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Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard

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DUE PROCESS PROTECTIONS FOR TENANTS IN SECTION 8 ASSISTED HOUSING: PROSPECTS FOR A GOOD CAUSE EVICTION STANDARD

by **Mary L. Heen**

I. INTRODUCTION: THE SECTION 8 PROGRAM AND HUD'S RETREAT FROM DUE PROCESS PROTECTIONS FOR TENANTS

The Section 8 assisted housing program,[1] devised as an alternative to the heavily criticized conventional public housing[2] and FHA subsidized housing programs,[3] was introduced in 1974[4] as the federal government's major low income housing program.[5] The twofold purpose of the program, as expressed by Congress, is to promote economically mixed housing and to aid lower income families obtain a decent place to live.[6]

The concept of Section 8 evolved from the Section 23[7] leased housing program established by the Housing and Urban Development Act of 1965.[8] Under the Section 23 existing housing[9] program, the Department of Housing and Urban Development (HUD) enters into annual contributions contracts with local public housing agencies which in turn lease privately owned units for "sublet" to low income tenants.[10] Section 8[11] utilizes a modified approach[12] both for the leasing of existing privately owned units[13] and for assisting new construction and substantial rehabilitation of housing units.

Under the Section 8 existing housing program, HUD enters into annual contributions contracts with public housing

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1. 42 U.S.C. §1437f (Supp. 1977), §201(a)8 of the Housing and Community Development Act of 1974 (Section 8 of the revised United States Housing Act of 1937).
2. 42 U.S.C. §§1401-1436 (1973). *See generally,* Friedman *Public Housing and the Poor: An Overview,* 54 CALIF. L. REV. 642 (1966).
3. 12 U.S.C. §1715*l*(d)(3) for §221(d)(3), Below Market Interest Rate Program, Housing Act of 1961. 12 U.S.C. §1715z-1 for §236, Housing and Urban Development Act of 1968. FHA subsidy programs are directed toward encouraging the production of low and moderate income units by private enterprise. *See generally, Hearing on the Suspension of Subsidized Housing Programs Before the Subcommittee on Housing of the House Banking and Currency Comm.,* 92d Cong., 1st Sess. 55 (1974).
4. Housing and Community Development Act of 1974, 88 Stat. 667 (1974).
5. *See* Senate Report (Banking, Housing and Urban Affairs Committee) No. 93-693 (to accompany S.3066) Feb. 27, 1974. 1974 U.S. CODE CONG. AND ADMIN. NEWS, 93d Cong. 2d Sess. at 4314-4317, 4360.
6. 42 U.S.C. §1437f(a) (Supp. 1977).
7. 42 U.S.C. §1421b (Supp. 1970).
8. §103(a), 79 Stat. 455 (1965).
9. The original Section 23 program had a limited new construction and substantial rehabilitation component in addition to the existing housing component. *See* HUD, Low Rent Leased Housing Handbook 7430.1, Ch. 1, §1 ¶ 3(d) and 6 (1969). Current Section 23 program regulations are found in 24 C.F.R. §§800, 801, 802, 803 *et seq.* These regulations differ considerably from those of the original program, but are very similar to the Section 8 regulations.
10. *See generally,* Friedman & Krier, *A New Lease on Life: Section 23 Housing and the Poor,* 116 U. PA. L. REV. 611 (1968); Palmer, *Section 23 Housing: Low-Rent Housing in Private Accommodations,* 48 J. URBAN L. 255 (1970).
11. For an introduction to the Section 8 program, *See* Bishop, *Assisted Housing Under the Housing and Community Development Act of 1974,* 8 CLEARINGHOUSE REV. 679 (Jan. Supp. 1975).
12. For a comparison of the Section 8 and Section 23 programs, *see generally,* Note, *Federal Leased Housing Assistance in Private Accommodations: Section 8,* 8 UNIV. MICH. J. L. REFORM 676 (1975); Note, *The New Leased Housing Program: How Tenantable A Proposition?* 26 HASTINGS. L. J. 1145 (1975).
13. The original Section 23 program provides for leases between the private owner and the local housing authority, with the PHA subletting to the tenant, or leases in the form of a PHA contract with the owner and the tenant. *See,* HUD, Low-Rent Leased Housing Handbook No. 7430.1, Ch. 3 §2 ¶ 1 (1969).

agencies (PHAs) which then may contract to make assistance payments to owners.[14] Tenants lease units directly from the owner, with the PHA paying the cash difference between 15 or 25 percent of the tenants' income and a "fair market rent."[15] The structure of the Section 8 existing housing program, even more clearly than that of the Section 23 program, results in tenants receiving what could be described as a "welfare benefit" enabling them to find decent housing at a cost based on a percentage of income.

Under the Section 8 new construction and substantial rehabilitation program, HUD enters into contracts with owners or prospective owners who agree to construct or rehabilitate housing for occupancy partially or totally by low income families. HUD then makes assistance payments directly to owners. Alternatively, HUD may enter into annual contributions contracts with PHAs which then enter into contracts to make assistance payments to owners.[16]

The Section 8 private owner retains much greater control over tenant selection and eviction than the Section 23 owner. In the existing housing program, the owner selects tenants, subject to the terms of the annual contributions contract between HUD and the PHA, and establishes standard maintenance and repair practices. The PHA has the sole right to evict, however, with the owner having the right to seek PHA authorization for termination of tenancy.[17] For newly constructed or substantially rehabilitated housing, the owner assumes all ownership, maintenance, and management responsibilities, including selection and eviction of tenants.[18]

By granting Section 8 owners more control over tenant selection and eviction,[19] HUD has failed to require many protections for tenants which are now well established in its other low income housing programs. For example, HUD requires public housing agencies[20] and private owners of FHA subsidized housing projects[21] to establish "good cause," such as non-payment of rent or other substantial violation of the lease, before a tenant may be evicted. Procedural protections are also required. Tenants in both public housing and subsidized housing must be given written notice of the reasons for the eviction. In addition, public housing tenants are entitled to an informal hearing before eviction and a trial de novo on the issue of good cause.

The impetus for HUD's issuance of these good cause regulations came from tenant-initiated suits.[22] The leading cases of *Escalera v. New York City Housing Authority*[23] and *Joy v. Daniels*,[24] decided soon after the Supreme Court's landmark opinion of *Goldberg v. Kelly*,[25] established the principle of an entitlement to continued occupancy in federally assisted housing and the necessity for a hearing on the issue of "cause" prior to an eviction by either a public housing agency or a private landlord receiving FHA mortgage assistance.

In its administration of the Section 8 program, HUD has demonstrated very little initiative in protecting Section 8 tenants from potentially arbitrary actions by landlords.[26] Although present Section 8 regulations do not prohibit the establishment of a good cause hearing requirement by local housing authorities or private owners,[27] in practice, local housing authorities and private landlords have interpreted the regulations to require nothing more than written notice to the tenant.

Because the Section 8 program was designed to attract private participation in a program of economically mixed housing, it poses special problems and obstacles to Section 8 tenants who, in the absence of HUD action, may turn to the courts for protection from arbitrary evictions. This article seeks to examine those difficulties and explore arguments for establishment of a Section 8 due process good cause eviction standard similar to that already judicially established for conventional public housing and for the FHA subsidized housing program.

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14. 42 U.S.C. §1437f(b)(1).
15. 42 U.S.C. §1437f(c)(2)(C)(3).
16. 42 U.S.C. §1437f(b)(2).
17. 42 U.S.C. §1437f(d)(1).
18. 42 U.S.C. §1437(e)(2).
19. Evictions pose a particularly distressing problem because of the severe shortage of decent low cost housing in the private market. *E.g.*, Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970), *cert. denied* 400 U.S. 925 (1970) (warranty of habitability implicit in private rental housing in part due to conditions arising from a severe shortage of rental housing); Green v. Superior Court of the City and County of San Francisco, 10 Cal.3d 616, 625 (1974).
20. 24 C.F.R. §§866, *et seq.*
21. 24 C.F.R. §§450, *et seq.*, 41 Fed. Reg. 16924 (April 22, 1976), and 41 Fed. Reg. 43329 (Sept. 30, 1976). These regulations also are applicable to HUD held units and to projects receiving §101 rent supplement payments, §221(d)(5) below market interest rates and §202 direct loans. The regulations were published to "harmonize" HUD policies with court decisions requiring good cause eviction.
22. Conventional public housing: *e.g.*, Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970); Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied* 401 U.S. 1003 (1971); notice, informal hearing, trial de novo and good cause eviction now required by HUD regulation. *See*, 24 C.F.R. §§866, *et seq.*, §236 subsidized housing: *e.g.*, Anderson v. Denny, 365 F.Supp. 1254 (W.D. Va. 1973); Bonner v. Park Lake H.D.F.C., 333 N.Y.S.2d 277 (1972). Section 221(d)(3) subsidized housing: *e.g.*, Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); McClellan v. University Heights, Inc., 338 F.Supp. 374 (D. R.I. 1972); McQueen v. Druker, 317 F.Supp. 1122 (D. Mass. 1970), *See* 24 C.F.R. §§450 *et seq.* Redevelopment authority housing: Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974).
23. 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970).
24. 479 F.2d 1236 (4th Cir. 1973).
25. 397 U.S. 254 (1970).
26. In fact, HUD encourages public housing agencies (PHAs) to emphasize to prospective Section 8 owners the fact that the program permits a 30-day termination clause in the lease and the PHA's record of cooperation in authorizing evictions in order to increase private landlord participation in the Section 8 Existing Housing Program. *See* Notice H 77-13 (PHA) Appendix I, pp. 4, 21 (April 1977).
27. New construction, 24 C.F.R. §880.220; substantial rehabilitation, 24 C.F.R. §881.220; existing housing, 24 C.F.R. §§882.215 and 882.107, 41 Fed. Reg. 19879 (May 13, 1976); set-asides for HUD-owned or subsidized projects, 24 C.F.R. §§886.122, 886.128, 42 Fed. Reg. 5601 (Jan. 28, 1977), *but cf.* 24 C.F.R. §§450 *et seq.*, 41 Fed. Reg. 43329 (Sept. 30, 1976).

A major obstacle to the establishment of a Section 8 good cause eviction standard, as indicated by the development of the good cause eviction standard for other low income housing programs, will be showing the requisite "state or governmental action" sufficient to invoke jurisdiction[28] over a Section 8 private landlord and to provide tenants with due process protections. Part II of this article examines the various Section 8 subprograms in light of recent Supreme Court decisions which impose significant limitations on the state action doctrine.

The establishment of a good cause eviction standard is discussed in Part III of the article in terms of tenants' entitlement to continued occupancy of the Section 8 unit and the appropriate procedural mechanisms to protect against deprivation of the Section 8 benefit without due process of law. The likelihood of establishing the requirement of a good cause hearing prior to eviction is considered under the standards suggested by recent due process decisions.

Any discussion of the Section 8 program is complicated by the number of separate Section 8 subprograms, *i.e.*, existing housing,[29] new construction[30] and substantial rehabilitation,[31] each with its own set of regulations and relationships with HUD. There is an existing housing program for private owners and for HUD-owned or subsidized units. This latter program is called the set-aside or special allocations program.[32] The new construction or substantial rehabilitation program may be implemented by private developers, private developers operating in conjunction with a public housing agency (PHA), by a PHA acting alone, or by a state housing finance agency. Presently, tenants receive full procedural protections only when faced with eviction from Section 8 set-aside units that are attached to HUD-owned or subsidized units.[33] The following discussion therefore concentrates on Section 8 units which are rented to tenants by private owners or private developers (exclusive of the HUD subsidized units described above).

Although there has been little reported[34] litigation of the Section 8 good cause eviction issue up to now, as the Section 8 program develops,[35] it will become a critical question for HUD, private owners, and low income tenants to resolve. It is likely that in the next few years a growing number of courts will be faced with the difficult task of balancing the sometimes conflicting goals of national housing policy with the rights of individual Section 8 low income tenants.

II. SECTION 8 AND STATE ACTION

The maxim that the fourteenth amendment imposes restrictions on governmental action but not on the private behavior of individuals was first discussed extensively over 90 years ago in the *Civil Rights Cases.*[36] The Supreme Court held that the wrongful act of an individual, unsupported by state authority, is simply a private wrong.[37] With purely private action removed from the operation of the fourteenth amendment, the courts began to search for indications of "state" authority.

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28. The Civil Rights Act's jurisdictional statute, 24 U.S.C. §1343(3)(4) used in conjunction with 42 U.S.C. §1983, the substantive law prohibiting violations of civil rights under color of state law, provides federal jurisdiction over rights otherwise protected by the fourteenth amendment. The Civil Rights Act requirement that there be action "under color of law" and the fourteenth amendment requirement that there be "state action" are virtually identical. *See,* United States v. Price, 383 U.S. 787, 794 n.7 (1966). Since there is no jurisdictional amount required under either 28 U.S.C. §§1343(3) or (4), the principal obstacle to federal court jurisdiction remains the establishment of "state action" and violation of a constitutional or statutory right.
    Jurisdiction over the private landlord should also be alleged under 28 U.S.C. §1331(a), federal question jurisdiction, *e.g.,* Anderson v. Denny, 365 F.Supp. 1254 (W.D. Va. 1973); Lawrence v. Oakes, 361 F.Supp. 432 (D. Vt. 1973); 28 U.S.C. §1337, commerce clause jurisdiction, *e.g.,* Davis v. Romney, 490 F.2d 1360, 1365 (3rd Cir. 1974), Ross v. Community Services, Inc., 396 F.Supp. 278 (D. Md. 1975); *but see,* Potrero Hill Community Action Committee v. Housing Authority, 410 F.2d 974, 979 (9th Cir. 1969) (no §1377 jurisdiction because despite some incidental effects on commerce, Housing Acts constitute welfare legislation for purposes of §1337). Jurisdiction over the Secretary of HUD may be alleged under 28 U.S.C. §1361 (mandamus jurisdiction), *see* Paulsen v. Coachlight Apts. Co., 507 F.2d 401 n.2 (6th Cir. 1974); Langevin v. Chenango Ct. Inc., 447 F.2d 296, 300 (2d Cir. 1971) (joinder of private landlord permissible in FHA housing mandamus action). For more detailed discussion of jurisdiction questions in public housing and FHA housing cases, *see* LAW PROJ. BULL., IV, 4, pp. 4-6.
29. 24 C.F.R. §§882 *et seq.,* 42 Fed. Reg. 19879 (May 13, 1976).
30. 24 C.F.R. §§880 *et seq.*
31. 24 C.F.R. §§881 *et seq.* The "New Construction and Substantial Rehabilitation" regulations are virtually identical.
32. 24 C.F.R. §§886 *et seq.*
33. 24 C.F.R. §§450 *et seq. But see,* 24 C.F.R. §§886.122 and 886.128, 42 Fed. Reg. 5601 (January 28, 1977). The conflict between the two sets of regulations has not yet been resolved by HUD. The regulations are ambiguous as to whether the good cause standard would apply to a tenant residing in a federally subsidized unit with a Section 8 existing housing certificate (24 C.F.R. §882.102) rather than a Section 8 set-aside unit.
34. Consent judgments have been entered in suits challenging Section 8 eviction and termination of assistance procedures: Belcher v. Jefferson County Housing Authority, No. C77-0137-L(B) (W.D. Ky., Oct. 28, 1977) (consent judgment outlines eviction procedures for Section 8 private owners and requires the housing authority to hold a good cause hearing prior to eviction); Smith v. Angelo, No. 77-1740-M (D. Mass., Oct. 19, 1977) (consent judgment establishes a good cause standard for termination of assistance and outlines notice requirements and hearing procedures to be followed in Section 8 assistance termination). *See* 11 CLEARINGHOUSE REV., 744-745 (Dec. 1977).
35. In fiscal year 1976, 290,000 Section 8 units (125,000 units of new construction or rehabilitation and 165,000 units of existing housing) were reserved by sponsors and slated for federal subsidy. *See,* HUD Programs, U.S. Dept. of Housing and Urban Development, 40 (Washington, D.C. March 1977).
    HUD submitted budget authority and contract authority requests to Congress in 1978 sufficient to finance 344,000 Section 8 units (110,000 new construction, 70,000 substantial rehabilitation, 39,000 moderate rehabilitation and 125,000 existing). *See* 5 HOUSING AND DEVELOPMENT REPORTER 779 (January 23, 1978).
36. 109 U.S. 3 (1883).
37. *Id.* at 11.

In deciding whether conduct is governmental or private in nature, courts have relied on a case-by-case analysis rather than on clear-cut guidelines.[38] Nevertheless, two distinct approaches have emerged: the "state involvement" approach and the "public function" approach.[39] The two major Section 8 programs, existing housing and new construction/substantial rehabilitation, require individual examination to determine whether the requisite state action can be established under either approach.

A. State Involvement in the Section 8 Program

The state involvement approach, exemplified by *Burton v. Wilmington Parking Authority,*[40] identifies points of contact between the state and the private individual. In *Burton,* the Court held that the exclusion of a black customer from the Eagle Coffee Shoppe, operated by a private owner under a lease in a parking building financed by public funds and owned by the parking authority, an agency of the State of Delaware, constituted discriminatory state action. The parking authority entered into its lease with the restaurant to ensure the parking facility's financial success. The Court concluded that the financial interdependence between Eagle and the Authority made them joint participants in the discrimination:

> The state has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so purely private as to fall without the scope of the 14th Amendment.[41]

More recently the Supreme Court in *Moose Lodge No. 107 v. Irvis*[42] and *Jackson v. Metropolitan Edison Co.,*[43] without explicitly overruling *Burton,* has defined a more stringent standard of state action necessary to trigger fourteenth amendment protections. In *Moose Lodge* the Court applied a balancing approach to state action by comparing competing private interests with the state's governmental obligations. The plaintiff, a black guest of a lodge member, was denied service at a fraternal club which held a state liquor license. Liquor licensing was held insufficient to implicate the state because the state regulations did not explicitly sanction the discrimination and could not therefore overcome defendant's "associational" interests. Mr. Justice Rehnquist, writing for the majority, maintained that the crucial factor was that Moose Lodge was a "private social club in a private building." thus distinguishing *Moose Lodge* from *Burton. Moose Lodge* may therefore restrict the type of evidence that can be relied upon to establish a joint venture under *Burton* to places of public accommodation which are physically located within publicly owned facilities.[44] Whether *Burton* is so severely limited to its special fact setting is not entirely clear; however, such a conclusion is further suggested by dicta in *Jackson v. Metropolitan Edison* which limits *Burton's* application to lessees of public property.[45]

In *Jackson,* Metropolitan Edison, a heavily regulated private utility which enjoyed a territorial monopoly for the provision of electricity, terminated service to Catherine Jackson's home for nonpayment of bills. Jackson claimed that termination without adequate notice and a hearing before an impartial body deprived her of property without due process of law. The Court, per Justice Rehnquist, rejected the claim that the termination constituted state action, even though the utility had included the termination procedures in its required general tariff filings with the state public utilities commission.

In support of its holding, the Court noted that it was not evident that the procedures had to be included in the filings, nor was it clear that the commission had the authority to disapprove them. Although the state had reviewed the tariff and had routinely "approved" it by not disapproving within 60 days after filing, the particular termination procedures had never been the subject of hearings or investigation.[46] Justice Rehnquist went on to observe that without such specific consideration, even approval might not be sufficient to transform private action into state action:

> Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."[47]

The Court therefore suggests, in apparent disregard of prior decisions, that the critical question is not how the regulatory scheme allocates decision-making power, but where it places the initiative.[48]

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38. *See,* Reitman v. Mulkey, 387 U.S. 369, 378 (1967), "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State . . . has become significantly involved in private discrimination." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *See generally.* Van Alstyne and Karst, *State Action,* 14 STAN. L. REV. 3 (1961); Horowitz, *The Misleading Search for State Action,* 30 S.CAL. L. REV. 208 (1957).
39. *See generally,* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 CAL. L.REV. 656 (1974).
40. 365 U.S. 715 (1961).
41. *Id.* at 725.
42. 407 U.S. 163 (1972).
43. 419 U.S. 345 (1974).
44. *See* Burke and Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment,* 46 S.CAL. L. REV. 1003, 1050.
45. 419 U.S. at 358 (1974). It could be argued that the Section 8 existing housing rental unit is "quasi-public" property due to the fact that the landlord contracts with the PHA to accept partial rent from the tenant in return for guaranteed payments from the PHA which make up the rest of the fair market value of the unit.
46. *Id.* at 355.
47. *Id.* at 357.
48. *See The Supreme Court, 1974 Term,* 89 HARV. L. REV. 47, 147 (1975); *see also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 355-357 (1976).

In addition, although the private utility was in effect a government protected monopoly, such status did not transform the termination procedures into state action. The Court held that not only must there be a close nexus between the state and the challenged entity, but also a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[49] Thus, a finding of state action must be based on a finding that the state is closely involved in the *challenged activity* itself.

Reading these cases together and applying them to Section 8 evictions, it is apparent that tc establish state involvement requires more than the identity of points of contact between the state and the private landlord. The state activity must be something more than what was seen in *Moose Lodge* to be passive regulation of an essentially private relationship. To meet the strict requirements of *Jackson,* it must be shown that there is a close nexus between the state and the eviction of the Section 8 tenant. Alternatively, if it can be shown that the state has ordered the eviction or has overtly or covertly encouraged it,[50] state action may be established.

The public and federally subsidized housing cases that have discussed the problem of state action all preceded *Jackson.* With the exception of the Montana Supreme Court,[51] each of the courts that have considered the issue have found sufficient contracts between the state and the PHA or private landlord to establish jurisdiction and to trigger the protections of the due process clause.[52] Although many of those courts blended the discussion of state and federal involvement, it is important to keep the two conceptually distinct for analysis purposes.

Federal involvement may be shown for the purpose of establishing fifth amendment governmental action. The Section 8 program clearly involves the federal government: Congress enacted the legislation; HUD has issued extensive regulations[53] and is responsible for the day-to-day administration of the program including such duties as allocation of funds,[54] evaluation of applications,[55] contracting responsibility,[56] setting fair market rent limits,[57] and general supervision of programs. However, since the requirements of *Jackson* presumably could be extended to fifth amendment governmental action as well as to fourteenth amendment state action, merely showing points of contact between the federal government and the program may be insufficient. Thus a sufficiently close relationship between both the federal government and the private owner, and the federal government and the eviction itself may be required.

For purposes of jurisdiction under the Civil Rights Act or the fourteenth amendment, state or local governmental involvement must be established.[58] Of course, under *Jackson,* there must be state or local government involvement in the eviction by the private landlord. The following discussion focuses primarily on an identification of the nexus between the Section 8 subprograms and state or local government sufficient to establish fourteenth amendment state action.

(1) Existing Housing

Establishing state action under the Section 8 existing housing program[59] presents no major problem because the PHA administers the program. HUD is limited by statute to contracting with PHAs for administration of the existing housing program or to performing the functions of a PHA directly where no PHA exists.[60] A public housing agency is defined by HUD as "any state, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of housing for low-income families."[61] Because of this direct involvement by the PHA, the existing housing program should not be subject to the requirements of *Jackson,* a case involving indirect government involvement by a state regulatory commission.

If the question arises, however, the structure of the existing housing program also fulfills the stricter state action nexus required for indirect government involvement. The following description of the application process outlines both the points of contact between the Section 8 private owner and state and local government and the PHA's connection with the eviction.

Before the PHA receives contract authorization for existing units, it must make an application to HUD. Each HUD field office allocates the number of units available for existing housing based on the Local Housing Assistance Plan (HAP).[62] Invitations then issue to the local PHA, governor of the state, and chief executive officers of the counties, municipalities or other public bodies authorized to operate low-income housing.[63] When screening applications, HUD

49. 419 U.S. at 351 (1974).
50. *Id.* at 357 n. 17.
51. Flamm v. Real-BLT, Inc., 543 P.2d 190 (Mont. Sup. Ct. 1975), *cert. denied* 424 U.S. 1313 (1976). Although this subsidized housing case was decided after *Jackson,* the Montana Court did not cite *Jackson* in its opinion. On application for a stay of judgment, Justice Rehnquist, acting as circuit justice, noted that in view of the express provision of the lease allowing termination by either party on 30-day advance notice, four justices of the Court would not grant certiorari, finding it unnecessary to reach the constitutional question.
52. *See supra* note 22.
53. *See supra* notes 29-32.
54. *See* 24 C.F.R. §§880.201, 881.201, 882.201, and 886.103; 886.202.
55. *See* 24 C.F.R. §§880.210, 881.210, 882.205, and 886.107.
56. *See* 42 U.S.C. §1437f(b).
57. 42 U.S.C. §1437f(c).
58. *See supra* note 28.
59. In the first years of the program, HUD displayed a preference for channeling program activity into existing rather than new housing. For a discussion of this pattern, *see* Senate Report to Accompany S.3295 (Banking, Housing and Urban Affairs Committee) No. 94-749, April 12, 1976, at 3.
60. 42 U.S.C. §1437f(b)(1).
61. 24 C.F.R. §882.102.
62. Each community, as a prerequisite to receiving a community development block grant under §104(a)(4) of the Housing and Community Development Act of 1974, must prepare a housing assistance plan which assesses the housing needs of lower-income persons. The allocation of Section 8 funds is also subject to the fair share requirements of §212. *See* 42 U.S.C. §1439.
63. 24 C.F.R. §882.203.

must send a copy of each application to the local government in which the proposed program is to be carried out,[64] and invite a response which is considered during the application evaluation by HUD.[65] Although the final decision is HUD's, inconsistency with the local HAP is allowed only in exceptional circumstances.[66]

Once the PHA is allocated units, it is responsible for inviting participation by owners[67] and determining family eligibility prior to issuance of a Certificate of Family Participation.[68] The PHA explains the program to the family[69] and upon request assists families in locating units.[70] The PHA approves the lease between the owner and tenant[71] and makes an initial and annual inspection of the unit.[72] It also has ongoing responsibility for reexamination of family income.[73]

In addition to the above PHA responsibilities, and most important to the issue of state action, the statute expressly provides that the PHA shall have the sole right to give notice to vacate, with the owner having the right to ask the agency for termination of tenancy.[74] As interpreted by HUD regulations,[75] however, the owner gives the family notice of the proposed eviction subject to authorization by the PHA. The PHA must authorize the eviction unless it finds the grounds insufficient under the lease. If the PHA makes no finding, or does not give notice of its determination within 20 days, the PHA is deemed to have authorized the eviction. According to the regulations, Section 8 existing housing leases may provide for termination of tenancy upon a 30-day notice.[76] Unfortunately, where applicable, it has been interpreted by many PHAs to authorize an eviction without good cause.

The *Moose Lodge* decision should not prevent a finding of state action in an eviction from Section 8 existing housing; the "business" relationship between a Section 8 landlord and tenant can be distinguished from the social relationships among members of a private club. Furthermore, as detailed above, a PHA assumes a much more active role in the Section 8 program than that performed by the state liquor licensing agency in *Moose Lodge*.

The eviction of a low income tenant by a Section 8 landlord also meets both of the tests set forth in *Jackson*. First, the requirement of a close nexus between the state and the challenged entity has been met by the significant contacts between the private Section 8 landlord and the PHA. A close nexus between the state and the challenged activity is directly established by PHA approval of the lease and by its authorization of the eviction by the Section 8 landlord. Second, because the Section 8 statute specifically reserves the right to give notice to vacate to the PHA (or to HUD if acting as a PHA where none exists), the PHA is placed in the position of ordering each individual eviction. Even under HUD regulations which allow private owners to give notice to vacate subject to PHA authorization, the PHA retains final approval authority over all evictions in existing housing.

On the other hand, an argument against a finding of state involvement may be based on the contention that the PHA is not *sufficiently* involved in the eviction so that the eviction by a private landlord may be fairly treated as that of the PHA itself. According to HUD regulations, a PHA may "authorize" an eviction through inaction. This procedure is similar to the public utility commission's routine "approval" by not disapproving, which was found insufficient to constitute state action in *Jackson*. Since the private landlord would be the logical party to initiate any eviction process, the PHA does not really order or encourage any eviction which is against the landlord's will. Based on the policy of encouraging private participation in the Section 8 program, the lease between the landlord and tenant should therefore govern the relationship.

On balance, the above argument should not preclude a finding of state involvement in a Section 8 existing housing eviction case because of the PHA's responsibility for evictions mandated by the statute itself. Although the owner has the right to ask the agency for termination of tenancy, the PHA has the sole right to give notice to vacate, and therefore is ultimately responsible for termination of tenancies in existing housing. Even though HUD regulations may result in passive PHA approval of owner-initiated evictions, the regulations should not be interpreted to allow PHAs to circumvent the clear intent of the statute. If so, PHAs would be cooperating with and possibly encouraging arbitrary evictions by Section 8 landlords.[77]

In addition, under the Section 8 regulations, the PHA is required to examine the grounds for each individual eviction[78] rather than merely passing on general eviction procedures. This factor alone should distinguish the PHA Section 8 eviction authorization from the tariff approval by the public utility commission in *Jackson*.

In conclusion, PHA responsibility for evictions combined with the additional factor of the direct contractual relationship between the PHA and the private landlord (providing for cash payments to the landlord), should sufficiently distinguish Section 8 evictions from the *Jackson* termination of electric service situation to justify a finding of state action even if the PHA is seen to be indirectly involved in the eviction.

(2) New Construction and Substantial Rehabilitation

Finding the requisite state action is more difficult for the new construction and substantial rehabilitation[79] component

64. 24 C.F.R. §882.205(b).
65. 24 C.F.R. §882.205(c).
66. Congress reaffirmed the requirement of consistency with the local HAP in Pub.L. No. 94-375, containing recent amendments to Section 8. *See* House Conference Report No. 94-1304 to Accompany S.3295, Joint Explanatory Statement of the Committee of Conference (June 25, 1976).
67. 24 C.F.R. §882.208.
68. 24 C.F.R. §882.209.
69. 24 C.F.R. §882.209.
70. 24 C.F.R. §882.103.
71. 24 C.F.R. §882.210.
72. 24 C.F.R. §882.211(b).
73. 24 C.F.R. §882.212.
74. 42 U.S.C. §1437f(d)(1)(B).
75. 24 C.F.R. §882.215.
76. 24 C.F.R. §882.107.
77. *See supra.* note 26.
78. 24 C.F.R. §882.215.
79. The relevant regulations for Section 8 new construction and substantial rehabilitation are virtually identical.

of Section 8 because unlike existing housing, the PHA is not required to send the notice to vacate and to authorize the eviction. In fact, the PHA is not involved in any phase of the eviction process; it is the owner who is responsible for termination of tenancy.[80]

The owner must follow specific eviction procedures, however, if he intends to receive benefits for the unit during any period of vacancy, not exceeding 60 days, resulting from the eviction.[81] This is a critical requirement for most owners because the feasibility of their projects is dependent upon continuing Section 8 benefits and the need to collect full fair market value for each unit. Although the vacancy period payments regulation requires the owner to certify that the eviction was not made in violation of the lease and that proper notice was given to the tenant, HUD has not implemented an enforcement mechanism and must rely upon such certification by the owner. In reality, therefore, the requirement offers little protection to tenants.

Evictions from new construction and substantial rehabilitation units have not been a widespread problem to date because very little housing construction was accomplished during the beginning of the Section 8 program.[82] This situation presumably will change, with a consequent heightening of the program's importance to tenants, as the program develops[83] and the demand for new low income housing increases. The most recent HUD projections show an increased emphasis on new construction and rehabilitation.[84]

Due to the structure of the new construction and substantial rehabilitation programs, an examination of government involvement should include an analysis of federal involvement for the purpose of making a fifth amendment governmental action showing as well as an analysis of state or local involvement for fourteenth amendment purposes. The following discussion first examines the possibility of making a fourteenth amendment state action showing.

The amount of state involvement present will vary according to ownership of the units, the parties to the Housing Assistance Contract and the method of financing the new construction or substantial rehabilitation. PHA ownership would clearly involve state action, and since good cause eviction standards already apply to PHA-owned Section 8 units, no further discussion of PHA ownership is needed.[85] In cases in which the PHA joins with a private owner[86] to construct units, state involvement may be found under a *Burton* joint venture theory. For all other cases involving a private owner contracting directly with HUD, state involvement will rest on the involvement of local government in the application process, in most cases not a substantial connection, and in the method used to finance the project.

Local involvement in the application process as required by the regulations is very similar to that required under the existing housing program. HUD must forward Preliminary Proposals to the chief executive officer of the unit of local government in which the project would be located, inviting response within 30 days.[87] The local officers may object on the grounds of inconsistency with an approved Housing Assistance Plan (HAP). HUD must rule within 30 days of the locality's claim.[88] In addition, the proposal must be reviewed by an A-95 Clearinghouse[89] in which the county or regional government's comments may be added.[90] Nevertheless, as in existing housing, HUD makes the final determination.

The method of financing used by the private developer therefore becomes crucial. Privately financed units may receive Housing Assistance Payments Contracts of up to only 20 years.[91] Contracts for projects financed by a loan or loan guarantee from a state or local agency or the Farmers Home Administration[92] may be made for up to 40 years.[93] The 40-year contract makes it much more desirable for private developers to seek state-aided financing.[94] Such involvement of the state may be the key to finding state action in privately-owned projects.

If the project was financed by a loan or loan guarantee from a state or local agency, state involvement may be found

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80. 42 U.S.C. §1437f(e)(2) and 24 C.F.R. §§880.220 and 881.220.
81. 24 C.F.R. §§880.107 and 881.107.
82. In the first one and one half years after enactment, Section 8 produced a total of 2,600 units, most of which were merely conversions from an earlier HUD program. In comparison, under the first calendar year of operation for Section 236 and Section 235, mortgages for 77 projects with 11,800 units were insured under Section 236, and 24,400 units were insured under Section 235. *See,* Senate Report to Accompany S.3295 (Banking, Housing and Urban Affairs Committee) No. 94-749, April 12, 1976, at 4.
83. An obstacle to obtaining financing for new construction, the 60-day limit for assistance payments when vacancies occur, has now been removed by an amendment which allows vacancy payments for up to one year. *See* Housing Authorization Act of 1976, Pub.L. No. 94-375 (S.3295), August 3, 1976. For a general discussion of the Section 8 financing limitations before the amendment, *see,* Halperin and Brenner, *Opportunities Under the New Section 8 Housing Program,* 6 REAL EST. REV. 70 (Spring 1976).
84. Preliminary HUD reports indicate that 103,431 units were started during the 1977 fiscal year, ending September 30, 1977. *See* HUD NEWSLETTER, Vol. 8, No. 45 (Nov. 7, 1977). *See supra* note 35.
85. *See* 24 C.F.R. §§866 *et seq.*
86. 24 C.F.R. §§880.102, 880.106, 880.121, 881.102, 881.106 and 881.121. The project is owned by the private developer, but the Housing Assistance Contract is entered into by the private owner and the PHA subject to an Annual Contributions Contract between HUD and the PHA.
87. 24 C.F.R. §§880.208(b) and 881.208(b).
88. 24 C.F.R. §§880.208(b)(2) and 881.208(b).
89. 24 C.F.R. §880.208(b)(1).
90. Local approval of rent supplements included as a factor in finding state action in FHA housing cases. *See, e.g.,* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973).
91. 42 U.S.C. §1437f(e)(1) (Supp. 1977).
92. There is substantial similarity between the Farmers Home Administration §515 program and §236 subsidized housing program, the major difference being that §515 is a direct loan program rather than an interest reduction program. A very strong argument therefore can be made that the good cause eviction regulations which apply to Section 8 assisted §236 projects should also apply to §515 projects receiving Section 8 assistance. *See* 24 C.F.R. §450.2(e)(4).
93. 42 U.S.C. §1437f(e)(1) (Supp. 1977).
94. *See* Ross, *Finding a Way to Finance Section 8 New Construction,* 7 J. HOUSING 309 (July 1976).

on a state aid theory,[95] particularly if the agency has approved the lease allowing eviction without good cause.[96] In addition to financing assistance, other special assistance may have been granted the project by state or local government such as tax breaks,[97] zoning variances, or buy-back arrangements with a redevelopment authority. Similar privileges were instrumental in the finding of state involvement in *McQueen v. Drucker,*[98] a §221(d)(3) eviction case.

In the case of participation in the Section 8 program by State Housing Finance and Development Agencies (HFDA),[99] state involvement may be found in both the state's utilization of the new construction/substantial rehabilitation program and in its administration of the special "set-aside" program.[100] In the HFDA set-aside program, HUD contracts with the State Housing Finance and Development Agency to act as a miniature HUD within the state. The state HFDA then implements state housing policy through use of the Section 8 housing assistance program. Developers apply directly to the state HFDA for Section 8 housing assistance payments. Through participation in this program, owners may be subject to the state HFDA requirements. For example, in California, a good cause eviction standard and hearing procedure has been established by statute for California Housing Finance Agency housing sponsors.[101] Thus HFDA involvement is important because it facilitates a state action showing and also may be significant because of particularly favorable eviction requirements.

An alternative argument for state involvement in an eviction from new construction or substantial rehabilitation units derives from use of state judicial procedures to enforce the "unconstitutional" eviction. In *Shelly v. Kraemer,*[102] the Supreme Court ruled that judicial enforcement of private agreements containing restrictive covenants against selling to blacks constituted state action and violated the equal protection clause.[103] However, the application of this case to Section 8 evictions may find little support in the lower courts.[104] Through the years most courts have felt constrained to limit the application of *Shelly* to race discrimination situations or to transactions between willing parties which are threatened by discriminatory judicial intervention.

The state judicial enforcement argument possibly could be used as an added indicant of state involvement, rather than as an alternative theory. Several courts have listed the utilization of state judicial eviction procedures as a factor in finding state action in FHA subsidized housing evictions.[105] Nevertheless, since *Jackson,* it is highly uncertain whether relevant, but not sufficient, factors may be aggregated to support a finding of state action.[106]

In summary, although many points of contact exist between state and local government and the Section 8 new construction and substantial rehabilitation program, it is more difficult to show state involvement in the eviction itself. Unless a state or local agency has approved a lease which allows termination of the tenancy without good cause or specifically requires certain eviction procedures, *Jackson* may well preclude a finding of fourteenth amendment state action in evictions from new construction and substantial rehabilitation program Section 8 units.

Fifth amendment government action, however, can be demonstrated through two aspects of HUD's administration of the new construction and substantial rehabilitation programs. First, HUD itself has issued eviction regulations which give the owner control over termination of tenancies.

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95. The state aid theory as applied to a finding of governmental action in FHA subsidized housing is exemplified by Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); McClellan v. University Heights, Inc., 338 F.Supp. 374 (D. R.I. 1972). *But see,* McGuane v. Chenango Court, 431 F.2d 1189, 1190 (2d Cir. 1970), *cert. denied,* 401 U.S. 994 (1971) (receipt of federal mortgage benefits not sufficient to establish state action); Wilson v. Lincoln Redevelopment Corp., 488 F.2d 339 (8th Cir. 1973).
96. State aid may not be enough after *Moose Lodge* and *Jackson.* For a case which required approval of challenged activity by the governmental agency giving aid, *see* Greco v. Orange Memorial Hospital, 513 F.2d 873 (5th Cir. 1975), *cert. denied,* 423 U.S. 1000 (1975) (no state action where a private hospital which prohibited abortion was operated in a building leased from the county for $1 per year, where the county had neither interfered with nor sought to influence the hospital's abortion policy.)
97. A lower real estate tax assessment for a §236 housing project was held not sufficient in itself to establish state action in Weigand v. Afton View Apts., 473 F.2d 545, 547-548 (3rd Cir. 1973); *but cf.,* Jackson v. Statler Foundation, 496 F.2d 626 (2d Cir. 1974); Comment, *Tax Benefits Conferred on Private Charitable Foundation May Amount to 'State Action' — Jackson v. Statler Foundation,* 49 N.Y.U. L. REV. 578 (1974).
98. 317 F.Supp. 1122 (D. Mass. 1970), *aff'd* 438 F.2d 781 (1st Cir. 1971); *see also,* Male v. Crossroads Associates, 469 F.2d 616, 620-622 (2d Cir. 1972) (private housing in urban renewal area cannot arbitrarily refuse to rent to welfare recipients); Colon v. Tomkins Square Neighbors, Inc., 294 F.Supp. 134, 137 (S.D. N.Y. 1968).
99. For a description of the origin of State Housing Finance Agencies, *see Development of State Housing Finance Agencies,* 9 REAL PROP., PROB. and TRUST J. 471 (1974).
100. 24 C.F.R. §§883, *et seq.* Note exceptions described in 24 C.F.R. §§883.105, 883.106 and 883.107.
101. CALIFORNIA HEALTH AND SAFETY CODE §41400 (West Supp. 1977).
102. 334 U.S. 1 (1948).
103. *See, e.g.,* Henkin, *Shelly v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1108-1120 (1960; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 29 (1959).
104. *See* LaVoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972) (zoning laws place mobile home park in favorable economic position, thereby making state eviction proceedings state action). *But compare,* Mullarkey v. Borglum, 323 F.Supp. 1218, 1225-6 (S.D. N.Y. 1970) *with* Hosey v. Club Van Cortlandt, 299 F. Supp. 501, 506 (S.D. N.Y. 1967) (finding of state action in use of eviction procedures depends on landlord's motive in evicting tenant).
105. *See* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Anderson v. Denny, 365 F.Supp. 1254 (W.D. Va. 1973).
106. *See* dissent by Justice Douglas, in Jackson v. Metropolitan Edison, 419 U.S. at 360 (1974), *see also,* Antoun, *State Action: Judicial Perpetuation of the State/Private Distinction,* 2 OHIO NORTH L. REV. 722, 729-730 (1975).

Although HUD originally made the subsidized housing good cause eviction regulations applicable to Section 8,[107] it changed its policy upon promulgation of the final regulations to exclude Section 8. The reason given for the change was the General Counsel's opinion that the owner should be vested with the fullest degree of management responsibility and that, in the absence of a court decision construing the statute differently, HUD should exclude Section 8 new construction and substantial rehabilitation units from the good cause eviction requirements.[108] HUD thus limited the application of the regulations to those housing programs which courts had already held to be subject to a good cause eviction standard.

Through its consideration of the question, HUD made a definite decision about eviction procedures. Under the reasoning in *Jackson,*[109] action in compliance with the regulations which results in an arbitrary eviction by a private owner therefore may be transformed into action by the federal government.

Second, if the owner applies for vacancy period benefits after an eviction, more significant federal involvement can be shown through the requirement of owner certification that proper notice was given and that the eviction did not violate the lease.[110] Thus, HUD prescribes the method of eviction when vacancy payments are made. If the owner has acted arbitrarily and is receiving vacancy payments, HUD is placed in the position of encouraging arbitrary actions. Such encouragement arguably constitutes governmental action sufficient to trigger fifth amendment due process protections.

Although the Supreme Court has not held the requirements of *Jackson* to be applicable to fifth amendment governmental action, the *Jackson* standard is likely to be applied by lower courts to the Section 8 new construction or substantial rehabilitation eviction situation.[111] If so, recent mortgage foreclosure cases[112] in which courts have refused to find governmental action in non-judicial foreclosures involving the Federal National Mortgage Association (FNMA) should be distinguished.

In *Roberts v. Cameron-Brown Co.,*[113] the Fifth Circuit held that no sufficient nexus existed to transform a private mortgagee's act in exercising its right of private foreclosure sale into that of the federal government with respect to a federally assisted low income housing mortgage. The decision is premised on a determination that the FNMA is a "private" entity and that the terms of the mortgage should govern the relationship between the parties. Even though HUD exercises some control over FNMA, including provision of the standard deed of trust form used by FNMA, HUD's regulation was held insufficient to establish that the government was involved in the activity which caused the injury.[114]

It can be argued that *Roberts* is wrongly decided because of the court's failure to acknowledge the distinction between a FNMA mortgage created by the government and a mortgage created by private parties. This distinction should differentiate the FNMA mortgage foreclosure case and the Section 8 eviction case from the *Jackson* termination of electric service by a private utility. The crux of the *Roberts* case and the main criticism of it therefore lies in its treatment of the FNMA as a purely nongovernmental entity.

Without attacking the basis of the decision, however, *Roberts* can be distinguished from the Section 8 eviction situation even though the regulatory relationship between HUD and FNMA, and HUD and the new construction or substantial rehabilitation private owner is very similar.[115] For example, if the Section 8 owner wishes to apply for vacancy benefits, HUD prescribes the method of eviction and requires owner certification of compliance, requirements which go beyond the provisions in the standard lease form. The vacancy payments situation is therefore different from a FNMA foreclosure pursuant to standard deed of trust provisions because of HUD's more specific prescription of procedures in the eviction case.

Furthermore, the Section 8 owner continues to receive benefits after the eviction not only in the vacancy payments situation, but also when the unit is rented to another low income tenant. The continuing involvement of the private owner in the program is ensured by the five year housing assistance payments contract, subject to renewal for up to 20 years. In contrast, after FNMA forecloses in a Section 235 homeowner situation, FNMA involvement with the housing unit comes to an end. Unlike the foreclosure situation, therefore, the Section 8 eviction occurs during the period of a continuing relationship between HUD and the owner of the unit.

In conclusion, although it is more difficult to establish the requisite state or governmental action in the new construction and substantial rehabilitation programs, *Jackson* should not preclude a finding of fourteenth amendment state action if the private owner receives state or local agency assistance in financing and if the agency has approved the eviction procedures or the lease used by the landlord. Alternatively, fifth amendment governmental action can be demonstrated, particularly if the owner utilized the 60-day vacancy period provision, through HUD's specific prescription of eviction procedures and certification of compliance by the owner.

B. Section 8 and the Public Function Approach to State Action

Finding state action or governmental action under the

107. *See* proposed 24 C.F.R. §450 in 41 Fed. Reg. 16922 (April 22, 1976) (applicability of proposed good cause eviction regulations to Section 8 was limited to termination of occupancy by the landlord prior to the end of a term, *see* §450.5).
108. *See* introductory comments to final regulations published in 41 Fed. Reg. 43329, 43330 (Sept. 30, 1976).
109. *See* Jackson v. Metropolitan Edison, 419 U.S. at 357 (1974).
110. *See* 24 C.F.R. §§880.107 and 881.107.
111. It could be argued that a less stringent standard should be applied to trigger fifth amendment due process protection due to the relative lack of interference with the state. Difficulties with values of federalism would be significantly less than in a fourteenth amendment situation. *See generally, Burke and Reber, supra* at 1012.
112. Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1975).
113. 556 F.2d 356 (5th Cir. 1977).
114. *Id.* at 359.
115. *See generally* 24 C.F.R. §§203 *et seq.*

public function approach requires that the activity performed by the private entity be so clearly governmental in nature that the state cannot be permitted to escape responsibility. The challenged private activity may be identified as state action if the private entity acts in form, power, and tradition like the government.

The public function concept first developed from political party primary election cases,[116] and received its classic statement in *Marsh v. Alabama.*[117] *Marsh* involved the prosecution of a Jehovah's Witness who refused to leave the business district sidewalk of a town owned by a ship-building company. The town had "all the characteristics of any other American town"[118] and replaced the state by performing a spectrum of municipal services.[119] After balancing property rights against freedom of press and religion, the Supreme Court determined that property rights do not "justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by application of a State statute."[120] The Burger Court has qualified the public function concept in *Jackson v. Metropolitan Edison Co.,* by applying the test of whether the power exercised by the utility company was one "traditionally associated with sovereignty," such as eminent domain.[121]

Under a fifth amendment governmental action analysis, it can be argued that a Section 8 private developer is acting like the federal government in the provision of low income housing. Since the United States Housing Act of 1937,[122] the federal government has been involved in the goal of providing decent, safe, and sanitary housing for low and moderate income families. To achieve that object, statutes provide that the federal government shall provide assistance to private enterprise to meet the need.[123] These factors have supported a finding of governmental action based on the public function approach in FHA subsidized housing cases.[124] Although FHA cases were decided previous to *Jackson,* the fact that the federal government has traditionally been involved in the provision of low income housing and that the Section 8 landlord is acting to further that goal within a statutory scheme should serve to distinguish the Section 8 landlord from the *Jackson* situation.

It is more difficult to establish traditional involvement in the provision of low income housing by state or local governments sufficient to establish fourteenth amendment state action. Under the existing housing program, public housing agencies perform a state function, as established by state enabling statutes,[125] through the provision of low income housing. Although PHAs administer the Section 8 existing housing program, private owners perform many functions traditionally assigned to local PHAs under previous federal housing programs such as conventional public housing and Section 23 leased housing. For example, owners select tenants, maintain the units, and perform management functions previously performed by the local housing agency. Under the Section 8 program, the local governmental unit derives the benefit from not having to perform these functions in addition to the added tax revenue obtained from utilizing "private units" to house its low income tenants.[126] Because the landlord performs functions similar in form, power and tradition to PHA responsibilities under the conventional public housing program and the Section 23 existing housing program, it can be argued that the state should not be permitted to escape responsibility simply because its functions are performed by the private landlord in the Section 8 existing housing program.

Under the new construction and substantial rehabilitation program, it can be argued that the private owner performs a state function through the provision of new low income housing. The proposed housing must be consistent with the local HAP and receive approval from local political bodies. Construction of housing units for rental to low income families may be considered a public function more readily if the Section 8 private developer has applied to a state housing finance agency for financing or for a housing assistance payments contract than without state involvement[127] on the

116. *See* Smith v. Allwright, 321 U.S. 649 (1944) (fifteenth amendment forbids exclusion of blacks from primary election conducted by the Democratic Party of Texas, pursuant to a party resolution); Terry v. Adams, 345 U.S. 461 (1953) (fifteenth amendment forbids exclusion of blacks from "pre-primary" elections of an all-white organization run like a regular political party and whose candidates since 1889 had nearly always run unopposed and won in the regular Democratic primary).
117. 326 U.S. 501 (1946).
118. *Id.* at 502.
119. For an expansion of the public function concept, *see* Evans v. Newton, 382 U.S. 296 (1966) (a private park which had been used as a public facility exhibited a predominant municipal character and purpose and therefore was treated as a public institution regardless of who held title under state law).
120. 326 U.S. at 509 (1946).
121. 419 U.S. at 353 (1974).
122. 42 U.S.C. §1437a. The term low income families is defined to mean families who "cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use."
123. *See* 42 U.S.C. §§1441(2) and 1441a (Supp. 1977).
124. *For example,* Anderson v. Denny. 365 F.Supp. 1254 (W.D. Va. 1973); McClellan v. University Heights, Inc., 338 F.Supp. 374 (D. R.I. 1972); Appel v. Beyer, 39 Cal.App.3dSupp. 7, 114 Cal.Rptr. 336 (1974).
125. Enabling legislation exists in all 50 states. The powers granted to local housing authorities are usually all those necessary and appropriate to provide for low income dwellings and to clear slums, such as the power to lease, sell and construct housing, the power to sell bonds and to contract with the federal government for financial assistance, and the power of eminent domain. *For example,* CAL. HEALTH & SAFETY CODE, §§34310, 34312 and 34315 (West 1973).
126. Conventional public housing requires local government to exempt public housing from property taxes. *See* 42 U.S.C. §1410(h). Leased housing properties remain on local tax rolls. *See* Senate Committee on Banking and Currency, Progress Report of Federal Housing and Urban Development Programs, 91st Cong., 2d Sess. 131 (1970).
127. *See generally* California Housing Finance Agency v. Elliott, 17 C.3d 575, 131 Cal.Rptr. 361, 551 P.2d 1193 (1976).

theory that the state should not be allowed to use private owners to violate tenants' rights when prohibited from such activity itself.

On the other hand, although provision of housing may be a function which is public in nature, it is not traditionally an exclusive state function.[128] Most housing is provided by the private sector, with private individuals making judgments about tenant selection and eviction subject to general state law. Therefore, provision of housing may not fall into the category of a power like "eminent domain" which is exercised exclusively by the state.

Resolution of the conflicting arguments regarding applicability of the public function concept to Section 8 will depend on the courts' interpretation of the function performed. If the court is willing to accept the formulation that Section 8 provides decent housing to low and very low income persons who otherwise could not afford it, and that the cost of new housing has made provision of new low income housing an exclusive state function, then the public function approach may provide an alternative way to establish state action. If the court determines that the landlord is merely providing housing to a general market, then the public function concept will not be very helpful to tenants because the activity must be a function of the state, not merely clothed with the public interest.[129]

In summary, under the public function approach, fifth amendment government action may be more easily established because of the federal government's more visible traditional role in the provision of low income housing. An argument for fourteenth amendment state action may be made for existing housing on the basis of the private owner's performance of a traditional PHA role. For new construction and substantial rehabilitation, the success of the public function argument depends upon a court's willingness to look to provision of *new low income* housing as the function performed rather than merely provision of housing to a general market.

III. ESTABLISHMENT OF A DUE PROCESS GOOD CAUSE EVICTION STANDARD

The presence of "state action" does not in itself result in the application of the due process good cause eviction standard.[130] It is merely a first step. Section 8 tenants must show two additional factors: entitlement to the continued occupancy of the assisted units, and the appropriateness of the requested good cause hearing procedure.

A. Tenants' Entitlement to Continued Occupancy in Section 8 Units

The concept of entitlement to government benefits received the Supreme Court's imprimatur in the landmark case of *Goldberg v. Kelly.*[131] In *Goldberg,* the petitioner claimed that termination of her welfare benefits without a prior hearing was a denial of due process. Rejecting the categorization of welfare benefits as a privilege rather than a right, the Court held that such benefits "are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights."[132] Termination of benefits deprives the welfare recipient of "the means to obtain essential food, clothing, housing and medical care."[133] The Court concluded that the same considerations which prompted the initial provision of welfare benefits, *i.e.,* in providing for necessities, should govern their uninterrupted flow.

The Court has since established guidelines for determining when an entitlement exists in *Board of Regents v. Roth*[134] and its companion case, *Perry v. Sindermann.*[135] Both cases involved termination of employment of state college professors. In determining whether the petitioner in *Roth* had been deprived of a protected property interest, the Court noted that "unilateral expectation" of benefits is not sufficient. The Court explained that property interests "are created and defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[136] Because the refusal to rehire came at the end of the teacher's first one-year contract with no indication by the school that it would renew the agreement, the Court held that the teacher was not entitled to a hearing on his termination.

In Sindermann, the Court noted the college policy of rehiring faculty members for as long as they performed satisfactorily, and decided that since the professor had been rehired for ten successive years, there was an objective basis for an expectation of contract renewal even though there was no formal acknowledgement of this policy by the college. Recognizing an unwritten "common law" rule that certain of the college employees had the equivalent of tenure, the Court determined that the teacher should be granted a hearing.

Although *Goldberg* and *Sindermann* suggest that the entitlement concept[137] should identify situations where an individual's dependency and reliance on continued distribution of government benefits is significant enough[138] to warrant procedural protection, the Court has since narrowed its view in *Bishop v. Wood.*[139]

In *Bishop,* a city police officer, discharged from his job without a hearing, claimed a due process property interest in continued employment. The ordinance defining the terms of his employment did not fix the duration of employment, and

128. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
129. *See* Jackson v. Metropolitan Edison, 419 U.S. at 353 (1974).
130. For an excellent discussion of due process protection for tenants in FHA subsidized housing, *see* Comment, *Procedural Due Process in Government Subsidized Housing,* 86 HARV. L. REV. 880 (1973). For discussion of procedural due process issues for Section 8, *see* Note, *The New Leased Housing Program: How Tenantable A Proposition?"* 26 HASTING L. J. 1145 (1975).
131. 397 U.S. 254 (1970).
132. *Id.* at 262.
133. *Id.* at 265.
134. 408 U.S. 564 (1972).
135. 408 U.S. 593 (1972).
136. 408 U.S. at 577 (1972).
137. For criticism of the entitlement doctrine and interest balancing approach to due process, *see* Note, *Limits on Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975), and Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 DUKE L. J. 89.
138. However, in *Roth* the Court observed that to determine whether due process requirements apply in the first place, we must look not to the "weight," but to the nature of the interest at stake. 408 U.S. at 570-571 (1972).
139. 426 U.S. 341 (1976).

listed several deficiencies for which an employee might be dismissed. The only process required to terminate an employee was written notice of the grounds for discharge. The Court noted that a property interest may be created by ordinance or implied contract, but held that the sufficiency of the claim of entitlement must be decided with reference to state law.[140] Under a North Carolina Supreme Court decision, an enforceable expectation of continued public employment could exist only if the employer, by statute or contract, had actually granted some form of guarantee. The Court adopted the district court's construction of the ordinance that the police officer held his position at the will of the city, even though a contrary reading of the ordinance was possible, and held that there was no deprivation of a property interest protected by the due process clause.

Bishop seems to indicate that a general inquiry into the legitimacy of expectations is no longer required, and that the Court may look instead to positive state law and judicial interpretations of that law to determine whether an entitlement exists.[141] It is not clear that the *Bishop* restriction of the entitlement doctrine, motivated by the Supreme Court's growing concern with reducing federal judicial interference with state decision-making,[142] should apply to evictions from units assisted by a federally designed low income housing program. Nevertheless, the following discussion will identify positive state (PHA) and federal rules which establish an entitlement to continued occupancy in Section 8 assisted units under the requirements of *Bishop*.

Both conventional public housing[143] and FHA subsidized housing[144] tenants have successfully established a protectable property interest in the continued occupancy of their rental units. Court decisions finding entitlement to federally assisted low income housing are based on the principle that the tenants' interest in remaining in assisted units is more than a "unilateral expectation;" the federal government has pledged itself to provide decent, safe, and sanitary dwellings for low income families and has enacted programs to meet this goal.[145] Courts have noted that the government policy of providing decent housing implies a commitment to promote "an atomosphere of stability, neighborliness, and social justice"[146] for low income tenants. Such a commitment creates an expectancy of continued occupancy in assisted units. In response to the reasoning of these courts, HUD has by regulation provided all public housing and subsidized housing tenants with the expectation that unless there is good cause for termination of tenancy, they may remain in assisted units. Thus, even though not all eligible families receive an assisted housing unit, unlike the *Goldberg* welfare situation where all eligible families receive benefits, all eligible families that actually receive assisted housing have a right to continued occupancy in the assisted unit unless good cause can be shown.

The structure of the Section 8 program also provides the necessary basis for the Section 8 tenant's belief that his or her family is entitled to continuing benefits. All Section 8 applicants must go through a screening process. To be eligible, a person must be of lower income and meet the PHA's definition of "family."[147] In addition, all tenants are protected from certain arbitrary and discriminatory practices. No person may be excluded from or be denied the benefits of the program on the ground of race, color or national origin.[148] Tenant leases may not contain certain lease clauses such as waiver of legal proceedings, confession of judgment, or exculpatory clauses.[149] No tenant may be discriminated against in the provision of services because of race, color, creed, religion, sex or national origin[150] or in existing housing, because they are a member of a class such as unmarried mothers or welfare recipients.[151] These rules indicate the government's recognition that Section 8 tenants need to be protected from certain practices in the private market.

For the purpose of establishing an entitlement, the expectation of continued occupancy is easily applied to the Section 8 new construction and substantial rehabilitation program. As with the public housing and subsidized housing tenants, the federal involvement is manifest to the tenant. But for the Section 8 statute and later assurances of Section 8 program participation, the tenants' units would not have been built or substantially rehabilitated. The agreement between the Section 8 owner and the federal government is for an initial term of not more than five years subject to renewal for up to 20, or in some circumstances 40 years if the owner complies with necessary obligations. This expectation of continuing benefits is also applicable to the tenant for whose benefit the Section 8 housing was created. Thus, as with public housing and subsidized housing, the government has created an expectation of continued occupancy in the Section 8 new construction and substantial rehabilitation programs.

Under the Section 8 existing housing program there are two major difficulties in establishing an entitlement to continued occupancy of the assisted unit. First, the limited

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140. *Id.* at 344.
141. *See The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 86-104 (1976).
142. *Id.*
143. *For example,* Caulder v. Durham Housing Authority, 433 F.2d 998, 1003 (4th Cir. 1070), *cert. denied,* 401 U.S. 1003 (1971); Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937, 943 (2d Cir. 1974) (redevelopment authority housing).
144. *See, e.g.,* Geneva Towers Tenant Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974); Caramico v. Secretary of HUD, 509 F.2d 694 (2d Cir. 1974); Joy v. Daniels, 479 F.2d at 1241 (4th Cir. 1973); McQueen v. Drucker, 317 F.Supp. 1122 (D. Mass. 1970), *aff'd,* 438 F.2d 781 (1st Cir. 1971).
145. 42 U.S.C. §§1401 and 1437f(a).
146. McQueen v. Drucker, 317 F.Supp. at 1130 (D. Mass. 1970); quoted in *Joy v. Daniels,* 479 F.2d at 1240 (4th Cir. 1973).
147. HUD defines an eligible "family" to include an elderly, mentally or physically handicapped, disabled or displaced person as well as those families whose income does not exceed limits set by HUD. *See* 24 C.F.R. §§880.102, 881.102 and 882.102.
148. *See* 42 U.S.C. §2000(d).
149. *See* 24 C.F.R. §§880.219(c), 881.219(c), 882.210(f)(3), 883.319(c) and 886.122(c).
150. *See* 24 C.F.R. §§880.219(b), 881.219(b), 882 App. VI(f), 883.219(b) and 886.122(b).
151. *See* 24 C.F.R. §882 App. II (¶2.1, *Nondiscrimination in Housing* provision in Housing Assistance Payments Contract).

duration of unit assistance poses a problem. The annual contributions contract (ACC) between the PHA and HUD is for a maximum of five years. The maximum term of the housing assistance payments contract between the PHA and owner is one to three years (congruent with the term of the lease) with a provision to renew up to a total of five years if a family continues in occupancy after the expiration of the one to three year term.[152] Second, under HUD regulations,[153] the Certificate of Family Participation is viewed as the Section 8 benefit, not the unit. If evicted, the family may relocate to another unit and continue to receive the benefit of the certificate. It is HUD's position that an eviction therefore does not interrupt the flow of the Section 8 benefit to the family. Although these program rules undermine the expectancy argument, there are several rebuttal arguments to be made which eliminate their impact.

The duration problem may be overcome by looking to the maximum period of the lease and the payments contract. On the basis of the subsidized housing cases there is little doubt that a tenant cannot be evicted for other than good cause during the term of the lease, *i.e.*, for one to three years up to a renewal total of five years. The 30-day notice to terminate provision[154] should not destroy the tenant's expectancy because of the regulation's simultaneous requirement that the landlord provide a lease of not less than one year. A reasonable construction of this dual requirement would be that the landlord must provide a lease for a minimum term of a year which could be terminated (actually not renewed) by either party giving 30 days' notice before the end of the year's term.

An argument for an expectancy beyond the initial lease period, however, can be made based on the normal practice in both federally assisted and private housing for the landlord and tenant to continue the initial lease period on a month-to-month or renewal basis. In general, termination of such tenancies is the exception rather than the rule.[155] The expectancy of a Section 8 existing housing tenant therefore should be based on maximum period of the housing assistance payments contract. The Section 8 regulations provide that if a family continues in occupancy after the expiration of the term on the same terms and conditions as the original lease (or with changes to the lease approved by the PHA), the housing assistance contract shall continue in effect for the duration of such tenancy up to a total period of five years.[156] Thus, under this view, existing housing tenants have an expectancy of five years of continued occupancy.

A deprivation of occupancy within this five-year period would exceed the *de minimis* line recently drawn by the Supreme Court in *Goss v. Lopez.*[157] In *Goss,* the Court held a ten-day public school suspension to be a deprivation of a property interest of which students may not be deprived without notice and hearing. Surely a deprivation of any duration prior to the expiration of the housing assistance payments contract period should constitute a protectable interest.

Even if the expectancy is found to be for only the period of the initial lease, under certain circumstances, a Section 8 tenant should not be subject to eviction at the end of the term of the lease merely because the landlord claims he or she no longer wants to keep that particular unit in the program. For example, if the tenant has complied with terms and conditions of the lease, but the landlord wants to evict the particular tenant claiming that the unit is no longer under the Section 8 program, the termination should not be permitted because the landlord should not be able to indirectly act in retaliation against the tenant.[158] Under this principle, the landlord should not be permitted to take just one unit off the Section 8 market if the landlord continues to participate in the program by maintaining other units.[159]

The second major difficulty in establishing an entitlement to continued occupancy of an existing housing unit, HUD's position that the Section 8 benefit is attached to the family and not the unit, may be overcome upon closer examination of the Certificate of Family Participation as the Section 8 "benefit." The Certificate merely indicates that the family is eligible to receive Section 8 benefits if it finds a rental unit which meets the family's needs and later receives final approval from the PHA.[160] Possession of the specific housing unit at an affordable rent constitutes the tangible benefit to the tenant.

Along with the Section 8 rental unit, the tenant acquires a "housing bundle" which includes participation in a neighborhood, access to shops and schools, services, transportation and other less tangible benefits attached to a specific unit. Eviction may mean a loss of these benefits as well as loss of the unit. Because of the shortage of housing for low and very low income families, there is no assurance that the family will be able to relocate in a decent, safe and sanitary unit after eviction,[161] much less find another unit in the same

152. *See* 24 C.F.R. §882.107.
153. *See* 41 Fed. Reg. 43330 (Sept. 30, 1976).
154. 24 C.F.R. §882.107.
155. *See* Comment at 886, *supra* note 130. *See also* Comment, *Due Process Protection Under the Entitlement Doctrine for Tenants of Federally Supported Housing,* 6 GEORG. L. J. 1301 (1975).
156. 24 C.F.R. §882.107.
157. 419 U.S. 565 (1975).
158. *Cf.* Silva v. East Providence Housing Authority, 423 F.Supp. 453, 461 (D. R.I. 1976), where city council and housing authority delayed construction of low income housing which had been contracted with HUD. Municipalities are forbidden from repudiating such cooperation agreements with HUD: "it would be anomalous, to say the least, and quite destructive of national housing policy, if the officials of the City and EPHA whose opposition and delay caused HUD to terminate (the project) were permitted to accomplish by indirection what they are barred from accomplishing by direct action."
159. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853, 867 (D.C. Cir. 1968) (landlord may go out of business entirely if he wishes to do so but his right to discontinue rental of all of his units does not justify a partial closing designed to intimidate remaining tenants in connection with retaliatory eviction defense after tenant's assertion of housing code violations). The danger of this approach is that an owner who maintains only a few Section 8 units could decide to terminate them all to avoid good cause eviction requirements for one tenant.
160. 24 C.F.R. §882.209.
161. *See generally* Owens v. Housing Authority of City of Stanford, 394 F.Supp. 1267, 1271 (D. Conn. 1975) (public housing eviction constituted irreparable injury because of scarcity of low income housing).

neighborhood. If a family must move to another PHA jurisdiction to find housing after an eviction, the family may be forced to compete with all other applicants for another Certificate.[162] Finally, there are substantial financial costs to any tenant who is required to move; moving costs and storage expenses are particularly burdensome for low income tenants. All of these factors argue against the interpretation of possession of the Certificate as the benefit rather than occupancy of the unit.

In summary, entitlement to continued occupancy in Section 8 newly constructed and substantially rehabilitated units may easily be established under the reasoning of previous cases. Entitlement to continued occupancy of Section 8 existing housing units is more difficult to establish under present HUD rules, but these rules may be successfully challenged by the concepts of a five year expectancy and the "occupancy" theory of benefit.

B. Balancing the Interests of the Tenant, the Private Landlord, and the Government: Right to a Good Cause Hearing

Once state action and entitlement to continued occupancy are established, courts must determine the appropriate procedural safeguards under *Goldberg*[163] by weighing the tenant and government interest in avoiding interruption of the government Section 8 benefit against the government's interest (and the private landlord's interest) in a summary procedure. As the Supreme Court recently outlined in *Mathews v. Eldridge,*[164] it is a balancing process:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[165]

In *Eldridge* the Court distinguished the welfare termination procedure invalidated by *Goldberg* and held that due process did not require an evidentiary hearing prior to the termination of Social Security disability benefits not based on financial need. The present and proposed Section 8 eviction procedures should be examined in light of the three factors outlined in *Eldridge.*

The first factor to be considered under the *Eldridge* standard is the private interest. The tenants' interest in continued occupancy, as discussed above,[166] is in the financial and social benefits derived from continued occupancy of the unit chosen by the tenant to meet the family's needs. The government shares the tenants' interest in stability through its stated objective of affording every American decent, safe, and sanitary housing and of encouraging stable communities.[167] The arbitrary eviction of assisted families runs counter to this shared private and governmental objective. In addition, since Section 8 benefits are based on financial need, the tenants' interest is similar to that of the welfare recipient in *Goldberg.* Deprivation of the Section 8 benefit means that a tenant would be forced to accept a substandard dwelling in the private market, or in the alternative, to pay much higher rent for satisfactory housing and therefore live without other necessities such as food, clothing and medical care. The private owner's interest in administrative convenience must also be considered. The government shares this interest through its goal of attracting private participation in the program.

The risk of erroneous deprivation of Section 8 benefits is the second factor to be considered under *Eldridge.* Under the existing housing program, the PHA must send the notice to vacate and authorize the eviction. In practice, however, most PHAs authorize any request for an eviction if the allegation of the landlord presents a reason that would be sustainable under the lease. For example, it is possible that if a landlord represents to the PHA that a tenant has a dog in violation of a lease provision, the PHA would authorize the eviction without further investigation. The fact that the tenant maintains that he does not own a dog and that the culprit belongs to the neighbors may not be considered by the PHA. Another situation which arises is the retention of security deposits by the landlord. PHAs often do not investigate a landlord's claim for the security deposit and automatically approve payment. As a result, the landlord uses the additional funds for repairs on the unit (repairs which needed to be done when the tenant moved in and not as a result of occupancy), and the tenant loses the Section 8 benefit through the PHA policy of not providing a relocation certificate for a family which "damaged" a unit. Without a prior hearing, the tenant has no way of preventing an erroneous deprivation.

For the new construction and substantial rehabilitation program the problem is even more pronounced. There are no procedural protections for tenants unless the owner wants vacancy benefits for the 60-day period subsequent to the eviction, in which case the landlord must certify that ten-day notice was given and that the eviction did not violate the lease, contract or any applicable law. No hearing is provided and HUD has no mechanism to check on arbitrary evictions by the owner. The tight housing market makes the risk of deprivation particularly troublesome for low income tenants. A late rent payment may automatically result in eviction when a welfare check arrives a few days late or when a tenant is temporarily laid off from work. There is also the risk that a tenant may be evicted for the actions of others. For example, a tenant may be evicted for damage to the unit, such as a broken window caused by children in the neighborhood. During a tight market, the landlord has little incentive to investigate such matters.

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162. 24 C.F.R. §882.209(e)(2).
163. 397 U.S. at 262-3 (1970).
164. 424 U.S. 319 (1976).
165. *Id.* at 335.
166. *See* textual discussion accompanying notes 161 and 162.
167. 42 U.S.C. §1441a.

Since there is considerable risk of erroneous deprivation of Section 8 benefits through present procedures, the probable value of additional or substitute procedural safeguards must be considered. In *Eldridge,* the Court determined that the written medical assessment of a worker's condition is a more easily documented decision than the typical determination of welfare entitlement where "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decision making process."[168] The Court further distinguished the welfare termination procedure in its failure to provide an effective means for the recipient to communicate his case to the decision-maker. Written submissions were unrealistic because most recipients lacked the "educational attainment necessary to write effectively" and could not afford legal counsel.[169] A Section 8 tenant, like the welfare recipient[170] in *Goldberg,* would benefit greatly from the opportunity to make an oral presentation before a decision-maker.

A final factor to be considered under the *Eldridge* standard is the governmental interest, including the function involved and the fiscal and administrative burdens the additional procedures would entail. The government's interest is twofold and potentially conflicting. The government shares the tenants' interest in the stability of continued occupancy. On the other hand, the government also has an interest in private owner participation in the Section 8 program. If governmental due process standards are imposed on landlords, many private owners may be uninterested in participating in the program, especially if they can easily rent the same unit to nonassisted families who could be evicted without due process procedures.

In balancing these interests, courts could arrive at alternative applications of a good cause eviction standard which would not be too costly to the government in terms of undue administrative burdens or endangering the success of the Section 8 program.[171] Under the existing program, the PHA could apply its existing model grievance procedure mechanism[172] to Section 8 tenants. This procedure provides for notice, an informal hearing, access to documents and PHA records relied upon in the eviction, personal appearances before an impartial decision-making body, and a right to a trial de novo. Since the PHA already is responsible for authorization of Section 8 evictions from existing units, this procedure would not add excessive burdens to the PHA administration of the program.

Harm to the landlord is minimal because of safeguards within the grievance procedure. For example, unless rent due is deposited in an escrow account during the course of the proceedings, the hearing procedure may be deemed waived.[173] If tenant behavior is hazardous to the health and safety of other tenants, the landlord may avoid the model procedures.[174] Although the grievance procedure may constitute some measure of inconvenience to the landlord, on balance, the tenants' interest in an inexpensive hearing should prevail.

Application of the good cause standard to new construction or substantial rehabilitation not administered by the PHA could be accomplished in ways similar to the good cause eviction standard for subsidized housing.[175] Courts have indicated that a federal good cause eviction standard may be incorporated as a defense in state judicial eviction proceedings as a way of meeting due process requirements.[176] This mechanism would present no undue burden to the landlord because of the necessity to go to court anyway. The good cause requirement would merely require the landlord to give reasons for the eviction and would give the tenant a right to produce evidence of a contrary position.

An alternative procedure would be to require HUD to implement an impartial hearing procedure on the issue of good cause for proposed evictions. The need for an informal hearing prior to the court proceeding is now under consideration by HUD for subsidized housing.[177] Requiring the landlord and tenant to talk in an informal setting may eliminate the cost to both parties of the eviction and rerental through the result of reaching agreement prior to legal action. Such a hearing should not eliminate the right to a trial *de novo.* Whatever the solution, tenants should be afforded a right to an adjudication of facts prior to an eviction, and landlords should be protected by a process with as little delay and inconvenience as possible consistent with a good cause requirement.

On balance, then, some type of prior evidentiary hearing should be established to protect Section 8 tenants from

168. 424 U.S. at 343-344 (1976)..
169. *Id.* at 345.
170. A substantial percentage of tenants in conventional public housing and subsidized housing receive public assistance. Of the 388,432 families recertified for continued occupancy in public housing during the 12-month period ending September 30, 1976, 77 percent received assistance and/or benefits and 45 percent received assistance with or without benefits (Table H-120). Of the 136,826 families certified for occupancy in §236 housing during the same time period, 93 percent received assistance and/or benefits and 80 percent received assistance with or without benefits (Table H-60). Of the 93,203 families recertified for occupancy in §236 housing, 95 percent received assistance and/or benefits and 77 percent received assistance with or without benefits (Table H-68). "Assistance" is defined as funds given on the basis of need by organizations, some private, but primarily public. "Benefits" are non-salary funds not given on the basis of need by governmental agencies (*See* note to Table H-67). 1976 STATISTICAL YEARBOOK OF THE U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, (Washington, D.C.). Similar information on Section 8 families was unavailable.
171. For a more detailed discussion of possible acceptable solutions, *see* Note, *supra* note 130 at 1190-1196.
172. 24 C.F.R. §§866.50, *et seq.*
173. 24 C.F.R. §866.55(e).
174. 24 C.F.R. §866.51(a).
175. *See* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Anderson v. Denny, 365 F.Supp. 1254 (W.D. Va. 1973); Appel v. Beyer, 39 Cal.App.3d Supp. 7, 114 Cal.Rptr. 336 (1974).
176. Where state summary procedures do not afford tenants the opportunity to present federal constitutional defenses, administrative hearings should be required. *See* Owens v. Housing Authority of City of Stanford, 394 F.Supp. 1267, 1273 (D. Conn. 1975).
177. *See* 24 C.F.R. §§450 *et seq.,* 41 Fed. Reg. 43329 (Sept. 30, 1976).

arbitrary evictions. The good cause standard should be instituted at the hearing, whether it be a PHA administrative hearing or a judicial proceeding. Under the standards of *Goldberg* and *Eldridge*, an oral presentation prior to eviction would be the most appropriate means to safeguard Section 8 tenants' entitlement to an uninterrupted flow of Section 8 assistance.

IV. CONCLUSION

Predictions regarding the success of establishing a good cause eviction standard for Section 8 tenants vary according to the special provisions and characteristics of the Section 8 subprograms. Although chances of establishing state action appear most favorable in the existing housing program because of PHA authorization of the eviction, existing housing tenants will encounter relatively more difficulty in justifying application of the good cause standard under the due process entitlement doctrine because of HUD's interpretation that the Certificate of Family Participation rather than the unit constitutes the Section 8 benefit.

The balance falls the other way for the new construction and substantial rehabilitation program. There are more obstacles to showing the requisite state or governmental action, but once it is established, application of the good cause eviction standard to private developers follows by analogy to the subsidized housing cases.

Although it is difficult to generalize, based on principles already established for the conventional public housing and FHA subsidized housing programs, a sound argument can be made for the establishment of both a due process good cause standard and a prior evidentiary hearing for tenants faced with eviction from Section 8 assisted housing.

ENERGY ISSUES AFFECTING THE POOR: A PRELIMINARY SURVEY

by **Allison Beck***

I. INTRODUCTION

The past winters of severely cold weather and the resulting energy problems have had a startling impact on the lives of most Americans. Sacrifices are being requested, or in many cases required, of all — rich and poor. But there can be no doubt that those who have little or nothing to begin with will suffer the most when asked to conserve or cut back; the poor have no margin for saving. The need for providing specific and direct attention and remedies to the energy problems of low income Americans is apparent. To heat homes, to drive to work or to the grocery store, to cook meals — all involve the ability to pay for energy. Obviously, when it is freezing and there is no money to pay for fuel, any long-range efforts to reduce the overall cost of energy to make it more affordable for the poor will seem remote at best. What they need is the fuel now, or the money to pay for it. The energy problem, therefore, must be considered on two levels: one requiring stop-gap solutions, the other requiring some comprehensive and long-range solutions.

II. PROBLEMS REQUIRING IMMEDIATE, SHORT-TERM REMEDIES

A. Unfair Credit Practices; Lack of Protective Services; Consumer Advocacy

The 1973 Arab oil embargo introduced into the headlines the phrase "energy crisis." The embargo set the stage for the enactment of the Emergency Petroleum Allocation Act (EPAA), Pub.L. No. 93-159, but many of the regulations, allocation procedures and price controls imposed by that legislation have since been phased out. The EPAA also touched on the critical area of protective services. How large a deposit may a utility or fuel distributor demand before beginning service? What kind of notice must a customer be given before service is disconnected? What are valid reasons

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