Legal Opinion: CLR-0002

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Subject: Implementation of Sec. 622 of HCDA of 1992

November 30, 1993

MEMORANDUM FOR: Joseph Shuldiner, Assistant Secretary for Public and Indian Housing, P

FROM: Nelson A. D¡az, General Counsel, G

SUBJECT: Implementation of Section 622 of the Housing and Community Development Act of 1992

The following responds to your request for advice on the legal opinion rendered by the law firm of Reno, Cavanaugh & Hornig concerning implementation of section 622 of the Housing and Community Development Act of 1992.

ISSUE: The issue is whether HUD's failure to issue final regulations for section 622 of the Housing and Community Development Act of 1992 (1992 Act)(which establishes the designated housing process) by the statutory deadline of April 28, 1993 requires HUD to proceed to review and approve or disapprove, within the time period set by statute, an allocation plan submitted by a public housing agency (PHA) that seeks to designate a public housing project for occupancy by elderly families.

SHORT ANSWER: No. Case law supports that courts would defer to HUD's decision that regulations are necessary for implementation of section 622, and allow HUD to promulgate regulations before implementing any part of section 622.

BACKGROUND: SECTION 622 OF THE 1992 ACT--NEW SECTION 7 OF THE 1937 ACT. Section 622 of the 1992 Act amended section 7 of the U.S. Housing Act of 1937 to provide PHAs with the option, subject to certain requirements, to designate public housing projects, or portions of projects, for occupancy by (1) disabled families, (2) elderly families, or (3) disabled and elderly families. New section 7 establishes criteria for approval of designated housing for disabled families and for approval of designated housing for elderly families. For approval of designated housing for elderly families, section 7(f) requires HUD to approve an allocation plan submitted by a PHA. For approval of designated housing for disabled families, section 7(e) requires HUD to approve an "application for designated housing for disabled families" (which application consists largely of a supportive services plan), and to meet all other requirements of section 7. Thus, approval of designated housing for disabled families requires HUD approval of the PHA's supportive services plan and its allocation plan. (A copy of section 622 is attached to this memorandum as Appendix A.)

THE CHALLENGE TO HUD'S AUTHORITY TO ISSUE REGULATIONS FOR SECTION 622. The issue stated above is before HUD for consideration because the Washington D.C. law firm of Reno, Cavanaugh & Hornig ("the Cavanaugh firm") advised its client, the Minneapolis Housing Authority ("MHA"), in an August 10, 1993 letter, that the MHA may proceed to develop, and submit to the Secretary of HUD, an allocation plan in accordance with section 622 of title VI of the 1992 Act, and that "the Secretary is obliged to approve or disapprove the plan within the 45 days set by statute regardless of the nonexistence of regulations." (A copy of the Cavanaugh firm opinion is attached to this memorandum as Appendix B.)

In the August 10, 1993 letter, the Cavanaugh firm stated its conclusion as follows:

> [I]t is our conclusion that HUD's position [that section 622 is not self-executing] is contrary to law. The particulars of the HCDA92 are consonant with general principles of administrative law, which presume laws to be immediately effective unless otherwise specified and which provide no support for the proposition that a person who is free to do something under existing law must await the issuance of regulations to see if they restrict the lawful act. We believe it was the clear intent of Congress, in this specific instance, that dilatory behavior by HUD not obstruct the ability of PHAs to designate elderly housing. There is no evidence of any specific belief on Congress' part that regulations were essential for the implementation of Title VI-B, and considerable evidence to the contrary. (Cavanaugh opinion, pg. 1)

The Minneapolis Housing Authority has not yet submitted an allocation plan to HUD. However, on October 8, 1993, the Housing Authority for the City of Milwaukee, WI, submitted to HUD an allocation plan accompanied by its request to designate a project for occupancy only by elderly families. Other housing authorities are expected to submit their allocation plans for elderly-only public housing within the upcoming weeks.

DISCUSSION OF, AND REBUTTAL TO, CAVANAUGH OPINION. The Cavanaugh firm cites to a number of cases in support of the advice provided to its client. The facts and holdings of these cases, and other cases not cited by the Cavanaugh firm, do not support the conclusion reached by the firm. The following provides a discussion of, and a rebuttal to, the August 10, 1993 opinion letter of the Cavanaugh firm.

1. The Statutory Language Provides Evidence that Section 622 Is Not Self-Executing and that Regulations Are Necessary for its Implementation. Although the Cavanaugh firm refers, at times, to all of section 622 (or title VI-B) as being self-executing and not requiring regulations, the Cavanaugh firm concedes that Congress intended for HUD to issue regulations for new section 7(e) of the 1992 Act, which pertains to designated housing for disabled families. The Cavanaugh firm contends, however, that Congress did not intend for HUD to issue

regulations for section 7(f), which pertains to designated housing for elderly families.

The Cavanaugh firm states in relevant part as follows:

> Where Congress in fact intended that a provision of the HCDA92 be supplemented by regulation, it said so specifically. Conveniently, there is no better illustration of this than what is now section 7(e) of the HCDA92, relating to designated public housing for disabled families. Here, the Secretary was explicitly directed to establish `forms and procedures for submission and approval of applications,' and was permitted to add to the statutory application factors `any other information or certification that the Secretary considers appropriate.' ***
>
> By contrast, subsection (f) dealing with elderly designation contains no reference whatsoever to Secretarial contributions. Indeed, the structure of its language suggests that Congress was limiting Secretarial discretion to modify or supplement it. Unlike subsection (e)(2), subsection (f)(2) contains no invitation for the Secretary to add elements to the allocation plan as he deems appropriate. *** (Cavanaugh opinion, p. 8)

The Cavanaugh firm proceeds to make the argument that since regulations are not needed for section 7(f), HUD cannot refuse to review and approve or disapprove an allocation plan submitted by a PHA for elderly-only housing on the basis of an absence of regulations. (Cavanaugh opinion, p. 9)

Whether regulations are necessary for implementation of section 622 (in part or in its entirety) is a decision that Congress explicitly authorized HUD to make.

Section 684 of the 1992 Act (Applicability) provides as follows:

> Except as otherwise provided in subtitles B through F of this title and the amendments made by such subtitles, such subtitles and the amendments made by such subtitles shall apply upon the expiration of the 6-month period beginning on the date of the enactment of this Act.

One of the "except as otherwise provided" provisions of subtitles B through F, which may preclude these subtitles from taking effect six months from the date of enactment of the 1922 Act, is found in section 685 (of subtitle F). Section 685 (Regulations) provides:

> The Secretary shall issue regulations necessary to carry out subtitles B through F of this title and the amendments made by such subtitles not later than the expiration of the 6-month period beginning on the date of the enactment of this

> Act. The regulations shall be issued after notice and opportunity for public comment pursuant to the provisions of section 553 of title 5, United States Code (notwithstanding subsections (a)(2),(b)(B), and (d)(3) of such section).

Section 685 clearly authorizes HUD to determine whether regulations are necessary to carry out subtitles B through F. That is, section 685 recognizes HUD's discretion to supplement section 622 by the establishment, through regulation, of additional requirements, criteria, or procedures as HUD may consider necessary to fulfill the statutory objectives of section 622.

HUD reviewed section 622, and made a decision that regulations were necessary for implementation of all of section 622.

Contrary to the position taken by the Cavanaugh firm, the language of section 7(f) does not suggest that Congress was limiting the Secretary's discretion to modify or supplement the provisions of section 7(f). Section 7(f)(2) provides as follows:

> (2) Contents. -- An allocation plan submitted under this subsection by a public housing agency shall include -- ***

A reasonable interpretation of the "shall include" language in section 7(f) is that the Secretary has authority to add requirements which the Secretary considers important to the approval of an allocation plan. HUD has construed the phrase "shall include" this same way in other HUD statutes.

For example, section 303(e) of the U.S. Housing Act of 1937 (42 U.S.C. 1437aaa-2), which pertains to the selection criteria for assistance under HUD's Hope for Public and Indian Housing Homeownership Program (HOPE I) provides that "The Secretary shall establish selection criteria for a national competition for assistance under this section, which shall include ***." The statute then recites mandatory selection criteria, and does not include a provision that expressly allows the Secretary to add other criteria as the Secretary considers appropriate. HUD, in implementing guidelines for the HOPE I Program, construed the "shall include" language of section 303(e) to permit HUD to add other selection criteria, which HUD did. (See Section 425 of Appendix A.V to 24 CFR Subtitle A.)

The Supreme Court has held that where an agency provides a reasonable interpretation of a statutory provision, a court may not substitute its own construction of the provision. (See Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 [104 S.Ct. 2778, 2782] (1984), Young v. Community Nutrition Institute, 476 U.S. 972, 981 [106 S.Ct. 2360, 2365] (1986).) The fact that another party may construe the language of section 7(f) to prohibit the Secretary from imposing additional criteria, and the fact that this construction may be equally reasonable, does not permit a court to substitute the other party's statutory construction for that of the agency's.

The Supreme Court has held that the view of an agency charged with administering a statute is entitled to considerable deference, and to sustain that view, a court need not find that the agency's view is the only permissible construction that the agency might have adopted, but only that the agency's construction is sufficiently rational. (See Train, Inc. v. NRDC, 421 U.S. 60, 75, 87 [95 S.Ct. 1470, 1489, 1485] (1975).)

HUD, exercising its discretion to establish additional allocation plan requirements as permitted by section 7(f), has added requirements in the draft regulation that are designed to ensure that non-elderly disabled families are not underserved by a PHA as a result of a designation of a public housing project for elderly families. However, even if HUD were to reverse its decision to impose by regulation additional allocation plan requirements, it remains within HUD's discretion to refrain from implementing section 7(f) without regulation if HUD determines that section 7(f) is significantly linked to the other provisions of section 622 for which regulations are determined necessary.

The Cavanaugh firm fails to note that an allocation plan is not submitted only when a PHA seeks to designate a project for occupancy by elderly families. The allocation plan also must be submitted by a PHA that seeks to designate a project for occupancy by disabled families. (See section 7(e)(1).) Thus, regardless of whether other requirements are added to the allocation plan, HUD may determine that it is unfair to disabled persons to only implement the designated housing process for elderly families while disabled families must await the completion of proposed and final rulemaking for designated housing for disabled families. (As discussed earlier, the Cavanaugh firm concedes that the Congress intended for HUD to issue regulations for section 7(e), which addresses the approval process for designated housing for disabled families.)

Despite the protections that the Congress provides in section 622 to preclude approval of an allocation plan that would adversely affect persons who are not members of the group for whom a project is to be designated, the fact remains that the designation of a public housing project for occupancy by a particular group can have the effect of reducing the availability of public housing for persons who are not members of that group. There may be other available HUD-assisted housing, but the availability of public housing may be reduced as a result of the designation process permitted by section 622. Thus, to allow the designated housing process to proceed for elderly families, and not for disabled families means that the availability of public housing may be reduced for non-elderly, disabled persons, and non-elderly, disabled persons will not have the opportunity to seek occupancy in designated housing for disabled families until HUD completes notice and comment rulemaking.

Additionally, there is no indication that the Congress envisioned or intended designated housing to be made available to elderly families before it is made available to disabled families, or vice versa. In establishing the designated housing process, the Congress, in the 1992 Act, did not take the same approach that it did in the National Affordable Housing Act

(NAHA) in establishing the Supportive Housing Programs for elderly persons and disabled persons. In NAHA, section 801 establishes the requirements and procedures for the Supportive Housing for the Elderly Program (12 U.S.C. 1701q), and section 811 establishes the requirements and procedures for the Supportive Housing for Persons with Disabilities Program (42 U.S.C. 8013).

In contrast to this approach, the Congress, in the 1992 Act, establishes the requirements and procedures for designating projects for elderly families and for designating projects for disabled families in a single statutory section -- section 622. A decision by HUD to implement, at one time, a single designated housing process that treats equally elderly families and disabled families, two groups competing for available public housing, is consistent with section 622 (which provides for one process), and should be found to be a reasonable and permissible agency policy decision.

Consistent with a policy choice to implement all of section 622 at one time (as opposed to piecemeal implementation) is the fact that HUD's regulatory input into the designated housing process does not necessarily end with approval of an allocation plan. Section 622 also establishes certain requirements that will govern a PHA's operation of approved designated housing. In this regard, section 7(a)(3) provides as follows:

> If a public housing agency determines (in accordance with regulations established by the Secretary) that there are insufficient numbers of elderly families to fill all the units in a project (or portion of a project) designated under paragraph (1) for occupancy by only elderly families, the agency may (pursuant to the approved allocation plan under subsection (f) for the agency) provide that non-elderly families who qualify for preferences for occupancy under section 6(c)(4)(A) may occupy dwelling units in the project (or portion). (Emphasis added)
>
> Thus, even were HUD to determine that no additional criteria should be added to the requirements of section 7(f), HUD may determine that additional requirements are needed to govern the operation of approved designated housing. Since it is anticipated that, following approval of allocation plans, PHAs will commence operation of designated projects as quickly as possible, regulations applicable to the operation of designated projects would need to be in place before HUD could approve a request to designate a project as provided by section 622.

Additionally, if, as the Cavanaugh firm claims, the Congress thought that regulations were not necessary for implementation of new section 7(f), or that the Congress did not intend for HUD to issue regulations for section 7(f), the Congress could have made section 7(f) effective upon enactment of the 1992 Act or upon a date certain, or alternatively, limited HUD's rulemaking authority to the remaining subsections of section 7, and excluded section 7(f) from rulemaking. The Congress took these courses of action in other sections of the 1992 Act as shown by the following.

Subsection (e) of section 162 of the 1992 Act (Housing Counseling) provides:

> The Secretary of Housing and Urban Development shall issue any regulations necessary to carry out the amendments made by subsection (d), not later than the expiration of the 6-month period beginning on the date of the enactment of this Act.

Subsections (a), (b) and (c) were not subject to the rulemaking provision of section 162.

Subsection (h) of section 509 of the 1992 Act (Mortgage Limits for Multifamily Projects) (and which consists of subsections (a) through (i)) provides:

> The Secretary of Housing and Urban Development shall issue regulations necessary to carry out the amendments made by subsections (a) through (g), which shall take effect not later than the expiration of the 1-year period beginning on the date of the enactment of this Act.

Subsection (b)(16) of section 853 of the 1992 Act (Community Investment Corporation Demonstration provides:

> This section shall become effective 6 months from the date of enactment of this Act.

Subsection (c) of section 932 of the 1992 Act (Disclosures under the Home Mortgage Disclosure Act of 1975) provides:

> The amendments made by subsections (a) and (b) shall apply with respect to information disclosed under section 304 of the Home Mortgage Disclosure Act of 1975 for any year which ends after the date of the enactment of this Act.

HUD's decision that regulations are necessary for implementation of section 622 (in part or in its entirety) is a decision supported by the language of sections 622 and 685 of the 1992 Act, and is an agency decision that case law supports a court would uphold.

2. HUD's Failure to Issue Regulations by the Statutory Deadline Does Not Mean that HUD Has Determined that No Regulations Are Necessary. In addition to providing evidence that Congress believed regulations may be necessary for implementation of title VI, title VI also provides evidence that Congress wanted the programs, definitions, procedures, and requirements set out in subtitles B through F of title VI effective and operational 6 months from the date of enactment of the 1992 Act.

For those programs, procedures, and requirements provided in title VI for which no regulations were determined necessary for implementation, section 684 of the 1992 Act provides that these programs, procedures, requirements would be effective six months

from the date of enactment. For those programs, services, procedures, and requirements provided in title VI, for which HUD, in its discretion, determined that regulations were necessary for implementation, section 685 requires HUD to issue final regulations (after providing the public with notice and an opportunity for public comment) 6 months from the date of enactment of the 1992 Act.

Given the clear intent of the Congress that the provisions of subtitles B through F (those that require regulations and those that do not) would be effective 6 months from the date of enactment, does HUD's failure to issue final regulations for section 622 make section 622 applicable commencing April 28, 1993 in accordance with section 684?

The response by the Cavanaugh firm to this question is yes. The Cavanaugh firm states that HUD's failure to issue regulations by the statutory deadline of April 28, 1993 is an admission by HUD that no regulations are necessary for implementation of section 622. The Cavanaugh firm states:

> In our view, these cases provide support for the argument that if HUD promulgated no regulations by April 26 although under statutory obligation to promulgate by that date `any regulations necessary,' then HUD's `complete response' should be deemed to be that no regulations are necessary. (Cavanaugh opinion, p. 4)

The cases cited by the Cavanaugh firm, however, do not address a situation comparable to the situation with section 622, which is that no regulations or any regulatory guidance has yet been issued by HUD.

In Hazardous Waste Treatment v. EPA, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989), petitioners challenged regulations issued by EPA on the basis of failing to include "necessary requirements" of the statute. The court dismissed the petition and stated:

> [A]n agency's failure to regulate more comprehensively is not ordinarily a basis for concluding that the regulations already promulgated are invalid. `The Agency might properly take one step at a time.' United States Brewers Ass'n v. EPA, 600 F.2d 974, 982 (D.C. Cir. 1979). Unless the agency's first step takes it down a path that forecloses more comprehensive regulation, the first step is not assailable merely because the agency failed to take a second. *** (861 F.2d at 287)

In Colorado v. Department of Interior (DOI), 880 F.2d 481 (D.C. Cir. 1989), the State of Colorado and three environment groups requested court review of final regulations issued by DOI. The petitioners claimed that the final regulations, published 4 years after the statutory deadline, were arbitrary, capricious and not in compliance with the provisions of the Comprehensive

Environmental Response, Compensation and Liability Act (CERCLA). In addressing the court's jurisdiction over this case, which was challenged by DOI, the court stated:

> We note that the rules at issue in this case are merely the first in a series of regulations intended to comply with section 301(c)(2)(A)'s mandate. *** In fact, DOI has already begun the process of promulgating type A regulations for natural resource damages in other environments. ***
>
> In our view, however, DOI's jurisdictional argument misreads section 301(c)'s statutory mandate and mischaracterizes petitioner's suit. Section 301(c)(1) expressly requires the President to promulgate natural resources damages assessment regulations `not later than' a date certain. That statutory deadline has now passed and the regulations promulgated to date therefore constitute the President's complete response in compliance with the statutory requirements of that section. *** Accordingly, even if DOI promulgates additional type A rules sometime in the future, petitioners' claim that the existing final regulations are unlawful remains reviewable by this court. (880 F.2d at 485-486.)

In Hercules Incorporated v. U.S. Environmental Protection Agency (EPA), 938 F.2d 276 (D.C. Cir. 1991), petitioners alleged that EPA's final regulations implementing certain sections of CERCLA were not in compliance with the express terms of the statute. In challenging the court's jurisdiction over this case, the court held, as it did in Colorado v. DOI, supra, that because the statutory deadline had passed, the promulgated regulations (notwithstanding that EPA may intend to issue further regulations) must be deemed the agency's complete response in compliance with the statute, and the regulations are therefore reviewable by the court. (938 F.2d at 282)

It is not evident how the holdings in the cases cited by the Cavanaugh firm (cases which involve judicial review of regulations issued by an agency after a statutory deadline) support the position that HUD's failure to issue its final rule on the designated housing process 6 months after the statutory deadline means that HUD's complete response is that no regulations are necessary.

HUD has publicly stated that it intends to issue regulations for section 622. (See sequence number 1564 in HUD's Regulatory Agenda published in the Federal Register on April 26, 1993 (58 FR 24382, 24434), and sequence number 1635 in HUD's Regulatory Agenda published in the Federal Register on October 25, 1993 (58 FR 56402, 56448).) HUD also has advised its Regional offices and Field Offices, housing authorities, and Senators and members of the House of Representatives who have inquired about the status of section 622, that HUD has determined that regulations are necessary for section 622, and are in development. Thus, HUD's failure to issue regulations by the

statutory deadline means only that HUD has missed the deadline.

Once HUD made a decision, in accordance with the authority provided by section 685, that regulations are necessary for section 622, the applicability provision of section 684 is moot. Section 684 only comes into play if HUD determines that no regulations are necessary. Section 684 does not come into play, as the Cavanaugh firm suggests, if HUD determines regulations are necessary, but misses the statutory deadline for issuance of regulations.

In contrast to the applicability language of section 684, see section 903(b) of the 1992 Act, which directs HUD to develop a release form that meets the requirements of section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, and provides specific instructions on what action is to be taken (or not taken) until that form is developed. See also section 104(c) of the Energy Policy Act of 1992 (Pub.L. 102-486, approved October 24, 1992), which clearly specifies the consequences of HUD's failure to issue final regulations by the date established in this section. Section 104(c) provides as follows:

> If the Secretary of Housing and Urban Development has not issued within 1 year after the date of enactment of this Act, final regulations pursuant to section 604 of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5403) that take effect before January 1, 1995, then States may establish thermal insulation and energy efficiency standards for manufactured housing if such standards are at least as stringent as thermal performance standards for manufactured housing contained in the Second Public Review Draft of BSR/ASHRAE 90.2P entitled `Energy Efficient Design of Low-Rise Residential Buildings' and all public reviews of Independent Substantive Changes to such document that have been approved on or before the date of the enactment of this Act.

If the Congress intended section 684 to be applicable if HUD missed the statutory deadline for issuance of regulations set forth in section 685, the above-described statutory sections indicate that the Congress would have specifically said so. Under the "reasonable statutory interpretation" principle enunciated in Chevron, supra, a court should find HUD's construction of section 684 is a reasonable one. That construction is that section 684 does not nullify HUD's authority to issue regulations under section 685 if HUD misses the statutory deadline set forth in section 685.

Additionally, case law indicates that courts are adverse to preclude agency rulemaking where an agency has stated that rulemaking is necessary.

In Public Citizen Health Research Group (PCHRG) v. Commissioner, Food & Drug Administration (FDA), 740 F.2d 21 (D.C.Cir. 1984), PCHRG petitioned the court to compel the FDA to

promulgate a rule requiring labels that warned that aspirin given to a child with influenza or chicken pox may increase the risk of the child developing Reye's Syndrome. On September 20, 1982, the Secretary of HHS announced that he had signed a proposed rule that would require the label warnings on aspirin as desired by the PCHRG. However, before publication of the proposed rule, the Secretary of HHS withdrew the rule, and on December 28, 1982, announced that HHS would issue instead an advance notice of proposed rulemaking on the labeling issue to seek a broad range of views in advance of the rulemaking process. PCHRG objected to the issuance of an advance notice of proposed rulemaking and requested that the court make a judicial decision that aspirin is misbranded as a matter of law. The court held as follows:

> Given the allocation of responsibility in the statutory scheme, PCHRG's request for initial judicial ruling on the misbranding issue amounts to an attempt to bypass the administrative process. Principles embodied in the requirement that a plaintiff exhaust administrative remedies suggest that such immediate judicial intervention would be precipitous. When Congress has allocated to an agency the power to decide certain questions in the first instance, `it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature, or frequently require expertise, the agency should be given the first chance to exercise that discretion or apply that expertise.' McKart v. United States, 395 U.S. 185, 194, 89 S.Ct. 1657, 1662 (1969). (740 F.2d at 29)

Courts recognize that although agencies have a duty to carry out, as expeditiously as possible, a specific mandate imposed by a particular statute, agencies must balance implementation of the specific mandate with the broader mandate that the Congress imposes on each agency. For HUD, that broader mandate is to provide the best administration of Federal programs which provide assistance for housing and for community development.

In Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, (1973), the Supreme Court, citing its holding in an earlier case, stated as follows:

> As we stated in Far Eastern Conference v. United States, 342 U.S. 570 574-575: `[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary

resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' (412 U.S. at 654)

HUD has a duty, under the 1992 Act, to PHAs, elderly families and disabled families to issue regulations for section 622 as quickly as possible so that these groups may take advantage of the benefits that designated housing is anticipated to provide. HUD, however, also has a duty to non-elderly families and non-disabled families, including families with children, to ensure that implementation of section 622 will not adversely affect all families served by HUD's public housing program. As stated earlier, designated housing may have the effect of reducing the availability of public housing for persons who are not members of the group for whom a project is to be designated. HUD's duty to non-elderly and non-disabled families, including families with children, may be carried out through the imposition of additional requirements and procedures that are designed to minimize any possible adverse impact the designated housing process may have on these families. Accordingly, a court should defer to HUD's decision that regulations are necessary for implementation of section 622.

3. HUD Has Not Unreasonably Delayed Issuance of Regulations for Section 622. The Cavanaugh firm claims that HUD has violated its duty of timeliness to issue regulations on the designated housing process by April 28, 1993. The Cavanaugh firm notes in its August 10, 1993 letter, that under the Administrative Procedure Act, an agency owes interested parties a duty not to "unreasonably delay" an agency action. (See 5 U.S.C. 555(b).) The Cavanaugh firm states that an agency has an obligation to carry out its activities in a timely manner, and that where the Congress has imposed statutory deadlines on an agency's activities, the agency is expected to comply with them.

The Cavanaugh firm is correct that agencies owe interested parties a duty not to unreasonably delay action, and the firm is also correct that HUD has missed the statutory deadline imposed for regulations necessary to implement section 622. However, failure to meet a statutory deadline does not appear to be sufficient in and of itself for a finding of unreasonable delay by a court. In fact, the Cavanaugh firm acknowledges in a footnote that "courts and commentators have noted the practical difficulties of enforcing that duty where an agency pleads incapacity to meet the deadline due to a lack of resources, conflicting priorities, and/or the time-consuming nature of the problem." (Cavanaugh opinion, fn. 2, p. 3)

The cases cited by the Cavanaugh firm do not provide support for the firm's conclusion that HUD has unreasonably delayed in the issuance of regulations for section 622.

In Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987), the Sierra Club sought declaratory and injunctive relief to compel the EPA to conclude rulemaking on whether to add strip mines to the list of pollutant sources subject to fugitive emissions

regulations issued under the "prevention of significant deterioration" program of the Clean Air Act. The court held that EPA's delay in concluding rulemaking had not been unreasonable. The court stated:

> [W]e must remember that Congress has assigned EPA a very broad mandate, not only under the Clean Air Act but also under a handful of other equally complex environmental statutes. Given that Congress provides EPA with finite resources to satisfy these various responsibilities, the agency cannot avoid setting priorities among them. As we have said, we can perceive no statutory command that EPA assign this rulemaking a higher priority than any of its other activities. (828 F.2d at 798)

In Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987), the court, in considering whether the Food and Drug Administration unreasonably delayed in implementing its over-the-counter drug review program, stated as follows:

> Any discussion of the standards relevant to the issue of delay must begin with recognition that an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings. An agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing. The agency's discretion is not unbounded, however, since the consequences of dilatoriness may be great. As we have had occasion to state, `[t]there must be a rule of reason' to govern the time limit to administrative proceedings. Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans. Moreover unjustifiable delay may undermine the statutory scheme and could inflict harm on individuals in need of final agency action. (818 F.2d at 896-897)

The court in Cutler set out the following criteria for determining where agency delay is unreasonable delay.

> Our cases identify a number of factors that aid in determining whether an agency's foot dragging constitutes unreasonable delay. First, the court should ascertain the length of time that has elapsed since the agency came under a duty to act, and should evaluate any prospect of early completion. Next, `[t]he reasonableness of the delay must be judged in the context of the statute' which authorizes the agency's action.' This entails an examination of any legislative mandate in the statute and the degree of discretion given the agency by Congress. The court must also estimate the extent to which delay may be undermining the statutory scheme either by frustrating the statutory goal or by creating a situation in which

> the agency is `losing its ability to effectively regulate at all.'
>
> Third, and perhaps most critically, the court must examine the consequences of the agency's delay. The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay. Economic harm is clearly an important consideration and will, in some cases, justify court intervention, and `[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake.' Lack of alternative means of eliminating or reducing the hazard necessarily adds to unreasonableness of delay.
>
> The agency must justify its delay to the court's satisfaction. If the court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable. If the court finds an absence of bad faith, it should then consider the agency's explanation, such as administrative necessity, insufficient resources, or the complexity of the task confronting the agency. Although complexity bears on avoidance in ascertaining reasonableness, it is not always sufficient to justify lengthy delays. And if an agency's failure to proceed expeditiously will result in harm or substantial nullification of a right conferred by statute, `the courts must act to make certain that what can be done is done.' The court should weigh any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources. Of course, these justifications become less persuasive as delay progresses, and must always be balanced against the potential for harm. (818 F.2d at 897-898)
> In the matter of delay of issuance of regulations for section 622, factors that should, and probably would, be considered by a court are the following: (1) HUD is 6 months past the statutory deadline, which is not a substantial time period in comparison to the time lapse in cases in which the issue of unreasonable delay is addressed; (2) HUD's resources are limited (i.e., since 1980, the number of programs administered by the Department has increased dramatically, while there has been an equally dramatic decrease in staff); (3) the passage of the 1992 Act by the Congress imposed a significant regulatory burden on HUD (the 1992 Act contains 72 statutory sections requiring regulatory action within 6 months or 180 days of the date of enactment of the statute); and (4) the change in administration which occurred in January 1993 as a result of the November 1992 Presidential election.

On the issue of the potential for harm caused by delay in issuance of regulations for the designated housing process, PHAs would point to the continued safety problems suffered by elderly residents in public housing who must reside next to persons whose

disabilities include mental illness, drug or alcohol abuse. On the issue of whether there are alternative means for eliminating or reducing this harm, there are, and one alternative is better and increased security in public housing.

Unless a PHA has a new, unoccupied public housing project which it seeks to designate for elderly families, the extent to which designated housing is the solution to security problems for elderly residents in public housing is questionable. Section 622 does not permit a PHA to evict or require any tenant lawfully residing in a public housing to vacate the project on the basis that the project is being converted to a designated housing. The PHA may offer incentives to induce existing tenants to vacate, but the choice to leave rests solely with the tenant. Thus, there is no assurance under the designated housing process that elderly residents will not continue to occupy public housing projects with residents who they believe threaten their safety. Even if there is a new, unoccupied public housing project, the security of elderly residents may still be threatened, dependent upon the socio-economic conditions of the neighborhood in which the project is located.

There is no guarantee that designated housing will result in safe and secure public housing for elderly residents. An alternative response to the security problems of elderly residents in public housing, and also an interim response until HUD issues regulations, is for PHAs to provide better security in public housing for all residents.

CONCLUSION. HUD's decision that regulations are necessary for implementation of section 622 is supported by the language of the 1992 Act, and case law. Existing case law supports that HUD should be able to successfully withstand a challenge to its decision to refuse implementation of the designated housing process until regulations are issued. The possibility of success of this challenge would be increased if HUD issues its proposed regulations on section 622 within the very near future.

Attachments