the laundry room at all hours any day of the week (i.e. 24 hours per day, 7 days per week).

Owner shall add security cameras. Tenant Association shall make best efforts to ensure no Tenants have washers and dryers in individual apartment units. Owner shall not increase rent because of improvements to Laundry Facility.

4. Community Space. Within thirty (30) days following the execution of this Cooperation Agreement, Owner shall provide a designated representative of the Tenants Association a key fob for access to the Community Room located at 175 Boerum Street for private events as approved by the rules of the Tenants Association and the Owner. Owner shall install security cameras for Tenant safety outside Community Room door, purchase eight (8) round tables and eighty (80) folding chairs (Sam's Club item number 238948, model 80145 x 2) for use in the Community Room of the kind discussed with Tenants Association sold by Sam's Club, replace exterior door that sticks, paint the Community Room walls a neutral color, and replace broken or discolored ceiling and floor tiles within thirty (30) days of Cooperation Agreement Execution.

5. Security and Parking.

As of the execution of this Cooperation Agreement, Owner shall:

(a) Within sixty (60) days Owner shall install closed circuit television system for Tenant security monitoring exterior Existing Building activity, excluding apartment exterior patios, in consultation with the Tenants Association. Such closed circuit television system shall be monitored by security staff on site as well as remotely. Owner shall cause the video feeds to be recorded and archived for a reasonable amount of time.

(b) In conjunction with the local precinct, take part in the police watch program to permit NYPD officers to enter the exterior premises of the Existing Buildings to ensure Tenant safety.

(c) If necessary for Tenants to relocate their vehicles during the construction of the New Buildings Owner represents that each Tenant shall not be required to relocate their individual parking space beyond a quarter mile of Caribe Gardens. In the event of relocation of parking space, Developer represents that the Developer will pay for Tenant parking costs. Should conflicts arise, Owner, Developer, and Tenants Association shall meet and confer regarding the relocation of existing parking spaces.

(d) Developer shall provide twenty-seven (27) parking spaces, during construction, and after Project construction completion in the New Buildings' garage(s) for Tenants who currently park at Caribe Gardens. Owner shall not increase the rent in any way based on the addition of the security cameras and the other security measures.

6. Section 8 Contract Term. Tenant Association acknowledges Owner has requested HUD to extend HUD contract for additional twenty (20) year term. Owner shall extend the term of the project-based Section 8 contract for the Existing Buildings for a twenty (20) year terms (or any other equivalent term determined by the Owner and the HUD that maintains current levels of

affordability) after the current term expires on January 31, 2017, through at least Termination Date. If project-based Section 8 is discontinued by the Federal Government during the term for which Owner has committed to extending the project-based Section 8 contract for the Existing Buildings, Owner shall honor all Section 8 vouchers for all tenants awarded said vouchers. New Buildings' construction, including but not limited to excavation, site preparation, and other work, shall not commence until the HUD contract is extended.

7. New Project Construction.

(a) Developer jointly shall adhere to current construction hours, noise, dust codes as required by the city of New York (i.e. netting and wetting to reduce dust and debris exposure to Tenants), and meet and confer with Tenants Association to review Noise and Dust Mitigation Plans prepared in accordance with applicable law.

(b) Developer shall provide a rodent abatement program during the Project construction. Owner shall provide extermination services every two weeks for the duration of the construction, and after construction as required by HUD and other applicable law.

(c) Developer shall post results of air quality monitoring in project manager's office on site.

(d) Developer shall have a project manager on site to respond to Tenants' concerns during construction. Developer shall also provide a 24-hour hotline for Tenants to report emergencies related to construction of the New Buildings and not unrelated emergencies.

(e) First Source Hiring Program. Developer shall provide first notice of jobs related to Project construction and permanent jobs at the New Buildings to Tenants by posting the job listings in the Existing Buildings. Developer shall use reasonable efforts to request that the subcontractors hire qualified Tenants for construction jobs and Developer will request that its management company post permanent jobs at the Existing Buildings. Construction contracts will include language stating that reasonable efforts should be made to hire qualified building tenants for available positions.

(f) In the event that a vacate order is issued because of the construction work, the Developer shall pay for the difference in the reasonable relocation of Tenants in the immediate area and ask the Tenants to contribute no more than their current portion of Section 8-subsidized rent (amount tenant is paying as of the date they are relocated, not the rental amount HUD is paying). Developer shall pay reasonable Tenant personal property storage for the duration of any relocation. Owner shall maintain the Tenants' right to return to the Existing Buildings when they rehabilitate or rebuild the Existing Buildings.

8. Tenants Association Entity Formation Fees. Until the completion of construction, Owner and Developer shall pay reasonable entity formation costs for the Caribe Gardens Tenants Association, Inc., including Secretary of State certificate of incorporation filing fees, and fees associated with applying for recognition of federal income tax exemption. Owner and Developer

agree to pay one thousand ($1,000) for entity formation costs in check made payable to BLS Legal Services Corp.

9. Attorneys Fees. Owner and Developer agree to pay Tenants Association's attorneys fees in the amount of twelve- thousand five hundred dollars ($12,500) in check made payable to BLS Legal Services Corp.

SCHEDULE A

LIST OF APARTMENT UNITS THAT ARE ADJACENT TO PARKING LOTS A AND B

(Please See Following Page)

List of apartments that are adjacent to Parking Lots A and B and Community Room

The Owner shall provide the total number of AC units equivalent to the total number of apartments listed below. This total shall include the AC units declined by individual tenants. The Owner shall also provide an AC unit for the Community Room.

Apartment square footage
1bedroom = 510 sq. ft.
2bedroom = 670 sq. ft.
3bedroom = 890 sq. ft.

75 units directly affected by development
65 units complied
10 units declined Air conditioners
1 Community Room AC

Apartment BTU
1bedroom = 12,000-13,000
2bedroom = 13, 000-14,000
3bedroom = 18,000 +

1 bedroom apt= 18 units

179 Boerum	183 Boerum	185 Boerum
1a	1a - declined	1a
1b	1b	1b
2a	2a	2a
2b	2b	2b
3a	3a	3a
3b	3b	3b- declined

2 bedroom apt= 39 units

169 Boerum	175 Boerum	193 Boerum	195 Boerum	199 Boerum	189 Boerum	191 Boerum
1a	1a	1a-	1a	1a - declined	1a	1a
1b	1b	1b	1b	1b	1b	1b
2a	2a	2a- declined	2a	2a- declined	2a	2a
2b	2b	2b-	2b	2b-declined	2b	2b
3a	3a	3a- declined	3a	3a		
3b	3b	3b	3b	3b		

3 bedroom apt= 18 units

161 Johnson	180 Johnson	190 Johnson
1a	1a	1a

1b	1b - declined	1b
2a	2a	2a
2b	2b	2b
3a	3a - declined	3a
3b	3b - declined	3b

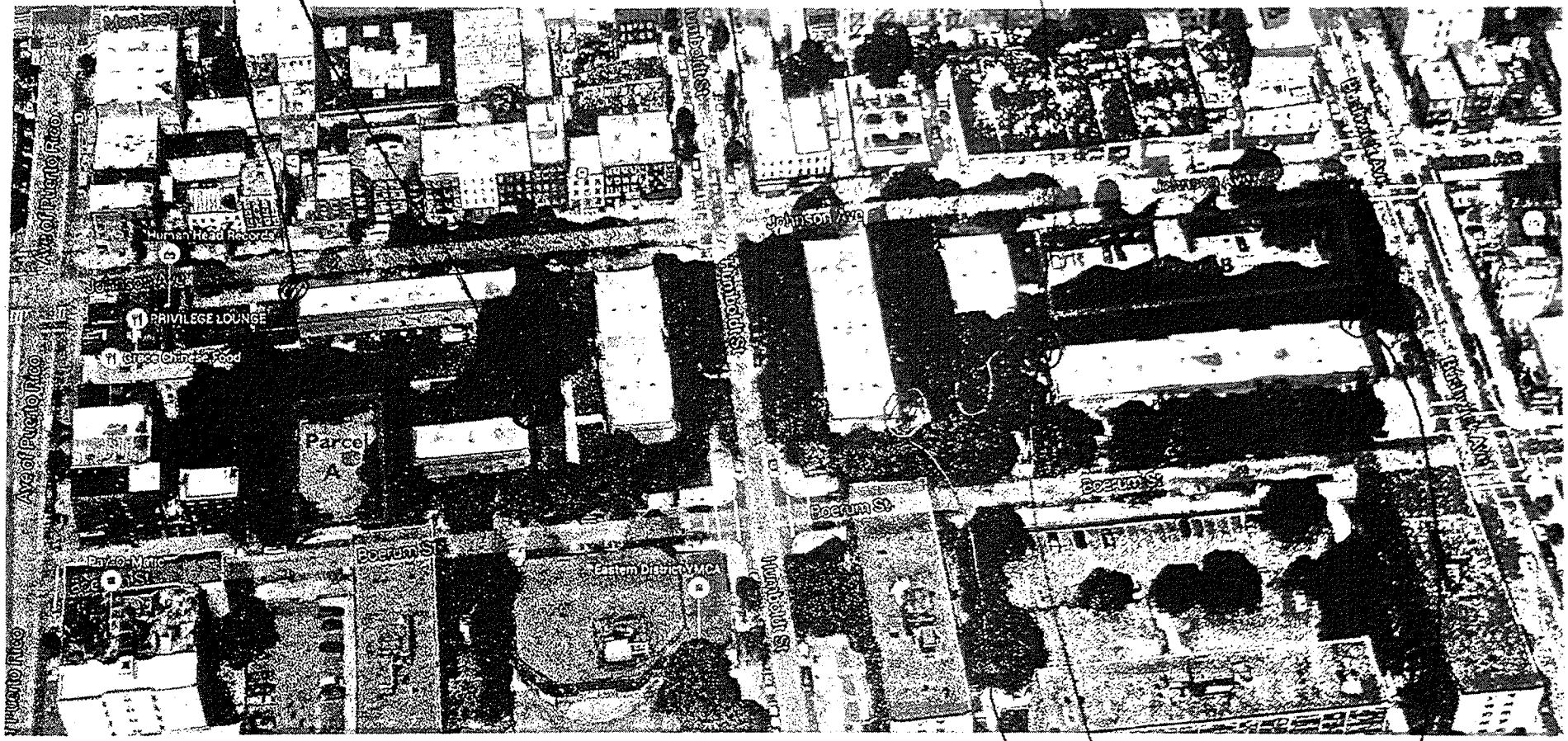
SCHEDULE B

MAP OF PROPOSED EXTERIOR AREAS OF EXISTING BUILDINGS

(Please See Following Page)

SECURITY CAMERAS (TOO DIM AT NIGHT) & LIGHTING

WATER FEATURE



SECURITY CAMERAS & LIGHTING (TOO DIM AT NIGHT)

EXHIBIT B

PROPOSAL

222 Johnson: a project containing approximately 105,000 SF (above grade) of residential, retail and parking and subject to the affordability requirements agreed to with the City of New York (20% of the units will be set aside to households earning no more than 60% AMI, 4% of the units will be set aside to households earning no more than 125% AMI and 4% of the units will be set aside to households earning no more than 135% AMI), which is expected to have approximately 117 units; and

159 Boerum: a project containing approximately 105,000 SF (above grade) of residential and parking and subject to the subject to the affordability requirements agreed to with the City of New York (20% of the units will be set aside to households earning no more than 60% AMI, 4% of the units will be set aside to households earning no more than 125% AMI and 4% of the units will be set aside to households earning no more than 135% AMI), which is expected to contain approximately 120 units.

OFFICE OF THE UNDERSIGNED
SUITE 240-S
98 CUTTER MILL ROAD
GREAT NECK, N.Y. 11021
TEL: (516) 466-6520
FAX: (516) 466-0643
TTY/TDD: 711

Council Member Antonio Reynoso
New York City Council
250 Broadway
New York, NY 10007

December 22, 2014

Dear Council Member Reynoso:

We represent Lindsay Bushwick Associates (the "Company"), which is a redevelopment company formed pursuant to Article 5 of the Private Housing Finance Law. We own a property consisting of 121 Section 8 project based units known as Caribe Gardens in the Bushwick area of Brooklyn (on Johnson Avenue between Bushwick Avenue and Humboldt Street). The building was developed by the Company in 1980 as a Section 8 project under HUD regulations.

The current Section 8 Housing Assistance Payments Contact ("HAP Contract") with the U.S. Department of Housing and Urban Development for Caribe Gardens expires in 2016. Because of HUD's budgetary problems it may be difficult for HUD to enter into an extension that reflects market rates. If no renewal takes place then the Project would opt out of the Section 8 program and be eligible for market conversion. With the contract soon expiring, the Company has been looking at options to stay in the program and maintain the affordable units.

Since Caribe Gardens has two underutilized parking lots, the company believes that development on those lots could create the return necessary to enter into a long-term HAP Contract and assume the risk that HUD may not be able to pay the true market rents.. The Company has received a proposal from Slate Property Group LLC ("Slate") to ground lease these two underutilized areas for a term of 99 years.

Slate would build two new multifamily apartments containing. in total. approximately 190 units utilizing Section 421-a, but without any additional city or state subsidies. Of those 190 units, 38 units would be made affordable for those at or below the 60% AMI level. Additionally, with the ground lease, the Company would have the stability to be able to enter into a 20 year contract with HUD (the longest possible) to preserve the affordability for the currently occupied 121 units. In the past we have only felt comfortable entering into, at the maximum, five year contracts.

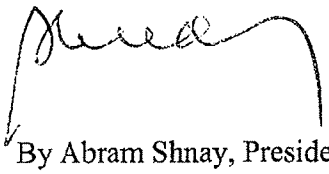
Because Lindsay Bushwick Associates was formed under Article 5, the lease to Slate requires the approval of the City Council. We ask for your support so that we can preserve the current 121 units of affordable housing as well create 38 new units of affordable housing.

Enclosed please find a massing study, a breakdown of the affordable units and their distribution.

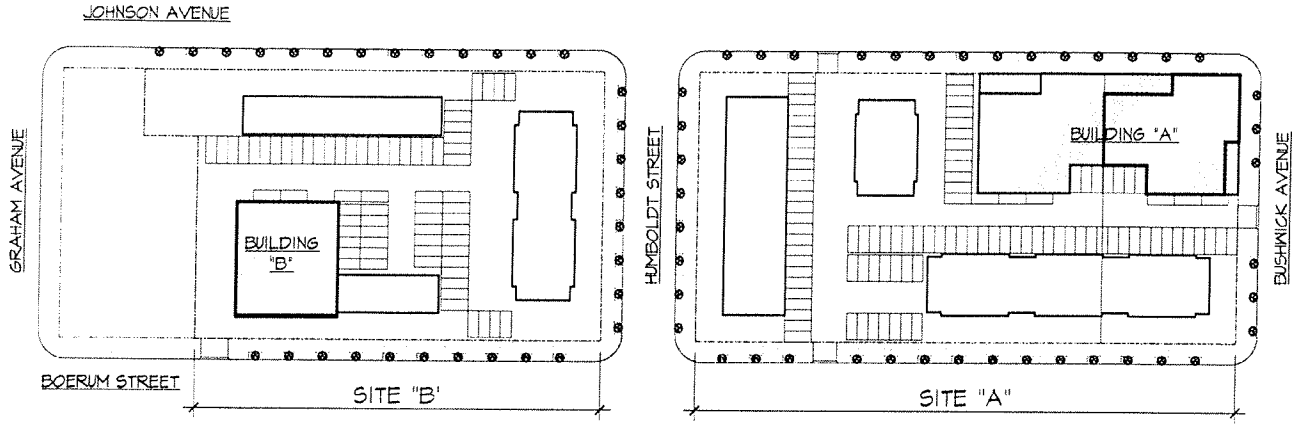
Sincerely,

Lindsay Bushwick Associates

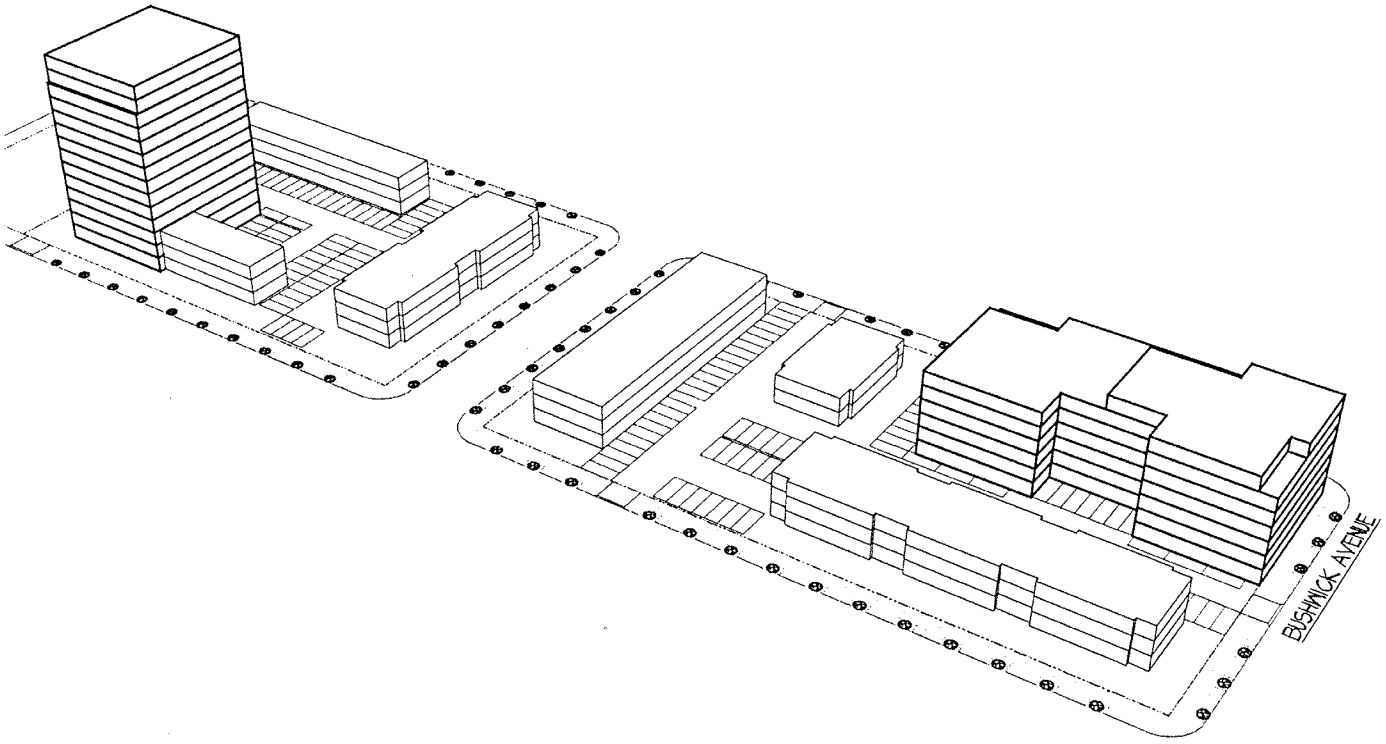
by Jusco Development Corp., General Partner



By Abram Shnay, President



SCHEMATIC PLOT PLAN
SCALE: 1/128"=1'-0"



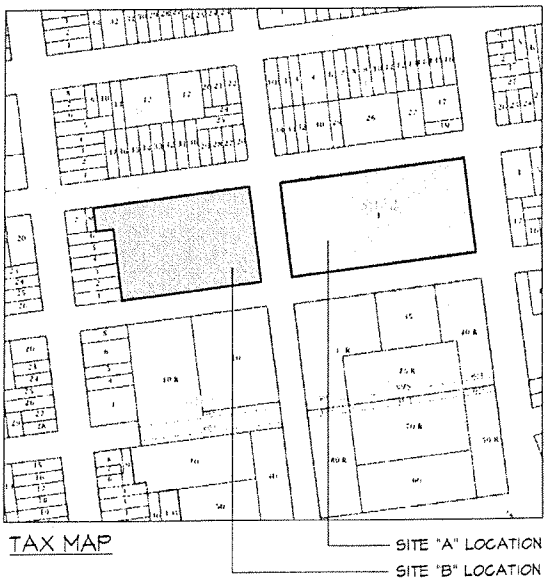
AUFGANG ARCHITECTS
49 North Fairmont Road, Suffern, NY 10901 tel 845.368.0004 www.aufgang.com

PROPOSED NEW DEVELOPMENT FOR:
CARIBE GARDENS
BROOKLYN, NY

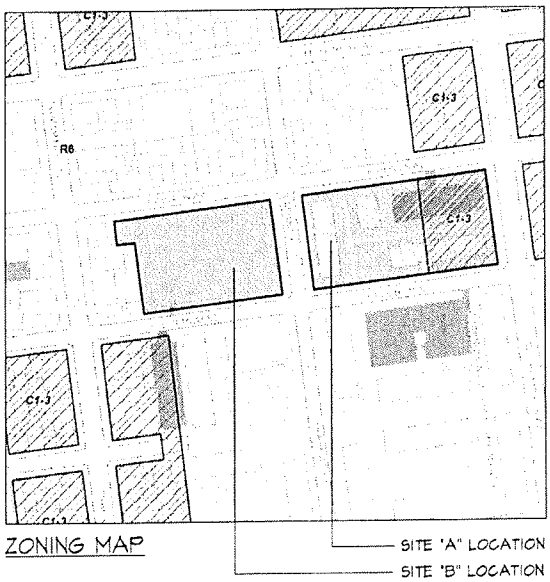
ZONING & MASSING STUDY

BLOCK NO.:	3072
LOT NO.:	1
DATE:	08.25.14
DRAWING NO:	Z-100

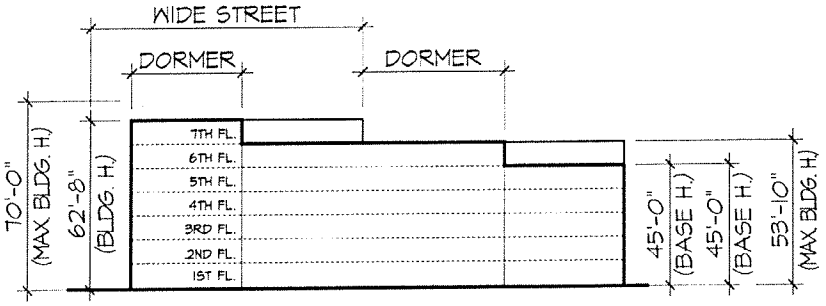
NORTH ARROW:



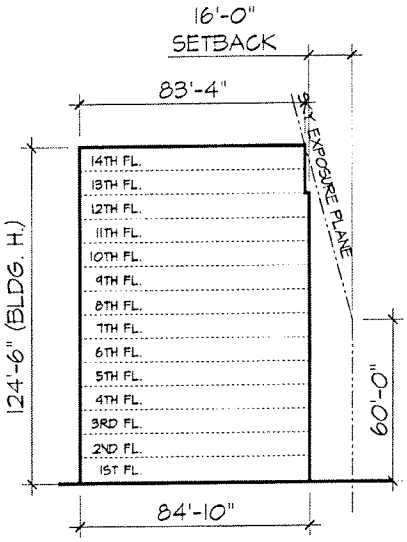
TAX MAP



ZONING MAP



BUILDING "A"
SCHEMATIC HEIGHT DIAGRAM
SCALE: 1/64"=1'-0"



BUILDING "B"
SCHEMATIC HEIGHT DIAGRAM
SCALE: 1/64"=1'-0"

AUFGANG ARCHITECTS
49 North Airmont Road, Suffern, NY 10901 tel: 845.368.0004 www.aufgang.com

PROPOSED NEW DEVELOPMENT FOR:
CARIBE GARDENS
BROOKLYN, NY

ZONING & MASSING STUDY

BLOCK NO.:	3072
LOT NO.:	1
DATE:	08.25.14
DRAWING NO:	Z-103

NORTH ARROW:

Block:	3071	CONST. CLASS 1-B 2HR RATED
Existing lot designation:	10	BUILDING TO BE FULLY SPRINKLERED
Zoning:	R6	BUILDING TO BE DESIGNED PER 2008 NYC BUILDING CODE
Map:	13b	

H. F.	PERMITTED/REQUIRED	PROPOSED		TOTAL	REMARKS	RES.
RESIDENTIAL - USE GROUP 2						
ZONING LOT AREA						23-32
Lot		62,000	SQ FT			
MIN OPEN SPACE RATIO		EXISTING	PROPOSED	TOTAL		23-142
30.50%	18,910.00 SQ FT MAX	12,440.00	6,466.04	18,906.04	OK	
FLOOR AREA RATIO						23-142
	2.23	0.60	1.42	2.02	OK	
GROSS FLOOR AREA		EXISTING	PROPOSED			23-142
	138,260.00	37,319.00	88,015.85	125,334.85	OK	
HEIGHT FACTOR						
	6.63			7	OK	23-142
NO. OF APARTMENTS		EXISTING	PROPOSED			
	203	42	100	142	OK	23-22
HEIGHTS REGULATIONS						
Base H	60'-0"	60'-0"			OK	23-64
Setback	15'-0"	16'-0"			OK	23-64
Sky Exposure Plane	3.7 to 1	3.7 to 1			OK	23-64
YARD REGULATIONS						
Front	NONE	NONE			OK	23-46
Side	NONE	NONE			OK	23-46
Rear	30'-0" MIN	30'-0"			OK	23-47
	PERMITTED/REQUIRED	PROPOSED			REMARKS	RES.
PARKING						
APARTMENTS						
APARTMENTS 50%	71	71			OK	25-23

SITE "B" ZONING CALCULATION

Block:	3072	CONST. CLASS 1-B 2HR RATED
Existing lot designation:	1	BUILDING TO BE FULLY SPRINKLERED
Zoning:	R6 / C1-3 COMMERCIAL OVERLAY	BUILDING TO BE DESIGNED PER 2008 NYC BUILDING CODE
Map:	13b	

QUALITY HOUSING PROGRAM	PERMITTED/REQUIRED		PROPOSED		TOTAL	REMARKS	RES.
RESIDENTIAL - USE GROUP 2							
ZONING LOT AREA							23-32
Corner Lot			40,000.00 SQ.FT.				
Interior Lot			40,000.00 SQ.FT.				
TOTAL			80,000.00 SQ.FT.			OK	
LOT COVERAGE			EXISTING	PROPOSED	TOTAL		23-145
Corner lot 80%	32,000.00 SQ FT MAX		10,998.00	8,225.96	19,223.96	OK	
Interior Lot 60% (Narrow)	24,000.00 SQ FT MAX		8,962.00	23,713.64	32,675.64	OK	
FLOOR AREA RATIO							23-145
Wide Street	3.00				3.00	OK	
Narrow Street	2.20				1.60	OK	
GROSS FLOOR AREA			EXISTING	PROPOSED			23-145
Wide Street	60,000.00		10,637.64	49,361.36	59,999.00	OK	
Narrow Street	132,000.00		50,292.36	45,781.89	96,074.25	OK	
TOTAL	192,000.00		60,930.00	95,143.25	156,073.25	OK	
NO. OF APARTMENTS			EXISTING	PROPOSED			
	282		79	106	185	OK	23-22
HEIGHTS REGULATIONS	NARROW	WIDE	NARROW	WIDE			
Min. Base Height	30'-0"	40'-0"	45'-0"	53'-10"		OK	23-633
Max. Base Height	45'-0"	60'-0"	45'-0"	53'-10"		OK	23-633
Max Building Height	55'-0"	70'-0"	53'-10"	62'-8"		OK	23-633
SETBACK ABOVE BASE HEIGHT							
Wide Street	10'-0" MIN.		10'-0"			OK	23-633(b)
Narrow Street	15'-0" MIN.		15'-0"			OK	23-633(b)
YARD REGULATIONS							
Front	NONE		NONE			OK	23-45
Side	NONE		NONE			OK	23-46
Rear	30'-0" MIN		30'-0"			OK	23-47
	PERMITTED/REQUIRED		PROPOSED			REMARKS	RES.
PARKING							
APARTMENTS							
APARTMENTS 50%	92		92			OK	25-23

SITE "A" ZONING CALCULATION

AUFGANG ARCHITECTS
49 North Airmont Road, Suffern, NY 10901 tel: 845.368.0004 www.aufgang.com

PROPOSED NEW DEVELOPMENT FOR:
CARIBE GARDENS
BROOKLYN, NY

ZONING & MASSING STUDY

BLOCK NO.:	3072
LOT NO.:	1
DATE:	08.25.14
DRAWING NO:	Z-104

NORTH ARROW:

***20% of each unit type will be set aside as affordable units.**

BUILDING "A" PRELIMINARY APARTMENT DISTRIBUTION				
FLOOR	0 BR	1BR	2BR	TOTAL
1	2	2	4	8
2	4	4	8	16
3	4	4	8	16
4	4	4	8	16
5	4	4	8	16
6	4	3	8	15
7	1	3	3	7
TOTAL	23 *	24 *	47 *	94
PERCENTAGE	24%	26%	50%	

BUILDING "B" PRELIMINARY APARTMENT DISTRIBUTION				
FLOOR	0 BR	1BR	2BR	TOTAL
1				
2	2	2	3	7
3	2	2	3	7
4	2	2	3	7
5	2	2	3	7
6	2	2	3	7
7	2	2	3	7
8	2	2	3	7
9	2	2	3	7
10	2	2	3	7
11	2	2	3	7
12	2	2	3	7
13			6	6
14			6	6
TOTAL	22 *	22 *	45 *	89
PERCENTAGE	25%	25%	51%	

PRELIMINARY APARTMENT DISTRIBUTION

AUFGANG ARCHITECTS
49 North Airmont Road, Suffern, NY 10901 tel: 845.368.0004 www.aufgang.com

PROPOSED NEW DEVELOPMENT FOR:
CARIBE GARDENS
BROOKLYN, NY
ZONING & MASSING STUDY

BLOCK NO.:	3072
LOT NO.:	1
DATE:	08.25.14
DRAWING NO:	Z-106

NORTH ARROW:

At a Special Term of the Supreme Court of the State of New York, County of Steuben, at the County Courthouse in Bath, New York on May 4, 2015

PRESENT: HON. JOSEPH W. LATHAM, J.S.C. (ACTING)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

JUDGE LATHAM

----------x

[redacted]

Plaintiff,

vs.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER

Index No. [redacted]

[redacted]

Defendant.

----------x

Upon the summons and complaint herein, and upon the affidavit of plaintiff, [redacted] sworn to on April 29, 2015, and upon the affirmation of Plaintiff's counsel Legal Assistance of Western New York, Inc., David Kagle of counsel, dated April 29, 2015 and upon all the papers and proceedings herein,

Let the Defendant [redacted] show cause before this Court located at Bath, New York on 18th day of May, 2015, at 1:30 in the afternoon of that day, or as soon thereafter as counsel may be heard, why an order should not be made and entered:

1. Entering a Yellowstone injunction pursuant to Graubard Mollen Horowitz, Pomeranz & Shapio v. 600 Third Ave. Assoc, 93 N.Y.2d 508 (1999) and Hopp v. Raimondi, 51 A.D.3d 726 (2nd Dept 2008), tolling the period in which Plaintiff [redacted] may cure any violation of her lease until at least ten days after this Court has ruled on the adequacy of the violation notice and merits of the allegations in the violation notice;

2. Requiring Defendant, its agents and assigns to accept monthly payments of Plaintiff's rent whether it be paid directly or made by a third party on behalf of Defendant during the pendency of this and any related proceeding;

3. Determining that any unpaid rental charges which accrued prior to August of 2014 cannot form the basis of a summary or other eviction proceeding due to laches and the fact that such charges no longer constitute current rent;

4. Determining that pursuant to Real Property Law Section 235-f and Defendant's ongoing acceptance of rental subsidies, [redacted] is a lawful occupant of Plaintiff's household;

5. Prohibiting Defendant from issuing a termination notice or maintaining a summary proceeding for possession of the subject premises until further order of this court and adjudication of the merits of the termination notices.

TEMPORARY RESTRAINING ORDER

Sufficient Cause appearing therefore, pending a hearing and determination of this Motion, it is hereby:

ORDERED that

1. Defendants [redacted] it agents and assigns are enjoined from issuing a termination notice or maintaining a summary proceeding for possession of the subject premises at [redacted] and
2. Any applicable cure period set out by violation notice to Plaintiff [redacted] is tolled pending further proceedings in this matter.

LET service of a copy of the Order to Show Cause, the Temporary Restraining Order and the papers upon which it is granted upon Defendants [redacted] pursuant to CPLR §310-a on or before May 8, 2015, be deemed good and sufficient service.

Dated: May 4, 2015

Hon. JOSEPH W. LATHAM, J.S.C. (A.C.)
Acting Supreme Court Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted] Plaintiff,

AFFIDAVIT

vs.

Index No. [redacted]

[redacted]

Defendants.

----------x

[redacted] being duly sworn, deposes and says:

1. I am the Plaintiff in the above-captioned action.

2. I have also been known as [redacted]

3. I have lived at [redacted] for more than four years, and receive a rental subsidy for my housing.

4. My household of 4 receives only SSI, disability and public assistance income at this time.

5. I live at [redacted]

6. I have arranged for payment of my share of rent through the Department of Social Services.

7. Until I received the violation notice in this matter, I was not aware that [redacted] had been rejecting my monthly payments since February of 2015.

8. I intend to make arrangements to pay all rental charges which are owed to [redacted] in a reasonable manner, but any such repayment must be affordable under my limited resources.

9. [redacted] lives with me, and I informed [redacted] of this on multiple occasions.

10. I have asked [redacted] to add [redacted] to my household.

11. [redacted] has refused to add [redacted] to my household, citing his allegedly poor credit.

12. I rely on subsidized housing in order to ensure that my low-income family has a dependable source of decent, safe housing.

13. I will be at imminent risk of homelessness if I am forced to wait for eviction proceedings to contest the sufficiency and accuracy of the violation notice I received.

14. Therefore, I request that this court extend my time to cure any lease violations until it determines what violations if any must be cured in order to prevent my eviction, and whether I have received a proper notice of any alleged violations.

[redacted]
Plaintiff

Subscribed and Sworn to
before me on 4/29/15

NOTARY PUBLIC

[illegible]LEY BROOKE TOMPKINS
[illegible] Public, State of New York
[illegible] No. 01TO6300025
[illegible]lified in Steuben County
[illegible]ission Expires 03/31/18

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted] 2015 APR 29 PM 4 48

Plaintiff, **AFFIRMATION**

vs. STEUBEN COUNTY CLERK'S OFFICE

Index No [redacted]

[redacted]

Defendant.

----------x

David Kagle, an attorney duly licensed to practice law in the Courts of the State of New York, hereby affirms under penalty of perjury:

FACTS

1. I am the attorney for Plaintiff [redacted] in the above captioned matter.

2. On information and belief, [redacted] is also known to Defendant as [redacted]

[redacted]

3. On information and belief, Plaintiff [redacted] lives at [redacted]

[redacted] (The Premises).

4. Upon information and belief the Premises are owned by Defendant [redacted]

[redacted]

5. Upon Information and belief, Defendant receives funds that subsidize [redacted]

[redacted] rent from the United States Department of Agriculture, Rural Development office (U.S.D.A.R.D.)

6. Upon information and belief, Defendant is accordingly subject to federal rules governing leasing and lease terminations.

7. Upon information and belief, Plaintiff received an unsigned Notice of Violation which contains no information identifying the party who issued notice of the violation. (Exhibit A)

8. However, the notice, dated April 20, 2015 asserts that Plaintiff has failed to pay rent in the amount of $1519.80.

9. The notice does not state the months for which the alleged arrears are due or the amount due for each month.

10. Upon information and belief and the attached lease page, Paragraph G.2 of Plaintiff [redacted] lease requires that any violation notice must "state that the Resident may informally meet with Management to attempt to resolve the stated violation before the date of corrective action specified in the notice." (Exhibit B)

11. The April 20, 2015 notice does not advise [redacted] that she is entitled to a conference to discuss the violation.

12. My office contacted the Steuben County Department of Social Services (DSS) upon receiving the violation notice, because it was our understanding that DSS had paid [redacted] rent share in full every month since August of 2014.

13. My office confirmed that regular payments had been made, but that [redacted] began voiding or rejecting these payments, without stating a reason, effective February of 2015. (Exhibit B).

14. Upon information and belief, Defendant [redacted] has added the amount of payments they rejected to [redacted] alleged rental arrears as set forth in the violation notice.

15. The violation notice also alleges that an unauthorized person is living in the home.

16. However, upon information and belief, Plaintiff [redacted] has notified Defendant [redacted] that [redacted] is occupying the home.

17. Upon information and belief, [redacted] claims that [redacted] occupancy of the home constitutes a violation because [redacted] refused to add [redacted] to the lease due to allegedly insufficient credit. (Exhibit C)

18. On April 28th, I sent a letter by fax and mail to counsel for Defendant [redacted] attempting to address concerns about violation notice. However, as of the filing date of these pleadings I have not been contacted by Defendant's attorney or reached a resolution of the matter. (Exhibit D)

ARGUMENT

19. Pursuant to Graubard Mollen Horowitz, Pomeranz and Shapio v. 600 Third Ave, Assoc, 93 N.Y.2d 508 (1999), a commercial tenant may seek a stay of any eviction proceedings to prevent forfeiture while litigating the underlying merits of a notice to cure.

20. Under Hopp v. Raimondi, 51 A.D.3d 726 (2nd Dept 2008), a residential tenant may also seek a Yellowstone injunction to prevent forfeiture of his or her leasehold interest.

21. The instant violation notice concerns a subsidized premises, in which Plaintiff [redacted] retains a valuable property interest.

22. Federally subsidized housing is a valuable resource to low-income families such as Plaintiff's.

23. Forfeiture or loss of subsidized housing works an extreme hardship on families that receive such benefits.

24. As a result, it is critical that owners and operators of subsidized housing comply with federal regulations, lease rules and general contract principles of good faith and fair dealing

to ensure that subsidy beneficiaries are not needlessly placed at risk of loss of their homes and subsidies.

25. The complaint filed with this proceeding challenges both the accuracy and adequacy of the notice to cure.

26. In particular, Plaintiff [redacted] raises in the annexed complaint that:

a. Defendant [redacted] voided or returned her recent rent payments, then sought to establish such rejected payments as arrears;

b. Plaintiff should not be required to immediately pay as rent stale charges which are now sought as current rental arrears, due to Defendant's inordinate delay in seeking payment and its lengthy period of acceptance of monthly rent prior to issuance of the notice to cure;

c. Plaintiff will need additional time to arrange for payment due to the fact that Defendant [redacted] began refusing payments from the Department of Social Services without notifying her;

d. Pursuant to Real Property Law § 235-f Defendant [redacted] cannot prohibit Plaintiff from allowing [redacted] to join her household, regardless of his credit history;

e. The notice of violation is defective and in breach of the terms of the lease because it is unsigned, contains no information identifying the party who issued it and fails to advise Plaintiff, as required under the lease, "that the Resident may informally meet with Management to attempt to resolve the stated violation before the date of corrective action specified in the Notice."

27. Plaintiff [redacted] risks forfeiture of her subsidized housing if she awaits a court's ruling in an eviction proceeding on her multiple challenges to the notice to cure that she received.

28. The risk of forfeiture necessitates preliminary relief so that Plaintiff is not compelled to contest the validity of a violation notice in a proceeding seeking to terminate her federally subsidized housing, because a forfeiture would result in unduly severe consequences for herself and her family.

29. Further, Defendants' actions in interfering with her payments, without notice to Plaintiff [redacted] have directly impaired her ability to cure any actual lease violations which may be adjudicated.

30. Plaintiff [redacted] accordingly requests declaratory relief determining the nature and extent of any lease violation, as well as additional time to affect any cure which a court finds just and proper.

4/29/15

David Kagle

Exhibit

A

NOTICE OF VIOLATION

Date: April 20, 2015

TO: [redacted]

FILE

Dear [redacted]

You are hereby notified that you are in violation of the terms and conditions of your lease in the manner indicated below. You have ten (10) days from the date of this letter to cure the violation. If you do not, your lease will be subject to termination and an eviction proceeding may be commenced.

__x__ Failure to Pay Rent. The amount due as of April 20, 2015 is $1519.80.

____ Failure to comply with income or other recertification requirements. Specifically: (what was needed) _____,
which were due on (date) _____.

_x___ Failure to comply with the occupancy rules by [redacted] ved person(s) to reside in your unit. Sp[redacted]no, if known) [redacted] -advised of violation 1/16 - [redacted] still the

____ Physical damage to [redacted] cifically: (include date and description of damage caused) _____

_____

____ Refusal to allow inspection of your unit after twenty four (24 hour) notice. Which was given on (date)_____ for the purpose of _____

_____

_____ Providing false information about income. Specifically (included date and description):

_____

_____

____ Criminal conviction for a narcotic related offense. Specifically: _____

_____

Engaging in, or permitting third parties to engage in, behavior or activities which are disruptive to other tenants, which create a risk of harm to the health, welfare and safety of other tenants or which interferes with other tenants' right to quite enjoyment of their units. Specifically: (include date and description) _____

_____

_____

_____ Permitting criminal activity to take place in or in the vicinity of your unit. Specifically: (include date and description) _____

_____

_____

_____ Assignment of lease/subletting of apartment. Specifically: _____
_____

_____ Waste, misuse or damage to unit and/or its immediate surroundings. Specifically: (include date and description) _____
_____
_____

_____ Other (see below)

Description of Violation:

_____
_____
_____
_____
_____
_____

_____
Landlord Representative

Exhibit

B

d. Be eighteen years of age or older.

G. TERMINATION OF THE AGREEMENT:

1. **TERMINATION BY MANAGEMENT:** Management may terminate or refuse to renew the lease agreement for material noncompliance with the lease or other good cause, such as:

   a. failure to pay rent when due under the terms of this lease.

   b. failure to meet eligibility requirements of the project.

   c. failure to comply with recertification requirements of the USDA, RD or HOME.

   d. transmission of false information regarding income or other eligibility factors to Management.

   e. making false statements in the rental application.

   f. failure to comply with all conditions and agreements contained in this lease.

   g. failure to comply with occupancy rules and regulations established by Management.

   h. any action or conduct of the **Resident, any member of the Resident's household, or their guests** which disrupts the livability of the project by being a direct threat to the health or safety of any person, which interferes with the right of any tenant or member to the quiet enjoyment of the premises and related project facilities, or that results in substantial physical damage causing an adverse financial effect on the project or the property of others, EXCEPT when such threat can be removed by applying a reasonable accommodation.

   i. admission to or conviction for use, attempted use, possession, manufacture, selling, or distribution of an illegal controlled substance that:

      (1) is conducted in or on the premises by the Resident or someone under the Resident's control

      (2) is allowed to happen by a household member or guest because the Resident has not taken reasonable steps to prevent or control such illegal activity; or because the Resident has not taken steps to remove the household member or guest who is conducting the illegal activity.

   Innocent members of the Resident's household who are not engaged in the illegal activity, and who are not responsible for control of another household member or guest may remain in the dwelling unit if an otherwise eligible household remains or can be formed.

2. **NOTICE OF VIOLATION:** Prior to termination of the lease agreement, Management must provide Resident with a Notice of Violation. The Notice of Violation will:

a. describe the violation of the lease by referring to the relevant provisions of the lease and stating the nature and frequency of the violation in order to enable the Resident to understand and correct the problem. In those cases where the lease or occupancy agreement violation is due to the Resident's failure to pay rent, the Notice will state the dollar amount of the balance due on the rent account and the date of computation.

b. state that the Resident will be expected to correct the lease violation by a specified date which shall be no less than ten (10) days from the date of the Notice.

c. state that the Resident may informally meet with Management to attempt to resolve the stated violation before the date of corrective action specified in the Notice.

d. Advise the Resident that if he or she has not corrected the stated violation by the date specified, Management may seek to terminate the lease by instituting an action for eviction at which time the Resident may present a defense.

3. **SERVICE OF NOTICE ON RESIDENT:** Management shall serve the Notice by sending it first class mail to the Resident at his or her address at the project, or by serving a copy of the notice on any adult person answering the door at the dwelling unit, or if no adult responds, by placing the Notice under or through the door. Service shall not be deemed effective until either method of notice as described herein has been accomplished. The date on which the notice shall be deemed to be received by the Resident shall be the date on which the required first class letter is mailed, or the date on which the notice provided for in this paragraph is properly given, whichever method of service is used.

4. **NOTICE OF TERMINATION:**

a. Upon failure by the Resident to meet the condition(s) or correct the violation(s) stated in the Notice of Violation by the date specified, the Resident will be notified that the occupancy is terminated and that eviction is being sought through the appropriate judicial process. In the case of housing projects financed pursuant to the HOME Investment Partnerships Program, such notice may not be given prior to 30 days following the date of the Notice of Violation.

b. The Notice of Termination will state the basis for the termination of the Agreement, and will include the location and regular office hours during which the Resident (or counsel) may view its file and copy any information it contains to aid in the Resident's defense.

c. The Notice will be given in the same manner described for the Notice of Violation except where state law requires a different procedure in which event, the Notice will be given as required by State law.

5. **EVICTION:** If Management terminates the lease agreement, Management shall have the right to repossess the apartment and cause the Resident to vacate the apartment in the manner provided by law. If Management is forced to evict Resident, Resident shall pay Management the expense incurred in obtaining possession of the apartment and all other damages sustained by Management, including attorneys' fees, to the extent permitted by law and the USDA, RD's regulations.

Exhibit

C

[redacted]

ADVERSE ACTION LETTER

Dear [redacted]

Response required by 1 / 20 / 2015

Thank you for your recent application to: [redacted]

At this time we are unable to approve your application for the reason(s) marked below: (Check as many as apply to the situation)
[ ] Application was incomplete
[ ] Household does not meet HUD's eligibility requirements for this property
[ ] Failed to provide social security numbers or certification for all family members
[ ] Unable to confirm eligible immigration status for any of your family members
[ ] Household member's criminal history does not meet standards established in the screening policy
[X] Household member's credit history does not meet standards described in the screening policy. The consumer reporting agency providing the report did not make the decision and is not able to explain why the decision was made. Please see information below about contacting the consumer reporting agency for a free copy of your report and your rights under the Fair Credit Reporting Act.
[ ] Household member's residency history does not meet the standards established in the screening policy.
[ ] Letters were returned undeliverable and/or phone disconnected
[ ] Applicant failed to respond to requests for information or follow-up letters.
[ ] Information provided on application was inaccurate.
[ ] No units on this property of the appropriate size to house the number of household members indicated on the Family Summary/Application

This adverse action has been taken in accordance with the requirements of the federal Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

This decision was based on:

[X] Information contained in consumer report(s) obtained from or through Core Logic SafeRent, LLC, which may include credit or consumer information from one or more credit bureaus or consumer reporting agencies.

Core Logic SafeRent, LLC can be reached at: Consumer Relations P.O. Box 509124 San Diego, CA 92150. By phone: (888) 333-2413.

[ ] Information obtained from a source other than a consumer reporting agency. **(You have the right to disclosure of the nature of this information, upon your furnishing proper identification, if you make a written request to us within 60 days of receiving this letter.)**

[ ] Other: _____

In evaluating your application, information obtained from or through CoreLogic SafeRent, LLC, which may include credit information or consumer information from one or more of the credit bureaus or consumer reporting agencies, may have influenced our decision in whole or in part. These consumer-reporting agencies and/or credit bureaus did not make the decision to take adverse action and are unable to provide specific reasons why adverse action was taken.

YOU HAVE CERTAIN RIGHTS UNDER FEDERAL AND STATE LAW WITH RESPECT TO YOUR CONSUMER REPORT. IF ANY PERSON TAKES ADVERSE ACTION BASED IN WHOLE OR IN PART ON ANY INFORMATION CONTAINED IN A CONSUMER REPORT OR CREDIT REPORT, YOU HAVE THE RIGHT TO A DISCLOSURE OF THE INFORMATION IN YOUR CONSUMER FILE FROM THE AGENCY THAT PROVIDED SUCH INFORMATION, IF YOU MAKE A WRITTEN REQUEST TO THEM AND UPON YOUR PROPER IDENTIFICATION WITHIN 60 DAYS OF RECEIVING THIS DENIAL. THE FEDERAL FAIR CREDIT REPORTING ACT ALSO PROVIDES THAT YOU ARE ENTITLED TO OBTAIN FROM ANY NATIONWIDE CREDIT REPORTING AGENCY OR CREDIT BUREAU A FREE COPY OF YOUR REPORT IN ANY TWELVE MONTH PERIOD. YOU HAVE THE RIGHT TO DIRECTLY DISPUTE WITH THE CONSUMER REPORTING AGENCY AND/OR CREDIT BUREAU THE ACCURACY AND COMPLETENESS OF ANY INFORMATION FURNISHED BY THAT AGENCY OR BUREAU AND TO PROVIDE A CONSUMER STATEMENT DESCRIBING YOUR POSITION IF YOU DISPUTE THE INFORMATION IN YOUR CONSUMER FILE. IF YOU BELIEVE THE INFORMATION IN YOUR CONSUMER FILE IS INACCURATE OR INCOMPLETE, YOU MAY CALL CORELOGIC SAFERENT, LLC CONSUMER RELATIONS DEPARTMENT AT (888) 333-2413. CORELOGIC SAFERENT, LLC WILL INITIATE THE REINVESTIGATION OF ANY DISPUTED INFORMATION OBTAINED THROUGH THEM AND WILL REINVESTIGATE ANY DISPUTED INFORMATION OBTAINED FROM THEIR DATABASE.

RIGHT TO DISPUTE DENIAL OF FEDERALLY FUNDED HOUSING ASSISTANCE

If you are receiving this letter in response to a housing application for a property that provides assistance through the Housing and Urban Development Agency (HUD), you have the following additional recourse:

If you disagree with this determination, you may request a meeting to discuss/appeal the rejection.

- If you believe the decision has been made in error
- If you believe there are extenuating circumstances that should be considered
- If you are a person with a handicap or disability, and believe a reasonable accommodation would allow us to continue processing your application.

You must make the request in writing (or in an equally effective format) by the Response Date stated above, which is 14 calendar days from today's date. If we do not receive a written request from you within that time, the rejection will be considered final.

You have a right to request a reasonable accommodation to assist in facilitating your request for appeal.

Your response to this letter does not preclude you from exercising other avenues available if you believe that you are being discriminated against on the basis of race, color, religion, sex, national origin, familial status, or disability.

Authorized Signature: [redacted]

Date: 1·6·2015

EQUAL HOUSING OPPORTUNITY

Exhibit

D

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.®

16 WEST WILLIAM STREET
P.O. BOX 272
BATH, NEW YORK 14810
PH 607-776-4126
FAX 607-776-4029

April 28, 2015

FILE

[redacted]

Re: [redacted]

Dear Attorney [redacted]

Our office represents [redacted] with respect to a ten day violation notice that she received from [redacted] The violation notice states that [redacted] owes rent in the amount of $1,519.80.

[redacted] had been collecting regular monthly rent payments in the amount of $282 per month since August of 2014. However, upon inquiring with the Department of Social Services in response to the violation notice, my office was advised that [redacted] has, apparently without comment, returned or voided the past three of [redacted] rental payments from the Department of Social Services.

It is my understanding that these rejected payments are now being treated as rental arrears and to constitute a large part of the alleged violation of [redacted] lease. As [redacted] had been accepting current rent payments since last summer, I believe that [redacted] is permitted to preserve her tenancy by making current payments of rent, although she may be required to make arrangements for payment of older charges which have not yet been settled.

[redacted] also disagrees that [redacted] presence in her household constitutes a violation of her lease, as she has notified [redacted] of his presence and asked to add him to the household. Even if [redacted] credit was inadequate for him to be added as a tenant of record, I believe that [redacted] is permitted to treat him as a household member and occupant under New York State Law, whose income can be considered in calculating rent share under federal regulations. Therefore I ask that [redacted] treat [redacted] as a household member.

Please contact me at your earliest convenience so that we can discuss a mutually agreeable resolution of the April 20 violation notice within the period set forth for cure.

Very truly yours,

David Kagle
Staff Attorney

DK/at

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.®

16 WEST WILLIAM STREET
P.O. BOX 272
BATH, NEW YORK 14810
PH 607-776-4126
FAX 607-776-4029

FAX COVER SHEET

TO: [redacted]

ATTN: [redacted]

FAX: [redacted]

FROM: David Kagle
Staff Attorney
Fax: 607-776-4029

DATE: April 28, 2015

Re: [redacted]

Total pages: 3
Including cover

Message:

Send Result Report

MFP

TASKalfa 5501i

Firmware Version 2N9_2000.002.114 2013.08.06

04/28/2015 09:57
[2N7_1000.001.114] [2N4_1100.001.002] [2N4_7000.002.114]

Job No.: 047776 Total Time: 0°00'27" Page: 003

Complete

Document: doc04777620150428095429

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.®

16 WEST WILLIAM STREET
P.O. BOX 272
BATH, NEW YORK 14810
PH 607-776-4126
FAX 607-776-4029

FAX COVER SHEET

TO: [redacted]

ATTN: [redacted]

FAX: [redacted]

FROM: David Kagle
Staff Attorney
Fax: 607-776-4029

DATE: April 28, 2015

Re: [redacted]

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	04/28/15 09:5[redacted]		0°00'27"	FAX	OK	200x100 Normal/On

[L7J3801037]

Send Result Report

MFP

TASKalfa 5501i

Firmware Version 2N9_2000.002.114 2013.08.06

04/28/2015 09:56

[2N7_1000.001.114] [2N4_1100.001.002] [2N4_7000.002.114]

Job No.: 047775 Total Time: 0°01'19" Page: 003

Complete

Document: **doc04777520150428095418**

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.®

16 WEST WILLIAM STREET
P.O. BOX 272
BATH, NEW YORK 14810
PH 607-776-4126
FAX 607-776-4029

FAX COVER SHEET

TO: [redacted]

ATTN: [redacted]

FAX: [redacted]

FROM: David Kagle
Staff Attorney
Fax: 607-776-4029

DATE: April 28, 2015

Re: [redacted]

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	04/28/15 09:5[redacted]		0°01'19"	FAX	OK	200x100 Normal/Off

[L7J3801037]

Exhibit

E

STEUBEN COUNTY
DEPARTMENT OF SOCIAL SERVICES
KATHRYN A. MULLER, LCSW-R, COMMISSIONER
3 EAST PULTENEY SQUARE
BATH, NEW YORK 14810-1579
TELEPHONE (607) 664-2000
FAX (607) 664-2177

4/29/2015

To Whom It May Concern:

This agency consistently paid rental assistance ($282.00) without interuption for [redacted] from August 1, 2014 through January 31, 2015 to [redacted] for rent at her apartment located in [redacted] provided me with a letter dated September 12, 2014 from [redacted] indicating they would not be renewing her lease. The Steuben County Department of Social Services issued payments for February 2015 and March 2015 but were returned to the agency. A letter was provided with the returned checks indicating that [redacted] would be proceeding with an eviction and would not be accepting rent payments. Please find both letters as referred above attached to this document.

Hattie Mullen

Hattie Mullen
Social Welfare Examiner

Sworn to before me
this 29th day of April, 2015.

Donna L. Evingham
Notary Public

DONNA L. EVINGHAM
Notary Public, State of New York
No. 01EV6085631
Qualified in Steuben County
Commission Expires Dec. 30, 2018

[redacted]

building opportunities, achieving dreams

[redacted]

CANCELLED

February 20, 2015

[redacted]

Enclosed please find the check for [redacted] February rent for apartment 5-201 here at [redacted]

Paperwork has been sent to our attorneys to remove her from this apartment and the eviction proceedings is in the lawyer's hands.

This being said, we cannot accept payment.

Best Regards,

[redacted]

Community Manager

[redacted]

building opportunities, achieving dreams

[redacted]

First Class and Certified Mail

September 12, 2014

[redacted]

In accordance with the terms of your lease, we are providing you with a sixty (60+) days notice that your lease will not be renewed after its expiration on December 31, 2014.

It will be necessary for you to notify the office to arrange for a move out inspection to be performed when you have vacated the apartment.

If you have any questions regarding this matter, please contact this office.

Sincerely,

[redacted]

SEP 16 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

2015 APR 29 PM 4 47

[redacted]

STEUBEN COUNTY
CLERK'S OFFICE

Plaintiffs,

vs.

SUMMONS

Index No. [redacted]

The basis of the venue designated is the location of the subject property:

[redacted]

[redacted]

Defendant.

----------x

TO THE ABOVE DEFENDANT:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

DATED: April 29, 2015

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.
Attorney for Plaintiff [redacted]
David Kagle, of counsel
16 West William Street
P.O. Box 272
Bath, New York 14810
Tel: (607) 776-4126

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted] 2015 APR 29 PM 4 48

Plaintiff,

vs. STEUBEN COUNTY CLERK'S OFFICE **COMPLAINT**

[redacted]

Defendant.

----------x

[redacted] Plaintiff, by her attorneys, LEGAL ASSISTANCE OF WESTERN NEW YORK, INC. David A. Kagle of Counsel, complaining of Defendant, respectfully alleges:

1. Plaintiff [redacted] resides at [redacted] premises).

2. Plaintiff [redacted] was formerly known as [redacted]

3. Upon information and belief, the premises are owned by Defendant [redacted]

4. Upon information and belief, Defendant receives subsidies from the United States Department of Agriculture, Rural Development (U.S.D.A. R.D.) and is accordingly subject to federal regulations governing leases and lease terminations.

5. The Plaintiff is in possession of the premises under a lease which commenced in July of 2011 and is renewed annually for additional one year terms.

6. Because the subject apartment is subsidized, Plaintiff [redacted] has a substantial and valuable stake in maintaining her lease, as it is only by virtue of the subsidy that she is currently able to afford decent housing.

7. Plaintiff [redacted] received a "Notice of Violation" dated April 20, 2014.

(Exhibit A).

8. The notice is not signed and does not identify the party who issued it.

9. The notice alleges that [redacted] owes $1519.80 in rent, but does not state the period in which the alleged rental arrears accrued.

10. On information and belief, a substantial portion of the alleged rental arrears accrued when Defendant, without notice, began refusing rent payments made on behalf of [redacted] by the Department of Social Services, effective February of 2015.

11. The violation notice also alleges that [redacted] is in breach of the terms of her lease by allowing [redacted] a non-approved person, to occupy the unit.

12. Plaintiff [redacted] advised Defendant of [redacted] presence, however Plaintiff's refused to add him to the lease, due to allegedly poor credit.

13. The violation notice does not advise [redacted] of her right to have an informal conference with management to discuss the alleged violation, which, upon information and belief is a requirement set forth in [redacted] lease, at paragraph G.2.

First Cause of Action:
Request for Declaratory Judgment that Defendant Fairside has forfeited the right to seek rent by rejecting payments without notice

14. Pursuant to Hopp v. Raimondi, 51 A.D.3d 726 (2nd Dept. 2008), a plaintiff may seek a declaratory judgment on the merits of a violation notice to prevent forfeiture of her leasehold interest.

15. The violation notice in this case was improperly issued because Defendant [redacted] has caused and exacerbated rental arrears by rejecting payments tendered by the Department of Social Services.

16. This rejection was in conflict with its past pattern under the lease of accepting payments from the Department of Social Services on behalf of Plaintiff [redacted]

17. Plaintiff [redacted] relied on the previous course of conduct of Defendant [redacted] in accepting payments and arranged for ongoing payments under the understanding that the payments would be accepted.

18. Defendant [redacted] actions in precipitously rejecting payments, then making a demand for the same money that it has refused, is in bad faith.

19. Further, by accepting consistent ongoing monthly rent payments from the Department of Social Services since August of 2014, Defendant [redacted] is prohibited under the doctrine of laches from refusing current payments and seeking possession based upon older rent claims without proper notice of its intent to do so.

20. Based upon the conduct of Defendant [redacted] in rejecting payments, and by laches, Plaintiff seeks an order declaring that the Defendant may not treat the amount of $1519.80 as rental arrears which may form the basis of a proceeding for possession of the home.

21. In the alternative, if Defendant [redacted] may treat some portion of the above amount as current rental arrears, Plaintiff [redacted] seeks an order extending the time to cure any adjudged violation due to the conduct of Defendant in impairing her efforts to comply with the terms of her lease.

Second Cause of Action:
Request for Declaratory Judgment that violation notice is defective and cannot form the predicate for a lease termination.

22. Pursuant to [redacted] lease, the landlord is required to issue a ten day notice of violation before it may consider terminating the lease.

23. Under the terms of the lease, the violation notice must advise the tenant of her right to an informal conference with management to discuss the violation.

24. The notice in this case does not advise the Plaintiff of her right to a conference.

25. It is also not signed by any person and lacks any information identifying the party who issued it.

26. As a result of these defects, the [redacted] seeks an order finding that the violation notice cannot be used as a predicate to a termination notice.

Third Cause of Action
Violation of Real Property Law Section 235-f

27. The violation notice alleges that Plaintiff [redacted] is in violation of the lease because of the presence of [redacted]

28. However, [redacted] notified Defendant of the presence of [redacted] in the household.

29. Defendan[redacted] has refused to ad[redacted] to the household due to his allegedly poor credit.

30. However, pursuant to Real Property Law Section 235-f, Plaintiff is permitted to have Mr. Lake as an occupant of the household.

31. Plaintiff[redacted] is also unsure of any lease provision she may be violating by allowing [redacted] to occupy the home.

32. To avoid potential forfeiture of her home, Plaintiff [redacted] accordingly needs declaratory relief from this court as to her right to associate with people of her own choosing, regardless of their creditworthiness.

33. Therefore Plaintiff [redacted] seeks an order of this Court holding that [redacted]

[redacted] occupancy of the premises does not constitute a violation of her lease and cannot constitute grounds for termination.

WHEREFORE, Plaintiff [redacted] requests that this Court enter an order:

1. Declaring that the April 20th, 2015 violation notice that she received is defective and void;

2. Declaring that Plaintiff may permit [redacted] to occupy the premises;

3. Declaring that by virtue of their conduct in refusing Plaintiff's current rent payments, Plaintiffs are forever barred and prohibited from seeking possession of the premises based on any rent charges which were rejected, as well as any other rent charges which accrued previous to the rejected payments;

4. In the alternative, extending any applicable cure periods to afford Plaintiff a reasonable opportunity to correct any lease violations and preserve her housing

5. Awarding such other and further relief as the court may deem just and proper.

4/29/15

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.
[redacted]
David Kagle of Counsel
16 W. William Street
Bath, New York 14810
Tel: (607) 776-4126

VERIFICATION

STATE OF NEW YORK)
COUNTY OF STEUBEN) ss:

Plaintiff [redacted] being duly sworn, deposes and says I am a plaintiff in the within action; I have read the foregoing complaint and know the contents thereof; the same is true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

[redacted]

Sworn to before me this
29th Day of April, 2015

NOTARY PUBLIC

ASHLEY BROOKE TOMPKINS
Notary Public, State of New York
No. 01TO6300025
Qualified in Steuben County
Commission Expires 03/31/18

COPY

At a Special Term of the Supreme Court of the State of New York, County of Steuben, at the County Courthouse in Bath, New York on June 29, 2015

PRESENT: HON. JOSEPH W. LATHAM
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted]

Plaintiff,

vs.

[redacted]

Defendants.

----------x

2015 DEC 2 PM 1 40
STEUBEN COUNTY
CLERK'S OFFICE

ORDER

[redacted]

The parties to the above-captioned case having appeared by counsel to on the return of an order to show cause and having entered into an agreement for a settlement of the complaint and final resolution of the claims raised therein, it is her hereby ORDERED THAT:

1. Defendants will accept payments of Plaintiff's rent for 2015 by the Department of Social Services;

2. Defendants will accept payments of any established arrears accruing prior to 2015 by payments of $100 per month;

3. Defendants will allow [redacted] to reside in the subject premises as an authorized household member;

4. The April 20, 2015 violation notice is withdrawn by Defendants;

5. Plaintiff agrees to exercise age-appropriate supervision of her son;

6. Plaintiff agrees to refrain from engaging in, or permitting third party visitors to her residence to engage in disruptive and disorderly activities that disturb the peace and interfere with other tenants' right to peaceful enjoyment of their apartments;

7. Plaintiff will allow inspection of her apartment with twenty-four hours' notice affixed to her door;

8. Defendant may act upon any future violations of the lease and or the stipulation including commencing summary eviction proceedings.

SO ORDERED:

DATED: Bath, New York
November 12 2015

HON. JOSEPH W. LATHAM
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted]

Plaintiff,

-against-

[redacted]

Defendants.

----------x

AMENDED SUMMONS

Index No.: [redacted]

Plaintiff resides a[redacted]

TO THE ABOVE DEFENDANTS:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

DATED: August 31, 201[redacted]

[redacted]E OF WESTERN NEW YORK INC.

Attorney for Plaintiff, [redacted]
David Kagle, of counsel
16 West William Street
P.O. Box 272
Bath, New York 14810
Tel: (607) 776-4126

STEUBEN COUNTY CLERK'S OFFICE
2016 AUG 31 PM 2 37

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted]

Plaintiff,

vs.

[redacted]

Defendants.

----------x

COMPLAINT

Index N[redacted]

Plaintiff [redacted] by her attorneys, Legal Assistance of Western New York, Inc., David Kagle of Counsel, complaining of Defendants, [redacted] respectfully alleges:

PARTIES

1. Plaintiff lives at [redacted] (the premises).

2. Upon information and belief, Defendant [redacted] is the owner of the premises and has an office at [redacted]

3. Upon information and belief, Defendant [redacted] has represented itself as the owner of the premises in summary proceedings.

4. Upon information and belief, Defendant [redacted] is the managing agent of the premises and has an office at [redacted]

5. Upon information and belief, Defendant [redacted] is an agent and Property Manager for [redacted] and has an office at [redacted]

FACTS

I. Defendants operate the subsidized housing in which Plaintiff lives.

6. Upon information and belief, the parties are bound by the terms of a written lease.

7. Upon information and belief, the premises are subsidized under the federal State Agency Loan Management Set Aside program.

8. Upon information and belief, as a consequence of this subsidy, Plaintiff has a right to ongoing occupancy of the premises, unless conditions permitting termination, as established under federal regulations, are met. 24 C.F.R. § 247.3(a).

II. Defendants, in violation of the lease and annexed "House Rules," placed [redacted] on a "Barred List."

9. Upon information and belief, the "House Rules" annexed to the lease of the premises establish a "Barred List" and state that allowing individuals who are on this list onto the premises is grounds for termination of the lease.

10. Upon information and belief, the lease states that additional House Rules do not become effective for thirty days.

11. Upon information and belief, the "House Rules" set out the manner in which individuals are placed on the "Barred List:"

> "The local Police Department advises management of people who have committed criminal conduct and are therefore prohibited from entering onto any part of the project."

12. On or about [redacted] by her own admission using procedures that are not set out in the "House Rules," or otherwise in the lease, placed [redacted] on the "Barred List," without having been advised by local police of criminal conduct by [redacted]

13. Upon information and belief, Defendant [redacted] has confirmed that she establishes the population of the "Barred List," in her sole discretion and outside of the written procedure set out under the lease or "House Rules" for establishment of a "Barred List."

14. Plaintiff is relying on a notice from Defendants to establish the relevant terms of the lease and the "House Rules."

15. Upon information and belief, Defendants' determinations regarding which individuals tenants may have as guests are not made in a uniform manner, under clearly established procedures which are set out in the terms of the lease. Upon information and belief, decisions are instead made in an irregular and non-transparent manner, and are affected by personal bias or other improper considerations.

16. Upon information and belief, Defendants have no process for notifying tenants of an opportunity to challenge Defendants' unilateral determinations that tenants may not allow a particular person to be a guest at their home.

III. Defendants provided Plaintiff a notice claiming to terminate her lease because she allowed [redacted] to walk on their yard.

17. By a [redacted] notice, Defendants notified Plaintiff that they were terminating her tenancy, effective on [redacted] because, Defendants claimed, on [redacted]

[redacted] exited Plaintiff's car while on the premises, and walked across the yard and onto [redacted] (Exhibit A)

18. Upon information and belief, on [redacted] Plaintiff did not cause [redacted] to make any significant incursion onto premises owned by Defendants, nor did her conduct threaten the health, safety or peaceful enjoyment of the project by any person.

19. As noted above, upon information and belief, the "Barred List," and particularly [redacted] inclusion on this list, was not established under the terms of the lease or the annexed "House Rules."

IV. On [redacted] the parties participated in conference to discuss the proposed termination of Plaintiff's subsidized tenancy.

20. Pursuant to the terms of Defendants' [redacted] termination notice, Plaintiff requested a conference to discuss the allegations set out in the notice.

21. On [redacted] the parties met to discuss the allegations in the notice.

22. At the conference, Defendants confirmed that Property Manager [redacted] in her sole discretion, places names on the "Barred List."

23. Upon information and belief, this procedure, and any termination based upon it, is not permitted by the lease, the "House Rules" or federal regulations.

24. At the conference, Defendants failed to identify any process in place for a tenant to challenge a person's inclusion on the "Barred List."

25. Defendants, by counsel, insisted that tenants who are renting subsidized property from Defendants have no right to challenge Defendant [redacted] unilateral determination that they may not invite a particular person to the premises.

26. At the [redacted] meeting, Defendants, by counsel also confirmed that their policy of barring certain individuals from the premises should be enforced in a uniform manner.

27. However, upon information and belief, and Defendant [redacted] statements at the conference, she has left at least one person off the "Barred List," who might otherwise have been included, based on personal factors and because, she said, the person had not been arrested.

28. Upon information and belief, [redacted] the individual whose brief alleged incursion on the premises is the sole stated grounds in Defendants' notice to terminate Plaintiff's tenancy, was also not arrested or charged with any crime immediately before Defendant [redacted] placed him on the "Barred List."

FIRST CAUSE OF ACTION

Breach of contract

29. The Defendants, in their termination notice, concede that there is a lease between the parties.

30. Although, upon information and belief, the "House Rules" reference a "Barred List," Defendants have implemented, and attempted to enforce, an entirely different "Barred List." This "Barred List" is not referenced in the lease or rules, and is formulated under different procedures, by a different person, and affecting a different population than would have been affected had Defendants used the procedure in the annexed "House Rules" for establishing the "Barred List."

31. Upon information and belief, neither the lease nor any rules annexed to it, incorporate the "Barred List" that Defendants have actually implemented.

32. Upon information and belief, [redacted] would not be on the "Barred List" described in the "House Rules."

33. The lease thus does not permit Defendants to terminate their contract with Plaintiff based on a "Barred List" that they have generated outside of the terms of the lease.

34. Thus, by their termination notice, the Defendants have impermissibly breached, repudiated and claimed to terminate the lease based on an alleged violation of a "Barred List" which is not incorporated into the lease and therefore not grounds for termination.

35. The Defendants have also breached the lease by enforcing an addition to the "Barred List" without providing the thirty days' notice required for additions to the "House Rules."

36. Plaintiff has been damaged by Defendants' refusal to continue her subsidized tenancy.

37. Plaintiff seeks an order directing specific performance of the lease against Defendants and reforming the lease to strike any reference to the "Barred List," until such time as the Defendants implement appropriate procedures and incorporate them into the lease, as well as any damages she may incur as a result of Defendants' breach.

SECOND CAUSE OF ACTION

Violation of federal regulations and handbook governing permissible grounds for eviction from subsidized housing

38. Even if Defendants implement a "Barred List" as set out in the "House Rules," the list is only enforceable if it complies with all applicable federal laws, regulations and guidance applicable to such subsidized projects.

39. Upon information and belief, the Defendants receive federal funds designated to assist low-income families in maintaining affordable housing.

40. In return for receiving these funds, Defendants are bound by rules of the Department of Housing and Urban Development (HUD), as well as HUD handbook § 4350.3.

41. Upon information and belief, 24 C.F.R. § 247.3(a) sets out an exclusive list of grounds for termination of tenancies.

42. A federally subsidized landlord cannot pursue an eviction proceeding unless it has complied with all lease terms, regulations and handbooks which relate to the termination process.

43. HUD handbook § 4350-3 notes on page 6-19 that House Rules "must be reasonable, and must not infringe on tenants' civil rights."

44. By contrast, the "House Rules" provision establishing that the local Police Department communicates a list of individuals who have committed criminal conduct and are therefore barred from the premises is overbroad and unreasonable on its face because:

> a) The provision fails to establish any standard at all for the type or location of alleged criminal conduct which will result in prohibiting tenants from allowing alleged offenders onto the premises;
>
> b) The provision fails to distinguish between recent offenses and those that are irrelevant to resident safety or property due to the passage of significant time;
>
> c) The provision fails to establish any evidentiary standard to determine whether criminal conduct occurred or whether such conduct is grounds for exclusion from the premises. (In regard to evaluating potential tenants, HUD has noted that "the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual" [HUD, April 4, 2016 Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate Transactions] Accordingly, it is improper to delegate the determination of criminal conduct, and consequent banning from property, to a law enforcement agency without establishing any clear standard for determining whether criminal conduct occurred and whether such conduct is grounds for barring access to premises.)

45. Because the "House Rules" procedure for establishing the population of the "Barred List" is overbroad and unreasonable on its face, termination predicated on violation of the "Barred List" is not permitted.

46. By pursuing an eviction based on an alleged violation of a lease term which is unreasonable and overbroad, Defendants have violated the federal regulations and associated guidance which establish permissible termination grounds.

47. As such, Defendants should be prohibited from pursuing an eviction on an alleged violation of the "Barred List."

48. Plaintiff also requests that the Court strike the lease term and "House Rules" relating to the "Barred List," until such time as Defendants establish clear, reasonable, transparent and uniform procedures for determining which individuals are not permitted on the property.

49. Further, the nature of the alleged violation, as described in Defendants' notice, fails to constitute a substantial violation of the lease.

50. Because subsidized housing is a valuable and protected right, termination of this housing requires a more substantial violation than is set out in Defendants' notice.

51. Therefore Plaintiff requests an order prohibiting Defendants from pursuing an eviction based on their [redacted] termination notice, and awarding any consequential damages she may incur.

THIRD CAUSE OF ACTION

Denial of due process of law in violation of the 14th Amendment

52. Defendants' actions with respect to subsidized tenancies also must provide due process of law.

53. A subsidized housing project is a governmental actor which must afford tenants due process of law under the fourth and fifth and fourteenth amendments. Central Brooklyn Urban Development Corp. v. Copeland, 122 Misc. 2d 726 (Civ. Ct. Kings County 1984).

54. Under the Fourteenth Amendment to the United States Constitution, a state may not "deprive any person of life, liberty or property without due process of law."

55. Before a party suffers a deprivation by a state actor, procedural due process requires notice and an opportunity to be heard. Fuentes v. Shevin, Parham and Cortese, 407 U.S. 67, 80 (1972).

56. Due process of law requires that a person who is to be deprived of a protected interest first be given "notice reasonably calculated to apprise [the person] of the availability of an administrative procedure." Memphis Light, Gas and Water Divison v. Craft, 436 U.S. 1, 22 (1978) (Holding that termination of utility service without notice of the opportunity to challenge billings deprived utility customer of procedural due process of law).

57. Tenants of federally subsidized housing have a right to have guests at their home.

58. The prohibition of specific individuals from the premises materially limits this right.

59. As such, the prohibition of an individual from subsidized premises constitutes a deprivation of a tenants' property or liberty.

60. Such deprivations by government actors must be accompanied by notice of a meaningful opportunity to challenge the deprivation.

61. Both Defendants' written policies and actual policies impair and limit the right of Plaintiff and other tenants to have guests, without affording notice of any opportunity to challenge this determination.

62. 42 U.S.C. § 1983 et seq. provides a cause of action to address such deprivations of due process of law.

63. These provisions allow for injunctive relief, damages and attorneys' fees.

64. Defendants' stated position that tenants lack standing to challenge their property manager's unilateral decisions, or the process she uses to arrive at these decisions, improperly deprives tenants of an avenue to enforce their due process and lease rights.

65. By limiting the right of Plaintiff to allow specific people onto the premises without notice of an opportunity to challenge this determination, and by following procedures that are not set out in the "House Rules," or otherwise in the lease, Defendants have deprived Plaintiff or property or liberty without due process of law.

WHEREFORE, Plaintiff requests that this Court enter judgment:

1. Finding that Defendants violated federal regulations and guidelines governing the management of subsidized properties and protecting the right of Plaintiff to a valuable government subsidy; and

2. Finding that Defendants breached the terms of the lease; and

3. Finding that Defendants deprived Plaintiff of due process of law by infringing on her rights to have guests without establishing or providing notice of a procedure to challenge Defendants' determinations; and

4. Ordering Defendants to continue and renew Plaintiff's lease and applicable subsidies; and

5. Striking from the lease and rules the improper, overbroad and improperly enforced provisions relating to the establishment of a "Barred List;" and

6. Awarding any and all appropriate damages for breach of contract and violation of federal regulations.

7. Awarding attorneys' fees pursuant to 42 U.S.C. § 1988; and

8. Such other and further relief as may be deemed just and proper.

Dated: [redacted]

[redacted]

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.
Attorneys for Plaintiff Angela Burdick
David Kagle, of Counsel
P.O. Box 272
16 W. William Street
Bath, New York 14810
Tel: (607) 776-4126

VERIFICATION

STATE OF NEW YORK)
COUNTY OF STEUBEN) ss:

Plaintiff [redacted] being duly sworn, deposes and says: I am a plaintiff in the within action; I have read the foregoing complaint and know the contents thereof; the same is true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

[redacted]

Sworn to before me this

[redacted]

[redacted]
Notary Public, State of New York
No. 01TO6300025
Qualified in Steuben County
Commission Expires 03/31/18

EXHIBIT "A"

DATE: July 29, 2016

RE: Violation of Lease Agreement

TO: [redacted]

NOTICE OF TERMINATION OF TENANCY

You are hereby notified that the landlord elects to terminate your tenancy of the above-described premises now held by you effective [redacted] **Unless you remove from the said premises on August 31, 2016**, the day on which your term expires, the landlord will commence summary proceedings under the statute to remove you from said premises for the holding over after the expiration of your term and will demand the value of your use and occupancy of the premises during such holding over.

Your tenancy is being terminated for the following reasons:

Paragraph #14 of your Lease, **Rules**: The Tenant agrees to obey the House Rules which are Attachment No. 3 to this Agreement, particularly as it relates to

#23 **No Trespassing.** "The local Police Department advises Management of people who have committed criminal conduct and are therefore prohibited from entering onto any part of the project. If a resident allows any of those people listed on the "Barred List", which is distributed periodically, management will immediately take action to terminate tenancy of the resident or residents allowing such person or persons on to the property."; and

and

Paragraph # 23 of your Lease, **Termination of Tenancy:**

C. The Landlord may terminate this Agreement for the following reasons:

(1) The Tenant's material noncompliance with the terms of this Agreement. The term material noncompliance with the lease includes: One or more substantial violations of the lease that adversely affect the health and safety of any person or right of any Tenant to the quiet enjoyment to the leased premises and related project facilities.

On February 24, 2012, the day in which you moved into [redacted] you were given a list of barred persons who have committed [redacted] at [redacted] Apartments. The notice advised you that if you attempt to allow any of the above named persons onto any part of the project, we would be forced to immediately take action to terminate your tenancy and evict you.

On July 19, 2016, you received an updated list of all persons barred from [redacted] because of criminal activities committed on [redacted] property, including the name [redacted]. Also, on July 19, 2016, [redacted] maintenance staff spoke to [redacted] and advised him that he had to leave the property as he was placed on the barred list, to which he complied and exited the property without incident.

On July 22, 2016 at approximately 12:00 pm, [redacted] management, maintenance staff and two [redacted] residents witnessed you drive onto [redacted] property and stop your vehicle, at which time [redacted] exited the vehicle and walked through the yard and onto [redacted]

You have 10 days within which to discuss this termination of your tenancy. The 10-day period begins on the date that this notice is mailed or served on you, whichever is earlier. If you request a meeting, Landlord agrees to discuss the lease termination with you.

You are hereby advised that you have a right to defend in court against the eviction proceedings, which will be commenced against you, **if you do not vacate your apartment by August 31, 2016.**

[redacted]

CERTIFICATION of ORDER TO SHOW CAUSE

I, David Kagle do hereby certify:

1. I am an attorney admitted to practice in the Courts of the State of New York.

2. The annexed copy of the Order to Show Cause with Temporary Restraining Order, signed on [redacted] Steuben County Index [redacted] is a true and complete copy of the original Order to Show Cause with Temporary Restraining Order of such date, filed with the Steuben County Clerk's Office.

Dated: [redacted]

Legal Assistance of Western New York, Inc.
David Kagle, of Counsel
16 West William Street
PO Box 272
Bath, New York 14810
Tel: (607) 776-4126

10-3-16 TL

At a Special Term of the County Court of the State of New York, County of Steuben, at the County Courthouse in Bath, New York on ___, 2016

PRESENT: HON.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------x

[redacted] Plaintiff,

vs.

[redacted] Defendants.

----------x

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER

Index No [redacted]

JUDGE BRADSTREET

Upon the complaint dated August 30, 2016, and the Affidavit of [redacted] sworn to on August 30, 2016, and the Affirmation of David Kagle, dated August 30, 2016;

LET, the Defendants [redacted] as agent and Property Manager for Defendants [redacted] show cause before a Special Term of this Court, to be held at the Steuben County Courthouse at [redacted] on the [redacted] day of [redacted] at [redacted] o'clock in the F.&E noon, of that day, why an order should not be made and entered:

1. Prohibiting Defendants from maintaining a summary proceeding in any other Court to recover possession of the premises at [redacted] during the pendency of this action; and

2. Prohibiting Defendants, their agents and assigns from taking any other action to interfere with the peaceful possession and occupancy of the premises by Plaintiff; and

3. Tolling the period set out in the Defendants' July 29, 2016 "NOTICE OF TERMINATION OF TENANCY" until the Court determines whether Defendants have complied with the lease and regulatory provisions which are predicate to terminating Plaintiff's lease and whether such lease provisions must be stricken or modified; and

4. Granting such other and further relief as may be deemed just and proper.

Sufficient cause appearing therefore, it is hereby:

ORDERED that pending a hearing and determination of this motion:

Defendants [redacted] and [redacted], their agents, assigns, and any persons working in concert with them, be restrained, from interfering with the peaceable occupancy by Plaintiff [redacted] of the subject premises, located at [redacted] and from commencing any summary proceeding to recover possession of the premises at [redacted]

LET service of a copy of this order and the papers upon which it is granted by service upon the office of Defendants' counsel, [redacted] pursuant to CPLR § 2103 or before the 15 day of September, 2016 be deemed good and sufficient service.

DATED: Bath, New York
August 31, 2016

HON.
Acting Supreme Court Justice

Submitted by:

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC.
[redacted]
David Ragle, of Counsel
16 West William Street
PO Box 272
Bath, New York 14810
Tel: (607) 776-4126