Initiatives of Change
United States

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Call for Accountability for RRHA Regarding Public Housing Evictions

November 4, 2019

We, the Initiatives of Change USA staff, recently received information from a community advocate who obtained documents via the Freedom of Information Act (FOIA) that verified their suspicion that Richmond Redevelopment Housing Authority (RRHA) and its President & CEO Damon Duncan has been steadily increasing the amount of evictions since June. More troubling the FOIA request revealed that the RRHA has stopped leasing vacant units in Creighton Court since June without the proper approval from The Department of Housing and Urban Development (HUD). This very much resembles patterns of "Defacto Demolition" where in preparation for "redevelopment," housing authorities simply take large actions to achieve a high level of vacancy to justify demolition without approval from HUD. Refusing to lease vacant units despite a long waiting list at least seems to constitute a potential violation of HUD laws (such as Code 42 U.S.C. 1437 p[d]) as well as potential civil rights violations of discriminatory impact depending on who constitutes the waiting list being denied the opportunity to the vacant units.

As an organization rooted in the principles of "honesty over deception and exploitation" as well as "contributing to the flourishing of others instead of continuing hierarchical abuse and diminishment of the other", Initiatives of Change USA calls on Richmond City Council to hold RRHA accountable and to further discuss the concerns raised by Councilwoman Kim Gray in the October 28,2019 City Council work session concerning the RRHA's rising number of evictions and their potential connection to the Navy Hill Development proposal.

On May 20th, 2019, a convening took place of the Faith Rooted Revolution, a multi-faith and multi issue organizational coalition, to discuss the power in coming together to recognize and disrupt historic patterns of oppression as they emerge in our current time. One of the concerns raised during the time was the potential impact the Navy Hill Coliseum project would have on the public housing that surrounds the proposed project. In their written response to the Navy Hill Independent Commission, the Navy Hill developers stated "a portion of the RRHA Gilpin Court public housing development site is also within one half mile of the Navy Hill development site and may also be impacted by the new investments."

The acts of the Richmond Redevelopment Housing Authority and its CEO Damon Duncan in evicting and displacing families while refusing to lease vacant units in Creighton to new tenants have done more than just potentially unlawfully violate section 5 of the Annual Contributions Contract. The methods of how they have conducted these evictions have eroded the trust of those they are supposed to assist. From limiting public access to their September 18th board meeting around their five-year plan [1] to removing those offering legal support to Creighton residents at the October 30th meeting in Creighton Court, RRHA's actions continue historic legacies of displacement against some of the most vulnerable in our city.

Just because something is current doesn't mean that something is new. Eduardo Galeano once said "History never really says goodbye. History says, 'See you later." In the 1950's this same Richmond Housing Authority destroyed 4,700 units of housing in black neighborhoods and only replaced them with 1,736 units of public housing. The city of Richmond and RRHA must not repeat the harms of the past of actors such as consultants Harland Bartholomew or R. Stuart Royer & Associates whose path towards "redevelopment" was paved over black people and their neighborhoods. Moreover, the City of Richmond certainly must not perpetuate historical harms while simultaneously claiming to honor the black heritage and neighborhood called Navy Hill. Navy Hill was destroyed in the name of Urban "Renewal" to clear the land for the current Richmond Coliseum.

As a peacebuilding and trustbuilding organization, we take a stand against all harmful legacies of violence. Coretta Scott King once stated "I must remind you that starving a child is violence. Neglecting school children is violence. Punishing a mother and her family is violence. Discrimination against a working man is violence. Ghetto housing is violence. Ignoring medical need is violence. Contempt for poverty is violence." It is our great leaders of the movement toward liberation for black people that remind us that any project or 5-year plan presenting itself as redevelopment that leads to displacement rooted in contempt and criminalization of people in poverty is nothing but violence. James Baldwin in 1963 said that local governments involved in Urban "Renewal" were actually complicit in a process of violence whose impact truly meant and became "Negro Removal." The acts of Damon Duncan and RRHA in evicting and displacing families from Creighton Court while refusing to lease vacant units to new tenants are not just potentially unlawful violations. They are also acts of violence.

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[1] http://richmondfreepress.com/news/2019/sep/27/rrha-changes-rankle-residents-activists-who-are-mo/

Mayor Levar Stoney and Superintendent Jason Kamras recently had a beautiful program encouraging RPS children at Martin Luther King Jr. Middle School to "stop the violence." The leadership of the City of Richmond cannot invoke Dr. King to give a moral standard to the children, if the adults and leaders rebuke the moral standards of Coretta Scott King by committing the very acts of violence she defined and taught to Dr. King. On what moral authority can a city tell children to stop the violence, when it actively enacts violence against that same child's family through policies of displacement?

As an organization "committed to ensuring the lessons of history are not forgotten by our institutions or communities," **we ask that you join us in writing your Richmond City Council member to demand that the RRHA "stop the violence" and increasing eviction rates. We demand more accountability and oversight into RRHA's growing evictions and their ceasing to lease vacant units in Creighton Court since June. The issues raised in the October 28,2019 city council work session around the actions of RRHA must be addressed and also considered within the context of the Navy Hill Development proposal.**

Attorney Bryan Stevenson says "we have a legal system that treats you better if you are rich and guilty than if you are poor and innocent." The city is currently considering, through the Navy Hill Development proposal, paying over hundreds of millions of dollars in partnership with Tom Farrell and Dominion that has overcharged over $379 Million from everyday Virginians in overage charges from 2017-2018.[2] Yet the RRHA is evicting families, some only $87 short on rent, just for the "crime" of being unable to afford rent all in the name of "redevelopment" and a "pathway to more affordable housing."

One of the core values of the Faith Rooted Revolution, is that we all have agency and the power to decide whether we simply continue the oppressive legacies we have inherited or whether we choose to disrupt those legacies of oppression with streams of justice. As the Qur'an instructs its followers "O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor..." (Surah An-Nisa 4:135a, Sahih International translation)

On behalf of the Faith Rooted Revolution, **we call for RRHA to stop the violence and for Richmond City Council to investigate and hold RRHA accountable for their recent activity concerning not leasing vacant units in Creighton Court while increasing evictions.** We leave you with the words of the prophet Isaiah later uttered by Jesus to his followers at the beginning of his ministry.

"The Spirit of the Lord has anointed me to proclaim good news to the poor, to bind up the brokenhearted, to proclaim freedom for the captives and release from darkness for the prisoners, to proclaim the year of the Lord's favor..., to comfort all who mourn, and provide for those who grieve ...— to bestow on them a crown of beauty instead of ashes, the oil of joy instead of mourning, and a

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[2] https://wtvr.com/2019/09/09/protestors-want-refund-after-dominion-energy-makes-397-million-in-extra-profits-but-a-new-law-prevents-that/ .

garment of praise instead of a spirit of despair. They will rebuild the ancient ruins and restore the places long devastated; they will renew the ruined cities that have been devastated for generations." (Isaiah 61:1a-4b, NKJV Translation)

May those trapped in the dehumanizing cycle of poverty be blessed and may those who contribute to keeping people in that cycle be transformed into vessels of peace and justice. "Redevelopment" that becomes bad news to people in poverty is not the work of justice. It is the work and extension of a legacy of displacement that we are all called to disrupt.

In greater understanding and solidarity,
Initiatives of Change USA

For more information on Initiatives of Change USA, visit our website at us.iofc.org.

RRHA FOIA Requests

[redacted]

Thu 10/17/2019 5:24 PM

To: Allan-Charles Chipman [redacted]

2 attachments (1 MB)

2019 10 14 - Vacancy Report.pdf; RRHA Eviction Report.pdf;

Below are two FOIA requests that I've recently received from RRHA. These numbers prove that RRHA is intentionally trying to remove as many tenants as possible from Creighton and intentionally not moving tenants into Creighton. [redacted] and [redacted] staff have viewed these documents and are currently strategizing. Also, I believe the number of evictions in Creighton are higher than the stated 25 in the last 3 months because the head staff member at Creighton's Rent Office told me that they executed 15 evictions in one day on multiple days. Towards the end of this month, I'm going to request the amount of evictions for the month of October and I Am expecting that number to be at least 25 alone.

I also heard the podcast and I'm waiting on that #NavyChill part 2 to drop.

Good evening [redacted]

In response to your inquiry, please find attached:

- A "Move-In" report detailing each family that executed a new lease for a unit within the "Big Six" between June 1 and September 30, 2019. The name of each head of household has been redacted from this report. By my count, the new move-ins break down by community as follows:
  - **Fairfield (ffm007):** 23 new families.
  - **Gilpin (glm001, glm002, glm009):** 70 new families.
  - **Hillside (hlm004):** 21 new families.
  - **Mosby (mbm008, mbm009):** 33 new families.
  - **Whitcomb (whm006):** 22 new families.
  - **Creighton:** Zero new families.
- A vacancy report indicating the number of units which are vacant within each community of the Big Six as of today, October 14.

Please let me know if we can be of further assistance.

Best,

General Counsel

Interim Director of Procurement and Contract Administration
[redacted]

[redacted]

Thanks for your inquiry. Please find attached a move-out report which is generated automatically from RRHA's property management software. This report captures all move-outs from any RRHA public housing unit, organized by the concerned public housing community and the reason for move-out.

Highlighted is each entry for which the reason for move out was "nonpayment of rent." This category specifically refers to move-outs occurring at the last step of the lease enforcement/eviction process, at which time RRHA obtains physical possession of the residence pursuant to a judicial writ of eviction, which was issued subsequent to an active judgment for possession. I believe this procedure most closely reflects your request for the number of "evictions that RRHA has executed."

Not captured in this reports are events occurring at other points in the process, such as the time that RRHA issues a "pay-or-quit" notice, the time where RRHA files an unlawful detainer lawsuit in General District Court, or the time where a judgment for possession is issued by the court. It is only at the last step of this process when a tenant is legally obligated to vacate the premises, and, correspondingly, when RRHA is legally entitled to obtain physical possession of the unit.

Redacted from this report are the names of the concerned tenants.

For your convenience, following is a list of the internal property codes used in the report and the requested RRHA communities to which they refer. (Other codes used in the report refer to communities other than the Big Six.)

- **ctm005:** Creighton Court.
- **ffm007:** Fairfield Court.
- **glm001, glm002, and glm009:** These collectively refer to Gilpin Court.
- **hlm004:** Hillside Court.
- **mbm008 and mbm009:** These collectively refer to Mosby Court.
- **whm006:** Whitcomb court.

I hope this information suits your needs. Please feel free to reach back out if any additional information is needed.

Best,

Cory J. Wolfe

General Counsel

Richmond Redevelopment & Housing Authority

901 Chamberlayne Parkway

Richmond, VA 23220

Direct Line: (804) 780-4939

Email: cory.wolfe@rrha.com

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De Facto Demolition: The Hidden Deterioration of Public Housing

Julia Clayton Powell

DE FACTO DEMOLITION: THE HIDDEN DETERIORATION OF PUBLIC HOUSING

National perception of public housing is that of a failed system in disarray.[1] Fraught with problems such as gang warfare,[2] drug dealing and re-

1. JANE A. PETERSON, NATIONAL ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, LOCAL HOUSING AUTHORITIES IN THE 1990s 1 (1993). While early public housing enjoyed a positive image of helping low-income employed people move to a position of independence, this image began to change in the 1970s. *Id.* This change was due, in part, to a congressional mandate requiring public housing authorities (PHA) to give preference to the lowest-income tenants such as the elderly, disabled, and single-parent families, over the working poor. *Id.* at 4. The reduction in tenant income and, thus, the reduction in rents received, led to the physical deterioration of many of the projects. *Id.* Increasingly, reduced income was not adequately redressed by federal subsidies and a scarcity of funds led to a neglect of maintenance and modernization and to an escalation in crime and vacancy rates. *Id.*

In general, public housing provides homes to more non-white, impoverished and single-parent households than any other housing program. NATIONAL HOUSING LAW PROJECT, PUBLIC HOUSING IN PERIL: A REPORT ON THE DEMOLITION AND SALE OF PUBLIC HOUSING PROJECTS 15 (1990) [hereinafter PUBLIC HOUSING IN PERIL]. Increasingly, however, negative media coverage focusing on drug activity, rising crime, deteriorated conditions, and mismanagement has made it more difficult for public housing authorities to manage effectively or secure the requisite congressional funds. *Id.*; *see* Tom Puleo, *Plans Underway to Remake City's Housing Projects*, HARTFORD COURANT, Jan. 15, 1995, at B1, B4 (reporting that in the 1940s and 1950s, the Stowe Village and Bellevue Square housing projects were models of decent, affordable housing yet in recent years they have become notorious drug havens and deplorable places to live); *see infra* notes 9-12 and accompanying text (explaining how public housing conditions have deteriorated to the point that they often merit this perception).

However, many communities are trying to correct this negative image. *Cf. New Direction, LeMoyne Gardens Tests Public Housing Revamp*, THE COM. APPEAL (Memphis), Nov. 11, 1994, at 12A (EDITORIAL) (describing how the Memphis Housing Authority, after recently receiving a large Department of Housing and Urban Development grant, intended to integrate its public housing into the community and to reform its planning process with the hope that its actions will reverse the public's negative view of public housing); Kevin O'Neal, *Housing Grant Misses City's Goal: Scaling Down of Plans Expected*, THE INDIANAPOLIS NEWS, Jan. 20, 1995, at B1 (reporting on the Secretary of the Department of Housing and Urban Development, Henry Cisneros's desire to change the way public housing is perceived by giving Indianapolis a $30 million grant, 80% of which was to be spent according to the wishes of the city rather than according to HUD instructions); *Starting Over, Grant Sets New Course for Public Housing*, THE COM. APPEAL (Memphis), Jan. 21, 1995, at 10A (EDITORIAL) (anticipating that the forthcoming grant would allow for the creation of successful public housing similar to that of the 1940s and 1950s); *see also infra* note 13 (discussing Secretary Cisneros's plan to improve the Department of Housing and Urban Development's (HUD) efficiency and to allow the cities and local communities more control).

2. Puleo, *supra* note 1, at B4. Gangs, who have only recently infiltrated Hartford,

lated crime,[3] dilapidated buildings,[4] and high concentrations of poverty and unemployment,[5] the most visible and distressed public housing projects convey a negative image that Americans associate with all public housing.[6] Yet, in reality, the distressed projects represent only six to

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have found a haven in its public housing projects. *Id.* Specifically, they have commandeered the stairwells and hallways that allow gang members and drug dealers to conceal themselves, despite the fact that residents are too fearful to remove them. *Id.* Similar conditions exist in Chicago, where an eight-year old boy was ecstatic with the possibility of leaving the Robert Taylor project, "cause we can get away from all this violence." *Chicago Public Housing Family Moves to Own Home*, (Cable News Network, Dec. 24, 1994) (transcript # 1042-6).

3. Puleo, *supra* note 1, at B1, B4. One tenant in a Hartford housing project compared her apartment building to Grand Central Station due to the constant activity of drug dealers. *Id.* at B4. Another tenant described watching addicts injecting themselves in the hallways. *Id.* Similarly, in Washington, D.C., the drug dealers seem to run the Syphax Garden housing project, telling maintenance men to move to a different location so that they can continue their drug activities. Vernon Loeb, *D.C. Pleased with Rate of Renovations; Housing Agency Says It's Ahead of Schedule*, WASH. POST, Jan. 19, 1995, at D.C.1.

This type of interference with maintenance is one reason for the difficulties of keeping up with repairs and renovations. *Id.* For a discussion of specific problems, goals and options related to drugs and crime in public housing, see PUBLIC & ASSISTED HOUSING OCCUPANCY TASK FORCE, REPORT TO CONGRESS AND TO THE DEP'T OF HOUSING AND URBAN DEVELOPMENT 3-5 (Apr. 1994) [hereinafter TASK FORCE] (issuing recommendations on occupancy and management in public and assisted housing); *see also* HENRY CISNEROS, SECRETARY, HUD, ESSAY NO. 2, DEFENSIBLE SPACE: DETERRING CRIME AND BUILDING COMMUNITY, 24-26 (1995). One part of Secretary Cisneros's essay described the Community Partnership Against Crime (COMPAC) as HUD's latest effort to curtail violence by focusing on increased community and local police partnerships and tenant involvement. *Id.* Specifically, Secretary Cisneros discussed "defensible space," a concept that tries to lower crime by reconfiguring areas where incidents are most likely occur. *Id.* For an in-depth look at the Chicago Housing Authority's effort to combat rampant drug abuse and crime, *see generally* David E.B. Smith, Note, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505 (1993).

4. Maudlyne Ihejirika, *Wrecking Ball Claims 4 S. Side CHA Buildings*, CHI. SUN-TIMES, Jan. 23, 1995, at 6 (describing some of the dilapidated conditions of a recently demolished project such as rotting stairs that collapsed and rats that crawled into residents' beds). Similar conditions existed in some of Denver's projects. Hector Gutierrez, *'Brick City' Project Tumbles into Rubble*, ROCKY MTN. NEWS, Dec. 31, 1994, at 5A (reporting that sometimes as many as 1,000 residents live in the four-block project).

5. Camilo Jose Vergara, *The New American Ghetto*, ARCHITECTURAL REC., Nov. 1994, at 17 (describing the Chicago Housing Authority's projects as "places to load down poor people"). Even Secretary Cisneros, in his essay, called many of the country's housing projects "warehouses of the poor." CISNEROS, *supra* note 3, at 24. The remark reflects HUD's requirement that, to qualify for HUD-funded, rental-assisted housing, a person's income must be at or below 50% of the area's median level. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 1994 16 (1994) [hereinafter STATE OF THE NATION'S HOUSING]. For a compilation of regulations and statutory sections controlling tenant admission to public housing, see TASK FORCE, *supra* note 3, at 1-2 to 1-6.

6. Rachel G. Bratt, *Public Housing: The Controversy and Contribution in* CRITICAL PERSPECTIVES ON HOUSING 335, 354 (Rachel G. Bratt et al. eds., 1986). Bratt recognized that millions of Americans live in decent, safe, affordable public housing but that a nega-

seven percent of all public housing units.[7] In these developments, high vacancies and low maintenance have contributed to the increasing problem of "constructive" or "de facto demolition."[8]

A local public housing authority (PHA) permits a project to fall into a state of disrepair through several types of inaction that often render the development uninhabitable.[9] Such inaction includes failing to disburse

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tive stereotype exists. *Id.* She argued that many of the worst projects are in large urban areas and, therefore, are more visible to many more people; that many individuals and interest groups are against public ownership of housing and therefore emphasize the negatives; and that the excessive media coverage of those negatives rather than the successes have all contributed to this image. *Id.*; *see* Serge F. Kovaleski, *Funds to Fix Public Units Go Unspent; D.C. Housing Failed To Use $144 Million*, WASH. POST, Aug. 17, 1994, at A1. The article revealed that the District of Columbia's Public Housing Authority had been rated by HUD as one of the worst PHAs in the country with more than 10,000 families on the waiting list for public housing and about 20% of its 11,796 units vacant and in need of maintenance. *Id.* Such reports of a highly visible PHA in the nation's capital emphasize the negative image of public housing.

7. PETERSON, *supra* note 1, at 36 (explaining that the 6-7% of public housing developments are distressed and suffer from the most severe problems); *see* Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 523 (1993) (citing the 1992 National Commission on Severely Distressed Public Housing). This report found that 86,000 public housing units (6% of the total stock) was distressed and in need of rehabilitation, the cost of which would exceed 60% of their Total Development Costs (TDC). *Id.* TDC comprises the cost to plan, buy the land, and construct the public housing project. *Id.* For an explanation of the different types of federal funds designated for rehabilitation, see *infra* note 251; *see also* STATE OF THE NATION'S HOUSING, *supra* note 5, at 14-15 (stating that the most distressed public housing projects are located in the inner cities where the poorest Americans reside). In addition, the migration of the upper and middle classes to the suburbs, as well as economic flight from these areas, have left the poorest residents, often minorities, in aging and increasingly scarce public housing. *Id.*

8. Under 24 C.F.R. § 970.3 (1994), "demolition" is defined as "razing, in whole or in part, of one or more permanent buildings of a public housing project." Raze is defined as "to tear down, as an old building." THE RANDOM HOUSE DICTIONARY 729 (1980). "Disposition," often paired with demolition, is defined as "the conveyance or other transfer by the PHA, by sale or other transaction, of any interest in the real estate of a public housing project." 24 C.F.R. § 970.3 (1994). "De facto demolition" is not specifically defined in any of HUD's regulations or in the Housing and Community Development Act of 1937, ch. 896 § 2(2), 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437p (1988 & Supp. IV 1992)). Yet, the general interpretation of de facto demolition has been best characterized as "repeated patterns of neglect, physical deterioration, tenant complaints, difficulties keeping the project fully occupied, deliberate decisions not to rent vacant units, and judgments to consolidate the remaining tenants into some portions of the project while leaving the rest of the units vacant and boarded up." PUBLIC HOUSING IN PERIL, *supra* note 1, at 96-97.

9. PUBLIC HOUSING IN PERIL, *supra* note 1, at 97 (citing the neglect of a PHA to remedy ongoing maintenance problems and a failure to fill vacant units as creating an uninhabitable housing project); *see* Edwards v. District of Columbia, 821 F.2d 651, 666 (D.C. Cir. 1987) (Will, J., dissenting) (arguing that by neglecting and abandoning a project, a PHA is rendering that project uninhabitable to the same degree that actual demolition would); *see also* THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING (1982) [hereinafter COMMISSION REPORT]. President Reagan's Executive Order 12,310 on June

funds that have been allocated for reducing vacancy,[10] neglecting to request funds for a particular housing project while requesting those funds for other projects,[11] or simply refusing to conduct inspections and to respond to patent problems.[12] Thus, de facto demolition ultimately enables the PHA to apply to the Department of Housing and Urban Develop-

16, 1981 established the Commission to review and analyze federal housing policies, homeownership, costs, and housing and mortgage finance programs, as well as to recommend and advise the President on the development of, and the federal government's role in, future national housing policy. *Id.* at xv. One of the specific issues examined by the Commission was the quality of housing. *Id.* at 6. In its report, the Commission laid out factors that the Congressional Budget Office (CBO) used to determine whether a housing unit is inadequate. *Id.* at 7. Some of these factors include: absence of complete plumbing, kitchen, or sewer facilities; breakdowns in sewer, heating, or water systems for six hours or more during the prior 90 days; leaking roofs; exposed wiring; holes in the interior floors, walls, or ceilings; or missing or loose steps or handrails. *Id.* at 7.

10. Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 815 (N.D. Ill. 1993). In *Horner*, the residents and applicants of the three Henry Horner projects filed a class action suit alleging de facto demolition and a violation of § 1437p by the Chicago Housing Authority (CHA) through actions that had rendered the project uninhabitable. *Id.* at 809-10. One of the plaintiffs' factors in alleging de facto demolition was the rise in vacancy rates: in 1981 the rate was 2.3% or 40 units; in 1991 it had climbed to 49.3% or 868 vacant units. *Id.* at 810. According to HUD regulations, a vacancy rate at or above three percent is considered "deficient." 24 C.F.R. §§ 901.05(k), 901.10(b)(1)(vii) (1994).

To monitor a PHA's performance concerning vacancies, a PHA is required to submit a Comprehensive Occupancy Plan (COP) to the regional HUD administrator explaining how the PHA intends to bring the unoccupied units back "on line." *Horner*, 824 F. Supp. at 810. Despite the Horner project's having the highest vacancy rate of all of the CHA projects, in the CHA's 1990-92 COPs, Horner was slated for very minimal reductions. *Id.* Even when Horner was included in the vacancy-reduction plan—349 units were to be brought on line in 1991—only 33 of these units were successfully repaired. *Id.* at 811. This inaction on the part of the CHA was coupled with the regional administrator's finding that the Authority had not spent any of the $4,000,000 allocated to the Horner project to reduce vacancies. *Id.* at 815. *See infra* notes 92-98 and accompanying text for a further discussion of the *Horner* case.

11. *Horner*, 824 F. Supp. at 813. In comparison with the Horner projects, which had a 71% vacancy rate, funds were requested for the Cabrini Extension project, which had a 33% vacancy rate; Green Homes, which had a 51% vacancy rate; and LeClaire Extension, which had a 3% vacancy rate. *Id.*; *see also* Schill, *supra* note 7, at 501 (citing a recent study by the National Commission on Severely Distressed Public Housing estimating a cost of between $14.5 billion and $29.2 billion to modernize public housing). The lower figure represented simply bringing the units back to usable condition while the higher figure represented the cost of ensuring future viability, modernizing the units and ridding the projects of lead paint. *Id.* at 502.

12. *See* Velez v. Cisneros, 850 F. Supp. 1257, 1261-63 (E.D. Pa. 1994). In this case, the plaintiffs claimed that the Chester Housing Authority engaged in de facto demolition by neglecting to reduce vacancies, respond to tenants' requests for repair, keep units in a habitable condition, and effectively instruct maintenance workers. *Id.* at 1260. The court recognized a range of problems in the project including drug dealing, vandalized units, hazardous and exposed wiring, broken windows, deteriorated floors, and an enormous amount of trash in the stairways that residents had to climb over. *Id.* at 1262; *see infra* notes 100-05 and accompanying text (discussing *Velez* in further detail).

ment (HUD)[13] for approval to demolish or dispose of the project.[14] The PHA justifies its request on grounds that the project has become obsolete, is no longer suitable for housing purposes, and no reasonable

13. In 1965, the Department of Housing and Urban Development Act created the Department of Housing and Urban Development (HUD), Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965), which combined housing and redevelopment into one cabinet-level agency. Fenna Pit & Willem Van Vliet, *Public Housing in the United States*, in HANDBOOK OF HOUSING AND THE BUILT ENVIRONMENT IN THE UNITED STATES 199, 208 (Elizabeth Huttman & Willem Van Vliet eds., 1988). Setting an ambitious agenda for the new agency, the Act charged HUD with the "sound development of the Nation's communities"; assisting the President in coordinating federal activities affecting urban and suburban communities; seeking solutions to housing, mass transit, and urban development problems; encouraging private homebuilding and mortgage lending; and providing for the needs of the Nation's people and communities. Department of Housing and Urban Development Act § 2, 79 Stat. at 667.

HUD has devised several programs over the years to deal with many of these issues. Michael A. Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545, 545 (1991). Yet, quoting one commentator, Wolf called the plethora of programs a "bewildering variety of housing-related programs." *Id.* HUD recently has become a symbol of big, inefficient government that does not work. Guy Gugliotta, *Saving HUD: One Department's Risky Strategy for Radical Change*, WASH. POST, Feb. 6, 1995, at A4. For an in-depth look at recent housing scandals, see Wolf, *supra*.

Nonetheless, HUD is trying to change its image as well as fight for its own survival. Gugliotta, *supra*, at A4. In January of 1995, Secretary Cisneros proposed a drastic overhaul of the agency. *Capitol Hill Hearing Testimony Before the Subcomm. on VA, HUD and Independent Agencies of the House Comm. on Appropriations*, 104th Cong., 1st Sess. (1995) (statement of Henry Cisneros, Secretary, HUD). Secretary Cisneros laid out four overall objectives: develop flexibility at the state, local and community levels; give low and moderate income families as many choices as possible; change the financing policies; and fulfill HUD's mission at a lower cost. *Id.* Much of this change involves consolidating programs, abdicating large portions of the housing assistance programs to local and state governments, forcing PHAs to be competitive by giving residents vouchers, and a host of other initiatives. *Id.* Secretary Cisneros hoped that the end result would be deregulation of the public housing process, dissolution of those PHAs which are not effective, and placement of public housing funds into a block grant system for which all housing providers would compete. Gugliotta, *supra*, at A4.

14. PUBLIC HOUSING IN PERIL, *supra* note 1, at 66. A PHA applies to HUD for permission to demolish a project when:

> The project or portion of the project is obsolete as to physical condition, location or other factors, making it unusable for housing purposes, and no reasonable program of modifications is feasible to return the project or portion of the project to useful life; or in the case of an application proposing the demolition of only a portion of a project, the demolition will help to assure the useful life of the remaining portion of the project.

42 U.S.C. § 1437p(a)(1) (1988 & Supp. IV 1992). The PHA's action or inaction that creates the de facto demolition allows the housing project to qualify under this statute. PUBLIC HOUSING IN PERIL, *supra* note 1, at 96-97. Due to its neglect, inattention, mismanagement, and abandonment of units, the PHA will have forced the project to become unusable and impossible to rehabilitate. *Id.*

program of expenditures can return the project to a viable development.[15]

In the Housing and Community Development Act of 1987,[16] Congress amended § 18 of the United States Housing Act of 1937[17] to include § 18(d), codified at 42 U.S.C. § 1437p(d),[18] which prohibits a PHA from taking "any action" to demolish a public housing project unless it has complied with the statutory requirements[19] and obtained HUD approval.[20] Since 1987, a majority of

15. 42 U.S.C. § 1437p(a)(1). Yet, tenants allege that if a PHA reaches the point where the only avenue left is demolition and it has not complied with the statutory requirements intended to protect residents and preserve housing units, then the PHA has violated § 1437p. *Horner*, 824 F. Supp. at 817. Specifically, the plaintiffs in *Horner* argued that the PHA avoided the statutory criteria of § 1437p(a),(b) and (d). *Id.* For the language of § 1437p(b), see *infra* note 20. For the language of § 1437p(d), see *infra* note 18. These statutes were designed to be followed by the PHAs *before* any demolition occurred but by engaging in de facto demolition, a housing authority could circumvent these requirements. PUBLIC HOUSING IN PERIL, *supra* note 1, at 96-97.

Applying this concept, the plaintiff-tenants who oppose de facto demolition have brought suit under § 1437p. *Horner*, 824 F. Supp. at 817; *see* Edwards v. District of Columbia, 821 F.2d 651, 653 (D.C. Cir. 1987) (explaining that the plaintiffs brought suit under § 1437p, alleging that by engaging in de facto demolition of the housing project, the PHA had not complied with any of the statutory requirements which seek to involve tenants in the demolition and relocation process, preserve units and have HUD make the decision as to whether demolition is appropriate). In *Velez v. Cisneros*, the plaintiffs similarly argued that the PHA caused de facto demolition and did not adhere to any of the statutory requirements. *Velez*, 850 F. Supp. at 1260.

Once a PHA has decided to demolish a housing project, it becomes difficult to reverse this process. Marvin Krislov, Note, *Ensuring Tenant Consultation Before Public Housing Is Demolished or Sold*, 97 YALE L.J. 1745, 1747 (1988). As conditions deteriorate, units become vacant and as vacancies increase, HUD decreases subsidies to a PHA. *Id.* at 1754 n.64 (citing the agency regulation). Critics of this policy claim that reduced subsidies force PHAs to neglect maintenance. *Id.* This in turn leads to further deterioration enabling the PHAs to claim that the only viable option is demolition. *Id.*

An example of this trend was the Houston Housing Authority, which received $10 million to modernize the Allen Parkway Village public housing project but failed to spend more than $50,000 of the grant. *Id.* at 1755-56. Critics alleged that developers and city officials wanted to use the land to construct luxurious condominiums. *Id.* From 1977 until 1988, the Housing Authority officials failed to perform routine maintenance and to rent vacant units in order to justify demolition approval by HUD. *Id.*

16. 42 U.S.C. § 1437p (1988 & Supp. IV 1992).

17. United States Housing Act of 1937, ch. 896 § 2(2), 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437p (1988 & Supp. IV 1992)).

18. 42 U.S.C. § 1437p(d) (1988 & Supp. IV 1992). § 1437p(d) states that "[a] public housing agency shall not take any action to demolish or dispose of a public housing project or a portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in subsections (a) and (b) of this section." *Id.*

19. 42 U.S.C. § 1437p(a), (b); *see supra* note 14 (quoting § 1437p(a)); *see infra* note 20 (quoting § 1437p(b)).

20. 42 U.S.C. § 1437p(b). § 1437p(b) provides that:

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> The Secretary may not approve an application or furnish assistance under this section or under this chapter unless-
>
> (b)(1) the application from the public housing agency has been developed in consultation with tenants and tenant councils . . .
>
> (b)(2) all tenants to be displaced as a result of the demolition or disposition will be given assistance by the public housing agency and are relocated to other decent, safe, sanitary, and affordable housing, which is, to the maximum extent practicable, housing of their choice, including housing assisted under section 1437f of this title; and
>
> (b)(3) the public housing agency has developed a plan for the provision of an additional decent, safe, sanitary, and affordable dwelling unit for each public housing dwelling unit to be demolished or disposed under such application[.]

42 U.S.C. § 1437p. However, despite these recent statutory mandates, some people continue to find fault in the system. *See e.g.*, PUBLIC HOUSING IN PERIL, *supra* note 1, at 69-84 (criticizing many aspects of HUD's demolition decision-making process). The report faulted HUD for entering the decision-making process only after a project had already deteriorated and criticized the agency for rarely rejecting a demolition application. *Id.* at 72-73; *cf.* Letter from Joseph Shuldiner, Assistant Secretary of HUD, to Vincent Lane, Chairman, The Chicago Housing Authority, (Sept. 9, 1994) (on file with CATHOLIC UNIVERSITY LAW REVIEW) (rejecting the Chicago Housing Authority's demolition application because the PHA had not submitted a satisfactory plan for demolition and because the project was close to full occupancy) [hereinafter Rejection Letter].

When a PHA submits a demolition application to HUD, it is usually because adequate resources, maintenance, and security have not been allocated to the project. PUBLIC HOUSING IN PERIL, *supra* note 1, at 73. In fact, "[d]emolition approval is rarely sought for a fully occupied, decently maintained project. . . ." *Id.* Rather, PHAs often apply for demolition only after the housing project has become so dilapidated that the PHA is unable to envision any viable alternative. *Id.* Deciding on demolition, the PHA then decides to effectively abandon the project by ceasing repairs and renovations and vacating units. *Id.*; *see supra* note 8 (describing de facto demolition). Due to the PHA's inaction and failure to meet any of the statutory maintenance requirements, the project falls into a state of deterioration. *E.g.*, Tinsley v. Kemp, 750 F. Supp. 1001, 1007 (W.D. Mo. 1990). In *Tinsley*, the plaintiffs alleged that the Housing Authority of Kansas City had allowed the housing project to deteriorate to such a degree that demolition was the only viable option. *Id.* For further discussion of *Tinsley*, see *infra* notes 79-84 and accompanying text. *See also* Ihejirika, *Wrecking Ball Claims 4 S. Side CHA Buildings*, *supra* note 4, at 6 (reporting residents' comments that the Chicago Housing Authority had stopped repairing the building long before the tenants had moved out and that it was no longer prudent to invest in rehabilitation).

In general, compliance by PHAs with the requirements of § 1437p(b) has varied. PUBLIC HOUSING IN PERIL, *supra* note 1, at 69. Procedurally, PHAs have generally complied with the tenant participation requirement under § 1437p(b)(1). *Id.* at 83-84. Yet this consultation is often superficial: the PHA calls meetings on short notice; it ignores opposition; it does not explain alternatives; or the plan which the tenants have approved is changed. *Id.* Consequently, one commentator has argued that "meaningful consultation must occur *before* HUD approves the demolition or sale of public housing." Krislov, *supra* note 15, at 1747 (emphasis added). However, tenants can take control and voice their opinions in the consultation process. Flynn McRoberts, *CHA Near Resident Accord on Lakefront Buildings*, CHI. TRIB., Nov. 22, 1994, § 2 at 7 (describing negotiations between the Chicago Housing Authority and public housing residents over a nine-month period to ensure that the residents' rights were not violated). Residents of the lakefront public housing projects in Chicago agreed to vacate their projects on the understanding that once the projects were

courts[21] have held that de facto demolition constitutes "any action," and therefore violates the statute.[22] Nevertheless, while lower federal courts have recognized a tenant's right to sue under § 18, a consensus has yet to

rehabilitated they would return. *Id.* To ensure this promise, the residents signed a legally binding agreement with the CHA. *Id.*; *see also For True Housing Integration*, ST. LOUIS POST-DISPATCH, Nov. 29, 1994, at 10C (EDITORIAL) (demonstrating that other resident groups have shown the same negotiating power). For a further discussion on resident initiatives and leadership, see *infra* note 292.

Section 1437p(b)(2) requires that the PHA relocate the displaced residents to other safe, decent, and affordable housing. 42 U.S.C. § 1437p(b)(2). While the PHA usually does not have difficulty fulfilling this requirement, these displaced residents are relocated to units for which other applicants have been waiting. PUBLIC HOUSING IN PERIL, *supra* note 1, at 82. Additionally, HUD assumes that when vouchers are given for § 8 housing in place of relocation units, this housing meets the safe, affordable and decent requirement. *Id.* at 83. In reality, HUD neither checks the conditions of the units, nor ensures that tenants will locate housing with which to use their vouchers. PUBLIC HOUSING IN PERIL, *supra* note 1, at 83.

PHAs have had the most difficulty following the one-for-one replacement requirement codified at § 1437p(b)(3). *Cf.* Schill, *supra* note 7, at 542-43 (advocating that more leeway should be given to provide tenants with § 8 vouchers as part of the replacement requirement, as only a portion of replacement housing is available under the voucher system). PHAs have often avoided or violated the replacement rule, PUBLIC HOUSING IN PERIL, *supra* note 1, at 79, and view the rule as extremely burdensome because of the high costs and low fund allocation. Letter from Edward L. Stacy, Assistant Executive Director, Housing Authorities: City and County of Fresno, CA, to Joseph Shuldiner, Assistant Secretary, HUD 1-2 (Apr. 13, 1994) (on file with CATHOLIC UNIVERSITY LAW REVIEW.) [hereinafter Stacy Letter]. Accordingly, in reviewing initiatives to restructure HUD, President Clinton has indicated that the one-for-one replacement rule will be abolished. Maudlyne Ihejirika, *CHA Races GOP Ax on Replacement Rule*, CHI. SUN-TIMES, Dec. 23, 1994, at 15.

21. *See, e.g.*, Velez v. Cisneros, 850 F. Supp. 1257, 1271 (E.D. Pa. 1994) (reasoning that demolition due to the destruction of exterior walls or interior dilapidation are interchangeable); Gomez v. Housing Auth., 805 F. Supp. 1363, 1374-75 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (recognizing a cause of action for de facto demolition but declining to hold for the plaintiffs because the defendants' actions were at best negligent); Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511, 515 (N.D. Ill. 1991), *summ. judgment denied*, 824 F. Supp. 808 (N.D. Ill. 1993) (ruling that § 1437p(d) creates a cause of action for activities that result in de facto demolition); *Tinsley*, 750 F. Supp. at 1007 (allowing a cause of action for de facto demolition by finding that restricting the statute to only active demolition would undermine the congressional intent of providing tenants with the right to bring suit for physical deterioration); Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (holding that the requirements of the statute should encompass both active and de facto demolition).

22. *See Concerned Tenants*, 685 F. Supp. at 321 (allowing a cause of action for de facto demolition). *But see* Dessin v. Housing Auth., 783 F. Supp. 587, 590 (M.D. Fla. 1990), *rev'd in part and vacated in part*, 948 F.2d 730 (11th Cir. 1991) (per curiam) (mem.). The court in *Dessin* held that if Congress had intended to allow a cause of action for de facto demolition, it would have stated so in the plain language of the statute. *Id.* While *Dessin* is no longer good law, it is interesting to study the court's reasoning which accepted HUD's view and did not recognize de facto demolition as a cause of action. *Id.* at 589-90. For a discussion of *Dessin*, see *infra* notes 86-90 and accompanying text.

emerge about the requisite elements of a de facto demolition cause of action.[23]

In November of 1993, HUD proposed a final rule[24] to implement § 1437p(d)[25] that interpreted the statute to include an intent element.[26] Therefore, to satisfy the intent requirement, a tenant would have to establish that the PHA *intended* to demolish the project by its failure to maintain the units.[27] The intent requirement placed a heavy burden upon plaintiff-resident groups, increasing the difficulty of bringing a successful suit.[28] In response to opposition from tenant groups,[29] HUD withdrew

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23. *Compare Horner*, 824 F. Supp. at 817 (stating that the court was unwilling to define its requirements for proving de facto demolition) *with Gomez*, 805 F. Supp. at 1375 (indicating that plaintiffs would have "to produce evidence questioning" the PHA's need to demolish the units or the PHA's compliance with statutory mandates).

24. Public and Indian Housing Program—Demolition or Disposition of Public and Indian Housing Projects—Required and Permitted PHA/IHA Actions Prior to Approval, 58 Fed. Reg. 58,784 (1993) (withdrawn) [hereinafter Final Demolition Rule].

25. 42 U.S.C. § 1437p(d) (1988 & Supp. IV 1992).

26. Final Demolition Rule, *supra* note 24, at 58,785. Following the enactment of § 1437p(d), HUD promulgated an interim rule to implement the changes made in the Housing and Community Development Act of 1987. 53 Fed. Reg. 30,984 (1988) (Interim Rule to be codified at 24 C.F.R. § 970). Following the statute, the interim rule explained that "a PHA may not take any action to demolish or dispose of a public housing project without obtaining HUD approval." *Id.* at 30,986.

During the interval between the interim rule and the proposed final rule, the court in *Gomez v. Cisneros*, found that the plaintiffs had to show that the defendant PHA had a policy of neglect allowing for de facto demolition, even though this intent requirement was not specifically stated in the statute or the interim rule. 805 F. Supp. at 1375. When HUD proposed its final rule on November 4, 1993, it also included an intent provision. Final Demolition Rule, *supra* note 24, at 58,784-85.

The proposed final rule explained HUD's position by stating "[i]n response to *Edwards*, Congress enacted section 18(d), to prevent PHAs/IHAs from intentionally evading the statutory application and approval requirements of the demolition statute. HUD's interpretation of section 18(d) thus contains an intent provision." *Id.* For a more detailed discussion of HUD's reasons, see *infra* notes 176-200 and accompanying text. Thus, the intent provision now required a plaintiff not only to prove de facto demolition but also to prove that the PHA intended this demolition to occur through whatever actions or inactions it was taking. *Gomez*, 805 F. Supp. at 1375.

27. Final Demolition Rule, *supra* note 24, at 58,784 (emphasis added).

28. Telephone Interview with Director of Housing Litigation at the Legal Assistance Foundation of Chicago (Sept. 28, 1994)(discussing HUD's withdrawn intent provision and the burdens this would have placed on tenant groups) [hereinafter Legal Assistance Foundation Interview].

29. Public and Indian Housing Program—Demolition or Disposition of Public and Indian Housing Projects—Required and Permitted PHA/IHA Action Prior To Approval; Withdrawal of Final Rule, 59 Fed. Reg. 14,369 (1994) [hereinafter Notice of Withdrawal]. HUD explained that the withdrawal of the rule was due to "serious concerns" expressed by tenant groups regarding the severe impact that the requirement might place upon them. *Id.*; *see also* Plaintiffs' Trial Memorandum at 19, Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (No. 90-6449) [hereinafter Brief for Plaintiff] (stating that "[r]equiring intent would destroy the essence of de facto demolition"). While HUD's Final Rule was not at

the rule in March of 1994.[30] Yet, despite HUD's withdrawal of the rule, implementation of the statute remains an unsettled issue.[31]

Tenant groups and HUD offer different interpretations of the intent requirement under the statute.[32] While tenant groups support a defini-

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issue in *Velez*, HUD contended that, in proving a cause of action for de facto demolition under § 1437p, the plaintiffs would have to show that the PHA, whether through passive neglect of maintenance or an active policy of vacating the units without rehabilitation, intended to cause demolition. *Id.* Conversely, the plaintiffs in *Velez* argued that the intent provision was contrary to the legislative history of § 1437p(d) which Congress passed to prevent demolition unless the statutory criteria had been met. *Id.* To further support their position, the plaintiffs also asserted that Congress intended to prohibit any demolition, irrespective of intent. *Id.* Forcing tenants to prove intent would permit PHAs to engage in de facto demolition simply by alleging that the destruction of the project was not their intent. *Id.*

30. Notice of Withdrawal, *supra* note 29. The Notice of Withdrawal stated that the final rule, "which establishes an 'intent' standard to the August 17, 1988 interim rule currently in effect, was to become effective on December 6, 1993." *Id.* at 14,369. Yet, the notice stated that:

> Because serious concerns had been expressed about the impact of some of the provisions of the final rule on residents and resident organizations . . . in the spirit of cooperation, the Department further delayed the effective date . . . [and] now believes that the Department can better serve all parties concerned with this rule by receiving public comments before issuing this rule for effect.

Id. For an elaboration of the issue of public comments, see *infra* notes 221-25 and accompanying text.

31. Telephone Interview with Assistant General Counsel, HUD, (November, 1994) [hereinafter Assistant General Counsel Interview] (stating that, as of November, 1994, HUD had not proposed another final rule, thus leaving the 1988 interim rule still in effect). Not only did the final rule require proof of intent, but it also specified that de facto demolition did not constitute actual demolition and, therefore, did not fall under the statute's prohibition. Final Demolition Rule, *supra* note 24, at 58,784 n.3. Therefore, HUD's withdrawal of the final rule left unanswered the issues of whether de facto demolition is included under demolition as a cause of action and whether plaintiffs must prove intent.

An illustration of the unsettled nature of this issue occurred in Washington, D.C. when Judge Steffen Graae ordered the city to surrender its public housing authority to a receiver. *See* Serge F. Kovaleski, *Court Delays Takeover of D.C. Public Housing; City Will Retain Authority Until Its Appeal Is Heard*, WASH. POST, Nov. 4, 1994, at B1. Opposing this order, the District of Columbia argued that its failure to rehabilitate units was not constructive demolition and a federal violation, as Judge Graae had found. *Id.* at B4. In disputing this order, the District argued that only intentional demolition, not neglect, is controlled by the statute. *Id. But see Velez*, 850 F. Supp. at 1271, 1273 n.7 (illustrating that, in the most recent case regarding de facto demolition, the U.S. District Court for the Eastern District of Pennsylvania found that de facto demolition was included in the statutory definition of demolition and that the plaintiffs need not show intent).

32. In two of the three recent cases where the court has considered the issue of intent, plaintiff/tenants have argued against an interpretation requiring intent. *See* Brief for Plaintiff, *supra* note 29, at 19 (maintaining that plaintiffs did not have to prove intent); Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 818-19 (N.D. Ill. 1993) (rejecting the necessity of proving intent). *But see*, Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (noting that the plaintiffs did not argue against an intent provision but nor did they provide any evidence of intent). Plain-

tion of demolition that includes de facto demolition, they oppose vehemently the inclusion of an intent provision.[33] Prior to judicial recognition of de facto demolition as a cause of action, tenant groups unsuccessfully sued PHAs for mismanagement and deteriorated conditions of public housing units.[34] Conversely, these groups have prevailed when challenging housing authorities for violations resulting in de facto demolition under § 1437p(d).[35]

Unlike tenant groups, HUD interprets "demolition" to mean razing[36] and excludes from this definition mere failure to maintain public housing

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tiffs' failure to address the intent issue in *Gomez* may be explained by the fact that prior to *Gomez*, intent had not become an issue and no court had found that this was a necessary element. *Contra* Final Demolition Rule, *supra* note 24, at 58,785 (revising the regulations to require proof of intent).

33. National Housing Law Project, The "De Facto" Demolition Regulation, Oakland, CA 3 (1993) (unpublished position paper, on file with CATHOLIC UNIVERSITY LAW REVIEW) [hereinafter NHLP Paper]. The National Housing Law Project (NHLP) is one of the tenant groups that lobbied HUD to withdraw the rule. Telephone Interview with Housing Management Specialist, HUD (Sept. 1994) (discussing the withdrawal of the rule) [hereinafter Housing Specialist Interview]. The NHLP position paper attacked HUD's intent requirement by analyzing previous case law, the legislative history of § 1437p(d), and HUD's procedural process for proposing the rule. NHLP Paper, *supra*, at 2-5. For a discussion of the NHLP's arguments, see *infra* notes 202-25 and accompanying text. *See also* Notice of Withdrawal, *supra* note 29, at 14,369 (indicating that HUD withdrew the final rule in response to serious opposition concerning the provision's negative impact on tenants).

34. NHLP Paper, *supra* note 33, at 4; *see also infra* notes 169-70 and accompanying text (discussing plaintiffs' lack of success generally in bringing a cause of action for deteriorated conditions under the Annual Contributions Contract (ACC)). For a discussion of the role of the ACC in public housing, see *infra* notes 50-56 and accompanying text.

35. NHLP Paper, *supra* note 33, at 4. *But see* Edwards v. District of Columbia, 821 F.2d 651, 659-60 (D.C. Cir. 1987) (stating that "neither the language nor the legislative history of § 1437p creates rights in public housing tenants against the constructive demolition of their units"). In *Edwards*, the plaintiffs alleged that the PHA had "embarked upon a program to demolish public housing" with no regard for the statutory requirements. *Id.* at 653. The court rejected the plaintiffs' complaint under § 1437p, holding that neither the legislative history nor the statute created a cause of action for de facto demolition. *Id.* at 659.

Following the *Edwards* decision, courts have ruled for plaintiffs by reasoning that § 1437p(d), enacted "to correct the [*Edwards* court's] erroneous interpretation of the existing statute," created a cause of action for de facto demolition. *See supra* note 21 (detailing recent court rulings in favor of including de facto demolition in a cause of action); *see also* Maudlyne Ihejirika, *Lane Takes Aim Again at Horner Homes Annex*, CHI. SUN-TIMES, Sept. 22, 1994, at 22 (highlighting the impact of § 1437p on the Chicago Housing Authority's (CHA) efforts to negotiate a settlement with Horner residents who accused the CHA of de facto demolition). A failed settlement resulting in trial would be a continuation of the 1993 case in which the court approved de facto demolition as a cause of action but stated that the uncertainties of the case warranted a trial. Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817-18 (N.D. Ill. 1993).

36. 24 C.F.R. § 970.3 (1994). In *Velez*, the court, quoting Webster's Dictionary, stated

through inaction, neglect, or negligence.[37] Additionally, under the withdrawn rule, HUD interpreted the statute to require proof that the PHA's actions, the alleged de facto demolition, was the result of an intent to demolish.[38] HUD articulated this position before the United States District Court for the Eastern District of Pennsylvania in 1994.[39] Arguing that the plain statutory language required proof of intent, HUD maintained that plaintiffs had to establish a nexus between the actions taken and the razing or demolition of the building.[40]

Similarly, federal courts have split on the issue of intent.[41] In 1992, the United States District Court for the Western District of Texas held in *Gomez v. Housing Authority*, that plaintiffs must show a plan or scheme by a PHA that allowed units to remain vacant or in such disrepair that they were de facto demolished.[42] If courts followed this decision, plain-

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that razing means, " 'to tear down completely; level to the ground.' " Velez v. Cisneros, 850 F. Supp. 1257, 1271 (E.D. Pa. 1994).

37. Federal Defendants' Motion For Judgment Pursuant To Rule 52 And Post-Trial Memorandum, at 24, Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (No. 90-6449) [hereinafter Brief for Defendant, HUD]. HUD supported this argument by stating that Congress was aware of HUD's definition interpreting demolition to mean razing when it enacted § 18(d) of the Housing Act of 1937 (§ 1437p(d)). *Id.* Therefore, Congress could have explicitly stated that actions or inactions resulting in de facto demolition were to be included in this definition. *Id.* at 24-25. Since Congress did not address this issue, HUD argued that Congress "implicitly ratified" HUD's definition. *Id.* at 25. HUD clearly stated this position in its final rule. Final Demolition Rule, *supra* note 24, at 58,784 n.3.

38. Final Demolition Rule, *supra* note 24, at 58,785; *see infra* notes 182-200 and accompanying text (explaining HUD's interpretation in more detail).

39. Brief for Defendant, HUD, *supra* note 37, at 20.

40. *Id.* HUD contended that the statute's language, which provides that a PHA "shall not take any action to demolish or dispose of," meant that there is a link between the words "action" and "demolish." *Id.* (discussing 42 U.S.C. § 1437p(d) (1988)). Therefore, any action taken by a PHA must be taken with the intent to demolish. *Id.* For a detailed look at this portion of HUD's argument, see *infra* notes 176-81 and accompanying text.

41. Three federal district courts have considered the issue of whether intent is a necessary element for a cause of action under § 1437p(d). *See* Velez v. Cisneros, 850 F. Supp. 1257, 1273 n.7 (E.D. Pa. 1994) (ruling that plaintiffs need not show intent); Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 818-19 (N.D. Ill. 1993) (holding that a showing of de facto demolition does not require proof of intent); Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992) *aff'd without op. sub nom.* Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (holding that plaintiffs must show evidence of a plan by the PHA to demolish).

42. *Gomez*, 805 F. Supp. at 1375 (holding that the plaintiffs had to show that the housing authority had a policy of allowing the units to deteriorate). In *Gomez*, the plaintiffs brought an action against the Housing Authority for the City of El Paso alleging that the Housing Authority's failure to maintain and effectively manage the units resulted in uninhabitable vacant units which were effectively demolished. *Id.* at 1367. Since the Housing Authority failed meet any of the statutory requirements set out in § 1437p before the alleged de facto demolition occurred, the plaintiffs brought suit under the statute. *Id.* While the *Gomez* court recognized an action for de facto demolition, it held that plaintiffs had failed to show that the PHA had a policy or plan of allowing its units to become vacant in

tiffs would have to prove that by action or omission, the PHA *intended* to demolish the units.[43] In contrast, in 1994, the United States District Court for the Eastern District of Pennsylvania held in *Velez v. Cisneros* that plaintiffs are not required to show that the housing authority intended de facto demolition by its actions.[44]

This Comment argues that an intent requirement is unfairly prejudicial against tenant suits under § 1437p(d). Further, this Comment asserts that an intent requirement impedes the statute's goal of prohibiting the de facto demolition of public housing by neglect. First, this Comment examines the case law, statutory law, and legislative history supporting de facto demolition as a cause of action for tenants against a PHA. Next, this Comment reviews and critiques HUD's rationale for proposing intent as an element in bringing suit under § 1437p(d). This Comment then ad-

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order to demolish them. *Id.* at 1375. The court, therefore, followed HUD's definition of demolition and read an intent requirement into the statute. *Id.* For a detailed discussion of *Gomez*, see *infra* notes 111-18 and accompanying text.

43. *Gomez*, 805 F. Supp. at 1375 (emphasis added); *cf. Horner*, 824 F. Supp. at 818 n.8 (disagreeing with the *Gomez* court's requirement of proving that the PHA's policy, which to the *Horner* court was the equivalent of intent, caused the demolition). The *Horner* court stated that "it [did] not agree with *Gomez* in this regard." *Id.* Similarly, but without citing the *Gomez* case, the court in *Velez v. Cisneros* also refused to interpret the statute as requiring intent. *Velez*, 850 F. Supp. at 1273 n.3.

Yet while the *Gomez* court and HUD have interpreted § 1437p(d) to require intent, neither has specified how a plaintiff might prove intent. *See* Final Demolition Rule, *supra* note 24, at 58,784-85 (stating that the statute includes an intent requirement, yet omitting any factors that a plaintiff would have to allege in order to *prove* intent). In *Gomez*, the court held that the plaintiffs did not offer evidence showing that PHA action or inaction had demolished the units, evidence "questioning the need to demolish [the] units," or evidence challenging the PHA's fulfillment of the statutory requirements. *Gomez*, 805 F. Supp. at 1375.

These types of issues may have caused HUD to deny the Chicago Housing Authority's (CHA) request for demolition of 109 units at the Henry Horner Annex. *See* Rejection Letter, *supra* note 20. For example, in declining to approve the CHA's demolition request, Assistant Secretary Shuldiner questioned the CHA's plan to demolish a building that was close to full occupancy when there were other high-rises with many more vacancies. *Id.*; *see also* Maudlyne Ihejirika, *Horner Resident Fights for Home*, CHI. SUN-TIMES, Aug. 14, 1994, at 1 (supporting HUD's questioning of the CHA by noting that, coincidentally, the Horner Annex is adjacent to the stadium that will host the 1996 Democratic National Convention). Tenants also asserted that stadium owners and the city want to demolish the housing project prior to the Convention. *Id.* The CHA and Mayor Daley have denied these allegations. *Id.*

Yet, the CHA is now involved in litigation brought by residents of the Henry Horner Annex who have alleged de facto demolition and Assistant Secretary Shuldiner emphasized the litigation in his denial letter to the CHA. *See* Rejection Letter, *supra* note 20. Consequently, HUD appears to be acting cautiously in approving demolition requests for questionable reasons and may be mindful of the *Gomez* court's "factors."

44. *Velez*, 850 F. Supp. at 1273 n.7. For the facts of *Velez*, see *supra* notes 100-05 and accompanying text.

dresses tenant groups' proposals concerning the fair enforcement of the statute. This Comment concludes that the most effective way to accomplish the statutory goals is through a proactive response that prevents demolition before it occurs.

I. Enforcement of § 1437p: Preventing Demolition without HUD Approval

A. The Emergence and Affirmation of De Facto Demolition as a Cause of Action

When the federal government first instituted public housing under the Housing Act of 1937,[45] it did not provide a cause of action for de facto demolition.[46] Congress passed the Housing Act "for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity . . . ."[47] The 1937 Housing Act created a system whereby

45. The Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. § 1437p (1988 & Supp. IV 1992)).

46. Edwards v. District of Columbia, 821 F.2d 651, 659 (D.C. Cir. 1987).

47. 81 Cong. Rec. 8097 (1937) (reporting on the Senate discussion of the Housing Act). One of the many reasons for this first national public housing effort, which Congress enacted during the Depression, was that many people had lost their homes due to bank foreclosures. Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 Cath. U. L. Rev. 681, 686 (1994). For the first time, middle class families were forced to move into slum areas due to a scarcity of affordable housing. *Id.* This development may have spurred the federal government to enact a comprehensive policy. Harold A. McDougall, *Affordable Housing for the 1990's*, 20 U. Mich. J.L. Ref. 727, 727 (1987). This new policy also may have represented an acknowledgment that private industry could not satisfy the housing needs of low-income people and, therefore, the federal government had to intervene. Pit & Van Vliet, *supra* note 13, at 205.

Whether society actually empathized with the lower-class or not, the middle-class wanted to eradicate the slums, where poverty, disease, and crime were creating health and moral hazards. *Id.* at 205-06. Codes were enacted to address these concerns as well as to provide minimum standards for housing conditions. Green, *supra*, at 686-87. But upon the creation of the Housing Act of 1937, the private sector, fearing opposition, provided enormous opposition. Bratt, *supra* note 6, at 337. Thus, due to the intense lobbying effort by real estate boards, mortgage banking organizations and savings and loan associations, the Housing Act placed "low-ceilings" on expenditures to ensure that the buildings would not be competitive with the private sector. Schill, *supra* note 7, at 502-03. In light of these limits, many buildings were constructed with small rooms, poor noise insulation, nondurable materials for interior structures, and antiquated plumbing, heating and electrical equipment to ensure the lowest possible costs. *Id.* at 503.

To finance this public housing, initially provided only for the fallen middle-class, the Act required tenants to pay for operating expenses through their rental payments. Schill, *supra* note 7, at 499. While this system worked well at the outset, the demographics of public housing tenants began to change. Bratt, *supra* note 6, at 338. For example, following

local public housing agencies were formed to erect, own, and run housing for low-income tenants.[48]

World War II, many of the original public housing tenants achieved middle-class status and moved into private sector homes. *Id.* Additionally, in 1949, Congress mandated that only the lowest-income people could live in public housing by lowering the amount of rent PHAs could charge and ordering eviction of those able to pay more. *Id.* at 399. During the 1960s many African-Americans moved north and into the urban areas, dramatically increasing the minority percentage in public housing to 65%. Pit & Van Vliet, *supra* note 13, at 208.

Due to aging buildings and inflation, operating costs rose in the 1960s. Schill, *supra* note 7, at 505. Tenants' rental payments no longer covered these costs and for the first time the Public Housing Administration, which later became HUD, began granting subsidies to individual households. Bratt, *supra* note 6, at 399. To protect tenants from increasing operating costs, Congress passed the Brooke Amendment, which capped rental payments at 25% of income and increased operating subsidies. Schill, *supra* note 7, at 505. Operating expenses skyrocketed, increasing from $12.6 million to $102.8 million between 1969 and 1972 and growing to $1.3 billion from 1971 to 1982. Bratt, *supra* note 6, at 399.

Additional appeasement of public housing opponents came in the form of a decentralized system. *Id.* at 340. Local authorities determined where the housing would be located, and bowing to local pressure, concentrated the projects in urban areas. *Id.* In addition, local control allowed officials to continue patterns of racial segregation. *Id.* For a detailed look at the issue of segregation, see Elizabeth B. Bowling, *Viewing Metropolitan Housing Authorities as Parties to be Joined, if Feasible, in Fair Housing Suits: Will Minnesota Break a Great Silence?*, 78 MINN. L. REV. 733 (1994). The Housing and Community Development Act of 1974 sought to remedy the problem of concentrated poverty by establishing selection criteria to include families with a wide range of income levels. Schill, *supra* note 7, at 512. Additionally the Act eliminated the set income ceilings and the forced evictions of tenants who earned more than a specified income. *Id.* at 512-13.

In 1981, the Reagan Administration took the position that only the very poor should receive the scarce housing resources. *Id.* In 1981, Congress mandated that 90% of the tenants in existing public housing and 95% of the tenants in newly built housing must have very low incomes. *Id.* Furthermore, the Administration raised the base rent from 25% to 30% of income but reserved only 10% of available housing for those with higher incomes. Pit & Van Vliet, *supra* note 13, at 210. This forced many of the more prosperous tenants to vacate and exacerbated the concentration of the very poor in public housing. *Id.* The Administration also lowered the rent ceiling for § 8 housing as well as the standards for public housing. *Id.* For a description of § 8, see *infra* note 266. Overall, the policies of the Reagan Administration caused a dramatic increase in homelessness due, in large part, to the lack of affordable housing, which was reserved only for a very small segment of the population. McDougall, *supra*, at 760-61.

In 1983, the percentage of low-income families decreased to 75% in old housing and 85% in newly constructed housing. Schill, *supra* note 7, at 513. In 1992, the percentage dropped to 50%. *Id.* Yet, the number of poor people concentrated in the oldest and most run-down buildings continues to rise at the same time that rents continue to rise. STATE OF THE NATION'S HOUSING, *supra* note 5, at 15. By 1994, rent payments of $200-300 were insufficient to cover a housing project's operating expenses. *Id.* If the operating costs cannot be paid, the owner of the project divests from the property, allowing the project to fall into a state of disrepair and demolition becomes the only viable solution. *Id.* As a result, the housing stock continues to decrease, making it more difficult for people to gain access to assisted housing. *Id.* Between 1985 and 1991, the housing stock decreased by 130,000 units per year, of which 100,000 units were demolished. *Id.* at 16.

48. Schill, *supra* note 7, at 499 (outlining briefly the role of a public housing authority);

Once a locality decides to develop low-income housing, it forms a PHA, that contracts with the federal government.[49] The contract, termed the Annual Contributions Contract (ACC),[50] allows the PHA to buy land, often through long-term bonds,[51] and requires that the housing authority agree to follow federal standards for maintenance, replacement housing, and other such concerns.[52] In return, the federal government pays the interest on the financial instrument used to purchase the land, and the local municipality agrees to waive property taxes.[53] Through the ACC, HUD also pledges certain subsidies in exchange for a PHA's commitment to meet such requirements as: maintaining housing quality standards,[54] imposing limitations on rental charges,[55] and including specific lease provisions between tenants and PHAs.[56] Currently there are 3,308 PHAs nationally.[57]

HUD has related requirements via the Annual Contributions Contract

see also McDougall, *supra* note 47, at 762-63 (explaining the emphasis on local control). While the Depression forced the federal government to intercede, the tendency has always been to delegate housing policy discretion to local officials who are closer to the community. *Id.* One commentator has argued that effective housing policy must be developed in the context of community development, which includes employment, transportation, and social concerns. *Id.*

49. Schill, *supra* note 7, at 499 n.12 (explaining that before PHAs were created, the federal government had been unable to secure land for housing purposes because courts had held such action unconstitutional under the Takings Clause).

50. 42 U.S.C. § 1437c (1988 & Supp. IV 1992).

51. Bratt, *supra* note 6, at 398 (explaining that the federal government agreed to pay the principal and interest on the bonds offered by the local housing authority to finance a particular housing project on the understanding that the PHA would be responsible for operating expenses); *see also* 42 U.S.C. § 1437c(a)(1) (stating that HUD is responsible for no more than the interest and principal payments on bonds issued by the PHA).

52. Schill, *supra* note 7, at 500 (stating that part of the PHA's responsibilities is to maintain its buildings in compliance with HUD standards); *see* 42 U.S.C. § 1437c(j) (listing some of the obligations imposed on PHAs); *see also* COMMISSION REPORT, *supra* note 9, at 31 (listing procedures and policies that the federal government requires PHAs to follow in the areas of labor agreements, evictions, grievances, accounting, contracting, and tenant selection).

53. Schill, *supra* note 7, at 499-500.

54. 42 U.S.C. § 1437c(j).

55. Paul E. Harner, *Implied Private Rights of Action Under The United States Housing Act of 1937*, 1987 DUKE L.J. 915, 915 (1987) (citing 42 U.S.C. § 1437a (1982 & Supp. III 1985)) (the "Brooke Amendment"). The Brooke Amendment ended the requirement of minimum rents and instead obligated tenants to pay a maximum of 25% of their income. PETERSON, *supra* note 1, at 4 (explaining the effects of the Brooke Amendment). Although the percentage was later raised to 30%, the Brooke Amendment still resulted in a large reduction in PHA income. *Id.* Critics have blamed this amendment, in part, for the physical deterioration of public housing as PHAs, with reduced incomes, cut maintenance budgets in order to survive. *See id.*

56. Harner, *supra* note 55, at 915.

57. National Ass'n of Housing and Redevelopment Officers (NAHRO) *Public Housing Program Nationwide*, 1994 NAHRO Agency Survey (detailing the number of Housing Authorities by size nationwide). In 1994, these PHAs will receive $2.9 billion in operating

Under present statutory and agency regulations,[58] if a PHA wishes to demolish a project it must submit an application to HUD and have complied with requirements[59] outlined in § 1437p(b).[60] If the PHA fails to meet these requirements and HUD approves the application, a tenant has a cause of action under § 1437p.[61] *Edwards v. District of Columbia*[62] first considered the issue of whether plaintiffs could bring a cause of action under § 1437p for de facto demolition.[63]

The case arose when tenants brought suit under § 1437p, alleging that the District of Columbia Housing Authority had engaged in de facto demolition of the Fort Dupont low-income housing project.[64] The court dismissed the suit for failure to state a claim, holding that the plain meaning of the statute did not provide a cause of action for de facto demolition.[65] As a result of this ruling, PHAs could evade the statutory requirements for demolition approval by simply allowing a building to become demolished through neglect.[66]

In response to the court's interpretation of § 1437p in *Edwards*, Congress passed an amendment, § 18(d), codified at § § 1437p(d),[67] in the

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subsidies for public housing. *Id.* They will also receive $3.7 billion for public housing modernization from the federal government. NAHRO *Funding, HUD Program, Fiscal Years 1987-1995* (1994) (explaining HUD funding for public housing operating subsidies and modernization).

58. 24 C.F.R. § 970.4 (1994) (describing the general requirements that a PHA must meet before HUD will grant demolition approval).

59. 42 U.S.C. § 1437p(b) (1988 & Supp. IV. 1992); *see supra* note 20 (quoting the requirements in § 1437p(b)).

60. 42 U.S.C. § 1437p(b).

61. *E.g.*, Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 320 (D. Conn. 1988) (holding that § 1437p created enforceable rights for the tenants).

62. 821 F.2d 651 (D.C. Cir. 1987).

63. *Id.* at 653 (addressing the argument that de facto demolition was the equivalent of actual demolition and that even though HUD had not approved the application, defendant-PHA had engaged in activities that rendered the project demolished).

64. *Id.* The plaintiffs based their cause of action on the Housing Authority's failure to meet with tenant groups, to maintain the vacant units, to take any action to fill the vacant units, and to provide acceptable relocation housing. *Id.*; *see supra* note 20 (outlining the requirements for demolition application approval under § 1437p(b)).

65. *Edwards*, 821 F.2d at 659-60 (holding that while the PHA might be neglecting the project and causing it to become as uninhabitable as if it were actually razed, the statute did not prohibit this action). *Contra id.* at 669 (Will, J., dissenting) (arguing that 42 U.S.C. § 1437p placed a duty on a PHA not to abandon the project unless it met the statutory requirements and gained HUD approval).

66. *See id.* at 666 (Will, J., dissenting).

67. United States Housing Act of 1937, ch. 896 32(2), 50 Stat. 888 (1937) (codified as amended 42 U.S.C. § 1437p(d) (1988 & Supp. IV 1992)); *see supra* note 18 (quoting the specific language of the amendment).

1987 Housing and Community Development Act.[68] In the amendment's legislative history, the House Banking, Finance and Urban Affairs Committee specified that it was "correcting. . . [the *Edwards* court's] erroneous interpretation of the existing statute" in *Edwards* and that a suit for de facto demolition could be brought by tenants and applicants for public housing.[69] The Committee's goal in creating the amendment was the preservation and expansion of existing public housing units for eligible tenants.[70]

One of the early cases interpreting the amendment was *Concerned Tenants Association v. Pierce*.[71] This class action suit on behalf of 700 tenants of a low-income housing project in Bridgeport, Connecticut alleged de facto demolition in violation of § 1437p.[72] The United States District Court of Connecticut rationalized that if it followed the majority in *Edwards*,[73] a cause of action would be permitted only for the affirmative destruction of the housing projects.[74] After a review of the legislative history of § 1437p, the court concluded that Congress's intent was to prevent the destruction of public housing without HUD's approval.[75] The court then determined that Congress, by the words "any action," intended to broaden the type of prohibited activity to include neglect con-

68. 42 U.S.C. § 1437p (1988 & Supp. III 1992); *see* H.R. CONF. REP. No. 426, 100th Cong., 1st Sess. 172 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3458, 3469.

69. *See* H.R. CONF. REP. No. 426, *supra* note 68, at 172, *reprinted in* 1987 U.S.C.C.A.N. at 3469.

70. H.R. REP. No. 122(I), 100th Cong., 1st Sess. 25 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3341. In the legislative history, the House Committee recognized the need for affordable housing and, therefore, wished to preserve viable units as long as modernization or rehabilitation would permit. *Id.* The amendment also noted that tenants were provided an enforceable right to prevent demolition or disposition if the PHA failed to comply with statutory requirements. *Id.* Furthermore, the House Committee stressed that the amendment's goal was to add to the number of available units. *Id.* at 26, *reprinted in* 1987 U.S.C.C.A.N. at 3342.

71. 685 F. Supp. 316, 320 (D. Conn. 1988).

72. *Id.* at 318-19 (alleging that the deteriorated conditions included unsecured doors which allowed drug dealing and robberies to occur; a failure to repair the myriad of broken appliances, fixtures and structures; infestation by rodents and termites as well as hallways filled with garbage).

73. Edwards v. District of Columbia, 821 F.2d 651 (D.C. Cir. 1987). *See supra* notes 62-70 and accompanying text (discussing *Edwards* and its impact).

74. *Concerned Tenants*, 685 F. Supp. at 320-21.

75. *Id.* at 321; *see supra* note 70 (explaining Congress's intent to preserve and add to the supply of viable housing units).

tributing to the demolition of a project.[76] Thus, the court held that the plaintiffs had established a cause of action.[77]

Following *Concerned Tenants*,[78] the United States District Court for the Western District of Missouri, in *Tinsley v. Kemp*,[79] also found that limiting a cause of action to only the actual physical demolition of a project weakens the effectiveness of Congress's intent in enacting the statutory amendment.[80] In *Tinsley*, the tenants in Watkins Homes housing project brought suit alleging that the PHA had violated § 1437p by its passive neglect of the project.[81] Out of 288 units in the Watkins Homes project, 118 were vacant.[82] The tenants claimed that the Housing Authority of Kansas City neglected to consult with them about replacement housing and, therefore, did not formulate a plan for re-housing tenants after the demolition.[83] Based on the legislative history of the statute, the court recognized the tenants' cause of action for de facto demolition under § 1437p.[84]

Despite these two federal district court decisions interpreting the statute to allow a cause of action for de facto demolition,[85] the United States District Court for the Middle District of Florida in *Dessin v. Housing Authority*[86] adopted a different view of the plain meaning of the statute,

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76. *Concerned Tenants*, 685 F. Supp. at 321; *see also Edwards*, 821 F.2d at 666 (Will, J., dissenting) (reasoning that, for the statute to be effective, it must allow a cause of action against a PHA if, by the PHA's inaction and neglect, the building becomes effectively demolished).

77. *Concerned Tenants*, 685 F. Supp. at 321.

78. *Id.* (recognizing a cause of action for de facto demolition under § 1437p).

79. 750 F. Supp. 1001 (W.D. Mo. 1990).

80. *Id.* at 1007 (reasoning that if the court prohibited a cause of action for de facto demolition, PHAs would be able to circumvent the statute by allowing the projects to deteriorate).

81. *Id.* at 1003. In this case, the number of vacant units in the 288 unit Watkins Homes housing project exploded from 35 in 1988 to 188 in 1990. *Id.* at 1004. The plaintiffs alleged that the PHA violated the statute by allowing the vacant units to fill with trash, human waste and vermin; exist with broken windows and without window frames, appliances, counter tops and cabinets; and become available to drug dealers and trespassers. *Id.*

82. *Id.* at 1003 (finding that, while HUD had approved demolition of 60 units, 288 remained for which HUD had not approved a demolition order).

83. *Id.*; *see supra* note 20 (quoting the statutory requirements of § 1437p(b)).

84. *Tinsley*, 750 F. Supp. at 1007-08.

85. *See supra* notes 76-77 and accompanying text (noting the *Concerned Tenants* holding that § 1437p should encompass both de facto and actual demolition); *see supra* note 84 and accompanying text (citing the *Tinsley* court's ruling that § 1437p should allow for a cause of action for either actual or de facto demolition).

86. Dessin v. Housing Auth., 783 F. Supp. 587 (M.D. Fla. 1990), *rev'd in part and vacated in part*, 948 F.2d 730 (11th Cir. 1991) (per curiam) (mem.); *see infra* note 89 (explaining the reasons for the vacated decision).

one that was consistent with HUD's statutory interpretation.[87] In *Dessin*, the tenants sought to enjoin the Housing Authority of the City of Fort Myers and HUD from taking further action toward demolition of the Southward Village housing project.[88] The court ruled that the defendants had not fulfilled the statutory requirements of tenant consultation and formulation of a plan for post-demolition.[89] Nonetheless, the court rejected the tenants' cause of action, reasoning that HUD's interpretation of demolition as razing should be given considerable weight and finding the statute's plain language unambiguous.[90]

Other courts have declined to follow the *Dessin* decision.[91] The United States District Court for the Northern District of Illinois held, in *Henry Horner Mothers Guild v. Chicago Housing Authority*,[92] that § 1437p(d) incorporates a right to challenge actions that result in de facto demolition.[93] In repudiating *Dessin*, the court relied on the *Edwards* dissent's

87. *Id.* at 589-90 (declining to find a cause of action for de facto demolition under § 1437p).

88. *Id.* at 587.

89. *Id.* at 588. *But see id.* at 588-89 (finding that the project was vacated at HUD's direction due to unsafe conditions, not an intent to demolish). The *Dessin* court disagreed with the plaintiffs' contention that their relocation resulted from the housing authority's demolition plans and determined that HUD had properly required relocation due to unsafe conditions. *Id.* at 588. However, the court did not adequately address how those conditions came about and whether the conditions that forced HUD to require relocation were due to the PHA's negligence or inaction, which in other cases led to a cause of action for de facto demolition. *E.g.*, Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (holding that the words "any action" in the statute 42 U.S.C. § 1437p(d)(1988) prohibiting demolition, extended to any inaction or negligence that may have led to the deterioration of the project). In *Dessin*, the PHA argued that the construction defects and drug dealing had caused the decrepit conditions, but the court did not consider whether these reasons were legitimate. Dessin v. Hous. Auth., No. 90-4069, at 2 (11th Cir. Oct. 30, 1991) (explaining that the decision was later vacated and remanded because a finding of fact was made by the District Court without affording plaintiffs the opportunity to litigate). In *Dessin*, the court found that the relocation of former tenants was not part of the Housing Authority's plan to dispose of the property, despite evidence in the record to the contrary. *Id.* The 11th Circuit then remanded the case for an evidentiary hearing on the issue of the ripeness of the plaintiff's challenge. *Id.* While *Dessin* is not precedent, it remains a worthwhile analysis of the definition of demolition and intent.

90. *Id.* at 590.

91. *See* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817 (N.D. Ill. 1993) (holding that de facto demolition constituted a cause of action under § 1437p); Velez v. Cisneros, 850 F. Supp. 1257, 1271 (rejecting HUD's definition that excludes de facto demolition).

92. Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511 (N.D. Ill. 1991), *summ. judgment denied*, 824 F. Supp. 808 (N.D. Ill. 1993) (rejecting the Chicago Housing Authority's motion to dismiss and determining that § 1437p(d) created an enforceable cause of action for de facto demolition).

93. *Id.* at 515 (finding that the definition of demolition and the words "any action" in the statute should be broadly interpreted).

opinion[94] and the legislative history of § 1437p(d).[95] In *Horner*, the plaintiffs alleged that the Chicago Housing Authority (CHA) had violated § 1437p by failing to maintain the Horner project.[96] In a second proceeding two years later, the same court denied a summary judgment motion, deciding that while it recognized a cause of action under § 1437p for de facto demolition,[97] the uncertainty of the elements and standard of proof needed for the action warranted a trial.[98]

Confirming the holding in *Horner*,[99] the United States District Court for the Eastern District of Pennsylvania also upheld de facto demolition as a cause of action in *Velez v. Cisneros*.[100] In *Velez*, the plaintiffs alleged that the Chester Housing Authority had failed to fill vacancies, to main-

94. Edwards v. District of Columbia, 821 F. 2d 651, 670 (D.C. Cir. 1987) (Will, J., dissenting) (reasoning that no distinction should be made between actual and de facto demolition).

95. *See* H.R. CONG. REP. No. 426, *supra* note 68, at 172, *reprinted in* 1987 U.S.C.C.A.N. at 3469 (declaring that Congress intended that the amendment to § 1437p should correct the erroneous interpretation in *Edwards* and create a fully enforceable cause of action against a PHA for taking any step toward demolition without meeting the statutory criteria).

96. *Horner*, 780 F. Supp. at 512-13. Many of the problems in the Horner project are common to other Chicago housing projects. *See* Flynn McRoberts, *CHA Spending Choices: Safety or Maintenance*, CHI. TRIB., June 12, 1994, § 2, at 1 (reporting that the Legal Assistance Foundation of Chicago filed suit against the CHA based partially on the CHA's alleged failure to maintain a housing project). On June 12, 1994, *The Chicago Tribune* detailed 713 housing code violations found in the Cabrini-Green development, a project under the jurisdiction of the CHA. *Id.* As an example of the deterioration of Cabrini-Green, one tenant reported that it took two years to replace her boarded-up windows with glass. *Id.*

97. *Horner*, 824 F. Supp. at 818-19 (rejecting the motions for summary judgment by finding that "a genuine issue of material fact" remained as to whether the units were no longer habitable and whether defendants' actions caused this de facto demolition). While the plaintiffs had introduced evidence showing high vacancy rates, the court felt that this evidence alone was not sufficient to rule on the issue of inhabitability. *Id.* at 818. The judge also questioned whether the cited code violations translated into demolished property, how Horner compared to other Chicago projects, and whether the conditions had improved since the parties' briefs had been submitted. *Id.*

98. *Id.* at 817-18; *see supra* note 97 (describing the judge's concerns that the case should not be decided on summary judgment); *see also* Flynn McRoberts, *CHA Proposes Its Biggest Rehab; $200 Million Horner Plan Aims To End Suit*, CHI. TRIB., Sept. 21, 1994, § 2, at 1 (reporting on plaintiffs' efforts to take the *Horner* case to trial). As the case approached a trial date of December 15, 1994, it appeared that the CHA sought a settlement with the plaintiffs, who were represented by the Legal Assistance Foundation of Chicago. *Id.* In the fall of 1994, the CHA proposed spending $200 million on rehabilitation of the Henry Horner project. *Id.* Yet, the Legal Assistance Foundation indicated that it would only view this proposal as a serious compromise if it were backed by federal funds. Legal Assistance Foundation Interview, *supra* note 28.

99. *Horner*, 824 F. Supp. at 817 (recognizing de facto demolition as a cause of action).

100. 850 F. Supp. 1257, 1273 (E.D. Pa. 1994) (holding that, in the absence of satisfying § 1437p(a) and (b), de facto demolition was a violation of § 1437p(d)).

tain units at a decent standard, to respond to complaints, and to perform necessary inspections.[101] The court reasoned that if the statute is silent or unclear, the court may apply the agency's interpretation provided it is a "permissible construction of the statute."[102] The court found, however, that HUD's interpretation failed to fall within the range of permissible interpretations.[103] In upholding the claim, the *Velez* court stated that HUD's narrow definition of demolition not only allows a PHA to violate § 1437p by vacating units and permitting them to deteriorate through passivity and neglect,[104] but also violates Congress's intent in enacting the amendment.[105]

B. Judicial Adoption and Rejection of an Intent Requirement

Although the issues of whether an action for demolition should include a claim of de facto demolition and whether plaintiffs need to prove a PHA's intent to demolish tend to occur in similar factual contexts, they are two distinct questions.[106] Following *Edwards*,[107] a consensus emerged among the courts that a cause of action for de facto demolition exists.[108] But courts struggled to agree about the need for plaintiffs to

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101. *Id.* at 1260.

102. *Id.* at 1270 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)). The *Chevron* standard permits deference to an agency's interpretation if the statute is silent or unclear and the agency's reading is a "permissible construction of the statute." *Id.* (citing *Chevron*).

103. *Id.* at 1271.

104. *Id.* (determining that housing units may become uninhabitable for reasons other than razing). The court drew a parallel between a PHA's razing a building to make room for replacement housing, and allowing the interior of a building to deteriorate so that tenants have to be displaced in order to modernize and rehabilitate. *Id.* The former situation would trigger the requirements under § 1437p(a) and (b) while the latter situation would not trigger the statutory requirements. *Id.* The court then concluded that the distinction between actual, razing demolition and passive, de facto demolition was "arbitrary." *Id.*

105. *Id.* at 1270 (deducing that Congress's intent in enacting § 1437p(d) was to preserve the number of available housing units). Since the HUD definition would allow units to deteriorate without meeting the statutory requirements, the court found that HUD's definition "conflicts with the clear purpose of § 1437p." *Id.* at 1271.

106. *E.g.*, Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 818 (N.D. Ill. 1993) (distinguishing a violation of § 1437p(d) based on de facto demolition from the issue of intent and holding that while intent would be a factor in determining whether de facto demolition has occurred, it would not be dispositive).

107. Edwards v. District of Columbia, 821 F.2d 651, 660 (D.C. Cir. 1987) (refusing to recognize a cause of action for de facto demolition); *see supra* notes 62-66 and accompanying text (explaining the reasoning and holding in *Edwards*).

108. *See supra* note 21 (noting examples of cases following *Edwards* which held that de facto demolition constituted a cause of action under § 1437p).

satisfy the intent requirement.[109] Federal courts addressed the issue of intent for the first time in 1992.[110]

In *Gomez v. Housing Authority*,[111] the El Paso Housing Authority (EPHA) stated that it had left units vacant pending HUD's approval of EPHA's demolition application.[112] In response, the plaintiffs asserted that while the EPHA waited for approval of its demolition application, it removed the vacant units from the rent rolls, possibly triggering further deterioration.[113] The plaintiffs further argued that by neglecting the maintenance of these numerous vacant units, the EPHA had engaged in de facto demolition and therefore had violated § 1437p.[114]

The United States District Court for the Western District of Texas was the first court to hold that tenants had to prove by a preponderance of the evidence that the PHA had a policy or intention of allowing the units to remain vacant or deteriorate for a substantial period of time, resulting in de facto demolition.[115] In denying the plaintiffs' claim, the court reasoned that vacancies due to pending demolition or tenant complaints[116] constituted evidence that the PHA did not have a policy to allow the units to become uninhabitable.[117] Thus, simple neglect that caused the

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109. *See Velez*, 850 F. Supp. at 1273 n.7 (stating that, while in this case the plaintiffs adequately proved defendants' intent, intent was not a statutorily required element); *Horner*, 824 F. Supp. at 818 (determining that, whatever the court decided was needed to prove an action for de facto demolition, proof of the defendant's intent to demolish the project will not be an element). *But see* Gomez v. Hous. Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (holding that plaintiffs have to prove a policy of allowing extended vacancies or deterioration on the part of the defendant housing authority).

110. *E.g.*, *Gomez*, 805 F. Supp. at 1375 (considering for the first time the PHA's intentions by holding that the plaintiffs had not shown that the PHA had a "policy of allowing public housing units to deteriorate").

111. *Id.*

112. *Id.* at 1378. In addition to HUD approval, the EPHA also stated that it had left units vacant due to modernization under the Comprehensive Improvement Assistance Program (CIAP). *Id.*; *see also* H.R. REP. No. 122(I), *supra* note 70, at 25, *reprinted in* 1987 U.S.C.C.A.N. at 3341 (explaining the types of funding CIAP provides and the process of compliance).

113. *Gomez*, 805 F. Supp. at 1375 (omitting any discussion of *why* the foundations were in disrepair and whether tenants had been consulted prior to construction of the overpass).

114. *Id.* at 1374-75; *see also* Flynn McRoberts, *CHA Attempts A Delicate Balancing Act*, CHI. TRIB., Sept. 25, 1994, § 2, at 1 (reporting on the criticism for putting funds toward fixing up units slated for demolition while an application was pending at HUD).

115. *Gomez*, 850 F. Supp. at 1375 (finding that the plaintiffs had failed to establish that the EPHA had either purposefully allowed the units to become deteriorated or had willfully disregarded HUD requirements).

116. *Id.* at 1376 (finding that tenants had complained about a newly constructed highway overpass).

117. *Id.* at 1375. The court reasoned that the EPHA applied for demolition of eighteen

dilapidation would not constitute an actionable violation of § 1437p unless the PHA intended for this dilapidation to occur.[118]

The federal district court in *Henry Horner Mothers Guild v. Chicago Housing Authority*[119] found the *Gomez* requirement that the plaintiff must show a PHA policy of allowing units to become uninhabitable as "tantamount" to a required showing of intent.[120] In *Horner*, the plaintiffs contended that the Chicago Housing Association (CHA) violated § 1437p by evading local statutory requirements and allowing the project to deteriorate through neglect and inaction.[121] However, unlike *Gomez*, the defendant had not applied for HUD approval to demolish.[122]

units of the Kathy White and Salazar housing projects because the units' foundations had deteriorated and due to tenant complaints concerning the newly built overpass. *Id.* The court ruled that, because plaintiffs had not questioned the need for the demolition or the EPHA's compliance with statutory requirements and because the EPHA had bought replacement housing, there was no showing of a policy or intent by the EPHA to allow for de facto demolition. *Id.*

118. *Id.* at 1378.

119. Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808 (N.D. Ill. 1993).

120. *Id.* at 817 n.8 (rejecting the *Gomez* interpretation); *see Gomez*, 805 F. Supp. at 1378 (holding that proof of intent was a critical element in an action for de facto demolition).

121. *Horner*, 824 F. Supp. at 818. The facts in the case bear witness to plaintiffs' allegations. From 1981 to 1991 vacancy rates rose from 2.3% to 49.3%, while the vacancy rate for nine other CHA projects was 17.3%. *Id.* at 810. In a 1990 plan to decrease vacancies submitted by the CHA to HUD's regional administrator, Horner was not included as a targeted project; yet, while it was included in a 1991 plan, only thirty-three of the projected 349 units were successfully repaired and "brought on line." *Id.* at 811. In addition to vacancies, the CHA admitted in a report to HUD that Horner was its most "troubled development." *Id.* at 812. After the complaint was filed, City of Chicago inspectors cited 570 code violations. *Id.*

Following these inspections, HUD conducted its own inspection and found that only 1.3% of the units complied with HUD Housing Quality Standards. *Id.* at 813. In 1989, the CHA requested $48 million in funding under the Comprehensive Improvement Assistance Program (CIAP), which was replaced by the Comprehensive Grant Program in 1992, 1% of which was spent on the Horner project. *Id.* In 1990, the CHA requested $81 million of which 8% was slated for Horner. *Id.* Between 1983 and 1991 while Horner vacancy rates were higher than any of the other CHA developments, less CIAP funds were spent at Horner than at any of the other developments. *Id.* at 814. In a letter to the CHA in August of 1992, the HUD regional administrator wrote that the fact that Horner did not appear to be receiving its fair share of HUD funds made it difficult to believe that the CHA was committed to improving conditions at the project. *Id.* at 815.

122. *Id.* at 817. The plaintiffs in the *Horner* case did not allege that the CHA applied to HUD for demolition approval without meeting the statutory requirements of § 1437p(a) and (b). *Id.* Instead, they alleged that the CHA had violated § 1437p(d) as well as (a) and (b) by failing to maintain and repair the Horner project. *Id.* Through these inactions, the CHA had effectively demolished the building, which, plaintiffs argued, was a violation of § 1437p. *Id.*

The court agreed that § 1437p controls any action that destroys a project, whether active or passive.[123] Addressing the issue of intent, the court disagreed with the *Gomez* decision[124] and emphatically rejected the necessity of proving the CHA's intent to demolish the Horner housing project.[125] The court held that if the PHA had failed to meet the statutory requirements and the public housing had been demolished, whether through "design, neglect, incompetence or inadvertence," then the PHA had violated § 1437p(d).[126] The *Horner* court further held that the legislative history and statutory language evidenced a congressional intent to allow a plaintiff to bring an action for demolition without a showing of intent and regardless of whether the PHA had applied for approval to demolish.[127] Consequently, the court found that HUD's duty to enforce the statute begins when a PHA takes action to demolish, whether that action be affirmative or passive neglect.[128]

In *Velez v. Cisneros*,[129] the United States District Court for the Eastern District of Pennsylvania followed the *Horner* court, holding that the plaintiffs were not required to prove that the housing authority had a plan or intent to demolish the project.[130] Relying on the statutory language of

123. *Id.* at 818. The court was not prepared to rule on what constituted an action for de facto demolition and what the plaintiffs would have to prove to sustain such an action. *Id.* at 817. The plaintiffs proposed criteria that they believed would justify a finding of de facto demolition. *Id.* These criteria included a showing that defendants engaged in conduct likely to produce either affirmative or passive demolition; a showing that the defendants engaged in de facto demolition effecting some or all of the project; and a showing of a high vacancy percentage. *Id.* The court, however, declined to adopt this proposal and determined that its ruling would have to be based on a trial. *Id.* at 818.

124. *Id.* at 818 n.8.

125. *Id.* at 818.

126. *Id.* The court, in presenting its opinion, referred to its earlier decision in Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511 (N.D. Ill. 1991). In *Horner*, the court dismissed defendants' prior motion and held that action or inaction that destroys a project and renders the units uninhabitable is controlled by § 1437p(d). *Id.* at 513-15.

127. *Horner*, 824 F. Supp. at 818-19. *Contra* Post-Trial Brief of Defendant, CHA, at 13, Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (No. 90-6449) [hereinafter Brief for Defendant, Chester HA] (questioning the logic of the *Horner* court's reasoning that, even if intent is not an element, it remains a factor in the court's determination of de facto demolition).

128. *Horner*, 824 F. Supp. at 818.

129. Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994).

130. *Id.* at 1273 n. 7 (following *Horner* and rejecting the intent provision). Tenants of the Chester Housing Authority (Chester HA) filed suit against HUD and Chester HA for gross mismanagement and neglect that resulted in de facto demolition, in violation of § 1437p. *Id.* at 1260. The opinion detailed the deteriorated physical condition of many of the Chester HA projects. *Id.* For example, one project was so dilapidated that the HUD regional administrator refused to walk through the project out of concern for his safety. *Id.* at 1261-62. He cited unsecured units with wide-open and broken windows on the sec-

§ 1437p, the court determined that the purpose of the section was to prevent the reduction of available housing units.[131] The court then concluded that it is irrelevant whether a PHA intentionally removes units from use or whether they become unusable due to a PHA's unintentional neglect.[132]

Vacancies as direct causes of action

The *Velez* court found that the defendant, Chester Housing Authority (Chester HA), through its policy of removing units from the rent rolls when they become vacant, had reduced the number of housing units available without preparing a plan for replacement.[133] The court held that the combination of the high number of vacancies, the plan not to make interim repairs of vacant units awaiting modernization, and the substantial amount of time that units would be vacant during modernization constituted de facto demolition.[134] While the court determined that intent was not a requirement of the plaintiff's case, nevertheless, the court found intent through the Chester HA's negligence.[135] The court looked not to whether there was specific intent to demolish, but whether there was intent to act,[136] that then resulted in de facto demolition.[137]

ond and third floors and trash scattered throughout the building. *Id.* at 1262. Furthermore, there was no evidence of maintenance or efforts to halt the deterioration, as the maintenance staff had been hired through a system of patronage and Chester HA's financial health was rapidly deteriorating. *Id.* at 1263.

131. *Id.* at 1270.

132. *Id.* at 1271. This holding is consistent with the dissenting opinion in *Edwards v. District of Columbia*, which determined that the key issue in demolition is the result, not how the action was carried out. 821 F.2d. 651, 670 (D.C. Cir. 1987) (Will, J., dissenting).

133. *Velez*, 850 F. Supp. at 1273. The court found that the Chester HA had a policy of not re-renting units once they became vacant. *Id.* This policy was based on the Chester HA's belief that it was futile and wasteful to make temporary repairs to re-rent the units while awaiting complete rehabilitation. *Id.* Yet, the court concluded that rehabilitation of these units would take years, and in the interim, a large number of units would be unavailable. *Id.*

134. *Id.* at 1278.

135. *Id.* at 1273 n.7; *see also* Telephone Interview with Attorney at Drinker, Biddle & Reath, Phila., Pa. and counsel for plaintiffs in Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (Sept. 1994) [hereinafter Attorney Interview].

136. Attorney Interview, *supra* note 135 (explaining that the court looked only at whether there was an intent to act).

137. *Velez*, 850 F. Supp. at 1278.

II. HUD's Withdrawn Rule of Intent: The Agency's Statutory Reading and Means of Enforcement

A. *HUD's Final Rule Interpreting § 18(d) of the 1987 Housing and Community Development Act*

In November of 1993, HUD proposed a final rule to implement § 1437p(d)[138] and replace the interim rule, which was promulgated in August of 1988.[139] While public comments had been requested for the interim rule, the rule made no mention of an intent provision or that HUD intended to exclude de facto demolition as a cause of action.[140] HUD sought no public comments while promulgating the final rule.[141]

1. HUD's Definition of Demolition

In a footnote to the final rule, HUD defined demolition as razing, and specifically excluded de facto demolition.[142] By excluding de facto demolition, HUD allowed actions or inactions that constituted deterioration, such as negligence, lack of maintenance, and extended vacancies to occur without resulting in a violation of § 1437p.[143] In addition, HUD argued that nowhere in the statute or its legislative history did Congress indicate a desire to police PHAs' failed maintenance efforts unless they are done with the intent of razing.[144]

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138. Final Demolition Rule, *supra* note 24.

139. Public Housing Program; Demolition or Disposition of Public Housing Projects, 53 Fed. Reg. 30,984 (1988) (interim rule) (to be codified at 24 C.F.R. pt. 970).

140. NHLP Paper, *supra* note 33, at 4-5; *see infra* notes 233-36 and accompanying text (discussing this procedural process).

141. NHLP Paper, *supra* note 33, at 4-5.

142. Final Demolition Rule, *supra* note 24, at 58,784 n.3 (clarifying that deterioration does not qualify as demolition under the meaning of this statute). Therefore, HUD concluded that because demolition only occurs when a building is razed, any action short of razing, meaning de facto demolition, was not covered under the statute. *Id.*

143. *See* Edwards v. District of Columbia, 821 F.2d 651, 671 (D.C. Cir. 1987) (Will, J., dissenting) (concluding that, under the majority's approach, PHAs could demolish the projects by allowing vandalism and a lack of necessary, routine maintenance to render the projects uninhabitable without triggering the statutory requirements set out in § 1437p(b)).

144. Final Demolition Rule, *supra* note 24, at 58,785. *See also infra* notes 176-80 and accompanying text (discussing HUD's argument that there is a nexus between the words "action" and "demolish" in the statute); *infra* text accompanying notes 198-200 (explaining HUD's belief that Congress was aware of HUD's razing definition when it enacted § 1437p(d) and that Congress could have altered the definition in the statute if it disagreed with HUD's definition); and *infra* text accompanying notes 157-59 (detailing HUD's argument that provisions to maintain the project are spelled out under the ACC and to interpret § 1437p(d) to encompass those same provisions would be repetitive).

In *Velez v. Cisneros*,[145] the court concluded that HUD's narrow definition of demolition was contrary to congressional intent,[146] based on its determination that the clear purpose of the 1987 amendment was to maintain the number of available housing units.[147] The legislative history of the amendment described the purpose as adding to the number of available units.[148] By allowing de facto demolition to occur, HUD's rule permitted PHAs to vacate and decrease the number of available units. The *Velez* court found that this result directly contradicted the statutory intent.[149]

2. *De Facto Demolition: Consideration as to Whether It Should Be Included in the Definition of Demolition*

The court in *Velez v. Cisneros* held that HUD's definition was "arbitrary" because the same result occurred whether the exterior walls were demolished by razing or the interior walls were demolished by lack of maintenance—the number of habitable units decreased.[150] Courts also

145. 850 F. Supp. 1257 (E.D. Pa. 1994).

146. *Id.* at 1273 n.7 (holding that, by allowing units to be removed from the rent rolls, whether through neglect or direct demolition, the PHA was still reducing the number of available housing units and, therefore, violating congressional intent) .

147. *Id.*

148. H.R. REP. No. 122(I), *supra* note 70, at 25, *reprinted in* 1987 U.S.C.C.A.N. at 3341 (citing the "desperate need for affordable housing for lower income families"). The House Committee stated that the purpose of the 1987 amendment, which added the one-for-one replacement rule back into the statute after it had been removed in 1986 and added § 18(d), codified at 42 U.S.C. § 1437p(d), was to increase the total number of units offered to low-income, eligible tenants. *Id.* at 25-26, *reprinted in* 1987 U.S.C.C.A.N. at 3341-42.

Between 1973 and 1983, 4.5 million units were removed from the rent rolls due to demolition or "structural conversions" and roughly half were low-income residences. THE NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE 6 (Mar. 1988) (discussing the shrinking number of affordable housing units). In 1980, the number of low-income people, those earning $10,000 or less and seeking affordable housing, with rent payments of $250 or less, surpassed the supply of affordable housing. *Id.*; *see also* STATE OF THE NATION'S HOUSING, *supra* note 5, at 32 (explaining that from 1985 to 1991, 69,000 units of low-cost housing, defined as subsidized rental units with monthly rents equal to $300 in 1989 dollars, were lost in the Northeast). Additionally, 83,000 of the same type of units were lost in urban areas (including the Northeast). *Id.*

149. *Velez*, 850 F. Supp. at 1273 (examining the policies of the Chester Housing Authority and determining that the PHA's practice of either unintentionally allowing units to deteriorate or intentionally removing units from the rent rolls violated Congress's intent to preserve the number of available housing units).

150. *Id.* at 1271. Evidence of deterioration that leaves units uninhabitable is not unusual in many of the housing projects across the country. *See, e.g.*, Mary Francis, *Housing Residents Planning Better Lives*, INDIANAPOLIS STAR, Nov. 4, 1994, at C1 (describing the prevalence of drugs in the Eagle Creek Village housing project which has forced residents to remain inside behind bolted doors); Gutierrez, *supra* note 4, at 5A (documenting overcrowded conditions and dilapidated units with broken heating and air-conditioning systems); Ihejirika, *Wrecking Ball Claims 4 S. Side CHA Buildings*, *supra* note 4, at 6

have argued that § 1437p itself does not distinguish between de facto demolition and actual demolition and, therefore, both actions ought to be prohibited because they would lead to the same result.[151]

In contrast, the court in *Dessin v. Housing Authority*[152] reasoned that if Congress had intended to allow tenants to bring suit against a PHA for a failure to maintain the units, Congress would have stated so in unambiguous language.[153] Although the *Dessin* decision is not precedent,[154] it is instructive to review its findings. The *Dessin* court held that HUD's definition of razing should be given considerable weight and that the court should reject the definition only if it is contrary to "clearly expressed legislative intention."[155] The court concluded that the agency and

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(reporting on the demolition of buildings that had become so dilapidated that rotten stairs were collapsing and rats and roaches were rampant).

By concluding that there was no resultant difference if the structure was razed by bulldozers or slowly deteriorated due to lack of maintenance and care, the *Velez* court followed the dissent in *Edwards*. *Velez*, 850 F. Supp. at 1271. The *Edwards* dissent argued that, because Congress was trying to prohibit a result from occurring, Congress was not concerned with *how* this result occurred. Edwards v. District of Columbia, 821 F.2d 651, 670 (D.C. Cir. 1987) (Will, J., dissenting) (emphasis added). Therefore, the statute should prevent any process that resulted in demolition of the housing units which did not meet the statutory requirements. *Id.*

151. *See* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817 (N.D. Ill. 1993) (holding that de facto demolition constitutes a legitimate cause of action under 42 U.S.C. § 1437p(d)); Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (ruling that the words "any action" include conduct such as negligence, inaction or neglect that would render the units uninhabitable).

152. Dessin v. Housing Auth., 783 F. Supp. 587 (M.D. Fla. 1990), *rev'd in part and vacated in part*, 948 F.2d 730 (11th Cir. 1991) (per curiam) (mem.) (holding that de facto demolition does not constitute a cause of action).

153. *Id.* at 590 (maintaining that HUD's definition of razing should be adopted).

154. *See supra* note 89 (discussing the vacated decision in *Dessin*).

155. *Dessin*, 783 F. Supp. at 590 (citing North Dakota v. United States, 460 U.S. 300 (1983)). The *Dessin* court relied on the Supreme Court's methodology for statutory interpretation developed in *Chevron U.S.A. v. Natural Resources Defense Council* which laid out a two part test. 467 U.S. 837, 842 (1984). The first prong of the statutory interpretation test was to determine whether Congress had clearly spoken and whether the intent of Congress was clear. *Id.* If so, the court and the agency must adopt this interpretation. *Id.* at 842-43. However, if the statute is unclear, the court must defer to the agency's interpretation if it is a "permissible construction of the statute." *Id.* at 843.

The *Dessin* court believed that the statutory language was facially clear and meant razing. *Dessin*, 783 F. Supp. at 590. Yet the court also made the alternative argument stating that even if the term was not facially clear, step two of the *Chevron* test applied and the agency's interpretation should be given substantial weight. *Id.* HUD interpreted "demolition" as razing and the *Dessin* court held that this was a permissible construction of the statute. *Id.*

The *Velez* court, however, argued that only the second part of the *Chevron* test applied. Velez v. Cisneros, 850 F. Supp. 1257, 1270 (E.D. Pa. 1994). Determining that the statute was ambiguous, the court looked at congressional intent, which was to preserve the number of available units of public housing, and reasoned that HUD's definition did not

dictionary definitions were consistent in meaning active demolition only.[156]

HUD's argument for excluding constructive or de facto demolition is that, under the ACC, PHAs are required to keep units in a "decent, safe and sanitary manner," and inclusion of these maintenance requirements under § 1437p(d) would be redundant.[157] In *Velez*, the defendant, the Chester Housing Authority (Chester HA), expanded upon this argument.[158] The Chester HA argued that the statutory language did not discuss PHA neglect or inaction and that, therefore, there was no reason to include these circumstances under the statute as their inclusion would render the regulations under the ACC superfluous.[159]

HUD's argument in favor of excluding de facto demolition as a cause of action based on redundancy is a strong one. Yet, the statute explicitly duplicates language when discussing additional areas of the demolition issue.[160] For example, under the ACC, § 1437c(j)(1)(C)(i) requires that the housing authority replace one-for-one units that are demolished or disposed.[161] This requirement for HUD approval of demolition also is included in § 1437p(b).[162] The prevalence of such "redundant" language in the statute weakens HUD's argument.[163]

Another response to the ACC argument lies in the legislative history and the intent of the 1987 amendment.[164] By refusing to incorporate into

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comport with the statutory intent. *Id.* at 1270-71. The *Velez* court, therefore, rejected HUD's interpretation and included de facto demolition in its definition of demolition. *Id.*

156. *Dessin*, 783 F. Supp. at 590 (interpreting both the dictionary and agency meaning of demolish as " 'to pull or tear down [, to] raze' ").

157. Final Demolition Rule, *supra* note 24, at 58,785. Commenting on the rule, HUD stated that it would be "superfluous and illogical" to assume that Congress intended to replicate existing requirements specified in the ACC. *Id.*

158. Brief for Defendant, Chester HA, *supra* note 127, at 8.

159. *Id.* Chester HA argued that if § 1437p(d) allowed tenants to bring suit in federal court for violations of maintenance duties and repairs, the statute would needlessly mirror the ACC. *Id. But see infra* notes 169-70 and accompanying text (explaining the court's decision in *Velez*, 850 F. Supp. at 1276-77, not to allow tenants to bring suit under the ACC).

160. *See infra* notes 161-62 (illustrating the identical language in the ACC and § 1437p(b) with regards to the one-for-one replacement rule).

161. 42 U.S.C. § 1437c(j)(1)(C)(i) (1988 & Supp. IV 1992) (stating that a PHA will replace units that are sold, demolished, or lost through redesign by the PHA).

162. 42 U.S.C. § 1437p(b)(3) (requiring that the PHA provide an additional "decent, safe, sanitary, and affordable dwelling unit" for each unit that is demolished or disposed).

163. *See infra* notes 169-70 and accompanying text (explaining that there is no cause of action for lack of maintenance and deteriorated conditions under the ACC, which leaves a suit for de facto demolition under § 1437p(d) as a tenant's only cause of legal action).

164. *See* H.R. REP. No. 122(I), *supra* note 70, at 25, *reprinted in* 1987 U.S.C.C.A.N. at 3342 (explaining that the House Committee specifically stated that its goal was to add to the number of available housing units).

the words "any action" the activities of neglect, passivity or simple inaction, courts have argued that defendants are ignoring the very reason the amendment was enacted: to preserve the supply of housing units.[165] These arguments have followed the dissent's reasoning in *Edwards v. District of Columbia*,[166] which found that the resulting demolition to a public housing project is the same, whether by bulldozer or inaction.[167] Congressional intent clearly favors preserving available housing units.[168] Therefore, interpreting the statutory language to mirror that of the ACC, while perhaps repetitive, ensures that PHAs will follow the statutory intent.

Yet, while the requirements of § 1437p(d) may duplicate the ACC requirements, only § 1437p allows tenants to bring a cause of action for violation of these requirements.[169] Therefore, without § 1437p(d), ten-

165. *E.g.*, Tinsley v. Kemp, 750 F. Supp. 1001, 1007 (W.D. Mo. 1990) (holding that limiting the requirements of the statute to actual demolition would undermine congressional intent, which was to allow tenants to enforce the "physical condition requirements" of § 1437p); Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (concluding that demolition of housing units, whether through actual or de facto demolition, violated the congressional intent of preserving the number of available housing units).

166. 821 F.2d 651, 670 (D.C. Cir. 1987) (Will, J., dissenting) (finding a cause of action for de facto demolition).

167. *Id.* The dissent viewed the congressional intent as favoring the preservation of housing. *Id.* at 669. It therefore concluded that because the statutory goal was to maintain the number of units available to low-income tenants, the method of destruction was irrelevant. *Id.* at 670. Consequently, the dissent held that de facto demolition should be subject to the requirements of § 1437p. *Id.*

168. *See supra* notes 164-67 (analyzing the congressional intent of § 1437p(d)); *see also* PUBLIC HOUSING IN PERIL, *supra* note 1, at 76 (criticizing some of HUD's actions just before the 1987 amendments were passed as contrary to the congressional intent of preserving "the public housing stock").

169. *See* H.R. CONF. REP. No. 426, *supra* note 68, at 172, *reprinted in* 1987 U.S.C.C.A.N. at 3469 (indicating that the language of § 1437p(d) which prohibited taking any action toward demolition would be "fully enforceable" by residents or applicants); *cf.* Velez v. Cisneros, 850 F. Supp. 1257, 1276 (E.D. Pa. 1994) (citing § 510(B) of the ACC, which explains that only bond holders and the PHA may be classified as third party beneficiaries—the only groups who may bring a cause of action under the ACC). Therefore, residents may not bring suit alleging violations under the ACC. *Id.*; *accord* Assistant General Counsel Interview, *supra* note 32 (confirming that HUD does not recognize tenant suits for maintenance violations under the ACC). *But see* Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511, 516 (N.D. Ill. 1991), *summ. judgment denied*, 824 F. Supp. 808 (N.D. Ill. 1993) (dismissing defendants' motion claiming tenants could not bring a cause of action under the ACC as they were not third party beneficiaries); Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 323 (D. Conn. 1988) (holding that tenants should be considered third party beneficiaries and should have an enforceable right against a PHA to comply with the ACC). The lower federal courts remain divided over the definition of eligible third party beneficiaries. *Velez*, 850 F. Supp. at 1277 n.14.

ants would have no recourse against PHAs that failed to maintain and consequently demolished their buildings.[170]

HUD's final argument in the proposed rule is that reading § 1437p(d) to encompass actions for de facto demolition would nullify § 1437p(a).[171] This section provides that HUD should not grant an application for approval unless the project is obsolete and uninhabitable.[172] If de facto demolition is prohibited under this statute, HUD argues, then the circumstances outlined in § 1437p(a) will never occur.[173] This reasoning is flawed because § 1437p(a) describes circumstances where the project is obsolete due to "physical condition, location, or other factors."[174] There will be circumstances that fall under these categories that are not a result of a PHA's action or inaction.[175]

3. HUD's Interpretation of an Intent Provision

HUD reads the language of § 1437p(d) prohibiting "any action to demolish"[176] to imply a plan to demolish with a "nexus" between the words action and demolish.[177] Webster's Ninth New Collegiate Dictionary de-

170. *See supra* note 169 (discussing the eligibility of residents to sue as third party beneficiaries). If decisions as to who may bring a cause of action under the ACC continue to follow the *Velez* court's ruling, § 1437p(d) will be the only method by which tenants may enforce the maintenance requirements.

171. Final Demolition Rule, *supra* note 24, at 58,785 (arguing that § 1437p(a) does not become relevant until the housing project is obsolete, unusable for housing purposes and that no amount of rehabilitation will remedy the problems). By allowing § 1437p(d) to include de facto demolition, HUD reasoned that buildings would not reach the state at which § 1437p(a) is relevant. *Id.* Therefore, this interpretation of § 1437p(d) would nullify § 1437p(a). *Id.*

172. 42 U.S.C. § 1437p(a) (1988 & Supp. IV 1992).

173. *See* Final Demolition Rule, *supra* note 24, at 58,785. Yet, HUD failed to acknowledge the congressional intent of preserving and maintaining current housing stock. *Id.*; *see supra* note 70 (explaining that Congress wanted to preserve and add to the number of housing units available and allow tenants the means to prevent the unnecessary demolition of the units). Therefore, if § 1437p(d) were to eliminate the need for § 1437p(a) by preventing de facto demolition, then arguably it would further congressional intent. *But see infra* note 175 and accompanying text (noting that § 1437p(a) covers instances other than de facto demolition).

174. 42 U.S.C. § 1437p(a)(1); *see supra* note 14 (quoting § 1437p(a)(1)).

175. *E.g.*, Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (revealing that the PHA's application for demolition was based on tenants' complaints about a recently built highway overpass that forced the PHA to vacate the units).

176. 42 U.S.C. § 1437p(d) (1988 & Supp. IV. 1992). The language of the provision states that "[a] public housing agency shall not take any action to demolish or dispose of a public housing project or a portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in subsections (a) and (b) of this section." *Id.*

177. Brief for Defendant, HUD, *supra* note 37, at 20.

fines "plan" as "a method for achieving an end" and involves a mental element.[178] HUD has asserted that the "plan" is a plan to demolish and thus, the mental element of intent applies strictly to demolition.[179] Therefore, according to HUD, § 1437p(d) does not apply when a PHA vacates units with the intent to renovate.[180] Since not all PHAs will announce their intention to demolish by submitting an application to HUD, plaintiffs will be forced to prove intent by the totality of the circumstances and to prove that demolition was a motivating factor behind a PHA's actions or negligence.[181]

HUD reasoned that a PHA's failure to maintain the units alone would not trigger a violation of the statute.[182] It based this conclusion, in part, on Congress's stated intention in enacting § 1437p(d), which was to correct the erroneous decision announced in *Edwards*.[183] In *Edwards*, the PHA had submitted an application for demolition.[184] Since the de facto demolition occurred while an application for demolition was awaiting approval, HUD read the 1987 amendment to pertain only to violations occurring under the same circumstances, those where the PHA had an intent to demolish.[185]

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178. *Id.*

179. *Id.* (offering an example of a PHA purposefully leaving units vacant with the knowledge that they are slated to be modernized, and reasoning that this is not a "plan" that has the intent of demolition). *See also Gomez*, 805 F. Supp. at 1375. In *Gomez*, the defendant PHA acknowledged that it purposefully left units vacant because they were to be demolished. *Id.* The PHA argued that it did not allow the vacancies to occur with the intent of having the units fall into a state of disrepair and therefore warrant vacancy, but rather the units were left vacant *after* demolition had been approved. *Id.*

180. Brief for Defendant, HUD, *supra* note 37, at 20; *see also Gomez*, 805 F. Supp. at 1375 (holding that there was no violation of the statute because the actions were not taken as part of a plan to further the de facto demolition).

181. Final Demolition Rule, *supra* note 24, at 58,785 (specifying HUD's interpretation of the plaintiff's burden of proof in a cause of action under § 1437p(d)). For a discussion of what elements might be needed to prove an action for de facto demolition, see *supra* note 123.

182. Final Demolition Rule, *supra* note 24, at 58,784.

183. H.R. CONF. REP. No. 426, *supra* note 68, at 172, *reprinted in* 1987 U.S.C.C.A.N. at 3469 (stating that the *Edwards* decision prompted the enactment of § 1437p(d)).

184. Edwards v. District of Columbia, 821 F.2d 651, 653 (D.C. Cir. 1987). In *Edwards*, the PHA submitted an application to HUD initially to demolish 28, but ultimately 112, units in the Fort Dupont housing project. *Id.* *See also supra* notes 62-66 and accompanying text (discussing the *Edwards* case in more detail).

185. Final Demolition Rule, *supra* note 24, at 58,784-85 (concluding that, because the PHA was waiting for demolition approval, the PHA was acting with the *intent* of demolition by allowing vacancies to occur). HUD further stated that a PHA's failure to repair or maintain units, without being linked to an application for demolition, would not be actionable under the statute because such action would lack the necessary intent to demolish. *Id.* at 58,784. *But see* Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert.*

Counsel for the Chester Housing Authority (Chester HA), as co-defendant with HUD in *Velez v. Cisneros*, supported HUD's interpretation of an intent requirement by relying on the *Edwards* dissent.[186] Since Congress specifically noted that § 1437p(d) was written to correct the statutory misinterpretation in *Edwards*,[187] reliance on the *Edwards* opinions is particularly relevant. In discarding the majority's interpretation that denied a cause of action, Congress seemed to be embracing the *Edwards* dissent's position.[188]

The Chester HA, meanwhile, asserted that the *Edwards* dissent's opinion, using words that connote a plan or scheme to explain de facto demolition, gave credence to HUD's intent requirement.[189] As further support of an intent requirement, the *Edwards* dissent argued that, at trial, the plaintiffs would have difficulty proving a "deliberate scheme to evade federal law."[190] By using these words, the dissent seemed to incorporate the necessity of proving a conscious strategy in an action for de facto demolition.[191]

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denied, 115 S.Ct. 198 (1994) (explaining that the court sought by a preponderance of the evidence that the PHA had a policy of allowing extended vacancies or deterioration beyond the fact that the EPHA had applied for demolition); *see also supra* text accompanying notes 111-18 (explaining the *Gomez* court's rationale that absent an intent to demolish, the PHA's actions in neglecting the housing units and allowing the units to stand vacant while an application for demolition was pending did not constitute de facto demolition).

186. Brief for Defendant, Chester HA, *supra* note 127, at 11. It is interesting to note that both the defendants and the plaintiffs in this case relied on the *Edwards* dissent to bolster their case. *See infra* note 189 and accompanying text (explaining the defendants' use of the *Edwards* dissent's exact language); *supra* note 150 and accompanying text (noting the plaintiffs' reliance on the dissenting opinion in *Edwards*).

187. H.R. CONF. REP. No. 426, *supra* note 68, at 172, *reprinted in* 1987 U.S.C.C.A.N. at 3469 (specifically stating that § 1437p(d) was "intended to correct. . .[the *Edwards* court's] erroneous interpretation").

188. *See also* Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (holding that the *Edwards* dissent provided a more convincing interpretation of the rights available under § 1437p).

189. *See* Brief for Defendant, Chester HA, *supra* note 127, at 11; *see also Edwards*, 821 F.2d at 669-70 (Will, J., dissenting). Judge Will stated that " '[d]e facto demolition,' as the plaintiffs use it, is simply a shorthand form denoting the deliberate abandonment of public housing units to render them uninhabitable and therefore subject to demolition." *Id.* at 669. The judge continued, "§ 1437p requires a PHA to obtain HUD approval before it may engage in a concerted course of conduct designed to destroy public housing units whether by actual demolition or by rendering them uninhabitable." *Id.* at 670. Consequently, HUD and Chester HA interpreted this language to require proof of an intent to demolish before neglect and abandonment could cause a violation under § 1437p(d). *See* Brief for Defendant, Chester HA, *supra* note 127, at 11.

190. *Edwards*, 821 F.2d at 671 (Will, J., dissenting) (expressing concern over the difficulty of proving de facto demolition because plaintiffs would have to prove a deliberate scheme).

191. *See id.*

The question in *Edwards*, however, was whether to provide a cause of action for de facto demolition under § 1437p,[192] rather than how to define the specific elements of that cause of action.[193] The dissent looked to a Senate Report to support its findings that no distinction should be made between actual and de facto demolition.[194] Furthermore, the dissent determined that at the crux of § 1437p there was a preference to preserve existing housing units however possible.[195]

While HUD and Chester HA, defendants in the *Velez* case, focused on some specific words in the *Edwards* dissent to make a case for intent, the dissent emphasized the more fundamental argument of allowing de facto demolition to be included as a cause of action. The *Edwards* dissent's language of a scheme may be shown to favor an intent requirement, however, the opinion pointed to the need to permit a cause of action to prevent the results of de facto demolition,[196] which an intent provision might inhibit.[197]

HUD also has argued that if Congress wanted to allow an action for failure to properly maintain the units, it could have done so in the 1987 amendment, as Congress was familiar with HUD's razing definition.[198] However, in HUD's proposed rule, HUD added language stating that a PHA may not take any action *intended* to further demolition.[199] Congress also could have added the word intended, but instead, left the language open to cover "any action" that would result in the deterioration of housing units.[200]

192. *Id.* at 665 (Will, J., dissenting) (determining that the only issue was whether the plaintiffs' allegations established a cause of action under 42 U.S.C. § 1437p).

193. *See* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817 (N.D. Ill. 1993) (deciding that on the motion for summary judgment, the court declined to articulate a standard of proof or the necessary elements in a de facto demolition suit, preferring to let that issue be resolved at trial).

194. *Edwards*, 821 F.2d at 669 (Will, J., dissenting).

195. *Id.* (citing S. REP., No. 142, 98th Cong., 1st Sess. 38 (1983) *reprinted in* 1983 U.S.C.C.A.N. 1768, 1809, which stated that the goal of § 1437p(d) was to preserve and maintain available housing).

196. *See Edwards*, 821 F.2d. at 670 (Will, J., dissenting).

197. *See id.* at 670-71 (Will, J., dissenting). While the dissent advocated the inclusion of de facto demolition in the definition of demolition, thereby allowing a tenant cause of action for de facto demolition, it also acknowledged that it would be very difficult for plaintiffs to prove that a PHA intended to evade the statutory requirements by engaging in de facto demolition. *Id.*

198. Brief for Defendant, HUD, *supra* note 37, at 24-25. For the language of HUD's regulation defining demolition as razing, see 24 C.F.R. § 970.3 (1994).

199. Final Demolition Rule, *supra* note 24, at 58,784-85 (emphasis added).

200. *See supra* note 18 (quoting the language of § 1437p(d)).

B. Tenant Groups' Opposition to the Rule

Following HUD's proposed rule, tenant reaction, and subsequent withdrawal of the rule, HUD convened a meeting of interested tenant groups and housing authority representatives to discuss the drafting of a final rule.[201] Arguing against the proposed rule, tenant groups contended that the congressional intent of the words "any action" included a broad range of actions.[202] They supported this interpretation by focusing on the dissent's view in *Edwards*,[203] arguing that Congress, in prohibiting a certain result, failed to specify a method of implementation.[204] Rather, the National Housing Law Project (NHLP) agreed with the *Edwards* dissent's view that unauthorized demolition constitutes a statutory violation, whether by bulldozing or abandonment and neglect.[205]

The NHLP further asserted that, in light of the *Edwards* dissent's interpretation of the scope of the statute, courts should focus on the result of defendants' actions rather than plaintiffs' ability to establish intent.[206] The NHLP explained that a test that ignores the *results* of defendants' actions and focuses only on intent, would foster further deterioration of public housing.[207] A test that delays enforcement until the PHA applies to HUD for demolition approval results in a development that is often irreparably deteriorated, leaving demolition as the only option.[208] Therefore, the intent provision is contrary to the goals of the statute because this delay permits the deterioration of a housing development to continue

Impact vs intent

201. Letter from Joseph Shuldiner, Assistant Secretary for Public and Indian Housing, HUD, to Barry Philpott, Co-Chair, NAHRO Modernization Group (Apr. 1994) (on file with CATHOLIC UNIVERSITY LAW REVIEW) [hereinafter Shuldiner Letter]. The letter is a sample of an invitation to an April 15, 1994 meeting convened and held at HUD. *Id.* The meeting followed the withdrawal of the final rule and was intended to solicit recommendations from housing authorities and groups in order to develop "a proposed rulemaking" for § 1437p(d). *Id.*

202. NHLP Paper, *supra* note 33, at 2-3 (citing the dissent's conclusion in Edwards v. District of Columbia, 821 F.2d 651, 670 (D.C. Cir. 1987) (Will, J., dissenting) that Congress wanted to prohibit the destruction of housing by any method).

203. *Edwards*, 821 F.2d at 670 (Will, J., dissenting) (reasoning that Congress wanted to prohibit the destruction of housing units if the PHA had not complied with the statutory requirements).

204. *Id.* at 669 (Will, J., dissenting).

205. NHLP Paper, *supra* note 33, at 2-3.

206. *Id.* at 3 (calling this focus "an effects test" and arguing that the focus should be on the effects of the action and not on the type of action taken).

207. *Id.* at 3-4.

208. *Id.*; *see* Tinsley v. Kemp, 750 F. Supp. 1001, 1007 (W.D. Mo. 1990) (alleging that the PHA's neglect left actual demolition as the only possible remedy); PUBLIC HOUSING IN PERIL, *supra* note 1, at 72-73 (calling this type of action "[d]ecision-making after the fact" because HUD makes the approval decision only *after* the PHA has already allowed the project to deteriorate); *see also supra* note 20 (criticizing the problem of HUD's nullified decision-making power).

before actual demolition approval is granted.[209] Thus, the intent requirement effectively prevents tenants from obtaining injunctive relief as a prophylactic safeguard against de facto demolition. While tenants could file suit and attempt to prove a PHA's intent to demolish in the absence of an application for demolition, this task would be extremely difficult.[210]

One tenant group organization believes that a more effective way of enforcing the statute would be to take action *before* de facto demolition occurs and renders a building unsalvageable.[211] The NHLP argued that the rule should institute a device whereby tenants can ensure that PHAs are held accountable for actions leading to deteriorated housing units.[212] This group reasoned that HUD officials were unable to provide the oversight necessary to prevent PHAs from presiding over deteriorating conditions, either by their action or neglect.[213] The group views tenants, not HUD officials, as the most effective monitors of enforcement.[214]

The group envisions the use of litigation as the primary § 1437p(d) enforcement mechanism against de facto demolition.[215] In light of success-

Accountability for Housing Authorities is needed in the early stages of Defacto Demolition to preserve supply of low-income housing

209. *See* NHLP Paper, *supra* note 33, at 3 (commenting that allowing only intentional demolitions to be covered under the statute would frustrate the purpose behind the enactment of § 1437p(d)).

210. *See* Attorney Interview, *supra* note 135 (explaining that, although the court in *Velez v. Cisneros*, 850 F. Supp. 1257, 1273 (E.D. Pa. 1994) found an intent to demolish through negligence, the plaintiffs would struggle to prove that intent at trial).

211. *See* Letter from Jon M. Gutzman, Executive Director, Public Housing Agency of St. Paul, MN, to Sunia Zaterman, Executive Director, Council of Large Public Housing Authorities (Apr. 12, 1994) (on file with CATHOLIC UNIVERSITY LAW REVIEW) (advocating that action be taken at the earliest opportunity to prevent de facto demolition) [hereinafter Gutzman Letter]. This position represents the tenant groups' argument for early intervention. NHLP Paper, *supra* note 33, at 4.

212. NHLP Paper, *supra* note 33, at 4 (advocating a mechanism to enforce PHA accountability).

213. *Id.* (indicating that HUD has limited staff assigned to the job of overseeing PHAs and "historically" has failed to hold PHAs liable for ineffective management and deteriorated conditions).

214. *See id.* (noting the success of "tenant enforcement efforts" in cases of § 1437p(d) litigation). Tenant involvement in maintenance, management, security, and other services in public housing projects is not a new idea. *See* OFFICE OF RESIDENT INITIATIVES, HUD, RESIDENT MANAGEMENT SUCCESS STORIES . . . PUBLIC/PRIVATE PARTNERSHIPS FOR EMPOWERMENT 4 (Apr. 9, 1993) (including a success story about the Cochran Gardens housing project in St. Louis, Mo. which began organizing tenants in the early 1970s for roles in management, janitorial services and catering services) [hereinafter SUCCESS STORIES]; *see also* A DECENT PLACE TO LIVE, *supra* note 148, at 38 (complimenting HUD and PHAs on improved tenant involvement and urging these groups to continue promoting tenant activity in recognizing project needs, prioritizing project improvements and establishing tenant selection criteria).

215. NHLP Paper, *supra* note 33, at 4 (concluding that litigation has worked in challenging maintenance violations); *see supra* notes 169-70 and accompanying text (discussing the uncertainty of bringing suit under the ACC and the necessity of using § 1437p to bring a cause of action for such problems).

ful tenant litigation against PHAs in the past, the group reasoned that HUD regulations should facilitate rather than hinder the effectiveness of this device.[216] This argument encourages filing suit against a PHA before significant deterioration has taken place.[217] Yet, litigation is more likely to be successful when conditions are so measurably deteriorated that the court can make an accurate determination that the PHA has violated the statute.[218] In effect, a successful suit could be brought before an application for demolition is submitted, but after a substantial, and perhaps irreversible, amount of damage has been done.[219] The weakness of this argument is that HUD, in promulgating the rule, was unwilling to strengthen a litigation device that has been used against it so often.[220]

This tenant group also criticized HUD for proposing the rule without providing an opportunity for public comment.[221] It believed that HUD incorporated its litigation position of requiring proof of intent into its

216. *See* NHLP Paper, *supra* note 33, at 4; *see also supra* note 43 (discussing the impact on the Chicago Housing Authority of the Chicago Legal Assistance Foundation's continuing threat of litigation).

217. *See* Gutzman Letter, *supra* note 211 (advocating that measures should be taken at the earliest possible time to prevent de facto demolition before it happens); *see* PUBLIC HOUSING IN PERIL, *supra* note 1, at 73 (commenting that before the 1987 amendment and even in 1988 there was no formal way for HUD to step in and counter PHA actions which caused a project to deteriorate).

218. *See* Velez v. Cisneros, 850 F. Supp. 1257, 1274-75 (E.D. Pa. 1994) (stating that, while a housing project may be uninhabitable because it "is not [legally] decent, safe, or sanitary," it is not "necessarily functionally demolished"). To prove demolition, plaintiffs would have to establish the existence of hazardous conditions which threaten the lives of the tenants such as lead paint, asbestos or fire safety violations which threaten the lives of the tenants. *Id.* Yet, the court in *Velez* held that, despite the fact that not all the units were "demolished," plaintiffs could still be successful because they had been harmed by the actions of the housing authority and HUD. *Id.* The court read the legislative history to allow suits if the tenants were "threatened" and found that the vacancies and poor conditions lead to this result. *Id.*

219. *See* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817 (N.D. Ill. 1993) (alleging that although the PHA did not formally apply for demolition approval, the PHA constructively demolished the housing project by failing to make repairs and allowing the project to exist in a deteriorated state); *see* PUBLIC HOUSING IN PERIL, *supra* note 1, at 73 (noting that PHAs rarely apply for demolition when the project is well-maintained and in good condition).

220. *See* Legal Assistance Foundation Interview, *supra* note 28 (commenting on the withdrawn rule and HUD's losses in recent lawsuits). HUD is often named as a co-defendant because it must enforce the statute. *See Horner*, 824 F. Supp. at 809 (filing class action suit against Chicago Housing Authority and HUD); *Velez*, 850 F. Supp. at 1259 (filing class action suit against Chester Housing Authority and HUD). PHAs also often demand that HUD join in suits to ensure satisfaction of any judgment. *E.g.*, Legal Assistance Foundation Interview, *supra* note 28 (describing that while the $200 million settlement package offered by the Chicago Housing Authority was enticing, it needed the financial backing of HUD before the tenants would seriously consider it).

221. NHLP Paper, *supra* note 33, at 5.

proposed rule without providing for public comment to buttress its chances in future litigation.[222] HUD has not acknowledged this tactic and instead has maintained that this proposed rule served to clarify and implement § 1437p(d).[223] Nonetheless, an intent provision would ease HUD's task in litigating claims alleging de facto demolition.[224] Following the withdrawal of the proposed rule, HUD convened a meeting to discuss future rulemaking on this issue.[225]

C. *Alternative Solutions Proposed by Tenant and PHA Organizations*

While the proposed rule was withdrawn, HUD has taken steps toward proposing a new rulemaking to implement § 1437p(d).[226] In so doing, HUD's goal is to ensure that the maximum number of housing units remain available, while simultaneously protecting tenants from any unsafe or unsanitary conditions.[227]

1. *HUD's Preliminary Proposal*

HUD's implementation strategy was to propose the development of specific criteria to determine whether § 1437p(d) had been violated.[228] Suggested criteria included high vacancy rates over a six to nine month period, the length of response time to maintenance problems, and the inadequacy of funds spent on maintenance as compared with other hous-

high vacancy rates over a 6 to 9 month period are a sign of de-facto Demolition

222. *Id.* The NHLP believes that because HUD has lost several times in court when defending its position that de facto demolition should not be included under the statute and that the statute only applies to intentional demolition, HUD used its rulemaking powers to implement an unsuccessful litigating position. *Id.*

223. *See* Final Demolition Rule, *supra* note 24, at 58,784.

224. *See* Attorney Interview, *supra* note 135 (discussing the difficulty facing tenants who seek to prove intent).

225. *See* Shuldiner Letter, *supra* note 201 (inviting relevant housing groups to a meeting at HUD to discuss future rulemaking).

226. *See id.* (informing various housing groups and authorities about the meeting and asking them for their input into HUD's new rulemaking).

227. *Id.* (stating HUD's goal in implementing § 1437p(d)).

228. *Id.* (listing several of the acknowledged problems for which plaintiffs have been filing suit); *see* Tinsley v. Kemp, 750 F. Supp. 1001, 1003 (W.D. Mo. 1990) (complaining of vacant units that have been left unsecured and uninhabitable thereby attracting looters and drug dealers; mounds of trash; rats and other vermin in the apartments; and broken or missing windows, frames, counter tops and appliances).

ing projects.[229] The issue of intent was noticeably absent from HUD's list of proposed criteria.[230]

Intent is a distraction from the impact of De facto Demolition

HUD also proposed a year-long grace period to afford PHAs an opportunity to remedy deteriorated housing conditions.[231] If the PHA and HUD determined that the units were salvageable, the PHA could correct the problems and return the units to the rent rolls.[232] If, however, the units were determined to be non-viable, the PHA could apply for demolition.[233] At the end of the grace period, HUD would meet with the PHA to determine whether the housing authority had complied with § 1437p(d)'s requirements.[234] HUD's proposal, however, fails to specify the conditions that would trigger the grace period.[235] Presumably, HUD would react to violations under § 1437p(d) and institute the year-long grace period to establish a deadline by which the PHA would have to remedy the problems.[236]

Early intervention is essential to disrupting De-facto Demolition

In implementing § 1437p, HUD regulations should seek to preserve available housing units and remedy dangerous and unsanitary conditions.[237] HUD could enact the most effective rule by taking action to prevent the large number of public housing units that are currently viable from becoming distressed.[238] Such a rule would satisfy both statutory

229. Shuldiner Letter, *supra* note 201; *see also* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 817 (N.D. Ill. 1993)(suggesting a standard of proof for finding violations under § 1437p). Criteria included a showing that defendants' actions were likely to result in active or de facto demolition or that defendants' action had caused de facto demolition through evidence of high vacancies or a high number of uninhabitable units. *Id.*; *see also supra* note 123 (discussing possible criteria that a court would look to to determine de facto demolition).

230. Shuldiner Letter, *supra* note 201 (lacking any reference to an intent provision).

231. *Id.* (anticipating that this grace period, during which PHAs would take required steps toward rehabilitation or demolition, would deter PHAs from boarding up units and allowing them to deteriorate).

232. *Id.*

233. *Id.* (presuming that by having to submit an application for demolition, this would prevent PHAs from boarding up the dilapidated units).

234. *Id.*

235. *See id.* (proposing the adoption of a grace period but not defining how and when it would be activated).

236. *See* Gutzman Letter, *supra* note 211 (criticizing HUD's proposal because it focused on "violation-based regulations" rather than focusing on what can be done before violations occur).

237. *See* Harner, *supra* note 55, at 915 n.2 (explaining the policy goals of 42 U.S.C. § 1437 (1982)).

238. *See* Schill, *supra* note 7, at 498-99. Professor Schill urged that cost-effective repairs be made to prevent housing units from becoming distressed. *Id.* He then concluded that once the cost of renovations exceeds the cost of new development, the projects should be demolished and replaced. *Id.* at 540-41.

policy and congressional goals.[239] HUD's proposal set out a reasonable goal, but its method of implementation would allow for substantial violations to occur before any solutions are determined.[240]

2. A Public Housing Representative's Suggestion

While HUD's idea may allow the projects to deteriorate, a comment sent by a meeting invitee, a member of the Council of Large Public Housing Authorities (CLPHA), suggested that the regulation should seek to determine the earliest possible action to prevent a slide towards deterioration.[241] CLPHA's proposal was to involve HUD's field office staff in monitoring the status of housing authority units.[242] Under this approach, HUD would review units that remained vacant for a designated period of time to determine whether rehabilitation or demolition would provide the better solution.[243]

CLPHA's proposal urged the confrontation of problems at the outset before significant deterioration, yet its method does not promote this goal. The method is flawed because HUD's field office would monitor the units by relying on the housing authority to apprise it of status changes.[244] Since a PHA's funding is often contingent upon maintaining vacancy rates below a certain level,[245] a PHA lacks a strong incentive to inform HUD of increases in its vacancy rates. Additionally, the PHA knows that disclosure of this information to HUD will result in increased governmental oversight.[246] Although CLPHA's proposal appropriately

239. *See* H.R. REP. No. 122(I), *supra* note 70, at 25-26, *reprinted in* 1987 U.S.C.C.A.N. at 3341-42 (explaining the congressional goals in enacting § 1437p(d)).

240. *See* Gutzman Letter, *supra* note 211 and accompanying text (suggesting that, rather than waiting until the violations occur, the focus should be on preventing such occurrence at the outset).

241. *See id.* (supporting a proactive response).

242. *Id.*

243. *Id.* The proposal suggested the development of a database of all of the housing authority's units and assigning each unit a certain status based on occupancy such as "occupied, vacant, deprogrammed, etc." *Id.* Through this database, HUD's field office would be able to monitor each unit's status. *Id.*

244. *See id.* (suggesting the idea of a PHA/HUD partnership in monitoring the condition of housing projects).

245. Public Housing Management Assessment Program (PHMAP), 24 C.F.R. § 901.01(a)-(e) (1994). The PHMAP provides guidance and criteria by which to assess housing authorities' management, performance, and disabilities. § 901.01(a). PHAs that perform well are entitled to additional responsibility and flexibility. § 901.01(e); *see* § 901.10(b) (listing the indicators for assessing a PHA's management performance). The first indicator is vacancy and various grades are awarded based on percentage of vacant units. § 901.10(b)(1).

246. *See* PETERSON, *supra* note 1, at 37 (referring to excessive HUD regulation as "HUD's 'Regulatory Reign of Terror' " and describing how increased regulation stifles a PHA's creative ideas and solutions to improve conditions and services for its tenants).

suggested a joint strategy formulated by both the PHA and HUD, such cooperation most likely would not occur until substantial violations had taken place and the public housing project had greatly deteriorated.[247]

3. Incorporation of Existing Regulations

Of those invitees who submitted proposals, all agreed that they would prefer a minimum amount of additional regulations and believed that current regulations for other programs could be utilized.[248] Using regulations from other programs, the Housing Authority of Portland (HAP) suggested that a PHA should not submit an application for demolition unless the project was completely vacant.[249] Under this method, the PHA would submit the strategy for demolition in a five-year action plan but would maintain the units at Housing Quality Standards (HQS)[250] to prevent the occurrence of de facto demolition.[251]

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247. *See* Gutzman Letter, *supra* note 211 (explaining that a meeting would not take place until units had been vacant for a certain period of time). This vacancy period would allow looters, vagrants, drug dealers and gang members to enter the units, much to the detriment of the rest of the project. *See* Tinsley v. Kemp, 750 F. Supp. 1001, 1004 (W.D. Mo. 1990) (describing similar types of activities occurring in the Watkins Homes housing project due to the large number of vacancies).

248. *See* Letter from Barrett Philpott, Chair, NAHRO Modernization Group, to Joseph Shuldiner, Assistant Secretary for Public and Indian Housing, HUD (Apr. 8, 1994) (on file with CATHOLIC UNIVERSITY LAW REVIEW) [hereinafter Philpott Letter] (stating that a "minimum amount of 'new' regulations" would be necessary to implement § 1437p(d)); *cf.* Stacy Letter, *supra* note 20 (suggesting that a set of new criteria to monitor violations would be unnecessary).

249. Philpott Letter, *supra* note 248 (suggesting that this idea was at the crux of the proposal and would prevent the need to maintain the units while the demolition application was pending). Presumably, this application would be approved because there would be zero occupancy and, therefore, no need to maintain units while an application for demolition was pending. *Id.* HAP recognized, however, that if a PHA began to develop the idea of demolition while the unit was still partially occupied, the problem of maintenance would remain. *Id.*

250. 24 C.F.R. § 901.05q (1994) (defining HQS as Housing Quality Standards and indicating where the text of these standards may be found).

251. Philpott Letter, *supra* note 248 (proposing the use of CIAP (Comprehensive Improvement Assistance Program) or CGP (Comprehensive Grant Program) funds for the purpose of demolition). Specifically, CIAP funds are slated for modernization of public housing. Schill, *supra* note 7, at 522. Projects may obtain these funds if the modernization costs do not exceed 62.5% of their Total Development Costs (TDC). *Id.* TDC is measured by calculating the costs of planning, land purchase and construction of the housing project. *Id.* In 1987, the CGP was created to supply PHAs owning projects with 500 or more units with funds that could be used on expenses not exceeding over 90% of their TDC. *Id.* HUD created a third program, entitled the Major Reconstruction of Obsolete Programs (MROP), to supply PHAs with modernization funds. *Id.* Under this program HUD could grant funds to PHAs for the rehabilitation of obsolete projects. *Id.* at 522-23.

By suggesting the use of CIAP or CGP funds, HQS standards and the Public Housing Management Assessment Program (requiring that units be maintained according to HQS

The HAP proposal, however, fails to question why there would be a need for demolition if the units can be maintained at HQS.[252] If the PHA maintained these standards until just before submission of the application, there would be no reason for the project to be 100% vacant, since meeting the HQS standards is a strong indication of viability.[253]

Despite HUD's involvement of tenant groups in the rulemaking process, no concrete plan emerged from the April 15 meeting, leaving the issue of intent unresolved.[254] Demonstrating the unsettled nature of this issue, HUD's letter inviting participants outlined its goals for the implementation of § 1437p(d) and omitted mention of an intent provision.[255] Since an intent requirement would be in HUD's best interest,[256] it is unclear as to how this issue will be addressed in future rulemaking.[257]

Recent case law also has shown that the issue of intent remains far from settled. While the courts in *Henry Horner Mothers Guild v. Chicago Housing Authority* and *Velez v. Cisneros* have rejected intent as an ele-

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standards), HAP attempted to offer a means to avoid the creation of new regulations to implement § 1437p(d) by consolidating these three overlapping regulations. Philpott Letter, *supra*.

HAP's proposal is correct in its conclusion that zero occupancy would be a large factor weighing toward approval. *Cf.* Rejection Letter, *supra* note 20 (rejecting a PHA's application for partial demolition of the Henry Horner Annex and professing confusion as to why the PHA would apply to demolish the Henry Horner Annex when other projects under Chicago Housing Authority jurisdiction had a much higher vacancy rate). *See also* Ihejirika, *Horner Residents Fight for Home*, *supra* note 43 (reporting that critics of the PHA application could not understand why the Horner Annex was being targeted for demolition when Horner Homes and the Horner Extension had much higher vacancy rates); Maudlyne Ihejirika, *Horner Annex Residents Face 2-Year Housing Wait*, CHI. SUN-TIMES, Aug. 11, 1994, at 4 (commenting that many residents believed the Annex will be razed because it is located near the site of the 1996 Democratic National Convention).

252. *Cf.* 42 U.S.C. § 1437p(a)(1) (1988 & Supp. IV 1992) (mandating that HUD may approve demolition only if there is no reasonable plan of modifications that can be administered to restore the project to health).

253. *See* 24 C.F.R. § 901.10(b)(7) (1994) (describing one of the criterion for evaluation under the Public Housing Management Assessment Program (PHMAP) as the annual inspection of units including the percentage of units the PHA inspected using Housing Quality Standards).

254. *See* Housing Specialist Interview, *supra* note 33 (indicating that the meeting participants failed to agree on any formal plan).

255. Shuldiner Letter, *supra* note 201 (omitting any mention of an intent provision, and failing to expressly state that the provision had been discarded).

256. *See* Legal Assistance Foundation Interview, *supra* note 28 (postulating that HUD may have proposed the intent rule because of adverse verdicts in de facto demolition litigation); *see supra* notes 222-24 and accompanying text (discussing HUD's possible motive for including an intent provision).

257. Assistant General Counsel Interview, *supra* note 31 (explaining that no action had been taken on the rulemaking issue since the April, 1994 meeting and that HUD was still standing by its position).

ment of proof for de facto demolition,[258] the opposite decision in *Gomez v. Housing Authority* remains.[259] Yet, in addition to the question of intent, the elements of proof in an action for de facto demolition are also unclear. As an example, a recent District of Columbia Housing Authority statement explained that demolition encompassed only actual demolition.[260]

III. Stopping De Facto Demolition before It Starts: A Difficult Goal with Public Housing

Many public housing authorities view the current demolition rules as a "legal Catch-22."[261] Under certain circumstances, demolition may be the most cost-effective option. For example, some projects are so dilapidated that the costs of renovation and modernization could fund the cost of new homes.[262] Yet, to have an application for demolition approved, a PHA must meet, among other requirements, the prerequisite of being able to provide one-for-one housing replacement.[263] The catch is that the majority of HUD funding in this area is designated for rehabilitation and modernization, not for replacement.[264] While this requirement furthers the congressional intent of preserving the number of units available, many

258. *See* Henry Horner Mothers Guild v. Chicago Hous. Auth., 824 F. Supp. 808, 819 (N.D. Ill. 1993) (concluding that intent was not an essential element of a cause of action for de facto demolition); Velez v. Cisneros, 850 F. Supp. 1257, 1273 n.7 (E.D. Pa. 1994) (stating that the plaintiffs did not have to prove intent).

259. *See* Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992), *aff'd without op. sub nom.*, Gomez v. City of El Paso, 20 F.3d 1169 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 198 (1994) (holding that tenants had to prove that the PHA had a policy to precipitate de facto demolition by a preponderance of the evidence).

260. Serge F. Kovaleski, *D.C. Asks Judge to Defer Putting Housing Agency in Receivership*, Wash. Post, Sept. 28, 1994, at B7. In a motion to prevent District of Columbia Superior Court Judge Steffen W. Graae from placing the Department of Public and Assisted Housing into receivership, the District challenged Judge Graae's contention that the Authority's high vacancy rate constituted grounds for de facto demolition and a violation of federal law by arguing that the statute does not cover "inaction, omission or neglect." *Id.*

261. Marc Guidry, *Demolition Only Salvation for Desire Residents*, The Times-Picayune, Oct. 3, 1994, at B4. The article focused on the Housing Authority of New Orleans's Desire housing project which was built on an unsafe landfill with substandard materials; maintained an occupancy rate below 50%; was rodent, termite and sewage-infested; and endured substantial drug-related crime. *Id.* The Housing Authority argued that renovation was the only option because demolition required one-for-one replacement and the Housing Authority lacked the funds for such replacement. *Id.*

262. *Cf. id.* (stating that the cost of renovating one apartment in the Desire project was $66,000, which would be enough money to purchase a new home).

263. 42 U.S.C. § 1437p(b)(3) (1988 & Supp. IV 1992) (mandating that a PHA must have developed a plan to replace every demolished unit with an additional unit). For the text of § 1437p(b), see *supra* note 20.

264. Guidry, *supra* note 261, at B4 (reporting that while Congress requires PHAs to

housing authorities view it as extremely onerous.[265] In response, Congress began reviewing the one-for-one replacement requirement during its 1994 term, but failed to pass legislation that would have eliminated the rule.[266]

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replace all demolished units, Congress's major funding programs do not allocate funds for replacement, only for modernization).

265. *See* Stacy Letter, *supra* note 20 (asking HUD whether there is HUD or congressional support for changing the one-for-one replacement housing requirement); Gutzman Letter, *supra* note 211 (suggesting a process by which PHAs could raze projects that warranted demolition while keeping the land until replacement funds were allocated or vouchers issued).

The one-for-one replacement requirement was first introduced in 1979 and later codified in the Housing & Community Development Act of 1987 as § 1437p(b). PUBLIC HOUSING IN PERIL, *supra* note 1, at 79 n.170. In the House Banking, Finance and Urban Affairs Subcommittee's Report of 1987, House members stated that the purpose of the requirement was to mitigate the effects of a demolition on the tenants. H.R. REP. No. 122(I), *supra* note 70, at 25, *reprinted in* 1987 U.S.C.C.A.N. at 3341. The House members also determined that replacement housing could be accomplished through additional public housing units or "project-based subsidies," such as Section 8 vouchers. *Id.*

Section 8 housing was created under the Housing and Community Act of 1974, and codified at 42 U.S.C. § 1437f (1988). Green, *supra* note 47, at 695. This housing is owned by private parties who contract with a PHA to provide units to low-income families. *Id.* Generally, tenants are required to pay 30% of their income in rent and HUD subsidizes the difference between the tenant's rent and the fair market value. *Federally Assisted Housing: Expanding HUD's Options for Dealing with Physically Distressed Properties, Oct. 6, 1994: Testimony Before the Subcomm. on Employment, Housing and Aviation of the House Comm. on Government Operations*, 103d Cong., 2d Sess. 3 (1994) (Statement of Judy A. England-Joseph, Director, Housing and Community Development Issues, Resources, Community, and Economic Development Division, GAO) [hereinafter OPTIONS FOR DISTRESSED PROPERTIES]. Under the program, tenants receive vouchers that represent the fair market value of the property. Green, *supra* note 48, at 695. For a more in-depth look at costs associated with rehabilitation, see OPTIONS FOR DISTRESSED PROPERTIES 239. *See* H.R. REP. No. 122(I), *supra* note 70, at 25-26, *reprinted in* 1987 U.S.C.C.A.N. at 3341-42 (explaining the congressional goals in enacting § 1437p(d)). For an in-depth look the difference between the replacement housing and Section 8 vouchers, see generally Schill, *supra* note 7, at 526-40 (discussing the differences between these two alternatives for providing replacement housing).

The cost of replacement housing is often extremely high. Laurie Niles, *Housing Board OKs Fontenelle Replacements*, OMAHA WORLD-HERALD, Jan. 21, 1995, at 23 (sunrise edition). To demolish the Logan Fontenelle South public housing project would cost $2 million, whereas purchasing 194 replacement units would cost $17.2 million. *Id.*

As part of Secretary Cisneros's plan to reform HUD, the Clinton Administration is considering eliminating the requirement. Allie Shah, *CHA Starts to Topple Image as High-Rise Prison for Poor*, CHI. TRIB., Jan. 24, 1995, § 1, at 7. Nevertheless, if the replacement rule is abolished, advocates for low-income housing worry that this action will radically reduce the number of units available to low-income residents. *Id. See also* Ihejirika, *CHA Races GOP Ax on Replacement Plan*, *supra* note 20, at 15 (explaining that if the one-for-one replacement rule is abolished, the replacement housing slated to go to residents after the demolition of their projects will be in jeopardy).

266. Guidry, *supra* note 261, at B4 (reporting that a waiver of the rule was passed by the House of Representatives in the Housing and Community Development Act of 1994).

The difficulties of following the replacement rule may cause PHAs to hesitate in submitting an application for demolition.[267] Even worse, the PHAs may also continue to avoid routine repairs and maintenance due to excuses ranging from lack of funds to mismanagement.[268] This may cause a housing project to decline into a state of demolition and, absent adherence to statutory requirements, trigger a violation of § 1437p(d).[269] As the costs of replacement housing continue to be high and enforcement of § 1437p(d) remains unsettled,[270] PHAs continue to engage in de facto demolition.[271]

Due to many of the problems inherent in public housing,[272] effective enforcement of § 1437p(d) remains essential.[273] De facto demolition results in great harm to tenants and ought to be prevented.[274] Therefore,

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But see Flynn McRoberts, *Door Shut on Plan to Transform CHA*, CHI. TRIB., Oct. 5, 1994, § 1, at 1 (reporting that the legislation failed to pass the Senate having been pushed aside by the Republicans until after the November 1994 elections). In addition to the waiver, the Act would have allocated more funding for replacement housing and less for modernization. *Id.* at 14.

267. *E.g.*, McRoberts, *CHA Spending Choices: Safety or Maintenance*, *supra* note 96, at C1 (reporting that until the Chicago Housing Authority (CHA), constructs replacement housing and gets tenant approval for demolition, it would not obtain demolition approval from HUD, and that the CHA should be monitored to determine whether the federal funds allocated to the housing authority are being effectively spent on maintenance).

268. *E.g.*, Guidry, *supra* note 261, at B4 (reporting that funds were allocated to emergency inspections and repairs as well as security costs, as opposed to routine maintenance).

269. *See* Stacy Letter, *supra* note 20 (indicating that the replacement rule was one of the greatest deterrents in demolishing unsafe housing units). Before introducing his suggestions, Stacy requested that HUD consider changing the one-for-one replacement rule and argued that the rule forced PHAs to continue funding non-viable units when the funds could be better spent on viable units. *Id.*

270. *See* Kovaleski, *D.C. Asks Judge to Defer Putting Housing Authority in Receivership*, *supra* note 260, at B7 (highlighting that the definition of de facto demolition continues to be unclear).

271. *See also* Steve Bates, *The Berg Still Mired in Debate*, WASH. POST, Dec. 8, 1994, at Va. 1 (reporting on the contentious debate in Alexandria, Virginia about whether to demolish the Old Town public housing project and construct new homes on the site or whether to rehabilitate the current project).

272. *See* PETERSON, *supra* note 1, at 36 (describing problems endemic to public housing in the 1990s).

273. *See* McRoberts, *CHA Spending Choices: Safety or Maintenance*, *supra* note 96, at C1 (describing many of the funding problems yet reporting that funds must still be spent on routine maintenance); *see also* McRoberts, *Door Shut on Plan to Transform CHA*, *supra* note 266, at 1 (reporting that until the Chicago Housing Authority receives funds for demolition, it will have to continue to budget for maintenance costs). These articles show that funding problems make it difficult for housing authorities to make necessary repairs and, without the requirements of § 1437p(d), there may be numerous instances of de facto demolition.

274. *See* Maudlyne Ihejirika, *No Money and No Repairs; Rundown Units Stand Empty As Thousands Wait for Homes*, CHI. SUN-TIMES, July 5, 1994, at 6 (illustrating the disastrous effects of vacancy including vandalism, gang activity, drug dealing, and prostitution).

after the withdrawal of HUD's final rule, the question remains as to how to best implement § 1437p(d) to accomplish the statutory policy goals[275] and to avoid imposing unnecessary burdens on PHAs or tenants.

HUD's proposed rule requiring a showing of intent is an ineffective and overly burdensome means and fails to comport with the legislative history.[276] While the court in *Velez v. Cisneros* found that there was a sufficient showing of negligence and a high number of vacancies to establish that de facto demolition had occurred,[277] plaintiffs' counsel admitted that she probably could not have proven the Chester Housing Authority's intent to demolish.[278] An intent requirement would make it more difficult to bring a successful suit and may discourage tenants from doing so,[279] ultimately frustrating the implementation of § 1437p(d),[280] and rendering the statute toothless.

Additionally, § 1437p(d) litigation has been the most effective means for residents to halt the deterioration of their living conditions.[281] While the ACC requires a PHA to maintain its units,[282] tenants have no cause of action to enforce these provisions.[283] So long as § 1437p(d) remains

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275. Harner, *supra* note 55, at 915 n.2 (citing 42 U.S.C. § 1437 (1982) and noting the statute's policy goals to be "assist[ing] the several States . . . to remedy the unsafe and unsanitary. . . dwellings for families of lower income and . . . to vest in local public housing authorities the maximum amount of responsibility . . .").

276. *See generally supra* notes 67-70 and accompanying text (explaining the legislative history of § 1437p(d)). The legislative history makes clear that Congress wanted to maintain available housing and specified that the units were to be demolished only if there was no hope of their rehabilitation. *See* H.R. REP. No. 122(I), *supra* note 70, at 25-56, *reprinted in* 1987 U.S.C.C.A.N. at 3341-42. Yet, an intent provision would make this preservation more difficult as plaintiffs would have a more onerous burden of proof. *See* Edwards v. District of Columbia, 821 F.2d 651, 670 (D.C. Cir. 1987) (Will, J., dissenting) (noting that the plaintiffs would have a difficult time proving that the local government had engaged in a plan to circumvent the statute).

277. Velez v. Cisneros, 850 F. Supp. 1257, 1273 (E.D. Pa. 1994) (finding that the plaintiffs were successful in proving intent although it was not a required element of the cause of action).

278. Attorney Interview, *supra* note 137 (commenting on the intent provision and Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994)).

279. *See supra* note 276 (discussing the difficulties the intent provision would create for plaintiffs).

280. *Cf. Velez*, 850 F. Supp. at 1273 n.7 (finding that, because the congressional goal was to preserve the number of units available, it was irrelevant whether the PHA demolished the project through intentional or unintentional means, since either method would violate Congress's intent).

281. NHLP Paper, *supra* note 33, at 4 (explaining the necessity of keeping § 1437p(d) as workable as possible because it has been an effective litigation tool).

282. 42 U.S.C. § 1437c (j)(1)(B)(1) (1988 & Supp. IV 1992) (requiring that funds shall be allocated only if the public housing is maintained according to prescribed standards).

283. *Velez*, 850 F. Supp. at 1276-77 (holding that nothing in the ACC allows a plaintiff to bring a cause of action under the ACC unless that plaintiff is a bondholder or the PHA);

the only effective enforcement measure that tenants may utilize to challenge deteriorated conditions, its viability should not be undermined by the imposition of an intent provision.[284]

As an alternative, HUD could use existing regulations pertaining to demolition to implement the statute.[285] For example, prior to demolition, a PHA is required to develop its application in consultation with tenants.[286] Meaningful tenant consultation should occur before the PHA develops a plan for demolition to permit the discussion of possible alternatives or to plan for replacement housing.[287] In fact, because meaningful tenant consultation often prevents de facto demolition, it should occur regardless of whether the PHA intends to demolish the housing development.[288]

Resident initiatives are one of the criteria that HUD uses to evaluate PHAs under the Public Housing Management Assessment Program (PHMAP).[289] The goal of this factor is to encourage partnerships between the PHA and the residents to develop safe, sanitary, drug-free units that are viable and allow tenants to become more self-sufficient.[290] HUD then evaluates whether the PHA has developed and encouraged policies to promote safety; including reducing drug activities, resident management, self-sufficiency, and homeownership.[291]

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see also supra notes 169-70 and accompanying text (discussing the standing tenants have to sue under the ACC).

284. *See* NHLP Paper, *supra* note 33, at 4 (explaining the effectiveness of § 1437p(d) in actions for maintenance, neglect, and inaction).

285. *See* Philpott Letter, *supra* note 248 (suggesting that existing regulations should be sufficient).

286. 42 U.S.C. § 1437p(b) (1982).

287. Krislov, *supra* note 15, at 1747-48, 1752-53 (finding that meaningful tenant consultation does not occur and asserting that communication between tenant groups and management can help to increase tenant support for an eventual demolition). Krislov defines meaningful tenant consultation as informed involvement by tenants in a proposed demolition or sale that allows tenants to suggest alternatives and to participate in future planning. *Id.* at 1747.

288. *See* PETERSON, *supra* note 1, at 37-38 (discussing ways that public housing can be improved, including participation on resident councils).

289. 24 C.F.R. § 901.10(b)(11) (1994).

290. *Id.*

291. *Id.* To gain a grade of "A" in this category, PHAs must show that there is substantial improvement in three areas at one or more developments. *Id.* at § 901.10(b)(i). Conversely, the grades decrease as the amount of activity decreases. *Id.* at (i)-(vi).

PHAs could work toward increasing tenant involvement in the projects[292] by building on the PHMAP criteria.[293] The goal would be to encourage tenant oversight of maintenance problems, by alerting the PHAs when there are problems and by establishing a more efficient system of response on the part of the PHAs, as well as training tenants to remedy simple maintenance problems.[294]

The goal of § 1437p(d) is to prevent any action that results in demolition or disposition in order to preserve the number of available units.[295] Instead of waiting for violations to occur, HUD could incorporate ex-

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292. Active resident involvement is already a common feature of many housing projects across the country. *See generally* OFFICE OF RESIDENT INITIATIVES, HUD, RESIDENT INITIATIVES: EXAMPLES OF POLICIES AND PROGRAMS (Apr. 1992) [hereinafter INITIATIVES]. Much of this tenant involvement is in the form of resident management. *Id.* at 25. Resident management is a plan through which residents of public housing projects take over part or all of the PHA's management responsibilities. *Id.* Resident Management Corporations (RMC) provide management services often encompassing security, child care, employment opportunities and medical services. *Id.*

HUD's involvement with RMCs began in 1975 with the National Tenant Management Demonstration, and in 1987, Congress passed § 20 as part of the Housing and Community Development Act of 1987. ICF INC., OFFICE OF POLICY DEVELOPMENT AND RESEARCH, HUD, REPORT ON EMERGING RESIDENT MANAGEMENT CORPORATIONS IN PUBLIC HOUSING 1-1 (Jan. 1993). This section authorized HUD to issue Technical Assistance Grants (TAG) to emerging RMCs to support the development of resident involvement. *Id.* Through efficient management practices RMCs are allowed to retain the unused portion of the funds and apply these funds to services or improvements for the project. *Id.*

Typically RMCs are run by a board of seven to nine residents elected by the residents of the project. INITIATIVES, *supra*, at 25. For a compilation of model by-laws as well as a guide to organizing and maintaining tenant initiatives, see OFFICE OF RESIDENT INITIATIVES, HUD, GUIDE TO DEVELOPING TENANT OPPORTUNITIES (1994).

Examples of success stories by RMCs that revitalized deteriorated, hopeless, public housing projects are ones like the Cochran Gardens in St. Louis, Mo. SUCCESS STORIES, *supra* note 214, at 4-5. After forming an RMC, the residents contracted with the PHA to perform janitorial services for the project, an operation which employs 12 residents and grants stipends to 30 other residents. *Id.* at 4. In addition, Cochran Gardens has made vast improvements in maintenance, replacing boarded up windows with panes and maintaining lawns and flower beds, as well as cutting vacancy rates in half. *Id.* at 5. This and other success stories provide evidence that resident involvement can improve maintenance and management. *Id.* at 1.

293. *See also* Philpott Letter, *supra* note 248 (indicating that there should be a minimum amount of new regulations to implement § 18(d)).

294. *See* PETERSON, *supra* note 1, at 38 (encouraging housing authorities to involve tenants in improving their living conditions); *see* Krislov, *supra* note 15, at 1754 (suggesting that tenant monitoring could help curb PHA practices of leaving units vacant to facilitate demolition); *see also* 2 Kevin Neary, OFFICE OF POLICY DEVELOPMENT AND RESOURCE, HUD, CASE STUDIES OF EFFECTIVE MANAGEMENT PRACTICES WITHIN PUBLIC HOUSING AGENCIES, MAINTENANCE AND CUSTODIAL (1985) (distinguishing between maintenance and custodial activities and including case studies illustrating such practices in a large, medium, and small PHAs).

295. *See* H.R. CONG. REP. NO. 122(I), *supra* note 70, at 26, *reprinted in* 1987 U.S.C.C.A.N. at 3342 (specifying Congress's intent in enacting § 1437p(d)).

isting regulations that govern demolition and attempt to repair maintenance problems at the earliest opportunity.[296]

IV. Conclusion

In the last decade, public housing has faced difficult challenges. Tenants have become poorer, the supply of available housing has diminished, and the federal government has reduced its funding. Yet, a large supply of viable public housing units across the country remain. To preserve these projects and units, HUD should carefully consider the effect of its rules on tenants, PHAs, and HUD. While HUD's proposed rule to implement § 1437p(d) included an intent provision, this requirement would have made it more difficult to enforce the statute, whose goal is the preservation of public housing. In the wake of the withdrawal of the rule, de facto demolition, the elements of proof for a cause of action and the necessity of proving intent all remain unsettled issues. In initiating future rulemaking, HUD must conform to congressional intent but also must utilize proactive methods of preventing violations.

Julia Clayton Powell

296. *See* NHLP Paper, *supra* note 33, at 4 (advocating that steps should be taken at the earliest possible time to prevent de facto demolition); *see* Public Housing in Peril, *supra* note 1, at 72-73 (criticizing the current demolition approval process which allows violations to occur *before* HUD can respond).