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Procedural Due Process and the Section 8 Leased Housing Program

James M. Klein
University of Toledo

John E. Schrider Jr.
University of Toledo

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The general welfare and security of the Nation and the health and living standards of its people require the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family.

The federal government has long recognized that low-income people are unable to obtain decent shelter without substantial government assistance. In this regard, Congress recently passed the Housing and Community Development Act of 1949, § 2, 42 U.S.C. § 1441 (1970) (Declaration of Policy) (emphasis added).
of 1974 (HCDA) which amended the Housing Act of 1937 to eliminate certain federal housing programs, modify others, and create the section 8 housing program for low income housing assistance. Since passage of the HCDA, section 8 has been the primary federal program providing additional units of low cost housing. Nevertheless, the conventional public housing program which provides financial support for housing that is planned and operated by public housing authorities (FHA's) retains vitality. Additional units continue to be authorized under the conventional public housing program as modified by the HCDA of 1974.

2 Act of Aug. 22, 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 42 U.S.C.). The § 23 leased housing program created by the Housing and Urban Development Act of 1965, 42 U.S.C. § 1421a (1970), has been replaced by the § 8 program. Under § 23, public housing authorities leased new or existing housing in the private market for the purpose of subleasing it to low income tenants at rents affordable to them. Many features of the § 23 program have been incorporated into the § 8 program. For a recent discussion of the § 23 program, see Note, The New Leased Housing Program: How Tenantable a Proposition?, 26 HASTINGS L.J. 1145, 1158-74 (1975) [hereinafter cited as Leased Housing Program].

The Housing and Community Development Act of 1974 (HCDA) provides that HUD may not unilaterally apply the § 8 policies to § 23 programs in operation. 42 U.S.C. § 1421(b) (note) (Supp. V 1975). However, provisions have been made for voluntary conversion of projects from § 8 to § 23. HUD Notice HPMC—FHA 75-20 (1975). Problems involved in this conversion process are discussed in HUD OFFICE OF POLICY DEVELOPMENT AND RESEARCH, A REPORT TO THE SECRETARY ON THE SECTION 8 EXISTING HOUSING PROGRAM, 38-41 (June 30, 1976) [hereinafter cited as A REPORT TO THE SECRETARY].


Before the section 8 program, residents affected by federal housing programs had been granted extensive procedural protections through the courts, legislation, and regulations. Since the role of the PHA’s is much smaller under section 8 than the conventional program, tenants’ rights regarding admissions and evictions are unclear. First, this article will describe the function of the section 8 housing program, including the issue of site selection. Second, the eviction process under section 8 will be analyzed in light of the requirements of procedural due process. Finally, the admissions procedures will be discussed in terms of due process.

I. The Section 8 Housing Program

The section 8 program, by subsidizing rents of low income

ated for new public housing construction by the HUD-Independent Agencies Appropriation Act of 1977, Pub. L. No. 94-378, 90 Stat. 1095. This will finance the construction or acquisition of approximately 37,000 public housing units. 4 Hous. & Dev. Rep. (BNA) 871 (1977). Under new HUD policies, family units, as opposed to those for the elderly, will be emphasized and scattered site housing will be given preference over the traditional large projects. 24 C.F.R. Part 841 (1977). See 4 Hous. & Dev. Rep. (BNA) 682, 729 (1976) for further explanation.

Eligibility for public housing has been substantially modified under the HCDA of 1974. Prior to 1974, public housing units were solely for “families of low income,” defined as those in the lowest income group who cannot afford to pay enough for housing to cause the private market to supply decent housing. 42 U.S.C. § 1402(2) (Supp. V 1975). Under the HCDA of 1974 public housing projects must include “families with a broad range of incomes and . . . avoid concentrations of low-income and deprived families with serious social problems . . . .” Id. § 1437d(c)(4)(A). This provision is reinforced by a requirement that housing authorities cannot qualify for federal operating subsidies unless the aggregate rentals required to be paid by its tenants equal one-fifth of the income of the tenants. Id. § 1437g; 24 C.F.R. § 860.407 (1977). See Bishop, Assisted Housing Under the Housing and Community Development Act of 1974, 8 Clearinghouse Rev. 672 (1975).


people, can be viewed as a type of housing allowance providing direct cash payments to tenants to enable them to obtain decent housing in the private market. The Department of Housing and Urban Development (HUD) pays owners of existing, new, or rehabilitated rental units the difference between the contract rents, which generally cannot exceed a federally determined "fair market rent" for a unit, and fifteen to twenty-five percent of the incomes of assisted tenants. Section 8 creates three categories of assisted housing: newly constructed, substantially rehabilitated, and existing housing. In general, the section 8 newly constructed and substantially rehabilitated programs are administered by HUD with the participating owners having substantial control of management. In addition to HUD and the owners, PHA's play a significant role in the existing housing program.

HUD implements the newly constructed and substantially rehabilitated programs by contracting directly with owners or prospective owners of the housing units to pay the difference

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8 See Whitman, Federal Housing Assistance for the Poor: Old Problems and New Directions, 9 Urb. Law. 1, 55-59 (1977). For a brief discussion on the theory of housing allowances and the implication of that theory for the program prior to § 8 (the so-called revised § 23 housing program) see Leased Housing Program, supra note 2, at 1165.

9 HCDA of 1974, § 201(a)8, 42 U.S.C. § 1437f (Supp. V 1975). See notes 32-37 infra and accompanying text for a discussion of circumstances under which the rents may exceed the fair market figure. See note 26 infra regarding exceptions to the rule that at least 25% of the income must be paid by tenants.

HUD regulations implement the § 8 program: 24 C.F.R. Part 880 (1977) (newly constructed); id. Part 881 (substantially rehabilitated); id. Part 882 (existing housing).

Owners of § 8 housing may be either private or public. In addition, HUD has issued special regulations for § 8 housing administered by "public housing agencies." 24 C.F.R. § 883 (1977). These regulations repeat many of the provisions contained in the general regulations and will not be specifically discussed here. The regulations for the newly constructed housing and substantially rehabilitated housing are virtually identical. Therefore, in discussing the two programs, citations to the latter will not be made unless they vary from the provisions for newly constructed housing.

The § 8 program does not provide direct financing to developers or builders of leased housing. See 24 C.F.R. § 880.115 (1977) and the discussion of the fair market rent mechanism in notes 32-41 infra and accompanying text.

between the contract rent and the tenant's share of rent. The PHA's may participate as owners in the section 8 newly constructed or substantially rehabilitated programs through annual contribution contracts with HUD. The assistance payments contracts can run for five years and are renewable for up to twenty years at the owner's option. In the case of existing housing, HUD enters into annual contribution contracts with PHA's which, in turn, contract with owners of suitable rental units to make assistance payments. The contracts are for one to three years, the same as the lease term between the tenant and owner. In the existing housing program, the PHA's are responsible for certifying eligible persons and issuing "certificates of family participation" which are presented to prospective landlords. In the existing and newly constructed or substantially rehabilitated programs the eligible tenant must enter into a lease with the owner. However, in the exist-

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12 Id. In addition, see, e.g., 24 C.F.R. § 880.214 (1977). Special regulations apply to state housing agencies participating in the newly constructed or substantially rehabilitated programs. 24 C.F.R. § 883.301-329 (1977). In addition, under HUD's regulations, an owner may also seek assistance through a public housing authority instead of directly through HUD. This arrangement, called a "private owner-PHA-HUD option" in the regulations, is accomplished through the payment of an annual contributions contract by HUD to the PHA. If this is done, the PHA undertakes all administrative responsibilities for the housing assistance payments, which would otherwise fall to HUD. Id. § 880.212.
13 Id. § 880.109. The fiscal 1977 Supplemental Authorization Act contained a section extending the maximum contract term to 30 years. Pub. L. No. 95-24, § 101(c), 91 Stat. 55. When a project is owned or financed by a state or local agency, the assistance payments contract can be renewed for a total of 40 years. 24 C.F.R. § 880.109(h) (1977).
14 42 U.S.C. § 1437f(b)(1) (Supp. V 1975); 24 C.F.R. § 882.210 (1977). Section 1437f(b)(1) states that "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 existing housing program]," HUD is permitted to perform the role of the PHA. 24 C.F.R. § 882.121(b) (1977).
15 24 C.F.R. § 882.107 (1977). In situations where the family remains as tenants and the lease is renewed, the contract may remain in effect until the expiration of the annual contribution contract which is five years. Id.
16 Id. § 882.209. Under the newly constructed and substantially rehabilitated programs, eligibility and admission are the responsibility of the owners. Id. § 880.119(a).
17 Id. § 880.218(b)(4) (newly constructed); id. §§ 882.103(a), .210(a) (existing housing). The owner may contract management duties out to any private or public (e.g., PHA) entity. Id. § 880.119(b). PHA's which participate in the newly constructed and substantially rehabilitated programs may not perform management functions under contract. Id. See Leased Housing Program, supra note 2, at 1173 n.141. A similar
ing housing program the certifying PHA is to provide assistance to eligible persons in finding suitable accommodations.18

The owners are responsible for maintenance and management, including selection of tenants and termination of tenancies.19 Where existing housing units are involved, however, the private owner acts in an advisory capacity to the PHA20 in terminating tenancies. In the event that a section 8 unit becomes vacant, assistance payments will be continued to the owner under certain circumstances, such as when an assisted tenant has abandoned a unit in breach of the lease or where the landlord is making a "good faith effort" to fill the vacancy.21

In order to be eligible for section 8 housing a family’s income generally must not exceed eighty percent of the median income for the area, as determined and adjusted by HUD.22 At

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20 The statute provides that the PHA “shall have the sole right to give notice to vacate, with the owner having the right to make representations to the agency for termination of tenancy.” 42 U.S.C. § 1437f(d)(1)(B) (Supp. V 1975); 24 C.F.R. § 882.215 (1977).
21 42 U.S.C. § 1437f(c)(4) (Supp. V 1975). The regulations provide that the owner may receive up to 80% of a unit’s market rent for a 60-day period subject to certain conditions. 24 C.F.R. § 880.107(b) (1977) (newly constructed); id. § 882.105(b) (existing housing). Under § 2(d) of the Housing Authorization Act of 1976, Pub. L. No. 94-375, 90 Stat. 1068, HUD may continue making assistance payments to owners of certain vacant § 8 units for up to one year in an amount equal to the debt service attributable to the vacant units. Id. § 880.107(d) (newly constructed). See also § 201(d) of the Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111, providing the expanded assistance payment coverage even when the vacant unit is insured under the National Housing Act.
22 42 U.S.C. § 1437f(f)(1) (Supp. V 1975). HUD regulations refine this standard to define “family” for income purposes as having four members. Adjustments are then made for larger or smaller families. For example, a three-person family is low income if it earns less than 72% of the area median, while a family of five may earn as much as 85% and still be low income. See 24 C.F.R. § 880.117 (1977) (newly constructed); id. § 882.113 (existing housing). The 1976 Housing Authorization Act, Pub. L. No. 94-375, 90 Stat. 1067, provides that HUD may issue regulations permitting certain formerly ineligible single persons to occupy § 8 housing. No more than 10% of the units under the jurisdiction of any public housing authority may be occupied by single persons made eligible by that provision. Regulations appear at 24 C.F.R. Part 812.
least thirty percent of the families assisted under section 8 must have "very low incomes" at the time of initial rental; that is, their incomes may not exceed fifty percent of the median income for the area.\textsuperscript{23} It is noteworthy that applicants rejected for section 8 housing have no statutory right to respond at an informal hearing.\textsuperscript{24}

It was noted above that the tenant's share of the rent is limited to a percentage of his income, usually twenty-five percent. However, large very low income families, very large low income families, and families with "exceptional expenses" pay only fifteen percent of income in rent.\textsuperscript{25} The rent for other families is twenty-five percent of income after deductions for minors and "unusual expenses."\textsuperscript{26} Under these rent formulae, section 8 tenants will often have higher rental payments than if they resided in traditional public housing.\textsuperscript{27}

\textsuperscript{23} 42 U.S.C. §§ 1437f(c)(7), (f)(2) (Supp. V 1975). Although the statute applies the 30% requirement to the entire § 8 program, the regulations impose the requirement on each project. 24 C.F.R. § 880.117 (1977) (newly constructed); id. § 882.113 (existing housing). The regulations also require that a developer participating in new construction (or substantial rehabilitation) must continue to "exercise his best efforts to maintain at least 30 percent occupancy of contract units by Very Low-Income Families." Id. § 880.117. PHA's are under a similar duty in administering the existing housing program. Id. § 882.113.

\textsuperscript{24} Such a right exists in the conventional public housing program. 42 U.S.C. § 1437d(c)(3) (Supp. V 1975). This statutory provision does not apply to § 8. Id. § 1437f(h).

\textsuperscript{25} Id. § 1437f(c)(3). Regulations define a household with six or more minors as "large" and a household with eight or more minors as "very large." 24 C.F.R. § 880.118 (1977) (newly constructed); id. § 882.114 (1977) (existing housing).

\textsuperscript{26} HUD is authorized to permit families with unusual expenses to pay less than 25% of their income in rent (but not less than 15%). 42 U.S.C. § 1437f(c)(3) (Supp. V 1975). Instead these families must pay 25% of their income but are permitted first to make deductions from gross income. For example, they may first deduct $300 for each minor child and medical expenses which exceed 3% of annual income. See 24 C.F.R. Part 889 (1977).

\textsuperscript{27} If § 8 definitions were applied to public housing tenants, the average family's rent would increase 24% according to a recent survey of 133 public housing authorizations conducted by the Urban Institute for HUD. 4 Hous. & Dev. Rep. (BNA) 884 (1977). Under the so-called Brooke Amendments, tenants of public housing pay 25% of their adjusted income in rent, but more deductions from income are permitted than in § 8. See 42 U.S.C. § 1437a(1) (Supp. V 1975). In spite of the higher cost of living in § 8 housing, it has been reported that some public housing officials are finding that public housing tenants are interested in moving into § 8 existing housing. A Report to the Secretary, supra note 2, at 40-41. Insofar as the § 8 program effectuates a wider
Based on the income eligibility requirements and the rent formulae, the section 8 housing program may result in only minimal benefit for the lowest income groups. The median income of all families residing in traditional public housing is substantially lower than fifty percent of the national median income. Since only thirty percent of section 8 tenants are required to be of very low income, i.e., having less than fifty percent of area median income, the poorest families are being allocated only a fraction of section 8 housing. This result is intended. The section 8 program is designed to attract tenants with varying levels of income, a policy generally referred to as "economic mix." Apparently the assumption is that the poorest families and those with severe social problems will benefit from being exposed to more stable neighbors. In this regard, HUD may give preference to applications for section 8 newly constructed or substantially rehabilitated housing contracts that propose to assist only twenty percent of a building's units, except where the building contains fifty or less units or is designated for the elderly.

choice of housing locations, this should be encouraged. See notes 84-93 infra and accompanying text for a discussion of site selection for § 8 existing housing.


It is likely that § 8 landlords will tend to select tenants at the higher end of the median scale rather than those at the lower end because they will assume that the former would be better tenants.

It should be noted that there is some evidence that the § 8 existing housing program is benefiting more very low income families than required by law. According to a HUD study, 84% of the tenants in existing housing have very low incomes. A Report to the Secretary, supra note 2, at 6. However, the same study indicates that large families are not being served well by the existing housing program. Id. at 19.

42 U.S.C. § 1437f(a) (Supp. V 1975). The purpose of the § 8 program is to aid "lower-income families in obtaining a decent place to live and . . . [to promote] economically mixed housing . . . ." Id.

Since projects can be 100% subsidized, the design of § 8 is such that it may result in less "economic mix" than in the § 23 program. It is likely that most § 8 newly constructed projects will have a high percentage subsidized unit. In fact, the Government Accounting Office found that many developers felt that few would submit appli-
The subsidy HUD pays to owners of section 8 units is the difference between the contract rent, generally not exceeding the "fair market rent" for a unit, and the tenant's share of the rent. Thus, the "establishment of realistic fair market rentals [is] a prime factor in the success or failure" of the program. HUD is required, at least annually, to calculate fair market rentals for existing and newly constructed units of various types and sizes. The assistance contracts between HUD and owners or between PHA's and owners specify a maximum monthly rent (including utilities) for the rental units, including the tenant's contribution. Maximum rent may not exceed the fair market rent by more than ten percent unless HUD determines that local needs warrant up to twenty percent excess. Assistance contracts also provide that maximum rents will be adjusted annually to correspond to changes in fair market rentals.


42 U.S.C. § 1437f(c)(1) (Supp. V 1975). By regulation, the maximum rent in the newly constructed program may exceed the fair market by up to 10% only if the HUD area office determines that this is warranted by special circumstances. The HUD regional office has authority to permit maximum rent to exceed fair market rent by 20% in special circumstances. In either case, the contract rent must be "reasonable." 24 C.F.R. § 880.108 (1977). In the existing housing program there is greater flexibility: PHA's may approve maximum rents exceeding fair market rents by up to 10% on a unit-by-unit basis for as many as 20% of their units under the annual contribution contract. Id. § 882.106(a)(2). The HUD area office has authority to permit maximum rents up to 20% over the fair market rent. However, maximum rents can exceed average rents in the area for available standard units of similar size or type only with the permission of regional office. Id. § 882.106(a)(3)-(4). Special provisions are made for "recently completed housing." Id. § 882.120(b).

42 U.S.C. § 1437f(c)(2)(A) (Supp. V 1975). HUD also has discretion to make adjustments "on the basis of a reasonable formula." Id.
case of existing housing. Further increases may be made if an owner can "clearly demonstrate" financial need due to other variables such as property tax or utility rate increases.

By defining fair market rents HUD can regulate the number and quality of section 8 housing units. If the market rents are set too low, private developers will not participate and suitable units will not be available. It has been reported that low fair market rents have restricted activity in the newly constructed, substantially rehabilitated, and existing housing programs. On the other hand, there are dangers in setting the fair market rents too high. Since a tenant's contribution is based on personal income, higher maximum rents will not affect him. However, federal funding is limited, and for every increase in fair market rents, fewer units can be funded under the program. Because of these problems, activity in the section 8 program was generally slow at its inception in August 1974.

HUD publishes an "automatic adjustment factor" for newly constructed units. 24 C.F.R. § 880.110(b) (1977). In existing housing, adjustments are limited to changes in the fair market rent and are made only in the years when the landlord can terminate the lease. id. § 882.108(a).

Id. § 880.110(c) (newly constructed); id. § 882.108(a) (existing housing). See 42 U.S.C. § 1437f(c)(2)(B)-(C) (Supp. V 1975).

A Government Accounting Office study, dated January 1977, suggests that higher rents than those charged for private units may be necessary to bring developers of family housing into the program in view of higher costs and risks associated with low-income housing. GAO REPORT, supra note 31, at 16-30. An earlier HUD study also indicates that low fair market rents have inhibited the Existing Housing program, especially with respect to large units with three or more bedrooms. A REPORT TO THE SECRETARY, supra note 2, at 19. A National Association of Housing and Redevelopment Officials survey of public housing agencies made similar findings. 4 Hous. & Dev. REP. (BNA) 477 (1976). Owners of potential § 8 existing housing are also reluctant because they feel that participation involves much red tape. GAO REPORT, supra note 31, at 33-36. HUD recently has become more flexible in allowing maximum rents to exceed fair market rentals in the newly constructed and substantially rehabilitated programs. 4 Hous. & Dev. Rep. (BNA) 729-30 (1977).

Vacancy rates also play an important part in whether landlords participate in § 8. If vacancy rates are low, the profits from purely private units rise and landlords are less likely to become involved in a federal program. A REPORT TO THE SECRETARY, supra note 2. See Note, Federal Leased Housing in Private Accommodations, 8 U. Mich. J.L. Ref. 676, 688 (1975).

It is estimated that in 1974, there were more than 1,000,000 low income families of four or more living in over-crowded or substandard housing who needed different housing than they occupied. A REPORT TO THE SECRETARY, supra note 2, at 19-20.

See GAO REPORT, supra note 31, at 5-9. At the close of calendar 1976, 153,962 § 8 units were occupied. The figures are somewhat deceptive, however. Of these occupancies, 61,288 were in existing units under the loan management program for finan-
With respect to site selection, courts in recent years have required HUD to consider the effect of proposed locations upon existing and developing concentrations of racial minorities. Congress expanded this policy in the HCDA of 1974 which seeks to avoid residential concentrations of low income persons. This policy recognizes the need of low income persons and minorities to migrate from the inner city to gain access to job opportunities, improved housing, and better living environments. Section 8 of the HCDA of 1974 states that the purpose

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2. (a) The Congress finds and declares that the Nation's cities, towns, and smaller urban communities face critical social, economic, and environmental problems arising in significant measure from-(1) . . . the concentra-
of providing lower income housing assistance is to "[aid] lower income families in obtaining a decent place to live and [to promote] economically mixed housing." A similar policy is contained in the HUD regulations governing site selection of section 8 housing.

A. Site Selection for Section 8 Newly Constructed and Substantially Rehabilitated Housing

The HUD regulations require that the sites used for newly constructed and substantially rehabilitated housing "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low income persons." Also, the locations of newly constructed housing must not contribute to minority concentrations. Prospective sites must be accessible to recreational,......

42 U.S.C. § 5301 (Supp. V 1975) (emphasis added). For the legislative history of this aspect of the Act, see U.S. Code Cong. & Ad. News 4422 (1974). But see City of Hartford v. Town of Glastonbury, 561 F.2d 1032, (2d Cir. 1977) in which these policies are variously treated by the plurality, concurring, and dissenting opinions.


45 24 C.F.R. § 880.112 (1977) (newly constructed); id. § 881.112 (substantially rehabilitated). Since persons holding "certificates of family participation" issued under the existing housing program are "responsible for finding...[a] unit suitable to the holder's needs and desires in any area where the PHA determines that it is not legally barred from entering into [Housing Assistance Payments] Contracts," there are no similar site selection provisions applicable to the existing housing program. Id. § 882.103(a). See notes 84-93 infra and accompanying text for a discussion of site selection for § 8 existing housing.

46 24 C.F.R. § 880.112(d) (1977) (newly constructed); id. § 881.112(c) (substantially rehabilitated).

47 Id. § 880.112(c) provides that in the new construction program:
The site shall not be located in
(1) An area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be.... 
educational, commercial, and health facilities and services, and other municipal facilities and services. In addition, the location of such assisted housing must comply with any applicable conditions in the local Housing Assistance Plan approved by HUD.

The Housing Assistance Plan (HAP) is required in a local government’s application for a grant under Title I of the HCDA of 1974 and is the link between that program and section 8. Title I grants are made to local governments to eliminate slums and blight, to conserve and expand the supply of low and moderate cost housing, to expand community services, and to reduce the geographical isolation of income groups. However, Title I monies cannot be used for new housing construction or for housing allowance payments. Rather, the local governments applying for community development block grants must include a HAP which assesses the housing needs of lower in-

served by the proposed project, outside areas of minority concentration, or
(ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An “overriding need” may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable).

(2) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

Of course, the sites for substantially rehabilitated housing as well as newly constructed housing must comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d (1970); Title VIII of the Civil Rights Act of 1964, 42 U.S.C. §§ 3601-3631 (1970); and Exec. Order No. 11,063, 3 C.F.R. 652 (1962); 24 C.F.R. § 880.112(b) (1977); id. § 881.112(b).

* 24 C.F.R. §§ 880.112(g), 881.112(f) (1977).
* Id. §§ 880.112(f), 881.112(c).
come persons residing or expected to reside in the community, establishes goals for the number of persons or units to be given housing assistance, and describes the location of existing and proposed low income housing.\textsuperscript{53}

As the primary federal housing program in operation, the section 8 program often represents the housing "assistance best suited to the needs of lower income persons in the community."\textsuperscript{54} Allocations of section 8 funds made by HUD are based on the needs set forth in the HAP "to the maximum extent practicable."\textsuperscript{55} Thus, the HAP is an important link between section 8 and the community development block grant program of the HCDA.\textsuperscript{56}

\textsuperscript{53} No grant may be made \ldots unless an application shall have been submitted to the Secretary in which the applicant \ldots (4) submits a housing assistance plan which —

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped persons, large families, and persons displaced or to be displaced) residing in or expected to reside in the community,

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community, and

(C) indicates the general locations of proposed housing for lower-income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects.


\textsuperscript{63} City of Hartford v. Hills, 408 F. Supp. 889, 898 (D. Conn. 1976); see note 63 infra for a discussion of the Hills case.

In its notice accompanying proposed amendments to the regulations governing
Since HAP's are prepared by local governments (subject to HUD approval) they constitute a measure of control exercised by local governments on section 8 site selection.\textsuperscript{57} Prior to the enactment of the HCDA of 1974, public housing authorities were required to enter into cooperation agreements with local governments in order to become eligible for federal housing aid.\textsuperscript{58} Local opposition to project proposals for low income housing has been a significant barrier to housing development, and

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\textsuperscript{57} 42 U.S.C. § 5304(a) (Supp. V 1975). When a § 8 project is proposed for a community which has a HAP, HUD must inform the local governing body of the application. The local government has 30 days in which to evaluate the proposal. 42 U.S.C. § 1439(a)(1) (Supp. V 1975); 24 C.F.R. §§ 891.202-204 (1977).

If the community determines that the proposed project is inconsistent with the HAP, HUD may approve the application only if it concludes that, based on substantial evidence, the project is consistent with the HAP. 42 U.S.C. § 1439(a)(2) (Supp. V 1975); 24 C.F.R. § 891.205(b)(2)(c) (1977). If the local government does not respond within the 30-day period, HUD must make a determination of whether or not the proposal complies with the HAP. 42 U.S.C. § 1439(a)(3) (Supp. V 1975); 24 C.F.R. § 891.205(b)(3) (1977). If the local government responds that there is no objection, HUD "may approve the application unless [it] makes an independent determination that it is inconsistent with the applicable HAP." 24 C.F.R. § 891.205(b)(1) (1977). The legislative history indicates that HUD may override local objections only on the basis of substantial reasons. CONG. REP. NO. 1279, 93d Cong., 2d Sess. 145, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4470-71.

This process does not apply to proposals for § 8 housing involving 12 or fewer units in a single project or development nor to projects of state housing agencies. 42 U.S.C. § 1438(b) (Supp. V 1975); 24 C.F.R. § 891.201(a)(6) (1977). However, the local approval requirements do apply to state agency projects if the local government objects to the exception in its HAP. 42 U.S.C. § 1439(b)(3) (Supp. V 1975); 24 C.F.R. § 891.201(c) (1977).

In areas where there are no applicable housing assistance plans (perhaps because the local government has not applied for community development funds), HUD must determine that § 8 housing is needed in light of any applicable state housing plans and any comments given by the local government. 42 U.S.C. § 1439(c) (Supp. V 1975); 24 C.F.R. §§ 891.301-.305 (1977).

\textsuperscript{58} 42 U.S.C. § 1415(7) (1970). In these agreements municipalities promise to exempt all housing projects from local taxes. Id. § 1415(7)(b)(i) (Supp. V 1975). However, authorities can be required to pay up to 10% of their rent receipts in lieu of taxes. Id. § 1410(h) (1970). Local approval of § 23 housing was also required, but only in the form of a general resolution of assent. Id. § 1421(b)(a)(2). Local governments do not have to exempt federally subsidized leased housing properties such as § 8 properties from local taxes, so that no ground for objection exists due to failure to exempt such properties from local taxes. See generally Note, Federal Leased Housing Assistance in Private Accommodations: Section 8, 8 Mich. J. L. REV. 676, 686 (1975).
the requirement of local approval has enabled municipalities to exclude low income housing at will by refusing to enter into cooperation agreements.\textsuperscript{59} The effect of HAP's on the selection of sites for newly constructed and substantially rehabilitated section 8 housing is still uncertain. However, as the following discussion will indicate, to the extent that local HAP's are legally sufficient, they can encourage section 8 housing in areas formerly closed to the conventional public and other low cost housing programs.\textsuperscript{60} Whether this goal is realized depends, in large part, on the content of local HAP's.

HUD has issued detailed regulations describing HAP requirements.\textsuperscript{61} In regard to the requirement that the HAP identify low income housing needs in the community, it is noteworthy that the needs of lower income persons who are "expected to reside in the community" must be considered.\textsuperscript{62} The


\textsuperscript{60} Hills v. Gautreaux, 425 U.S. 284 (1976). In affirming metropolitan-wide relief to remedy discrimination in site selection of HUD-funded public housing, the Supreme Court discussed the potential impact of HAP's.

As stated in a report of the United States Commission on Civil Rights, in the HCDA:


\textsuperscript{61} 24 C.F.R. § 570.303 (1977). The regulations require a community to identify housing needs by type of tenant or owner, such as family, elderly or handicapped, or large family. This must be accompanied by an assistance plan which is roughly proportional to the recipient's needs.

\textsuperscript{62} 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Those expected to reside are defined in 24 C.F.R. § 570.303(c)(2)(i)-(ii) (1977) as "families with workers expected to be
"expected to reside" provision is the mechanism for achieving the HCDA objective of "spatial deconcentration of housing opportunities for persons of lower income" in suburban areas.63

In addition to stating the needs for low cost housing assistance, the HAP must specify goals for low cost housing units.64 According to the regulations, the goals must proportionally "address the needs of the three household types (elderly and/or handicapped, families, and large families)."65 Also, locations must be identified for newly constructed and substantially rehabilitated housing units to be assisted. The locations must be accessible to public services, further the goals of revitalizing neighborhoods and avoid "undue concentrations of assisted persons in areas containing a high proportion of low-income persons."66

In reviewing the HAP component in a community development block grant application, HUD must approve the application unless it finds that the applicant's description of housing needs and objectives is "plainly inconsistent" with generally available facts and data or that it conflicts with the require-

42 U.S.C. § 5304(a)(4)(B) (Supp. V 1975) states that a HAP must "[specify] a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community . . . ." See also 24 C.F.R. § 570.303(c)(3) (1977).


ments of the HCDA or other applicable law. Thus, in *City of Hartford v. Hills,* the court held that HUD had acted arbitrarily in approving a community development application where housing needs identified in the HAP were “plainly inconsistent” with generally available facts and data. Even if the applicant adequately assesses housing needs in the HAP, the goals may be “plainly inappropriate to meet needs” and, therefore, subject to rejection by HUD. In HUD’s review of the HAP, the locations of proposed housing for lower income persons must also be considered.

The manner in which HUD enforces the HAP requirements will play an important role in the location of newly constructed and substantially rehabilitated section 8 housing. In the event that HUD fails to enforce its regulations relating to approval of HAP’s, administrative and judicial challenges exist. For example, to the extent that central cities rely on

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49 Id. at 902-07. See note 63 *supra* and accompanying text for additional discussion of this case.
51 HUD regulations require that goals be proportional to needs. For example, where 70% of a community’s housing need is for families, HUD will allow a goal of no less than 60% (with exceptions for special circumstances). 24 C.F.R. § 570.303(c)(3)(iv) (1977). But see *NAACP v. Hills*, 412 F. Supp. 102, 110-11 (N.D. Cal. 1976), in which HUD’s approval of a HAP with larger variations was upheld. Compliance with the regulations was not addressed. See also *Kushner,* *supra* note 51, at 70-71.
52 See note 66 *supra* and accompanying text. Section 8 and substantially rehabilitated housing must conform with the site standards in the regulations. See notes 46-48 *supra* and accompanying text for site selection requirements.
53 According to a study by the GAO, HUD approved two community development block grant applications in 1975, even though the HAP’s were inadequate in terms of assessing housing needs or setting realistic goals for assisted housing. The cities involved were Midland, Tex., and Wayne, N.J. On the other hand, HUD rejected community development applications by Parma, Ohio, Bloomfield, N.J., and Maple Shade, N.J., on the basis of inadequate HAP’s. 4 *Hous. & Dev. Rep.* (BNA) 68 (1976). Subsequently, HUD has rejected applications by Pomona, Cal., St. Joseph, Mich., East Hartford, Conn., and Hightown, N.J., because of HAP violations. 5 *Hous. & Dev. Rep.* (BNA) 95 (1977).
54 24 C.F.R. § 570.306(b) (1977) alludes to the possibility of administrative complaints during HUD’s review of an application. In judicial review, the challenges will be confronted with the Supreme Court’s restrictive interpretation of standing in exclu-
section 8 substantially rehabilitated housing as a mechanism for addressing housing needs, the impact of the HAP on promoting a greater choice of housing opportunities is problematic. The HAP regulations require locations to be described by census tract, but this does not necessarily disclose whether the actual locations of housing will have the effect of increasing racial or low income concentrations. Of course, the proposed section 8 housing assistance must also conform to the section 8 site selection regulations. In this regard, it is significant that while the regulations seek to avoid the undue concentration of low income persons, they do not prohibit substantially rehabilitated housing which contributes to racial concentrations.

Even if a HAP is facially adequate, it is possible that the applicant, particularly a suburb, might not be able to implement the HAP goals under existing land use restrictions. For example, exclusionary zoning in the form of large lot requirements or growth limitations based on the number of construction starts or phased growth programs could thwart a HAP goal for low income housing.

Since the HCDA calls for a "realistic"
description of annual goals, HUD may be required to disapprove such an application.  

Assuming that a HAP is adequate, HUD must monitor the applicant's compliance with the HCDA in its use of community development funds. Under regulations governing performance standards for implementing HAP's, a community will be judged to have met its one-year HAP goal if the units specified in the HAP have received a firm commitment for financing within two years. In addition, a community will be judged on whether it took action to reach HAP goals, such as removing zoning barriers to low cost housing, cooperating with public housing authorities, and whether the housing assistance pro-

to establish that zoning regulations violate the equal protection clause, racially discriminatory motive, as well as racially disproportionate impact must be shown. See also Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated, 426 U.S. 945 (1977), aff'd on rehearing, 558 F.2d 350 (6th Cir. 1977), cert. denied, 46 U.S.L.W. 3373 (1977); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970). Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971). But see United States v. City of BlackJack, 508 F.2d 1179 (8th Cir. 1974); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, (3d Cir. 1977) (intent need not be shown under 42 U.S.C. § 3604 (1970)).


10 See Kushner, supra note 51, at 73-77 for a discussion of the relation of restrictive land use practices with HAP's.

10 42 U.S.C. § 5311 (Supp. V 1975); 24 C.F.R. § 570.900 et seq. (1977). Annual performance reports, including information on housing assistance provided, must be submitted by recipients. Id. § 570.906 (1977). If deficiencies appear HUD must provide the recipient with notice and an opportunity for a hearing. After the hearing, HUD can terminate or reduce payments, or request the U.S. Attorney General to sue for recovery of payments or injunctive relief. 42 U.S.C. §§ 5311(a)-(b) (Supp. V 1975); 24 C.F.R. § 570.913 (1977).
vided conforms with the HAP.\footnote{24 C.F.R. § 570.909(e)(2), (f)(2) (1977). See 4 Hous. & Dev. Rep. (BNA) 804-05 (1977). If a recipient's failure to implement its HAP is racially motivated, constitutional and civil rights remedies, as well as the HUD noncompliance procedures, would be available to compel compliance. See Kushner, supra note 51, at 86-87.}

Of course, in areas where communities do not apply for community development grants, there will be no HAP. In such a situation, proposals for newly constructed and substantially rehabilitated section 8 housing would still have to be situated so as to promote increased housing opportunities for low income persons, as required by the site selection regulations for section 8.\footnote{See notes 46-49 supra and accompanying text for discussion of HUD site selection regulations.} However, the proposed sites would have to comply with local zoning requirements.\footnote{24 C.F.R. Part 882 (1977); id. § 882.103(a).} Such communities will not have the pressure of the HAP to admit low cost housing within their borders.\footnote{Id. § 882.209(a)(2). However, the housing authority must implement an “equal opportunity housing plan” including procedures for obtaining the participation of landlords in areas outside low income and minority concentrations. Id. § 882.204(b)(1)(i)(B). It must also include certification of intent to “take affirmative action to provide opportunities to participate in the program to persons expected to reside in the locality because of present or planned employment as indicated in the [applicable] Housing Assistance Plan.” Id. § 882.204(b)(1)(iii).}

B. Site Selection for Section 8 Existing Housing

There are no specific site selection provisions in the regulations for the section 8 existing housing program.\footnote{24 C.F.R. § 880.209(a)(13) (1977); id. § 881.209(a)(16).} Persons who obtain certification in this program are entitled to find suitable housing in any area where the certifying public housing authority is authorized to enter into housing assistance payments contracts with landlords.\footnote{Id. § 882.209(a)(2). However, the housing authority must implement an “equal opportunity housing plan” including procedures for obtaining the participation of landlords in areas outside low income and minority concentrations. Id. § 882.204(b)(1)(i)(B). It must also include certification of intent to “take affirmative action to provide opportunities to participate in the program to persons expected to reside in the locality because of present or planned employment as indicated in the [applicable] Housing Assistance Plan.” Id. § 882.204(b)(1)(iii).} This is the so-called “finders-keepers” policy. The PHA cannot favor prospective section 8 residents of existing housing based on the location of the housing selected.\footnote{There is no requirement in the HCDA that an eligible community apply for funds. City of Hartford v. Hills, 408 F. Supp. 889, 902 (D. Conn. 1976). However, failure to apply for funds, along with other factors, could violate state and federal due process and equal protection clauses and federal civil rights statutes. But see Mahaley v. Cuyahoga Metro. Hous. Auth., 500 F.2d 1087 (6th Cir. 1974). See also note 77 supra and accompanying text and Kushner, supra note 51, at 77 n.173 regarding exclusionary zoning.} Thus, even if there is full compliance with the
regulations, there is no assurance that the existing housing program will deconcentrate low income persons, even though theoretically families participating in the program can take their certificates anywhere within the local authority's territory. Any failure of the existing housing program to disperse housing opportunities may be aggravated by the "rent reduction incentive" aspect of the program. Under the "rent reduction incentive," if a family selects a unit where the rent is below the applicable fair market rent or other applicable maximum, the family's share of the rent is reduced. This may tend to encourage families participating in the program to choose housing in low cost housing areas. Another factor working against deconcentration is the desire of recipients of section 8 certificates to remain in minority or low income areas because of racial, ethnic, family or religious ties.

In order to become a certifying agent for the § 8 existing housing program in its jurisdiction, a local housing authority must demonstrate that its proposal is consistent with applicable HAP goals. Id. § 882.204(a)(3). See note 57 supra and accompanying text. If a local housing authority does not qualify as a certifying agent, HUD may assume that function. 42 U.S.C. § 1437f(b)(1) (Supp. V 1975); 24 C.F.R. § 882.121(b) (1977).

A preliminary report by HUD's Office of Policy Development and Research shows that the existing housing program is not causing widespread dispersion of low income families. The findings were based on preliminary studies of 50 local housing authorities around the country. A REPORT TO THE SECRETARY, supra note 2, at 21-23.

See GAO REPORT, supra note 31, at 48-49. See also paragraph 18 of the preamble to the final HUD Regulations, 24 C.F.R. Part 882 (1977).

A REPORT TO THE SECRETARY, supra note 2, at 22; GAO REPORT, supra note 31, at 43. Other factors preventing deconcentration include low fair market rents limiting choice to low income areas; geographical limits due to regulations restricting a participant's shopping range to the geographical jurisdiction of the certifying PHA (24 C.F.R. § 882.103 (1977)); and PHA-imposed residency requirements on applicants seeking eligibility certification. A REPORT TO THE SECRETARY, supra note 2 at 21-22; GAO REPORT, supra note 31, at 42-45. Another factor is extensive use of the § 8 loan management program which ties subsidies to specific projects with HUD-insured mortgages. GAO REPORT, supra note 31, at 50-54.

A comparison to the results of the § 23 leased housing program is instructive since that program involved a situation in which PHA's provided units to low income tenants which were leased from private landlords. 42 U.S.C. § 1421b (1970 and Supp. V 1975). A goal of that program was to foster racial and economic mixes in communities. See H.R. REP. No. 365, 89th Cong., 1st Sess. 9-15, reprinted in [1965] U.S. Code Cong. & AD. NEWS 23-28. Between 1965 and 1974 under the § 23 program, 150,000 units were leased: S. REP. No. 693, 93d Cong., 2d Sess. 43 reprinted in [1974] U.S. Code Cong. & AD. NEWS 4273. It has been reported that § 23 had not been successful in achieving substantial economic and racial integration. Friedman & Krier, A New Lease on Life: Section 23 Housing and the Poor, 116 U. PA. L. REV. 611, 616-26 (1968).
In areas where there are HAP's any failure of the existing housing program to promote increased housing opportunities could undermine that objective of the program and the HCDA.\textsuperscript{91} This is due to the fact that HAP's must use the existing and substantial rehabilitation programs except in unusual circumstances.\textsuperscript{92} This consideration is particularly relevant to central cities which may rely on section 8 substantially rehabilitated housing, which is likely to be located in economically or racially impacted areas, and on section 8 existing housing.\textsuperscript{93}

II. Evictions Under the Section 8 Program

Every tenant who is required to move by his landlord incurs costs and suffers inconvenience. This burden is particularly great on low income tenants of government subsidized housing. It is unlikely that such persons will be able to find decent housing in the private market at affordable rents. Furthermore, the threat of eviction can be used by a landlord, with varying degrees of subtlety, to discourage tenants from resisting objectionable management practices such as inadequate maintenance and unreasonable charges for damages or late rent.\textsuperscript{94} Therefore, protecting tenants from arbitrary evictions is an important issue in the section 8 housing program.

See also, Palmer, Section 23 Housing: Low-Rent Housing in Private Accommodations, 48 J. Urb. L. 255 (1971). Factors which may have limited the program's use include the requirement of local approval, 42 U.S.C. § 1421b(a)(2) (1970 and Supp. V 1975); the restriction on § 23 in areas in which the vacancy rate for comparable units was less than 3% and finally, the provision that § 23 would be funded only if the cost was less than that for construction of conventional public housing units. 42 U.S.C. §§ 1421b(a)(1), (e) (1970 and Supp. V 1975). See Leased Housing Program, supra note 2, at 1158-65.

\textsuperscript{91} 42 U.S.C. §§ 1437f(a), 5301(c)(6) (Supp. V 1975).

\textsuperscript{92} 24 C.F.R. § 570.303(c) (1977). Section 8 new construction may be approved if there is a low rental housing vacancy rate, if a community can demonstrate that available housing assistance resources cannot be used in programs using the existing housing stock, or if the housing assistance needs of one or more household types cannot be met by programs using the existing housing stock.

\textsuperscript{93} Substantially rehabilitated § 8 housing must be located so as to avoid undue concentrations of low income persons. 24 C.F.R. § 881.112(c) (1977). See notes 46-49, 74-76 supra and accompanying text. It may be that a central city HAP which relies almost exclusively on § 8 existing housing may violate the HCDA goal of promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in low income areas. 42 U.S.C. §§ 5301(c)(6), 5304(a)(4)(c) (Supp. V 1975). Depending on the racial intent or effect, such a situation might also violate federal civil rights statutes. See Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970).

\textsuperscript{94} Leased Housing Program, supra note 2, at 1174 n.145.
A. The Eviction Process

The eviction procedure under section 8 varies with the type of housing involved (existing, substantially rehabilitated or newly constructed), the identity of the owner, and the source of financing. The most extensive procedure among the various section 8 programs is the one applicable to existing housing with HUD-insured and HUD-held mortgages and newly constructed or substantially rehabilitated housing which has been financed under section 202 of the National Housing Act of 1959.15

In regard to the regular section 8 existing housing program the HDCA provides that the PHA has "the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy."96 The existing housing regulations state that all evictions must be authorized by the PHA and the owner cannot evict any family unless he complies with local law and the regulations.97 Written notice of the proposed eviction must be given by the landlord.

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15 HUD has issued regulations governing evictions from certain subsidized and HUD owned projects, including certain § 8 housing. 24 C.F.R. § 450.2 (1977). A significant portion of § 8 existing housing under the loan management "Additional Assistance Program" is covered by the eviction regulations. See note 41 supra. The proportion of newly constructed and substantially rehabilitated § 8 housing under § 202, a program for elderly housing, is also large. See note 41 supra. See also 5 Hous. & Dev. Rep. (BNA) 49 (1977). According to these regulations, landlords may not terminate any tenancy except upon a material noncompliance with the lease, a material failure to carry out any tenant obligations under the appropriate state landlord-tenant statute, and upon other good cause. 24 C.F.R. §§ 450.2, .3 (1977). In addition, no termination is valid to the extent that it is based upon a lease or state law allowing termination without good cause. Id. Evictions based upon the "good cause" provision must be preceded by prior notice to the tenant of the conduct constituting the basis for the termination. Id. § 450.4. A prerequisite to any termination is a written statement that must include the date of termination, the specific reasons for the landlord's action, and advice to the tenant of his right to present a defense in any court proceeding. Id. Strict service requirements are also included in the HUD regulation.

The regulations are HUD's response to cases such as Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), and Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973). The regulations are based on the assumption that tenants would receive a due process hearing in state court. 41 Fed. Reg. 43,330-1 (1976).


97 24 C.F.R. § 882.215 (1977). This eviction procedure must be set out in the lease. Id. § 882.210(f)(2). Certain lease terms, such as confessions of judgment, waivers of prior notice to actions for eviction or money, and waivers of rights to jury trial are prohibited. Id. § 882.210(f)(3). A similar prohibition applies to such lease clauses in the new construction program. Id. § 880.219(c).
The notice must contain the grounds and advise the family that it has ten days to respond to an eviction notice. A copy of this notice must be provided to the PHA which, in turn, has twenty days from the date on which the family received the notice to examine the grounds. Unless the PHA determines that the grounds are insufficient under the lease, it must authorize the eviction. Noticeably absent from the regular existing housing regulations (and present in the HUD-insured and HUD-financed existing housing units regulations) is an express "good cause" requirement or a requirement that a tenant's non-compliance with the lease be material. If the landlord has complied with the lease and local laws, the regulations appear to require the PHA to authorize the eviction.

The most permissive eviction procedure is in newly constructed and substantially rehabilitated housing which is not financed under the section 202 program. The HDCA and the HUD regulations simply provide that the owner is responsible for termination of tenancies, including evictions. No PHA authorization is required; whatever eviction procedure exists in the private market will apply. There is one exception when the owner seeks housing assistance payments during the time the unit is vacant as a result of eviction. The regulations allow the owner of a vacant unit to receive eighty percent of the contract rent for a vacancy period not exceeding sixty days. To be eligible for this assistance the owner must certify that he gave the evicted family a written notice of the proposed eviction stating the grounds and that the family was allowed to present objections to the owner within ten days of the notification. In addition, the owner must certify that the eviction did not violate the lease, contract or any applicable law. If the owner does not seek housing assistance payments during a vacancy,
these certification requirements do not apply. If the number of eligible families exceeds the number of available units, it is unlikely that many owners will need to avail themselves of this subsidy. Even if they do, the tenant's right to object to the owner has limited value. Furthermore, the regulations do not provide for regular monitoring of the owner's certification of compliance with the lease and local laws. Certainly an evicted tenant is not in a position to know if his landlord will request continued assistance payments and whether the landlord complies with procedures since there is no requirement that the procedures appear in the lease.

While there are some differences in the eviction procedures for the various section 8 programs, there is a common element that permeates all of them: the relative lack of protection given the tenants who occupy these government-subsidized projects. This lack of protection is most serious in the newly

104 According to the housing assistance payments contracts, HUD reviews owners' requests for assistance payments. HUD Processing Handbook 7420.1, formerly 24 C.F.R. § 880, app. II, § 1.9F (1976).
105 See Leased Housing Program, supra note 2, at 1178 nn.172-73.
106 HUD has recently promulgated regulations regarding lease requirements for conventional public housing projects and grievance procedures for public housing tenants. 24 C.F.R. Part 866 (1977). These regulations supersede HUD circular RHM 7465.8 (Feb. 22, 1971), HUD circular RHM 7465.9 (Feb. 22, 1971), and the Proposed Dwelling Lease Grievance Procedures, 39 Fed. Reg. 39,287 (1974). Subpart A of the regulations outlines various required and prohibited provisions for dwelling leases issued by all PHA's. With regard to termination of leases, the regulations require that the PHA give 14 days notice in nonpayment of rent cases unless there exists a threat to health or safety of other tenants in which case the notice must be given within "a reasonable time commensurate with the exigencies" of the case. 24 C.F.R. § 866.4(1),(2) (1977). In all other cases, 30 days notice is required. Id. The regulations further require that the notice of termination state the reasons for the termination and inform the tenant of his right to make a reply and to request a hearing in accordance with the grievance procedure in subpart B of Part 866. Id. § 866.4(1),(3).

The grievance procedures afford PHA tenants "an opportunity for a hearing if the tenant disputes . . . any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." Id. § 866.50 (emphasis added). To receive a hearing, the tenant must present the grievance to the PHA or to the project office either orally or in writing. This will invoke an informal discussion, analogous to a pretrial conference, after which a summary is prepared and sent to the tenant. The summary must also apprise the tenants of the procedures by which a hearing may be obtained. Id. § 866.54. To receive a hearing the tenant must request it in writing, along with the reasons for the grievance and the relief sought. Id. § 866.55(a). The regulations provide the tenant with a Goldberg v. Kelly (see note 120 infra and accompanying text) administrative hearing. Id. §§ 866.53(c), .56 and .57. The PHA is required to await the decision of the hearing panel before it serves a notice to vacate and proceeds to commence an
constructed and substantially rehabilitated programs without financing under section 202 in which the tenant may object only to the owner himself, rather than to the PHA, as in the existing program. HUD's rationale for this policy is that Congress felt that "the Section 8 program can serve the nation best by vesting in private owners the fullest measure of management responsibilities." A similar justification was given by HUD for the regular existing housing program where the protection to the tenant is much less than that provided tenants of conventional public housing or other subsidized units.

In excluding these families from coverage under the eviction regulations for other subsidized and HUD-owned projects, HUD also rationalized that the regular existing housing program is premised on the "finders-keepers" concept where eligible families are issued a certificate of family participation which enables them to shop for acceptable housing among the eligible owners. If evicted, the family is free to find another dwelling

eviction action in the state or local court. Id. § 866.58.

One important change of policy by HUD in its implementation of 24 C.F.R. Part 866 pertains to the right of the PHA to exclude particular evictions or terminations from its grievance procedure. The proposed regulations allowed the PHA to waive the procedure in nonpayment of rent cases and in cases involving a threat to the health and safety of PHA tenants or employees if the local courts would provide a due process hearing on the merits. 39 Fed. Reg. 39,288 (1974). The new regulations retained the waiver only with regard to the health and safety provision in 24 C.F.R. § 866.51(a) (1977). HUD apparently decided not to allow the waiver in nonpayment cases in any instance.

Preamble to 24 C.F.R. Part 450 (1977). The HCDA states at 42 U.S.C. § 1437f(e)(2) (Supp. V 1975): "The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwelling units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner . . . ." See note 100 supra and accompanying text regarding exceptions which apply when the units are owned by a PHA or a private owner financing under § 202 of the National Housing Act of 1934.


24 C.F.R. Part 450 (1977). This regulation applies to § 8 housing projects that have HUD-insured or HUD-held mortgages. Id. § 450.2(e). Fifty to sixty percent of § 8 newly constructed and substantially rehabilitated starts have been financed with FHA insurance. 5 Hous. & Dev. Rep. (BNA) 49 (1977). For a description of the procedures under 24 C.F.R. Part 450, see note 95 supra. The regulations are based in part on cases such as Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), and Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973). See also Note, Procedural Due Process in Government-Subsidized Housing, 86 Harv. L. Rev. 880, 903-10 (1973) [hereinafter cited as Due Process in Subsidized Housing].
unit and continue to receive the benefit of the certificate. To the extent that the number of available existing units is less than the number of families looking for housing, reliance upon the "finders-keepers" concept is misplaced.

Unlike the newly constructed and substantially rehabilitated programs, however, the regular existing housing program does afford the tenant the opportunity to object to the eviction with the PHA. But without a "good cause" requirement or similar prerequisite to eviction, a tenant's ability to contest capricious actions by landlords is limited. In addition, except in the case of PHA-owned newly constructed or substantially rehabilitated units, the section 8 programs do not provide even a semblance of a "prior oral hearing" to tenants facing eviction. HUD expressly excluded the section 8 program from coverage under the model lease and grievance procedure. Thus, the objecting tenant has no express statutory right to examine pertinent records and documents relating to the tenancy; he has no right to even an informal hearing at which he can rebut evidence against him, cross-examine the owner, and examine other witnesses; and he has no right to an eviction decision based on stated reasons and findings of fact. Unlike the tenant in conventional public housing, the section 8 tenant will not be able to receive a hearing until and unless he decides to avail himself of whatever judicial proceedings may exist. Consequently, the section 8 programs appear to be susceptible to arbitrary eviction by landlords.

111 See A REPORT TO THE SECRETARY, supra note 2, at 24-26.
112 24 C.F.R. § 882.216 (1977) (existing housing); id. § 880.226 (new construction). See note 100 supra for the sole exception.
113 See notes 98 and 99 supra and accompanying text regarding the eviction process from § 8 existing housing.
114 Good cause need not be shown for failure to renew a tenancy after the expiration of a lease term on the private market. See, e.g., CAL. CIV. PROC. CODE § 1161.1 (West 1976); D.C. CODE ENCYCL. § 45-901 (West 1968); FLA. STAT. ANN. § 83.58 (West Supp. 1977); IOWA CODE ANN. §§ 562.6, 648.1(2) (West 1950); MICH. COMP. LAWS ANN. § 600.5714(1)(b)(ii) (Supp. 1977-78); MISS. CODE ANN. § 89-7-23 (1972); N.Y. REAL PROP. LAW § 232-c (McKinney 1968); N.Y. REAL PROP. ACTS. § 711.1 (McKinney 1968); OHIO REV. CODE ANN. § 5321.04(A)(4) (Page Supp. 1976).
B.  Application of Due Process Requirements to the Section 8 Eviction Procedure

The important question concerning the section 8 eviction regulations is whether they violate procedural due process under the fifth and fourteenth amendments to the United States Constitution. As early as 1955, a lower federal court recognized that the government acting as a landlord "must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law." It took almost fifteen more years for a federal court to hold that public housing tenants must be given due process safeguards before their eviction by a housing authority. Further light was shed in the area of procedural due process in the following year when the Supreme Court decided Goldberg v. Kelly, a case involving suspension of public assistance benefits. In Goldberg, the Court held that public assistance could not be terminated without a prior due process hearing. The Court recognized that welfare benefits were a "matter of statutory entitlement" the termination of which amounts to state action that "adjudicates important rights." The Court defined the requisite safeguards needed to satisfy due process by balancing the governmental interest in summary adjudication with the recipients' interest in avoiding "grievous loss." After applying this balancing test, the Court held that the recipients' interest outweighed any governmental need to minimize the administrative burden of pretermination hearings. The Court held that due process required notice of proposed action as well as the reasons for it; an administrative hearing at which the recipient, with counsel, could argue his case and examine and cross-examine witnesses before an impartial decisionmaker; and a decision based solely on the facts presented at the hearing which states both the findings of fact and reasons underlying them.

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118 397 U.S. at 262.
119 Id. at 262-63. Citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961), the Court recognized the necessity of identifying "the precise nature of the governmental function involved as well as of the private interest." Id. at 263.
120 Id. at 266-71.
Shortly after the *Goldberg* decision, two circuit courts applied *Goldberg* to evictions in conventional public housing.\(^{121}\) Shortly thereafter, federal courts included privately-owned subsidized projects within the *Goldberg* rule.\(^{122}\) The question is whether the section 8 program, with its emphasis and dependence on purely private ownership, is distinguishable from these statutory programs. To determine the extent of the procedural safeguards due section 8 tenants, a careful examination of the program is required in light of the constitutional standards set down by the Court in *Goldberg* and later cases.

In the past decade the Supreme Court has established a three-part test to analyze claims for procedural due process. First, there must be either state or federal government action sufficient to invoke the principles of due process.\(^{123}\) Second, the claimant must show that the interest sought to be protected is a property or liberty interest within the scope of the due process clause.\(^{124}\) Third, the private interest sought to be protected must be balanced against the competing government interest to determine what procedures are required to satisfy due process.\(^{125}\) In the following sections each of these three elements will be analyzed and applied to the section 8 eviction process.


\(^{124}\) Perry v. Sindermann, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972).

\(^{125}\) Mathews v. Eldridge, 424 U.S. 319 (1976); Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974). In *Eldridge*, the Court held that an evidentiary hearing is not required prior to the termination of social security disability payments. The Court stated that three factors must be considered in resolving the constitutional (due process) sufficiency of the Social Security Administration procedures prior to the initial termination of benefits:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The key factor in *Eldridge* was the existence of "an effective process for asserting [the recipients'] claim prior to any administrative action . . . [and the]
1. **Government Action in Section 8**

Due process under the fifth or fourteenth amendments does not apply to purely private behavior; there must be federal or state governmental action. The Supreme Court has never established an absolute test for determining whether a private person’s conduct has been so intertwined with the government that it constitutes “government action.” Rather, the Court has stated that “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.” In its most recent decision involving the test of state action, *Jackson v. Metropolitan Edison Co.*, the Court again emphasized that “the question whether particular conduct is ‘private,’ on the one hand, or ‘state action’ on the other, frequently admits of no easy answer.” Although the Supreme Court never passed on the question, there is little dispute that the due process clause does apply to the eviction process in conventional public housing. Likewise many lower federal courts have found a sufficient relationship between the government and the private landlords of federally subsidized projects to invoke the requirements of procedural due process. In finding government ac-

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right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of [the] claim becomes final.” *Id.* at 349. *See also* Arnett v. Kennedy, 416 U.S. 134, 166-68 (1974); Morrissey v. Brewer, 409 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970); and notes 90-91 supra and accompanying text.


129 *Id.* at 349-50.


tion in evictions from subsidized housing, the courts have relied upon the following factors: local approval; use of judicial process; receipt of federal assistance to subsidize the rental and mortgage payments; supervision of the project by the PHA or HUD; and the regulatory agreement between HUD and the landlord. Most of these cases, however, were decided prior to Jackson.

In Jackson the Court held that where a heavily regulated utility company with a territorial monopoly in supplying electricity terminates a customer’s service for non-payment, the termination does not constitute state action. The case presented many facets of the state action doctrine, and the majority in Jackson considered these various aspects seriatim. First, the Court found that it was doubtful that the state ever granted defendant a monopoly, and in any event there was an "insufficient relationship between the challenged actions of the defendant and their monopoly status." 

Second, the Court determined that the provision of electricity was not a "public function" because it was not among "the powers traditionally exclusively reserved to the State." The Court next considered plaintiff's argument that defendant specifically authorized and approved the termination practice. It found that the termination procedure had appeared in many previously filed tariffs and had never been the "subject of a hearing or other scrutiny by the Commission." Accordingly the Court determined that the defendant never "put its own weight on the side of the proposed practice by ordering it" and thus this practice was not "transmuted" into state action. Finally, the Court did not find the "symbiotic relationship" that was present in Burton v. Wilmington Parking Authority. The Court distinguished

Druker, 317 F. Supp. 1122 (D. Mass. 1970); and Green v. Cooperstone, 346 A.2d 686 (Md. 1975). Prevo involved the eviction procedures of a § 236 landlord. Relying on the prior decisions in Joy, McQueen, and Lopez, the court held that a privately-owned apartment complex was subject to the standards of due process because it received substantial federal benefits and was subjected to comprehensive HUD regulations. The significance of Prevo is that it was decided after Jackson. See also Due Process in Subsidized Housing, supra note 109.

133 Id.
131 Id. at 354-55, 357.
132 Id. at 357.
Burton since Metropolitan Edison was a privately-owned corporation, it did not lease its facilities from the state, and it alone was responsible for providing power to its customers. Even though defendant was subject to extensive regulation by the state, the Court held that the state was not "a joint venturer or partner in the challenged activity."\(^{137}\)

To determine whether the proposed eviction of a section 8 tenant is government action, the section 8 program must be analyzed in light of the Jackson and Burton cases and other Supreme Court decisions involving the elusive concept of state or government action.

The HCDA clearly states that the PHA or the equivalent has the sole right to terminate the tenancy in the regular existing housing program.\(^{138}\) The HCDA also recognizes that the PHA is a governmental entity\(^{139}\) and the courts have consistently held that PHA activities are subject to the standards of the fourteenth amendment.\(^{140}\) Thus, it seems clear that even under Jackson, the proposed eviction of a tenant in the section 8 existing housing program constitutes "state action."\(^{141}\)

Unlike the existing housing program, eviction from newly constructed and substantially rehabilitated housing is generally not subject to PHA approval. Section 8(e)(2) of the HCDA gives the owner authority to terminate tenancies in these programs.\(^{142}\) Assuming that the owner is a private entity without PHA sponsorship\(^{143}\) and that he has not contracted with a PHA to provide management services,\(^{144}\) it will be difficult to show that proposed evictions constitute governmental action after Jackson. However, in spite of HUD’s obvious intent to vest as much control and authority as possible in the private owner seeking to evict a tenant, there are several aspects of the newly


\(^{141}\) See Leased Housing Program, supra note 2, at 1183.


\(^{143}\) The regulations also contemplate ownership by a PHA and by a private owner with PHA sponsorship. 24 C.F.R. § 880.102 (1977).

\(^{144}\) Id. § 880.119(b).
constructed and substantially rehabilitated programs that could support a finding of federal governmental action.\textsuperscript{145}

The federal government is very involved in the section 8 newly constructed and substantially rehabilitated programs. Eligibility for federal subsidies is the main incentive for construction or rehabilitation of assisted units.\textsuperscript{146} Through substantial federal subsidies and pervasive HUD regulations, it appears that even under \textit{Jackson} there may be a "symbiotic relationship" between the private owner and HUD. Notwithstanding the extensive regulation and subsidies, HUD has adopted a "hands off" position on evictions from newly constructed and substantially rehabilitated housing. In effect HUD has stated that evictions are not subject to HUD control.\textsuperscript{147} It is arguable that by expressly relinquishing the eviction decision to private owners, HUD has "insinuated itself—into a position of interdependence with the eviction process of the Section 8 landlord."\textsuperscript{148}

\textsuperscript{145} A similar conclusion is reached in \textit{Leased Housing Program, supra} note 2, at 1185. It is unlikely that there would be a finding of state action, unless perhaps the § 8 housing is part of an urban renewal project. \textit{See Leased Housing Program, supra} note 2, at 1184-85 nn.202 & 204. In such a situation a "symbiotic relationship" between state government and the private owner may exist.

\textsuperscript{146} The regulations provide several financial benefits to private owners. For instance, the owner may be entitled to financing from a conventional lender utilizing HUD-PHA mortgage insurance concurrently processed with his § 8 application. Financing may be available from state housing finance agencies, the § 202 elderly program, the Farmer's Home Administration or from PHA's themselves, acting as direct lenders. 24 C.F.R. § 880.115(a) (1977). In addition, the owner is awarded a rent subsidy in the form of housing assistance payments pursuant to a housing assistance payments contract. Under this arrangement the owner receives from HUD the difference between the tenant's rent (15-25% of the tenant's annual income) and the contract rent which is based on fair rental value set by HUD. \textit{See} notes 11, 32-37 \textit{supra} and accompanying text. The HUD portion (housing assistance payments) is paid to the owner.

Receipt of these two benefits, financing and housing assistance payments, is conditioned upon the owner's compliance with a myriad of regulations imposed by HUD. These regulations give HUD extensive control of the location, 24 C.F.R. § 880.212 (1977); maintenance, \textit{id.} § 880.221; and management of the projects, \textit{id.} §§ 880.212, .223. The regulations dictate some lease provisions and outlaw others. \textit{id.} § 880.219. HUD is expected to monitor the assisted units to insure owner compliance with the regulations. \textit{Id.} § 880.228. \textit{But see} Weigand v. Afton View Apts., 473 F.2d 545 (8th Cir. 1973) (receipt of financial benefits alone is not a basis for finding government action).

\textsuperscript{147} 24 C.F.R. § 880.220 (1977).

\textsuperscript{148} Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). In \textit{Jackson} v. Metropolitan Edison Co., 419 U.S. 345 (1974) and \textit{Moose Lodge No. 107} v. Irvis, 407 U.S. 163 (1972), the Court refused to find a "symbiotic relationship" despite detailed and extensive state regulation due to a lack of connection between the state and the
2. Property Interest: Is There Tenant Entitlement to Continued Occupancy of the Section 8 Unit?

As stated earlier, procedural due process is required only challenged action. 419 U.S. at 358. The crucial question is whether HUD fosters or encourages eviction without due process safeguards. The historical development of the HUD § 8 regulations demonstrates that HUD initially provided a "good cause" requirement for eviction from all § 8 housing, but later decided to eliminate this requirement for most newly constructed, substantially rehabilitated and regular existing housing programs. Compare 41 Fed. Reg. 16,924 (1976) with 41 Fed. Reg. 4,330 (1976). Similarly, HUD specifically excluded the § 8 program from the lease grievance procedure regulations. 24 C.F.R. § 880.226 (1977). HUD's grant of wide discretion to the private landlord in the eviction process is readily distinguishable from the situation in Jackson, where the defendant "never put its weight on the side of the proposed [termination] practice by ordering it." 419 U.S. at 357.

With respect to the public function theory, the Court in Jackson recognized the proposition that state action is present because private persons exercised powers traditionally reserved to the state. Id. at 352. Relying upon state cases, the Court found that supplying utility services was neither a city nor a state function. The Court stated that the conduct of an enterprise is not state action merely because it is affected with or is essential to the public interest. Id. at 352-53. The power delegated to the private entity must be one "traditionally associated with sovereignty, such as eminent domain." Id. Public housing historically has been a function of federal and state government. 42 U.S.C. § 1401 (1970). With the advent of the § 221(d)(3), § 236, § 23 and § 8 programs (see notes 2, 4 supra) private persons can be said to be performing functions traditionally reserved to government. Under § 8, private landlords are being induced into the public housing area subject to the pervasive regulatory schemes of the various programs. Thus, the § 8 owner is providing a service (public housing) that from its inception was the sole responsibility of federal, state and local governments. Consequently, it is arguable that the action of the § 8 landlord constitutes government action under the "public function" state action doctrine. This argument, however, is a tenuous one particularly in light of the Supreme Court's restriction of Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). However, this does not prevent the public function aspects of the § 8 program from being considered along with the other circumstances in determining the presence of governmental action. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

when liberty or property interests are involved. In *Board of Regents v. Roth*\(^{48}\) the Court stated:

Certain attributes of "property" interests protected by procedural due process emerge from [the Court's] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that support claims or entitlement to those benefits.\(^{5}\)

In *Roth*, the plaintiff, a nontenured professor, was terminated without a hearing at the end of his first year with a state university. The Court held that Roth possessed no legitimate claim to reemployment and thus had no due process right to a hearing. A companion case, *Perry v. Sinderman*,\(^{11}\) involved a nontenured professor who had been rehired for ten consecutive years before being terminated by the college without a hearing. In asserting a due process right to a hearing, the petitioner contended that his interest in continued employment, "though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration."\(^{12}\) The Court recognized that the absence of an explicit contractual provision may not always foreclose the possibility that a teacher has a "‘property’ interest in reemployment."\(^{13}\) It stated that certain "rules and understandings" may comprise an unwritten "common law" in the university that would be tantamount to a written tenure con-

\(^{48}\) 408 U.S. 564 (1972).
\(^{5}\) Id. at 577.
\(^{11}\) 408 U.S. 593 (1972).
\(^{12}\) Id. at 599-60.
\(^{13}\) Id. at 601.
tract. Citing Roth, the Court reiterated that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

After Goldberg v. Kelly the courts have consistently held that tenants of conventional public housing have a property interest in continued occupancy. In regard to privately-owned, federally-subsidized housing, in Joy v. Daniels the Fourth Circuit held that tenants of such quasi public housing have a property interest in continued occupancy after the expiration of a rental term. In applying the principles enunciated in Goldberg, Roth and Sindermann, the court in Joy looked to the "applicable statutes, governmental regulations and custom and understandings of the public landlords in the operation of their apartments." The court held that Congress intended for that particular housing program (section 221(d) (3)) to provide a "decent home and suitable living environ-
ment for every American family” and to provide “an atmosphere of stability, security, neighborliness and social justice.” In addition, the court referred to HUD regulations barring discrimination and arbitrary treatment of tenants in section 221(d)(3) units. Finally, the court stated that the “tenant’s expectation of some degree of permanency, seemingly shared by the Congress, if not the landlord, is bolstered by custom. Just as there may be a ‘common law’ of tenure at a college or university, there may be a common law of tenancy in public housing projects.” Thus, the court found that tenancies in subsidized housing programs cannot be terminated without good cause as a matter of federal law and that this reasonable expectation to continued entitlement is protected by the due process clause.

A strong argument can be made that continued occupancy of section 8 assisted units is also a property right under the due process clause. Property rights can be altered by legislation, implied contracts, rules or mutually explicit understandings, and even common law or custom. The HCDA, which created the section 8 program, states in part:

It is the policy of the United States to promote the general welfare of the nation [by assisting] several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . .

Section 8(a) of the HCDA further states that payments will be made “for the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing . . . .” These statutory goals are almost

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162 Id. at 1241.
164 See text accompanying note 150 supra for a discussion of the source of property interests.
165 Id.
167 Id. at 602.
169 Id. § 1437f(a).
identical to the goals of the section 221(d)(3) program that was under consideration by the court in *Joy*, and similar rights of entitlement can be inferred from the statutes enacting the leased housing program. By fair implication it appears that low income tenants, once entitled to assistance under the HDCA, cannot lose entitlement without good cause. Section 8 tenants must meet certain statutory conditions to be eligible for the program.\(^{170}\) Once they are deemed eligible and accepted in a federally assisted unit, entitlement to continued occupancy is legally indistinguishable from tenants of conventional or subsidized public housing projects.\(^{171}\) Under this theory, the "common law" of public housing, regardless of the program, recognizes that the tenant may normally expect continued occupancy. Notwithstanding HUD's failure to require good cause for eviction from most section 8 housing\(^ {172}\) and to exclude the section 8 program from lease and grievance procedure regulations,\(^ {173}\) section 8 tenants should be entitled to the same benefit

\(^{170}\) See text accompanying notes 22, 28 *supra* for income eligibility requirements.

\(^{171}\) HUD requires a minimum one-year lease term. 24 C.F.R. § 880.219(a) (1977) (newly constructed); *id.* § 882.107(b) (existing housing). This raises the question of whether HUD may justifiably expect continued tenancy after the term. *Sindermann*, however, states that formal elements should not be controlling. 480 U.S. at 601-03. Instead, one should look to the normal practice of the programs. *See Due Process in Subsidized Housing, supra* note 109, at 904-05.

With respect to congressional intent, it appears that if a tenant's income increases to the point that the rent subsidy ceases, the tenant can continue to live in the unit and pay the full market rent. 42 U.S.C. § 1437f(c)(3), (4) (Supp. V 1975). "This suggests the Congress was contemplating more occupancy entitlement than limited leasehold terms." *Joy* v. *Daniels*, 479 F.2d 1236, 1241 (4th Cir. 1973) (dealing with a similar feature of § 221(d)(3) housing.)

\(^{172}\) On September 30, 1976, HUD excluded § 8 new construction, substantial rehabilitation (unless financed under § 202 of the National Housing Act of 1959) and regular existing housing from regulations requiring "good cause" before a landlord of privately-owned subsidized housing may evict a tenant. 24 C.F.R. Part 450 (1977); *see note 55 supra*. With regard to exclusion of new construction and substantial rehabilitation housing, HUD's rationale was that the § 8 program "can serve the nation best by vesting in private owners the fullest measure of management responsibilities." In excluding regular existing housing HUD stated that an "evicted family is free to find another eligible dwelling and continue to receive the benefit of their 'Certification to Family Participation'." 24 C.F.R. Part 450 (1977). Despite HUD's stated intent to exclude most § 8 tenants from the "good cause" requirements, it did condition their exclusion on "the absence of a definitive court decision" to the contrary. *Id.* Certainly HUD's action is not definitive in determining whether there is a statutory entitlement to continued occupancy.

\(^{173}\) 24 C.F.R. § 886.1-.59 (1977); *id.* § 880.226 (newly constructed); *id.* § 882.216 (existing housing).
of continued occupancy as their counterparts in other public housing. If not, the purpose of the section 8 program will not be realized and it will be less meaningful for its intended beneficiaries.\footnote{174}

There are several weaknesses with the above argument. First, a landlord can elect to withdraw from the section 8 program by failing to renew the housing assistance payments contract, with the result that formerly subsidized tenants will be unable to pay the contract rent.\footnote{175} Second, the section 8 regulations, with the exception of certain types of housing, permit termination of the lease upon thirty days written notice by either party with no mention of good cause.\footnote{176} If these regulations are valid, section 8 tenants' due process property rights are severely restricted.\footnote{177} Any judicial interpretation of these regulations which allows this kind of arbitrary termination of section 8 tenancies would unduly restrict application of due process principles as defined by the Court in recent years.\footnote{178}

\footnote{174} A similar approach was taken in Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973). In holding that tenants of subsidized housing have a property right to continued occupancy, the court found that the goal of providing "a decent home and suitable living environment" included providing an "atmosphere of stability, security, neighborliness and social justice." \textit{Id.} at 1240, quoting McQueen v. Druker, 317 F. Supp. 1122, 1130 (D. Mass. 1970). In McQueen, the court found that arbitrary evictions would create a "sense of injustice" and an "atmosphere of hostility" which would encourage "anomie and alienation." 317 F. Supp. at 1130. Both courts concluded that the tenant's interest in continued occupancy could be implied from the purpose of the housing program. The same rationale applies to the \$ 8 program. A similar conclusion is made in \textit{Leased Housing Program}, supra note 2, at 1187-89.

\footnote{175} 24 C.F.R. \$ 880.109 (1977) (newly constructed); \textit{id.} \$ 882.107 (existing housing). It has been stated that it might be possible legally to require a landlord to renew the assistance payments contracts if bad faith and government action is attributable to the landlord (wholly apart from the lapsed housing assistance payment contracts). \textit{Leased Housing Program}, supra note 2, at 1189-90.

\footnote{176} 24 C.F.R. \$ 880.219(a) (1977) (newly constructed); \textit{id.} \$ 882.107(b) (existing housing). If the \$ 8 units are HUD-owned or financed by a HUD-insured mortgager, "good cause" must be shown by the owner. \textit{Id.} Part 450. See notes 95-99 supra, and accompanying text. Strangely, where 24 C.F.R. Part 450 applies, even if there is a 30-day notice clause in the lease, the landlord must show "good cause" to evict.\footnote{177}


It should be noted with respect to the existing housing program that 24 C.F.R. \$ 882.215 (1977), requiring PHA approval of an owner's decision to evict, may conflict
3. Procedural Requirements: Balancing the Interests of the Parties

Once the existence of government action and the right to continued occupancy are demonstrated, any proposed action to evict a section 8 tenant must be accompanied by some procedural safeguards. In the past decade the Supreme Court has had many occasions to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of a property interest. In only one case, Goldberg v. Kelly, has the Court required a judicial-type hearing. Decisions of the Court make it clear that due process is not a "technical conception with a fixed content unrelated to time, place, and circumstances." Instead, due process is "flexible and calls for such

with 24 C.F.R. § 882.107 (1977) to the extent that the latter permits a 30-day notice of termination without cause. Such PHA approval is required by the statute. 42 U.S.C. § 1437f(d)(1)(B) (Supp. V 1975). With respect to newly constructed or substantially rehabilitated § 8 housing, 42 U.S.C. § 1437f(e)(2) (Supp. V 1975) states that the contract between HUD and the owner shall give the responsibility of terminating tenancies to the owner. The general policy of § 8, set out in notes 168-74 supra and accompanying text, may create an entitlement to continued occupancy protected by due process in spite of any clause permitting termination on 30 days notice. This is the result with § 8 housing covered by HUD's regulations on evictions from certain subsidized housing. See note 176 supra. But see note 172 supra concerning certificates of family participation. Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973), discussed in notes 158-63 supra and accompanying text, and Caulder v. Durham Hous. Auth., 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971), involved leases permitting termination on 30 days notice prior to the end of the term in federally subsidized and conventional public housing, respectively. Nevertheless, the courts held that due process protected those tenants from the landlord's arbitrary exercise of the termination notice. It is unclear in both cases whether HUD had approved the notice of termination clause.


Id. at 266-71. The Court held that the hearing must contain the following elements: (1) timely notice of, and reasons for, proposed action which affects the recipient; (2) the right of the recipient to make an oral presentation; (3) the right to cross-examine witnesses before an impartial decisionmaker; (4) the right to be represented by counsel; and (5) the right to a decision based solely upon the evidence presented at the hearing and which states the facts and reasoning underlying the decision. Id. HUD has provided an almost identical due process hearing to conventional public housing tenants who seek to challenge their eviction or to raise other grievances. 24 C.F.R. § 866.53(c), .56, .57 (1977). See note 106 supra for a discussion of the regulations.

Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895
procedural protections as the particular situation demands. In applying the principles of due process to a particular administrative scheme, there must be an analysis of the private and government interests that are affected. As the Court recently reiterated in Mathews v. Eldridge:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The interest of the assisted tenant in preventing arbitrary evictions is readily apparent: The loss of assisted housing is likely to impose financial hardship on the evicted tenant. In addition to financial strain, the evicted tenant will suffer psychological deprivation relating to a change in neighbors and familiar surroundings. If a tenant is evicted for being undesirable, it is likely that he will be unable to qualify for other public housing or even private housing if the stigma of being


186 Id. at 335. In Eldridge, the Court held that due process did not require an evidentiary hearing prior to the termination of Social Security disability benefits. The Court distinguished the Social Security procedure from the welfare termination procedure struck down in Goldberg. Id. at 544-46. See note 194 infra regarding possible procedures for hearings.

187 Unlike the Social Security benefits terminated in Eldridge, eligibility for § 8 housing is based on need.

undesirable follows him. An injury to reputation has been held sufficient to require an adversary hearing.\textsuperscript{189} Arbitrary evictions subvert the recognized goals of the public housing program to enable all citizens to obtain and continue occupancy in decent, safe, sanitary dwellings that promote the development of socially acceptable lifestyles.\textsuperscript{190}

The second element in the three part due process standard of \textit{Eldridge} is the risk of an "erroneous deprivation" of the tenant's interest. Under the existing housing program, the PHA must approve the eviction. Although the tenant must be given notice of the eviction and the reasons therefore, there is no express provision for an administrative hearing either before or after the eviction. No informal grievance procedure exists that enables the tenant or his counsel to present his side of the case.\textsuperscript{191} Also, there are not requirements of "good cause" or materiality regarding the tenant's noncompliance with the lease.\textsuperscript{192} In the newly constructed and substantially rehabilitated programs the risk of "erroneous deprivation" is even greater. Here evictions are solely the function of the owner; no PHA authorization is required unless the owner seeks assistance payments while the unit is unrented, in which case the owner must certify to the PHA that the eviction did not violate the lease, contract, or any applicable law. Again, no hearing procedure is provided and there exists no meaningful check on arbitrary evictions by the owner.\textsuperscript{193}

\textsuperscript{189} See notes 169-174 \textit{supra} and accompanying text for additional discussion of these goals.
\textsuperscript{191} Cf. 24 C.F.R. § 866.54 (1977) (conventional program prehearing procedure).
\textsuperscript{191} See notes 96-98 \textit{supra} and accompanying text for a discussion of the eviction notice.
\textsuperscript{192} See notes 100-114 \textit{supra} and accompanying text for eviction procedures in the newly constructed and substantially rehabilitated programs.
\textsuperscript{194} See Mathews v. Eldridge, 424 U.S. 319 (1976), where the Court recognized that an important consideration was the fairness and reliability of the pretermination procedures and the existence or extent of additional procedural safeguards. \textit{Id. at} 343. The Court found that the determination of disability, or lack thereof, is "a more sharply focused and easily documented decision than the typical determination of welfare entitlement [where] . . . a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process." \textit{Id. at} 343-44. The Court found that the risk of error is not as great in the disability assessment where written medical reports are the basis for the termination. \textit{Id. at} 343-45. The Court further distinguished the welfare termination procedure in its
In all three programs, existing, newly constructed, and substantially rehabilitated housing, there is a considerable risk of erroneous deprivation to the tenant, assuming there is a property interest. Therefore, additional safeguards should be afforded the section 8 tenant. The extent of these additional safeguards cannot be determined without balancing the interests of the tenant, owner, and government and analyzing the fiscal and administrative burdens accompanying these safeguards.

As stated earlier, the existing housing regulations require PHA approval of all evictions. The PHA is under an obligation to provide judicial-type hearings to tenants being evicted from all properties (including section 8 projects) owned by or leased to PHA’s and leased or subleased by PHA’s to tenants. The PHA’s are experienced in conducting these hearings and could provide the same type of hearing to other section 8 tenants with little difficulty or hardship. The private owner would bear the burden of these additional hearings and would be required to attend them to defend his actions. If these hearings could be held at the apartment project, this burden might be reduced. Nevertheless, a financial and administrative burden on the owner is obviously present, and it may be that many landlords would not participate in the program if they had to defend all of their evictions in an administrative hearing. 

failure to "provide an effective means for the recipient to communicate his case to the decisionmaker." 195 See note 100 supra. See also Caulder v. Durham Hous. Auth., 433 F.2d 998, 1004 n.3 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971) and Escalera v. New York City Hous. Auth., 425 F.2d 853, 861 (2d Cir.), cert. denied, 400 U.S. 853 (1970) which indicate that a full evidentiary hearing could be dispensed with in compelling circumstances.

194 See Leased Housing Program, supra, note 2, at 1192 n.236. This assumes that the apartment project has the facilities for such a hearing and that it is in a convenient location for the owner and decisionmaker.

195 It has been suggested that such a hearing could work to the advantage of a landlord. In a situation where the tenant loses the administrative hearing, it is said the tenant may vacate voluntarily and spare the landlord the necessity of court action. Leased Housing Program, supra note 2, at 1194-95. It is unlikely that many landlords will view the process in that way, but rather will expect the worst from their tenants.
A less burdensome alternative would be to require the owner to conduct a factfinding hearing prior to the eviction. Here the owner would wear the hats of judge, jury, and prosecutor and it is unlikely that the tenant would be able to obtain an impartial hearing and decision. Owners may even resist the burden of conducting mini-hearings in all proposed evictions. They would be more likely to allow the normal judicial process to handle the matter so as to avoid "litigating" the case twice.

In fact, it is this alternative, judicial hearings, that was chosen in several cases dealing with eviction from privately owned subsidized housing. These federal courts and HUD recognize that a tenant's right to continued occupancy in the absence of good cause for termination is based on federal law and is a defense in state judicial proceedings. The key ingredient to this alternative is the availability of a constitutionally sufficient hearing in the state courts. Another problem is the inability of certain low income tenants to obtain legal services.

In light of Eldridge, it is highly unlikely that lower courts would be more likely to allow the normal judicial process to handle the matter so as to avoid "litigating" the case twice.

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201 Many state tribunals, unfamiliar with the "good cause" requirement, will be prone to adhere to the traditional summary eviction process. See Due Process in Subsidized Housing, supra note 109, at 909.

202 An additional problem is noted in Leased Housing Program, supra note 2, at 1194 n.242:

Provision of an evidentiary hearing only within a state's eviction proceeding may put tenants to an unenviable choice when a dispute arises concerning the payment of late rental fees or fines for building damage. If the tenant chooses not to pay, he risks possible eviction. In conventional public housing cases, the courts have held that, if tenants are to be evicted for nonpayment of additional charges, due process requires that they be permitted to challenge the assessment of fees through an administrative procedure. Escalera v. New York City Housing Auth., 382 F. Supp. 992 (S.D.N.Y. 1974).
will interpret the due process clause to require an administrative hearing for evictions in the section 8 program. The administrative and fiscal burden on the PHA and the owner probably will be deemed to outweigh the tenants' interest. Most courts will probably relegate tenants to the eviction process in state courts. To the extent that state court proceedings permit parties to present evidence and expose falsehoods or misunderstandings through cross examination, such hearings are better suited to a just resolution of disputes than a "hearing" conducted by the landlord. Courts have adopted this approach in reviewing the due process requirements in eviction proceedings from subsidized housing. Even if this alternative is adopted, it is still essential that the section 8 owner be subject to a good cause requirement before evicting a tenant, and that the state courts adopt procedures that recognize this standard. The relative burden on the owner would be minimal; he must go to court in any event. The landlord would be spared the burden of two hearings and he would be assured of being able to evict any tenant who was violating a material lease provision or state law.

III. Admissions Under the Section 8 Program

As described in Part I, under section 8 only a small fraction of the units must be allocated to the poorest of the poor. Furthermore, there is a substantial likelihood of arbitrary action by landlords in the admission process.

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203 See cases cited in note 199 supra.

204 The summary process in evictions is not in itself unconstitutional. Lindsey v. Normet, 405 U.S. 56 (1972). Current HUD regulations applicable to certain subsidized housing programs other than those of § 8 assume that state courts will adopt adequate procedures. See Preamble to 24 C.F.R. Part 450 at 41 Fed. Reg. 43330 (1976). See also note 109 supra. No such regulation applies to the regular existing housing or newly constructed and substantially rehabilitated programs which are not financed under § 202 of the National Housing Act of 1959. See notes 95-104 supra and accompanying text for discussion of the eviction procedure.

A potential problem for the § 8 landlord is a situation in which other tenants refuse to testify as witnesses about the facts supporting "good cause" because of fear of reprisal. It has been suggested that, under certain circumstances, anonymous information be accepted in any administrative hearings relating to evictions of § 8 tenants. Leased Housing Program, supra note 2, at 1193-94. This could give rise to constitutional difficulties.

205 See text accompanying notes 22-31 supra.
A. The Admission Process

As in the area of evictions, the regulations regarding admission to newly constructed or substantially rehabilitated units differ from the existing housing regulations. In existing housing the PHA makes the initial eligibility determinations for prospective tenants. Eligible tenants are issued certificates of family participation (CFP) by the PHA. The CFP is valid for sixty days unless the family submits a request for lease approval within that time. However, the regulations allow the PHA to grant extensions of the CFP up to sixty days if the PHA believes that there is a reasonable possibility of finding a suitable unit. Once in receipt of a CFP, the holder must locate an eligible owner who is willing to lease the unit to them. Under this so-called "finders-keepers" policy the burden of locating available housing is on the eligible family. If the family requests, the PHA is required to assist in this search. Once the CFP is issued, the owner controls the tenant selection process and makes the final decision on who becomes his tenant.

Similarly, owners of newly constructed or substantially rehabilitated units control the selection of tenants. The owner is required to follow the statutory criteria in determining eligibility. A standardized application is required as well. The application may be refused by the owner if he has no vacancies and his waiting list is such that there would be an "unreasonable" length of time before the family could be admitted. If there are vacancies and the owner determines that

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207 24 C.F.R. § 882.209(b) (1977); id. Part 882, app. III.
208 Id. § 882.209(d)(1).
209 Id. § 882.209(d)(2). This regulation further provides that upon expiration of a certificate of family participation, the family can apply for another certificate.
210 Id. § 882.103(a). The PHA is required to promote a "greater choice of housing opportunities" by working with owners, families, and other PHA's. Id. § 882.103(c).
211 Id. § 882.103(a).
214 Id. See notes 22-31 supra and accompanying text for a description of eligibility requirements.
216 Id. The regulations fail to define "unreasonable" and do not provide for an
the applicant is eligible on the basis of income and family composition and the applicant is “otherwise acceptable,” the owner and family must enter into a lease.\textsuperscript{\textsmallsuperscript{217}} If no vacancies exist the owner must place the applicant on a waiting list.\textsuperscript{\textsmallsuperscript{218}} The regulations do not define the term “otherwise acceptable”; thus, applicants have no idea what to expect when they apply for assisted housing since there are no public and uniform selection criteria. If an applicant satisfies the income and family composition requirements and is rejected, no procedure exists whereby he is notified of the reason for the rejection and provided an opportunity to discuss the rejection with the owner.\textsuperscript{\textsmallsuperscript{219}} On the other hand, if the unit is owned by the PHA, the regulations require a written notice to the applicant explaining the basis for the rejection and informing him of the right to an informal hearing. Further, if the applicant is rejected after the PHA hearing, he has the right to HUD review of the PHA determination.\textsuperscript{\textsmallsuperscript{220}}

It is not surprising that HUD and Congress have delegated the responsibility of tenant selection to the owner. Under the HCDA and applicable regulations the owner is responsible for maintenance and management of his units.\textsuperscript{\textsmallsuperscript{221}} Since the owner bears the risk of damage to the units and of default in payment of rent, he is given the opportunity to screen his prospective tenants. The landlord has incentive to deny admission to any applicant that he considers undesirable. Applicants with young

\textsuperscript{\textsmallsuperscript{217}} Id. § 880.218(b)(4).

\textsuperscript{\textsmallsuperscript{218}} Id. § 880.218(b)(3). There are no regulations governing how applicants are to be ranked in these lists and no express requirement that an owner inform an applicant of his place on the list. An exception applies when a PHA is the owner. In such a case, the agency must inform applicants on the waiting list of the approximate date by which a suitable unit will be available “insofar as such a date can be reasonably determined.” Id. § 880.218(b)(6).

\textsuperscript{\textsmallsuperscript{219}} In such cases, applicants for conventional public housing have a right created by statute and regulation to an informal hearing. 42 U.S.C. § 1437d(c)(3) (Supp. V 1975); 24 C.F.R. §§ 860.201-.207 (1977). Compare the similar rights of applicants to the § 23 program described in Leased Housing Program, supra note 2, at 1196-97.

\textsuperscript{\textsmallsuperscript{220}} 42 C.F.R. § 880.218(b)(6) (1977).

children, families considered to be unstable, and those with
criminal records may find it difficult to obtain assisted hous-
ing. Landlords are not expressly prohibited by regulation from
denying admission solely on the basis of past criminal records
and family instability." An additional incentive to rejecting
large and socially undesirable families is the statutory prefer-
ence given to applications for newly constructed and substan-
tially rehabilitated units that propose to seek assistance for
twenty percent or less of the total number of units in develop-
ment. This economic mix of tenants will probably cause the
owner to exercise extreme caution in selecting tenants in order
to prevent offending middle class tenants in the development.

The section 8 program will probably result in many of the
families most in need of decent housing, the problem poor,
being foreclosed from obtaining it. They will be excluded from
newly constructed and substantially rehabilitated projects be-
cause of pressure on the owner to appease his middle class
tenants and to prevent damage or default for which he is al-
most entirely responsible. Those seeking existing housing units
will be subject to the "finders-keepers" policy which will favor
tenants with the ability to "sell" themselves and the mobility
to locate prospective units.

The outlook for prospective tenants is not altogether bleak.
The regulations require that at least thirty percent of all as-
sisted units in each project be occupied by "very low income"
families, that is, families whose income does not exceed fifty
percent of the median income for the area. However, depend-
ing upon the median income for any geographical area, the
definition of very low income might or might not be at the
poverty level because section 8 landlords have discretion to
select persons at the high range of the very low income group.
In addition, assurances by owners of compliance with fair hous-
ing and other civil rights laws are required. With respect to

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222 See note 230 infra and accompanying text.
224 It has been suggested that landlords may be deterred from renting to potential
tenants under the existing housing program because of the government regulations
involved. Indeed the red tape may be used by landlords as an excuse to refuse to rent
to families when the real reasons may be illegal. Leased Housing Program, supra note
2, at 1201.
new and rehabilitated projects, HUD regulations state that management and operation must be free of racial, religious, and sex-based discrimination. Further safeguards for newly constructed and substantially rehabilitated projects include a prior showing of management capability and assurances that the location of the project is not in a racially concentrated neighborhood or at a site with adverse environmental conditions.

The most significant protection for prospective section 8 tenants is contained in the housing assistance payments contract which prohibits automatic exclusion "because of membership in a class such as unmarried mothers, recipients of public assistance, etc." It is unclear how these regulations are to be enforced. The housing contract compels the owners of newly constructed and substantially rehabilitated units to cooperate with the government in compliance reviews and complaint investigations pursuant to civil rights laws and regulations. It is not clear that the complaint investigation process applies to discrimination other than that based on race, religion, color, sex, or national origin or whether the complaint investigation process is effective before the housing assistance payments contract is executed.

In conclusion, there is little doubt that the admissions process in the section 8 program is susceptible to abuse by discriminatory owners. The absence of a "good cause" requirement for rejecting applicants and the lack of uniform, public

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227 Id. § 880.218(a). An affirmative marketing program is required in any proposal for five or more units. Id. §§ 880.209(a)(7), .218(a).
228 Id. § 880.209(a)(10).
229 Id. § 880.112. See notes 46-49 supra and accompanying text for a discussion of site selection.
230 24 C.F.R. § 882, app. II, § 2.1(a) (1977) (existing housing). The housing assistance payments contract for new construction is contained in the HUD Processing Handbook 7420.1. It was formerly located in appendix II of the regulations. 40 Fed. Reg. 18,698 (1975). Since many applicants for newly constructed and substantially rehabilitated housing will learn of the program only through the owner, they may be ignorant of these rights. PHA's are required to inform holders of certificates of participation of their rights. 24 C.F.R. § 882.208(c) (1977).
231 24 C.F.R. § 882, app. II, § 2.2 (1977) (existing housing); HUD Processing Handbook 7420.1 (newly constructed). See note 230 supra regarding the housing assistance contract.
232 "Leased Housing Program, supra note 2, at 1203."
standards of admission give wide discretion to the owner. In addition, the eligible applicant who has been rejected is not given a quick and inexpensive administrative remedy to contest the owner’s decision. This is especially true in instances of discrimination where the civil rights statutes are not applicable. It is HUD’s policy not to interfere with the owners in the tenant selection process and it is unlikely that it will alter this policy. Thus, the rejected tenant may look only to the judiciary for relief.

B. Application of Due Process Requirements to Section 8 Admission Procedures

In conventional public housing programs, applicants denied admission to a project are given prompt notice of the reason for the denial and the right to an informal hearing. In the section 8 program applicants for newly constructed and substantially rehabilitated housing who are rejected by a non-PHA owner are not given these procedural safeguards. Applicants for certificates of family participation in existing housing who are determined ineligible by the PHA are given an informal hearing. However, once the family receives a certificate from the PHA and is rejected by an owner, these procedural safeguards do not apply and the family has no recourse under the regulations.

From a constitutional standpoint, the due process safeguards of notice and the right to an impartial hearing will attach only if the section 8 applicant can satisfy the test previously set forth: governmental action in the denial of admission, and a property interest in the admission to the assisted unit.

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233 See note 230 supra and accompanying text. There is a “good cause” requirement of sorts that applies to owners receiving housing assistance payments due to vacancies in assisted units. In order to be eligible for such payments, the owner may not reject “any eligible applicant, except for good cause acceptable to HUD or the PHA...” 24 C.F.R. § 880.107(b), (c)(1) (1977) (newly constructed); id. § 882.105(b)(2) (existing housing). The rejected applicant is not in a position to benefit from this requirement and enforcement by HUD will be difficult. Compare Leased Housing Program, supra note 2, at 1204 with the regulations dealing with continued assistance payments after an eviction described in notes 102-05 supra and accompanying text.


1. **Governmental Action in Denial of Admission**

In determining whether sufficient governmental action exists, the specific relationship between the owner and the governmental entity must be examined. With regard to existing housing, there are two classes of owners: those with ongoing assisted units who have signed contracts with the PHA; and private owners who are approached by tenants for the first time under the "finders-keepers" policy.\(^{237}\) Even under *Jackson* an argument can be made that the requisite "symbiotic relationship" exists between the owner who has signed housing assistance payments contracts and the PHA and HUD.\(^{238}\) As an ongoing participant in the program, the owner has received financial support for his units. He has agreed to comply with specific provisions of the HUD regulations and the housing assistance payments contract and for all practical purposes he is an arm of the PHA.\(^{239}\) This is not true, however, of the purely private landlord who is approached by a certificate holder. Such a landlord is not bound by the housing assistance payments contract at the time and is in no way linked with HUD or the PHA. Consequently, there is no foundation for a finding of governmental action by the private landlord.\(^{240}\)

With regard to newly constructed and substantially rehabilitated housing, there will be similar problems in establishing the required government action as per *Jackson*\(^{241}\) and prior Supreme Court decisions. The owner has received significant federal subsidy in the form of financing and housing assistance payments and these payments are conditioned upon the

\(^{237}\) See text accompanying notes 110-11 *supra* for a discussion of the "finders-keepers" policy.


\(^{239}\) The owner receives a rent subsidy (housing assistance payment) even if a unit is vacant under certain circumstances. 24 C.F.R. § 882.105 (1977). Regulations deal with maintenance, *id.* § 882.211; evictions, *id.* § 882.215; and lease provisions, *id.* § 882.107(b) and app. VI. Cf. the regulations for new construction in note 144 *supra*. A similar conclusion is reached in *Leased Housing Program, supra* note 2, at 1207.

\(^{240}\) This will undermine the potential success of the existing housing program since the "finders-keepers" policy is the primary means of locating existing units. See 24 C.F.R. § 882.103 (1977). The certificate of family participation may very well be a worthless document to those applicants who do not know of owners presently under contract with PHA and HUD.

\(^{241}\) See text accompanying notes 128-37 *supra* regarding the test for state action.
owner’s compliance with HUD-imposed regulations. In addition, the owner is arguably performing a public housing function traditionally reserved for federal and local governments. Notwithstanding the restrictive approach taken by the Court in Jackson, a persuasive argument could be made for finding requisite governmental action in the denial of admission to newly constructed and substantially rehabilitated units.

2. Property Interest in Admission to Section 8 Housing

Assuming that government action exists in the admission to section 8 housing, the applicant’s right to a due process hearing depends on whether he has a legitimate property interest as defined by Roth, Sindermann, and subsequent Supreme Court decisions. The Court has stated that the nature of the interest asserted, not its weight, is the important consideration in determining whether a due process property right exists.

At first glance, the tenant’s interest in continued occupancy is more readily apparent than the applicant’s interest in commencing a tenancy. A rejected applicant will not suffer burdens such as the cost and inconvenience of being forced to relocate. The question is whether the distinction between termination of a benefit and withholding of a benefit is constitutionally significant. It can be argued that the mere expectancy of a benefit is not an entitlement, especially when the admissions process permits the landlords to exercise discretion in deciding whether to admit an applicant. This argument is

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12 See note 146 supra and accompanying text regarding incentives for the construction of assisted units.
13 See note 148 supra for a discussion of the governmental action requirement under the § 8 program.
14 A similar conclusion is reached in Leased Housing Program, supra note 2, at 1206-07. Prior lower court decisions involving eviction from § 221(d)(3) and § 236 projects are instructive. These decisions found government action on the basis of the receipt of federal benefits and the pervasive federal regulation. See note 131 supra. Only one of these cases, Prevo v. National Corp. in Hous. Partnerships, No. C-76-104A (N.D. Ohio, E. Div., injunction filed June 3, 1976) was post-Jackson.
16 Board of Regents v. Roth, 408 U.S. 564, 571 (1972).
17 It may be that a tenant who seeks to transfer from a federally assisted unit to a § 8 unit has an interest in continued occupancy in some kind of government supported housing.
18 See notes 210-31 supra and accompanying text for a more detailed discussion
suspect for reasons outlined below.

An important factor in defining a constitutionally protected property interest is whether there are rules or mutually explicit understandings that a claim of entitlement exists. When an agency determines an individual's eligibility for a benefit under criteria set forth by federal statutes or regulations, the individual applicant has a legitimate expectancy that he will not be denied assistance unless it is factually determined that he failed to satisfy those criteria. In analyzing its previous decision in Goldberg, the Court in Roth stated:

[T]he welfare recipients in Goldberg v. Kelly . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Thus, the key point in Goldberg was not that benefits had previously been received, but rather that there existed statutory provisions creating the right to public assistance and defining the terms under which it could be obtained.
In the context of conventional public housing, several federal courts have recognized a constitutional right to a hearing upon rejection of an applicant.\textsuperscript{253} In \textit{Colon v. Tompkins Square Neighbors, Inc.},\textsuperscript{254} involving admission to federally subsidized housing under section 221(d)(3), it was held that applicants rejected solely because they were welfare recipients were denied equal protection of law. While the court did not base its decision upon due process grounds, it did provide the applicants with several important procedural safeguards including notification of the status of the application within a reasonable time, a waiting list on a chronological basis, and uniform admissions criteria.\textsuperscript{255}

The nature of the applicant's interest varies with the specific section 8 program. For example, the applicant for an existing unit follows a two-step process: First, he obtains a certificate of family participation from the PHA; then he must find an owner to accept him.\textsuperscript{256} Once the CFP is issued, it is arguable that the applicant's claim of entitlement becomes "legitimate" and a subsequent rejection by an owner constitutes a deprivation within the purview of the due process clause. An applicant for newly constructed and substantially rehabilitated housing, on the other hand, does not receive certification from the PHA;


\textsuperscript{256} See notes 206-12 \textit{supra} and accompanying text regarding the "finders-keepers" admissions policy. It is noteworthy that a PHA is given discretion to adopt preferences for groups such as displaced families or families in substandard or overcrowded housing. 24 C.F.R. \textsection 882.204(b)(1)(i)(c) (1977); \textit{id.} \textsection 882.209(a)(2); Preamble, \textsection 56, 41 Fed. Reg. 19,891 (1976). An informal hearing is available to rejected applicants. 24 C.F.R. \textsection 882.209(f) (1977).
his only contact is with the owner who determines income eligibility and family size as well as the subjective qualification of the application. Even here, however, the applicant could argue that once he satisfies the criteria for income and family composition his property right to assistance vests and upon rejection by the owner he is entitled to notice of the reasons for rejection and an informal hearing.

The principal weakness in this argument is the degree of discretion granted to section 8 landlords in the admission process. Landlords may not reject applicants in violation of fair housing laws or because they are welfare recipients or unwed mothers. These restrictions may be required by the equal protection clause as interpreted by the court in Colon. Indeed, Colon may require that any preferences for admission be rational, thereby prohibiting discrimination against lower income applicants. Beyond this, however, owners seemingly have unlimited discretion under the regulations. Clearly, a landlord need not establish "good cause" to reject an applicant. However, the factors do not necessarily negate a determination of entitlement by the applicant but are relevant to the balancing of interests.

Whether the courts will hold that applicants for section 8

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257 See notes 213-20 supra and accompanying text for a discussion of the owner's role in the application for assisted housing.

258 This expectancy of benefits is created by the HCDA and HUD regulations. By the establishment of criteria for admission, the Act and regulations create a legitimate expectation that a § 8 applicant will not be denied unless it is factually determined that the composition of his family disqualifies him, his family income is too high, or that he is "otherwise ineligible." The standard for denial of benefits is fully established by the regulatory scheme just as it was in Goldberg and Roth. The applicant's property interest is one of major importance to him, and arbitrary rejection would deprive him of shelter and could cause him "to suffer grievous loss." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). See also Davis v. United States, 415 F. Supp. 1086, 1091 (D. Kan. 1976). But see Bishop v. Wood, 426 U.S. 341 (1976) (discussed in note 155 supra).

259 See note 226 supra and accompanying text.

260 See note 229 supra and accompanying text.

261 See notes 222, 223 supra and accompanying text.

262 See note 212 supra and accompanying text regarding existing housing, and note 217 supra and accompanying text regarding newly constructed housing. Note that applicants have a right to an informal hearing when the owner of new construction is a PHA. See note 220 supra.

263 See text accompanying notes 179-86 supra for a discussion of the balancing of interests.
housing have a legitimate claim of entitlement will depend upon their characterization of the applicants' status as seekers of government-assisted housing. Congress\textsuperscript{244} and the Secretary of HUD\textsuperscript{255} have concluded that the right to adequate shelter is a basic human need and right, and it is reasonable to expect that the judiciary will adopt a similar view when considering whether due process applies to the section 8 admission process.

3. \textit{Procedural Requirements: Balancing the Interests of the Parties}

Once it has been determined that due process applies to the section 8 application process, the question of what process is due remains; that is, what are the precise procedural safeguards to which the rejected applicant is entitled?\textsuperscript{266} Recently in \textit{Mathews v. Eldridge},\textsuperscript{267} the Court stated that competing interests of the parties must be weighed and balanced in order to determine what procedures are required.\textsuperscript{268} The central issue is what kind of hearing applicants are entitled to upon rejection by the section 8 landlord. In \textit{Davis v. Toledo Metropolitan Housing Authority}\textsuperscript{269} and \textit{Neddo v. Housing Authority},\textsuperscript{270} lower federal courts have held that applicants denied admission to conventional public housing are entitled to a \textit{Goldberg}-type hearing.\textsuperscript{271} A series of New York state court cases chose not to follow this precedent and held that the applicant is entitled to an informal interview at which the housing authority must apprise him of the reasons for nonadmission.\textsuperscript{272}

\begin{itemize}
\item[\textsuperscript{244}]{See text accompanying notes 168-69 supra.}
\item[\textsuperscript{245}]{See Remarks of Secretary Patricia Roberts Harris at National Housing Conference, Washington, D.C., published in HUD News, March 7, 1977. If tenants in § 8 housing do not have a property interest in continued occupancy, applicants for admission certainly do not. See notes 162-78 supra and accompanying text for the proposition that continued occupancy in assisted units creates a property interest.}
\item[\textsuperscript{246}]{See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972).}
\item[\textsuperscript{247}]{424 U.S. 319 (1976).}
\item[\textsuperscript{248}]{See text accompanying notes 179-86 supra for an analysis of this balancing process.}
\item[\textsuperscript{249}]{311 F. Supp. 795 (1970).}
\item[\textsuperscript{250}]{335 F. Supp. 1397 (1971).}
\item[\textsuperscript{251}]{Cf. 42 U.S.C. § 1437d(c)(3) (Supp. V 1975); 24 C.F.R. § 860.207(a) (1977) (statutory right to informal hearing).}
\end{itemize}
An inherent problem in requiring a Goldberg-type hearing in all section 8 admissions cases is the burden that would be imposed upon the private owner. In the existing housing program the PHA makes the initial decision whether to issue a certificate of family participation.\textsuperscript{273} It is at this stage of the admissions process that the administrative burden of providing a hearing would be least oppressive because PHA’s are equipped to, and in fact do, conduct Goldberg-type hearings on their eviction cases.\textsuperscript{274} However, once the certificate of family participation is granted, the decision to rent an existing unit rests almost entirely with the private owner.\textsuperscript{275} Likewise, the private owner has almost unchecked discretion in admissions to newly constructed and substantially rehabilitated units.\textsuperscript{276} In these two programs there would be a real administrative burden on the private owner if such hearings were required upon rejection of applicants. This would most likely discourage private owners from participating in the program, especially since the number of rejected applications will far exceed evictions. It is unlikely that courts would balance the interests to require such hearings.

Nevertheless, applicants, like section 8 tenants who are threatened with eviction, have an important interest in living in decent, affordable housing. As noted in the discussion of property interests in admissions,\textsuperscript{277} section 8 owners have wide discretion under the regulations to establish preferences and priorities. However, under Colon v. Tompkins Square\textsuperscript{278} and similar cases, any preferences must bear a rational relationship to the goals of the housing program.\textsuperscript{279} In addition, Colon would seem to require that section 8 owners adopt public, uniform admission criteria and allow access to a waiting list based on reasonable priorities.\textsuperscript{280} Furthermore, rejected applicants

\textsuperscript{273} See notes 206-07 supra and accompanying text.
\textsuperscript{275} See notes 212, 225-26, 230-32 supra and accompanying text regarding the owner’s discretion in the admission process.
\textsuperscript{276} See notes 213-20, 225-32 supra and accompanying text regarding the owner’s discretion in the admission process.
\textsuperscript{277} See notes 244-64 supra and accompanying text.
\textsuperscript{279} See notes 252, 253 supra and accompanying text.
\textsuperscript{280} See note 256 supra and accompanying text. A waiting list based strictly on chronological order could probably not be required since priorities can be adopted. See
should have the right to be informed of the reason for rejection. ²²¹

In light of Eldridge it is unlikely that the applicant has a constitutional right to anything more than notice of the reason for the adverse decision, with perhaps an informal interview with the owner. Nevertheless, a rejected applicant's right to a decision based on uniform standards and notice of reasons for rejection is meaningless unless he can object to a decision arbitrarily and incorrectly applying those standards.²²² It would seem that as a matter of public policy, a realistic procedural safeguard should provide for administrative review by an impartial fact-finder.²²³ From a constitutional standpoint a rejected applicant should, at the very least, have access to the courts to attack the owner's application of the standards as an abuse of discretion on a case-by-case basis.²²⁴

**Conclusion**

It appears that the section 8 program, as implemented by HUD regulations, has potential for arbitrary practices and policies by owners in admissions and evictions. Given that government involvement in the form of financial support and regulation is sufficient to bring section 8 admissions and evictions under the due process clause, the courts should recognize the entitlements of tenants and applicants. Tenancies would not be terminated by owners except for "good cause" to be deter-


²²² See cases cited in notes 253 and 281 supra.

²²³ In Leased Housing Program, supra note 2, at 1214-15, the conclusion is that such a procedure is constitutionally required.

mined in judicial proceedings. Admissions would be based on public and uniform standards of individual owners subject to HUD regulations. Rejected applicants would be entitled to know the reason for refusal and have the opportunity to obtain judicial relief if an owner's application of the standards constitutes an abuse of discretion. If the courts subject section 8 owners to these minimal due process requirements and if HUD aggressively enforces site selection requirements, then the program may actually give lower income persons an opportunity for better housing.