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1/12/81

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
Plaintiffs,	)	No. 66 C 1459
vs.	)	No. 66 C 1460
	)	(Consolidated)
MOON LANDRIEU, et al.,	)	
Defendants.	)	

MEMORANDUM OF DEFENDANT
ILLINOIS HOUSING DEVELOPMENT AUTHORITY
IN RESPONSE TO MOTION TO DISMISS
ITS CROSS-CLAIM FOR FAILURE
TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED

On January 2, 1981, defendant ILLINOIS HOUSING DEVELOPMENT AUTHORITY ("IHDA") filed a cross-claim against defendant, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD"). In a hearing before this court on January 5, 1981, HUD orally presented a motion to dismiss the cross-claim for failure to state a cause of action upon which relief can be granted. Fed. R. Civ. Pr. 12(b)(6). Although transcripts from this hearing are not yet available to IHDA from the court's reporter, IHDA believes that it has captured all relevant details of HUD's motion, and can demonstrate that it has no merit.

At the basis of IHDA's cross-claim against HUD is a proposed consent decree submitted on December 18, 1980, to this court

by HUD and representatives of the plaintiff class as Exhibit B to a certain Joint Motion for Order Respecting Proposed Consent Decree. The proposed consent decree presents the court and the parties with a program of "remedial action" purportedly designed to remedy part of HUD's prior history of racial discrimination.

The proposed consent decree places remedial obligations upon IHDA's conduct which clearly violate Section 8 of the United States Housing Act of 1937 as amended (42 U.S.C. §1437, et seq.) and the federal regulations promulgated by HUD that govern the relationship under the so-called Section 8 program between HUD and state financing agencies. 24 C.F.R. Part 883.

The proposed decree would cease to exceed HUD's authority if the phrase "State Housing Agencies (24 C.F.R. Part 883)" were deleted on page 2 from the definition of the term "assisted housing." Although this change would correct HUD's error, a description of at least some of the substantive provisions of the proposal that exceed HUD's authority is in order. Three are particularly worthy of note.

First, at ¶5.5.4, the draft decree requires that a certain percentage of housing units in all developments in the Chicago SMSA be reserved for offers to Gautreaux related "eligible persons."

The precise percentage "shall be finally determined by HUD." ¶5.5.4.a. The minimum number of bedrooms in each reserved unit is also specified. ¶5.5.4.b.

Second, ¶5.5.4.c. of the draft decree prohibits the withdrawal of a reserved unit from the Section 8 program.

Third, at ¶5.6.2., the proposed decree requires all developments (of 5 or more assisted units) to contain a minimum percentage of "units designed for large families," including at least two four-bedroom units.

ARGUMENT

HUD's Proposed Consent Decree Violates HUD's Own Regulations

A. The Regulatory System For The Section 8 Program

1. Overview

"By law and practice, State agencies have been given a unique role in the delivery of HUD programs." 12/1/80 Memorandum from Lawrence B. Simons, Assistant Secretary for Housing, HUD, p. 1. That memorandum, a copy of which in its entirety is attached hereto as Appendix A, was prefaced with "several general comments with regard to the role of State housing finance and development agencies

(HFDAs*) in HUD programs, [and] the Department's administrative relationship with those agencies . . .," and for that reason is instructive here. Id. The purported irregularities of the New Jersey Housing Finance Agency considered in that memorandum are not pertinent.

The "partnership role" (Id. p. 10) played by the HFDAs, of which IHDA is one, requires HUD to "respect their autonomy" (Id. p. 1) while articulating certain narrow programmatic rules. Thus, in the Section 8 program

> "HUD has given State agencies substantial latitude in delivering its programs in return for the agencies' providing financing, taking over substantial processing and oversight functions, and/or sharing or assuming the risks of project failure." Id.

The governing regulations can be found at 24 C.F.R. Part 883. The purpose of this Part is to establish special

> "procedures for allocating set-asides of contract authority to state agencies and [set] the policies and procedures under which they must use this authority to provide assistance in newly constructed, substantially rehabilitated, moderately rehabilitated, and existing housing." 24 C.F.R. §883. 101(a)(3).

Thus, except for specific cross references in Part 883 to other Parts, Part 883 constitutes the entire regulatory framework for

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* Also known as HFAs (housing finance agencies).

IHDA's use of the Section 8 program. 24 C.F.R. §883.101(a)(2). Accordingly, for the court's convenience, attached hereto as Appendix B is Part 883, 24 C.F.R.

2. HUD's Citation of Authority Is Inapposite

Actual restrictions placed on HFAs under Part 883 are few and do not support the limitations contained in the proposed consent decree referred to above. The one regulation cited by HUD in presenting its oral motion to dismiss, 24 C.F.R. §883.204(c), provides no basis for mandating the three identified excessive conditions. That section only presents an exclusive list of factors to be used in determining the annual amount of an HFA set-aside. Further, there is no foundation in that regulation for eliminating an HFA set-aside for failure to meet any one or more (but less than substantially all) of the enumerated factors. What is more, none of the factors could possibly form the basis for the excessive conditions. Of the six enumerated factors in §883,204(c), only three even superficially relate to the proposed decree:

> (2) The extent to which the Agency [an HFA] has identified and evaluated the unmet housing needs in the State and developed a plan for serving those not likely to be met effectively through other channels and for promoting mobility;
>
> (3) The extent to which the Agency's program complements the allocation plan of the HUD field office;
>
> (4) The Agency's ability and willingness to assist families in types of projects and in areas which meet particular HUD goals (e.g., spatial deconcentration, substantial rehabilitation, units for large families). . . .

As to factor (2), the record in this case is replete with evidence that IHDA created, maintained and improved the very placement program HUD is now seeking to impose. So, even if utter failure on this factor were a sufficient predicate (which it is not) to denying an entire HFA set-aside, it would be pure mockery for HUD to find a failure here or to argue that this was the basis for its authority.

As to factor (3), "allocation plan" is a defined term (24 C.F.R. §883.302) and refers only to the formulaic distribution of funds among geographic areas and the separation of funds into elderly/family and existing/newly constructed/substantially or moderately rehabilitated categories. Accordingly, it is not relevant to the excessive limitations contained in the proposed decree identified above.

The last factor even worthy of mention, (4), is stated in terms of "ability and willingness" and on that basis alone would on the record be inapplicable here. Furthermore, this item requires factoring in ability and willingness in producing other program elements (e.g., substantial rehabilitation) than those relevant to the proposed decree. Thus, even a complete lack of ability or willingness to produce large family units, say, would not necessarily tip this factor against the HFA.

Even if utter failure on one, or an element of one, of the factors would be sufficient for a denial or a conditioning of

a set-aside, and even if IHDA had failed on one of the factors, the regulations do not countenance a long term prohibition of an HFA's participation in Section 8 set-asides. At least, such a review and determination would have to be made annually. A more accurate reading of the regulation, though, suggests the need for review and determination at the time of each set-aside. The proposed agreement by HUD can be read alternatively as (1) a one time review and determination of some unspecified failure by IHDA limiting set-asides for the term of the proposed decree (which even assuming the continued existence of the federal programs mathematically could be 100 years, and most optimistically might be 10 years*), or (2) a complete disregard by HUD of the specified procedure. On neither reading is the proposed action supportable by law.

3. Part 883 Does Not Support HUD's Actions

In short, Part 883 contemplates that the state agency will be more than a mere funding conduit implementing HUD's program decisions. Rather, they are premised on an active and expert privately financed housing assistance agency that is effectively

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* The placement goal of 7,100 divided by the minimum monthly placements (5) divided by 12 months equals 118.33 years. This computation disregards the additions to the time period caused by the obligation to provide replacement units, the three month averaging factor and the force majeur clause. The 10 year figure is not now explained of record, but based on discussions with HUD and the plaintiffs' representatives, IHDA feels that this figure for this purpose will not be protested.

within the parameters of its own law and circumstances meeting housing needs in its community. The result of any review of that Part is that no basis can be found for the identified limitations on IHDA's program.

In any event, Part 883 countenances only a passive supervisory role for HUD, not the active role as a program specifier embodied in the proposed decree. Thus, HFAs certify to compliance with the few rules of Part 883 in submitting a project proposal and HUD "approves" based solely on these certifications. 24 C.F.R. §833.102(a). Only if HUD has "substantial reasons to question" the certification will HUD look behind them. Id. If the HFA defends its position "HUD will act in accordance with the HFA's judgment or evaluation unless HUD determines that the certification is clearly not supported by documentation." 24 C.F.R. §883.201(c)(1). Aside from making it impossible for HUD to be a program initiator, this laissez-faire relationship articulated in the regulations is totally at odds with the intricate, numerous provisions in the draft decree for exceptions and dispute resolution.

B. The Proposed Consent Decree And The Identified Excessive Limitations on IHDA

1. ¶5.5.4. - The 6-12% Requirement

Not only is there no authority under Part 883 for HUD insistence on the special reservation of 6-12% of all units in each of IHDA's Chicago SMSA developments (as shown in the preceding section) requirements of statute and regulations affirmatively prohibit that kind of requirement. Both the United States Housing Act of 1937 as amended and Part 883 affirmatively require that a preference be given in tenant selection that is inconsistent with the proposed decree's reservation. Section 8(e)(2) of that Act requires only that a project owner shall give preferences to families which occupy substandard housing or are involuntarily displaced. See also, 24 C.F.R. §833.311. Moreover, that Act and the regulations expressly provide that this is the only exception to the owner's management control, "including the selection of tenants."

Likewise, the proposed reservation conflicts with requirements in 24 C.F.R. §883.702(a)(3) that before an owner markets to any other class of propsective tenants, he must market (and if there is demand, rent) to two specific groups: (1) families expected to reside in the community because of current or planned

employment there and (2) families who are in the category of "least likely to apply" as determined in the Affirmative Fair Housing Marketing Plan. That Plan is the owner's product and is always tailored to meet the owner's capabilities and the particular circumstances of the development's location. Thus, it would be fair to surmise that for a development in the Limited Area, the categories of "least likely to apply" and "eligible person" under the proposed decree would be mutually exclusive. In some circumstances, those categories would be similar in composition, although it would be sheer chance that they would be identical. The employment category for advanced marketing obviously bears no meaningful relationship to the Gautreaux eligible persons. The proposed Gautreaux reservation requirement is thrown up by HUD as if this advanced marketing requirement did not even exist. IHDA and its mortgagors are left with the conflicting duties.

Similarly, the regulatory requirement that "[l]ocal residency requirements are prohibited" (24 C.F.R. §883. 704(b)(l)) would be violated by reserving units in Chicago developments for CHA tenants. Lastly, the requirement that 30% of assisted units be rented to "very low-income families" (24 C.F.R. §883.704(c)), is not accomodated by the rigid requirements of the proposed decree.

An overriding consideration in comparing the regulatory scheme with the proposed decree is the conflict explained well in Appendix A between HUD's desire for inexpensive production and the HFA's desire for financial soundness. See Appendix A, p.2, second paragraph. The arbitrary selection of a range (6-12%) with HUD to set the level within that range completely emasculates the "partnership" role provided for in the regulations which is designed to balance delicately prudence and production.

2. ¶5.5.4.c. - Prohibition Against Withdrawal of the Set-Aside

24 C.F.R. §883.207(c)(2) provides for the free transferability and withdrawal by the HFA of a set-aside earmarked for a specific development simply on notice to HUD. This procedure is manifestly inconsistent with the prohibition on withdrawal imposed by ¶5.5.4.c of the proposed decree.

Further, the regulations also describe the bases and methods upon which a termination of tenancy can be effected. 24 C.F.R. §883.708. In effect, the proposed consent decree now amends this regulation adding a new limitation: no tenancy may be terminated should the owner wish to withdraw from IHDA's program--unless, of course, plaintiffs' counsel consents. A carefully drafted set of regulations now is to be replaced by HUD's prohibitions and plaintiffs' counsel's prerogative.

3. ¶5.6.2 - The Large Family Requirement

The requirements in the proposed decree for a certain quantity of large apartments in each IHDA Chicago SMSA development is so foreign to Part 883, that the subject is not covered even in a general way in the regulations. Such a requirement is not an item specified in the regulations for compliance; it is not an item specified for certification; it is not an item permitted for HUD review. Simply put, there is not even a wisp of authority for HUD to insist on this requirement in the proposed decree. There is a reason for this: the mix in a development among apartment types is inherently a function of local market conditions and accordingly an area affecting financial soundness - the specified ken of HFB's under the regulations.

C. IHDA's Cross-Claim Against HUD's Attempt to Exceed Its Authority States A Claim Upon Which Relief Can Be Granted

In its oral motion before this court, HUD has generally stated that IHDA's cross-claim fails to state a cause of action and should be stricken. It is elementary that for the purposes of a motion to dismiss, the cross-claim is construed in the light most favorable to the cross-claimant, and its allegations are taken as true. Scheuer v. Rhodes, 416 U.S. 232 (1974). In Conley v. Gibson, 355 U.S. 41 (1957), the Supreme Court set forth the applicable standard which governs a court's evaluation of the sufficiency of a complaint (or cross-claim) being challenged by a rule 12(b)(6) motion:

> [I]n appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

See also French v. Heyne, 547 F.2d 994 (7th Cir. 1976).

Any analysis of HUD's authority regarding the proposed consent decree must start from the fundamental premise that no federal agency operates in a vacuum, i.e., before an agency of the government takes action it must have statutory authority to do so. HUD, of course, has been granted such authority by Congress. 42 U.S.C. §3535(d). However, no grant of statutory authority operates as a carte blanche to an agency. An agency cannot exceed its statutory authority, see e.g., SEC v. Sloan, 436 U.S. 103 (1978), nor may an agency promulgate regulations without following the provisions of the Administrative Procedure Act, 5 U.S.C. §551 et seq. Where an agency acts in excess of its statutory authority or without observing the procedures required by law, such actions are unlawful and are to be set aside. 5 U.S.C. §706.

Agency regulations, after proper procedural implementation, have the force of law, United States v. Ansani, 240 F.2d 216 (7th Cir.) cert. denied 353 U.S. 936 (1957), and are as binding upon the government as upon those being regulated. United States v. Coleman, 478 F.2d 1371 (9th Cir. 1973). Once these textbook principles of administrative law are reviewed, it is clear

that HUD's activities described in the proposed consent decree are unlawful.

First, the above description of certain terms of the proposed consent decree as they relate to HUD's own regulations clearly establishes that the proposed conduct openly conflicts with the conduct required by those regulations. In short, HUD is bound by its own regulations in 24 C.F.R. Part 883 and the proposed consent decree flatly violates the provisions of that Part. Those regulations define and limit the scope of HUD's authority, and the consent decree is an unlawful exercise beyond the scope of that authority.

Arguably, HUD is attempting to effectuate an amendment of its regulations, and amendatory power is clearly within an agency's authority. United States v. O'Brien, 391 U.S. 367 (1968). However, where an agency is so massively redefining its relationship to State government, it is clear that the provisions of the Administrative Procedure Act must be followed United States v. Daniels, 418 F.Supp. 1074 (D.S.D. 1978). Nor does any general regulatory language which might be found in Title 24, C.F.R., authorizing additional rules provide any support for HUD's actions. Such general language cannot operate as a self-exemption from the Administrative Procedure Act where so massive a shift in HUD's authority and duties is being attempted. Rather, HUD's proposed actions must be seen as an unlawful attempt to exceed HUD's

statutorily created authority to promulgate regulations in accordance with the Administrative Procedure Act.

These conclusions that the inconsistencies and contradictions between Part 883 and the proposed decree are enough to prevent the entry of the decree as proposed are supported further by the fact that Part 883, as revised effective February 29, 1980, includes "all necessary material." See, Summary, Notice of Action for Interim Rule, 45 Fed. Reg. 6886. Part 883 as now constituted was the result of a specific effort to make those regulations "more prescriptive and detailed." Appendix A, p.2. Thus, the paucity of program requirements and lack of HUD flexibility are not the result of oversight or haste; instead they are the result of a specific national program respecting local initiative.

Even a federal court's broad equitable remedial powers are limited by the regulatory framework. Thus, one program should not be judicially penalized or threatened with termination because of the sins of another. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972); see also, Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969). A fortiori, the federal agency that perpetrated the Constitutional violation here cannot put aside its regulations to restrict an innocent party's participation in an untainted federal program.

The proposed consent decree requires conduct violative of HUD's own regulations or, in effect, is an exercise of unlawful ad hoc rulemaking. IHDA's cross-claim, then, clearly sets forth a cause of action to halt the implementation of HUD's unlawful conduct.

HUD's motion to dismiss the cross-claim for failure to state a claim upon which relief can be granted should be denied.

Respectfully submitted,

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DEC 1 1980

MEMORANDUM FOR: Joseph Sickon
Assistant Inspector General for Audit

SUBJECT: Report on Audit of the Administration of Section 236 and Section 8 New and Substantial Rehabilitation Programs -- New Jersey Housing Finance Agency

This constitutes the Office of Housing's response to the Office of Inspector General's report and recommendations of August 29, 1980, concerning the administration of the Section 236 and Section 8 programs by the New Jersey Housing Finance Agency (HFA). Before responding to the report's specific findings and recommendations, I would like to make several general comments with regard to the role of State housing finance and development agencies (HFDAs) in HUD programs, the Department's administrative relationship with those agencies and our approach to the issues raised by the report.

By law and practice, State agencies have been given a unique role in the delivery of HUD programs. As administrators of Federal subsidies, they are accountable to the Department and to the Congress for their actions. At the same time, they are instrumentalities of a State, primarily accountable to the legislature which created them, and to the executive and judicial processes of the State. Thus, in working with State agencies, the Department seeks to respect their autonomy, while holding them to standards and practices that are appropriate to the programs involved.

In practice, this has meant that HUD has given State agencies substantial latitude in delivering its programs in return for the agencies' providing financing, taking over substantial processing and oversight functions, and/or sharing or assuming the risks of project failure. When a State agency provides financing without FHA mortgage insurance, we rely upon the agency's underwriting standards and procedures, rather than our own. When an agency assumes the responsibility for inviting, evaluating, ranking and selecting proposals, we do not hold the agency to HUD's requirements on these matters. This point is essential to appreciating the report's findings, for it means that a particular State agency practice is not necessarily wrong simply because it differs from the HUD practice.

APPENDIX A

The line between those standards and procedures which should be left to State agency discretion, and those which HUD must prescribe is necessarily difficult to draw, and it may shift as our experience under a program grows. Thus, the Inspector General's findings suggest that in several respects HUD may have given State agencies too much latitude in administering the Section 236 and Section 8 programs. For the most part, our own experience agreed with this basic thrust of the report, and with regard to Section 8 (new production under Section 236 having ceased), we had revised the State agency program regulations to be more prescriptive and detailed. Examples of these revisions are given in our responses to individual findings and recommendations, and these responses also indicate areas in which we intend to consider further restraints.

The need to tighten State agency regulations stems in part from the differing interests which HUD and an agency may have in a particular transaction. Where, for example, the New Jersey HFA provided uninsured mortgage financing, its interest was in obtaining a high level of subsidy (under Section 236 or Section 8) in order to assure the security of its bonds and the lowest posible interest rate -- thereby lowering program costs. HUD's interest in the same transaction, however, was to provide adequate levels of subsidy to ensure project success, but at the same time, to hold subsidies down to the lowest necessary level. This is the sort of contradictory interest which the report finds and which points out the need to continue to weigh the merits of potential added program controls against such considerations as lower interest rates, administrative simplicity and speed, etc.

While the audit report confirms the importance of the tightening of State agency regulations which has taken place, I would caution that it does not necessarily suggest misconduct or impropriety on the part of the New Jersey HFA. It is entirely appropriate for the HFA to seek, within the scope of program regulations, levels of subsidy which ensure good projects and provide strong security for bondholders. In each case two questions must be asked. First, was the cited action permissible under program regulations and practices at the time? If the action was permitted, the next question is whether the Department should prospectively prohibit that type of action or set out a specific alternative procedure. This is the type of issue -- one of program policy rather than agency misconduct -- that is raised by most of the report's findings. Further, in deciding whether to permit a particular agency practice in the future, the Department must consider not only whether that specific practice is preferable to other options, but whether it is appropriate for HUD to regulate that element of a State agency's operations in such detail.

Finally, with regard to those instances in which the report recommends that the Department seek to recoup subsidies paid or to reduce ongoing payments, several principles will govern our actions. Where the HFA was acting in accordance with program regulations, contracts and procedures at the time, opinions received from the Office of General Counsel, which will be sent to you under separate cover, raise serious questions about the Department's ability to succeed in a legal action to reduce or recoup subsidy payments. As the following analysis points out, however, HUD's general administrative authority over State agency participation in our programs permits us to negotiate with the HFA as to specific instances in which reduction or repayment of subsidy may be appropriate. This authority will be used sparingly and with full consideration of the financial needs of the projects concerned and the bonds for which they furnish security. When a program is operated according to law and regulations, State agency bondholders and officials need not fear that HUD will seek to change the rules retroactively and assert a legal right to recovery which would jeopardize projects or bonds.

I will now proceed to the report's specific findings and recommendations.

Finding #1: Annual Excess Subsidies of $481,209 Result from Failure to Reduce Original Mortgage When Project is Converted.

Finding

Several HFA projects have converted from nonprofit or limited dividend ownership. The 10 percent equity contribution, which is required of limited dividend owners by state law, was not used by the agency to reduce the principal amount of the mortgage. Instead the funds were placed in a development cost escrow (a debt service and operating reserve) and a community development escrow (a reserve for social services, additional community development and amenities). The report recommends that the mortgages on all converted projects be reduced and that future subsidy payments be based on these reduced mortgage amounts. On future conversions, the report recommends that a reduction of the mortgage be required.

Housing Response

Whether or not NJHFA's practices regarding the treatment of equity in conversion cases based on New Jersey law are appropriate or legal must be left to the HFA, their counsel and their Attorney General. The NJHFA has indicated in its response that it has requested an opinion from the New Jersey Attorney General on whether it has com-

plied with the State statute. We will request a copy of that legal opinion, and if it sustains the actions of the HFA, we shall take no further action.

Even if the HFA's authorizing legislation would not have permitted the transfer to take place in the manner it did, questions arise, first, as to whether the transfer violated HUD regulations or requirements, and second, whether HUD or the taxpayer suffered any loss by virtue of the transfer.

On the first point, the Office of Housing finds and the Office of General Counsel agrees that the transfer of ownership of these projects did not violate HUD regulations. Attached are opinions from OGC concerning these and other points, and a brief review of them is instructive.

Counsel advises that the regulatory framework of the Section 236 program has no requirement for mortgage reduction after a conversion in ownership so there is no basis for legal proceedings. Consequently, Associate General Counsel John Kopecky concluded that for Section 236 projects, HUD has no legal basis for requiring either a mortgage reduction or repayment of excess subsidies on the mortgage to a limited-dividend owner.

The Office of General Counsel via Associate General Counsel Robert Kenison similarly concluded that Section 8 subsidies on converted projects cannot be reduced. This conclusion is based on the reliance of the HFA on the Department's acceptances of the HFA certifications of rent reasonableness pursuant to Section 883.205(b)(1) of the pre-1980 regulations.

> "Aside from the questionable legality of imposing standards now by which to judge actions taken in the past in good faith by HFAs in implementing the Section 8 program, the affected parties (including HFAs, owners, and bond purchasers) presumably have relied on HUD's acceptance of the certifications and execution of the contract documents. If the parties had known that HUD would later assert the right to reduce the rents in these circumstances, it would undoubtedly have affected their decision to contract to provide the assisted housing for the approved rents or to purchase the bonds at the then market rates. For HUD to change the basis for the contractual agreements would be inconsistent with firmly established principles of contract law, ..."

As to prospective rent reductions, OGC concludes that HUD may not reduce future Section 8 subsidies based on the questioned development costs.

OGC's conclusion is based on the fact that HUD has not specified what are allowable expenses which an HFA may use to support its certification of rent reasonableness as required in the pre-1980 regulations. Furthermore, he states that it would raise serious legal questions if HUD were to rescind its original acceptance of the certifications and unilaterally reduce rents.

A further point on Section 8 is that the questions of whether a project was converted from non-profit to limited dividend ownership, and whether the mortgage amount should have been reduced, are basically irrelevant to the amount of the Section 8 subsidy. Under the State agency Section 8 regulations in effect at the time, the HFA's certification as to the reasonableness of project rents was accepted without direct reference to a project's actual construction costs. Thus, even had New Jersey required a mortgage reduction in these cases, it would not necessarily have produced lower Section 8 rents.

In summary, HUD cannot require that the NJHFA reduce the mortgages on converted Section 8 projects nor require repayment of excess rent subsidies because HUD has already approved the rents and the sale and assignment of the contracts. However, instructions will be included in the new handbook on State agency projects that will require HFDAs to certify to the continuing reasonbleness of rents when, prior to execution of the HAP contract, an amendment to a proposal affects the cost for a project. Along with the other elements of cost containment that are now part of the Section 8 program, the issue of reserves as a part of development costs will be addressed.

Finding #2 - Excess Interest Reduction Payments Have Been Paid by HUD on Closed Section 236 Projects.

Findings

The report found that the NJHFA had retained funds left over after the completion of construction on several Section 236 projects. These funds were not used to decrease the mortgage amount but were placed into an interest income producing account known as the Reserve for Bonded Projects Account. Interest subsidy payments and debt service payments collected

by the Agency were based on the total mortgage amount including the excess funds contained in the Reserve for Bonded Projects account. The report recommends that the interest reduction payments on such reserves and the interest earned thereon be returned to HUD and that future subsidies be computed on the basis of mortgage amounts reduced to reflect the actual development costs.

Housing Response

This is an instance in which the HFA created a reserve in order to provide further security for its projects. OGC found no applicable legislation, regulations, handbooks or other specific agreements executed between HUD and the Agency that would require reduction of the project mortgage by the excess proceeds remaining from the development phase of a project. It further cautions against use of retroactive amendments to establish guidelines to recover interest subsidies paid on excess mortgage proceeds.

The Department is, however, concerned that the HFA received interest reduction subsidies on funds that may not have actually been expended. Therefore, the Office of Housing will initiate negotiations with the Agency to recover subsidies paid on any reserves which have not been disbursed for legitimate project purposes. To the extent it is determined from a case-by-case review that funds have been withdrawn from the Reserve for Bonded Projects for legitimate purposes (e.g., deferred maintenance, necessary capital improvements or operating loss loans), subsidies on these will be permitted. HUD will not seek the interest on any reserve funds since NJHFA must use these funds to pay the debt service on the bonds issued to obtain them. Interest reduction subsidies will be the only subject of these negotiations.

Finding #3 - Unsupported Expenses Included in Estimated Annual Expenses Cause Inflated Section 8 Rents and Excess Annual Subsidies

Findings

The report concludes that the NJHFA included unjustified operating contingency reserves in certain projects that may have resulted in excessive rents. IG staff detected a pattern of raising operating expenses to inflate rents to at least to the level of Fair Market Rents (FMR's). This practice increased both the development cost and the amount paid for Payments in Lieu of Taxes (PILOT). The report recommends retroactive disallowance of the operating reserve and recovery of excess contract rents.

Housing Response

OGC concludes that for the Section 8 program HUD has no regulations or instructions on which HFA's may base their certifications of rent reasonableness. The only standard for HUD to use in reviewing certifications is found in Section 883.302(b) of the old regulations, as follows:

> "HFA Certifications and HUD Review. Generally in reviewing any HFA certification required by this Part, HUD shall accept the certification as correct. However, if HUD has a substantial reason to question the correctness of any element, HUD shall promptly bring the matter to the attention of the HFA and ask that the HFA review its findings. After such review, HUD will act in accordance with the judgment of the HFA unless HUD determines that the certification is not supported by the evidence."

Since HUD has not provided guidance to the HFAs and has limited the scope of its review of the HFA's certifications, it would raise serious legal questions if HUD were to rescind its orginal acceptance of the certifications and reduce contract rents set forth in the original HAP contract, retroactive to the effective date. Only if the rents were so excessive that the Agency can be presumed to have been on notice that the rent was unacceptable can HUD take any action. Except under these severe circumstances, retroactive change by HUD of the basis for the previously agreed upon contracts could be inconsistent with firmly established principles of contract law. Such an action would have an extremely adverse affect on the bond market as well as the future contract rents.

HUD has accepted the certifications from NJHFA for the rents in the projects involved in this finding and since these rents cannot be considered "so excessive that the Agency can be presumed to have been on notice" that they are unacceptable, Housing will not seek to reduce the rents in these projects. We will advise the HFA that the practice of using unsupported operating contingencies will not be acceptable in the future. More importantly, the revised State agency regulations substantially reform the rent determination process, and in the new handbook for State agency projects, the issue of appropriate elements of development costs will be addressed.

Finding #4 - Disposition of Section 8 HAP Payments Held by the HFA Pending the Outcome of Litigation

Finding

NJHFA has proposed to shorten the mortgage term and increase rents, in accordance with HUD guidelines, on one Section 8 project (Parkview Towers). HUD has been paying Housing Assistance Payments (HAP) to the HFA in accordance with the Annual Contributions Contracts (ACC) between HUD and the Agency. However, the Agency has not been passing the full amount of the HAP on to the owner of the project. The owner is suing the Agency to stop it from shortening the term of the mortgage so the Agency has only been paying the owner HAP in the amount required by the original mortgage term. Pending the outcome of this litigation, the HFA is holding the disputed HAP in an Early Mortgage Retirement Account (EMRA). The report recommends that these funds, with interest, be returned to HUD and that until the litigation is settled, future HAP be limited to the amount required under the original mortgage term.

Housing Response

The main issue in this case is who will hold the funds that are the subject of a dispute being litigated in court. HUD has agreed on the ACC to pay to the HFA the higher rents for a shorter contract term. Because of the owner's law suit, the State agency is passing through only the lower contract rents based on the longer term and holding the difference in escrow. If HUD pays the lower HAP payments pending the outcome of litigation, HUD must break its contract with the HFA. Since the funds are being held by the Agency under court order, HUD will have to petition the court to have the funds in escrow transferred. These funds would then be held by HUD subject to the court order.

Pursuant to the report's recommendation, Housing will review the court order directing the establishment of the escrow, and, if appropriate, will petition the court to permit HUD to hold te escrow.

Finding #5 - Excess Subsidies for Section 236 Noninsured Projects

Finding

This finding is substantially the same as Finding #2 discussed above. IG staff found five instances in which there were unclosed Section 236 projects where NJHFA has undisbursed mortgage proceeds. NJHFA has billed for interest reduction payments on the full amount

of the mortgage and permitted sponsors to use a portion of the undisbursed mortgage proceeds for operating expenses. The report recommends that future interest reduction payments be based on only the disbursed amount of the mortgage and that when a project is closed the mortgage be reduced by the amount of any undisbursed proceeds. In cases where undisbursed proceeds were used for operating expenses, the amount of these should be removed from the development cost.

Housing Response

While findings #2 and #5 distinguish between closed and unclosed projects in regard to retention of undisbursed mortgage proceeds, there is no need to make such a distinction. The central issues are when amortization on the permanent mortgage began and in what amount.

As in the case of those projects in Finding #2, Housing will initiate negotiations with the Agency to recover subsidies paid on any reserves which have not been disbursed for legitimate project purposes. These wll be reviewed on a case-by-case basis and to the extent reserve funds were either used for operating expenses that meet the criteria of an operating loss loan (as permitted in insured projects) or used for legitimate capital costs, retention of subsidies on these will not be challenged.

Finding #6 - Lack of System for Timely Closing of Completed Section 8 Projects will Result in Excess Annual Subsidies

Finding

NJHFA has 26 Section 8 projects under occupancy on which final closings have not been held. On eight of these projects under occupancy for more than six months, undisbursed mortgage proceeds are available to reduce a portion of the mortgage. The report asserts that if these mortgages had been reduced in a timely manner, excess Section 8 subsidies would not have been paid. The report recommends that the HFA be required to implement a system for timely establishment of final development costs and mortgage closings.

Housing Response

Since the Section 8 payments are based on rents, not mortgage amounts, a mortgage reduction would not necessarily result in either lower rents or a shorter term for the Section 8 Contracts. Therefore, a requirement for timely closings would not affect HUD's subsidy pay-

ments. Housing recognizes, however, that good administrative practices should require timely closings. Housing will monitor the program to clear up the backlog of closings NJHFA mentions in its response to the audit.

Under the old Section 8 regulations for State agencies, there were no requirements for timely closing of projects or for cost certification which are part of a closing. The new Section 8 regulations and the contract documents for them, require cost certifications in cases where rents exceed certain thresholds. The State agency is required to submit the cost certification within 90 days following execution of the HAP Contract on these cases. Housing will remind NJHFA of these deadlines under the new regulations.

Finding #7 - Overestimate of Construction Interest and Incorrect Computation of Related Actual Interest for Section 8 Projects Result in Excess Subsidy

Finding

According to the report, the method used by the Agency to calculate interest during construction on Section 8 projects overstates the development costs and, therefore, the amount of subsidy payments. The report recommends that NJHFA (a) adopt the method used in HUD's insurance programs to estimate interest during construction, (b) establish a system for the timely closing of projects and (c) eliminate an inconsistency in the method it uses to determine the actual construction interest charged to each project.

Discussion

As stated previously, a mortgage reduction would not necessarily result in either lower rents or a shorter term for the Section 8 Contracts. More importantly, the method used by an Agency to estimate construction interest is not prescribed in either the old or new Section 8 regulations for State agencies. As indicated previously, the partnership role of State agencies under HUD's housing programs makes them responsible for the risk of financing projects. In exchange for accepting these risks, the professional judgments of its staff on underwriting issues such as this are accepted by the Department. Thus, the method of computing construction interest is a matter which it is not appropriate for HUD to dictate. Given this relationship and the fact that the amount of subsidy would not be affected, Housing will not take any action against NJHFA.

Finding #8 - HFA Contract Rents are Based on Costs Without any Comparability Determination

Finding

The HFA bases its proposed contract rents on costs rather than a marketing study. This results in contract rents which are too high. The report recommends that the HFA be advised that all future proposed contract rents be supported by a market comparability study.

Housing Response

We agree with this recommendation, while the old regulations for State agency projects (those in effect prior to February 29, 1980) did not preclude a cost based system for determining contract rents, the new ones require a system based on rent comparability. NJHFA will be reminded of this requirement.

Finding #9 - Overbilling of Section 236 Interest Reduction Payments

Finding

The Fulton Place Project, FHA No. 031-6-NI, originally consisted of 60 subsidized dwelling units and one unsubsidized unit. During construction, in 1970, one building consisting of six units collapsed. A second building which also consisted of six units was destroyed by fire around March 1977. None of the 12 destroyed units were ever replaced, nor has there ever been any reduction in subsidy.

The report recommends repayment of any excess subsidies paid on units after they were destroyed and a prospective reduction in the Interest Reduction Contract to reflect the actual number of units in the project. The method recommended for this reduction is proportionately based on the number of units.

Housing Response

The Section of the 236 Contract on which the IG based his finding was not added to the standard contract until 1973. Therefore, that section is not a part of the contract for the Fulton Place project. Consequently, HUD's legal basis for reducing interest reduction payments and seeking recoupment of past overpayments is questionable. However, the Agency's incorrect certifications on the billing form do provide some basis for HUD to institute legal proceedings.

Housing will request recovery of excess subsidies and reduce prospective rent payments for this project. However, the method

of calculation will differ from that suggested in the report. Since units vary in size, recovery should be based on the number of subsidized rooms destroyed in relation to toal subsidized rooms. We will permit subsidy to continue for the total value of the site and common facilitates as originally determined in processing, provided the site and common facilities remain unchanged after the disasters.

Finding #10 - Sponsor Inflated Land Value at One Project and Used Excess Funds to Purchase Land for a Second Project

Finding

According to the report, the land valuation for one Section 8 project was overstated because the Agency did not use the recent acquisition cost as the land value. Instead, they valued it higher but required that the non-profit sponsor (an inner-city community corporation) have the "profit" held in escrow by the Agency for use in sponsors project. The report recommends that the rents for the project be reduced to reflect the acquisition cost of the land and that all previously paid subsidies in excess of these reduced rents to be repaid to HUD.

Housing Response

OGC concluded that there is no requirement for HUD to adjust the Contract Rents, and that such action would be of questionable legality for reasons stated under Finding #3. There is no policy under the Section 8 program concerning the value which may be attributed to the land portion of the project development costs. Further, since there is not a direct relationship between Section 8 rents and individual cost items, and since HUD accepted the certification on the level of contract rents, there is no requirement that HUD could use to force reduction of contract rents in this circumstance. Therefore, Housing will not seek a reduction of rents in this project.

With regard to future projects, HUD will not generally specify land valuation procedures to State agencies. This is appropriately within their authority. However, cost certification requirements and instructions as to appropriate development cost items should ensure that this discretion is not abused.

/s/

Lawrence B. Simons
Assistant Secretary

SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM-- STATE HOUSING AGENCIES (24 CFR 883)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 883

Section 8 Housing Assistance Payments Program—State Housing Agencies

ACTION: Interim rule.

SUMMARY: The regulation governing the Section 8 Program for State Housing Agencies is being completely revised to accomplish three major objectives. First, the language of the regulations has been simplified and the format appreciably altered to make the regulations easier to read and use. Also, the regulation has been reviewed to make sure that all necessary material is included and that material which is not appropriate for inclusion no longer appears. Second, some processing changes have been made to clarify recurring questions, reduce and level out field office workload, and assure coordination of this program with other Section 8 regulations (Parts 880, 881 and 882). Third, rent, cost and amenities limitations, and requirements for cost justification of rents in certain cases have been added in order to control and reduce the costs of the program. The relationship between State Agencies and HUD which allows them to certify that program requirements are met has not been altered in this interim regulation.

In addition, relocation requirements are revised to provide more equitable treatment to tenants temporarily and permanently displaced under the Program.

This regulation does not apply to projects developed under other Section 8 regulations including Parts 880, 881, 882 and 885, except as provided in those parts.

EFFECTIVE DATE: February 29, 1980.

COMMENT DUE DATE: Written comments and suggestions will be accepted on or before March 31, 1980. The Department will make any modifications it deems appropriate in the final regulations.

ADDRESS: Comments should be filed with the Rules Docket Clerk, Office of General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT: Kenneth L. Hoagland, Office of State Agency and Bond Financed Programs, Room 6138, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410, 202–426–0730. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The Section 8 Program for State Housing Agencies is a rental assistance program. Under this program, the government provides the difference between the approved rent for an eligible lower-income family, including the elderly and handicapped and the family's contribution to the established rent. Program funds are administered by State Agencies eligible to have contract authority set-aside for Agency assignment to existing, new construction, substantial rehabilitation and moderate rehabilitation projects. After HUD approval of new construction and substantial rehabilitation projects, selected by the Agency, which may be processed under special Fast Track procedures if the Agency provides permanent financing without Federal mortgage insurance, the construction and management is overseen by the State Agency. The Section 8 program does not provide construction or mortgage financing. The regular procedures are used for Existing and Moderate Rehabilitation projects. Amendments to the Section 8 New Construction Program regulations were published for comment on June 12, 1979 in the **Federal Register** at 44 FR 33804. After considering the comments received, the Department is publishing the New Construction amendments for effect at this time. The general requirements for the Section 8 Program for State Housing Agencies closely parallel those for the Section 8 New Construction Program and the changes made to the State Agency Regulations by these amendments are basically the same as those for the New Construction regulations which have recently been the subject of public comment. Therefore, the Department has determined that it is unnecessary to provide an opportunity for public comment prior to publication of these amendments to the regulations for the Section 8 Program for State Housing Agencies. Accordingly, these amendments are being published as an interim rule, effective February 29, 1980, but with a public comment period of 60 days after such publication (March 31, 1980).

This regulation does not propose any substantive changes to the joint HUD/Department of Agriculture Section 8 program regulations, Part 883, Subparts G and H, administered with the Farmer's Home Administration. The only change is to redesignate the regulations as Subparts A and B of a new Part 884.

A discussion of the principal changes to the regulation follows:

Language and Format

A primary purpose of this revision to Part 883 is to simplify the language of the regulation and generally improve readability and ease of use. A brief summary has been added as Subpart A so that the general concepts of this program can be understood without reading the entire regulation. To improve usability, the remainder of the regulation has been divided into various segments which generally flow chronologically from allocation and assignment of contract authority through project occupancy and management.

In order to aid in understanding the program, the revised regulation makes several changes in the basic terms used to describe the rent and assistance concepts of the program.

1. The term "total housing expense" has replaced the term "gross rent" which was confusing because the utility allowance (formerly "allowance for utilities and other services") making up part of the gross rent was not rent at all but rather an estimate of tenant-paid utilities and other services not included in the contract rent. Total housing expense is the sum of the contract rent and utility allowance, if any, for a unit.

2. The term "total family contribution" has replaced the term "gross family contribution." It consists of the "tenant rent," a new term which has been added to describe the portion of the total family contribution payable directly by the family to the owner, and any utility allowance for the unit the family is leasing.

3. The term "housing assistance payments" includes two payments—the "housing assistance payment to the owner" and in some cases an additional "housing assistance payment to the family." The housing assistance payment to the owner for a leased unit is the difference between the contract rent and the tenant rent described in number 2 above. An owner may also receive a housing assistance payment for a vacant unit. An additional housing assistance payment to the family is made only if the utility allowance described in number 1 above is greater than the total family contribution, in which case the family is paid the difference between the two in order that

the allowed total family contribution is not exceeded.

With these new terms, the basic rent and assistance concepts of the program can now be expressed in several simple formulas:

1. Total housing expense equals contract rent plus utility allowance.
2. Total family contribution equals tenant rent plus utility allowance. (Where the utility allowance is greater than the total family contribution, the tenant rent is zero and housing assistance payment to family equals utility allowance minus total family contribution.)
3. Housing assistance payment to owner equals contract rent minus tenant rent.
4. Housing assistance payments (to owner and to family, where applicable) equals total housing expense minus total family contribution.

Several other terms have been introduced or revised for purposes of clarification or simplification. For example, the regulation now uses "Fast Track Procedures" to describe the one-step processing available to state Agencies that finance without HUD mortgage insurance.

Allocation of Funds

The regulation now being revised was written prior to the development of Part 891, under which Section 8 contract authority is allocated. New language clarifying the relationships between field offices(s) and agencies in this process has been added to this Part consistent with Part 891.

Cost Containment

In the interest of providing housing at the lowest possible costs and rents, and thereby serving more families with available funding, the regulation includes the addition of several major cost containment features.

1. *Revised Limitation on Rents Including Cost Justification.* Although rent reasonableness has been a major determination of Section 8 project acceptability since the inception of the program, it has been implemented mainly through HUD handbooks, but an adequate explanation has never been included in the regulation. In addition to explaining rent reasonableness, the regulation includes more stringent standards in determining the reasonableness of rents.

The reasonableness test contained in the regulation would permit Section 8 rents to exceed comparable rents by a maximum of 20 percent, but only when justified by cost estimates during processing and by cost certification at the time the project is completed. Small and partially-assisted projects for non-elderly families would be exempt from this cost justification to the extent the proposed Contract Rents do not exceed 110 percent of the comparable rent.

This change, as well as the continuation of current Fair Market Rent limitations, is contained in § 883.305(b). The revision represents a major policy change which is expected to help avoid excessive expenditures under this program.

2. *Limitations on Replacement Costs.* To aid in controlling costs and assuring that Section 8 projects will be of "modest design," limits on project replacement costs have been included in § 883.305(c). The numerical limits are included in the regulation, and will be updated periodically by Notice published in the **Federal Register.**

This limitation will require the submission of a replacement cost estimate by the State Agency with each proposal.

3. *Limitation on Amenities.* The current regulation does not expressly exclude amenities or design features considered luxurious, and some fear has been expressed that luxury level projects could result under the program. The revised regulation prohibits the inclusion of amenities or design features which would exceed the standards of modest housing in the area in which the project is proposed. Partially-assisted projects for non-elderly families are exempt from this limitation because of their predominantly unassisted nature. See § 883.305(e).

Limitations on Distributions

Section 883.306 of the revised regulation limits the distributions that can be made to profit-motivated owners out of surplus project funds, with different rates of return for family and elderly housing. Distribution for elderly projects is limited to 6 percent on equity and for non-elderly projects to 10 percent on equity. The higher rates of return for family projects are intended to provide additional incentive for developers to provide this "hard to get" type of housing.

The Assistant Secretary for Housing may provide for an increase in later years' distributions. Any allowable adjustments will be made in accordance with a Notice published in the **Federal Register.** The HFA may approve a lesser or no increase.

Return is to be calculated annually, and shortfalls in one year may be paid from surplus project funds accumulated in future years.

Relocation and Land Acquisition Requirements

The revised regulation makes substantial changes in relocation requirements in order to provide more equitable treatment to tenants temporarily or permanently displaced as a result of activities under this part.

Section 883.311, Relocation and Land Acquisition Requirements, established the following:

1. The Uniform Relocation and Real Property Acquisition Policies Act of 1970 continues to apply to displacement resulting from the acquisition of real property by a public housing agency or other State agency.
2. For tenants temporarily or permanently relocated as a result of the project but not subject to the Uniform Act, the owner must provide adequate notice and assistance in relocating to a suitable unit, reasonable moving and related expenses [or in some circumstances, a fixed payment for moving), temporary relocation expenses, and other related provisions.
3. If replacement housing within the tenant's ability to pay cannot otherwise be identified and government assistance that would satisfy this requirement cannot be secured, the owner may satisfy the requirements of § 883.311 by providing the tenant with a lump sum payment equal to 48 times the amount, if any, necessary to reduce the monthly cost of a suitable replacement dwelling to 25 percent of the combined monthly gross income of all adult members of the tenant's household. This provision is applicable to tenants not subject to the Uniform Act.
4. Lower-income single persons, who are displaced as a result of the project, may return to occupy assisted units in accordance with 24 CFR Par 812.

Relationship Between HUD and State Housing Agencies

The current regulation contains a system under which State Agencies that finance new construction and substantial rehabilitation projects without Federal mortgage insurance may certify to most program requirements. This revised rule continues this system for new program requirements (e.g., replacement cost limitations, amenity limitations) as well as the current ones with only slight modifications (e.g., public notice of contract authority allocations, reasonable rents, etc.).

Financing Cost Contingency

Current regulations allow for the reservation of contract authority (the Financing Cost Contingency or FCC) in

the Annual Contributions Contract (ACC) between HUD and a State Housing Agency. The FCC is used to cover increases in the contract rents resulting from unanticipated increases in the debt service of a project. Such increases occur because agencies sell obligations to raise funds for developments after the ACC is executed but contract rents are established prior to execution of the ACC and based on a projected borrowing cost on these obligations. The FCC has been used only intermittently by agencies.

Until Fiscal Year 1979, the Department has reserved contract authority for FCCs with each project reservation. This system has resulted in an overstatement of the annual cost for projects financed by state agencies and the unnecessary reservation of contract authority as FCCs which could be used for additional units. In order to eliminate these problems and maintain the flexibility of the FCC concept, this interim regulation modifies it. The amount of Financing Cost Contingency will now be determined during processing but it will not be reserved at that time. The ACC will be amended later only if necessary to cover increased rents resulting from a higher than projected debt service and only if contract authority is available for this purpose.

Small and Partially Assisted Projects for Non Elderly Familes

In order to aid in deconcentration of assisted family housing, and thereby increase economic integration while at the same time lessening the impact of such housing on a neighborhood, the regulation contains exemptions from program requirements and special preferences to encourage development of small projects for non-elderly families (50 units or fewer) and partially-assisted projects for non-elderly families, i.e., projects of more than 50 units of which 20 percent or less are assisted under Section 8.

1. Small projects are exempt from the cost justification requirement of § 883.305(b)(2), if Contract Rents are no more than 10 percent above reasonable rents, and the limitation on distributions of § 883.306.

2. Partially assisted projects are exempt from the cost justification requirement of § 883.305(b)(2), if Contract Rents are no more than 10 percent above reasonable rents, from the limitation on replacement costs of § 883.305(c), from the limitation on amenities of § 883.305(e), and from the limitation on distributions of § 883.306. The State Agency may exempt projects from the replacement reserve requirements of § 883.703.

Processing Deadlines

The current regulation allows a six month period between the time when funds are reserved for a project and the time construction or rehabilitation must begin. Experience has shown this deadline to be too short for most new construction and substantial rehabilitation projects. This proposed regulation extends this time period to nine months.

Site and Neighborhood Standards Unchanged

The revised regulation does not alter the current site and neighborhood standards. Revisions to these standards have been published for comment. Comments have been received and are currently under study. When new standards are published, they will replace the standards contained in this regulation. It is noted that 24 CFR Part 200 Subpart N, Project Selection Criteria, does not apply to projects approved under Part 883.

Contract Provisions

Three major changes to be made in the Housing Assistance Payments Contract are reflected in the revised regulation. First, the provision for an initial term of five years renewable at the sole option of the owner for up to the maximum total term of the Contract has been deleted. Under § 883.603 of the revised regulation, the Contract will be executed for a single term without optional renewals. Second, where the estimated cost of the rehabilitation in a substantial rehabilitation project is less than 25 percent of the estimated value of the project after completion, the Contract will be executed for a single term of 15 years rather than for five years renewable for an additional five years at the sole option of the owner as authorized by the current regulation. The reason for these two changes is to assure that units developed under the Section 8 program remain available as assisted housing for the total term of the Contract. The third change, in § 883.605 has the same purpose. It places a 10 percent limitation on the leasing of assisted units to ineligible families without the prior approval of the State Agency and HUD and provides for appropriate remedies, including a reduction of the number of units covered by the Contract.

A new provision is included in § 883.410, similar to a provision in 24 CFR Part 811. It permits execution of the Contract upon acceptable physical completion of the project, even though evidence of completion in other respects is not yet acceptable. In such cases, however, and until acceptable completion of all such other requirements, housing assistance payments will be limited to the amount of debt service, and rent-up and occupany will be subject to HUD conditions.

Changes have been made in § 883.603 to limit the availability of a 40-year maximum Contract term to projects which:

1. Are not financed with the aid of a loan insured, co-insured, made, guaranteed or intended for purchase by the Federal Government,
2. Are owned or financed by a loan or loan guarantee from a state or local agency,
3. Are intended for occupancy by non-elderly families, and
4. Are located in an area designated by HUD as requiring special financing assistance.

Special Marketing Requirements

With respect to marketing of Section 8 non-elderly family units, the revised regulation requires the owner to undertake marketing activities in advance of marketing to other prospective tenants in order to provide opportunities to non-elderly families who are least likely to apply as specified in the Affirmative Fair Housing Marketing Plan, to non-elderly families expected to reside in the community by reason of current or planned employment, as indicated in the Housing Assistance Plan, if any, and to non-elderly families from impacted jurisdictions.

The requirement for advanced marketing to non-elderly families from impacted jurisdictions was also included in the revised Part 880 final rule published October 15, 1979 to be effective November 5, 1979. Because questions were subsequently raised over the nature and extent of the requirement, the Department suspended enforcement of the requirement in Part 880 pending issuance of a clarification. We expect that the clarification will be available prior to the effective date of this revised regulation; however, if it is not, enforcement of the requirement in this regulation (set forth with other requirements in § 883.702(a)(3)) will also be suspended pending the clarification.

Residency Requirements and Preferences

Section 883.704(b)(1) of the revised regulation prohibits residency requirements but allows residency preferences to the extent that they are not inconsistent with affirmative fair housing marketing objectives and the

owner's HUD-approved Affirmative Fair Housing Marketing Plan.

Replacement Reserves

A replacement reserve has been added in § 883.703. Experience with both HUD mortgage insurance programs and the State Agency program indicates that reserves are an important form of insurance against default on the basis of operating shortfalls during the early years of a project and extraordinary maintenance, repair and capital costs in later years.

The replacement reserve is to be built up by annual deposits at least equal to .006 of the replacement cost with annual adjustment by the amount of the automatic annual adjustment factor. The reserve must be built up to and maintained at a level determined by the Agency to be sufficient to meet projected requirements. Should the reserve achieve that level, the rate of deposits may be reduced by the Agency.

Termination of Tenancy and Modification of Leases

The provisions regarding termination of tenancy have been rewritten to bring the language and format in line with the recently published regulations for the Section 8 moderate rehabilitation program. Section 883.708 now specifies that a tenancy may be terminated by the owner only for good cause and provides detailed notice requirements. This section also contains provisions concerning modification of leases as of the end of any lease term.

Other Management Changes

1. Section 883.702(d) adds a requirement for the submission annually of audited financial and operating statements to the State Agency. Upon request, these must be provided to HUD so the Department can assure that a project is being properly managed.

2. Section 883.704(c) provides that owners will use their best efforts to achieve occupancy by families with incomes averaging at least 40 percent of the median income in the area for the purpose of promoting economically-mixed housing as stated in Section 8(a) of the U.S. Housing Act of 1937, as amended.

3. A new provision is added permitting a family to report at any time a change in income or other circumstances that would result in a decrease of its required family contribution. An owner may require a family to report increases in income between scheduled reexaminations.

4. Section 883.709 contains a requirement for a security deposit from the tenant, rather than the permissive provision included in the current regulation.

Applicability

Provisions on the applicability of this revised regulation are contained in § 883.105.

NEPA

A finding of inapplicability regarding the National Environmental Policy Act of 1969 has been made in accordance with HUD procedures. A copy of this finding of inapplicability will be available for public inspection during regular business hours at the Office of the Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410.

Accordingly, 24 CFR Chapter VIII is hereby amended as follows:

1. Part 883 is revised to read as follows:

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—STATE HOUSING AGENCIES

Subpart A—Summary and Guide

Sec.

883.101 General.
883.102 Processing.
883.103 Construction and management of new construction and substantial rehabilitation projects.
883.104 Implementation of moderate rehabilitation and existing housing projects.
883.105 Applicability of revised regulation.

Subpart B—Allocation and Assignment of Contract Authority

883.201 Applicability and relationships between HUD and State agencies.
883.202 Allocation of contract authority to field offices and State agencies.
883.203 Eligibility for a set-aside.
883.204 Set-asides.
883.205 Submission of application.
883.206 HUD review and approval of application.
883.207 Termination and transfer of set-asides.

Subpart C—Definitions, Project Eligibility and Requirements

883.301 Applicability.
883.302 Definitions.
883.303 Project eligibility.
883.304 Fair market rents.
883.305 Limitations on contract rents, replacement costs and amenities.
883.306 Limitation on distributions.
883.307 Financing.
883.308 Adjustments to reflect changes in terms of financing.
883.309 Site and neighborhood standards.
883.310 Property standards.
883.311 Relocation and land acquisition requirements.
883.312 Other Federal requirements.

Subpart D—Proposal Submission to Cost Certification for New Construction and Substantial Rehabilitation Projects

Sec.

883.401 Applicability.
883.402 Obtaining proposals.
883.403 HFA submission of proposals.
883.404 HUD evaluation of proposals.
883.405 Notification of acceptability of proposal.
883.406 HFA's submission of acceptance of notification and certification of design and construction quality.
883.407 HUD execution of annual contributions contract and agreement.
883.408 Construction or rehabilitation period.
883.409 Project completion.
883.410 Execution of housing assistance payments contract.
883.411 Cost certification.

Subpart E—Existing Housing and Moderate Rehabilitation

883.501 Modification of existing housing/moderate rehabilitation regulations.

Subpart F—Housing Assistance Payments Contract

883.601 Applicability.
883.602 The contract.
883.603 Term of contract.
883.604 Maximum annual commitment and project account.
883.605 Reduction of number of units covered by contract.
883.606 Administration fee.
883.607 Default by owner and/or agency.

Subpart G—Management of New Construction and Substantial Rehabilitation Projects

883.701 Applicability.
883.702 Responsibilities of owner.
883.703 Replacement reserve.
883.704 Selection and admission of families.
883.705 Tenant rent.
883.706 Overcrowded and underoccupied units.
883.707 Lease requirements.
883.708 Termination of tenancy and modification of lease.
883.709 Security deposits.
883.710 Adjustments of contract rents.
883.711 Adjustment of utility allowance.
883.712 Conditions for receipt of vacancy payments.
883.713 Reviews during management period.

Authority: Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—Summary and Guide

§ 883.101 General.

(a) *Purpose.* (1) The purpose of the Section 8 program is to provide decent, safe and sanitary housing for lower income families through the use of a system of housing assistance payments. These needs may be met by statewide or special purpose housing agencies established by the various States.

(2) The regulations in this Part 883 contain the policies and procedures applicable to the Section 8 program for

these State agencies. In addition to this regulation, Section 8 assistance may also be made available (i) in connection with financing by the Farmers Home Administration (24 CFR Part 884) or (ii) directly from HUD field offices for newly constructed housing (24 CFR Part 880), for substantially rehabilitated housing (24 CFR Part 881), for Existing or Moderately Rehabilitated housing (24 CFR Part 882), for elderly housing in conjunction with direct HUD loans (24 CFR Part 885) and for existing HUD-insured and HUD-held housing (24 CFR Part 886).

(3) This part establishes procedures for allocating set-asides of contract authority to State Agencies and sets the policies and procedures under which they must use this authority to provide assistance in newly constructed, substantially rehabilitated, moderately rehabilitated, and existing housing.

(b) *Housing Assistance.* Under the Section 8 program, monthly payments are made directly by the State Agency to the project owner to assist an eligible family leasing an assisted unit or for vacancies in certain cases. These payments, known as "housing assistance payments" are made pursuant to a Housing Assistance Payments Contract which has a maximum term of 40 years. This Contract is discussed in Subpart F of this part.

(c) *Tenant Rents and Eligible Families.* In addition to housing assistance payments, owners receive tenant rents directly from the eligible family occupying each assisted unit. The total amount received by the owner for rent is called the contract rent and is set forth in the Contract. "Eligible families," including elderly and handicapped individuals, must have incomes within HUD-specified limits (based on 80% of median income for the area), and pay between 15% and 25% of their income for rent (including utilities), adjusted according to HUD regulations in 24 CFR Part 889.

(d) *Rent, Cost and Mortgage Limitations.* In newly constructed and substantially rehabilitated units, rents, replacement costs and amenities must comply with limitations contained in Subpart C of this part. These limitations serve to establish the modest nature of housing assisted under the program and to assure that the rents in Section 8 housing are reasonable in relation to comparable unassisted housing in the area. After occupancy, rents may be adjusted to reflect changes in the costs of owning and operating rental housing. Different limitations on rents are applicable to the Existing Housing and Moderate Rehabilitation Programs, under 24 CFR Part 882.

(e) *Financing.* The Section 8 program provides only rental assistance. It does not provide construction or permanent financing. It is the responsibility of an agency participating in the program under this part to arrange for the financing of newly constructed or substantially rehabilitated housing assisted under it. It is the responsibility of the owner to arrange financing of moderately rehabilitated housing assisted under the program.

(f) *Eligible Owners.* All types of developers and sponsors, including profit-motivated, non-profit, and public agency developers or sponsors, are eligible to develop and own housing assisted under this program. In new construction and substantial rehabilitation projects, the owner is responsible for the determination of eligibility and selection of tenants. In Moderate Rehabilitation and Existing Housing Programs, the State Agency is responsible for the determination of eligibility and the owner is responsible for the selection of eligible families. Management responsibilities for newly constructed or substantially rehabilitated projects are generally contained in Subpart G of this part. The regulations governing administration of Existing Housing and Moderate Rehabilitation programs are contained in 24 CFR Part 882.

(g) *Contract Authority.* HUD commits funding for additional projects under the Section 8 program and increases the commitment for previously approved projects out of contract authority Congress appropriates for HUD annually. A portion of the contract authority is set aside for assignment to specific projects by State Agencies participating under this part. The contract authority for additional projects, including these set-asides, is allocated to HUD field offices on the basis of a "fair share" formula reflecting population, poverty, overcrowding, housing condition and similar indices of housing need. Each field office, in turn, suballocates this contract authority among the various allocation areas within its jurisdiction on essentially the same "fair share" basis. Where there is a set-aside for a State Agency, this suballocation process includes a determination of which allocation areas are to be served by the field office and by the State Agency or Agencies under this part. Contract authority for Agency set-asides may not be available in every allocation area. A further description of this process is contained in 24 CFR Part 891, Subpart D.

§ 883.102 Processing.

(a) *New Construction and Substantial Rehabilitation Projects.* Proposals from developers and owners for housing to be assisted under this part are received and selected by State Agencies participating in the program. The Agency normally provides the financing for these projects. If the Agency uses federal mortgage insurance or is the owner of a proposed project, HUD processes it and the work is carried out under the provisions of 24 CFR Part or 880 Part 881.

If the Agency provides permanent financing without federal mortgage insurance, except coinsurance under 24 CFR Part 250, it is processed and the work is carried out under the Fast Track Procedures of Subpart D. Under these procedures, Agencies must certify that the limitations and other requirements of the program are being met for each new construction and substantial rehabilitation proposal. Generally, HUD accepts these certifications, unless it has substantial reasons to question them and, based on them, approves each proposal. Execution of an Agreement between the owner and Agency and an ACC between HUD and the Agency is then authorized and construction can begin. The Agreement provides that a Contract will be executed upon proper construction, completion and acceptance of the project by the Agency. Details of this process are contained in Subpart D.

(b) *Moderate Rehabilitation and Existing Housing Projects.* Applications for the Moderate Rehabilitation or Existing Housing Programs may be initiated by State Agencies participating under this part using contract authority available for these programs. They will be processed in accordance with the requirements of 24 CFR Part 882 except as modified by Subpart E of this part.

§ 883.103 Construction and management of new construction and substantial rehabilitation projects.

(a) *Construction.* Construction of projects is carried out in conformance with the Agreement approved by HUD. Increases in contract rents and utility allowances are permitted during construction if they are necessary to cover cost increases as specified in § 883.408. Upon completion in accordance with the Agreement, the project will be accepted by the Agency which certifies to HUD that the project has been acceptably completed and a Contract executed. These provisions are contained in Subpart D, §§ 883.407 through 883.410.

(b) *Cost Certification.* As soon as possible after completion of a project, the owner, except in the case of certain

types of exempted projects, will provide the Agency with cost certifications. The Agency will, based on these, certify the costs to HUD. It will also review the contract rents, based on the owner's certified cost, and reduce them where they are not justified. Section 883.411 details this process.

(c) *HAP Contract.* The Contract will be executed on satisfactory completion of the project. It provides that the owner will receive housing assistance payments for units being leased by eligible families and under certain circumstances, for vacant units. The owner may not reduce the number of units available to lower-income families by more than 10 percent without the prior approval of the State Agency and HUD. The term of the Contract varies depending on the type of financing the project's location and the type of tenants served (elderly or families). Administration of the Contract is done by the State Agency under an Annual Contributions Contract with HUD. Subpart F contains Contract provisions.

(d) *Management.* The owner is responsible for all management functions, including marketing, selection of tenants, reexamination of family incomes, evictions and other terminations of tenancy and collection of rents. The owner must also provide for a replacement reserve. Contract rents will be adjusted annually in accordance with 24 CFR, Part 888. Subpart G contains management provisions.

§ 883.104 Implementation of moderate rehabilitation and existing housing projects.

Implementation of Moderate Rehabilitation and Existing Housing projects is governed by the provisions of 24 CFR Part 882.

§ 883.105 Applicability of revised regulation.

(a) These revised Part 883 regulations apply to projects for which the initial application was submitted on or after the effective date. Projects for which applications or proposals were submitted before the effective date will be processed under the regulations and procedures in effect at the date of submission. If, however, the agency notifies HUD within 60 calendar days of the effective date of the regulations that they are choosing to have these revised regulations apply to a specific case, it must promptly modify the application(s) and proposal(s) to comply.

(b) Subpart F, dealing with the HAP contract and Subpart G, dealing with management, apply to all projects for which an Agreement was not executed before the effective date of these revised regulations. In cases where an Agreement has been executed:

(1) The Agency, owner and HUD may agree to make the revised Subpart F applicable and execute appropriate amendments to the Agreement or Contract;

(2) The Agency, Owner and HUD may agree to make the revised Subpart G applicable (with or without the limitation on distributions) and execute appropriate amendments to the Agreement or Contract.

(c) Section 883.708, Termination of Tenancy and Modifications of Leases, applies to new families who begin occupancy or execute a lease on or after 30 days following the effective date of this revision. This section also applies to families not covered by the preceding sentence, including families currently under lease, who have a lease in which a renewal becomes effective on or after the 60th day following the effective date of this regulation. A lease is considered renewed when both the landlord and the family fail to terminate a tenancy under a lease permitting either to terminate.

Subpart B—Allocation and Assignment of Contract Authority

§ 883.201 Applicability and relationships between HUD and State agencies.

(a) *Applicability.* This subpart applies to contract authority set aside for a State Agency. Newly constructed and substantially rehabilitated housing units using contract authority set aside under this subpart may be processed and the work accomplished under either the Fast Track Processing procedures contained in Subpart D or the regular procedures under 24 CFR Part 880 or 24 CFR Part 881. Section 883.401 contains the criteria used to qualify new construction and substantial rehabilitation proposals for Fast Track Processing. Moderate Rehabilitation and Existing Housing Programs using contract authority set aside under this subpart must be processed in accordance with the provisions of 24 CFR Part 882, except as indicated in Subpart E of this part.

(b) *General Responsibilities and Relationships.* Subject to audit and review by HUD to assure compliance with Federal requirements and objectives, Housing Finance Agencies (HFAs) shall assume responsibility for project development and for supervision of the development, management and maintenance functions of owners.

(c) *Certifications and HUD Monitoring.* (1) Generally, when reviewing any of the certifications of an HFA required by this part, HUD shall accept the certification as correct. If HUD has substantial reason to question the correctness of any element in a certification, HUD shall promptly bring the matter to the attention of the HFA and ask it to provide documentation supporting the certifications. When the HFA provides such evidence, HUD will act in accordance with the HFA's judgment or evaluation unless HUD determines that the certification is clearly not supported by the documentation.

(2) HUD will periodically monitor the activities of HFA's participating under this part only with respect to Section 8 or other HUD programs. This monitoring is intended primarily to ensure that certifications submitted and projects operated under this part reflect appropriate compliance with Federal law and requirements.

§ 883.202 Allocation of contract authority to field offices and State agencies.

(a) Funding authorization for the Section 8 program is assigned to HUD field offices and Agencies in the form of contract authority, which is the maximum amount authorized for annual payments under Contracts. Assignments are made pursuant to 24 CFR Part 891, Subpart D. HUD may set aside a portion of contract authority for use by Agencies out of amounts identified for this purpose and allocated in the Field Office allocation plan under Part 891, Subpart D.

(b) In the allocation process, the field office prepares an allocation plan consistent with Areawide Housing Opportunity Plans (AHOPs) and Housing Assistance Plans (HAPs) which specifies the amount of contract authority and approximate number of Section 8 units by housing type (new construction, rehab, and existing), household type (families, large families, and elderly), and program mixes to be provided in each allocation area. Any set-aside for a State Agency within the jurisdiction of a field office is included in this allocation plan which must not be finalized until after the field office has consulted with the State Agency. Allocation of the set-aside will provide for feasible sized projects by housing and household type which is consistent with the overall allocation plan.

§ 883.203 Eligibility for a set-aside.

(a) *Request for Set-Asides and/or Fast Track Procedures.* (1) In order to qualify for a set-aside and/or the Fast Track procedures set forth in this part, a State Agency must submit a letter showing that:

(i) It is a housing finance or development agency with statewide responsibility;

(ii) It qualifies as a public housing agency (PHA), as defined in the U.S. Housing Act of 1937, and

(iii) It desires to participate under this part.

(2) The letter must be sent to the Assistant Secretary for Housing, U.S. Department of Housing and Urban Development (HUD), Washington, D.C. 20410. Enclosed with the letter shall be 2 copies of:

(i) The relevant enabling legislation,

(ii) Any rules and regulations adopted or about to be adopted by the State agency to govern its operations, and

(iii) An opinion from the agency counsel that the agency is legally qualified and authorized to participate in the Housing Assistance Payments Program. This opinion shall include an explanation of the basis and extent of the agency's legal authority, if any, for housing development or administration in the areas of operation of any existing PHAs.

(b) *Review and Approval of Requests for Participation.* After prompt review, the agency shall be notified as to whether or not, and in what respects, it is qualified to apply for and receive a set-aside and/or use the Fast Track procedures.

§ 883.204 Set-asides.

(a) *Notification of Agency of Set-Aside.* Agencies eligible for a set-aside must be consulted by the HUD field office in the process of preparing the field office allocation plan. When a set-aside is made available for a State Agency, HUD must notify the Agency in writing of the amount and terms of the contract authority set aside for it and provide a reasonable deadline by which the Agency must agree to the terms and amount. If HUD determines to deny a set-aside, it must notify the Agency by letter of its determination specifying the reasons for this determination. When the set-aside is made available to the Agency out of the Assistant Secretary's reserve under § 891.403(b), HUD must notify the Agency in writing of the amount and the provisions of paragraphs (b) and (c) of this section are inapplicable.

(b) *Agency Acceptance of Set-Aside.* In order to receive a set-aside, an Agency must submit a letter to HUD, within the time frame set forth in the Notification of a Set-Aside under paragraph (a) of this section, agreeing to the terms of the set-aside. If the Agency wishes to discuss the terms or amount of the set-aside further, it should do so within the time frame stated in the Notification of Set-Aside.

(c) *Determination of Set-Aside.* The determination of whether to grant a set-aside and the amount of any set-aside shall be made on the basis of the following criteria:

(1) The degree of the Agency's expertise as demonstrated, in part, by

(i) Past performance in the development of housing, and

(ii) The Agency's ability to administer a set-aside so that housing is placed under construction or rehabilitated quickly or assistance is provided in a timely manner to eligible families through the Existing Housing Program;

(2) The extent to which the Agency has identified and evaluated the unmet housing needs in the State and developed a plan for serving those not likely to be met effectively through other channels and for promoting mobility;

(3) The extent to which the Agency's program complements the allocation plan of the HUD field office;

(4) The Agency's ability and willingness to assist families in types of projects and in areas which meet particular HUD goals (e.g., spatial deconcentration, substantial rehabilitation, units for large families); and

(5) With respect to set-asides for new Construction, Substantial or Moderate Rehabilitation, the Agency's ability and willingness to provide permanent financing without Federal mortgage insurance (other than with coinsurance under Section 244 of the National Housing Act); or

(6) With respect to set-asides for Moderate Rehabilitation or Existing Housing, the extent to which the Agency is willing and capable of serving housing needs in areas not currently served by local Public Housing Agencies and will use the Existing Housing Program to promote mobility.

[FINAL RULE]

(d) Agency Notification and Selection Requirements. Promptly after the Agency receives notification of its set-aside from HUD, the Agency must make a public announcement that it has been allocated a set-aside, specify the amount of the set-aside by housing and household type, indicate where and when applications to the Agency for fund commitments may be submitted by owners, and indicate that the Agency's selection procedure is available upon request. The Agency must have a written procedure for open and competitive owner selection. The Agency must certify that these requirements have been met.

[45 FR 56326, Aug. 22, 1980]

§ 833.205 Submission of applications.

(a) *Application.* When a State Agency intends to assign a portion of its set-aside to a project, it must submit a separate application on the prescribed HUD form. This application must be accompanied by certifications that:

(1) For areas where there is no Housing Assistance Plan or Areawide Housing Opportunity Plan, there is need for housing assistance in the number and size of units applied for based upon an Agency's housing needs study or Agency-approved study, and

(2) The agency has or will comply with the public notification and selection procedures of § 883.204(d).

(b) *Agencies Using Set-Aside but Not Fast Track Processing.* If an Agency has a set-aside but does not qualify for or does not wish to utilize the Fast Track Procedures under Subpart D, it must follow the provisions set forth in 24 CFR Part 880 or 881, whichever is applicable, except as follows:

(1) The Agency may submit an Application with or without a Preliminary Proposal at any time to a HUD field office without reference to any Notification of Fund Availability (NOFA) pursuant to 24 CFR 880.304 or 881.304.

(2) Such Preliminary Proposal and related Final Proposal must be evaluated on the basis of acceptability in accordance with the requirements of the applicable part but will not be subject to the competitive ranking and selection provisions of 24 CFR Part 880.306 and 880.307 or 881.306 and 881.307;

(3) Even though Fast Track Procedures are not used, Subparts F and G of Part 883 apply.

§ 883.206 HUD review and approval of application.

(a) *Review of Applications.* Applications from State Agencies should be processed in the order received. Based on the policies set forth in § 883.201(c), HUD shall promptly review an application to determine whether or not the application is complete and accurate. HUD must make an independent determination that:

(1) The proposed project is consistent with the field office allocation plan;

(2) The addition of these units will not adversely affect occupancy in existing federally assisted projects;

(3) The State Agency meets all equal opportunity requirements in the operation of its programs; and

(4) The proposed project, when a specific site is designated, complies with 24 CFR Part 891.

(b) *Review and Comment by Local Governments.* An application or proposal under this Subpart must comply with the provisions of Part 891 concerning review and comment by units of general local government. In cases where the local government in which the assistance is to be provided objects in its local Housing Assistance

Plan to the exemption for State Agency projects, the application (or proposal when the application does not designate a specific site) must be approved by HUD in accordance with 24 CFR Part 891, Subpart B. If no objection has been filed or where there is no applicable Housing Assistance Plan, the application (or proposal when the application does not designate a specific site) must be approved in accordance with 24 CFR Part 891, Subpart C.

(c) *Notification to State Agency.* (1) For proposed projects not using or not eligible for Fast Tract Procedures and after completion of the actions necessary to satisfy the requirements of Part 891, HUD shall notify the State Agency that its application or proposal has been accepted for processing under 24 CFR Part 880, or Part 881 as appropriate.

(2) For proposed projects using or eligible for Fast Track Procedures and after completion of the action necessary to satisfy the requirements of Part 891 HUD shall promptly complete its review and notify the HFA by letter that:

(i) The application and any portions of the proposal on which reviews have been completed, are approved (this letter will be called a Notification of Application Approval);

(ii) The application is disapproved and state the reasons, in detail for disapproval; or

(iii) HUD has substantial reason to question a certification of the HFA. The letter shall specify the reasons. Promptly after receipt of the HFA's response to this letter, HUD must notify the HFA of approval or disapproval of the application.

§ 883.207 Termination and transfer of set-asides.

(a) Contract authority in a set-aside which is not assigned to projects on or before the 45th day prior to the end of each Federal fiscal year will be terminated as of that date, unless the Assistant Secretary for Housing agrees in writing to extend the date. For purposes of this paragraph, set-aside authority is deemed assigned on the date HUD issues a notification of application approval, or a notification of application or proposal acceptance for processing for cases not processed under Subpart D;

(b) With respect only to projects processed under Subpart D, an Agreement, executed by the HFA and the owner, must be submitted to HUD within nine months of the date of Notification of Application Approval or the Notification will expire. Any units for which this Notification expires will be automatically cancelled, unless the Assistant Secretary for Housing agrees in writing to extend the date. Extensions to this deadline will be granted by the Assistant Secretary for Housing only for reasons clearly beyond the control of the HFA or owner.

(c) *Transfer of Set-Asides.* Where a specific portion of an Agency's set-aside is assigned to a particular project (as defined in paragrph (a) of this section) and it is subsequently determined that the portion so assigned cannot be used for that project, the Agency may retain use of that contract authority under the following rules.

(1) *Projects terminated or reduced on or before the 45th day prior to the end of the Federal fiscal year.* The Agency must notify HUD of any determination to terminate or reduce the contract authority assigned to specific project. The portion of the set-aside cancelled or reduced will be released and become available for assignment to another project through the 45th day prior to the end of the same fiscal year.

(2) *Project terminated or reduced after the 45th day prior to the end of the Federal fiscal year.* If the determination to terminate or reduce the contract authority assigned to a particular project is made after the 45th day prior to the end of the Federal fiscal year in which the assignment was made to that project, the Agency may transfer the released portion of the set-aside to another project or projects. When transferring contract authority under this paragraph, the Agency must (i) notify the HUD field office promptly after the determination is made, that the transfer is to a specific project, and (ii) provide full and complete information concerning the proposed transfer, including names and locations of the projects involved, the specific amount of set-aside to be transferred, and a written statement of assurance that an Agreement, executed by the Agency and the Owner, will be submitted to HUD within nine months. If an Agreement is not submitted within nine months, the transferred contract authority will be automatically terminated unless this deadline is extended in writing by the Assistant Secretary of Housing. For proposals to which contract authority is assigned under the provisions of this paragraph (c), HUD will comply with the provisions of §§ 883.206(a)(4) and 883.206(b).

Subpart C—Definitions, Project Eligibility and Requirements

§ 883.301 Applicability.

The provisions of this subpart are applicable to newly constructed and substantially rehabilitated housing allocated contract authority under Subpart B of this part and processed and constructed under the Fast Tract Procedures of Subpart D. The definitions contained in § 883.302 and the provisions of § 883.307(b) regarding review and approval of financing documents, however, apply to all of this part.

§ 883.302 Definitions.

ACC (Annual Contributions Contract)—The contract between the State Agency and HUD under which HUD commits to provide the Agency with the funds needed to make housing assistance payments to the Owner and to pay the Agency for administrative fees in cases where it is eligible for them.

Agency—See State Agency.

Agreement—(Agreement to enter into Housing Assistance Payments Contract.) The agreement between the owner and the State Agency on new construction and substantial rehabilitation projects which provides that, upon satisfactory completion of the project in accordance with the HUD-approved proposal or final proposal, the Agency will enter into a Housing Assistance Payments Contract with the owner.

Allocation Area—A municipality, county, one or more Indian areas or group of contiguous municipalities or counties identified by HUD or in an approved Areawide Housing Opportunity Plan for the purpose of allocating housing assistance to support economically feasible housing projects.

Allocation Plan—The plan developed by HUD field offices in accordance with 24 CFR Part 891, Subpart D on which the distribution of contract authority is based.

Assisted Unit—A dwelling unit eligible for assistance under a Contract.

Application—A request, submitted by a State Agency, to assign a portion of its set-aside to a specific jurisdiction or project.

Contract—(Housing Assistance Payments Contract). The Contract entered into by the owner and the State Agency upon satisfactory completion of a new construction or substantial rehabilitation project which sets forth the rights and duties of the parties with respect to the project and the payments under the Contract.

Contract Rent—The total amount of rent specified in the Contract as payable by the Agency and the tenant to the owner for an assisted unit.

Existing Housing—Housing assisted under a contract entered into pursuant to 24 CFR Part 882. (See Subpart E of this part.)

Fair Market Rent (FMR)—HUD's determination of the rents, including utilities (except telephones), ranges and refrigerators, parking and all maintenance, management and other essential housing services, which would be required to obtain, in a particular market area, privately developed and owned, newly constructed or substantially rehabilitated rental housing of modest design with suitable amenities.

Family. (Eligible Family) A family which qualifies as a lower-income family, as defined in this section. For purposes of this definition, "family" will have the meaning of "family" contained in 24 CFR Part 812, (including single elderly, handicapped, disabled and displaced persons and the remaining member of a tenant family).

Fast Track Procedures—The procedures contained in Subpart D for processing and construction of new construction and substantial rehabilitation projects. In order to be eligible for these procedures, a State Agency must provide permanent financing without Federal mortgage insurance or a Federal guarantee except coinsurance under Section 244 of the National Housing Act.

Financing Cost Contingency (FCC)—The maximum amount of contract authority which may be used to amend the Annual Contributions Contract (ACC) and Housing Assistance Payments Contract (HAP Contract) to provide increased contract rents to cover higher than anticipated debt service on the loan for a new construction or substantial rehabilitation project.

Household Type. The three household types are (1) elderly and handicapped, (2) family, and (3) large family.

Housing Assistance Payment—The payment made to the owner of an assisted unit by the State Agency as provided in the Contract. Where the unit is leased to an eligible family, the payment is the difference between the total housing expense and the total family contribution. A housing assistance payment, known as a "Vacancy Payment", may be made to the owner when an assisted unit is vacant. A payment is made to the family if the utility allowance exceeds the total family contribution.

Housing Assistance Plan (HAP)—A housing plan submitted by a unit of general local or State government and approved by HUD as being acceptable under the standards of 24 CFR, Part 570.

Housing Type. The three housing types are new construction, substantial rehabilitation, and existing housing/moderate rehabilitation.

HFA (Housing Finance Agency)—A State Agency which provides permanent financing for newly constructed or substantially rehabilitated housing processed under Subpart D and financed without Federal mortgage insurance or a Federal guarantee except coinsurance under Section 244 of the National Housing Act.

HUD—The Department of Housing and Urban Development.

Impacted Jurisdiction. A jurisdiction in a Standard Metropolitan Statistical Area (SMSA) where the ratio of lower-income families to total families is materially higher than the ratio of lower-income families to total families for the entire SMSA.

Independent Public Accountant—Certified Public Accountant or a licensed or registered public accountant, none of which has a business relationship with the owner or State Agency except for the performance of audit, systems work and tax preparation. If not certified, the Independent Public Accountant must have been licensed or registered by a regulatory authority of a State or other political subdivision of the United States on or before December 31, 1970. In States that do not regulate the use of the title "public accountant," only Certified Public Accountants may be used.

Lower-Income Family. A family whose income does not exceed 80 percent of the median income for the market area, as determined by HUD, with adjustments for the size of the family. HUD may establish income limits higher or lower if necessary in certain cases. For purposes of this definition, "income" shall have the meaning of "income for eligibility" contained in 24 CFR Part 889.

MPS (Minimum Property Standards)—HUD Minimum Property Standards for new construction projects, or in Substantial Rehabilitation, the HUD Minimum Design Standards for Rehabilitation for Residential Properties, or standards which the Secretary finds are equivalent to or exceed such HUD standards.

Moderate Rehabilitation—The improvement of dwelling units in accordance with HUD requirements, under 24 CFR Part 882.

New Communities—New community developments approved under Title IV of the Housing and Urban Development Act of 1968 and Title VII of the Housing and Urban Development Act of 1970.

New Construction—Housing for which construction starts after execution of an Agreement, or housing which is already under construction when the Agreement is executed provided that:

(i) At the date an application is submitted to HUD, a substantial amount of construction (generally at least 25 percent) remains to be completed;

(ii) At the date of application to HUD, the project cannot be completed and occupied by eligible families without assistance under this part; and

(iii) At the time construction was initiated, all of the parties reasonably expected that the project would be completed without assistance under this part.

Override—The difference between an HFA's cost of borrowing on obligations issued to finance a new construction or substantial rehabilitation project and the lending rate at which they provide permanent financing for the project.

Owner—Any private person or entity (including a cooperative) or a public entity, having the legal right to lease or sublease dwelling units assisted under this part. The term Owner also includes the person or entity submitting a proposal to a State Agency under this part.

[FINAL RULE]

Partially-Assisted Project—A project for non-elderly families under this Part which includes more than 50 units, of which the number of assisted units does not exceed the greater of (a) 20 percent of the units in the project, rounded to the next highest whole number of units, or (b) the minimum percentage required by State law as a condition of HFA permanent financing, if the Assistant Secretary approves such minimum percentage for purposes of applicability of this definition.

[45 FR 56326, Aug. 22, 1980]

Permanent Financing—An Agency is determined to provide permanent financing if HUD determines that (1) the Agency permanently finances a project from its own funds, including the sale of its obligations; or (2) permanent financing for projects developed or administered by the Agency is provided by the State government or by an agency or instrumentality thereof other than the Agency; or (3) the permanent financing (by a public or private entity other than the Agency) is backed by the commitment of the Agency to assume the risks of loss on default or foreclosure of the loan.

PHA (Public Housing Agency)—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 lower-income families.

Project Account—A specifically identified and segregated account for each project which is established in accordance with § 883.604(b) out of the amounts by which the maximum Annual Contributions Contract commitment exceeds the amount actually paid out under the ACC each year.

Proposal—A proposal for a project that is submitted by an HFA to HUD for Section 8 assistance under this Part.

Rent—In the case of an assisted unit in a cooperative project, rent means the carrying charges payable to the

cooperative with respect to occupancy of the unit.

Replacement Cost: (1) *New Construction*—The estimated construction cost of the project when the proposed improvements are completed. The replacement cost may include the land, the physical improvements, utilities within the boundaries of the land, architect's fees, miscellaneous charges incident to construction as approved by the Assistant Secretary for Housing.

(2) *Substantial Rehabilitation*—The sum of the "as is" value before rehabilitation of the property as determined by the Agency and the estimated cost of rehabilitation, including carrying and finance charges.

Secretary—The Secretary of Housing and Urban Development (or designee).

Small Project—A project for non-elderly families under this Part which includes a total of 50 or fewer units (assisted and unassisted).

State Agency (Agency)—An agency which has been notified by HUD in accordance with § 883.203 that it is authorized to apply for a set-aside and/or to use the Fast Track Procedures of this part.

Substantial Rehabilitation

(a) The improvement of a property to decent, safe and sanitary condition in accordance with the standards of this part from a condition below these standards. Substantial Rehabilitation may vary in degree from gutting and extensive reconstruction to the cure of substantial accumulation of deferred maintenance. Cosmetic improvements alone do not qualify as Substantial Rehabilitation under this definition.

(b) Substantial Rehabilitation may also include renovation, alteration or remodeling for the conversion or adaptation of structurally sound property to the design and condition required for use under this part, or the repair or replacement of major building systems or components in danger of failure.

(c) Housing on which rehabilitation work has already started when the Agreement is executed is eligible for assistance as a Substantial Rehabilitation project under this part provided:

(i) At the date of application to HUD, a substantial amount of construction (generally at least 25 percent) remains to be completed;

(ii) At the date of application to HUD, the project cannot be completed and occupied by eligible families without assistance under this part; and

(iii) At the time construction was initiated, all of the parties reasonably expected that the project would be completed without assistance under this part.

Tenant Rent—The portion of the contract rent payable directly to the owner by an eligible family occupying an assisted unit. Tenant rent equals the total family contribution less any utility allowance.

Total Family Contribution—The portion of an eligible family's income payable toward the family's total housing expense, as determined in accordance with 24 CFR Part 889.

Total Housing Expense—The total monthly cost of housing an eligible family, which is the sum of the contract rent and any utility allowance for the assisted unit occupied by the family.

Utility Allowance—An estimate, accepted by HUD, of the cost of utilities (except telephone) and other essential housing services for an assisted unit which are not included in the contract rent paid directly to the owner but which are the responsibility of the eligible family leasing the unit.

Vacancy Payments—The housing assistance payment made to the owner by the State Agency for a vacant, assisted unit if certain conditions are fulfilled as provided in the Contract. The amount of vacancy payment varies with the length of the vacancy period and is less after the first 60 days of any vacancy.

Very Low-Income Family—An eligible family whose income does not exceed 50 percent of the median income for the market area, as determined by HUD, with adjustments for the size of the family.

§ 883.303 Project eligibility.

(a) For purposes of this part, an Agency may assign funds to and seek approval for new construction, substantial rehabilitation, moderate rehabilitation or existing housing projects.

(b) The Section 8 program under this part is for rental housing only. No assistance will be provided for any unit occupied by an owner. Cooperatives are considered rental housing rather than owner-occupied housing for the purposes of this part.

(c) The types of rental housing which can be assisted under this part include: (1) Single-family houses, mobile homes, which are excluded under the Substantial and Moderate Rehabilitation programs and may only be used under the New Construction and Existing Housing Programs, where appropriate, and multifamily structures; (2) housing designed for the elderly, disabled or handicapped; and (3) single-room occupant housing planned specifically as a relocation resource for eligible single persons.

(d) Newly constructed or substantially rehabilitated high-rise elevator projects for families with children are prohibited unless HUD determines that there is no practical alternative.

(e) Newly constructed high-rise elevator projects for the elderly may be approved only if the Agency determines that high-rise construction is appropriate after taking into account land costs, safety and security factors.

(f) Projects for non-elderly families are required, where practicable, to have at least 5 percent of the assisted housing units designed and accessible to the physically handicapped.

(g) Housing assisted under other provisions of the U.S. Housing Act of 1937, such as public housing assisted with annual contributions under Sections 5 and 9 of the Act, is not eligible for assistance under this part. Tax exemption under Section 11(b) of the Act is not considered assistance for this purpose.

(h) Conversions of projects under the Section 23 Leased Housing Program to the Section 8 program will be permitted, where appropriate: *Provided*, The Section 23 project qualifies as newly constructed or substantially rehabilitated as defined in this Subpart and all parties, including HUD, agree. Conversion of existing Section 23 projects to Section 8 will be governed by the provisions of Part 882.

§ 883.304 Fair market rents.

(a) Fair Market Rents are HUD's determination of the rents, including utilities (except telephone), ranges and refrigerators, parking and all maintenance, management and other essential housing services, which would be required to obtain in a particular market area privately developed and owned rental housing of modest design with suitable amenities. One schedule of Fair Market Rents (FMRs) has been developed for newly constructed and substantially rehabilitated housing and separate ones for existing and moderately rehabilitated housing.

(b) Separate Fair Market Rents for newly constructed or substantially rehabilitated housing are established by unit size (number of bedrooms), basic structure type (detached, semi-detached/row houses, walk-up apartments, and elevator apartments) and occupant group (family and elderly) for individual market areas.

(c) The Fair Market Rents for (1) dwelling units designated for the elderly or handicapped are those for the appropriate size units, not to exceed 2-bedrooms for the elderly, multiplied by

1.05, rounded to the nearest whole dollar, (2) congregate housing dwelling units are the same as for non-congregate units, and (3) single room occupancy dwelling units are those for 0-bedroom units of the same type.

(d) Fair Market Rents for newly constructed mobile homes may be established for an area upon application to HUD. The application must show that there is a need and demand for mobile homes in the area for which they are proposed and that mobile homes are acceptable under local requirements in that area.

(e) Fair Market Rents will be published in the **Federal Register** at least annually in accordance with 24 CFR Part 888. Interim revisions for one or more market areas may be initiated by HUD at any time and may be published as market conditions dictate.

§ 883.305 Limitations on contract rents, replacement costs and amenities.

(a) *Purpose and Applicability of Limitations.* The purpose of the Section 8 program is to assist lower-income families in renting decent, safe and sanitary housing of modest design with suitable amenities. This section sets limitations on the contract rents, replacement costs and amenities for new construction and substantial rehabilitation projects constructed under this part. These limitations are intended to permit production of suitable housing without excessive costs, design features or amenities.

(b) *Limitation on Contract Rents.* The contract rents for a project from proposal submission through cost certification, must be within both of the following limitations:

(1) *Fair Market Rent.* The contract rent (including a possible adjustment using the FCC) plus any utility allowance for the unit must not exceed the Fair Market Rent in effect at the time of processing. The published Fair Market Rents will reflect a trended rent in order to allow for the period of construction as stated in the publication. If the scheduled construction time for a project is less, an appropriate reduction will be made in determining the approvable Contract Rent. The contract rent plus any utility allowance for the unit may exceed the applicable Fair Market Rent under special circumstances or if needed to implement a local Housing Assistance Plan or Areawide Housing Opportunity Plan:

(i) By up to 10 percent with the approval of the HUD field office manager, or

(ii) By up to 20 percent with the approval of the HUD Assistant Secretary for Housing, and

(2) *Rent Reasonableness.* The contract rent must be reasonable. The HFA must certify to HUD on the appropriate form that:

(i) The rents compare reasonably to or are below the rents of unassisted units of similar age, design and location which provide comparable amenities and services, or

(ii) Any rents which exceed those determined to compare reasonably do so by no more than 20 percent, and are warranted by cost and expense estimates acceptable to the HFA and cost certifications, as specified in § 883.411.

(iii) For small projects and partially-assisted projects, the rents exceed the rents for similar units by no more than 10 percent. Where rents exceed those determined to compare reasonably by more than 10 percent but no more than 20 percent, the cost justification set forth in paragraph (b)(2)(ii) applies.

[FINAL RULE]

(c) *Limitation of Replacement Costs.* (1) The HFA must certify to HUD that the estimated replacement costs for the dwelling units in any new construction or substantial rehabilitation proposal do not exceed the following limits which are applicable to the part of the project attributable to dwelling use: (i) The basic limits are: (A) $23,720 per dwelling unit without a bedroom; (B) $27,129 per dwelling unit with one bedroom; (C) $32,983 per dwelling unit with two bedrooms; (D) $42,217 per dwelling unit with three bedrooms; (E) $47,032 per dwelling unit with four or more bedrooms.

(ii) Where necessary to compensate for the higher costs incident to construction or rehabilitation of elevator type structures of sound construction and design, the HFA may certify that the replacement costs exceed the limits in paragraph (c)(1)(i) of this section but do not exceed: (A) $24,962 per dwelling unit without a bedroom; (B) $28,614 per dwelling unit with one bedroom; (C) $34,795 per dwelling unit with two bedrooms; (D) $45,011 per dwelling unit with three bedrooms; (E) $49,409 per dwelling unit with four or more bedrooms.

(iii) For any market area where the cost levels so require, the Assistant Secretary for Housing may increase, at the request of the field office, the dollar limits set forth in paragraphs (c)(1) (i) and (ii) by an amount not to exceed 75 percent.

(iv) If the Assistant Secretary finds that, because of high costs, it is not feasible to construct dwellings in Alaska, Guam, or Hawaii without the sacrifice of sound standards of construction, design, livability, and within the limits in paragraphs (c)(1) (i) and (ii), the principal amount of the replacement cost limits may be increased by amounts as are necessary to compensate for additional costs but not to exceed the maximum, including high cost area increases under paragraph (c)(1)(iii), if any, otherwise applicable by more than 50 percent.

(2) Replacement cost of the project will consist of replacement costs attributable to dwelling use (which are subject to the limits in paragraph (c)(1) of this section) plus replacement costs not attributable to dwelling use. The HFA must certify that replacement costs not attributable to dwelling use are reasonable. Replacement costs not attributable to dwelling use may include the costs for some or all "functionally related and subordinate" facilities or areas, within the meaning of 26 CFR 1.103–8(b)(2). Except for the exemption contained in paragraph (c)(3) of this section, the limitations on replacement costs apply to all projects in their entirety regardless of whether or not 100 percent of the units are subsidized.

(3) Partially-assisted projects are exempt from the replacement cost limitations of this paragraph.

(4) Subsequent changes to the limitations on replacement costs under paragraphs (c)(1) (i) and (ii) of this section will be made by notice published in the **Federal Register** and will be available on request.

[45 FR 56326, Aug. 22, 1980]

(d) *Excess Costs.* The limitations of paragraph (c) of this section will not prohibit the total actual cost of a project from exceeding the limits referred to in that paragraph. However, in determining or adjusting contract rents, the HFA will not take into account or give credit for any cost which exceeds the applicable replacement cost limits.

(e) *Limitation on Amenities.* (1) The HFA must certify that the amenities in all new construction and substantial rehabilitation projects assisted under this part are limited to those amenities which are generally provided in unassisted housing of modest design in the market area. Generally, the amenities included in the determination of Fair Market Rents for the area may be included in a project. The use of more durable, high quality materials to control or reduce maintenance, repair and replacement costs will not be considered an excess amenity.

(2) The limitation on amenities applies to all projects in their entirety.

(3) Partially-assisted projects are exempt from the limitation of this paragraph.

§ 883.306 Limitation on distributions.

(a) Non-profit owners are not entitled to distributions of project funds.

(b) For the life of the Contract, project funds may only be distributed to profit-motivated owners at the end of each fiscal year of project operation following the effective date of the Contract and after all project expenses have been paid, or funds have been set aside for

payment, and all reserve requirements have been met. The first year's distribution may not be made until the HFA certification of project costs, (See § 883.411), where applicable, has been submitted to HUD. The HFA must certify that distributions will not exceed the following maximum returns:

(1) For projects for elderly families, the first year's distribution will be limited to 6 percent on equity. The Assistant Secretary for Housing may provide for increases in subsequent years' distributions on an annual or other basis so that the permitted return reflects a 6 percent return on the value, in subsequent years, as determined in accordance with HUD guidelines, of the approved initial equity. Any such adjustments will be made in accordance with a Notice in the **Federal Register.** The HFA may approve a lesser increase or no increase in subsequent years' distributions.

(2) For projects for non-elderly families the first year's distribution will be limited to 10 percent on equity. The Assistant Secretary for Housing may provide for increases in subsequent years' distributions on an annual or other basis so that the permitted return reflects a 10 percent return on the value, in subsequent years, as determined in accordance with HUD guidelines, of the approved initial equity. Any such adjustments will be made in accordance with a Notice in the **Federal Register.** The HFA may approve a lesser increase or no increase in subsequent years' distributions.

(c) For the purpose of determining the allowable distribution, an owner's equity investment in a project is deemed to be 10 percent of the replacement cost of the part of the project attributable to dwelling use accepted by the HFA at cost certification (See § 883.411), or as specified in the Proposal where cost certification is not required, unless the owner justifies a higher equity contribution through cost certification documentation accepted by the HFA.

(d) Any short-fall in return may be made up from surplus project funds in future years.

(e) If the HFA determines at any time that surplus project funds are more than the amount needed for project operations, reserve requirements and permitted distributions, the HFA may require the excess to be placed in a separate account to be used to reduce housing assistance payments or for other project purposes. Upon termination of the Contract, any excess project funds must be remitted to HUD.

(f) Owners of small projects or partially-assisted projects are exempt from the limitation on distributions contained in paragraphs (b) through (d) of this section.

§ 883.307 Financing.

(a) *Types of Financing.* A State Agency using the Fast Track Procedures of this part must provide permanent financing for any new construction or substantial rehabilitation project without Federal mortgage insurance, except coinsurance under Section 244 under the National Housing Act. Obligations issued by the HFA for this purpose may be taxable under Section 802 of the Housing and Community Development Act of 1974 or tax-exempt under Section 103 of the Internal Revenue Code, 24 CFR Part 811 or other Federal Law.

(b) *HUD Approval.* (1) A State Agency, prior to receiving HUD approval of its first New Construction or Substantial Rehabilitation Proposal using contract authority under this part, must submit copies of the documents relating to the method of financing Section 8 projects to HUD for review. These documents shall include bond resolutions or indentures, loan agreements, regulatory agreements, notes, mortgages or deeds of trust and other related documents, if any, but does not need to include the "official statement" or copies of the prospectus for individual bond issues. HUD review will be limited to making certain that the documents are not inconsistent with or in violation of these regulations and the administrative procedures used to implement them. After review, HUD must notify the Agency that the documents are acceptable or, if unacceptable, will request clarification or changes. This review and approval will meet the requirements of 24 CFR 811.107(a).

(2) When an Agency which has received HUD approval of its financing documents proposes substantive changes in them which affect the Section 8 program, the revised documents must be submitted for review. HUD review will be limited to the areas indicated in paragraph (b)(1) of this Section and must be carried our promptly. HUD will notify the Agency that the revised documents are acceptable, or, if unacceptable, will request clarification or changes.

(3) The review and approval of financing documents required under 24 CFR Part 811 will constitute HUD approval under this Section.

(4) The Agency must retain in its files, and make available for HUD inspection, the documentation relating to its financing of Section 8 projects, including any relating to the certifications of compliance with applicable Department of Treasury or HUD regulations (24 CFR Part 811) regarding tax-exempt financing.

(c) *Pledge of Contracts.* The HFA or owner may pledge, or offer as security for any loan or obligation, an Agreement, Contract, or ACC entered into pursuant this Part provided that such security is in connection with a project constructed pursuant to this Part. Any pledge of the Agreement, Contract, or ACC, or payments thereunder will be limited to the amounts payable under the Contract or ACC in accordance with its terms. If the pledge or other document provides that all payments will be paid directly to the HFA, other mortgagee or the trustee for bondholders, the HFA, other mortgagee or trustee may make all payments or deposits required under the mortgage or trust indenture and remit any excess to the owner.

[FINAL RULE]

(d) Foreclosure and Other Transfers. In the event of assignment, sale, or other disposition of the project or the contracts agreed to by the HFA and approved by HUD (which approval shall not be unreasonably delayed or withheld), foreclosure, or assignment of the mortgage or deed in lieu of foreclosure,

(1) The Agreement, the Contract and the ACC will continue in effect, and

(2) Housing assistance payments will continue in accordance with the terms of the Contract,

unless approval to amend or terminate the Agreement, the Contract or the ACC has been obtained from the Assistant Secretary for Housing.

[45 FR 56327, Aug. 22, 1980]

§ 883.308 Adjustments to reflect changes in terms of financing.

(a) *Certifications of Projected Financing Terms.* When an HFA, under this part, provides permanent financing for a project through the issuance of obligations and these are not sold until after the contract rents for a project have been set, the HFA must submit, with the Proposal, a certification of:

(1) Its projected rate of borrowing (net interest cost), based on a reasonable evaluation of market conditions, on obligations issued to provide interim and permanent financing for the project,

(2) The projected cost of borrowing to the owner on interim financing for the project,

(3) The projected loan amount for the project,

(4) The projected cost of borrowing and the term of the permanent financing to be provided to the owner for the project,

(5) The projected annual debt service for the permanent financing on which the Contract Rents are based, and

(6) The override, if any.

(b) *Revised Certifications.* If, at any time prior to the execution of the Agreement, the terms and conditions of financing change, other than the HFA's projected cost of borrowing, the HFA must submit revised certifications based upon the new terms.

(c) *Certifications of Actual Financing Terms.* After a project has been permanently financed, the HFA must submit a certification which specifies the actual financing terms. The items that must be included in this certification include:

(1) The HFA's actual cost of borrowing (net interest cost) on obligations from which funds were used to permanently finance the project,

(2) The override, if any, added to the actual cost of borrowing on obligations in setting the rate of lending to the owner,

(3) The annual debt service to the owner for the permanent financing on which contract rents are based; and,

(4) The actual loan amount and the term on which the annual debt service is based.

(d) *Reduction of Contract Rents.* If the actual debt service to the owner under the permanent financing is lower than the anticipated debt service on which the Contract Rents were based, the initial Contract Rents, or the Contract Rents currently in effect, must be reduced commensurately, and the amount of the savings credited to the project account.

(e) *Increase of Contract Rents.* This paragraph (e) applies only if the HFA is using its set-aside for the project and it is processed under Subpart D. If the acutal debt service to the owner under the permanent financing is higher than the anticipated debt service on which the Contract Rents are based, the initial Contract Rents or the Contract Rents currently in effect may, if sufficient contract and budget authority is available, be increased commensurately based on the certification submitted under paragraph (c) of this section. The amount of this increase may not exceed the amount of the Financing Cost Contingency (FCC) authorized but not reserved for the project at the time the proposal is approved. The adjustment must not exceed the amount necessary to reflect an increase in debt service (based on the difference between the projected and actual terms of the permanent financing) resulting from an increase over the projected interest rate of not more than:

(1) One and one-half percent if the projected override was three-fourths of one percent or less, or

(2) One percent if such projected override was more than three-fourths of one percent but not more than one percent, or

(3) One-half of one percent if such projected override was more than one percent.

(f) *Recoupment of Savings in Financing Costs.* In the event that interim financing is continued after the first year of the term of the Contract and the debt service of the interim financing for any period of three months after such first year is less than the anticipated debt service under the permanent financing on which the Contract Rents were based, an appropriate amount reflecting the savings in financing cost will be credited by HUD to the Project Account and withheld from housing assistance payments payable to the owner. If during the course of the same year there is any period of three months in which the debt service is greater than the anticipated debt service under the projected permanent financing, an adjustment will be made so that only the net amount of savings in debt service for the year is credited by HUD to the Project Account and withheld from housing assistance payments to the owner. No increased payments will be made to the owner on account of any net excess for the year of actual interim debt service over the acticipated debt service under the permanent financing. Nothing in this paragraph will be construed as requiring a permanent reduction in the Contract Rents or precluding adjustments of Contract Rents in accordance with paragraphs (d) or (e) of this section.

(g) *Compliance with Other Regulations.* The HFA must also submit a certification specifying:

(1) That the terms of financing, the amount of the obligations issued with respect to the project and the use of the funds will be in compliance with any regulation governing the issuance of the obligations, e.g., Department of the Treasury Regulations regarding arbitrage or HUD Regulations regarding Tax Exemption of Obligations of Public Housing Agencies (24 CFR Part 811), and

(2) That the override, if any, on the permanent financing for the project will not be greater than the projected override nor greater than the override allowed for the borrowing as a whole under applicable regulations, e.g., the Department of Treasury Regulations regarding arbitrage. The certifications required under 24 CFR 811.107(a)(2) will be sufficient to meet the certification requirements of this paragraph (g).

§ 883.309 Site and neighborhood standards.

Proposed sites must meet the standards in this section.

(a) *New Construction or Substantial Rehabilitation Projects.* (1) Adequate utilities (water, sewer, gas and electricity) and streets will be available to service the site.

(2) The site and neighborhood shall be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued pursuant thereto.

(3) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons to areas containing a high proportion of low-income persons.

(4) The site must be free from serious, adverse environmental conditions, or there shall be evidence that any such conditions will be corrected by the time the housing is completed. (For new construction projects, see paragraph (b)(3) of this section.)

(5) The site must comply with any applicable conditions in the Local Housing Assistance Plan approved by HUD if applicable under § 883.206.

(6) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(7) Travel time and cost via public transportation or private automobile from the neighborhood to places of employment providing a range of jobs for lower-income workers, must not be excessive. (While it is important that elderly housing not be totally isolated from employment opportunities, this requirement need not be adhered to rigidly for such projects.)

(8) The project may not be on a site which has occupants unless the relocation requirements referred to in § 883.311 are met.

(9) The project may not be in an area that has been identified by HUD as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the project is covered by flood insurance as required by the Flood Disaster Protection Act of 1973, and it meets any relevant HUD standards and local requirements.

(b) *New Construction Projects Only.* (1) The site must be adequate in size, exposure and contour to accommodate the number and type of its units proposed.

(2) The site must not be located in: (i) An area of minority concentration unless (A) sufficient, comparable opportunities exist for housing of minority families, in the income range to be served by the proposed projects, outside areas of minority concentration; or (B) the project is necessary to meet

overriding housing needs which cannot otherwise feasibly be met in that housing market area. An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable, or

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

(3) The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank backups, sewage hazards, or mudslides; harmful air pollution, smoke or dust; excessive noise vibration or vehicular traffic; rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is seriously detrimental to family life or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

§ 883.310 Property standards.

(a) *New Construction.* Projects must comply with:

(1) HUD's Minimum Property Standards;

(2) In the case of mobile homes, the Federal Mobile Home Construction and Safety Standards, pursuant to Title VI of the Housing and Community Development Act of 1974, and 24 CFR Part 3280;

(3) In the case of congregate or single room occupant housing, the appropriate HUD guidelines and standards,

(4) HUD requirements pursuant to Section 209 of the Housing and Community Development Act of 1974 for projects for the elderly or the handicapped;

(5) HUD requirements pertaining to noise abatement and control; and

(6) Applicable state and local laws, codes, ordinances, and regulations.

(b) *Substantial Rehabilitation.* Projects must comply with:

(1) Minimum Design Standards for Rehabilitation for Residential Properties; and,

(2) In the case of congregate or single room occupant housing, the appropriate HUD guidelines and standards,

(3) HUD requirements pursuant to Section 209 of the HCD Act for projects for the elderly or the handicapped;

(4) HUD requirements pertaining to noise abatement and control;

(5) HUD regulations issued pursuant to the Lead Based Paint Poisoning Prevention Act, 42 U.S.C. 4801; and

(6) Applicable State and local laws, codes, ordinances, and regulations.

§ 883.311 Relocation and land acquisition requirements.

(a) *Application of the Uniform Act.* The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) and HUD implementing regulations at 24 CFR Part 42 (Uniform Relocation Assisstance and Real Property Acquisition) apply to the acquisition of real property by a PHA or other State agency (as defined at 24 CFR 42.85) for a project assisted under this Part and to any displacement that results from such acquisition.

(b) *Displacement not Subject to the Uniform Act.* With respect to any residential tenants (not owner-occupants) who will be permanently or temporarily relocated from a project that is assisted under this Part, but who are not assisted under the Uniform Act, the following policies will apply:

(1) Such tenants are eligible for the relocation assistance and benefits described below if they are relocated following the submission to HUD of the Proposal for the project, except where (i) their tenancy is terminated on the grounds set forth in § 883.708(b) (i), or (ii) they take occupancy after HUD's approval of the proposal with notice from the owner of the pending proposal and potential displacement.

(2) Within a reasonable period of time prior to displacement, each tenant to be permanently relocated will be provided a reasonable choice of opportunities to move to a suitable replacement dwelling unit from among available units so located as to promote choice outside areas of low income and minority concentration.

(3) For purposes of this section, a suitable replacement dwelling is: (i) Decent, safe and sanitary as defined in 24 CFR 42.47.

(ii) Available within the tenant's ability to pay (i.e., the monthly rent and average estimated cost of utilities does not exceed 25 percent of the combined monthly income of all adult members of the tenant's household);

(iii) In an area not subject to unreasonable adverse environmental conditions, either natural or human-made;

(iv) In a location that is not generally less desirable than the location of the displaced tenant's dwelling with respect to public utilities, commercial and public facilities, and the tenant's place of employment (or to sources of employment, if the tenant is unemployed but employable).

(4) Each tenant will be reimbursed by the owner for reasonable moving and related expenses at the levels described at 24 CFR 42.303 or may receive, at the discretion of the owner, a fixed payment for moving expenses in accordance with 24 CFR 42.353.

(5) A tenant may be required to relocate for a temporary period only if this is necessary to carry out the project and he/she is permitted to occupy a dwelling in the completed project. If required, the temporary relocation will not exceed 12 months in duration; a decent, safe, and sanitary dwelling in an area not subject to unreasonable adverse environmental conditions will be available to the tenant for the period of the temporary relocation; and the tenant will be reimbursed actual, reasonable out-of-pocket expenses, including moving costs to and from the temporarily occupied dwelling and any increase in the monthly housing cost (rent and reasonable utility costs) incurred in connection with the temporary relocation. If the new dwelling unit is not ready for occupancy within the 12-month period, the tenant will be notified of the earliest date by which it will be ready, and the tenant in that case will have the right to agree to wait until the extended date or to request that he/she be treated as permanently displaced.

(6) All tenants occupying property on which units will be newly constructed or substantially rehabilitated will be provided with advance information in writing and by personal explanation sufficient to enable them to understand fully the reason for their displacement and the relocation opportunities and assistance which is available to them.

(7) All tenants will be provided appropriate advisory services necessary to minimize hardships in adjusting to required permanent or temporary relocation.

(8) No lawful occupant will be required to move from his/her dwelling or to move his/her business without at least 90 days advance written notice of the earliest date by which he/she may be required to move.

(i) If the tenant is provided but refuses a reasonable choice of opportunities to move to a suitable replacement dwelling, the owner will not be obligated to make further efforts to provide replacement housing.

(ii) If replacement housing within the tenant's ability to pay cannot be identified and government assistance that would satisfy this requirement cannot be secured, the owner's obligation under this section may be

satisified by providing the tenant with a lump sum payment equal to 48 times the amount, if any, necessary to reduce the monthly housing cost (rent and utilities) of a suitable replacement dwelling to 25 percent of the combined monthly gross income to all adult members of the tenant's household.

(iii) A tenant who believe he/she has not received the proper relocation payments or opportunities to relocate to decent, safe and sanitary dwelling to which the tenant is entitled under this section may appeal first to the HFA and, if this appeal does not resolve the issue within a reasonable period of time, may appeal to the HUD field office with jurisdiction over the proposed project.

(iv) Owners are responsible for assuring that payments and services required by this Section are provided. Costs incurred by the owner in providing these services and payments may be included in project replacement cost (see § 883.403(c)) except that payments to tenants permanently relocated in accordance with paragraph (b)(8) (ii) of this section may not be included.

[FINAL RULE]

(9) The maximum lump sum payment (permitted under paragraph (b)(8) of this section) which may be required to be paid to a tenant for whom replacement housing within the tenant's ability to pay cannot otherwise be identified, and for whom government assistance that would satisfy the owner's obligation cannot be secured, shall not exceed $4000.

(c) [Revoked]

[45 FR 56327, Aug. 22, 1980]

§ 883.312 Other Federal requirements.

(a) *Equal Opportunity Requirements.* Participation in this program requires compliance with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Orders 11063 and 11246, and Section 3 of the Housing and Urban Development Act of 1968, and all related rules, regulations and requirements.

(c) *National Environmental Policy Act.* Participation in this program requires compliance with the National Environmental Policy Act and all related rules, regulations and requirements.

(d) *Clean Air Act and Federal Water Pollution Control Act.* Participation in this program requires compliance with the Clean Air Act and the Federal Water Pollution Control Act and all related rules, regulations and requirements.

(e) *Davis-Bacon and Related Acts.* Participation in this program requires that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (49 Stat. 1011), be paid to all laborers and mechanics employed in the development of any new construction or substantial rehabilitation project with nine or more assisted units and all related rules, regulations and requirements.

(f) *Rehabilitation Act.* Participation in this program requires compliance with the Rehabilitation Act of 1973 and Executive Order 11914 and all related rules, regulations and requirements.

(g) *Other Federal Statutes and Regulations.* Participation in this program requires compliance with the National Historic Preservation Act (Pub. L. 89-665), the Archeological and Historic Preservation Act of 1974 (Pub. L. 93-291), and Executive Order 11593 on Protection and Enhancement of the Cultural Environment, including the procedures prescribed by the Advisory Council on Historic Preservation in 36 CFR Part 800.

Subpart D—Fast Track Procedures for New Construction and Substantial Rehabilitation Projects

§ 883.401 Applicability.

The Subpart provides special, simplified processing procedures (Fast Track Procedures) for new construction and substantial rehabilitation projects using contract authority from the set-aside of an Agency.

(a) The Agency may utilize the Fast Track Procedures set forth in this subpart only for new construction or substantial rehabilitation projects for which it provides permanent financing without Federal mortgage insurance, except coinsurance under Section 244 of the National Housing Act. An Agency using Fast Track Procedures is called a Housing Finance Agency (HFA).

(b) New Construction and Substantial Rehabilitation proposals initially selected by HUD under 24 CFR Part 880 or 881, for which an Agency agrees to provide permanent financing without Federal mortgage insurance (except coinsurance under Section 244) are eligible for Fast Track Procedures. Subsequent to selection by HUD, such proposals will be governed by the provisions of this part. Any material deviation in the Proposal submitted by the HFA under this subpart from the Preliminary Proposal, including a request for additional contract or budget authority, may be cause for reconsideration and rejection by HUD.

(c) If an Agency provides permanent financing with Federal mortgage insurance for a Section 8 project and does not utilize its set-aside for such project, the provisions of 24 CFR Part 880 or 881, whichever is applicable, and §§ 883.307(b) and 883.308 apply.

[FINAL RULE]

§ 883.402 Obtaining proposals.

Agencies may establish their own procedures (by published invitation, negotiation, or otherwise, in accordance with applicable State and local laws) for obtaining and selecting a Proposal for submission to HUD pursuant to § 883.403. HFAs must have a written procedure for owner selection in accordance with § 883.204(d).

[45 FR 56327, Aug. 22, 1980]

§ 883.403 HFA submission of proposals.

(a) *Submission to HUD.* Any proposal eligible for Fast Track Procedures submitted by an HFA must contain the certifications required by paragraph (d) of this section.

(b) *Previous Participation; A-95 Clearinghouse Review; and Review and Comment by Local Government.* (1) The HFA and the HUD field office may, where feasible, develop procedures by which the previous participation review, A-95 Clearance and the local government review and comment under Part 891 are initiated prior to Proposal submission. (A-95 Clearance depends on the degree of rehabilitation and, therefore, may not apply to all rehabilitation projects.) The Proposal may not be approved until the HUD field office has received a copy of the response from the appropriate A-95 Clearinghouse and the Chief Executive Officer of the unit of general local government where appropriate, pursuant to 24 CFR Part 891.

(2) If the HFA initiates the A-95 review, a copy of its letter of transmittal to the appropriate A-95 Clearinghouse must be included with its Proposal submission to HUD. The letters to the A-95 Clearinghouse(s) should request that copies of the response be forwarded to HUD.

(3) If special procedures as described in paragraph (b)(1) and (b)(2) of this section are not adopted, the HUD field office will conduct its previous participation review or initiate A-95 and Part 891 review and comment procedures after the Proposal has been submitted.

(c) *Proposal Contents.* Each Proposal must contain the following items, any one of which may be submitted and approved with the Application:

(1) The identity of the owner, developer, builder, architect, management agent (and other participants) and the names of officers and principal members, shareholders,

investors, and other parties having a substantial interest in the project. This must include the previous participation of each person in HUD programs on the prescribed HUD form, a disclosure of any possible conflict of interest by any of these parties which would be a violation of the Agreement, the Contract, or the ACC and information on the qualifications and experience of the principal participants;

(2) A description of the proposed housing and amenities agreed to by the HFA and the owner, including appropriate sketches or schematic drawings;

(3) A neighborhood map showing the location(s) of the site(s) and the racial composition of the neighborhood;

(4) The anticipated date for completion of the work. If the owner will complete the project in stages, identification of the units comprising each stage and the estimated dates for commencement and completion of each stage;

(5) The proposed contract rents by unit size and structure type; which utilities and services are to be included in the contract rent; which utilities and services, if any, are to be paid directly by the families and the estimated Utility Allowance for these utilities and services, if any; and, a list of the equipment to be provided in each type of unit as part of the contract rent;

(6) The estimated replacement costs for each size of dwelling unit which may include the cost to the owner of relocation (except for payments to tenants permanently relocated under § 883.311(b)(8)(ii)) and the total estimated replacement cost of the entire project;

(7) A signed certification on the prescribed form of the owner's intention to comply with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, Executive Order 11246, Section 3 of the Housing and Urban Development Act of 1968, and of the owner's intention to undertake marketing activities as required by § 883.702(a).

(8) A statement describing how the proposal is consistent with any applicable Housing Assisance Plan, and/or Areawide Housing Opportunity Plan;

(9) For proposals for projects of five units or more, an Affirmative Fair Housing Marketing Plan;

(10) The proposed term of the contract and justification for it in accordance with § 883.603;

(11) A statement of the marketing activities the owner intends to take in accordance with the requirements of § 883.702(a)(3). Such efforts might include: participation in regional or sub-regional application pools and clearinghouses; establishment of a referral system with PHAs, other public agencies and Section 8 owners/managers in the surrounding area; contact with and provision of information about the project to employers and their employees, labor unions and interested community groups.

(d) *HFA Certifications.* The HFA must submit, with the Proposal, the following certifications:

(1) That the developer, builder, and owner are acceptable for purposes of meeting all the obligations of the Agreement.

(2) That the proposed site(s) meets the standards specified in §§ 883.309(a) (1), (4), (6) and (7) and 883.309(b) (1) and (3).

(3) That the proposal complies with §§ 883.305(b)(2) regarding the reasonableness of contract rents, 883.305(e) regarding amenities, and 883.306 regarding distributions to owners, and 883.305(c)(2) regarding replacement costs.

(4) The certifications required by § 883.308 regarding the terms of financing.

(5) That the owner and management agent, if any, are acceptable for purposes of meeting all the obligations of the contract, including marketing, management and maintenance responsibilities.

(6) That consideration has been given to whether there are site occupants who would have to be displaced, whether there is a feasible plan for relocation of site occupants, the degree of hardship which displacement might cause, the availability of funding for relocation payments and the requirements of § 883.311 have been met. If any displacement will occur: The number of households affected, by size and race, and the business concerns affected, by race, and whether they own or rent; the number of each to be temporarily or permanently displaced.

(7) That the form of lease required by the HFA to be used by the owner will meet the requirements of § 883.707, and be otherwise consistent with program requirements.

(8) That the proposed project is in compliance with the various regulations, statutes and executive orders set forth in § 883.312.

§ 883.404 HUD evaluation of proposals.

HUD's evaluation of Proposals submitted by HFAs shall be limited to determining whether the following requirements are satisfied:

(a) The Proposal and the HFA certifications contain all elements required in § 883.403 and are acceptable in accordance with § 883.201(c);

(b) The proposed contract rents plus any Utility Allowance do not exceed the HUD established Fair Market Rents, except as provided in § 883.305(b);

(c) The proposed replacement cost for the dwelling units do not exceed the dollar limits specified in § 883.305(c)(1);

(d) The Proposal satisfies the requirements of the National Environmental Policy Act. In determining whether this requirement, is met, HUD must complete all appropriate environmental reviews required under HUD regulations;

(e) The proposed site meets the site and neighborhood requirements of § 883.309(a) (2), (3), (5), (8) and (9) and in the case of proposals for new construction, § 883.309(b)(2);

(f) The HFA and Owner are not in violation of the equal opportunity requirements of § 883.312(a) and the Affirmative Fair Housing Marketing Plan is approvable by HUD;

(g) The determination has been made by HUD as to whether any project participants are on the list of debarred, suspended, and ineligible contractors and grantees, available to the field office. If any participants are found to be on that list, the proposal will not be approved unless the participant withdraws;

(h) In cases where the Application for a proposed project did not specify a site, the requirements of § 883.206 (a)(4) and (b) must be satisfied; and

(i) The Proposal complies with such other requirements as the Secretary will from time to time prescribe.

§ 883.405 Notification of acceptability of proposal.

(a) *HUD Determination.* HUD shall notify the HFA that the Proposal is:

(1) Approved; or

(2) Approvable only if specified deficiencies are corrected and if HUD receives amendments to the Proposal necessary to correct these deficiencies within a specified time; or

(3) Not approved with an indication of the reasons for disapproval.

(b) *Notification.* The appropriate A-95 Clearinghouse and the unit of general local government must be notified by HUD of its final action at the time the HFA is notified.

§ 883.406 HFA's submission of acceptance of notification, and certification of design and construction quality.

(a) *HFA's Acceptance.* The HFA must indicate its acceptance of the notification of approval of the Proposal by returning to HUD a copy indicating its acceptance, together with a covering letter stating:

(1) The date by which the HFA will submit the documentation required in paragraph (b) of this section; and

(2) The date when construction or rehabilitation, as appropriate, is expected to begin. This acceptance must be furnished within the time prescribed in the notification. If the HFA does not accept the notification by the date specified, HUD may rescind the notification.

(b) *Documentation to Follow Acceptance.* The HFA must submit to HUD, by the date specified in its acceptance letter under paragraph (a) of this section, the following documents:

(1) A Certification of Design and Construction Quality in accordance with paragraph (c) of this section;

(2) Four copies of the ACC, prepared by the HFA in accordance with the HUD precribed form and executed by the HFA; and

(3) Four copies of the Agreement, prepared by the HFA in accordance with the HUD prescribed form and executed by the HFA and the owner.

(c) *Certification of Working Drawings and Specifications.* The HFA must submit to HUD a certification by the HFA, based upon an analysis and report by the design architect of the project or by an architect employed or engaged by the HFA, that:

(1) (i) For new construction, the working drawings and specifications are consistent with the approved Proposal, or

(ii) For substanial rehabilitation, the working drawings and specifications, where required under HUD guidelines considering the nature and extent of rehabilitation, and the work write-up are consistent with the approved proposal, and

(2) The proposed construction or rehabilitation is permissible under the applicable zoning, building, housing, and other codes, ordinances or regulations as modified by any waivers obtained from the appropriate officials. This certification must also cover compliance with the appropriate Minimum Property Standards and other standards, guidelines and criteria applicable pursuant to § 883.310.

(3) The amenities in the proposed project are in compliance with § 883.305(e).

(d) *Working Drawings and Specifications.* The HFA must retain in its files one set of the working drawings and specifications, or work write-up where working drawings and specifications are not required. (See paragraph (c) of this section.) These drawings and specifications, or work write-up, must be available for examination by HUD so long as the contract is in effect or for such shorter period of time as approved by HUD.

§ 883.407 HUD execution of annual contributions contract and agreement.

(a) HUD must review the Certification of Design and Construction Quality, the ACC, and the Agreement and, if found acceptable, execute the ACC and approve the Agreement. The Agreement may provide for execution of the contract in stages where the construction will permit occupancy of units prior to completion of the entire project. After execution, HUD will return two copies of the ACC and the Agreement to the HFDA, retaining two copies for its records.

(b) In the case of a non-elderly family project located in a Standard Metropolitan Statistical Area (SMSA), the field office will promptly notify PHAs and Community Development Agencies in the SMSA as well as any metropolitan-wide clearinghouse, or fair housing organizations where there is no metropolitan-wide clearinghouse, of the execution of the Agreement; the size and bedroom distribution of the project; and the expected time of initial marketing and occupany. The notification will indicate that agencies should inform the owner if they wish to be contacted by the owner for referrals.

§ 883.408 Construction or rehabilitation period.

(a) *Timely Performance of Work.* After execution of the Agreement, the owner must proceed promptly with construction or rehabilitation as provided in the Agreement and complete the project within the time stated in the Agreement. If the owner fails to start promptly, diligently continue or complete construction, the HFA may rescind the Agreement, or take other appropriate action.

(b) *Delays.* Extensions of time may be granted for the reasons specified in the Agreement. However, contract rents will be increased only for the reasons stated in paragraph (d) of this section.

(c) *Inspections During Construction.* (1) All projects will be inspected by the HFA periodically to determine compliance with Davis-Bacon Act requirements.

(2) Projects which involve financing which requires HUD construction inspection will be subject to the applicable inspection requirements of the applicable regulations (e.g., Part 811 or Coinsurance).

(3) A review to determine contractor compliance with equal opportunity requirements may be conducted at any time during the construction period.

[FINAL RULE]

(d) *Increases in Contract Rents or Utility Allowances Before Contract Execution.* (1) Increases in Contract Rents or Utility Allowances after execution of the Agreement and prior to execution of the Contract are permitted in the following circumstance: (i) To correct substantial errors by HUD or the HFA in the original processing which would otherwise result in serious inequities;

(ii) To reflect substantial and necessary changes in the plans and specifications which have been approved by the HFA (no optional betterments may result in rent increases);

(iii) To reflect additional costs for interest, taxes, hazard insurance, mortgage insurance premiums, and commitment fees, due to construction delays excusable under the Agreement;

(iv) To reflect additional costs which result from requirements imposed by local or State governments, HUD, or other Federal agencies which are beyond the control of the owner, which have been approved by the HFA and which could not have been anticipated at the time the Agreement was executed; or

(v) To reflect increased costs which result from a change in contractors which is necessary because the original contractor became bankrupt, was terminated by the owner due to inadequate performance or abandoned the job.

(vi) To reflect additional costs incurred by the owner in providing the relocation assistance and payments required by § 883.311 (except for payments made to tenants permanently relocated under § 883.311(b)(8)(ii)), or as a result of altering construction work schedules in order to minimize displacement, or as a result of other activities which minimize displacement or related hardships.

(2) The HFA must certify that any increases granted are limited to the amount necessary to cover the specific cost increase associated with the applicable item cited in paragraph (d)(1) of this section and do not result in rents that exceed the limitations to which the HFA certified under § 883.305(b)(2) or the limitations in §§ 883.305(b)(1) and 883.305(c).

(3) Contract rents may also be increased under the provision of § 883.308(e), either prior to or after execution of the Contract.

[45 FR 56327, Aug. 22, 1980]

§ 883.409 Project completion.

(a) *Certifications Upon Completion.* Upon completion of the project, the HFA must submit to HUD the following certifications:

(1) A certification by the HFA that: (i) The project has been completed in accordance with the requirements of the Agreement;

(ii) The project is in good and tenantable condition;

(iii) There are no defects or deficiencies in the project other than minor items or work which is incomplete because of weather conditions;

(iv) There has been no change in the management capability or in the proposed management program (if one was required) specified in the Proposal, other than changes approved in writing by the HFA in accordance with the Agreement;

(v) There are no claims of underpayment or alleged violation of the provisions of the Agreement relating to the payment of not less than prevailing wage rates. In the event there are any such pending claims to the knowledge of the owner, HUD, or the HFA, the HFA certification must include a statement that the owner has placed a sufficient amount in escrow, as determined by the HFA or HUD to assure payment of any contested underpayment; and

(vi) The project has been constructed or rehabilitated in accordance with applicable zoning, building, housing and other codes, ordinances or regulations, as modified by any waivers obtained from the appropriate officials.

(2) A certification by the owner that:

(i) The project has been completed in accordance with the requirements of the Agreement;

(ii) The project is in good and tenantable condition;

(iii) There are no defects or deficiencies in the project other than minor items or work which is incomplete because of weather conditions;

(iv) There has been no change in evidence of management capability or in the proposed management program (if one was required) specified in the Proposal, other than changes approved in writing by the HFA in accordance with the Agreement; and

(v) The provisions of the Agreement relating to the payment of not less than prevailing wage rates have been complied with and that there are no claims of underpayment in alleged violation of said provisions of the Agreement. In the event there are any such pending claims to the knowledge of the Owner, HUD, or the HFA, the Owner's certification shall include a statement that a sufficient amount has been placed in escrow, as determined by the HFA or HUD to assure such payments.

(3) In the case of substantial rehabilitation projects, a certification by the owner that the property has been treated and is in compliance with HUD Lead Based Paint regulations (24 CFR Part 35).

(b) *Additional Work to be Completed.* If the HFA certification states that the project is complete except for minor items or work which is incomplete because of weather conditions which do no preclude or affect occupancy, the project or appropriate stage will be accepted and the Contract executed subject to completion of these items within a reasonable period of time. When the owner reports to the HFA that the remaining work items have been completed, the HFA must inspect the work, and if it finds that the work has been completed satisfactorily, it must so certify to HUD. If HUD fails to receive this additional certification within a reasonable time period from acceptance of the project, HUD may, upon 30 days notice to the HFA and the owner cancel its approval of the Contract and require its termination or exercise its other rights under the ACC.

(c) *Completion in Stages.* If the project is to be completed in stages, the procedures of this section shall apply to each stage.

§ 883.410 Execution of housing assistance payments contract.

If the HUD Field Office determines that the certifications required by § 883.409 are in conformance with the requirements of that section, it will authorize execution of the Contract. If HUD finds that the evidence of completion is acceptable with respect to the physical completion of the project, including the certificate of occupancy and/or other official approvals required for occupancy, but the evidence of completion in other respects is not acceptable, it will, upon request by the HFA, approve execution of the Contract. In such cases, however, until the remaining evidence of completion is submitted and found acceptable by HUD:

(a) The contract rent for the purpose of computing housing assistance payments with respect to any unit will be the monthly amount of the debt service on the permanent obligations attributable to the unit, or, if the project is not yet permanently financed, the amount of debt service on the interim obligations; and

(b) Rent-up and occupancy will be subject to such conditions as HUD may require.

The contract will be executed first by the owner and the HFA and then approved by HUD.

[FINAL RULE]

§ 883.411 Cost certification.

(a) As soon as possible after execution of the Contract, the HFA must certify to HUD that it has reviewed and approved the certified costs submitted by the owner. The HFA must submit to HUD with its certification a summary of the owner's cost certifications. The certifiable cost may include relocation costs incurred by the owner under § 883.311, except for payments to tenants permanently relocated under § 883.311(b)(8)(ii). The owner's cost certifications must be consistent with any HUD requirements and be supported by the unqualified opinion of an Independent Public Accountant. A cost certification submission is not required by HUD for projects with rents that are equal to or less than comparable rents, or except as required by § 883.305(b)(2), for partially-assisted projects or small projects. HFAs may impose their own cost certification requirements in addition to any required by HUD.

[45 FR 56327, Aug. 22, 1980]

(b) If the certified costs provided in accordance with paragraph (a) of this section are less than the projected replacement costs provided under § 883.403(c), the contract rents will be reduced accordingly.

(c) If the contract rents are reduced pursuant to paragraph (b) of this section, the maximum ACC commitment will be reduced. If contract rents are reduced based on certification after Contract execution, any overpayments since the effective date of the Contract will be recovered from the owner by the HFA and returned to HUD.

Subpart E—Existing Housing and Moderate Rehabilitation Projects

§ 883.501 Modification of existing housing/moderate rehabilitation regulations.

If an Agency wishes to use all or part of its set-aside as agreed under § 883.204(b) for an existing housing or moderate rehabilitation program, it must follow the provisions set forth in the regulations for the Section 8 Housing Assistance Payments Program—Existing Housing, 24 CFR Part 882 except as follows:

(a) The Agency may submit to HUD at any time, without reference to any HUD Invitation, an application pursuant to 24 CFR Part 882 which must be in accordance with the provisions of that part.

(b) The Agency must at the same time submit to HUD, on the prescribed HUD form, an Application accompanied by:

(1) A Certification that it has made a public announcement that it has been allocated a set-aside, in accordance with § 883.204(d); and

(2) A demonstration that the proposed project complements the allocation program of the HUD field office.

(c) In implementing the provisions of 24 CFR Part 882, with respect to review and comment by local governments, the provisions of § 883.206(b) must be satisfied.

Subpart F—Housing Assistance Payments Contract

§ 883.601 Applicability.

The provisions of this Subpart apply to new construction and substantial rehabilitation projects using contract authority allocated under Subpart B, Allocation and Assignment of Contract Authority, or processed and constructed under Subpart D, Fast Track Procedures.

§ 883.602 The contract.

(a) *Contract.* The Housing Assistance Payments Contract sets forth rights and duties of the owner and State Agency with respect to the project and the Housing Assistance payments.

(b) *Effective Date of Contract.* The effective date of the Contract may be earlier than the date of execution, but no earlier than the date the Agency inspects and accepts the project except as provided in § 883.410.

(c) *Housing Assistance Payments to Owners under the Contract.* The Housing Assistance Payments made under the Contract are:

(1) Payments to the owner to assist eligible families leasing assisted units, and

(2) Payments to the owner for vacant assisted units ("vacancy payments") if the conditions specified in § 883.712 are satisfied.

The housing assistance payments are made monthly by the State Agency upon proper requisition by the owner, except payments for vacancies of more than 60 days, which are made semi-annually by the Agency upon proper requisition by the owner.

(d) *Amount of Housing Assistance Payments to the Owner.* (1) The amount of the housing assistance payments made to the owner of a unit being leased by an eligible family is the difference between the contract rent for the unit and the tenant rent payable by the family.

(2) A housing assistance payment will be made to the owner for a vacant assisted unit in an amount equal to 80 percent of the contract rent for the first 60 days of vacancy, subject to the conditions in § 883.712. If the owner collects any tenant rent or other amount for this period which, when added to this vacancy payment, exceeds the contract rent, the excess must be repaid as the Agency directs in accordance with HUD guidelines.

(3) For a vacancy that exceeds 60 days, a housing assistance payment for the vacant unit will be made, subject to the conditions in § 883.712, in an amount equal to the principal and interest payments required to amortize that portion of the debt attributable to the vacant unit for up to 12 additional months.

(e) *Additional Housing Assistance Payments to Families.* In those cases where the total family contribution of a family leasing an assisted unit is less than the utility allowance for the unit, the difference will be paid to the family as an additional housing assistance payment. The Contract will provide that the owner will make this payment on behalf of the Agency. Funds for this purpose will be paid to the owner in trust solely for the purpose of making the additional payment.

[FINAL RULE]

§ 883.603 Term of the contract.

(a) *New Construction.* The term of the Contract will be governed by the following provisions: (1) For assisted units in a project financed with the aid of a loan insured by the Federal government (including coinsurance under section 244 of the National Housing Act) or a loan made, guaranteed or intended for purchase by the Federal government, the term is 20 years.

(2) For assisted units in a project owned by or financed by a loan or loan guarantee from a State or local agency, where the assisted units are intended for occupancy by non-elderly families and where it is located in an area designated by the Assistant Secretary for Housing as one requiring special financial assistance, the Contract will be for an initial term of 20 years for any dwelling unit, with provision for renewal for additional terms of not more than 5 years each. The total term of initial and renewal terms will not exceed the lesser of (i) 40 years for any dwelling unit, or (ii) the term of the permanent financing.

(3) For assisted units in all other projects, the Contract will be for an initial term of 20 years for any dwelling unit, with provision for renewal for additional terms of not more than 5 years each. The total term of initial and renewal terms will not exceed the lesser of (i) 30 years for any dwelling unit, or (ii) the term of the permanent financing.

(b) *Substantial Rehabilitation.* The Contract will be for a term which is consistent with paragraph (b)(1) and with paragraph (b)(2), (3), or (4).

(1) The Contract term will cover the longest term, but not less than 20 years, of a single credit instrument covering: (i) The cost of rehabilitation or

(ii) The existing indebtedness, or

(iii) The cost of rehabilitation and the refinancing of the existing indebtedness, or

(iv) The cost of rehabilitation and the acquisition of the property; and

(2) For assisted units in a project financed with the aid of a loan (including Coinsurance under Section 244 of the National Housing Act), or a loan made, guaranteed or intended for purchase by the Federal government, the Contract term will not exceed 20 years for any dwelling unit; or

(3) For assisted units in a project owned or financed by a loan or loan guarantee from a State or local agency where the assisted units are intended for occupancy by non-elderly families and where it is located in an area designated by the Assistant Secretary for Housing as one requiring special financial assistance, the Contract will be for an initial term of 20 years for any dwelling unit. There will be a provision for renewal for additional terms of not more than 5 years each. The total of initial and renewal terms will not exceed the lesser of: (i) 40 years for any dwelling unit, or

(ii) The term of the permanent financing; or

(4) For assisted units in projects financed other than as described in paragraphs (b) (2) or (3), the Contract will be for an initial term of 20 years for any dwelling unit. There will be a provision for renewal for additional terms of not more than 5 years each. The total of initial and renewal terms will not exceed the lesser of: (i) 30 years for any dwelling unit, or

(ii) The term of the permanent financing.

(c) *Staged Projects.* If a project is completed in stages, the term of the Contract must relate separately to the units in each stage unless the Agency and the owner agree that only the units in the first stage will be assisted for the maximum term of the Contract. The total Contract term, for the units in all stages, beginning with the effective date of the Contract for the first stage, may not exceed the overall maximum term allowable for any one unit under this section, plus two years.

[45 FR 56327, Aug. 22, 1980]

§ 883.604 Maximum annual commitment and project account.

(a) *Maximum Annual commitment.* The maximum annual contribution that may be contracted for in the ACC is the total of the contract rents and utility allowances for all assisted units in the project, plus the HUD-approved fees, if any, for State Agency administration of the Contract. (See § 883.606)

(b) *Project Account.* (1) A project account will be established and maintained by HUD as a specifically identified and segregated account for each project. The account will be established out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the ACC each year. Payments will

be made from this account for housing assistance payments (and fees for Agency admininstration, if appropriate) when needed to cover increases in contract rents or decreases in tenant rents and for other costs specifically approved by the Secretary.

(2) Whenever a HUD-approved estimate of required payments under the ACC for a fiscal year exceeds the maximum annual commitment and would cause the amount in the project account to be less than 40 percent of the maximum, HUD will, within a reasonable period of time, take such additional steps authorized by Section 8(c)(6) of the U.S. Housing Act of 1937, as may be necessary, to assure that payments under the ACC will be adequate to cover increases in contract rents and decreases in tenant rents.

§ 883.605 Reduction of number of units covered by contract.

(a) *Limitation on Leasing to Ineligible Families.* Owners may not lease more than 10 percent of the assisted units in a project to ineligible families without the prior approval of HUD and the Agency. Failure on the part of the owner to comply with this prohibition is a violation of the Contract and grounds for all available legal remedies, including specific performance of the Contract, suspension or debarment from HUD programs and reduction of the number of units under the Contract, as set forth in paragraph (b) of this section.

(b) *Reduction for Failure to Lease to Eligible Families.* If, at any time, beginning six months after the effective date of the Contract, the owner fails for a continuous period of six months to have at least 90 percent of the assisted units leased or available for leasing by eligible families, the Agency and HUD may, on at least 30 days notice, reduce the number of units covered by the Contract. The Agency and HUD may reduce the number of units to the number of units actually leased or available for leasing, plus 10 percent (rounded up). This reduction, however, will not be made if the failure to lease units to eligible families is permitted in writing by the Agency and HUD under paragraph (a) of this section.

(c) *Restoration.* HUD will agree to an amendment of the ACC and the Agency may agree to an amendment to the Contract to provide for subsequent restoration of any reduction made pursuant to paragraph (b) of this Section if:

(1) HUD and the Agency determine that the restoration is justified by demand,

(2) the owner otherwise has a record of compliance with his obligations under the Contract, and

(3) contract authority is available.

§ 883.606 Administration fee.

(a) The State Agency is responsible for administration of the Contract subject to periodic review and audit by HUD.

(b) The Agency is entitled to a reasonable fee, determined by HUD, for administering a Contract on newly constructed or substantially rehabilitated units provided there is no override on the permanent loan granted by the Agency to the owner for a project containing assisted units.

§ 883.607 Default by owner and/or agency.

(a) *Rights of Owner if Agency Defaults under Agreement or Contract.* The ACC, the Agreement and the Contract will provide that, in the event of failure of the Agency to comply with the Agreement or Contract with the owner, the owner will have the right, if he/she is not in default, to demand that HUD investigate. HUD will first give the Agency a reasonable opportunity to take corrective action. If HUD determines that a substantial default exists, HUD will assume the Agency's rights and obligations under the Agreement or Contract and meet the obligations of the Agency under the Agreement or Contract including the obligation to enter into the Contract.

(b) *Rights of HUD if Agency Defaults under ACC.* The ACC will provide that, if the Agency fails to comply with any of its obligations, HUD may determine that there is a substantial default and require the Agency to assign to HUD all of its rights and interests under the Contract; however, HUD will continue to pay annual contributions in accordance with the terms of the ACC and the Contract. Before determining that an Agency is in substantial default, HUD will give the Agency a reasonable opportunity to take corrective action.

(c) *Rights of Agency and HUD if Owner Defaults under Contract.* (1) The Contract will provide that if the Agency determines that the owner is in default under the Contract, the Agency will notify the owner, and lender, if applicable, with a copy to HUD,

(i) Of the actions required to be taken to cure the default,

(ii) Of the remedies to be applied by the Agency including specific performance under the Contract, abatement of housing assistance payments and recovery of overpayments, where appropriate; and

(iii) That, if he/she fails to cure the default, the Agency has the right to terminate the Contract or to take other corrective action, in its discretion.

(2) If the Agency provided the permanent financing, the Contract will also provide that HUD has an independent right to determine whether the owner is in default and to take corrective action and apply appropriate remedies, except that HUD will not have the right to terminate the Contract without proceeding in accordance with paragraph (c) of this section.

Subpart G—Management of New Construction and Substantial Rehabilitation Projects

§ 883.701 Applicability.

The provisions of this Subpart apply to new construction and substantial rehabilitation projects using contract authority allocated under Subpart B, Allocation and Assignment of Contract Authority, or processed and constructed under Subpart D, Fast Track Procedures.

§ 883.702 Responsibilities of owner.

(a) *Marketing.* (1) The owner must commence diligent marketing activities in accordance with the Agreement not later than 90 days (or 60 days in the case of substantial rehabilitation) prior to the anticipated date of availability for occupancy of the first assisted unit of the project.

(2) Marketing must be done in accordance with the HUD-approved Affirmative Fair Housing Marketing Plan and all Fair Housing and Equal Opportunity requirements. The purpose of the Plan and requirements is to assure that eligible families of similar income in the same housing market area have an equal opportunity to apply and be selected for a unit in projects assisted under this Part regardless of their race, color, creed, religion, sex or national origin.

[FINAL RULE]

(3) With respect to non-elderly family units, the owner must undertake marketing activities in advance of marketing to other prospective tenants in order to provide opportunities to reside in the project: (i) to non-elderly families who are *least likely to apply* as determined in the Affirmative Fair Housing Marketing Plan, and

(ii) to non-elderly families *expected to reside* in the community by reason of current or planned employment.

[45 FR 56328, Aug. 22, 1980]

(4) At the time of Contract execution, the owner must submit a list of leased and unleased units, with justification for the unleased units, in order to qualify for vacancy payments for the unleased units. (See § 883.602 (c) and (d) and § 883.712.)

(b) *Management and Maintenance.* The owner is responsible for all management functions (including selection of tenants, reexamination of

family incomes, evictions and other terminations of tenancy, and collection of rents) and all repair and maintenance functions (including ordinary and extraordinary maintenance and replacement of capital items). All these functions must be performed in compliance with applicable Equal Opportunity requirements.

[FINAL RULE]

(c) *Contracting for Services.* With approval of the Agency, the owner may contract with a private or public entity (but not with the Agency unless temporarily necessary for the Agency to protect its financial interest and to uphold its program responsibilities where no alternative management agent is immediately available) for performance of the services or duties required in paragraphs (a) and (b) of this section. However, such an arrangement does not relieve the owner of responsibility for these services and duties.

[45 FR 56328, Aug. 22, 1980]

(d) *Submission of Financial and Operating Statements.* (1) After execution of the Contract, the owner must submit to the Agency:

(i) Within 60 days after the end of each fiscal year of the project, financial statements for the project audited by an Independent Public Accountant in a form approved by HUD, and

(ii) Other statements as to project operation, financial conditions and occupancy as the Agency may require pertinent to administration of the Contract and monitoring of project operations.

(2) The State Agency will be required to keep copies of annual financial statements for 3 years and make them available to HUD upon request.

[FINAL RULE]

(e) *Use of Project Funds.* Project funds must be used for the benefit of the project, to make required deposits to the replacement reserve in accordance with § 883.703, or to provide distributions to the owner as provided in § 883.306. Any remaining project funds must be deposited with the Agency, other mortgagee or other Agency-approved depository in an interest-bearing account. Withdrawals from this account may be made only for project purposes and with the approval of the Agency. In the case of HUD-insured projects, the provisions of this paragraph will apply instead of the otherwise applicable mortgage insurance provisions, except in the case of partially-assisted projects under this Part which are subject to the applicable mortgage insurance provisions.

[45 FR 56328, Aug. 22, 1980]

§ 883.703 Replacement reserve.

(a) A replacement reserve must be established and maintained in an interest-bearing account to aid in funding extraordinary maintenance and repair, and replacement of capital items.

(1) An amount equivalent to at least .006 of the cost of total structures, including main buildings, accessory buildings, garages and other buildings, or any higher rate as required from time to time by (i) the Agency, in the case of projects approved under Subpart D or (ii) HUD, in the case of all other projects, will be deposited in the replacement reserve annually. For projects approved under Subpart D, this amount may be adjusted each year by up to the amount of the automatic annual adjustment factor. For all projects not approved under Subpart D, this amount must be adjusted each year by the amount of the automatic annual adjustment factor.

(2) The reserve must be built up to and maintained at a level determined to be sufficient by the Agency to meet projected requirements. Should the reserve achieve that level, the rate of deposit to the reserve may be reduced with the approval of the Agency.

(3) All earnings, including interest on the reserve, must be added to the reserve.

(4) Funds will be held by the Agency, other mortgagee or trustee for bondholders, as determined by the Agency, and may be drawn from the reserve and used only in accordance with Agency guidelines and with the approval of, or as directed by, the Agency.

(b) The Agency may exempt partially-assisted projects approved under Subpart D from the provisions of this section. All partially-assisted projects not approved under Subpart D are exempt from the provisions of this section.

(c) In the case of HUD-insured projects, the provisions of this section will apply instead of the otherwise applicable mortgage insurance provisions except in the case of partially-assisted projects which are subject to the applicable mortgage insurance provisions.

§ 883.704 Selection and admission of tenants.

(a) *Application.* The owner must accept applications for admission to the project in the form prescribed by HUD. Both the owner (or designee) and the applicant, must complete and sign the application. On request, the owner must furnish to the Agency or HUD copies of all applications received.

(b) *Determination of Eligibility and Selection of Tenants.* The owner is responsible for determining whether the applicant is eligible in accordance with 24 CFR Parts 812 and 889 and for the selection of families.

(1) Local residency requirements are prohibited. Local residency preferences are discouraged and may be applied in selecting tenants only to the extent that they are not inconsistent with affirmative fair housing marketing objectives and the owner's HUD-approved Affirmative Fair Housing Marketing Plan. With respect to any residency preferences, persons expected to reside in the community as a result of current or planned employment will be treated as residents.

(2) If the owner determines that the family is eligible and is otherwise acceptable and units are available, the owner will assign the family a unit of the appropriate size in accordance with HUD standards. If no suitable unit is available, the owner will place the family on a waiting list for the project and notify the family of when a suitable unit may become available. If the waiting list is so long that the applicant would not be likely to be admitted for the next 12 months, the owner may advise the applicant that no additional applications are being accepted for that reason.

(3) If the owner determines that an applicant is ineligible on the basis of income or family composition, or if the owner is not selecting the applicant for other reasons, the owner will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has the right to meet the owner or managing agent in accordance with HUD requirements. Where the owner is a PHA, the applicant may request an informal hearing. If the PHA determines that the applicant is not eligible, the PHA will notify the applicant and inform the applicant that he has the right to request a review by the Agency and HUD of the PHA's determination. The applicant may also exercise other rights if the applicant believes he/she is being discriminated against on the basis of race, color, creed, religion, sex, or national origin.

(4) Records on applicants and approved eligible families which provide racial, ethnic, gender and place of previous residence data required by HUD, must be maintained and retained for three years.

(c) *Income Mix.* In the initial renting of assisted units, the Agency must be able to verify to HUD that at least 30 percent of the units assisted under its program are leased to very low-income families. After initial renting, the Agency must be able to verify to HUD that owners use their best efforts to maintain at least 30 percent occupancy by very

low-income families under the Agency's program. In addition, the Agency will use its best efforts to achieve leasing by owners to families with a range of incomes so that the average incomes of all families in occupancy is at or above 40 percent of the median income in the area.

(d) *Reexamination of Family Income and Composition.* (1) The owner is responsible for reexamining the income and composition of all families at least once each year (except that reviews may be made at intervals no longer than two years in the case of elderly families) and, upon verification of the information provided by the family, making appropriate adjustments in the total family contribution in accordance with the provisions of 24 CFR Part 889. The owner will adjust tenant rent and the housing assistance payment in accordance with any change in total family contribution. The owner may schedule reexaminations at intervals of less than one year when it is not possible to make a reasonable estimate of the family's income for a full year.

(2) If the family reports a change in income or other circumstances that would result in a decrease of total family contribution between regularly scheduled reexaminations, the owner, upon receipt of verification of the decrease in income, must promptly make appropriate adjustments in the total family contribution. The owner may require families to report increases in income or changes in family composition between scheduled reexaminations.

(3) A family's eligibility for housing assistance payments continues until its total family contribution equals the total housing expense for the unit it occupies. The termination of eligibility at this point will not affect the family's other rights under the lease nor will such termination preclude resumption of payments as a result of subsequent changes in income or other circumstances during the term of the Contract.

§ 883.705 Tenant rent.

The tenant rent is paid directly to the owner by the eligible family to whom an assisted unit is leased in partial payment of the contract rent. It is equal to the family's total family contribution minus any utility allowance for the unit. If the family's total family contribution is less than the utility allowance for the unit which it occupies, the tenant rent payable by the family to the owner is zero.

§ 883.706 Overcrowded and underoccupied units.

If the Agency determines that because of a change in family size an assisted unit is smaller than appropriate for the eligible family to which it is leased, or that the unit is larger than appropriate, housing assistance payments with respect to the unit will not be reduced or terminated until the eligible family has been relocated to an appropriate alternative unit. If possible, the owner will, as promptly as possible, offer the family an appropriate unit. The owner may receive vacancy payments for the vacated unit if the requirements of § 883.712 are met.

§ 883.707 Lease requirements.

(a) *Term of Lease.* The term of the lease will be for not less than one year. The lease may, or in the case of a lease for a term of more than one year must, contain a provision permitting termination on 30 days advance written notice by the family.

(b) *Form.* The form of lease must contain all require provisions, and none of the prohibited provisions specified below.

(1) *Required Provisions (Addendum to Lease).*

"The following additional Lease provisions are incroporated in full in the Lease between ———(Landlord) and ——— (Tenant) for the following dwelling unit: ———. In case of any conflict between these and any other provisions of the Lease, these provisions will prevail.

a. The total rent will be $— per month.

b. Of the total rent, $— will be payable by the State Agency (Agency) as housing assistance payments on behalf of the Tenant and $— will be payable by the Tenant. These amounts will be subject to change by reason of changes in the Tenant's family income, family composition, or extent of exceptional medical or other unusual expenses, in accordance with HUD-established schedules and criteria; or by reason of adjustment by the Agency of any applicable Utility Allowance; or by reasons of changes in program rules. Any such change will be effective as of the date stated in a notification to the Tenant.

c. The Landlord will not discriminate against the Tenant in the provision of services, or in any other manner, on the grounds of race, color, creed, religion, sex, or national origin.

d. The Landlord will provide the following services and maintenance:

_____

_____

e. A violation of the Tenant's responsibilities under the Section 8 Program, as determined by the Agency, is also a violation of the lease.

Landlord _____
By _____
Date _____
Tenant _____
Date _____

(2) *Prohibited Provisions.* Lease clauses which fall within the classifications listed below must not be included in any Lease.

a. *Confession of Judgment.* Consent by the tenant to be sued, to admit guilt, or to accept without question any judgment favoring the landlord in a lawsuit brought in connection with the lease.

b. *Seize or Hold Property for Rent or Other Charges.* Authorization to the landlord to take property of the tenant and/or hold it until the tenant meets any obligation which the landlord has determined the tenant has failed to perform.

c. *Exculpatory Clause.* Prior agreement by the tenant not to hold the landlord or landlord's agents legally responsible for acts done improperly or for failure to act when the landlord or landlord's agent was required to do so.

d. *Waiver of Legal Notice.* Agreement by the tenant that the landlord need not give any notices in connection with (1) a lawsuit against the tenant for eviction, money damages, or other purposes, or (2) any other action affecting the tenant's rights under the lease.

e. *Waiver of Legal Proceeding.* Agreement by the tenant to allow eviction without a court determination.

f. *Waiver of Jury Trial.* Authorization to the landlord's lawyer to give up the tenant's right to trial by jury.

g. *Waiver of Right to Appeal Court Decision.* Authorization to the landlord's lawyer to give up the tenant's right to appeal a decision on the ground of judicial error or to give up the tenant's right to sue to prevent a judgment being put into effect.

h. *Tenant Chargeable with Cost of Legal Actions Regardless of Outcome of Lawsuit.* Agreement by the tenant to pay lawyer's fees or other legal costs whenever the landlord decides to sue the tenant whether or not the tenant wins. (Omission of such a clause does not mean that the tenant, as a party to a lawsuit, may not have to pay lawyer's fees or other costs if the court so orders.)

§ 883.708 Termination of tenancy and modification of lease.

(a) *Applicability.* The provisions of this section apply to all decisions by an owner to terminate the tenancy of a family residing in a unit under Contract during or at the end of the family's lease term.

(b) *Entitlement of Families to Occupancy.*—(1) *Grounds.* The owner may not terminate any tenancy except upon the following grounds:

(i) Material noncompliance with the lease;

(ii) Material failure to carry out obligations under any state landlord and tenant act, or

(iii) Other good cause, which may include the refusal of a family to accept an approved, modified lease form (see paragraph (d) of this section).

No termination by an owner will be valid to the extent it is based upon a lease or a provision of State law permitting termination of a tenancy solely because of expiration of an initial or subsequent renewal term. All terminations must also be in accordance with the provisions of any State and local landlord tenant law and paragraph (c) of this section.

(2) *Notice of Good Cause.* The conduct of a tenant cannot be deemed "other good cause" under paragraph (b)(1)(iii) of this section unless the owner has given the family prior notice that the grounds constitute a basis for termination of tenancy. The notice must be served on the family in the same

manner as that provided for termination notices under paragraph (c) of this section and State and local law.

(3) *Material Noncompliance.* The term material noncompliance with the lease includes:

(i) One or more substantial violations of the lease, or

(ii) Repeated minor violations of the lease which disrupt the livability of a building, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, interfere with the management of a building or have an adverse financial effect on the building or project. Nonpayment of rent or any other financial obligation due under the lease (including any portion thereof) beyond any grace period permitted under State law will constitute material noncompliance with the lease. The payment of rent or any other financial obligation due under the lease after the due date but within the grace period permitted under State law will constitute a minor violation.

(c) *Termination Notice.* (1) The Owner must give the family a written notice of any proposed termination of tenancy, stating the grounds and that the tenancy is terminated on a specified date and advising the family that it has an opportunity to respond to the Owner.

(2) When a termination notice is issued for other good cause (paragraph (b)(1)(iii) of this section), the notice will be effective, and it will so state, at the end of a term and in accordance with the termination provisions of the lease, but in no case earlier than 30 days after receipt by the family of the notice. Where the termination notice is based on material noncompliance with the lease or material failure to carry out obligations under a State landlord and tenant act pursuant to paragraph (b)(1)(i) or (ii) of this section, the time of service must be in accord with the lease and State law.

(3) In any judicial action instituted to evict the family, the owner may not rely on any grounds which are different from the reasons set forth in the notice.

(d) *Modification of Lease Form.* The owner may, with the prior approval of the Agency, modify the terms and conditions of the lease form effective at the end of the initial term or a successive term, by serving an appropriate notice on the family, together with the offer of a revised lease or an addendum revising the existing lease. This notice and offer must be received by the family at least 30 days prior to the last date on which the family has the right to terminate the tenancy without being bound by the modified terms and conditions. The family may accept the modified terms and conditions by executing the offered revised lease or addendum, or may reject the modified terms and conditions by giving the owner written notice in accordance with the lease that the family intends to terminate the tenancy. Any increase in rent must in all cases be governed by Section 883.710 and other applicable HUD regulations.

§ 883.709 Security deposits.

(a) At the time of the initial execution of the lease, the owner must require each family to pay a security deposit in an amount equal to one month's total family contribution or $50, whichever is greater. The family is expected to pay the security deposit from its own resources or other public sources. The owner may collect the security deposit on an installment basis.

(b) The owner must place the security deposits in a segregated, interest-bearing account. The balance of this account must at all times be equal to the total amount collected from the families then in occupancy, plus any accrued interest. The owner must comply with any applicable State and local laws concerning interest payments on security deposits.

(c) In order to be considered for the return of the security deposit, a family which vacates its unit will provide the owner with its forwarding address or arrange to pick up the refund.

(d) The owner, subject to State and local law and the requirements of this paragraph, may use the security deposit, plus any accrued interest, as reimbursement for any unpaid family contribution or other amount which the family owes under the lease. Within 30 days (or a shorter time, if required by State or local law) after receiving notification of the family's forwarding address, the owner must:

(1) Refund to a family owing no rent or other amount under the lease the full amount of the security deposit, plus accrued interest; and

(2) Provide to a family owing rent or other amounts under the lease a list itemizing any unpaid rent, damages to the unit, and estimated costs for repair, along with a statement of the family's rights under State and local law. If the amount which the owner claims is owed by the family is less than the amount of the security deposit, plus accrued interest, the owner must refund the unused balance to the family. If the owner fails to provide the list, the family will be entitled to the refund of the full amount of the security deposit plus accrued interest.

(e) In the event a disagreement arises concerning the reimbursement of the security deposit, the family will have the right to present objections to the owner in an informal meeting. The owner must keep a record of any disagreements and meetings in a tenant file for inspection by the Agency. The procedures of this paragraph do not preclude the family from exercising its rights under State and local law.

(f) If the security deposit, including any accrued interest, is insufficient to reimburse the owner for any unpaid tenant rent or other amount which the family owes under the lease, and the owner has provided the family with the list required by paragraph (d)(2) of this section, the owner may claim reimbursement under the Contract, for an amount not to exceed the lessor of:

(1) The amount owed the owner, or

(2) One month's contract rent, minus the amount of the security deposit plus accrued interest. Any reimbursement under this section will be applied first toward any unpaid tenant rent due under the lease. No reimbursement may be claimed for unpaid rent for the period after termination of the tenancy.

§ 883.710 Adjustments of contract rents.

(a) *Automatic Annual Adjustment of Contract Rents.* Upon request from the owner to the Agency, contract rents will be adjusted annually on the anniversary of the Contract in accordance with 24 CFR Part 888.

(b) *Special Additional Adjustments.* For all projects, special additional adjustments will be granted, to the extent determined necessary by the Agency and HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units which have resulted from substantial general increases in real property taxes, assessments, utility rates, and utilities not covered by regulated rates, which are not adequately compensated for by annual adjustments under paragraph (a) of this section. The owner must submit to the Agency required supporting data, financial statements and certifications.

(c) *Overall Limitation.* Any adjustments of contract rents for a unit after cost certification, where applicable, must not result in material differences between the rents charged for assisted units and comparable unassisted units except to the extent that the differences existed with respect to the contract rents set at Contract execution or cost certification, where applicable.

§ 883.711 Adjustment of utility allowance.

The owner must recommend to the Agency, in connection with annual and special adjustments of contract rents, and at other times, if appropriate, whether and to what extent the utility allowance for any assisted unit should be adjusted. Whenever a utility allowance for a unit is adjusted, the owner will promptly notify the families occupying assisted units and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment for the unit.

§ 883.712 Conditions for receipt of vacancy payments.

(a) *General.* Vacancy payments under the Contract will not be made unless the conditions for receipt of these housing assistance payments set forth in this section are fulfilled.

(b) *Vacancies During Rent-Up.* For each assisted unit that is not leased as of the effective date of the Contract, the owner is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy if the owner:

(1) Conducted marketing in accordance with § 883.702(a) and otherwise complied with § 883.702;

(2) Has taken and continues to take all feasible actions to fill the vacancy; and

(3) Has not rejected any eligible applicant except for good cause acceptable to the Agency.

(c) *Vacancies After Rent-Up.* If an eligible family vacates a unit, the owner is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy if the owner:

(1) Certifies that he/she did not cause the vacancy by violating the lease, the Contract or any applicable law;

(2) Notifies the Agency of the vacancy or prospective vacancy and the reasons for the vacancy immediately upon learning of the vacancy or prospective vacancy;

(3) Has fulfilled and continues to fulfill the requirements specified in § 883.702(a) (2) and (3) and § 883.712(b) (2) and (3); and

(4) For any vacancy resulting from the owner's eviction of an eligible family, certifies that he has complied with § 883.708.

(d) *Vacancies for Longer than 60 Days.* If an assisted unit continues to be vacant after the 60-day period specified in paragraph (b) or (c) of this section, the owner may apply to receive additional vacancy payments in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit for up to 12 additional months for the unit if:

(1) The unit was in decent, safe and sanitary condition during the vacancy period for which payments are claimed.

(2) The owner has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate, and

(3) The owner and the Agency have demonstrated to the satisfaction of HUD that:

(i) For the period of vacancy, the project is not providing the owner with revenues at least equal to project expenses (exclusive of depreciation), and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit, and

(ii) The project can achieve financial soundness within a reasonable time.

(e) *Prohibition of Double Compensation for Vacancies.* The owner is not entitled to vacancy payments for vacant units to the extent he/she can collect for the vacancy from other sources (such as security deposits, payments under § 883.709(f) and governmental payments under other programs).

§ 883.713 Reviews during management period.

(a) After the effective date of the Contract, the Agency will inspect the project and review its operation at least annually to determine whether the owner is in compliance with the Contract and the assisted units are in decent, safe and sanitary condition.

(b) In addition, HUD:

(1) Will periodically review the Agency's administration of the Contract to determine whether it is in compliance with the Contract, and

(2) May independently inspect project operations and units at any time.

(c) Equal Opportunity reviews may be conducted at any time.