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Expanding the Role of North Carolina State Courts in Resolving Public Housing Disputes

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EXPANDING THE ROLE OF NORTH CAROLINA STATE COURTS IN RESOLVING PUBLIC HOUSING DISPUTES

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ABSTRACT

Public Housing Authorities regularly make quasi-judicial decisions affecting the rights of public benefit recipients. Public Housing Authorities make these decisions without direct administrative or judicial oversight at the federal level. The only option for federal review is litigation through a § 1983 action. As § 1983 actions are practically infeasible and legally problematic, North Carolina should explore providing for state judicial oversight of these quasi-judicial decisions. Other states, including Minnesota and Missouri, have already implemented processes for state judicial review of decisions by Public Housing Authorities.

I. THE PECULIAR LEGAL STATUS OF PUBLIC HOUSING AUTHORITIES

Public Housing Authorities ("PHAs") occupy a peculiar place under the law of North Carolina and the rest of the United States. North Carolina PHAs are municipal corporations, governed by § 157 of the N.C. General Statutes.[1] At the same time, they must comply with federal statutes under Title 42.[2] Furthermore, PHAs are governed by regulations promulgated by the Department of Housing and Urban Development, organized under Title 24 of the C.F.R.[3]

PHAs provide housing for thousands of North Carolinians; as of fiscal year 2000, over 175,000 North Carolinians benefited from either public housing or Section 8 voucher assistance.[4] These housing assistance recipients are serviced by one hundred twenty-eight PHAs,

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1. N.C. GEN. STAT. § 157-25 (2009).
2. 42 U.S.C. § 1437(b) (2000).
3. 24 C.F.R. (2010).
4. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A PICTURE OF SUBSIDIZED HOUSEHOLDS – 2000, http://www.huduser.org/picture2000/index.html (last visited Oct. 25, 2010) (allowing user to create custom query by geographic level).

most of which serve municipalities or counties, though a handful serve regions or specific projects.[5] By statute, each PHA is governed by a council of five to eleven commissioners, each appointed by the municipality's mayor to five year terms.[6] Each PHA is administered by a director, an employee of the municipal corporation, who sets PHA policy within the guidelines of the Department of Housing and Urban Development ("HUD"). Although the PHAs are organized under North Carolina law and the commissioners are appointed by local mayors, HUD funding is the lifeblood of housing authorities.[7] The funds expended for public housing are staggering; in the final quarter of 2007 alone, Section 8 vouchers in North Carolina cost nearly $70 million.[8] These vouchers are specifically authorized by HUD; this means that for authorized vouchers, HUD provides the funding to the PHAs. The PHAs are only fiscally responsible for vouchers beyond the authorized number.[9] PHAs also receive income from other sources, principally the rents received from tenants; however, federal funding is critical to the operation of PHAs.

Despite the fact that PHAs are federally funded, PHAs are not federal agencies and therefore not subject to the Administrative Procedures Act ("APA"), like most federal agencies.[10] While agency decisions affecting federal benefit recipients are subject to the APA, decisions of local PHAs are not. HUD is a federal agency, and therefore the regulations it promulgates must comply with § 553 of the APA.[11] Local level decisions by PHAs regarding granting or terminating a housing assistance benefit are not governed by the sections of the APA concerning adjudication.[12] Further, PHAs are not governed by the APA provisions for judicial review.[13]

5. HUD, *PHA Contact Information*, http://www.hud.gov/offices/pih/pha/contacts/states/nc.cfm (last updated Oct, 4, 2010).

6. N.C. GEN. STAT § 157-5(a), (d) (2009).

7. *Id.* at § 157-5(a).

8. HUD, *Housing Choice Voucher Program Support Division (PSD)*, http://www.hud.gov/offices/pih/programs/hcv/psd/index.cfm (last visited Oct. 25, 2010).

9. There is anecdotal evidence that HUD may actually be underfunding the PHAs for vouchers, by providing insufficient funding per voucher. In conversations with several PHA directors, I was repeatedly told that underfunding was the primary reason that PHAs often failed to use all authorized vouchers. However, the point remains that vouchers are funded primarily by the federal government.

10. 42 U.S.C. § 1437(a)(2) (2006) (stating "that the Federal Government cannot through its direct action alone provide for the housing of every American citizen, or even a majority of its citizens, but it is the responsibility of the Government to promote and protect the independent and collective actions of private citizens to develop housing and strengthen their own neighborhoods."). Congress has declined to provide public housing directly through federal agencies, instead partnering with states and localities through federal funding of PHAs.

11. 5 U.S.C.S. § 553 (2010).

12. 5 U.S.C. §§ 554-557 (2006).

13. 5 U.S.C. §§ 701-706 (2006).

Although PHAs are not governed by the APA, they are still subject to regulatory constraints. PHAs must comply with HUD regulations which provides 24 C.F.R. § 982.555, which provides specific requirements for an informal hearing when a PHA makes decisions on individual circumstances.[14] All HUD regulations may be attacked on constitutional grounds either facially or as applied under classic Due Process Clause principles.[15] Because PHAs often supplement HUD regulations with their own policies, constitutional challenges are more common.[16]

In addition to federal *Goldberg v. Kelly* requirements, states may also impose additional requirements on PHAs.[17] In some states, procedural obligations are placed on PHAs through state versions of APA, but the NC APA does not apply to PHAs. The NC APA does not apply to PHAs.[18] Like the federal APA, N.C.G.S. § 150B provides state agency requirements for rulemaking, adjudication, and judicial review.[19] Through the Office of Administrative Hearings "OAH", North Carolina provides Administrative Law Judges ("ALJs") to rule on state agency decisions, such as decisions by state medical licensing boards. Since PHAs fall outside the federal APA and NC APA, NC PHAs fall into a strange gap in administrative law; PHAs make exactly the sort of quasi-judicial decisions which concern federal and state governments enough to pass statutory procedural protections for persons affected by these adjudications.

There is an important distinction between the quasi-judicial decisions made by PHAs and the judicial decisions to which a PHA is a party. PHAs are in many cases landlords, and they can be involved in landlord-tenant disputes like any other landlord. If a tenant in a public housing facility does not pay rent, the PHA can bring a summary ejectment action.[20] Although there are some special requirements for a summary ejection action involving a PHA, it is still simply a judicial case to which the PHA is a party.[21] Cases to which a PHA is a party are different from the quasi-judicial actions that this article addresses.

14. 24 C.F.R. § 982.555(a) (2010).

15. Basco v. Machin, 514 F.3d 1177, 1182 (11th Cir. 2008) (holding that HUD regulations under § 982.555 are facially constitutional and comply with *Goldberg v. Kelly* requirements). *See generally* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (establishing that social welfare benefits are statutory entitlements and that terminating such entitlements requires compliance with procedural due process).

16. *Goldberg*, 397 U.S. at 262.

17. *See*, N.J. Ct. R. 4:69-1 (2010); MO. REV. STAT. § 536.150 (2010).; MINN. STAT. § 14.63 (2009).

18. N.C. GEN. STAT. § 150B (2009).

19. *Id.*

20. N.C. GEN. STAT. § 7A-223 (2009). In North Carolina, a summary ejection action must precede an eviction.

21. N.C. GEN. STAT. § 157-29(e) (2009).

PHAs render quasi-judicial decisions, primarily in the area of terminating public housing assistance benefits. In theory, these decisions could be appealed to a variety of venues, but as the foregoing analysis has shown, the North Carolina and federal APA do not provide for judicial review, as they are not applicable to NC PHAs.[22]

The stakes in these quasi-judicial decisions are enormous for public benefits recipients. Consider a hypothetical person receiving a monthly housing assistance benefit of $1,000. A 32 year-old female could potentially receive benefits of around $600,000 over her lifetime. Some benefits recipients may be able to receive new benefits after a waiting period, but other recipients, particularly those terminated for illegal drug-related activity, may be barred from benefits forever.[23] These enormously important quasi-judicial decisions are made by municipal corporations without the oversight of North Carolina state courts.[24]

II. FEDERAL CIVIL RIGHTS ACTIONS UNDER § 1983 ARE PROBLEMATIC PRACTICALLY AND LEGALLY

With no direct judicial review provided by a federal or state procedures act, housing assistance beneficiaries may seek judicial review from federal courts through a civil rights action. A typical set of facts are presented in *Clark v. Alexander*.[25] Stacey Clark was a Section 8 voucher recipient whose benefit was terminated due to the drug-related criminal activity of a family member; such termination is mandated by HUD regulations.[26] Ms. Clark requested an informal hearing after being informed by her PHA director that her housing assistance was terminated as a result of the drug-related criminal activity, and the hearing was granted.[27] The informal hearing considered testimony from police officers who conducted a search of the premises and found drugs.[28] Testimony was also heard from Ms. Clark's estranged husband, David Clark, who admitted to owning the drugs.[29] The hearing officer, a local attorney, upheld the termination, conclud-

22. *See generally* N.C. GEN. STAT. § 150B (2009).

23. 24 C.F.R. § 960.204(a)(3)-(4) (2010). Persons convicted of methamphetamine production or who fail to meet sexual offender registration requirements are permanently prohibited admission to public housing assistance.

24. *Id.* at § 960.204(a).

25. Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996). (Though the case is from Virginia, it is binding throughout the 4th Circuit and has been positively cited repeatedly).

26. *See* 24 C.F.R. § 966.4(f) (2010) (requiring that the lease between the landlord and tenant obligate the tenant to insure that drug-related activity does not occur on the premises);24 C.F.R. § 247.3(a) (2010). (stating that drug-related criminal activity is a basis for eviction under HUD regulations.); 24 C.F.R. § 882.118(b)(4) (1994).

27. *Clark*, 85 F.3d at 149.

28. *Id.*

29. *Id.*

ing that a family member had been involved in drug-related criminal activity.[30]

Most assistance termination cases end after the informal hearing and there is no further review. Though legal assistance attorneys can fight the results of informal hearings, their primary goal is to keep a case from ever reaching this stage. For example, if a legal assistance attorney uncovers convincing legal arguments as to why a housing benefit should not be terminated, it is common practice to disclose these arguments to the PHA in order to convince the PHA to drop termination before it reaches the informal hearing. In most instances, an informal hearing is the end of the matter. In rare cases like *Clark v. Alexander*, however, the assistance recipient brings a suit in federal district court under 42 U.S.C. § 1983.[31] Section 1983 provides a civil action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[32] The deprivation suffered must also be under color of law.[33] In summary, a § 1983 claim may be brought for a constitutional procedural violation, a *Goldberg v. Kelly* violation, or a procedural or substantive violation of a protection afforded through statute.[34]

In *Clark*, the § 1983 claim alleged that the informal hearing suffered from procedural errors and that the PHA exceeded its authority by terminating the voucher.[35] The federal district court granted summary judgment to the PHA.[36] On appeal, the 4th Circuit affirmed, holding that the district court properly showed deference to the fact-finding of the informal hearing, under a standard of substantial evidence.[37]

In this instance, Ms. Clark received two levels of federal judicial review, in addition to the PHA director's decision-making and the informal hearing. However, § 1983 claims provide a very limited means for obtaining judicial review of PHA decision-making. As a practical matter, § 1983 claims are complex legal matters which require the devoted attention of competent attorneys. Indigent plaintiffs must rely on legal assistance organizations such as Legal Aid of North Carolina. The resources of legal assistance organizations are limited and stretched perilously thin. While legal assistance organizations rarely turn away deserving clients, the overwhelming number of clients has a definitive impact on the legal strategies employed by legal assistance

30. *Id.*
31. *Clark*, 85 F.3d at 149.
32. 42 U.S.C. § 1983 (2010).
33. *Id.*
34. *Id.*
35. *Clark*, 85 F.3d at 149.
36. *Id.*
37. *Id.* at 152.

attorneys. The staggering number of requests for assistance dictate that not all applicants can receive representation in litigation of their cases, so that, in many cases, alternate methods of resolving their problems must be explored and used where possible.[38] Anecdotal reports of the pressures on legal services attorneys are supported by budget figures; in fiscal year 2007, the federal budget allocated $349 million for legal services.[39] By comparison, $303 million was allocated in fiscal year 2000. Adjusting for inflation, this is a net decrease in legal services funding of $12 million dollars.[40] Legal assistance attorneys simply do not have the resources to use § 1983 claims as judicial review over PHA decisions.

Even if legal assistance funding becomes readily available, the legal viability of § 1983 claims is in doubt. Although there has been some past success in using § 1983 claims to vindicate tenant or beneficiary rights, the status of these successes is muddied following recent changes in § 1983 doctrine.[41] In 2002, the Supreme Court made a critical ruling regarding § 1983 claims in *Gonzaga University v. Doe*.[42] In *Gonzaga*, a student brought a § 1983 claim for release of personal information by the university, in violation of the Family Educational Rights and Privacy Act ("FERPA").[43] Although the university had clearly violated FERPA's nondisclosure provisions, the Supreme Court held that those provisions did not create rights enforceable under § 1983.[44] The Court held that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action."[45] The intent of Congress was placed at the core of determining whether a right is enforceable through § 1983.[46] According to *Gonzaga*, determining whether a statute confers an individual right does not differ from the inquiry into

38. These methods may include negotiation with senior officials of the PHA pre-hearing, brokering a deal with a complaining private landlord in order to mollify the PHA (often involving a voluntary relocation to a new dwelling by the tenant), formulating a repayment plan, removing offending household members, and other means.

39. OFFICE OF MGMT. & BUDGET, OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, 227-9 (2008), http://www.gpoaccess.gov/usbudget/fy09/pdf/hist.pdf.

40. *Id.* Inflation adjusted, $303 million dollars is valued at roughly $362 million in 2007.

41. Diggs by Diggs v. Housing Auth., 67 F. Supp. 2d 522 (D. Md. 1999) (arguing through a § 1983 claim that under the Housing Act and the implementing regulations of HUD a no-guest lease provision was precluded). *See also* Evans v. Hous. Auth. of Raleigh, 2008 U.S. Dist. LEXIS 48950 (E.D.N.C. June 24, 2008) (claiming due process violations through § 1983 claim, but received only nominal damages).

42. Gonzaga Univ. v. Doe, 536 U.S. 273, 273 (2002).

43. *Id.* at 276.

44. *Id.*

45. *Id.* at 286.

46. *Id.* at 280.

whether there is an implied right of action; the only advantage of suing under § 1983 (rather than searching for an implied right of action) is that there is no burden on plaintiffs of showing intent to create a remedy, as § 1983 supplies a remedy.[47]

The ruling in *Gonzaga* has the potential to substantially weaken the impact of § 1983. Members of the housing law community have expressed concern as to the impact of *Gonzaga* on future public housing law claims.[48] One particular area of concern is whether HUD regulations can be enforced using § 1983 actions. In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the United States Supreme Court held that some HUD regulations established enforceable rights.[49] In *Wright*, the Court allowed § 1983 enforcement of a regulation that defined allowable maximum rent to include utilities; thereby, forbidding charging tenants a separate utility fee.[50] Although there is uncertainty on how *Wright* is to be read, it seems clear that at least one previously plausible reading of *Wright* is no longer permissible after *Gonzaga*:

> [T]he argument that regulations alone may create rights enforceable through 1983 is probably untenable because a regulation alone normally cannot provide "clear" and "unambiguous" evidence that Congress intended to establish an individual right.[51]

The impact of *Gonzaga* has not been fully realized, but if Congressional intent is truly the touchstone for creating a private right of action, HUD regulations may no longer be enforceable through § 1983 claims.

Thus far, the Fourth Circuit appears somewhat reluctant to fully embrace the heightened standards for bringing a § 1983 claim. In *Brooks v. Vassar*, the Fourth Circuit held that existing precedent, not expressly overruled by *Gonzaga*, remained controlling authority, and allowed a Commerce Clause challenge under § 1983.[52] In *Pee Dee Health Care, P.A. v. Sanford*,[53] the Fourth Circuit carefully distinguished *Gonzaga* and applied the previous standard of *Blessing v. Freestone* for determining whether a statute creates an enforceable right.[54]

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47. *Id.* at 284.

48. *See* Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417 (2003). *See also* Elena Goldstein, Note, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215 (2003).

49. Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 429-30 (1987).

50. *Id.* at 430.

51. MANK, *supra* note 51, at 1467.

52. Brooks v. Vassar, 462 F.3d 341, 360 (4th Cir. 2006).

53. Pee Dee Health Care, P.A. v. Sanford,509 F.3d 204, 210 (4th Cir. 2007).

54. Blessing v. Freestone, 520 U.S. 329 (1997) (holding that the *Blessing* analysis focuses on whether Congress intended the statute to benefit the plaintiff, not on whether Congress intended a right of action to be created).

Despite the Fourth Circuit's narrow application of *Gonzaga*, the case still demonstrates the vulnerability of § 1983 claims to a court's statute-specific analysis as to whether a right of action exists.[55] Furthermore, since portions of *Wright* appear to be overruled, HUD regulations alone can no longer serve as the basis for a cause of action.[56] As one commentator put it:

> Chief Justice Rehnquist's requirement of clear and unambiguous proof that Congress intended to establish an individual right on behalf of a class including the plaintiff eroded the Court's precedent emphasizing the presumptive enforcement of federal statutory rights through [§] 1983.[57]

The practical and legal difficulties of defending the rights of public housing assistance recipients through § 1983 forces the consideration of alternative legal avenues. While having its own difficulties, state judicial review provides a promising option for advocates of housing assistance recipients.

III. Options for State Judicial Review of Benefits Decisions by PHAs

Having state courts oversee PHAs may initially seem peculiar given the largely federal nature of PHAs. After all, PHAs are funded by HUD and must comply with federal statutes as well as with federal regulations.[58] However, PHAs are also organisms of state law, organized under NC General Statutes as municipal corporations, with commissioners appointed by local mayors.[59] Though PHAs may fit more naturally under federal judicial regulation and the federal APA, the federal government has not seen fit to provide direct oversight over quasi-judicial decisions in need of judicial review.[60] In lieu of federal action, North Carolina has the authority to step in and provide state judicial oversight.[61]

Such a review process already exists in Minnesota, where as a result, a rich body of case law regarding public housing issues has developed at the state court level. Unlike North Carolina, Minnesota treats its PHAs similarly to how the federal government treats federal agencies.[62] A Minnesota court held that "[t]hese authorities form part of the executive branch of government but exercise quasi-judicial func-

55. *Gonzaga*, 536 U.S. at 283 .
56. Mank, *supra* note 51, at 1467.
57. Mank, *supra* note 51, at1481.
58. 24 C.F.R. (2010).
59. N.C. Gen. Stat § 157-5(a) (2009).
60. 5 U.S.C. §§ 701 – 706 (2006).
61. N.C. Gen. Stat. § 157-25 (2009).
62. Tischer v. Hous. & Redevelopment Auth. of Cambridge, 675 N.W.2d 361, 363 (Minn. Ct. App. 2004).

tions in their operation."[63] Such a view is similar to the view federal courts have towards the National Labor Relations Board or the Environmental Protection Agency.

Although Minnesota PHAs hold hearings conducted by a hearing officer (not a state administrative law judge), Minnesota courts have been willing to consider PHA hearings to be administrative in nature. Under Minnesota Rule 115, a Section 8 voucher recipient can appeal a termination decision to the Minnesota Court of Appeals.[64] Among the most widely cited cases of this type is *Carter v. Olmstead County Housing and Redevelopment Authority*.[65] In *Carter*, the court reversed the termination of benefits due to a number of procedural errors by the hearing officer, as well as the lack of substantial evidence to support the agency's decision.[66] As to the scope of review, the court held that "[a]n agency's quasi-judicial determinations will be upheld unless they are unconstitutional, outside the agency's jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious."[67] Minnesota's scope of review over PHA decisions largely mirrors the scope of judicial review over agency action created by the federal APA.[68]

Minnesota's state courts may have the richest case law regarding PHAs, but Minnesota is not the only state to involve state courts in reviewing PHA decisions. While state judicial review varies widely both in procedure and substance, the concept is widely utilized.[69] In California, a statutory writ can be filed which allows review of decisions of administrative agencies, which includes PHAs.[70] California rules also offer an alternative procedure, by which the performance of an act can be compelled as a duty resulting from the office or station.[71] This alternative procedure is an intriguing option for North Carolina, because it may apply to an "inferior tribunal, corporation, board, or person" to compel an action associated with "a duty result-

63. *Id.*

64. Minn. R. Civ. App. P. 115 (2010).

65. Carter v. Olmstead County Hous. and Redevelopment Auth., 574 N.W. 2d 725 (Minn. Ct. App. 1998).

66. *Id.* at 733.

67. *Id.* at 729 (*quoting* Hiawatha Aviation v. Minnesota Dep't of Health, 375 N.W.2d 496, 501 (Minn. App. 1985)).

68. 5 U.S.C. § 706 (2006).

69. Reliance on anecdotal evidence, although problematic in its own right, is useful as it illuminates how legal services attorneys throughout the country tackle problems. Furthermore, because many appeals end at the state trial level, there are often no reported decisions. Magistrate judges in many state rarely write formal opinions. Minnesota is a rarity, as their appeals are handled by an appeals level court. Even in states like Missouri where a right of appeal is established, it is impossible to evaluate the case law due to the lack of published opinions.

70. CAL. CIV. PROC. § 1094.5 (West 2010).

71. CAL. CIV. PROC. § 1085 (West 2010).

ing from an office, trust, or station."[72] This formulation for state judicial review, unlike the primary statutory writ, does not require that a PHA be considered a state administrative agency.[73] However, anecdotal evidence from California legal service attorneys suggests that this alternative formulation is only occasionally accepted by courts.[74]

In lieu of court rules providing for an appeals process, legal services attorneys in several states have demonstrated remarkable resourcefulness in finding avenues to state court review. The result is that despite no formal appeals process, some states informally allow their courts to accept review of PHA decisions on a case-by-case basis. In New Jersey, appeals are normally made to federal courts as civil rights actions pursuant to § 1983, but an appeal can be made to the state courts through a complaint in lieu of a prerogative writ.[75]

Though the resourcefulness of legal service attorneys is to be applauded, the weaknesses of these informal processes are readily apparent. In many states, there is no state Supreme Court case law on point, leaving state courts without sufficient guidance on when to accept such appeals.

One example of a much more formalized appeals process is the system implemented in the State of Missouri. Like Minnesota, Missouri provides for state court review of PHAs as administrative agencies; appeals are made pursuant to the Missouri APA.[76] However, Missouri's process differs from Minnesota's in several notable respects and incorporates one practical advantage of the less formal processes. In Missouri, appeals from administrative agency decisions are made to the state trial courts.[77] At the trial court level, the review is normally *de novo*.[78] *De novo* review does not mean a completely fresh review; the trial court reviews the agency's decisions and decides whether they were "unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion."[79] In determining whether the PHA erred, the trial court hears evidence on the merits and creates a fresh record.[80] If the decision is appealed beyond the trial court, it is the trial court's decision, not the PHA's decision,

72. *Id.*

73. *Id.*

74. There are no published opinions to support the anecdotal experiences of California legal aid attorneys. Due to the paucity of written opinions by state trial court judges, anecdotal evidence is often the only information available.

75. N.J. Ct. R. 4:69-1.

76. Mo. Rev. Stat. § 536.150 (2010).

77. *Id.*

78. State ex rel. Smith v. Housing Auth. of St. Louis County., 21 S.W.3d 854, 856 (Mo. Ct. App. 2000).

79. *Id.*

80. *Id.*

which receives appellate review.[81] Review at the trial court level also has the practical benefit of allowing legal services attorneys to practice in venues with which they are familiar. By contrast, the Minnesota system sends appeals directly to the appellate level, due to state constitutional concerns.[82] This practical benefit of the Missouri system is not to be dismissed lightly; legal services attorneys operate in magistrate and trial courts on a weekly basis but rarely litigate at the appellate level.

IV. LESSONS FOR THE NC STATE COURTS

North Carolina need not be concerned with the intricate differences between the Minnesota and Missouri appeals systems. This partial survey of state appeals processes is meant to demonstrate that there is an array of options for providing state judicial review of PHA decisions, and that other states have acknowledged that this is a significant problem that requires remedial steps. This article highlights a few specific concerns that would apply to any legislative proposal in this area for reform in North Carolina.

First, no state appeals process should be, either in design or practice, an exclusive remedy for appealing PHA decisions. Regardless of how comprehensive such an appeals process may be, § 1983 claims should still be allowed and brought in federal courts to vindicate civil rights claims. Even if North Carolina state courts become the best method to vindicate individual claims, § 1983 claims are critical to ensuring that PHA hearing processes remain within the bounds of *Goldberg v. Kelly*. A state court appeals process would allow more PHA adjudications to receive judicial review, but PHA informal hearings will remain the first step for all decisions and for some housing benefit recipients these hearings will remain the final step of review. Preserving a constitutionally sound PHA informal hearing system is just as important as creating an appeals system.

Second, any state appeals process should carefully weigh the benefits to wrongfully deprived recipients of PHA assistance against the increased costs to the PHA. In essence, while the first concern seeks to ensure the legacy of *Goldberg v. Kelly*, the second concern addresses *Mathews v. Eldridge*.[83] As the United States Supreme Court noted in *Mathews*:

> the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the

81. *Id.*
82. MINN. STAT. § 14.63 (2009).
83. Matthews v. Eldridge, 424 U.S. 319 (1976).

> individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.[84]

PHAs operate under tremendous budget constraints.[85] PHAs throughout North Carolina attempt to render the most assistance possible with limited resources. While administrative and judicial review is needed to ensure that PHAs respect individual rights while achieving community-wide objectives of providing affordable housing, those same objectives cannot be reached without an appeals process which is respectful of the limitations under which PHAs operate. This factor militates in favor of a process similar to a writ of certiorari, rather than an appeal of right, although this factor alone should not be dispositive.

Third, a reviewing court should carefully scrutinize the record produced by a PHA hearing. There are reasons to believe that a record produced at an informal hearing may be deficient. A variety of procedural violations can occur at an informal hearing, particularly if an attorney for the tenant or beneficiary is not in attendance. The informal setting may not be as conducive to creating a complete factual understanding of the situation; the adversarial pressures of trial, including full discovery, may create a more complete record of the facts. The Missouri system has recognized this concern by doing away with the administrative hearing record on judicial appeal, and developing a completely fresh record of the facts based on evidence presented at trial.[86] In light of the previously stated concern regarding conserving PHA resources, the Missouri system may go too far by providing for a completely new case on the merits on judicial review. Instead it may be sufficient to allow courts to take notice of new facts unavailable at the informal hearing. If the reviewing court does not compile a new record, it should analyze the hearing record with a high degree of scrutiny to ensure that the procedures observed were sufficient to create a credible record on which to base a decision.

Finally, the implementation of a state court appeal system should not bar consideration of a further intermediate level of review. North Carolina already operates an OAH, which provides ALJs to rule on issues ranging from child support to tax petitions.[87] To date, the OAH remains uninvolved with public housing issues, and appearances by public housing advocates before the OAH judges are uncommon.[88]

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84. *Id.* at 348.

85. *Id.*

86. *Smith*, 21 S.W.3d at 856 .

87. N.C. Gen. Stat. § 150B-40(e) (2009).

88. N.C. GEN. STAT. § 150B-38 (2009) (OAH's jurisdiction does not extend to public housing cases).

The OAH is appealing as a possible intermediate level of review in between the PHA informal hearing and the state court appeal; however, there may be other options, such as appeal to a new statewide body. At the federal level, initial disposition of agency adjudications can be appealed, at which point the officer who presided at the initial adjudications recommends a final decision to the agency.[89] North Carolina could consider a similar process, whereby the hearing officer at the PHA informal hearing recommends a decision to the state PHA commissioners for final disposition before judicial review. Creating an intermediate level of review is a radical suggestion, but it is not an idea which should be excluded solely because of the creation of a state court appeals process.

Any appeals process should be viewed as a tool for improving outcomes for the residents of North Carolina in need of public housing assistance. Judicial process can help further these people's interests, but, as previously illustrated, judicial process does not necessarily improve outcomes. Some of the best work done by legal services attorneys is amicably settling cases and avoiding court altogether. PHA directors and general counsels are both partners and adversaries of legal services attorneys, and a judicial appeals process should be viewed as an avenue of last resort, not only to preserve scarce resources, but also to encourage collaboration between all parties in reaching just solutions to public housing issues.

89. 5 U.S.C. § 557(b) (2010).