



WORKSHOP N.

# Moving Towards Civil Gideon

*2014 Legal Assistance  
Partnership Conference*

Hosted by:

The New York State Bar Association  
and The Committee on Legal Aid



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# NEW YORK STATE BAR ASSOCIATION 2014 PARTNERSHIP CONFERENCE

## N. PRESERVATION ISSUES IN HUD SUBSIDIZED HOUSING

### AGENDA

September 11, 2014  
3:00 p.m. – 5:00 p.m.

#### **2.0 Transitional CLE Credits in Professional Practice.**

*Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.*

#### **Panelists:**

**Afua Atta-Mensah, Esq.**, Director of Litigation, Safety Net Project, Urban Justice Center

**Ellen Davidson, Esq.**, Staff Attorney, The Legal Aid Society

**Edward Josephson, Esq.**, Director of Litigation, Legal Services NYC

|   |                          |
|---|--------------------------|
| <b>I. Overview</b>  | <b>3:00 pm – 3:10 pm</b> |
| <b>II. General Statutory Mandates</b>   | <b>3:10 pm – 3:15 pm</b> |
| <b>III. Section 8 Contract Opt-outs</b>   | <b>3:15 pm – 3:20 pm</b> |
| <b>IV. Restrictions On Prepayment of Insured Mortgages and/or Transfer of Title</b>                   | <b>3:20 pm – 3:30 pm</b> |
| <b>V. Enhanced Vouchers</b>   | <b>3:30 pm – 3:40 pm</b> |
| <b>VI. Contract Renewals: Owner Inducements and Tenant Rights</b>                                     | <b>3:40 pm – 4:05 pm</b> |
| a. Multifamily Assisted Housing Reform and Affordability Act (MAHRAA)                                 |                          |
| b. Owner's Right to Contract Renewal  |                          |
| c. Preservation of 236 Interest Reduction Payment Mortgage Contracts Through HUD's Decoupling Process |                          |

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### **FIVE MINUTE BREAK**

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|--|--------------------------|
| <b>VII. Expiring Use</b>                         | <b>4:10 pm – 4:30 pm</b> |
| a. Project Based Vouchers                        |                          |
| b. Rental Assistance Demonstration Project (RAD) |                          |

## **VIII. Miscellaneous Issues**

**4:30 pm – 5:00 pm**

- a. Foreclosures
- b. Supporting HUD Enforcement – Preventing Owner Reinstatement
  - i. MMFA Provisions: Monetary & Regulatory Defaults
  - ii. Transfer of Physical Assets (TPA) Restrictions
- c. Preventing Auction Sales to Undesirable Purchasers
  - i. Bid Restrictions
  - ii. Section 219
  - iii. U.S. Housing Act
- d. Bankruptcy Issues

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# **Substantive Outline**

## **N. 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/hsg/4350.3](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsg/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](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, Cheatham 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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. Contract Renewals**

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 (1<sup>st</sup> 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 (7<sup>th</sup> Cir. 1980); *Zamiarsky v. Kozial*, 18 A.D.2d 297, 301, 239 N.Y.S.2d 221 (4<sup>th</sup> 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 3<sup>rd</sup> 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](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. Owner’s Right to Contract Renewal**

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. Preservation of 236 Interest Reduction Payments Mortgage Contracts through HUD’s decoupling process.**

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. Project Based Vouchers**

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. Rent Demonstration Project**

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 is 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. Preventing auction sales to undesirable purchasers

- 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. Preservation Plans**

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 (5<sup>th</sup> 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)



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