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NOTES

IS THERE HOPE? AN ANALYSIS OF HOW PREMATURE TENANT HOMEOWNERSHIP POLICIES THREATEN THE HOUSING RIGHTS OF LOW INCOME PERSONS AND FAMILIES ON WAITING LISTS FOR SECTION 8 HOUSING

The [Koble-Espy] amendment is based on an ill-conceived, politically driven plot devised to relieve the Federal Government of its responsibility to provide decent, low income housing for the poor.¹

There is a legitimate concern that public housing tenants will be saddled with unprofitable projects and left holding the bag after Uncle Sam has gone. . .[and] that with the large number of families already waiting for housing assistance, it is unwise to reduce the stock of public housing.²

[G]ive those people a chance to own their own property, recycle the property into homeownership, take these dollars for new and better subsidized housing, and get them out of this trap that they are in and allow them to move forward.³

I. INTRODUCTION

“The federal government has long recognized a goal of providing a decent home and suitable living environment for every American family, [and]. . .has conceded that low-income families are unable to obtain a decent living environment without government financial assistance.”⁴ Federal programs emphasized homeownership

1. 137 CONG. REC. H4101, H4108 (daily ed. June 6, 1991)(statement of Rep. Clay) (speaking on funding for the Homeownership and Opportunity for People Everywhere Program [hereinafter HOPE 1]).

2. *Id.* at H4104 (statement of Rep. Espy) (in support of HOPE 1).

3. *Id.* at H4109 (statement of Rep. McEwen).

4. Note, *Are Applicants For Section 8 Housing Entitled To Benefits?*, Vol. 1985 U. ILL. L. REV. at 757 (1985) (citing The United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified at 42 U.S.C. §§ 1437-1437aaa-5 (1990 & Supp. 1991)) [hereinafter 1937 ACT]).

for those families and persons that could not afford it on their own.⁵ Federally funded public housing was created for those families and persons that still could not afford their own homes, despite federal subsidies.⁶

In 1974, Congress enacted the Housing and Community Development Act (HCDA of 1974), which created federal housing subsidies for low-income families.⁷ The purpose of the Section 8 housing program is to provide lower income families with safe, decent, and sanitary rental housing through a system of housing assistance payments.⁸ Recognizing that there are many more families in need of public housing than there are units,⁹ Congress intended to maintain and replenish the public housing supply constantly.¹⁰ Section 104(d) of the HCDA of 1974 underscores this intent to maintain the public housing supply by requiring that for each Section 8 public housing unit that is demolished or converted to another use, there must be another unit of public housing created to take its place.¹¹

As housing costs increased throughout the 1970's,¹² public housing units became increasingly attractive. The realities inside these units often were (and still are) frightening. Public housing projects often became plagued by high crime, drug problems, constant mechanical breakdowns, and nonpayment of rent.¹³ These problems led many to seek new ways to improve public housing projects.

Two such programs are Resident Management and Resident Homeownership. Generally, public housing projects are owned and

5. McDougall, *Affordable Housing For The 1990's*, 20 U. MICH. J.L. REF. 727, 728-9 (1986-1987).

6. *Id.* at 729.

7. The Housing And Community Development Act of 1974, Pub. L. 93-83, Aug. 22, 1974, 88 Stat. 633 (as codified in 42 U.S.C. §§ 5301, 5320 (1989)) [hereinafter Section 8 housing].

8. 24 C.F.R. § 880.101(a) (1991).

9. Legislative History of the Housing and Community Development Act of 1987, 101 Stat. 1815, Pub. L. No. 100-242, reprinted in U.S. Code Cong. & Admin. News 3332 [hereinafter *Legislative History of 1987 ACT*].

10. 55 Fed. Reg. 29296 (July 18, 1990) (to be codified at 24 C.F.R. § 570 (1991)).

11. *Id.*

12. See, e.g., *The Killer Cost*, Wash. Post, Dec. 17, 1991 at A 20.

13. See Cramer, *Turning Public Housing Over to Resident Owners: A Welfare Mother of Five Who Organized a Housing Complex Sparks a National Controversy*, TIME, Dec. 12, 1988 at 15 (which describes factors leading to resident management); DAYE AND MANDELKER, HOUSING & COMMUNITY DEVELOPMENT: CASES & MATERIALS 20 (2d ed. 1989 & Supp. 1991) (describes how the large size of public housing projects made them easily susceptible to becoming high crime area. [hereinafter MANDELKER]).

managed by the local housing authorities that build them.¹⁴ In these programs, residents become the managers and owners of their public housing units.¹⁵ The resident programs are driven by the hope that these tenants will have more of a stake in their units as managers and homeowners and that their pride will increase the overall quality of the units.¹⁶ The goal of this program is to create communities which are not reliant on welfare.¹⁷

The latest attempt to pursue this policy is contained in the Cranston-Gonzalez National Affordable Housing Act of 1990¹⁸ and is known as the Homeownership And Opportunity For People Everywhere Program (HOPE 1).¹⁹

This note will focus on the unique and frustrating problem of the low-moderate income persons and families already accepted on the long waiting lists for public housing. As more and more public housing is converted into tenant-owned units under the HOPE 1 program, it has become increasingly difficult to maintain the supply of public housing. Those already on the waiting lists could be left stranded without ever receiving a unit.

The first part of this note will discuss the Section 8 housing program and the problems with it that led to the adoption of alterna-

14. McDougall, *supra* note 5 at 743. The local housing authorities (LHAs) which manage public housing projects have been linked to many of the problems that occur in these areas. Telephone interview with Justin Milberg, Project Associate at the National Center For Neighborhood Enterprises (Jan. 15, 1992) [hereinafter Milberg interview]. It is alleged that these LHAs are too far removed from the problems within the projects and that this distance fostered their decline. *Id.*

15. See *infra* notes 48-62 and accompanying text (describing resident management and homeownership).

16. See sources cited *infra* note 63 (describing the advantages of these programs).

17. See Cramer, *supra* note 13; Jack Kemp's Favorite Public Housing Tenant, N.Y. Times, Jul. 13, 1990 at A1, col. 2 (describing resident management plans); Hearing of the Housing and Community Development Subcommittee, Subject HUD Budget and Housing Proposal (Mar. 13, 1990) (Statement of Sec. Jack Kemp)(favoring resident management and homeownership programs) [hereinafter March 1990 Hearing]. The tenant management program is viewed as an entire support project, with such programs as Operation Bootstraps, job training, and day care to give the homesteaders the skills they will need to keep their community flourishing, thus recognizing that simply providing housing is only the minimum of what needs to be done. Legislative History of the Cranston-Gonzalez National Affordable Housing Act of 1990, 104 Stat. 4159, 5788-91, 97, Pub. L. No. 101-625, reprinted in U.S. CODE CONG. & ADMIN. NEWS, 26-29, 36 [hereinafter *Legislative History of 1990 Act*].

18. 104 Stat. 4079, Pub. L. 101-625, Nov. 28, 1990 (codified at 42 U.S.C.S. §§ 12701-12898 (Supp 1991)) [hereinafter 1990 ACT].

19. *Id.* at 104 Stat. 4148 (codified at 42 U.S.C. § 1437aaa-aaa-5 (Supp. 1991)). Although there are other initiatives encompassed by the HOPE program, this note will focus only on HOPE 1, which deals with resident initiatives, such as resident management and homeownership.

tive programs. Specifically, this section will examine The Kenilworth-Parkside Development, the most well-known tenant-owned residence in America, and the varied response to this project. The important goal of tenant self-sufficiency should not necessarily lead to a potentially disastrous reduction in public housing units. The second part of this note will discuss possible remedies families and persons on public housing waiting lists may seek in order to protect their rights. Because the remedies within the Department of Housing and Urban Development (HUD) are inadequate, this note will urge that those on the waiting lists should be able to seek constitutional protection in order to guard their future interest in the publicly owned housing that they have already been approved for. It will be necessary to examine notions of property rights and how those on the waiting lists can prove that they have such rights.

The final section of this note will offer suggestions as to how the goals of tenant homeownership can be sought without harming the rights of those families and persons on the waiting lists.

II. THE SECTION 8 PROGRAM AND RESIDENT INITIATIVE

In the 1960's, the lack of housing units was perceived to be the leading problem in public housing.²⁰ The Section 8 housing program²¹ created housing subsidies that were tied to particular units.²² Section 8 programs include housing assistance payment programs for new construction,²³ substantial rehabilitation of existing units,²⁴ and ongoing maintenance for existing units.²⁵ Section 8 subsidies are given either to the tenant or the local Public Housing Authority (PHA).²⁶

In the case of new construction, a local PHA borrows the money to build housing from HUD.²⁷ In return, the PHA agrees to allocate a certain percentage of the units to be leased to tenants that

20. See *Legislative History of 1990 Act*, *supra* note 17 at 104 Stat. 5770.

21. 42 U.S.C. §§ 5301-5320 (1989); 24 C.F.R. § 880, 87 (Apr. 1991); see *supra* notes 7-11 and accompanying text for a description of the policy goals of the Section 8 housing program.

22. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 899 (1990).

23. 24 C.F.R. § 880.101-.613 (1991).

24. *Id.* at § 881.101-.709.

25. *Id.* at § 882.101-.716.

26. See *infra* notes 39-47 and accompanying text (describing the voucher program and subsidies).

27. McDougall, *supra* note 5 at 743.

qualify for Section 8 subsidies.²⁸ For substantial rehabilitation of existing units, subsidies are given to whomever has taken the initiative to make the repairs.²⁹ Subsidies for general maintenance are usually given directly to tenants.

Persons seeking Section 8 housing apply for it through the local PHA.³⁰ If an applicant is rejected he or she is informed by a letter mailed within a reasonable time.³¹ When families are approved to be in Section 8 housing, either they are assigned a unit,³² or more often, if there are no units available at the time the family is approved, the family is placed on a waiting list.³³ The approved family receives a letter informing them that they have been approved for Section 8 housing and that as soon as a unit becomes available, they will be provided to them.³⁴

By the 1980's, the reality became far less efficient than the ideal situation above. Waiting lists for public housing are often long,³⁵ especially in tight housing markets.³⁶ The shortage of public housing units has been exacerbated by the 80% cuts in the housing budget that have occurred since 1980,³⁷ and a variety of policy alterations, including the virtual elimination of new construction and substantial rehabilitation under the Reagan administration.³⁸

Further, HUD under the Reagan administration, instead of assigning applicants to particular units, transformed the program into a "voucher and certificate" program.³⁹ Those on the lists now await vouchers.⁴⁰ A Section 8 Voucher is a form of direct rental assis-

28. 24 C.F.R. § 880.504(a) (1991). The Section 8 Housing subsidies are geared towards persons and families that pay more than 50% of their adjusted income on housing, or who have been involuntarily displaced, or whose current housing is substandard, or those who have little prospect of gaining housing in the future. *Id.* at § 880.613(a) (1991).

29. 24 C.F.R. § 881.501 (1991).

30. Telephone Interview with Charles Bell, Housing Program Specialist within the Office of Resident Initiative in HUD (Jan. 14, 1992)[hereinafter Bell Interview].

31. 24 C.F.R. § 882.205(d) (1991). This rejection letter must contain specific reasons for the denial and whether the application will be accepted, providing certain changes are made. *Id.*

32. *See Id.* at § 880.603(b)(2) (1991); Bell interview, *supra* note 30.

33. *See Id.*

34. *See id.*

35. See March 1990 Hearing, *supra* note 17 at 11 (Statement of Rep. Hogeland).

36. *See Berger, Beyond Homelessness: An Entitlement To Housing*, 45 U. MIAMI L. REV. 315, 329 n. 76 (1991); Bell interview, *supra* note 30.

37. Legislative History of 1990 Act, *supra* note 17 at 5771.

38. McDougall, *supra* note 5 at 754 n. 138.

39. *Id.* at 754.

40. *See generally* 24 C.F.R. § 887.151-.567 (1991).

tance.⁴¹ Theoretically, the voucher program is superior to the previous program because participants⁴² are now mobile and may now seek out housing opportunities wherever they may exist.⁴³

A housing voucher lasts only for sixty days.⁴⁴ During this period it is the family's responsibility to find available housing.⁴⁵ If the family cannot find a unit, the voucher expires and the families⁴⁶ have the option to start again at the bottom of the waiting list.⁴⁷

In 1987, Congress passed The Housing and Community Development Act of 1987 (HCDA 1987),⁴⁸ which empowered residents of public housing projects to manage⁴⁹ and own⁵⁰ their own units. This program has gained momentum for both residents and the government. For residents, these programs provided an opportunity to become self-sufficient and to reverse the patterns of neglect and crime that were pervasive in many public housing projects. For a budget

41. A Section 8 Housing Voucher is a document issued by a PHA declaring a family to be eligible in the housing Voucher program. 24 C.F.R. § 887.7 (1991). A Housing Voucher Contract is a written contract between the PHA and the owner of the rental unit, whereby the PHA agrees to make housing assistance payments to the owner on behalf of an eligible family. Under the voucher program a "fair market rent" standard is established. 24 C.F.R. § 887.7 (1991). This standard is established by HUD and it is representative of average rate for rent in the area. Berger, *Beyond Homelessness: An Entitlement To Housing*, 45 U. MIAMI L. REV. 315, 329 note 76 (1991). The amount of the voucher is the difference between the "fair market rent" and 30% of the participant's annual adjusted income. *Id.*

42. An applicant qualifies for a federal preference if the applicant has been involuntarily displaced and is not living in acceptable replacement housing, or is living in substandard housing, or the applicant is paying more than 50% of the family income for rent. 24 C.F.R. § 887.157(c)(i)-(iii).

43. See 24 C.F.R. § 887.551-.567 (1991); Horowitz, *Why Kemp's HOPE Program Should Be Funded*, Heritage Foundation Reports, March 12, 1991 Issue Bulletin Section (describes how the mobility of the vouchers will be able to assist the elderly and the homeless). *But cf.* Berger, *supra* note 41 at 332 note 93 (describing how vouchers have been largely unsuccessful with minorities and when used in a tight housing market). The ideal is that vouchers will eliminate the concentration of poverty that occurs in large public housing projects.

44. 24 C.F.R. § 887.165(a) (1991). It can be renewed, however, the total period of the voucher cannot exceed 120 days. *Id.* at § 887.165(b).

45. Along with the housing vouchers, these families get an information packet that describes the Section 8 program and a briefing which explains the procedures, including suitable areas to look for housing, and an explanation of their future on the waiting lists should they not find a unit or refuse assistance. 24 C.F.R. § 887.162-.163 (1991).

46. See 24 C.F.R. § 887.165 (1991).

47. See 24 C.F.R. § 887 (1991).

48. 101 Stat. 1815, Pub. L. 100-242, Feb. 5, 1988.

49. *Id.* at 101 Stat. 1839-42 (known as section 122 of the United States Housing Act of 1937)(codified at 42 U.S.C.S. 1437(r) (1990)) (as amended by 42 U.S.C. § 1437aaa-aaa(5) (Supp. 1991)).

50. *Id.* at 101 Stat. 1842 (known as section 123 of the United States Housing Act of 1937)(codified at 42 U.S.C.S. 1437(s) (1990)(as amended by 42 U.S.C. § 1437aaa-aaa(5) (Supp. 1991)).

conscious government, it offered an opportunity to get rid of dilapidated housing stock and it provided hope that self-sufficient residents will no longer be dependent on the welfare system.⁵¹

The implications of the 1987 Act, however, were not fully realized until passage of the 1990 Act. The HOPE 1 program is the centerpiece of the 1990 ACT. The goal of HOPE 1 is that "people who are less fortunate ought to have a chance to own their own home. . .home ownership should not only be the dream of middle America, upper class America, but ought to be a dream that can be realized by people that live in public housing projects."⁵²

"The purpose of [public housing resident management]. . .is to encourage increased resident management of public housing projects as a means of improving existing living conditions in public housing projects."⁵³ Thus, the first step for tenants who want to pursue homeownership is the establishment of a successful resident management corporation (RMC).⁵⁴ Tenants must effectively and efficiently manage their own units for three years before they can apply to own their units.⁵⁵ They are expected to eliminate drugs from the project,⁵⁶ and to establish economic and social support services for the community.⁵⁷ Theoretically, both residents and government reap the rewards of these programs. Residents can take pride in their communities and hopefully enjoy a greater standard of living, and the amount of assistance that the government has to pay diminishes as the projects become self-sufficient.⁵⁸

51. Schill, *supra* note 22 at 878-81.

52. 137 CONG. REC. H4101, H4104 (daily ed. June 6, 1991)(statement of Rep. Kolbe).

53. 42 U.S.C. § 1437(r)(a) (1990).

54. 42 U.S.C. § 1437(s)(a)(1) (1990).

55. 42 U.S.C. § 1437(s)(a)(1)(C) (1991). Success in this endeavor is one of the most important indicators that these tenants will make responsible homeowners. Bell interview, *supra* note 30; see also 42 U.S.C. § 1437(r)(a)-(h) (1990) (which describes the responsibilities of resident management corporations, (RMCs) and the type of technical assistance they receive in order to learn how to manage their buildings).

56. *HUD and Justice Get Tough With Drug Dealers in Public Housing*, Home Front newsletter issued by Office For Drug Free Neighborhoods within HUD at 8 (Fall/Winter 1990).

57. *Legislative History of the 1990 Act*, *supra* note 17 at 104 Stat. 5788-91, 5799. Generally, job training programs and day care programs are created in the projects to create a solid economic and social framework for homeownership.

58. Since the amount of the voucher is based on 30% of the adjusted annual income of the resident, as the income of the tenant goes up, the amount the government has to pay for the voucher goes down. see *supra* note 41; 42 U.S.C. § 1437(f)(o)(2) (1990). It is a strong hope of government officials that this diminution of their responsibility will occur. Milberg interview, *supra* note 14.

Once an RMC has run a project successfully for three years and the drug and social programs are in place, the tenants apply to HUD to become owners.⁵⁹

The success of this program has been widely debated.⁶⁰ While the goal of tenant self-sufficiency are desirable; it is feared that a rapid push towards homeownership may be too much too soon. Critics have charged that simply transforming these poor tenants into owners will not eliminate problems in the units or for the tenants. Rep. Hogeland, for example, has expressed a fear that with the push towards homeownership, the financial realities of the homeowners will be ignored.⁶¹ Even if the resident, often a welfare recipient, is able to purchase a unit, it is difficult to maintain a privately owned apartment. Massive defaults could occur for all but the wealthiest of

59. See 42 U.S.C. § 1437(s)(a)-(a)(C) (1990)(as amended by 42 U.S.C. § 1437aaa(3)(C) (1991); Bell interview, *supra* note 30.

The buyer, however, does not have a fee simple interest in the property. When a resident in a public housing project wants to purchase his own unit, he is participating in a conditional sale that results in a limited dividend cooperative ownership. 42 U.S.C. § 1437(s)(a)(4)(B)(i)-(ii) (1990) (as amended by 42 U.S.C. § 1437aaa-4(g)(1991). Units can be sold only to low-income persons or families. *Id.* at § 1437(s)(a)(4)(C) (as amended by 1437aaa-4(g) (1991). This is important in order to retain the character of the community and to ensure that these units remain for the benefit of low-income persons and families. Bell interview. It is a limited equity acquisition because unlike the sale in fee simple, the owner of such a unit cannot realize any gains in value when the unit is sold. 42 U.S.C. § 1437(s)(a)(5) (1990). This provision prevents real estate speculators from exploiting these opportunities in order to realize windfall profits. All proceeds from the sale of the resident-owned unit revert back to the PHA and are used by the PHA to "increase the number of public housing units available for occupancy." *Id.* Only after owning a unit for six years may an owner realize the profits. See 42 U.S.C. § 1437aaa(g)(2) (1991); 42 U.S.C. § 12895 (1991).

60. Rep. Clay of Missouri is one of the biggest critics of the Kenilworth-Parkside program:

I am sick and tired of hearing about the wonderful accomplishments achieved at the Kenilworth project here in Washington DC. . . .Kenilworth is a colossal failure. It is a tribute to Government's propensity for waste and abuse. . . .All of this assistance, mind you, is being provided to Kenilworth residents in a lopsided effort to make Kenilworth appear to be a successful program. The truth is that thousands of poor people in public housing in this town who don't live at Kenilworth are being denied equal access to these social service programs.

137 CONG. REC. H4101, H4108 (June 6, 1991).

Support services at Kenilworth-Parkside include substance abuse seminars and training, family relationship seminars, special group sessions for women, pre-school education programs, business education programs for youths, special programs for the elderly, a summer youth program that focuses on leadership development and abuse prevention, homework centers, and weekly recreational and cultural trips outside of Kenilworth-Parkside. *Model Programs Information Package issued by Office for Drug-Free Neighborhoods within HUD* at 12 (1991).

61. March 1990 Hearing, *supra* note 17 (Statement of Rep. Hogeland); see also Spolar, *Report Cities High Cost of D.C. Project Tenants Would Need U.S. Subsidies To Buy*, Wash. Post, Dec. 5, 1989 at D6.

the tenants. Congress has recognized that two of the most serious problems with previous homeownership plans were that not enough emphasis was placed on ensuring whether the resident would make a successful homeowner, and that defaults were likely because RMCs were able to put up the units themselves as collateral to purchase them.⁶²

The Kenilworth-Parkside development in Washington D.C. is a notable example of a resident management/ownership program.⁶³ This project is run by Kimi Gray,⁶⁴ a former welfare recipient who organized a movement for tenants in her public housing project to have an opportunity to purchase their government owned rental units. Because the success of these projects has been an aim of the budget-conscious Bush administration, HUD Secretary Jack Kemp has worked closely with Kimi Gray on the Kenilworth-Parkside development.⁶⁵

Kenilworth-Parkside, which has been cited has proof of the viability of the program has, in actuality, had massive difficulties in getting its funding approved.⁶⁶ Moreover, it has been alleged that Kenilworth-Parkside was able to get funding only because of the dynamic and combined efforts of Kimi Gray and Jack Kemp. Although similar programs, such as the one run by Bertha Gilkey in St. Louis, have met with some success,⁶⁷ she too has close ties to Kemp.⁶⁸ It is

62. *Legislative History of 1990 ACT*, *supra* note 17 at 104 Stat. 5848-51. The 1990 ACT has attempted to remedy these problems. Selection criteria for homeownership now includes an evaluation of whether the applicant has the both the ability and the commitment to succeed as a homeowner, 42 U.S.C. § 1437aaa-2(e)(1)-(8) (1991). In addition, "[p]roperty pledged under this title shall not be pledged as collateral for debt. . . ." *Id.* at § 1437aaa-3(e)(2). However, if the Secretary determines that such a move would not endanger others in the area who seek property and it would not cause harm to the participants, the property may still be pledged as collateral. *Id.* at aaa-3(e)(2)(A)-(D). With these qualifiers, it seems that the dangers of a new homeowner defaults still exist.

63. *A Historic Event For Homeownership*, Wash. Post, Nov. 25, 1990 at C8; *Washington at Work; Jack Kemp's Favorite Public Housing Tenant*, N.Y. Times, Jul. 13, 1990 at A1, col. 2; *Bush Housing Proposals Reflect Kemp Philosophy; Initiative Based on Theory That Home Ownership is Best Approach to Poor*, Wash. Post Nov. 12, 1989 at A9; Osborne, *They Can't Stop Us Now*, Wash. Post Jul. 30, 1989 at W12; Cramer, *Turning Public Housing Over to Resident Owners: A Welfare Mother of Five Who Organized a Housing Complex Sparks A National Controversy*, TIME, Dec. 12, 1988 at 15.

64. See sources cited *supra* note 63.

65. March 1990 Hearing, *supra* note 17 at 22 (Statement of Sec. Jack Kemp).

66. *Kemp Assails Senate Funding Curbs; HUD Head and Sen. Mikulski Tangle Over Tenant Homeownership Plan*, Wash. Post, Sept. 29, 1990 at A6 (where Senator Barbara A. Mikulski (D-Md.), chair of the subcommittee that controls the budget for HUD held up the funds that would allow Kenilworth-Parkside to become a tenant owned project).

67. DeParle, *Cultivating Their Own Gardens*, N.Y. Times, Jan. 5, 1992 at 22-48 (an

feared that the fate of tenant management programs is more tied to the efforts of charismatic and strong figures, such as Gilkey and Gray, than to the fundamental soundness of the program.⁶⁹

Proponents of HOPE 1 admit that the Kenilworth-Parkside development has had some problems, but disagree as to their cause. The wastefulness of PHAs has been cited as the major reason why public housing is in trouble.⁷⁰ Bertha Gilkey, owner of the St. Louis development, has stated that "[t]he worst tenant management system in this country is 90 times better than the Housing Authority."⁷¹ Proponents also argue that the PHAs deliberately stand in the way of tenant management and ownership because they have grown accustomed to receiving the aid themselves, and are fearful of the loss of power.⁷² Lastly, Justin Milberg of the National Center For Neighborhood Enterprises has declared Kenilworth-Parkside to be a success based on the change in the quality of life for its residents: children are doing better in school, teenage pregnancy has dropped, the vacancy rates have dropped, and rent collection is up.⁷³

III. THE ONE-FOR-ONE REPLACEMENT REQUIREMENT

Although subsidized housing plans have appeared under various guises since the 1960's, Congress' commitment to maintaining the supply of public housing has not wavered. The principal policy that realizes this goal is known as "one-for-one" replacement. According to the rules of "one-for-one" replacement, every time a unit of public housing is demolished or converted to another use, it must be replaced, in order to maintain the current supply of public housing stock.⁷⁴ To administer this rule, HUD requires that any entity that engages in demolition or conversion must file a plan with HUD that describes how the replacement will be met.⁷⁵ Even with this replace-

evaluation of the Cochran Gardens tenant management project in St. Louis, operated by Bertha Gilkey).

68. *Id.* at 32.

69. *Id.* at 22-25. "Administration officials [responded][by] say[ing] there are Bertha Gilkeys everywhere, capable of seizing control of their communities." *Id.* at 25.

70. *See supra* note 63.

71. DeParle, *supra* note 67 at 25.

72. Milberg and the National Center For Neighborhood Enterprise have alleged that at Kenilworth-Parkside, the PHAs mismanagement caused many of the numerous delays and cost overruns that were later used to accuse the project of being a failure. *See The Silent Scandal*, *infra* note 81; Milberg interview, *supra* note 14.

73. Milberg interview, *supra* note 14.

74. 42 U.S.C. §§ 1437(p)(b) (1990).

75. 42 U.S.C. §§ 1437(p)(b) (1990).

ment policy, long waiting lists demonstrate that demand still outweighs the supply of public housing units.

The one-for-one replacement program, however, has been accused of being a major obstruction for the HOPE 1 program. Since the program takes public housing and converts it to private housing, the tenants must file a "one for one" replacement plan for every unit that is to be converted to homeownership.⁷⁶ Residents who seek to own their units must be able to finance both the purchase and the replacement program. It is equally expensive for a PHA which seeks to convert abandoned public housing units into owner-occupied units.⁷⁷

Supporters of tenant homeownership charge that it is this replacement requirement that has stood in the way of the HOPE program.⁷⁸ It has been through the efforts of these supporters that the "one-for-one" replacement program is being systematically dismantled. Coinciding with the rise of the HOPE 1 program, numerous schemes have been unleashed that diminish the commitment to "one-for-one" replacement. For example, it is now possible for a party to merely issue a Section 8 housing voucher and never have to file a plan to physically replace each lost unit.⁷⁹ More extreme is a plan

76. 42 U.S.C. § 1437(s)(3)(iv) (1990)(as amended by 42 U.S.C. § 1437aaa-3(g) (1991)).

77. The tenant homeownership program also can involve abandoned or substandard housing that a PHA seeks to rehabilitate and convert to owner-occupied units. 137 CONG. REC. H4101, H4112 (June 6, 1991) (daily ed.) (Statement of Rep. Michel). The terms of this sale are similar to the terms of the sale from the PHAs to the RMCs. See *infra* note 79 (describing the terms of the sale of the rental units to the tenants).

78. 137 CONG. REC. H4101, H4106 (June, 6, 1991) (Statement of Rep. Green). Initially, HOPE 1 was a demonstration program involving 2000 units. *Id.* Nevertheless, only 343 units were sold to tenants in the first six years of the program. *Id.* at 4110 (Statement of Rep. Stokes).

79. 42 U.S.C. § 1437f(b)(3)(B)(i) (1990). Theoretically the voucher substitute will not be acceptable to HUD unless it is determined that there is an adequate supply of public housing in the area so that those who are waiting for housing will be able to find it with the vouchers that will be issued. *Id.* If a five-hundred unit public housing project is sold to its tenants, the local housing authority would not have to build or renovate five-hundred more units, they would merely be required to issue five-hundred housing vouchers. Bethell, *Keeping Them On the Plantation; Public Housing Reform Rebuilding America: A Citizen's Guide*, 42 NAT'L REV. 85 (May 28, 1990).

The enormous dissatisfaction with this move away from "one-for-one" replacement and towards vouchers was demonstrated by the fact that Rep. Fauntroy, an initial sponsor of the 1987 ACT, was part of an active protest against HUD's policies on the day that Kenilworth-Parkside was set to open. Bethell, *Keeping Them On the Plantation; Public Housing Reform Rebuilding America: A Citizen's Guide*, 42 NAT'L REV. 85 (May 28, 1990); Gwenelfill, *Bush Housing Proposals Reflect Kemp Philosophy: Initiative Based on Theory That Home Ownership is Best Approach to Poor*, Wash. Post Nov. 12, 1989 at A9. This 1987 ACT is known as

that creates "one-for-two" replacement,⁸⁰ created in response to the charges that a "one-for-one" replacement plan was financially prohibitive.⁸¹

Equally as alarming as this latter proposal has been the reformulation of HUD policy, as the ideal of "one-for-one" replacement becomes diluted by statutory semantics. While HUD has kept its commitment to replacing public housing that is demolished or converted to something other than public housing, it has recently been determined that owner-occupied units that are rehabilitated and remain owner-occupied do not have a negative impact on the housing supply and thus are not subject to the replacement housing rules.⁸² As more and more units become owner-occupied, the waiting list for Section 8 housing continues to grow and the number of available units of public housing continues to shrink.

Resident management programs are to be applauded for their efforts to improve the quality of life for those living in the projects. Despite the many problems that have to be overcome, these programs should be allowed to flourish. Resident homeownership programs are more problematic. The goal of fiscal responsibility is ad-

the Kemp-Fauntroy Act.

A disturbing pattern may be emerging. The 1990 ACT was originally sponsored by Rep. Gonzalez, who ultimately protested the final draft of the legislation on the grounds that it threatened to slash the budgets for other public housing programs. *Gonzalez Raps Bush Treatment of Housing*, NAT'L MORTGAGE NEWS, Feb. 11, 1991, at 19.

80. *Legislative History of the 1990 ACT*, *supra* note 17 at 104 Stat. 5942-43.

81. *Id.* This is only to be implemented if the relevant project has experienced a 35% vacancy rate for each of the past five years, if the vacancy rate in the area is less than 10%, and it is a severe economic distress area. *Id.* At first glance, this program makes sense because facilitates either the conversion or demolition of housing that does not serving the community. However, during the Reagan administration, HUD, under Secretary Pierce, was shaken by a series of scandals, many of which involved scheming developers who defrauded the government out of millions of dollars that had been intended for public housing residents. See Wolf, *HUD and Housing in the 1990s: Crisis in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545 (1991) (detailing the scandals that have plagued HUD and the scars that these problems have left on current efforts). Moreover, critics of PHAs charge that the PHAs are wasteful and do not pursue policies that benefit the residents. See *The Silent Scandal: Management Abuses in Public Housing, A Special Report issued by the National Center For Neighborhood Enterprise* (1991) [hereinafter *The Silent Scandal*]; Milberg interview, *supra* note 14. Sometimes, public housing units have vacancy rates of almost 20% and there are still have long waiting lists. *Id.* Notably, in the Cabrini-Green development in Chicago, and the Lake-over-Terrace development in Cleveland, developers have found that these projects occupy land that is now worth far more than it was when the public housing was built. By evicting the current occupants, it could be possible, under this "two for one" scheme for the owners to demolish these projects and reap huge profits, even though the vacancy rates were grossly distorted.

82. 55 Fed. Reg. 29296 (to be codified at 24 C.F.R. § 570 (1991)).

mirable, but pushing low-income residents prematurely into purchasing their units has the potential to be a disaster. "This administration should stop fighting to reduce funding for public housing and discard this pie-in-the-sky notion that homeownership is the key to overcoming poverty. . . without adequate health care [and][the] possibility of decent education [this] is a dream that will dry up like raisin in the sun."⁸³ National housing policy should not include plans that lead to the reduction in the supply of public housing.

Throughout this entire debate, many voices have been heard. The voices that we have not heard belong to the low-income persons and families who are floundering on long waiting lists for public housing. The next section is devoted to formulating ways for these families and persons to protect themselves from being mere bystanders as the supply of public housing stock continues to dwindle.

IV. THE PURSUIT OF POLICIES THAT REDUCE THE SUPPLY OF PUBLIC HOUSING: AN ADMINISTRATIVE LAW ANALYSIS

HUD, an administrative agency of the Executive Branch, was created by Congress in order to coordinate and pursue the nation's housing and urban development policies.⁸⁴ HUD is required to implement the policy goals that Congress and the President have dictated.⁸⁵ The Agency is subject to the Administrative Procedure Act (APA),⁸⁶ which is designed to ensure that agencies do not abuse their discretion or abide by improper procedures.⁸⁷ As with all executive agencies, any claimant with a grievance must have exhausted all remedies within the agency before seeking an outside forum.⁸⁸

A review of the relevant HUD regulations demonstrates that they provide little source of hope for those families and persons on the waiting lists. Initially, when an applicant applies for Section 8

83. 137 CONG. REC. H4101, H4108 (June 6, 1991) (Statement of Rep. Clay).

84. 42 U.S.C. § 3531 (1983).

85. See MANDELKER, *supra* note 13 at 58-65.

86. 5 U.S.C. § 701-6 (1989).

87. *Id.* at 706. Agency rulings are set aside if they are found to be unlawful or their actions, conclusions or findings are:

(A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence. . . (F) unwarranted by the facts to the extent that facts are subject to trial de novo by the reviewing court.

Id. at 706(2)(A)-(F).

88. 42 U.S.C. § 704 (1989).

housing, he receives only an invitation to make an application.⁸⁹ Applications may be refused on the grounds that there are fiscal problems or that the waiting lists are too long.⁹⁰ The PHA merely creates a waiting list;⁹¹ the agency is not compelled to monitor how long the people wait on such lists.⁹² HUD has spoken quite clearly:

Except with respect to a claim for [f]ederal preference . . . nothing in this part is intended to confer on an applicant for participation any right to be listed on a PHA waiting list, to any particular position on a waiting list, to receive a housing voucher, or to participate in the PHA's Housing Voucher Program . . .⁹³

HUD has also indicated that the foregoing "does not affect or prejudice any right, independent of this part, to bring a judicial action challenging a PHA's violation of a constitutional or statutory requirement."⁹⁴ In order to obtain judicial review of an agency proceeding, the party must be "adversely affected or aggrieved by [that] agency action. . . ."⁹⁵ Families and persons on waiting lists are harmed by HUD policies that lead to the reduction of the supply of public housing, and therefore should have standing to seek relief under this act.⁹⁶ The decisions of administrative agencies are usually deferred to because these agencies are viewed as the sources of expertise in the areas that they have been entrusted to administer.⁹⁷ Thus judicial review exists as a check on the power of administrative agencies.⁹⁸

The U.S. Supreme Court has determined that the usual amount

89. 24 C.F.R. § 882.203 (1991).

90. See *supra* p. 243. However, "[e]ven if the PHA is not accepting additional applications for participation because of the length of the waiting list, the PHA must place the applicant on a waiting list if the applicant is otherwise eligible for participation and claims that the family qualifies for a [f]ederal preference." 24 C.F.R. § 887.153(c) (1991). This federal selection preference is offered when a family, at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or are paying more than 50% of family income for rent. *Id.* at § 887.157(a).

91. 24 C.F.R. § 887.153(a) (1991).

92. See 24 C.F.R. § 887.153 (1991).

93. 24 C.F.R. § 887.153(d) (1991).

94. *Id.*

95. 5 U.S.C. § 702 (1989).

96. *Id.* In an APA proceeding against HUD where public housing units were being demolished, it was recognized that "[t]enants and other affected interests must be heard." *Cole v. Lynn*, 380 F. Supp. 99 (D.D.C. 1975) (emphasis added).

97. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Council*, 435 U.S. 519 (1978).

98. See *supra* note 87 and accompanying text.

of deference to agency decisions is not appropriate when the agency has adopted policies that conflict with the original purposes of Congress.⁹⁹ "When a court reviews an agency's construction of the statute it administers. . . the court. . . [and] the agency must give effect to the unambiguously expressed intent of Congress."¹⁰⁰ "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to the clear congressional intent."¹⁰¹

On the other hand, if it is found that Congressional intent is ambiguous, then "the question for the court is whether the agency's [policy]. . . is based on a *permissible* construction of the statute."¹⁰² Therefore, the court allows much more deference to the Agency where there is an alternate permissible reading of the statute.¹⁰³

From a surface reading, it appears that a court reviewing HUD policies that modify the "one for one" replacement policy should find them in violation of the APA, because they frustrate the goals that Congress sought to uphold when it created the policy of "one for one" replacement.¹⁰⁴ As already stated, Congress has repeatedly upheld their commitment to one for one replacement as a necessity to ensure that the supply of Section 8 housing does not diminish.¹⁰⁵

However, the legislative intent of Congress has been far more ambiguous in the Section 8 area. Because Congress has deliberately allowed the policy of "one for one" replacement to become modified¹⁰⁶ in an attempt to make it easier for tenants to become homeowners, opponents argue that the Congressional intent is ambiguous.¹⁰⁷ Congress is torn between protecting those on the waiting lists and providing homeownership opportunities for those who already have units.¹⁰⁸ Consequently, it is doubtful that HUD's policies can be questioned because "[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it ap-

99. *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143 (1984) (quoting *FEC v. Democratic Senatorial Committee*, 454 U.S. 27, 32 (1981)).

100. *Chevron*, 467 U.S. at 842-3.

101. *Id.* at 843 note 9.

102. *Id.* at 843. (emphasis added)

103. *Id.*

104. See *supra* notes 74-5 and accompanying text.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Legislative History of 1990 ACT*, *supra* note 17 at 5844; 137 CONG. REC. H4101, H4104 (June 6, 1991)(Statement of Rep. Kolbe).

pears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."¹⁰⁹

Likewise, the voucher program, which also seems to accommodate these conflicting policies, is likely to be upheld. Despite the weaknesses of the voucher program,¹¹⁰ it is doubtful that it would be found to be "arbitrary, capricious, or manifestly contrary to the statute."¹¹¹ Moreover, in theory, the voucher program still encompasses "one for one" replacement.¹¹² The "one for two" replacement plan may become more than just a demonstration program,¹¹³ as HOPE 1 gains momentum.¹¹⁴

As such schemes become more entrenched, it is likely that any pretext of accommodation will be shattered. APA review must "also consider the consistency with which an agency interpretation has been applied"¹¹⁵ and the "legislation and its history."¹¹⁶ While the HOPE 1 program has gained popularity recently, the policy of maintaining and replenishing the supply of public housing has been a consistent Congressional theme for over fifty years.¹¹⁷ Proponents of HOPE 1 claim that they do not want the program to threaten those on the waiting lists.¹¹⁸ Applicants stranded on the waiting lists need more than wishful thinking; they need protection. If the reviewing court considers that both HUD and Congress are implementing policies that deviate from over a half a century of established practices, then it should find its within its power to rule in favor of those on the waiting lists.

An APA ruling in favor of the applicants would enable the them to obtain a preliminary injunction enjoining HUD from pursuing tenant homeownership policies which do not adequately protect

109. *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

110. See *supra* notes 39-47 and accompanying text.

111. *Chevron*, 837 U.S. at 844.

112. See 42 U.S.C. § 1437 (1990 & Supp. 1991).

113. See *supra* notes and accompanying text; 1990 ACT § 513 (expiration date is Sept. 30, 1992).

114. After all, it was only in 1983 that the voucher program began as a demonstration program. MANDELKER, *supra* note 13 at 147. By 1987 this money-saving and controversial program was made permanent. *Id.*

115. *NLRB v. United Food & Comm. Workers Union*, 484 U.S. 112, 124 n. 20 (1987) (citations omitted).

116. *Chevron*, 467 U.S. at 845.

117. 1937 ACT, *supra* note 4.

118. *Legislative History of 1990 ACT*, *supra* note 17 at 5844; 137 CONG. REC. H4101, H4104 (June 6, 1991) (Statement of Rep. Kolbe).

the supply of public housing.¹¹⁹ This would give proponents of the applicants an opportunity to lobby HUD and Congress for changes in this program that would offer real protection for the applicants.¹²⁰ Nevertheless, any success at this stage would be limited because a reviewing court lacks the authority to declare that these applicants have any tangible rights that must be protected.¹²¹ Therefore, we must look to additional ways to protect these applicants.

V. THE SECTION 1983 CLASS ACTION¹²²

In order to define, establish and protect their right to housing, these applicants need constitutional protection. The fifth amendment of the United States Constitution states that "[n]o person shall be . . . deprived of . . . property without due process of law."¹²³ A Section 1983 cause of action is invoked to privately enforce a Fifth amendment property interest.¹²⁴ Persons and families on the waiting lists for Section 8 housing, whose entry into such housing is threatened by the homeownership programs, could file a Section 1983 cause of action against HUD and the relevant PHA's to pro-

119. See *Cole*, 398 F. Supp. at 105; 5 U.S.C. § 706(2) (1989).

120. See *infra* pp. 262-263.

121. See 5 U.S.C. § 706(1)-(2) (1989).

122. A class action of this nature would be modeled after the one that was initiated in *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. 1990). *Tinsley* is a class action that was filed against HUD in order to prevent them from engaging in de facto demolition. *Id.* at 1003. Ordinarily, when HUD demolishes a unit of public housing, they must replace it with another unit or voucher. *Supra* notes 74-75 and accompanying text. De facto demolition allegedly occurs when HUD/PHA allows a public housing unit to become so dilapidated that it no longer can be used as public housing. *Id.* The plaintiffs in *Tinsley* claimed that "[d]espite the alleged de facto demolition . . . [the housing agency] has not developed post demolition plans" *Tinsley*, 750 F.Supp. at 1004. This includes not filing a replacement plan or a tenant relocation plan. See *id.*

This action included a class homeless plaintiffs who were on waiting lists to get into this allegedly neglected building. *id.* The district court held that these people on the waiting list were certifiable as a class and therefore the litigation was allowed to continue. *Id.* at 1004. These requirements were that the class is so numerous that joinder of all members is impracticable, that there are common questions of law or fact in common to the class, that the claims are typical to those of the class, and that the representative parties will fairly and adequately protect the interests of the class. *Id.* at 1004.

Similarly, the proposed class opposing policies that reduce the supply of public housing should also be certified: there are thousands of families on waiting lists, they all are threatened by these policies, and they all need housing. The only remaining task would be to choose a representative.

123. U.S. CONST. AMEND V.

124. 42 U.S.C. § 1983 (1990). Persons and families on the waiting lists for section 8 housing should simultaneously seek declaratory relief, which allows federal courts to declare that certain persons have constitutionally protected rights. See 28 U.S.C. § 2201 (1977).

tect their interests.

Initially, the applicants would encounter difficulty in maintaining an action because of the doctrine of ripeness. The court may reject a case that it has been brought too early; it is not yet a case and controversy within the jurisdiction of the judiciary branch of government.¹²⁵

The plight of those on the waiting lists would seemingly fall into this category. The waiting lists are still in existence; no government entity is depriving those waiting from the right to keep waiting. A reviewing court may reject this claim because there has been no direct government action and thus there is no real controversy.

However, if a court refuses to hear the case, rights of those on the waiting list may never be vindicated. This is contrary to the Supreme Court position followed since Chief Justice Marshall asserted that where a legal right is violated, the victim is entitled to a remedy.¹²⁶

Moreover, a comparable exception exists to the related mootness doctrine exists when the practice in question is considered to be an [action] capable of repetition, yet evading review.¹²⁷ This includes situations where harm resulted from an agency action, but the agency repealed the action before the case came to adjudication.¹²⁸ The reasoning for the exception—that the actor will ultimately never be held responsible for his wrongs and his victim's grievance will never be answered if the case is declared moot—is equally applicable in this instance to the ripeness doctrine.¹²⁹

125. U.S. CONST., art. III, Sec. 2.; see also *United Public Workers v. Mitchell*, 298 U.S. 238 (1936).

126. Chief Justice Marshall opined:

The very essence of civil liberty certainly consists in the right of every person to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws and not of men. It will most certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

127. *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

128. NOWAK, ROTUNDA, & YOUNG, *CONSTITUTIONAL LAW* at 60 (3d ed. 1988).

129. The applicants face a similar problem on the issue of standing. In order to have standing to sue, the parties "must demonstrate that they have suffered or are threatened with a direct injury with a fairly traceable causal connection between the injury and the challenged conduct of the defendant. . . ." *Walker v. Pierce*, 665 F. Supp. 831, 845 (N.D. Cal. 1987). The plaintiffs should assert that they are threatened by the systematic reduction of the supply of public housing stock through the modification in the one for one replacement requirements. See Note, *Are Applicants for Section 8 Housing Subsidies "Entitled" to the Benefits?*, 1985

VI. ANOTHER THRESHOLD ISSUE: DEFINING PROPERTY UNDER THE FIFTH AMENDMENT

Although there is constitutional protection against government¹³⁰ deprivation of property under the Fifth Amendment,¹³¹ the question of what constitutes property is as yet undecided. Traditionally, the definition only encompassed classic notions of real and personal property¹³² and did not include government benefits.¹³³ However, the Supreme Court held in *Board of Regents v. Roth*,¹³⁴ that the term 'property' is to be interpreted broadly, and that the framers of the Constitution meant it to be an evolving notion, one that would grow with the experience of the nation.¹³⁵ This holding was consistent with the Supreme Court's earlier holding in *Goldberg v. Kelly*,¹³⁶ which held that welfare benefits are a matter of statutory entitlement for those persons qualified to receive them,¹³⁷ and that welfare benefits are more like property than a gratuity.¹³⁸

ILL. L. REV. 757, 759 (1985).

130. There is little doubt that this potential case will meet the prerequisite that it involves government action. "The Due Process Clause of the Fifth Amendment applies to and restricts only the federal government and not private persons." Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483, 487 (9th Cir. 1974). It is recognized that when the HUD is involved in joint undertakings, the other participants in such ventures are subject to a Section 1983 Action, and vice versa. *Id.* The state action requirement is met when dealing with Section 8 housing because the PHAs and the LHAs are state and local actors which are heavily regulated by HUD.

A court deciding on a claim by those on the waiting lists must decide whether the agency (HUD), in enacting the regulations (Section 8 housing), provided remedial devices sufficient enough to preclude private action under Section 1983. *Victorian v. Miller*, 813 F.2d 718, 728 (5th Cir. 1987). In *Wright*, 479 U.S. at 418, the Supreme Court examined the wording of a similar provision in the United States Housing Act, The Brooks amendment, which dealt with rent ceilings in low-income housing. *Wright*, 479 U.S. at 419-20, and when analyzing the procedural devices available to potential victims, held "that these remedial devices were insufficient to foreclose a 1983 cause of action." *Wright*, 470 U.S. at 426-29. Although 42 U.S.C. § 1437(d)(k) (1990) provides that HUD shall require each public housing agency to resolve tenant management disputes, *Wright* held that these remedial devices were not comprehensive and effective enough to preclude a private § 1983 cause of action. *Id.*

131. U.S. CONST. amend. V.

132. NOWAK, *supra* note 128 at 473.

133. *Id.* at 473.

134. 408 U.S. 564 (1972).

135. *Id.* at 571.

136. 397 U.S. 254 (1970).

137. *Id.*

138. "Society today is built around entitlement. . . [s]uch sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentially deserved, and in no sense a form of charity . . . [it] is only the poor whose entitlements. . . have not been effectively enforced." *Id.*, at 262 n.8. (quoting Reich, *Individual Rights and Social Welfare: Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)); see also

Of course in the more than twenty years since *Goldberg*, the position of the Supreme Court has radically changed. "[T]he Supreme Court has not required the government to establish fair procedures for the initial allocation of benefits."¹³⁹ In general, where the deprivation of government benefits is at issue, the Court's position has generally been that welfare benefits are not property and that lower standards apply.¹⁴⁰

It is generally accepted that recipients of Section 8 housing benefits have a property interest to which they have a legitimate entitlement.¹⁴¹ In *Williams v. Barry*,¹⁴² this concept was expanded. In *Williams*, a shelter for homeless men was going to be closed.¹⁴³ The closing was opposed by a class comprised of homeless men that had been living in the shelter.¹⁴⁴ The District Court of the District of Columbia enjoined the shelter from closing and held that these men had a constitutionally protected property interest in the continued occupancy at the shelter.¹⁴⁵

In *Ressler v. Pierce*,¹⁴⁶ the Ninth Circuit held that low income persons had a constitutionally protected property interest solely "by virtue of . . . membership in the class of individuals whom the Section 8 program was intended to benefit."¹⁴⁷ This decision has been flatly rejected in some jurisdictions,¹⁴⁸ which have focused on the distinction between publicly owned Section 8 housing and privately

Reich, *The New Property*, 73 YALE L.J. 733 (1964).

139. NOWAK at 477.

140. *Id.* at 476-78. See also, Houseman, *Symposium: The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: The Validity of Goldberg v. Kelly to Welfare Advocacy in the 1990's* 56 BROOKLYN L. REV. 831 (1990).

141. See *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir. 1982) ("[s]ection 8 housing tenants have a protected property interest. . . ."); *Ward v. Downtown Development*, No. 85-5133, slip op. (11th Cir. 1986) ("tenancy, no matter the duration, is a property interest"); *Williams v. Barry*, 490 F. Supp. 941, 945 (D.D.C. 1980) (occupancy in public housing gives rise to property interest).

142. 490 F. Supp. at 946.

143. *Id.*

144. *Id.*

145. *Id.* at 947.

146. 692 F.2d 1212 (9th Cir. 1982).

147. *Ressler*, 692 F.2d at 1215-16. For a detailed and insightful analysis of the Section 8 program, the *Ressler* decision, and why property rights should be conferred solely because of membership in the target class of applicants, see, e.g., Note, *supra* note 129. While this note focuses on the waiting lists as an additional source of rights, it will be necessary to confront some of the same issues that this Note covered.

148. See *Hill v. Housing Dev. Corp.*, 799 F.2d 385 (8th Cir. 1986); *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984); *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816 (4th Cir. 1984).

owned Section 8 housing.¹⁴⁹ *Hill v. Housing Development Corp.*¹⁵⁰ held that applicants to privately run public housing did not have a constitutionally protected property interest in the receipt of these benefits because of the high degree of autonomy that private owners of public housing had in the tenant selection process.¹⁵¹ That the plaintiffs were in the target class was held insufficient to establish that they had a constitutionally protected property interest, because there were other criteria that the private owners themselves could establish that would keep out these applicants.¹⁵²

Hill, also held, however, that applicants to conventional public housing have more procedural safeguards than applicants to privately owned public housing.¹⁵³ All dealings with the units that are to be converted to homeownership are conducted with the knowledge that HUD retains the right to review all decisions made about the units.¹⁵⁴

The Fourth Circuit also has denied due process protection to applicants in *Phelps v. Housing Authority of Woodruff*.¹⁵⁵ *Phelps* held that contrary to *Ressler*, public housing applicants had no constitutionally protected property interests. Footnote 11 of that opinion

149. There are three types of public housing that fall within the units covered by Section 8 housing: newly constructed, rehabilitated, or existing. There are three types of contracts that are available for any of these latter forms of housing: a unit or potential unit can either be owned by a Public Housing Authority (PHA), with the contract being administered by HUD (this type of housing is known as publicly-owned public housing), privately owned with HUD as the contract administrator or privately owned with a PHA as the contract administrator (both of these latter types are known as privately-owned public housing). See 24 C.F.R. 880.103 (Apr. 1991).

150. 799 F.2d 385 (8th Cir. 1986).

151. *Id.*

152. *Id.*; see also *Phelps v. Housing Authority of Woodruff*, 742 F. 2d 816 (4th Cir. 1984) (held applicants to Section 8 housing who were denied housing were not entitled to due process).

153. See, *Hill*, 799 F.2d at 394, 397. The plaintiffs in *Hill* were applicants attempting to get into two privately owned apartment complexes. The court emphasized the fact that it was a privately owned building that the plaintiffs sought to enter, and also that actions concerning conventional public housing is subject to more scrutiny than public housing that is privately owned. It is reasonable to infer that since the housing that qualifies under the HOPE 1 Program is owned by a public entity, such as the PHA, HUD, or a RMC, those who are suffering a much longer wait due to the absorption of Section 8 housing into tenant owned units should be afforded greater procedural protection than those who sought to get into privately owned units. Government owners of public housing do not have the same latitude to refuse tenants; therefore, families floundering on long waiting lists should be afforded procedural due process in order to question the modification of the "one for one" replacement policy.

154. See 24 C.F.R. § 887 (1991); 42 U.S.C. § 1437(r)-(s) (1990)(as amended, by 42 U.S.C. § 1437aaa-aaa(5) (Supp. 1991)).

155. 742 F. 2d 816 (4th Cir. 1984).

states: "We do not necessarily disagree with *Ressler*. The claim to section 8 subsidies of one who is already a tenant in a qualifying public housing project seems to us much more ascertainable and 'property like' in character than the plaintiff[s'] [applicants] interest in any preference here."¹⁵⁶

The Fourth Circuit in *Phelps* seems to have ignored the *Roth* decision by the U.S. Supreme Court, which held that "property interests protected by procedural due process extend well beyond actual ownership of real estate. . . ." ¹⁵⁷ Moreover, *Carey v. Piphus*¹⁵⁸ held in a different context that persons who have been deprived of property under Section 1983 can sue, despite the fact that they can demonstrate no loss of benefits.¹⁵⁹ The Supreme Court's holdings imply that those on the waiting lists have rights that are ascertainable and that should not be denied due process merely because they have yet to take possession of public housing units.

Often, those on waiting lists for Section 8 housing do not know whether they will be placed in privately or publicly run public housing;¹⁶⁰ thus the reasoning of *Phelps* and *Hill* could be used to prevent anyone on the waiting lists from claiming HOPE 1 is depriving them of their entitlement. Those on the waiting lists could never prove that they would have moved into publicly, and not privately run, public housing. This would leave those on the waiting lists helpless while HOPE 1 smothers their chances of gaining the Section 8 housing that they have already been approved to live in.

Roth established that in order for a government benefit to be considered an entitlement there must be more than a unilateral expectation of a benefit.¹⁶¹ The person claiming that the benefit is an entitlement must have a concrete basis for making this claim, rather than just a hope that they may get the benefit.¹⁶² Examining the Section 8 housing program, one must conclude that those on the waiting lists have more than a mere unilateral expectation of receiving public housing. In addition to being part of the target class, those applicants who have been approved for Section 8 housing receive a letter informing them of their approval and that they will be pro-

156. *Id.*

157. *Roth*, 408 U.S. at 571-72.

158. 435 U.S. 247 (1978).

159. *Id.*

160. Bell interview, *supra* note 30.

161. 408 U.S. at 577.

162. *Roth*, 408 U.S. at 577.

vided with a unit as soon as one becomes available.¹⁶³

Recent efforts to make it more difficult to destroy public housing highlight a trend that recognizes the importance of Section 8 benefits. In 1987, Congress made it more difficult to demolish any form of public housing and required that all plans to demolish any form of public housing must be accompanied by plans to provide for "one-for-one" replacement of the units.¹⁶⁴ This concern for preventing the demolition of public housing was recognized several years later in *Tinsley v. Kemp*.¹⁶⁵ In *Tinsley*, the subject matter being dealt with was public housing buildings that were being 'demolished' by neglect. The court held not only that current tenants had a property interest in protecting their units, but also that those on the waiting list for units in the building had a property interest in ensuring that the units they were in line to receive were maintained in a suitable condition.¹⁶⁶

In sum, Congress and the *Tinsley* court have recognized that a property interest can include the ability for someone to ensure that their future benefit is not allowed to wither away without due process. The unique problem of these people on the waiting lists is that because their entrance into the units is contingent on the very existence of such units, it is possible that delay could be a permanent obstacle, keeping those on the waiting lists from ever receiving housing.¹⁶⁷ Just as rights exist to protect the condition of the public housing, similar protection should be afforded in order to ensure that the amount of such units does not shrink.

*Matthews v. Eldridge*¹⁶⁸ requires that once a program is determined to be an entitlement¹⁶⁹ the question is how much deprivation will be suffered by the recipient if the entitlement is cancelled or withdrawn.¹⁷⁰ The *Matthews* court developed a three part test to determine whether the process by which the deprivation was accom-

163. Bell interview, *supra* note 30.

164. See *Legislative History of 1987 ACT*, *supra* note 9 at 3420; see also *Summary of 1987 Federal Housing Legislation* 21 (pt. 2), Clearinghouse Rev. 1185 (Mar. 1988).

165. 750 F. Supp. 1001 (W.D. Mo. 1990); see *supra* note 122 (describing the facts of this case).

166. *Tinsley*, 750 F. Supp. at 1013-14.

167. Delay is recognized as one of the greatest threats to the recipients of welfare entitlements and those waiting for government benefits should be afforded procedural due process when confronted with great delays. See Reich, *The New Property*, 73 YALE L.J. 733, 750 (1964).

168. 424 U.S. 319 (1976).

169. *Id.* at 333, 336.

170. *Id.*

plished was constitutionally due. The three elements are the private interests at stake, the degree of risk that the procedures will lead to erroneous results, and the government interests affected.¹⁷¹

When HUD implements programs that will allow the amount of public housing units to decrease significantly, the private interests at stake are the potential losses that the needy persons and families will suffer by being deprived of their basic need of shelter. The risk resulting from these policies is that HOPE 1 may drastically reduce the supply of Section 8 housing available.

These latter private interests and risks are to be balanced against the government interest affected. In *Walker v. Pierce*,¹⁷² the District Court of Northern California referred to this as a balance of hardships.¹⁷³ "[T]he court finds that the balance of hardships tips decidedly in the plaintiff's favor. . . HUD's abilities to meet its budgetary goals for the current fiscal year do not carry substantial weight with the court."¹⁷⁴

VII. VICTORY IN A SECTION 1983 ACTION: WHAT WILL IT BRING?

Success in a 1983 Action could result in the issuance of a declaratory judgment.¹⁷⁵ The declaratory judgment would hold that the persons and families on Section 8 waiting lists have a constitutionally protected property interest in ensuring that HUD does not implement policies that will lead to the reduction of the supply of public housing. These applicants would now have a position, of strength from which to challenge these programs. The applicants could also seek an injunction enjoining the HOPE 1 program.

Roth and *Goldberg* established that at least there must be notice or a preliminary hearing before welfare entitlements can be taken away.¹⁷⁶ The applicants here may be confronted by a Court's view that due process hearings over Section 8 benefits are meaning-

171. *Id.*

172. 665 F. Supp. 831, 838 (N.D. Cal. 1987).

173. *Walker*, 665 F. Supp. at 843.

174. *Id.*

175. *See supra* note 128. A declaratory judgment could mean that a court would recognize that persons and families on Section 8 waiting lists have a constitutionally protected property interest in ensuring that HUD does not implement policies that will lead to the reduction in the supply of public housing. A declaratory judgment of this nature could bolster the success of a Section 1983 Action, leading a court to acknowledge the deprivation that would arise out of a diminished supply of housing. *See also, supra* note 124.

176. *See Roth*, 408 U.S. at 570 n.7; *Goldberg* 397 U.S. at 263.

less.¹⁷⁷ Shelter and survival are far from meaningless. Being involved in a hearing would allow these people to be aware of the HOPE 1 policies, and would enable them to ensure that new policies do not harm their interests.

CONCLUSION

The tenant homeownership program is one part of the effort to improve life in public housing projects. Unfortunately, "[e]mphasizing homeownership doesn't solve the problem of too many people for too little housing."¹⁷⁸

Congress must take steps to ensure that HUD maintains the original intent of the housing legislation, which is to provide low and moderate income persons and families with affordable housing. The notion that housing benefits are entitlements has been evolving ever since the Supreme Court held that the term property is a dynamic concept that will grow with the experience of the nation.¹⁷⁹ Courts today are recognizing that families on waiting lists can have a course of action against parties that threaten their future interest in public housing. Procedural safeguards are needed to ensure that those on the waiting lists have a means of redress against potential delays that may arise as a result of the HOPE 1 homeownership programs.

HOPE 1 should be amended by Congress to create a committee, independent of HUD, to observe the Section 8 waiting lists in area where such programs are the rise. If confronted with larger than usual delays, those on the waiting lists must be able to protect their entitlement and ensure that the policy of "one for one" replacement is upheld. The substitution of "one for one" replacement with vouchers and certificates should be closely monitored and if waiting lists become backlogged, it may be apparent that this substitution policy is a failure. Raising the quality of existing and future units are goals that must be met; substandard housing is unacceptable.

Experiments such as tenant management and ownership should be encouraged. However, no policy implemented by HUD should undermine the goal of providing low and moderate income persons and

177. *Eidson*, 745 F.2d at 453. For an expanded analysis of this issue see *Illinois Note*, *supra* note 129 at 781-3. This also recalls the last elements of the Section 1983 cause of action. Although the applicants will have problems seeking relief, this should not be a reason to bar them from trying.

178. Ifill, *Bush Housing Proposals Reflect Kemp Philosophy Initiatives Based on Theory That Homeownership Is Best Approach To Lodging Poor*, WASH. POST, Nov. 12, 1989 at A9.

179. *Roth*, 408 U.S. at 571.

families with housing, or threaten those who have already been approved to live in such units; policies that do, threaten to undermine the very existence of public housing programs.

Robert Bodzin