

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JOSIE D. CARTER, et al. :
Plaintiffs :
v. :
ANDREW M. CUOMO, et al. : CIVIL ACTION NO. JFM-99-3250
Defendants :

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDA IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs Josie Carter, Gloria Jackson, Debbie Montgomery and Marcia Phelps hereby submit a consolidated reply to the memoranda filed in opposition to Plaintiffs' Motion for Preliminary Injunction by defendants Jarmhl, LLC ("Jarmhl"), Harry D. Myerberg ("Myerberg") and the United States Department of Housing and Urban Development ("HUD"). Defendants' oppositions are fundamentally flawed.

First, HUD has failed to discharge its fundamental legal obligation to conduct a rigorous analysis, following its own regulations, to determine whether adequate affordable housing is available in the Dunhaven area if it chooses to provide tenant-based assistance to Dunhaven's Section 8 tenants.¹ A review of the agency's administrative record reveals its absolute failure to undertake a meaningful assessment of the availability of affordable housing in the Dunhaven area. Instead, it is clear that HUD is trying to justify a decision which was not based on a legally sufficient analysis of the availability

¹ This obligation arises under Section (e)(2) of the Multifamily Housing Disposition Act and is also a requirement of the Multifamily Mortgage Foreclosure Act, 12 U.S.C. § 3701 et. seq., which governs foreclosure procedures in this case.

of affordable housing because it mistakenly believed it did not have to perform such a study.² It appears that, when HUD discovered its error – that the property was not a loan management set aside but a new construction project – HUD sought justification in a prior study which fails to address even the most fundamental criteria the agency itself has deemed necessary for making the determination. Its failure means that the sale of the property to Jarmhl must be set aside.

Second, HUD erroneously concluded that it was not required to prepare a disposition plan prior to holding the sale because it was not the “owner” of the Dunhaven property. However, examination of applicable law regarding ownership of real property and the documents establishing the relationships among the parties leaves no doubt but that HUD held legal title to Dunhaven and, upon Walkint’s default, had the ability to exercise its ownership prerogatives. Its own regulations also require it to develop a disposition plan without regard to its status as an owner. Not even HUD contends that it did so. Therefore, its failure to prepare a disposition plan also contravenes its legal obligations and requires that the sale be set aside.

Defendants also fail to demonstrate that a preliminary injunction should not issue in this case. As at least one other federal Court has concluded, plaintiffs’ loss of important statutory rights constitutes a sufficiently tangible and imminent harm to warrant issuance of a preliminary injunction. Defendants’ claims of harm to themselves are unpersuasive. Finally, to the extent the issuance of a preliminary injunction is

² This is where HUD’s misconception that the project was a loan management set aside project becomes critical. As the agency itself admits, had the project been LMSA, it could have provided tenant-based assistance without doing the requisite study. 12 U.S.C. § 1701z-11(e)(1)(D)(ii). However, as a new construction project, HUD was obligated to determine that there was “available in the area an adequate supply of habitable, affordable housing for very low-income families and other low-income families using tenant-based assistance.” 12 U.S.C. § 1701z-11(e)(2)(A).

influenced by a balancing of equities, as defendants suggest, those equities tilt decisively in favor of plaintiffs. After all, responsibility for the deteriorating conditions at the complex – the “harm” articulated by defendants -- lies squarely with defendant Myerberg for Walkint’s default and inadequate management by his management company, and with HUD for its failure to take action for five years following the default and force needed repairs.

II. ARGUMENT

A. HUD is required to determine that there is adequate, available affordable housing for low-income people before it opts for tenant-based subsidies.

All of the parties agree that, no matter whether HUD “owns” Dunhaven, subsection (e) of the Multifamily Disposition Act requires it to exercise at least one of three options. Those options are: (1) a contract for project-based assistance; (2) tenant-based assistance if HUD “determines that there is available in the area an adequate supply of habitable, affordable housing for very low-income families and other low-income families using tenant-based assistance”; or (3) other forms of specified “discretionary” assistance which must provide no diminution in the number of affordable units for low-income tenants for the useful life of the project. 12 U.S.C. § 1701z-11(e). HUD claims that it opted for tenant-based assistance after determining the adequacy of affordable, habitable housing in the area. See Defendant HUD’s Opposition at pp. 8-9. Even a cursory examination of its purported analysis reveals that it is woefully inadequate and fails to address the basic elements required by law and HUD’s own criteria.

Based on its Foreclosure Recommendation, HUD contends that Dunhaven was in a “soft” rental market which kept rents low. *Id.* at 8. This conclusion was based on the HUD Baltimore Office’s undocumented “general knowledge of the market”, other equally unspecified and undocumented “information” and consideration of a rental housing market study prepared by a HUD Regional Economist in 1997. *Id.* HUD stated its conclusion that the market could absorb 14 families with tenant vouchers, in the event that Dunhaven’s purchaser elected against making the 14 units available for tenant-based assistance at some time in the future. *Id.* at 9.³

However, an examination of the market study reflects that HUD failed to address factors that it deems necessary to such a determination. In its own regulations at 24 C.F.R. § 290.3 and again in its Guide to those regulations, HUD states that it “will make the determination of whether sufficient habitable, affordable,⁴ rental housing is available using established market analysis techniques. The following factors (indicators of an absence of affordable housing) must be considered:

- (1) The rental housing vacancy rate is at a low level relative to the rate required for a balanced market, typically a four percent vacancy rate; except that a rate lower than four percent may be considered in unusual circumstances if it can be demonstrated that there is an adequate supply of affordable housing for low-income families;
- (2) The number of rental housing units being produced on an annual basis is not large enough to satisfy demand arising from the increase in households, or in markets where there is little or no growth, evidence that the number of additional rental units being supplied is not sufficient to

³ HUD’s Opposition also cites to an appraisal conducted of Dunhaven in 1997, but never indicates how it relied on the appraisal, if at all. *Id.* at 9.

⁴ To determine “affordability”, HUD must address very specific, quantifiable factors. The Multifamily Disposition Act defines “affordable” in three ways: 1) units occupied by very low income families where the rent does not exceed 30% of 50% of the area median income or 2) units occupied by low income families where the rent does not exceed 30% of 80% of the area median income or 3) units receiving Section 8 assistance. 12 U.S.C. 1701z-11(b)(5). The market study upon which HUD relies does not consider affordability as defined by the statute.

meet the demand arising from net losses to the available inventory and the inadequate supply of rental housing has inhibited growth;

- (3) The shortage of housing is resulting in rent increases that exceed normal increase commensurate with the costs of operating rental housing;
- (4) A significant number, or proportion, of the households holding Section 8 certificates or rental vouchers are unable to find adequate housing because of the shortage of rental housing, including PHA data showing a lower than average percentage of units under lease and a longer than average time required to find units.

24 C.F.R. § 290.3; HUD “Disposition of Multifamily Projects and Sale of HUD-Held Multifamily Mortgage Guide” (definitional section). The administrative record does not reflect consideration of HUD’s own criteria. This is not surprising, since the market study was prepared for an entirely different purpose – to determine the long term viability of other projects, most of which were not in Perry Hall. Defendant’s Ex. 15. See also * Affidavit and Statement of Wayne Sherwood (“Statement”) at p. 8. For example, the * market study does not examine the production or decline in affordable rental units * against demand. Statement at pp. 6-7. Similarly, it does not address whether voucher holders for tenant-based assistance are able to find housing in the Dunhaven (Perry Hall) * area. Statement at p. 7. And, perhaps most importantly, the study itself refutes HUD’s * contention that the market including Dunhaven is “soft”. Statement at pp. 10-11.

Dunhaven is located in Perry Hall. According to the study, Perry Hall is a growing area that is attracting wealthier and better educated residents. See Defendant’s Ex. 15 at p. 106. Median incomes rose at above average rates in the 1980s, “making these units less accessible to low-income households.” Id. Gross rents increased by over

* 165% during that time. Statement at p. 10. The increased demand created barriers to affordable housing in adjacent areas: “[s]pin-off housing demand that allowed nearby areas to

inflate rents, caused higher rent burdens since income appreciation of existing residents did not keep pace with rent inflation.” Id.

Perry Hall’s vacancy rate, according to the market study is less than 5%. See Defendant’s Ex. 15 at p. 55, IV.B.2 & Maps 16A & B. The demand for rental housing in this area continues to grow. Defendant’s Ex. 15 at p. 92. Only Essex, at the extreme other end of the County had a “soft” market indicator of a vacancy rate over 10%. Defendant’s Ex. 15 at p. 55. And, only 2% of the tenant-based subsidies used in the South Eastern sector of Baltimore County are used in Perry Hall. Defendant’s Ex. 15 at p. 21, III, Graph II. Thus, only by twisting and ignoring HUD’s own study can defendants claim that the market in the Dunhaven area provides available, affordable housing to low-income people. The “healthiness” of the market, to which defendants Myerberg and Jarmhl repeatedly point, is precisely what makes it an increasingly less affordable market for the low-income population HUD is charged with protecting. However, it is undoubtedly this healthy market, with its increasing number of higher income residents, that make the reacquisition of Dunhaven for a Myerberg venture so attractive, particularly after he has been relieved of a significant financial obligation for the property through Walkint’s default.

Indeed, even a preliminary assessment of the record by an expert in the demographics of low-income housing supports the foregoing analysis. As set forth in his Statement, Wayne Sherwood, an expert in public housing and low-income housing demographics readily concluded that HUD’s administrative record not only failed to address HUD’s own required criteria for determining the availability of affordable

* housing but supports a contrary conclusion. Statement at pp. 10-11. He found that the study

contained little information regarding the overall supply or demand for affordable housing units or the gap between supply and demand. What information there was, however, did not appear to support the conclusion that there was an adequate supply of * affordable housing in the Dunhaven area. Statement at p. 9. Based on HUD's own record, Mr. Sherwood concluded that the market was neither "soft" nor "balanced" as defendants suggest. Instead, it appears to be increasingly tight; one where the demand * for housing has exceeded the supply for at least 15 years. Statement at p. 9.

As Mr. Sherwood explains and as HUD's own study reveals, a tightening market is one which squeezes out low-income tenants. Statement at p. 8; Defendant's Ex. 15 at p. 106. Landlords in such markets are increasingly unwilling to accept Section 8 certificates * or vouchers. See Statement at p. 8; see also Beck, "Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier, 31 Harvard Civil Rights-Civil Liberties Law Review 155 (1996)(hereinafter "Beck"). The combination of factors apparent from the study itself – a tightening market attractive to higher income persons, strong demand and rapidly increasing rents – results in an increase and scarcity of affordable housing. * Statement at pp. 9-11.

HUD cannot claim that Mr. Sherwood's conclusions come as a surprise to it. Indeed, its contention that "it is unaware of any problem with the acceptance of vouchers in the area" is ludicrous. Defendant HUD's Opposition at 13. Its own studies document the crises in the availability of affordable housing to low-income persons. In particular, its studies, along with numerous others, confirm that increasingly tighter rental markets create virtually insuperable obstacles for prospective low-income tenants, particularly

those who are trying to find apartments using Section 8 vouchers.⁵ For example, in 1998, HUD produced a report to Congress which “document[ed] the ongoing shortage of affordable housing in America.” See Plaintiff’s Ex. 1 at Executive Summary. The 1999 update to that study underscores the fact that the substitution of tenant-based vouchers for project-based housing drives low-income people out of mixed communities into pockets of poverty:

Not only is the number of subsidized housing units shrinking, but some of the best quality affordable housing is at risk of being lost or replaced with vouchers which are likely to be used in higher poverty neighborhoods. This trend threatens to worsen an already dire rental crisis and counteract efforts to reduce the isolation of low-income families in high poverty neighborhoods. . . .in many cases, vouchers do not pay enough to allow residents to continue living where they are. This can mean moving long distances to find affordable housing or, worse still, finding none at all.

See Plaintiff’s Ex. 1 at p. 13. See also Beck (widespread discrimination exists against Section 8 voucher holders who are often unable to use the vouchers and are generally relegated to concentrated poverty areas; nationally 1 of 5 voucher holders are unsuccessful in finding housing).

Perhaps the most telling evidence that loss of project-based assistance will force these tenants out of their neighborhood is defendant Myerberg’s own admission that not one unit in the Dunhaven project is occupied by a Section 8 voucher or certificate holder. See Plaintiff’s Ex. 2 at pp. 4,5 (Myerberg Answers to Interrogatories 3, 4). He has

⁵ Defendant HUD repeatedly suggests that there are advantages to tenant-based assistance because it is “portable”. However, if a voucher cannot be used in one’s increasingly up-scale neighborhood, the holder * is forced to move farther from school, work and support systems like daycare. The theoretical advantages of portability are then illusory. Moreover, it is simply wrong that tenants with vouchers can pay any amount of difference between market rates and the amount of their voucher, as defendants contend. Rather, at least for initial occupancy, the tenants’ share of rent beyond the voucher amount must not exceed 40% of the family’s adjusted monthly income. See 24 CFR § 982.508. Thus, the usefulness of the voucher * is significantly constrained, particularly in markets like Perry Hall where rents are increasing.

objected to disclosing whether there are any Section 8 voucher or certificate holders in any of the other 1000 units he owns surrounding Dunhaven. Id. His failure to provide support for defendants' contention that there is affordable housing available to voucher holders in the area, if it exists, certainly raises a strong inference that his Fox Hall empire does not welcome persons who receive tenant-based assistance.⁶ HUD's own 1996 data indicates that there were only 5 certificate or voucher holders in census tract * 240054114.02, which includes the Fox Hall complex. See Plaintiff's Ex. 3. It is therefore simply contrary to the study upon which HUD relies, the voluminous, national evidence, and Myerberg's own evasive answer to plaintiffs' interrogatories, to claim that the Dunhaven market is one where there is affordable housing for low-income persons.

Another fatal flaw in HUD's efforts to justify its failure to conduct a meaningful study of the availability of affordable housing is that it has applied a legally incorrect standard. It argues that its study allowed it to determine that the market "could absorb 14 families with tenant vouchers". See Defendant HUD's Opposition at 9. However, the test is not whether the market could absorb only the individually affected Section 8 tenants. Rather, the inquiry requires an analysis of whether the applicable market * provides an adequate supply of affordable housing in the market. See 24 C.F.R. § 290.3. Moreover, there is absolutely no evidence in the record that HUD even examined how tenant-based subsidies might affect the 14 unit-holders.⁷ By limiting its purported

⁶ He cavalierly states that "he has no idea" how many applicants for rental units in that vast complex were Section 8 certificate or voucher holders because he does not maintain such records. Id. at p. 5.

⁷ Myerberg has refused to identify the Section 8 tenants in the complex, notwithstanding the fact that defendants have asserted that their individual circumstances were relevant to and considered in the very decision that is being challenged in this case. His refusal to provide information needed to explore the legitimacy of their defense weighs against altering the status quo prior to a merits hearing and resolution of this and other discovery disputes. Of course, a protective order could address any real concerns on the part of defendant regarding the confidentiality of such information.

consideration to the 14 families in the complex, HUD failed to follow its own regulations * and its “analysis” cannot withstand judicial review. U.S. v. Nixon, 418 U.S. 684 (1974).

Plaintiffs’ challenge to the adequacy of HUD’s study is not simply an effort to substitute their preferred result for that of the agency. Rather, this is a case where HUD clearly abused its discretion and erred as a matter of law. First, it failed to follow its own regulations and the governing statute. While an agency may have discretion in making policy choices, it may not ignore statutory or regulatory directives which provide the framework within which the discretion must be exercised. 5 U.S.C. § 706(2)(a); Frisby v. U.S. Dept. of Housing & Urban Development, 755 F.2d 1052, 1057 (3rd Cir. 1985). Yet that is precisely what HUD did here when it purportedly relied on a market study intended for a different purpose which did not address the regulatory factors in determining whether adequate affordable housing was available in the Dunhaven area. An agency abuses its discretion when, as here, its findings are “not in accordance with law.” Id. By applying the wrong legal standard and purportedly looking at whether the 14 tenants could be absorbed in the market and by acting on the mistaken assumption that HUD did not own the property and therefore was not required to develop a disposition plan prior to conducting the foreclosure sale, HUD made mistakes of law. HUD’s failure to comply with the law is fatal. The sale must be set aside. 5 U.S.C. § 706; Frisby at 1088.⁸ It is therefore clear that, for a variety of reasons, plaintiffs are likely to succeed

⁸ Second, the fact that the study upon which HUD relies leads to the opposite conclusion that HUD reached means that the basis of the agency’s decision was inherently unsound. Where an agency’s decision is unsupported by its record, its findings must be set aside as an abuse of discretion. 5 U.S.C. § 706(2)(a).

in their showing that the decision-making process required of HUD as a condition of the sale of Dunhaven was fundamentally flawed.

- B. HUD is the owner of the property.
1. Under the deed of trust, HUD owns the property until the loan is fully paid.

On July 15, 1982, Walkint, through defendant Myerberg, its General Partner, and Mercantile Mortgage Co., entered into a Deed of Trust which secured Mercantile's loan to Walkint to finance the construction of Dunhaven. See Defendant's Ex. 1. The loan was insured by HUD. Pursuant to the terms of the Deed of Trust, Walkint conveyed legal title in Dunhaven to Mercantile and, as Grantor, enjoyed the use and rents from the property. Upon full payment of the debt, the property was to be reconveyed to the Grantor. Id. at p. 2. In the event of a default, the Trustee named in the Deed was empowered to sell the land, premises and improvements thereon at public auction. Defendant's Ex. 1 at p. 2. The beneficiary, Mercantile and its successor, HUD, retained an irrevocable power under the Deed to appoint a substitute trustee. Id. at p. 3. Following a default, the Deed provides that the Grantor -- Walkint -- became a tenant at will. Id.

In Maryland, under a Deed of Trust, the mortgagee, Mercantile and its successors including HUD, owns title to the property. The mortgagor, Walkint, holds merely a beneficial interest in the property unless and until the mortgage is fully paid. The Maryland Court of Special Appeals recently reiterated the well-established Maryland rule of law:

[T]he mortgagor of real estate is regarded as the beneficial owner of the mortgaged property but the mortgage conveys the whole legal estate to the mortgagee, subject generally to the condition subsequent that upon due payment of the mortgage debt and on performance of all the covenants by the mortgagor, the mortgage deed

is avoided' In other words, the mortgagor, while retaining equitable title in the mortgaged property, grants to the mortgagee legal title in that property.

* IA Construction v. Carney, 104 Md. App. 378, 656 A.2d 369, 375 (1995), aff'd 341 Md. 703 (1996), quoting Hebron Sav. Bank v. City of Salisbury, 259 Md. 294, 299, 269 A.2d 597 (1970). See also Chemical Bank New York Trust Co. v. Steamship

* Westhampton, 358 F.2d 574, 584 (4th Cir. 1965), cert. denied 385 U.S. 921 (1966).

On March 20, 1995, because of Walkint's default on its HUD-insured mortgage, all rights and interests in Dunhaven of the Trustee, Bank of America NT & SA, were assigned to the Secretary of HUD, in return for HUD's payment of the outstanding mortgage and other costs of Dunhaven, totalling in excess of \$2,500,000. Beginning in March, 1995, then, HUD owned legal title to Dunhaven. As the owner of legal title, HUD was required to develop a disposition plan prior to the foreclosure sale.

Defendants offer no analysis to the contrary. Without explanation, they merely recite that the property is not "owned" by HUD. See, e.g., defendant HUD's Opposition at p. 5; defendants Jarmhl and Myerberg's Opposition at 7. They cite to no statutory or other authority -- and plaintiffs' do not believe there is any -- that would alter the legal relationships established by the Deed of Trust under Maryland law. Indeed, in Defendant Myerberg's Answers to Plaintiffs' First Set of Interrogatories (hereinafter "Myerberg Answers"), Myerberg describes Walkint's pre-foreclosure interest in the property as an "equitable interest", which is consistent with well-established state law. See Plaintiff's Ex. 2 at p. 5 (Answer to Interrogatory No. 5).

“Ownership” is not a defined term in any of the relevant federal laws. The legislative history does not reflect any intent to supplant the operation of long-standing state law ownership concepts. Since Congress did not see a need to federalize a concept * which is firmly ensconced in state law, HUD must take into account such laws when it structures its transactions with local, private parties and is bound to apply state law concepts of ownership to such transactions. See, e.g., Chicago Title Ins. Co. v. Sherred Village Associates, 708 F.2d 804 (1st Cir. 1983)(state law rules applied to determining lien priorities under Mortgage Foreclosure Act which federalized mortgage foreclosure procedures).

Upon foreclosure, Walkint’s equitable interest in Dunhaven was extinguished and legal and equitable title were joined in the Secretary of HUD. Since the abortive foreclosure sale – caused first by HUD’s rejection of Jarmhl’s bid and then by the two Federal Court temporary restraining orders – HUD remains the sole owner of Dunhaven.

2. HUD’s own regulations do not limit the scope of their obligations with respect to unsubsidized housing by any concept of ownership.

HUD, in its own regulations, defines a “HUD-owned project” as “a project that has been acquired by HUD.” 24 C.F.R. 290.3. Further, HUD defines an “unsubsidized project” as “a multifamily project that is not a subsidized project.” 24 C.F.R. 290.3. These regulations reflect that HUD interprets its mandate under the Disposition Act without regard to the concept of ownership, so that both disposition plan and consideration of all section (e) alternatives are required when HUD disposes of unsubsidized projects.

HUD's regulations reflect the underlying congressional intent of the Disposition Act: to govern the management and disposition of all multifamily projects. 103 S. Report * 107 (1993). See Defendant's Ex. 4 at p.

9. Congress intended that the definition of "unsubsidized projects" would include all "projects that are not subsidized or formerly subsidized ... [generally, that] are market-rate rental projects with mortgages insured under section 207 or Section 221 (d) (4) of the National Housing Act, or projects in which less than 50 percent of the units are under a contract to receive Section 8." Id. at page 10.

Clearly, HUD is entitled to develop regulations in accordance with its statutory mandate. However, once promulgated, a federal agency is bound to follow its own regulations. United States v. Nixon, supra, 418 U.S. at 695-696. An agency's failure to act in compliance with its own regulations is fatal to its actions. 5 U.S.C. § 706(2)(a); Frisby, supra, 755 F.2d 1052, 1056 (3d Cir. 1985). HUD cannot now argue a narrow interpretation of "ownership" contrary to its regulations and legislative history. HUD's failure to discharge the requirements associated with HUD-owned property for the Dunhaven "property that has been acquired by HUD" means that its actions are "not in accordance with law." 5 U.S.C. § 706(2)(a).

3. Since HUD owns the property, it was required to develop a disposition plan.

All of the parties agree that, if HUD owns the property, it was required to develop a disposition plan prior to conducting a foreclosure sale of Dunhaven. See Defendant HUD's Opposition at 5-6; Defendants Jarmhl and Myerberg's Opposition at 7. And no

one, not even HUD, contends that such a plan was actually developed for Dunhaven. This oversight is significant. The disposition plan serves important federal policies of preserving and promoting affordable housing and insuring that stakeholders, particularly members of the low-income community, provide input into the process. Thus, in developing its plan, HUD must conduct a rigorous determination of whether affordable housing is available to low income residents of the area. Tenants, along with local governments and community representatives, must be afforded an opportunity to have “appropriate and timely input”. 12 U.S.C. 1701z-11(c)(2)(D). To the extent feasible, the plan must also facilitate sale of the housing project to tenant organizations or public or nonprofit entities, particularly those affiliated with tenants. *Id.* Neither of these requirements were met in this case. Tenants were deprived of a meaningful opportunity to participate in development of a plan for the disposition of their housing as well as the opportunity to seek a nonprofit developer or other entity to facilitate tenant ownership. Without the disposition plan, HUD could not determine that Jarmhl, as the purchaser, was capable of satisfying the conditions of a disposition plan and therefore HUD failed to * meet a legal prerequisite for the sale. 12 U.S.C. § 1701z-11(c)(1). The only way to remedy its violation of the law is to rescind the sale and order that HUD adhere to all of its obligations associated with the development of a disposition plan.⁹

⁹ Defendant HUD claims that it has not failed in its affirmative duty to promote fair housing under Title VIII of the Civil Rights Act of 1968. It also asserts that there is no private right of action against the federal government under Title VIII of the Civil Rights Act of 1968. As stated in their supplemental memorandum, Plaintiffs do not need to address the fair housing issue to satisfy the standards for a preliminary injunction, but will address the claim at the trial on the merits. However, the Fourth Circuit has not yet addressed whether there is a private right of action against the federal government under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* In any event, Plaintiffs certainly may seek judicial review of HUD’s actions or inactions under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, as the Plaintiffs have also done in the instant action. See *N.A.A.C.P. v. HUD*, 817 F.2d 149 (1st Cir. 1987) (in which then Circuit Court Judge Breyer noted that finding an implicit private right of action against the

C. Issuance of a Preliminary Injunction is Warranted.

Plaintiffs are entitled to issuance of a preliminary injunction in this case.¹⁰ As set forth above, they are likely to succeed on the merits of their claim. Moreover, they readily meet the remaining factors supporting issuance of a preliminary injunction. Defendants run no risk of sustaining the type of harm that warrants denial of the preliminary injunction.

1. Defendants run no risk of sustaining the type of harm that warrants denial of the preliminary injunction.

Defendants' Oppositions demonstrate that they will suffer no significant harm from maintaining the status quo pending a merits hearing. Moreover, much of the financial harm they fear is within their power to avoid.

a. HUD has failed to articulate a credible harm to the government arising from issuance of a preliminary injunction.

HUD claims that it may lose money if the foreclosure sale is "delayed much longer". See Defendant HUD's Opposition at 14. It speculates that it might lose the bid

federal government is not necessary because federal action is nearly always reviewable under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.)

¹⁰ At this stage of the proceedings, it is not appropriate to combine the preliminary injunction hearing with one on the merits. Contrary to defendant Jarmhl and Myerberg's assertion, the opportunity to conduct and review meaningful discovery has been effectively thwarted by the defendants themselves. In the spirit of * cooperation, plaintiffs agreed to respond to defendants discovery by Friday, December 3, 1999, and provided defendants prior to that date with their objections regarding the discovery sought. Plaintiffs agreed to respond to the discovery propounded of them in exchange for defendants' agreement to provide responses in a similar fashion and within a similar time frame. Plaintiffs provided their discovery as promised. Despite repeated telephone calls, however, plaintiffs did not receive defendants' responses until the evening of Monday, December 13, making it almost impossible to review them and incorporate their contents into this reply brief. Plaintiffs were not provided with any responsive documents and defendants interposed objections which are plainly frivolous. These discovery issues will need to be resolved before a merits hearing. Further discovery may be required. In light of these factors, the Court should confine the inquiry on December 16 to whether a preliminary injunction should issue to prevent ratification of a sale which is based on violations of federal law and which would cause plaintiffs irreparable harm.

price of \$1.75 million and interest on the mortgage which it wants to put into the nation's treasury. Id. The answers to this contention are simple. First, it is speculative. Second, it had a number of bidders lining up right behind Jarmhl and Myerberg for the property at the sale, including a second bidder whose bid almost matched that of defendants. Third, the Jarmhl/Myerberg defendants have never said that they will withdraw their bid. Indeed, they are anxious to protect what they regard as their investment in the future of Dunhaven. Fourth, if HUD had not waited five years from Myerberg and Walkint's default to conduct the sale, its "losses" would not have mounted. Fifth, the government's interest in saving money cannot override its obligation to adhere to the law and balance its purely fiscal interest with the strong federal policy of preserving and promoting affordable housing for low-income people.

According to HUD, however, more important than these alleged economic losses is its "interest in the integrity and finality of the foreclosure process." Defendant HUD's Opposition at 14-15. The government, HUD contends, has an interest in "prompt enforcement" of the government's rights. HUD's own inaction during an almost five-year period following Walkint's default has already thoroughly defeated this goal. An additional delay to conclude a merits hearing and the probable need to conduct an adequate study (or opt for project-based assistance) is de minimis compared to the length of time the defaulted project languished on HUD's watch.

- b. There is no irreparable harm to Myerberg or Jarmhl which warrants denial of the preliminary injunction.

Tellingly, Myerberg and Jarmhl have stonewalled plaintiffs' attempt to ascertain the extent of any harm those defendants believe they will sustain as a result of

maintenance of the status quo in this case. They have objected to plaintiffs' request that * they itemize such damage by contending it is "premature". Ex. 2 (Myerberg Answer to Interrogatory 2). The only damages specified in his interrogatory answers are money damages. Those include the \$50,000 deposit which presumably they will get back if the sale is not consummated¹¹, attorneys fees required to challenge HUD's initial rejection of their bid, which have already been incurred and are unrelated to plaintiffs' challenge to the sale, and their fees in this action. They also assert that Myerberg "undoubtedly would * have earned some return on his investment in Jarmhl, LLC." Ex. 2. Any potential return on an investment which Myerberg may never realize is, of course, too speculative to warrant denial of a preliminary injunction in this case. See, e.g., Glendale Neighborhood Ass'n v. Greensboro Housing Authority, 901 F. Supp. 996 (M.D.N.C. 1995)(anticipated increase in construction costs so speculative that factor does not carry much weight in preliminary injunction analysis).

In their brief, defendants Myerberg and Jarmhl contend that issuance of a preliminary injunction will prevent them from making needed improvements to the property. Defendant Myerberg and Jarmhl's Opposition at 18-19. At the same time they concede that the project because of the default has gone without renovation for five years. Id. In other words, Myerberg and HUD are complaining about the consequences of their own default and inaction, respectively. However, the consequences of their abandonment of their responsibilities should hardly be shifted to plaintiffs' shoulders. The unmet need for repairs was not occasioned by plaintiffs' challenge to the sale but occurred long before. HUD certainly has an interest in and the power to avoid additional deterioration

¹¹ Indeed, that \$50,000 was returned to them after their bid was originally rejected.

to the premises for the relatively brief time before this Court can conduct a hearing on the merits.

c. The harm to plaintiffs is tangible and irreparable.

HUD claims that the harms plaintiffs have identified as arising from ratification of the sale of Dunhaven to Jarmhl are speculative. In very similar circumstances, HUD has attempted to defeat project-based tenants' claims of harm arising from a sale of their HUD-subsidized project based on the same contention that the injury tenants anticipate is too speculative to warrant protection. This argument has been soundly rejected. In Walker v. Pierce, 665 F. Supp. 831 (N.D. Cal. 1987), the Court recognized that loss of the protections of HAP contracts and statutes that provide tenant protections applicable to HUD held or insured mortgages is hardly an abstract or hypothetical injury but one which would constitute an actual injury:

Furthermore, in addition to the cancellation of the Regulatory Agreements, the tenants here will immediately lose the protection of various statutes that apply only to mortgages held or insured by HUD. Although the plaintiffs cannot know in advance exactly which of them would actually benefit from these statutes, they are all potentially disadvantaged by the elimination of these legal protections. . . .All that is required is that the plaintiff 'demonstrate a realistic danger of sustaining a direct injury' as a result of the invasion of legal rights created by the statute.'"

Walker v. Pierce, *supra*, 665 F. Supp. at 835-36, quoting Babbitt v. United Farm Workers National Union, 442 U.S. 289, 99 S. Ct. 2301, 2308, 60 L. Ed.2d 895 (1979). The Court concluded that such injury was likely to be irreparable were the sale of HUD insured or * held properties to go forward, *id.* at 843, and therefore found that the balance of hardships tipped "decidedly in the plaintiffs' favor." *Id.*

Here, the loss of project-based housing (or other significant protections of their units as affordable for the lifetime of the project) and the opportunity to have meaningful input into a pre-sale disposition plan are hardly remote or speculative. As demonstrated above, HUD's own administrative record, national studies, including its own, and even Myerberg's inadequate and incomplete responses to discovery show beyond a doubt that there are significant barriers to the meaningful use of tenant-based assistance, particularly in tighter markets like Perry Hall. HUD's own record strongly refutes the premise of a "soft" market, upon which its decision to offer tenant-based subsidies was made. Thus, if HUD actually did a thorough analysis of the availability of affordable housing in the Perry Hall area, it is highly unlikely that it could make the determination required to justify tenant-based, as opposed to project-based subsidies. It would then have to elect a project-based type of assistance or assistance under Section (f) of the statute which contemplates protection of the low income units through a variety of means for the useful life of the project. Either option gives the tenants the opportunity for continued low-income housing in their current neighborhood, near their jobs and their children's schools.

2. The equities weigh decisively in plaintiffs' favor.

Finally, defendants assert that equitable considerations weigh against issuance of a preliminary injunction here. However, the equities tilt exactly the other way. Plaintiffs did not delay their challenge to the sale. The notice issued to them in 1998 is hardly a model of clarity. It did not alert them to the possibility that they might lose their project based subsidy; indeed, it suggested that HUD was considering continuing it. Therefore, it did not put plaintiffs on notice of the losses that a foreclosure would cause. When the

impending sale came to their attention, they took steps to alert HUD and the foreclosure Commissioner to their concerns and sought to resolve them with HUD. However, when HUD indicated that it intended to go forward and ratify the sale to Jarmhl, the potential harm to plaintiffs become sufficiently imminent to warrant their seeking extraordinary relief from this Court.

Perhaps more important, as set forth above, defendants come to this proceeding with extremely unclean hands. The entity of which Myerberg was the General Partner caused the Dunhaven default in the first place. Ratification of the sale to a new Myerberg entity allows him to reap the benefits of that previous default. HUD slept on its right to foreclose for years and has thus exacerbated problems at the complex. The bare pecuniary interests of these defendants must take a back seat to protection of otherwise irretrievable statutory rights for vulnerable low-income persons.

* III. CONCLUSION

* For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be granted.

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CERTIFICATE OF SERVICE

I certify that on this 15th day of December, 1999, I mailed a copy of the foregoing by first-class mail, postage prepaid, to the following:

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