

December 23, 2009

Secretary Shaun Donovan
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Mr. Secretary:

The undersigned organizations are writing to request a reversal of PIH Notice 2009-51, issued December 11, 2009 which if allowed to stand will result in the economic displacement of low and moderate income families in “expiring use” projects. HUD policy, as recently articulated in a Notice from the Office of Public and Indian Housing (copy attached) prohibits owners from offering “owner financial assistance” in the form of rent phase ins, at the owner’s option and cost, to previously assisted tenants in a preservation property without being financially penalized for their actions through reduced rents for units housing enhanced voucher recipients. The sole purpose of providing owner assistance is to financially assist residents with the transition from a prior HUD preservation program to a market rate property without imposing a sudden undue financial burden on residents who do not qualify for enhanced vouchers.

When an owner prepays a HUD subsidized mortgage, such as a HUD 221(d)(3) BMIR or HUD 236, or opt-outs of a project-based Section 8 contract, it is called an Eligibility Event. Upon an Eligibility Event, an owner’s legal obligation to maintain low income rents or accept project-based rental assistance at the property ends and the owner is allowed to charge market comparable rents for all the units in the project. Congress realized that many of the existing low and moderate income tenants living in such an expiring use property would be unable to pay this new rent without a subsidy. Congress, therefore, authorized and funded “Enhanced Vouchers” to subsidize rents for Eligible Tenants (who, with certain specific exceptions for the elderly and handicap, must be existing tenants with incomes of no more than 80% of median income) at market comparable rents upon the occurrence of an Eligibility Event. The payment standard for the enhanced voucher is the gross rent for the unit. The PHA conducts a rent reasonableness test to determine if the gross rent being charged by the owner is consistent with other market rate property rents in the area.

Eligible Enhanced Voucher tenants are required to pay the greater of: a) 30% of their adjusted gross income, or b) their current rent. In many situations, due to the application of the rent setting rules under the applicable HUD subsidized housing program over the prior decades, tenants have not been required to pay 30% of their adjusted gross income at the time of the Eligibility Event. An example would be tenants in an ELIIPHA property, where four tiers of rents have existed under this HUD preservation program which resulted in many tenants paying less than 30% of current income for rent. The effect of this change from one HUD rule setting mechanism to another at the end of the

regulatory period is that the increase to 30% in one jump can, for many existing low income tenants, be substantial and unaffordable. This is particularly unfortunate at a time when many tenants in HUD-assisted properties, even if over income for Section 8 assistance, are struggling to make ends meet.

Tenants who are not eligible for Enhanced Vouchers (i.e., tenants who make more than 80% of the Median Income) must now pay the market rate rent. As in the case with the Eligible Enhanced Voucher tenants, these tenants' rents were also restricted by the previous HUD low income housing regulatory programs. They too often face very large jumps in rent from their current restricted rent to the new market rent.

The Office of Public and Indian Housing's rationale in issuing Notice 2009-51 is that in determining rent reasonableness, a PHA must take into consideration rents that are not assisted under a Federal, State or local government program – including those assisted by an owner. HUD argues that to do otherwise would allow owners to charge taxpayers higher rents, collect additional public subsidy and in some cases inflate area rents. That position does not reflect the fact that when the local PHA designated by HUD determines the reasonable market rent level through its rent reasonableness process, it does so consistent with the requirements of HUD regulations 24 CFR 982.4. That in fact is the check on the owner, to assure that the owners cannot manipulate the market or as the Office of Public and Indian Housing suggested, charge taxpayers higher rents in order to collect additional public subsidy.

ELIHPA Precedent

Congress intended, with the enactment of ELIHPA, to reduce hardships on tenants previously assisted under FHA subsidy programs. Furthermore, tenants who have been living in ELIHPA projects have in fact received the benefit of assistance provided under ELIHPA and HUD's goal of non displacement of these residents in FHA insured-housing was achieved. Applicable HUD guidance on determining rent "reasonableness" appropriately excludes rents charged in assisted units, as those rents do not reflect the true market rent that the owner can charge a new tenant coming to the property. In the situation being addressed of a property transitioning from ELIHPA, those tenants who were assisted under ELIHPA have been living in "assisted" units, and their rents during transition should not be considered "unassisted" for purposes of determining rent reasonableness. The units in such projects that are truly "unassisted" are those that are vacant at the time of the eligibility event and available to be rented at market rate rent levels.

In addition, in Massachusetts a recently enacted preservation statute itself limits rent increases when public assistance has ended and a property is transitioning to market. This local law – and its underlying policy – should be respected by HUD in making a determination of how to calculate a reasonable market rent. HUD's concern over not paying more in federal funds than is necessary to prevent displacement and protect tenants is entirely appropriate. But constructing a rule that forces the owner to choose between obtaining what everyone agrees is the actual market rent in the market in which

the building is located, and causing displacement of existing tenants through rent shock, only undercuts HUD and local policy.

In view of the foregoing, the undersigned request that you direct the Office of Public and Indian Housing to issue a clarification Notice relating to Enhanced Vouchers to avoid the unintended consequences of the recent PIH determination, which is not required by law, and will displace existing low and moderate income tenants. In the event there are any questions on the foregoing or need for further discussion, we request a meeting with you as soon as possible to address this urgent matter.

Signed:

National Leased Housing Association

National Affordable Housing Management Association

National Multi Housing Council

National Apartment Association

Institute for Responsible Housing Preservation

cc: Sandra Henriquez, Assistant Secretary, Office of Public & Indian Housing
Helen R. Kanovsky, General Counsel, HUD
Carol Galante, Deputy Assistant Secretary, Multifamily Housing Programs
Barbara Sard, Senior Advisor for Rental Assistance, HUD

Encl. PIH Notice 2009-51



**U.S. Department of Housing and Urban Development
Office of Public and Indian Housing**

Special Attention of: Section 8 Public
Housing Agencies; HUD Office of
Public Housing Directors; Section 8
Financial Management Center;

Notice PIH 2009- 51 (HA)

Issued: December 11, 2009

Expires: December 31, 2010

Cross References:

Subject: PHA Determinations of Rent Reasonableness in the Housing Choice Voucher (HCV) Program – Comparable Unassisted Units in the Premises

1. **Purpose.** This Notice provides guidance on rent reasonableness requirements in the Housing Choice Voucher (HCV) program, including what constitutes an unassisted as opposed to an assisted unit. An assisted unit is a unit that is assisted under a Federal, State, or local government program.
2. **Background.** The HCV program regulations at 24 CFR 982.507 provide that the PHA may not approve a lease until the public housing agency (PHA) determines that the initial rent to owner is a reasonable rent. In order for the rent to be reasonable, the rent may not be more than rent charged for comparable units in the private unassisted market. In addition, the rent may not be more than rent charged by the owner for comparable unassisted units on the premises. In other words, the owner is not permitted to charge the HCV program more for rent than what unassisted tenants in comparable units are paying.

By accepting each monthly housing assistance payment from the PHA, the owner certifies that the rent to owner is not more than rent charged by the owner for comparable unassisted units in the premises. The owner must give the PHA information requested by the PHA on rents charged by the owner for other units in the premises or elsewhere.

The regulations provide that the PHA must redetermine the reasonable rent: (1) before any increase in the rent to owner; (2) if there is a five percent or more decrease in the published Fair Market Rent (FMR) in effect 60 days before the contract anniversary (for the unit size rented by the family) as compared with the FMR in effect one year before the contract anniversary date; or (3) if directed to do so by HUD.

It has recently been brought to HUD's attention that in the case of a few properties undergoing Housing conversion actions,¹ the owner implemented a "landlord assistance program" for certain residents who were either not income eligible for HCV assistance or declined the HCV assistance. The owner decided to 'subsidize' the rent for these families and as a result the actual rents for the units occupied by these non-voucher residents were significantly less than the rents approved by the PHAs for units leased by HCV participants. In several cases, the administering PHA approved the HCV rents as reasonable even though rents charged to the non-HCV families (who were not assisted under a Federal, state, or local program) were lower.

HUD understands that the PHA in this and similar cases misunderstood the meaning of assisted unit in the HCV regulations and a reduction in HCV rents at this time might threaten the financial viability of the projects. Since previous HUD guidance has not expressly addressed this particular issue, if a PHA determined HCV rents in a property are reasonable after excluding certain units on the basis that those units were 'assisted' by the owner, the PHA may continue to consider those rents reasonable for current HCV tenants in those specific properties without needing to recalculate the reasonableness using the landlord assisted units as comparables.

In addition, the PHA in those instances may continue to accept the owner certification that the rent to owner is not more than the rent charged by the owner for comparable unassisted units in the premises.

However, these exceptions do not apply to any rent reasonableness determinations for new HCV tenants at these properties or any future rent reasonableness determinations at any other properties (including properties undergoing future Housing conversion actions).

- 3. Unassisted Units on the Premises.** In determining that the rent to owner does not exceed the rents charged for comparable unassisted units on the premises, the PHA takes into consideration the rents for those units in the premises that are not assisted under a Federal, State, or local government program.

Units for which the owner has simply decided of his or her own volition to charge rents that are below what other tenants are charged and what the market might actually bear are not assisted units for purposes of rent reasonableness determinations. Rents for these particular units in the premises must be considered in determining if an HVC rent to owner is reasonable.

¹ HUD provides tenant-based rental assistance in order to assist eligible residents that are affected by several different types of owner or HUD actions in HUD's Office of Multifamily Housing programs (collectively referred to as "Housing conversion actions"). Depending on the Housing conversion action and subject to the availability of appropriations, eligible families receive either regular voucher assistance or enhanced voucher assistance to mitigate the impact of the conversion action on the family's rent.

In addition, the PHA must take into consideration the real value of the rents charged by the owner for unassisted comparable units in the premises when determining rent reasonableness. For example, if the rent recorded on the lease for comparable unassisted units on the premises is the same as the rent for an HCV family but an owner is reducing the amount that is actually required to be paid by the unassisted tenants, the PHA takes the actual amount into consideration. For example, unassisted tenants might be receiving a credit each month, or a “rent-back”, or free rent some months, or some other type of subsidy from the owner. All of these actions reduce the true value of the charged rent, and the PHA must use these reductions to determine the actual ‘rent’ the owner is charging for the unassisted units.

Note, however, in some rental markets it is common practice for certain employees of the property management company (e.g., a resident manager) to reside in the property rent-free or at a significantly reduced rent as part of their employment compensation. A PHA should not take the rent or lack of rent for units in which a resident manager or similar type employee resides into consideration in making a rent reasonableness determination. The rent for these units does not represent the rent that is charged or would be charged for a comparable unassisted unit, but rather reflects some or all of the owner’s compensation for his or her employee(s).

In the case of a family moving into a multifamily property, the PHA may choose to only consider the most recent rentals in determining the rents that the owner is charging for comparable unassisted units. In some markets, new tenants routinely pay higher rents than the rents that longer time tenants in comparable units may be paying (often due to local rent stabilization programs or ordinances that limit rent increases for existing tenants).

However, in determining if subsequent rent increases result in rents that are reasonable for units occupied by families under voucher Housing Assistance Payments (HAP) contracts, the PHA should take any rent setting policies by the owner for existing tenants into consideration. Any increases in rent for HCV tenants over time should be similar to increases charged to unassisted tenants who have lived in their units for approximately the same amount of time. In other words, rents for existing HCV tenants may not exceed the rents charged to unassisted tenants in comparable units who have been in a property for approximately the same amount of time.

Similarly, in the case of a multifamily property undergoing a Housing conversion action, the families receiving vouchers as result of the action are existing tenants of the property, and the rents charged those families that choose to remain at the property with their HCV assistance must not exceed the rents charged for those existing tenants that do not qualify or do not accept the HCV assistance, even if the owner intends to eventually charge new tenants higher rents.

4. **Paperwork Reduction Act.** The information collection requirements contained in this notice have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3520). In accordance

with the PRA, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. The following active information collections contained in this notice have been approved under the PRA OMB Control Number 2577-0169.

5. **Questions.** Inquiries about this Notice should be directed to staff in the Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, at (202) 708-0477.

/s/

Sandra B. Henriquez, Assistant Secretary for
Public and Indian Housing