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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY  
CLERK, U.S. COURT OF APPEALS

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MARGARET RESSLER, et al., )  
 )  
 Plaintiffs/Appellees/ )  
 Cross-Appellants, )  
 )  
 vs. )  
 )  
 SAMUEL R. PIERCE, JR., et al., )  
 )  
 Defendants/Appellants/ )  
 Cross-Appellees. )  
 /-)

Nos. 81-3294; 81-3404  
D.C. No. A77-223  
O P I N I O N

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On Appeal from the United States District Court  
for the District of Alaska  
Honorable James A. von der Heydt, Judge, Presiding

Argued and Submitted August 20, 1982

Before: PREGERSON, ALARCON, and NELSON, Circuit Judges

PREGERSON, Circuit Judge:

This is a class action against the Secretary of Housing and Urban Development ("HUD") and the owners of certain subsidized housing in Alaska. Plaintiffs are applicants and potential applicants for HUD rent subsidies under the Section 8 Set-Aside Program, 42 U.S.C. § 1437f (1978 & Supp. 1982), of the Housing and Community Development Act of 1974 ("the Section 8 program"). Plaintiffs allege that they were denied due process and equal protection by the manner in which the owners of a subsidized apartment complex processed their applications for rent subsidies.

These are cross appeals from two orders of the district court. In Appeal No. 3294, HUD appeals the court's ruling that applicants for Section 8 benefits must be afforded Fifth Amendment due process protection in the application and

1 selection process. HUD also argues that, in the event this  
2 court determines that due process is required, the procedures  
3 ordered by the court should be modified in several respects.  
4 In Appeal No. 3404, Plaintiffs appeal both the application  
5 and selection procedures ordered by the district court and  
6 the court's ruling that HUD is not required to ensure that  
7 project owners rent to Section 8 applicants all units for  
8 which Section 8 subsidies are available.

9  
10 We affirm that part of the district court's judgment  
11 holding that applicants for Section 8 benefits are entitled  
12 to due process protection. We also affirm the court's ruling  
13 that HUD need not require owners to utilize all available  
14 Section 8 subsidies. However, because we believe that  
15 certain application and selection procedures ordered by the  
16 district court should be modified, we also reverse the  
17 court's order in part and remand the case for further  
18 proceedings.

19  
20 FACTS

21  
22 Plaintiff Margaret Ressler moved into Jewel Lake Villa  
23 apartments in Anchorage, Alaska, in August 1977. Because the  
24 owners of Jewel Lake Villa were receiving mortgage insurance  
25 benefits from HUD under Section 236 of the National Housing  
26 Act, 12 U.S.C. § 17152-1 (1980 & Supp. 1982), low-income  
27 tenants such as Ressler were eligible for rent subsidies  
28 under the Section 8 program.

29  
30 Ressler inquired about the Section 8 rent subsidies and  
31 was told by an employee of Jewel Lake Villa that none were  
32 available. Ressler was not given a written application, nor

1 was she put on a waiting list. Ressler was told that she  
2 would be notified if any Section 8 benefits became available.

3  
4 Having received no such benefits by November 1977,  
5 Ressler filed the instant action. Ressler alleged that she  
6 had been denied Section 8 rent subsidies improperly for two  
7 reasons. First, Ressler contended that the absence of pro-  
8 cedural safeguards in the application and selection process  
9 was a denial of due process and equal protection. Second,  
10 Ressler argued that HUD's failure to require project owners  
11 to rent to Section 8 applicants all units for which Section 8  
12 subsidies are available violated the national housing policy  
13 and constituted an abuse of discretion by HUD. The parties  
14 made cross motions for summary judgment.

15  
16 By a Memorandum and Order filed March 6, 1980, the dis-  
17 trict court granted partial summary judgment in favor of  
18 Ressler, holding that Ressler had a "legitimate, objectively  
19 justifiable claim" to Section 8 benefits which entitled her  
20 to due process protection.<sup>1</sup> The court invited further  
21 briefing on the issue of the form and extent of procedural  
22 due process to be afforded Section 8 applicants. The court  
23 also granted partial summary judgment in favor of HUD, ruling  
24 that HUD's failure to require project owners to utilize all  
25 available Section 8 benefits was not inconsistent with the  
26 national housing policy and did not constitute an abuse of  
-27 discretion.

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<sup>1/</sup> The district court did not reach Ressler's equal protec-  
tion claim, holding that resolution of the due process  
issues "effectively resolves the issue of procedural  
safeguards." Memorandum and Order filed Mar. 6, 1980, at  
5.

1 After considering the parties' proposed application and  
2 selection procedures, the court issued a final judgment  
3 setting forth the requisite procedures in three phases: (1)  
4 tenant-selection criteria; (2) a waiting list procedure; and  
5 (3) notice and hearing procedures. These cross appeals  
6 followed.

7  
8 ANALYSIS

9  
10 1. Entitlement to Due Process

11  
12 HUD argues that an applicant for Section 8 benefits  
13 does not have a **protectible** "property" interest in those ben-  
14 efits because project owners are vested with a certain amount  
15 of discretion in selecting among qualified applicants. HUD's  
16 argument has two basic components. First, HUD points to the  
17 U.S. Supreme Court's decision in Board of Regents v. Roth,  
18 408 U.S. 564 (1972), in which the Court stated:

19 To have a property interest in a benefit, a  
20 person clearly must have more than an abstract  
21 need or desire for it. He must have more than  
22 a unilateral expectation of it. He must,  
instead, have a legitimate claim of entitle-  
ment to it.

23 Id. at 577.. Second, HUD reads this court's decision in  
24 City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.  
25 1978), as requiring a "certainty of receipt" of benefits  
26 before a right to due process attaches. Consequently,  
27 according to HUD, there can be no due process entitlement  
28 where the receipt of benefits depends upon the exercise of  
29 discretion in the selection process.

30  
31 HUD has overstated the holding of City of Santa  
32 Clara. In that case, the court found Roth to be directly

1 dispositive of the question whether the City of Santa  
2 Clara had a protectible "property" interest in power allo-  
3 cations from the Central Valley Project. Common to both  
4 Roth and City of Santa Clara was the fact that the entity  
5 charged with dispensing governmental benefits had "un-  
6 bridled discretion" in the selection process. In each  
7 case, the applicant was held to have an insufficient  
8 "property" interest in the benefits to give rise to due  
9 process procedural safeguards.

10  
11 It is clear, however, that the owners of Jewel Lake  
12 Villa had only limited discretion in the Section 8 appli-  
13 cation and selection process. While under the Section 8  
14 program "the selection of tenants . . . shall be the  
15 function of the owner," 42 U.S.C. § 1437f(d)(1)(A) (Supp.  
16 1982), the regulations and guidelines promulgated pursuant  
17 to the statute closely circumscribe an owner's discretion.  
18 For example, the regulations dictate what percentage of  
19 the Section 8 contract units an owner must rent to "very  
20 low-income families" (24 C.F.R. § 886.117(b) (1982)) and  
21 require the owner to select eligible tenants in accordance  
22 with a HUD-approved marketing plan (id. § 886.121(a)). In  
23 addition, HUD's administrative guidelines set eligibility  
24 standards for Section 8 applicants, provide detailed  
25 application and instruction forms, establish rules for the  
26 calculation of an applicant's income and allowances, and  
27 require HUD review of all certificates of eligibility'  
28 after determinations have been made by project owners.  
29 See HUD Handbook 4352.1, "Loan Management Section 8  
30 Set-Aside," ¶¶ 23-26 ("HUD Handbook").  
31  
32

1           The instant case is thus similar to Griffeth v.  
2 Detrich, 603 F.2d 118 (9th Cir. 1979), in which this court  
3 found that applicants for general relief had a protectible  
4 claim of entitlement to benefits based solely on the  
5 limiting language in the authorizing statute and regula-  
6 tions. In rejecting the argument that applicants could  
7 have no legitimate claim to benefits because each county  
8 had discretion in establishing eligibility criteria, the  
9 court-held:

10           The regulations adopted by San Diego County  
11 are detailed. They set forth specific objec-  
12 tive eligibility criteria for receipt of aid.  
13 . . . The regulations are comprehensive and  
14 **definite**. They greatly restrict the discre-  
15 tion of the intake eligibility worker. . . .  
16 Here the authorizing statute coupled with the  
17 implementing regulations of the county creates  
18 a legitimate claim of entitlement and expect-  
19 tancy of benefits in persons who claim to meet  
20 the eligibility requirements.

21 Id. at 121. Cf. Jacobson v. Hannifin, 627 F.2d 177, 180 (9th  
22 Cir. 1980) ("A property interest may be created if 'procedu-  
23 ral' requirements are intended to operate as a significant  
24 substantive restriction on the basis for an agency's  
25 actions.").

26           In addition, Ressler has a constitutionally protected  
27 "property" interest in Section 8 benefits by virtue of her  
28 membership in a class of individuals whom the Section 8  
29 program was intended to benefit. 42 U.S.C. § 1437f(a) (1978)  
30 provides:

31           For the purpose of aiding lower-income  
32 families in obtaining a decent place to live  
and of promoting economically mixed housing,  
assistance payments may be made with respect  
to existing, newly constructed, and substan-  
tially rehabilitated housing in accordance  
with the provisions of this section.

1 A similar statutory statement of purpose was held to  
2 give rise to a legitimate claim of entitlement in Geneva  
3 Towers Tenants Organization v. Federated Mortgage Investors,  
4 504 F.2d 483 (9th Cir. 1974). The statute at issue in Geneva  
5 Towers had a declared purpose "to assist private industry in  
6 providing housing for low and moderate income families and  
7 displaced families." 12 U.S.C. § 17151(a). This court  
8 affirmed the ruling of the district court that beneficiaries  
9 of the statute had to be accorded due process safeguards,  
10 holding:

11 Congress' purpose was . . . to provide the  
12 tenants with the benefit of low cost housing.  
13 The source of the tenants' entitlement is  
14 explicit: it lies in the congressionally  
15 stated purpose of providing persons of meager  
16 economic means with low-priced housing . . .  
17 and the statutory requirement that the FHA  
18 regulate the rents charged by the private  
19 developer. . . .

20 504 F.2d at 490 (emphasis added).

21 The same rationale applies to give Ressler a protect-  
22 ible claim of entitlement to Section 8 benefits. Ressler is  
23 a primary beneficiary of the Section 8 program, and her  
24 receipt of benefits is closely monitored by HUD under the  
25 implementing regulations and guidelines. Ressler thus has a  
26 sufficient "property" interest in Section 8 benefits to  
27 entitle her to due process safeguards in the processing of  
28 her application.

29 Finally, the facts and circumstances of the instant  
30 case are themselves a compelling argument for affording at  
31 least some due process safeguards to Section 8 applicants.  
32 Ressler was not allowed to submit an application for benefits  
to Jewel Lake Villa in August 1977 based upon a representa-  
tion by a Jewel Lake Villa employee that no benefits were

1 then available. In fact, it appears from the record that  
2 there were as many as seventeen unallocated Section 8 leases  
3 at Jewel Lake Villa between August and October 1977. Ressler  
4 should have been given some means of ensuring that her appli-  
5 cation for Section 8 benefits was received and given meaning-  
6 ful review.

7  
8 2. Application and Selection Procedures  
9

10 In its Judgment filed April 20, 1981, the district  
11 court ruled that project owners under the Section 8 program  
12 were required to implement certain specified procedures  
13 regarding (1) tenant-selection criteria: (2) a waiting list  
14 procedure: and (3) notice and hearing procedures. Ressler  
15 and HUD claim in their appeals that the procedures ordered by  
-16 the district court should be modified in several respects.

17  
18 Both Ressler and HUD agree that the test articulated  
19 in Mathews v. Eldridge, 424 U.S. 319 (1976), controls the  
20 determination of what process is due. In Mathews the Court  
21 stated that

22 identification of the specific dictates of due  
23 process generally requires consideration of  
24 three distinct factors: First, the private  
25 interest that will be affected by the official  
26 action: second, the risk of an erroneous  
27 deprivation of such interest through the  
28 procedures used, and the probable value, if  
29 any, of additional or substitute procedural  
30 safeguards: and finally, the Government's  
31 interest, including the function involved and  
32 the fiscal and administrative burdens that the  
additional or substitute procedural require-  
ment would entail.

Id. at 335.

The parties have argued at length regarding the weight  
that each of the Mathews factors deserves in the context of

1 the Section 8 program. Ressler refers repeatedly to the  
2 statement of the district court that "[t]he 'private Inter-  
3 est' of the 'lower income' or 'very low-income' family . . .  
4 is enormous." (Memorandum and Order filed Nov. 24, 1980, at  
5 5.) Ressler also argues that the government involvement in  
6 Section 8 projects' is so great that the actions of the pro-  
7 ject owner are tantamount to those of the government, thus  
8 making the only relevant "private interest" that of Section 8  
9 applicants. HUD, on the other hand, urges that every project  
10 owner has a substantial interest in ensuring that the appli-  
11 cation procedure is easy to administer and does not frustrate  
12 his efforts to select satisfactory tenants.

13  
14 A brief review of several basic due process principles  
15 is of aid in according the proper weight to the Mathews  
16 factors in the instant case. First, having determined that  
17 Ressler has a sufficient "property" interest in Section 8  
18 benefits to be entitled to due process protection, this court  
19 need not look further at the nature of Ressler's interest but  
20 must focus primarily on its weight. See Board of Regents v.  
21 Roth, 408 U.S. 564, 570-71 (1972).

22  
23 To that end, while "the legitimacy of an alleged  
24 interest does not inherently depend upon whether the person  
25 has previously been receiving the desired benefit" (Davis v.  
26 United States, 415 F. Supp. 1086, 1092 (D. Kan. 1976)), it is  
27 indisputable that Ressler, as an applicant for governmental  
28 benefits, has a less weighty interest than someone who is  
29 currently receiving benefits and is threatened with reduction  
30 or termination of those benefits. See, e.g., Richardson v.  
31 Perales, 402 U.S. 389, 406-07 (1971).

1           Finally, to the extent that the "private interest" of  
2 the owners of Jewel Lake Villa merges with the government's  
3 interest, the owners' interest may deserve more weight,  
4 rather than less weight as Ressler contends. For example, in  
5 Fuentes v. Shevin, 407 U.S. 67, 92-93 (1972), the Supreme  
6 Court recognized that the interest of a private creditor  
7 seeking summary seizure of goods would be weighed less heavi-  
8 ly than the government's interest in summary proceedings in a  
9 comparable situation. Since owners involved in the Section 8  
10 program carry out an important governmental purpose, they  
11 should be spared all unnecessary administrative burdens.

12  
13           With these principles in mind, the objectionable por-  
14 tions of the district court judgment may be analyzed as  
15 follows:

16  
17                   (a) Tenant-Selection Criteria

18  
19           The district court judgment stated, in part:

20           TENANT SELECTION CRITERIA USED BY PRIVATE  
21           PROJECT OWNERS

- 22           1. Owners shall establish written tenant  
23           selection criteria.
- 24           2. All prospective applicants must be pro-  
25           vided with a copy of the criteria.
- 26           3. Tenant selection criteria must relate to  
27           the ability of the applicant to fulfill  
28           lease obligations and should not automati-  
29           cally deny tenancy to a particular group  
30           or category of otherwise eligible  
31           applicants.
- 32           4. The following are illustrative of the  
          types of criteria which the owner may  
          establish:
- a. Demonstrated ability to pay rent and  
          make timely payments.
- b. Good credit references.

- 1                   c.    Positive endorsements from prior  
2                               landlords.
- 3                   d.    Absence of a record of disturbance of  
4                               neighbors, destruction of property,  
5                               or living or housekeeping habits at  
6                               prior residences which may adversely  
7                               affect the health, safety, or welfare  
8                               of other tenants.
- 9                   e.    Other good reasons related to the  
10                              applicant's ability to fulfill lease  
11                              obligations.

- 12                   5.    If the owner chooses to establish criteria  
13                              similar to "other good reasons" (4-e) and  
14                              further chooses to reject a particular  
15                              applicant based upon these criteria, the  
16                              notice to the applicant advising the  
17                              applicant of the determination shall  
18                              specify the particular reason for the  
19                              rejection.

20                   Ressler contends that these criteria are not "reason-  
21                              able" and "ascertainable," citing Holmes v. New York City  
22                              Housing Authority, 398 F.2d 262 (2d Cir. 1968). In particu-  
23                              lar, Ressler argues that subparagraphs 4b and 4c are unneces-  
24                              sary, since a project owner would obtain the same information  
25                              pursuant to subparagraph 4a. Similarly, she argues that sub-  
26                              paragraph 4e is duplicative of paragraph 3 and subparagraphs  
27                              4a and 4d and thus is also necessary.

28                   There is no need to disturb the district court judg-  
29                              ment in these respects. Subparagraphs 4a through 4d are  
30                              expressly stated to be merely "illustrative" of permissible  
31                              selection criteria: owners are free to use any or all of  
32                              these criteria or to develop other criteria pursuant to  
33                              subparagraph 4e. Whatever criteria are ultimately estab-  
34                              lished must, to be in accordance with paragraph 3, "relate to  
35                              the ability of the applicant to fulfill lease obligations and  
36                              should not automatically deny tenancy to a particular group  
37                              or category of otherwise eligible applicants." These  
38                              requirements should provide project owners with the

1 discretion reserved to them under 42 U.S.C. § 1437f(d)(1)(A)  
2 (Supp. 1982) and keep the exercise of that discretion within  
3 reasonable limits.  
4

5 Ressler also objects to the tenant-selection criteria  
6 as a whole as being so broad that they conflict with the  
7 purposes of the National Housing Act and encourage abuse and  
8 discrimination by project owners. The short answer to these  
9 objections is that the National Housing Act grants project  
10 owners a certain amount of discretion in selecting among  
11 qualified applicants. If an applicant believed that such  
12 discretion had been abused, some form of administrative  
13 review would be immediately available (see Section 2(c),  
14 infra), with judicial review an eventual alternative.  
15

16 (b) Waiting List Procedure  
17

18 The district court judgment further stated:  
19

20 WAITING LIST PROCEDURE

- 21 1. If the owner of a project participating in  
22 the Section 8 program determines that the  
23 family is eligible for a unit with Section  
24 8 assistance and is otherwise acceptable  
25 and that units are available, the owner  
26 will assign the family a unit of the  
27 appropriate size in accordance with HUD  
28 standards. If no suitable unit is avail-  
29 able and the owner has suitable units  
30 under contract, the owner will place the  
31 family on a waiting list for the project  
32 and notify the family of when a suitable  
unit may become available. If the waiting  
list is so long that the applicant for a  
unit with Section 8 assistance would not  
be likely to be admitted for the next 12  
months, the owner may advise the applicant  
that no additional applications are being  
accepted for that reason.
2. Selections from the waiting list shall be  
made chronologically, according to the  
date of submission of the application for

1 § 8 benefits, except where certain appli-  
2 cants are entitled to priority as a matter  
of law.

- 3 3. The waiting list will be made available to  
4 the applicants upon request in the office  
of the project manager.

5  
6 Both HUD and Ressler seek modification of the waiting  
7 list procedure outlined above. Ressler contends that a  
8 project owner should be required to maintain separate waiting  
9 lists for each size of unit within the project. Without  
10 separate lists, Ressler maintains, there is a likelihood that  
11 eligible applicants who are on the waiting list will be  
12 forced to continue waiting even after an appropriate unit  
13 becomes available. Ressler further argues that applicants  
14 should be given written notice of (1) the fact that they have  
15 been placed on a waiting list: (2) their place on the list:  
16 and (3) their minimum estimated waiting period.

17  
18 Ressler's suggested modifications are substantially--  
19 if not completely---covered by the procedures contained in the  
20 district court judgment. Paragraph 1 requires an owner to  
21 notify qualified applicants that they have been placed on a  
22 waiting list and to give them estimates "of when a suitable  
23 unit may become available." In addition, the directive that  
24 a project owner assign an applicant from the waiting list to  
25 "a suitable unit" when one becomes available implicitly  
26 requires that the waiting list indicate what size unit each  
27 applicant on the list is waiting for. Finally, all appli-  
28 cants would have ready access to the waiting list under  
29 paragraph 3 in order to determine their place on the list.  
30 Thus, this portion of the judgment in its present form is a  
31 sufficient answer to Ressler's objections.  
32

1 HUD's proposed modification of the waiting list pro-  
2 cedure is to extend the priority provision of paragraph 2 to  
3 include current tenants who may have applied or qualified for  
4 Section 8 benefits later than non-tenants. Otherwise, HUD  
5 argues, project owners might be forced to evict current  
6 tenants who could not then pay their full rent and replace  
7 them with new and unknown tenants who happen to stand higher  
8 on the Section 8 waiting list.

9  
10 HUD's proposal is a reasonable attempt at solving the  
11 "identifiable problem" of "high vacancies and/or turnover" in  
12 subsidized housing projects. 24 C.F.R. § 886.107(g) (1982).  
13 Current tenants are already encouraged to apply for Section 8  
14 benefits under the HUD guidelines. HUD Handbook at 11 24(a).  
15 Statutory preference is already mandated for "families which  
16 occupy substandard housing or are involuntarily displaced at  
17 the time they are seeking assistance . . . ." 42 U.S.C.  
18 § 1437f(d)(1)(A) (Supp. 1982). Establishing a priority for  
19 current tenants is simply a form of local residence prefer-  
20 ence, which is allowed "to the extent that [it is] not  
21 inconsistent with affirmative fair housing marketing objec-  
22 tives and the owner's HUD-approved Affirmative Fair Housing  
23 Marketing Plan." 24 C.F.R. § 886.321(b)(1) (1982). Such a  
24 priority might, in addition, encourage owners to make full  
25 utilization of their Section 8 contract authority. HUD's  
26 proposed modification should be adopted.

1 (c) Notice and Hearing Procedures

2  
3 The district court judgment further provided:

4 NOTICE AND HEARING PROCEDURES

- 5 1. If the owner determines that an applicant  
6 is ineligible for a unit with Section 8  
7 assistance on the basis of income or fam-  
8 ily composition, or that the owner is not  
9 selecting the applicant for other reasons  
10 related to his ability to fulfill his  
11 obligations as a tenant of the project,  
12 the owner will notify the applicant in  
13 writing within 15 days of that determina-  
14 tion and of the specific reasons for it.  
15 The written notification shall state: (1)  
16 that the applicant has 14 days from  
17 receipt to submit a written response to  
18 the notice to the local HUD officials; (2)  
19 that the applicant may have an attorney or  
20 other representative prepare a written  
21 response, or appear at the local HUD  
22 office; (3) that the applicant's response  
23 to the notification does not preclude him  
24 from exercising his other rights if he  
25 believes he is being discriminated against  
26 on the basis of race, creed, religion,  
27 sex, or national origin.
- 28 2. The review of either the applicant's  
29 written response or of the information  
30 provided at the informal meeting will be  
31 undertaken by an employee at the local HUD  
32 office. Within 5 working days of receipt  
of said written response or of the date of  
the meeting, HUD shall advise the appli-  
cant in writing as to whether the owner's  
determination is approved or reversed.
3. If, after review, the owner's finding of  
ineligibility is reversed, the applicant  
will be placed in a suitable vacant unit,  
if available. If no such unit is avail-  
able, he will be placed on a waiting list.
4. The owner will be required to maintain in  
its files for one year the application,  
the notification of eligibility or ineli-  
gibility, the applicant's written request  
for a meeting or written response to a  
negative determination, if any, any other  
written submissions presented by the  
applicant or his representative in support  
of his position, and a copy of HUD's  
written determination.

1 Ressler and HUD object to different portions of the  
2 district court's notice and hearing procedures. Ressler  
3 contends that the procedures should be revised to require (1)  
4 that the project owner make eligibility determinations and  
5 notify all applicants within five working days of the date of  
6 application: (2) that rejected applicants be furnished with  
7 "the particular reason for the rejection" in every case: and  
8 (3) that the notice of rejection contain information regard-  
9 ing area legal services or other advocacy groups.  
10

11 Ressler's second proposed modification is easily  
12 disposed of. Her apparent concern is that, under the court-  
13 ordered procedure in its present form, rejected applicants  
14 will not be notified of the specific grounds **therefor** unless  
15 rejection is pursuant to paragraph 4e of the court's **tenant-**  
16 **selection** criteria. Ressler has, however, overlooked the  
17 requirement of **paragraph 1** of the notice and hearing proce-  
18 dures, which states that "the owner will notify the applicant  
19 in writing within 15 days of that determination [of ineligi-  
20 bility] and of the specific reasons for it." (Emphasis  
21 added.) Thus, rejected applicants will know the basis for  
22 rejection in every case.  
23

24 Ressler's third proposed-modification is well taken.  
25 Requiring project owners to maintain a list of local legal  
26 services organizations would impose only a slight burden on  
27 the owners and would be of value to applicants who claim to  
28 have been denied benefits erroneously. **That** such a require-  
29 ment would not place an undue fiscal or administrative burden  
30 on project owners or HUD is evidenced by the fact that  
31 similar lists must be maintained by government agencies in  
32

1 other contexts.<sup>2</sup> Thus, supplying legal services informa-  
2 tion to rejected applicants should be considered a due  
3 process requirement.  
4

5 Ressler's first point--that owners should make eligi-  
6 bility determinations and give notice thereof within five  
7 days of the date of application--also raises important due  
8 process issues. The district court's procedures contain no  
9 time limit on the processing of applications: owners are only  
10 required to serve written notice to rejected applicants with-  
11 in fifteen days of the date that a determination is made.  
12 The court in Colon v. Tompkins Square Neighbors, Inc., 294 F.  
13 Supp. 134 (S.D.N.Y. 1968), when confronted with similar  
14 application and selection procedures, held:

15 In order to avoid keeping applicants in a  
16 state of indefinite suspension pending a  
17 determination of their applications, a reason-  
18 able time limit should be agreed upon between,  
19 the parties herein within which the Rental  
20 Committee should be required to complete its  
21 investigation of an applicant and notify the  
22 applicant as to the results thereof. Due to  
23 the steady inflow of applications for low and  
24 middle income housing accommodations, the  
25 directors of Haven Plaza cannot be expected to  
26 process them with the same dispatch as would  
27 be anticipated from a private rental agent.  
28 Nevertheless, a time limit should be estab-  
29 lished by the parties herein which, although  
30 taking into account the amount of applications  
31 which steadily burdens the Rental Committee,  
32 primarily caters to the interest of the appli-  
cants in a prompt determination of their  
status and in having adequate time to obtain a  
review thereof.

8  
Id. at 139. Although Colon was decided before Mathews, a  
balancing of the applicants' and owners' interests still  
requires some time limit on eligibility determinations.

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2/ See, e.g., 8 C.F.R. § 2922.1 (1982), which requires  
district directors of the Immigration and Naturalization  
Service to maintain a current list of free legal ser-  
vices programs within their respective jurisdictions "for  
the purpose of providing aliens in deportation or  
exclusion proceedings with a list of such organizations."

1           The five-day time limit suggested by Ressler is, how-  
2 ever, unreasonable. Owners would likely find it extremely  
3 difficult to assemble the "accurate verification records" of  
4 income and allowances mandated by the HUD guidelines, which  
5 require, among other things,

- 6           (a) Letters or other statements from employ-  
7           ers and other pertinent sources giving  
8           authoritative information concerning all  
9           items and amounts of income,  
10          (b) Photocopies or carbon copies of documents  
11          in the applicant's possession which  
12          substantiate his statements, or a brief  
13          summary of the pertinent contents of such  
14          documents signed and dated by the  
15          reviewer,  
16          (c) Certified statements or summary data from  
17          books of account from self-employed  
18          persons, and from persons whose earnings  
19          are irregular, such as salesmen, taxi  
20          drivers, etc., setting forth gross  
21          receipts, itemized expenses, and net  
22          income. . . .

23 HUD Handbook at ¶ 23e(1).

24           At the same time, applicants have a substantial  
25 interest in ensuring that their applications are processed as  
26 quickly as possible. Moreover, as Ressler points out, prepa-  
27 ration of a proper notice, once the eligibility determination  
28 has been made, would not require the fifteen-day period  
29 approved by the district court. In our view, the fairest  
30 accommodation of these competing interests is to give owners  
31 fifteen days from the date of application within which to  
32 make eligibility determinations and give applicants the  
required notice.

          With respect to the review procedures ordered by the  
district court, HUD argues that an impartial staff member of  
the owner--not HUD--should conduct the review of rejected  
applications. HUD contends that the procedure as ordered

1 (1) is inconsistent with the statutory requirement that  
2 selection of individual tenants be made by project owners,  
3 rather than HUD: (2) is unnecessary because an impartial  
4 representative of the owner can provide a fair review: and  
5 (3) would be extremely costly and burdensome to HUD.  
6

7 HUD raises a difficult issue, since the potential  
8 economic and administrative burden to HUD of reviewing  
9 rejected applications--HUD's third rationale--requires that  
10 the government's interest be factored into the Mathews  
11 balancing formula. HUD's two other rationales are not per-  
12 suasive, however. First, HUD review would not usurp project  
13 owners' tenant-selection discretion. Eligibility determina-  
14 tions are already subject to HUD review (HUD Handbook at  
15 ¶ 26), and HUD may examine general project operation "at such  
16 intervals as it deems necessary to ensure that the Owner is  
17 in full compliance with the terms and conditions of the  
18 [Section 8] Contract" (24 C.F.R. § 886.130 (1982)). Requir-  
19 ing HUD also to review rejected applications would not  
20 interfere to any significant extent with an owner's tenant-  
21 selection discretion.  
22

23 Second, it seems unlikely that a project owner's rep-  
24 resentative could provide a meaningful and impartial review  
25 of rejected applications. The difficulties with such an  
26 approach in the context of evictions from public housing have  
27 been described by one commentator as follows:

28 Imposing a requirement of providing a  
29 hearing before eviction on the private land-  
30 lord has a number of serious disadvantages.  
31 First, it imposes a much more substantial  
32 burden on the landlord than a requirement of  
participation in a hearing which someone else  
must provide. Second, a private landlord is  
likely to be totally inexperienced in running  
an administrative hearing; thus, the hearing

1 is less likely to reach a correct result effi-  
2 ciently. Finally, the problem of "separation  
3 of function" of prosecutor and decisionmaker,  
4 serious but soluble in the context of an  
5 administrative agency, may be insoluble in the  
6 case of a private landlord who, wanting to  
7 evict a tenant, is called upon at the same  
8 time to be an impartial decisionmaker.

9 Note, Procedural Due Process in Government-Subsidized Housing,  
10 86 Harv. L. Rev. 880, 908 (1973). Although similar review  
11 procedures have been utilized where an agency or business was  
12 sufficiently large and diverse to make impartial review by a  
13 designated employee possible (see, e-g., Memphis Light, Gas &  
14 Water Division v. Craft, 436 U.S. 1 (1978), Goldberg v.  
15 Kelly, 397 U.S. 254 (1970)), any such procedure would be  
16 inappropriate where, as here, project owners have relatively  
17 few employees, most or all of whom may have been involved in  
18 the initial eligibility determination.

19 Thus, the private interest of Section 8 applicants in  
20 a fair review of rejected applications outweighs project  
21 owners' fears of losing the statutory grant of discretion in  
22 selecting among eligible tenants. In addition, the risk of  
23 an erroneous deprivation of the applicants' protected  
24 "property" interest is measurably greater without HUD  
25 review. Yet to be assessed, however, is the government  
26 interest in avoiding the additional "fiscal and administra-  
27 tive burdens" which HUD review would entail.

28 HUD argues in this regard that it would have to  
29 increase its professional loan-management staff approximately  
30 seven percent nationwide at a cost of more than \$2,000,000 to  
31 provide review of rejected Section 8 applications. Of  
32 course, this projection is purely speculative, since HUD can  
only guess how many applicants would seek review and, of

1 these, how many reviews would be by written response rather  
2 than personal appearance.

3  
4 The district court struck a proper balance under the  
5 circumstances. It stated that, "[w]hile the court is mindful  
6 of the cost associated with such a procedure, the importance  
7 of the applicant's interest and the increased risk of an  
8 erroneous eligibility determination by a private-project  
9 owner" require review by an impartial HUD employee. (Memo-  
10 randum and Order filed Nov. 24, 1980, at 11.) Thus, the  
11 notice and hearing procedures in the district court judgment  
12 should be modified to state a time limit for the processing  
13 of applications and notification of applicants but should  
14 retain the provision for informal HUD review.

15  
16 3. Abuse of Discretion by HUD

17  
18 Ressler argues that HUD's failure to require project  
19 owners to rent to Section 8 applicants all units for which  
20 Section 8 subsidies are available violates national housing  
21 policy and constitutes an abuse of discretion. According to  
22 Ressler, what the district court characterized as the  
23 "sanction approach" of 24 C.F.R. § 886.129 (1982), which  
24 allows HUD to reduce the number of units under Section 8  
25 contract authority when a project owner fails to lease or  
26 have available for leasing by eligible families eighty  
27 percent of its Section 8 units, restricts the access of  
28 low-income people to Section 8 projects.

29  
30 Ressler apparently asks this court to "hold unlawful  
31 and set aside" HUD's non-utilization policy as being "arbi-  
32 trary, capricious, an abuse of discretion, or otherwise not

1 in accordance with law." 5 U.S.C. § 706(2)(A) (1977). The  
2 Supreme Court has held that

3 [t]o make this finding the court must consider  
4 whether the decision was based on a considera-  
5 tion of the relevant factors and whether there  
6 has been a clear error of judgment. [Cita-  
7 tions.] Although this inquiry into the facts  
8 is to be searching and careful, the ultimate  
9 standard of review is a narrow one. The court  
10 is not empowered to substitute its judgment  
11 for that of the agency.

12 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.  
13 402, 416 (1971).

14 HUD's policy of requiring project owners to maintain  
15 eighty percent utilization of Section 8 contract authority is  
16 not an abuse of discretion under this analysis. The flexible  
17 nature of the policy might reasonably have been intended to  
18 encourage owner participation in the Section 8 program. In  
19 any event, in establishing the policy HUD did not "disagree  
20 with Congressional policy and refuse to implement it,"  
21 Ross v. Community Services? Inc., 396 F. Supp. 278, 286 (D.  
22 Md. 1975), nor did it fail to act "in a manner which is  
23 consistent with the objectives and priorities of the National  
24 Housing Act," Russell v. Landrieu, 621 F.2d 1037, 1041 (9th  
25 Cir. 1980) (footnote omitted). See also Daniels v. United  
26 States Department of Housing & Urban Development, 518 F.  
27 Supp. 989 (S.D. Ohio 1981) (100% occupancy of HUD-owned  
28 rental property not required). The determination of the  
29 district court that HUD's policy was not an abuse of  
30 discretion is therefore affirmed.

#### 31 SUMMARY

32 The matter is remanded so that the tenant-selection  
criteria ordered by the district court may be modified (1) to

1 give priority on the waiting list to current tenants over  
2 non-tenants: (2) to require project owners to make available  
3 to Section 8 applicants a list of local legal services  
4 organizations: and (3) to allow project owners a maximum of  
5 fifteen days from the date of application within which to  
6 make eligibility determinations and give applicants proper  
7 notice thereof. The district court should retain juris-  
8 diction to review and/or modify the application and selection  
9 procedures in the event that they prove to be in any way  
10 inadequate or impracticable. The district court judgment,  
11 which ably and carefully resolved a number of complex and  
12 difficult issues, is in all other respects affirmed.

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14 **AFFIRMED IX PART, REVERSED IN PART AND REMANDED.**  
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