

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

FRANCES HINES, TIMOTHY OWENS)
PRISCILLA JOHNSON, ESSIE McCATREY,)
DANNY HINES, ANGELA MOORE)
and)
HOUSING COMES FIRST, Inc.,)
A Missouri non-profit corporation,)
)
Plaintiffs,)
)
v.)
)
CHARLESTON HOUSING AUTHORITY,)
A municipal corporation;)
PAUL PAGE, in his official capacity)
As Executive Director of the)
Charleston Housing Authority;)
UNITED STATES DEPARTMENT OF)
HOUSING AND URBAN DEVELOPMENT, and)
MEL MARTINEZ, in his)
official capacity as Secretary of)
the United States Department of)
Housing and Urban Development,)
)
Defendants.)

Case No. 1:01CV00070CDP

PRELIMINARY INJUNCTION ORDER

Plaintiffs seek a preliminary injunction under Fed.R.Civ.P. 65 requiring the Defendant Charleston Housing Authority (“CHA”) and its executive director Paul Page to lease, maintain and use vacant units at the Charleston Apartments as low-income rental housing and enjoining the Housing Authority Defendants from demolishing the Charleston Apartments. They also seek injunctive relief requiring the Defendant U.S. Department of Housing and Urban Development to take all steps necessary to treat the

Housing Assistance Payment (“HAP”) contract between CHA and HUD as still in effect pending a final determination of the validity of CHA’s attempt to opt out of the HAP contract or alternatively, requiring CHA and HAP to execute a renewal HAP contract pending a final hearing on the merits of Plaintiffs’ First Amended Complaint.

Now, having heard and considered the evidence, oral argument and the parties’ briefs, the Court finds that:

1. This Court has jurisdiction of the subject matter of this action.
2. The Charleston Apartments is a 50-unit federally subsidized apartment complex located in Charleston, Missouri. It was built in the early 1970’s as Section 23 leased housing. On or about April 27, 1981, it was converted to a FmHA – mortgaged Section 8 project-based Substantial Rehabilitation Project when FmHA made a 50 year loan to Defendant CHA in the amount of \$740,000 (the “Loan”) pursuant to the Section 515 Rural Rental Housing program.
3. In connection with the Section 515 Loan, CHA executed a Loan Resolution, a promissory note (with level principal and interest payments over a 50 year period) and a Deed of Trust on the Charleston Apartments in favor of FmHA securing repayment of the promissory note. The Loan Resolution, promissory note and Deed of Trust shall be collectively referred to herein as the “Loan Agreement.”
4. The Housing Authority also executed a 20 year Housing Assistance Payment (“HAP”) contract with the Defendant U.S. Department of Housing and Urban Development effective April 27, 1981 to cover the difference between the rent contributed by Charleston Apartment residents and the maximum approved contract rent for the unit.

5. Pursuant to the Loan Resolution, the Housing Authority agreed that “So long as the loan obligations remain[ed] unsatisfied” and until the Government gave prior consent, it would not use the housing for any purpose other than rental housing and would do other things as may be required by the Government in connection with the housing. Loan Resolution, ¶¶6d(1) and 6(i).

6. Similarly, under the Deed of Trust, the Housing Authority agreed that so long as the Government held the Note, the Housing Authority would “maintain improvements in good repair...and not abandon the property or cause or permit waste...” Deed of Trust ¶ 9. It also expressly agreed to use the housing “ for the purpose of housing people eligible for occupancy as provided in Section 515...and FmHA regulations then extant during the 20 year period beginning April 27, 2001.” Deed of Trust, ¶27.

7. Notwithstanding these promises, since December 1999, the Housing Authority Defendants have failed and refused to lease vacant units in the Charleston Apartments and to perform ordinary and necessary repairs on the vacant units.

8. On February 14, 2000, the CHA Board of Commissioners unanimously passed Resolution #604 which called for CHA to:

Make application to U.S.D.A. Rural Development to accept early pre-payment of the fifty (50) year loan in the 19th or 20th year, with the intention of NOT seeking to renew the HUD Housing Assistance Payment (HAP) contract, because of the intentions of the Board of Commissioners to DEMOLISH the project as soon as possible after April 2001, because of the high density of the population of low-income government apartments in a four (4) block area (109 apartments, site 1 and 61 apartments, site 2) history of drug crime and violent crime and limited funding.

Then provide a preference to Charleston Apartments’ residents for admission to Charleston Housing Authority’s Public Housing Vacancies and also arrange the availability of Section 8 Resident Based Housing Assistance vouchers as an additional Option for the residents.

9. The CHA notified the residents of the Charleston Apartments of the planned demolition by letter dated April 1, 2000. It informed them that rental assistance would continue to be provided on their behalf for one year and that subject to the availability of appropriations, HUD would provide portable vouchers that would enable the residents to choose other Section 8 housing which was “not likely to include the dwelling” in which they resided. To induce the tenants to move, it informed them that they would be given a preference on the Housing Authority waiting list for public housing (if they applied).

10. On or about December 1, 2000, the Housing Authority Defendants attempted to apply to USDA to prepay the Loan. To date, however, the USDA has not accepted the Housing Authority’s payment. The Housing Authority has purportedly mailed a final payment to USDA on at least two separate occasions. Each time, however, the USDA has returned the Housing Authority’s check. Recently, on June 5, 2001, USDA informed the Housing Authority Defendants that by allowing Charleston Apartment units to sit empty and by not performing maintenance on the units, the Housing Authority was in non-compliance with its Loan Agreement and not fulfilling the marketing plan that it had previously submitted.

11. Meanwhile, occupancy levels at the Charleston Apartments have been dropping. While 47 families resided there on February 14, 2000, today there are only 9 families.

12. With CHA refusing to lease vacant Charleston Apartment units and inducing residents to move, the waiting list for families in need of affordable housing in

Charleston, Missouri continues to grow. Presently, there are more than 80 families on the waiting list.

13. According to CHA's annual agency plan for the fiscal year beginning January 1, 2000, African-American families and low-income families of all racial affiliations in Mississippi County have "severe" needs with respect to the affordability, supply and quality of housing in the county.

14. Plaintiffs Frances Hines, Timothy Owens, Priscilla Johnson, Essie McCatrey and Danny Hines will suffer irreparable harm if the injunction prohibiting the Housing Authority Defendants from evicting, inducing or encouraging residents of the Charleston Apartments to move and proceeding with the demolition of their homes and implementation of Resolution 604 is not granted. These plaintiffs have lived in the Charleston Apartments with their children for many years. The Charleston Apartments is both their home and a community which will be permanently destroyed by the Housing Authority defendants if the injunction is not granted.

15. Plaintiff Angela Moore and others like her on the waiting list for public housing in Charleston, Missouri will suffer irreparable harm if the injunction requiring the Housing Authority Defendants to lease, operate and maintain all vacant units at the Charleston Apartments is not granted. Each day that the units remain empty is another day that Plaintiff Moore and others on the waiting list are deprived of affordable housing. Plaintiff Moore and others like her on the waiting list will also be harmed by the demolition of the Charleston Apartments since it will further reduce the supply of affordable rental housing in the community.

16. Plaintiff Housing Comes First's mission is to prevent homelessness and to preserve, expand, and ensure the availability of affordable housing. If the injunctive relief described above is not granted, Housing Comes First will suffer irreparable harm since it will be necessary for it to continue to divert significant time and resources from its other educational counseling, referral and advocacy to prevent the loss of affordable housing resulting from the Housing Authority Defendants actions.

17. There is a substantial probability that Plaintiffs will succeed on the merits of their claim.

18. By refusing to offer vacant units for rent and operate the development as rental housing for eligible families since December 1999, the Housing Authority Defendants have violated and continue to violate the Loan Agreement for Charleston Apartments.

19. The Loan Resolution (¶6) requires the CHA to use Charleston Apartments as rental housing for eligible families until the loan on the property has been paid in full and the Government gives prior consent.¹ In this case, the Section 515 loan has not been satisfied and USDA has not consented to CHA's decision to discontinue operation of Charleston Apartments as affordable rental housing.

¹ The Loan Resolution also provides that the Section 515 loan "shall be used solely for the specific eligible purposes for which it is approved by the government, in order to provide rental housing and related facilities for eligible occupants." Furthermore, the CHA promised in the Loan Resolution to comply with all its agreements and obligations in or under the note, security instrument, and any related agreement executed in connection with the loan and to do other things as may be required by the Government in connection with the operation of the housing or with its other affairs that may affect the housing, the loan obligation, or the security. Loan Resolution at ¶ 6g and i. The Housing Authority Defendants' decision to leave units sitting empty and not to comply with USDA's lease-up directive of June 5, 2001 also violates these provisions of the Loan Resolution.

20. The CHA's refusal to lease-up available units and use Charleston Apartments as affordable rental housing also violates the Deed of Trust on the property.

That instrument includes a 20-year use restriction:

The borrower and any successors in trust agree to use the housing for the purpose of housing people eligible for occupancy as provided in Section 515 of Title V of the Housing Act of 1949 and FmHA regulations then extant during this 20 year period beginning April 27, 2001. No person occupying the housing shall be required to vacate prior to the close of such 20 year period because of early repayment. Deed of Trust ¶ 27

21. By refraining from renting vacant units since December 1999, the CHA breached its obligation to use the property as rental housing for those families eligible for occupancy. It similarly breached its duty under the Deed of Trust by encouraging existing residents to move out of their homes at Charleston Apartments. The Deed of Trust provides that tenants as well as the Government may enforce those duties. Deed of Trust, ¶ 27. In the Deed of Trust, the CHA further agreed to maintain Charleston Apartments "in good repair" and not to "abandon the property, or cause or permit waste." Deed of Trust ¶ 9. By vacating the premises and doing little more than shutting off the water and mowing the grass, the Housing Authority has for all intents and purposes abandoned the development, thereby fostering deterioration and waste of the housing units. Furthermore, while the CHA Housing Authority asserts that the apartments are presently or with minor repairs would be habitable, it is not keeping the property "in good repair" as required by the Deed of Trust.²

² Pursuant to USDA requirements, the CHA also has a reserve fund for Charleston Apartments that can be used to make the repairs necessary for the vacant units to be rented to eligible families. According to CHA records as of December 31, 2000, there was \$149,557.00 in reserve funds for the development.

22. Section 515 and its implementing regulations also require CHA to operate Charleston Apartments as affordable rental housing over the duration of its mortgage. The Section 515 Rural Rental Housing Program is one of several programs established by Congress to increase the supply of affordable housing. "Congress enacted Section 515 of the Rural Rental Housing Program in an effort to resolve the housing shortage for the elderly and others on low incomes in rural areas." Lifgren v. Yeutter, 767 F. Supp. 1473, 1477 (D. Minn. 1991). See also 42 USC §1485(a).

23. Under Section 515, USDA issues long-term loans at market rates to developers and owners of rural rental housing for the elderly, disabled, and other low-income households. "In exchange, borrowers agreed to provide affordable housing over the duration of their government-assisted mortgages." Parkridge Investors Limited Partnership v. Farmers Home Administration, 13 F.3d 1192, 1195 (8th Cir. 1994).

24. The statutory scheme contemplates that units in the Section 515 project will be made available for occupancy on a continuous basis. Section 1485(p)(3) provides that "[u]nits in projects financed under this section which become available for occupancy after November 30, 1983, shall not be available for occupancy by persons and families other than very low income persons and families if the authority to provide assistance for such persons is available." 42 U.S.C. § 1485(p)(3).

25. Here, there is a project-based Section 8 HAP contract for Charleston Apartments. Therefore, CHA has the authority to provide assistance to very low-income families, and it must make the vacant units in the complex available for rental by such families.

26. The USDA regulations similarly obligate CHA to rent up vacant units in the complex. Section 515 projects must have and comply with a Management Plan approved by USDA. 7 C.F.R. § 1930.108; Part 1930, Subpart C, Exs. B ("Management Handbook" & B-1. The Management Plan must include "plans and procedures for marketing units, achieving and maintaining full occupancy" and "[d]escribe the methods that will be used to achieve and maintain the highest possible level of occupancy." Id. at Ex. B-1, ¶3. According to the Management Handbook, the borrower must advertise the availability of units even if there is an adequate waiting list, post permanent signage indicating where rental applications may be made, advise prospective applicants of their right to file an application, and maintain a waiting list of eligible applicants. Id. at Ex. B, ¶ VI C, E. The Management Plan also includes extensive requirements for maintenance of the project. Id. at Ex. B-1 at ¶ 8; Ex. B at ¶ X.

27. The CHA and USDA executed a Management Plan for Charleston Apartments on April 17, 1995.³ In it, CHA promised that "[c]ontinual and periodic advertising will be used in an effort to maintain the highest levels of occupancy that are reasonably attainable," waiting lists will be kept, and prospective tenants will be selected from the waiting list when vacancies occur. Since December 1999, CHA admittedly did not comply with the requirements of its Management Plan and has violated this Management Plan and corresponding obligations under the FmHA regulations. It has failed to offer vacant units to waiting list families, advertise available units, accept

³ Despite the USDA requirement that borrowers have a management plan and update it every three years, CHA did not update its 1995 plan in 1998 or thereafter because of its intention to demolish Charleston Apartments. 7 C.F.R. Part 1930, Subpart C, Ex. B-1. Its executive director admitted that CHA did not inform or obtain approval from USDA of its unilateral decision to forego renewal of the management plan.

applications, or place eligible applicants in available units violated Section 515 and its implementing regulations.

28. CHA's refusal to lease and maintain the vacant units also runs afoul of the Emergency Low Income Housing Preservation Act ("ELIHPA") 42 U.S.C. §1472(c). Congress was concerned that a large portion of the federally assisted housing stock, including some 150,000 units under the Section 515 program, was vulnerable to prepayment and removal from the supply of low-income housing. See Parkridge, 13 F.3d at 1195. In 1987, it enacted the Emergency Low Income Housing Preservation Act (ELIHPA) in order "to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance . . . [and] to minimize the involuntary displacement of tenants currently residing in such housing." Pub. L. No. 100-242, § 202, 101 Stat. 1815, 1877-78 (Feb. 5, 1988).

29. ELIHPA (as amended in 1989) imposes prepayment requirements for Section 515 projects that USDA and owners seeking to prepay their loans must take to try to preserve the property as affordable housing. Generally, those steps are that (1) USDA must offer financial incentives to owners to continue operating their property as affordable housing and, if they rejects the incentives, (2) owners must offer the property for sale for a period of 6 months to nonprofit or public agencies that would continue to operate the project as affordable housing. See 42 U.S.C. § 1472(c)(4) & (5). In the underlying action, Plaintiffs contend that the CHA has rejected or failed to consider an incentive offer and has not offered the project for sale as required by statute.

30. The USDA regulations implementing the ELIHPA requirements for Section 515 projects contemplate that owners will continue to lease-up and maintain their properties during the prepayment process. For example, the regulations require a special lease addendum to be used with "tenants moving into the project while the prepayment request is pending." 7 C.F.R. § 1965.206(b)(5). Owners must submit the language they propose to use as an addendum to new tenant leases for approval by USDA. *Id.* The regulations also expect that existing tenants will remain in the complex during the prepayment process, providing that the USDA Servicing Office will keep tenants apprised of the status of the prepayment request and actions being taken. 7 C.F.R. § 1965.206(b)(6).

31. The USDA regulations expect that vacant units will be made available for occupancy and the project will continue to operate as rental housing in order to facilitate the sale of the project to a non-profit organization and its preservation as low-income housing. Nonprofit or public agencies will be less inclined to purchase a Section 515 project if the development has no rental income stream and high deferred maintenance costs. The CHA cannot be permitted to thwart the preservation objectives of ELIHPA by driving the complex into the ground and failing to comply with its duties under the Section 515 program to maintain the highest possible level of occupancy and keep the complex in good repair.

32. The Section 8 substantial rehabilitation program rules similarly require participating owners to make good faith efforts to lease available units to eligible families. Applicable regulations provide that:

During the term of the Contract, an owner shall make available for occupancy by eligible families the total number of units for which

assistance is committed under the Contract. For purposes of this section, making units available for occupancy by eligible families means that the owner: (1) Is conducting marketing in accordance with Sec. 880.601(a); (2) has leased or is making good faith efforts to lease the units to eligible and otherwise acceptable families, including taking all feasible actions to fill vacancies by renting to such families; and (3) has not rejected any such applicant family except for reasons acceptable to the contract administrator.

24 C.F.R. § 880.504(a). See 24 CFR § 881.104, 24 CFR § 881.503 (making § 880.504 applicable to the Section 8 substantial rehabilitation program), 24 CFR § 880.504(d), 59 Federal Register 13652, Mar. 23, 1994.

33. By failing to lease vacant units at Charleston Apartments since December 1999, CHA has violated these requirements to take all feasible actions to fill vacancies at Charleston Apartments. It violated the full occupancy mandate for more than a year before the scheduled time to opt out of the Section 8 HAP contract on April 27, 2001.

34. Defendants contend that the Section 8 program rules are no longer applicable to Charleston Apartments on the theory that the HAP contract expired on April 27, 2001. However, owners choosing to opt out of their HAP contracts must provide statutorily required notice to HUD and tenants at least one year in advance of termination.⁴ Section 1437f(c)(8)(A) sets out the precise terms of that notice:

The notice shall also include a statement that, if the Congress

⁴ The notice requirements are part of Congress' effort to address the displacement of tenants and loss of affordable housing as a result of the expiration of Section 8 HAP contracts. In ELIHPA, Congress also found that more than 465,000 units under the Section 8 program could be lost through the expiration of rental assistance contracts. Pub. L. No. 100-242, § 202, 101 Stat. 1815, 1877-78 (Feb. 5, 1988). Congress has authorized various financial incentives to encourage owners to remain in the Section 8 project-based program and, as with mortgage prepayments, has required HUD and owners to take certain steps to minimize displacement and attempt to preserve the property as affordable housing. One of those steps is the requirement for a one-year notice to tenants and HUD before an owner may opt-out of the Section 8 HAP contract. See 42 U.S.C. § 1437f(c)(8)(A).

makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside.

(8)(A).

35. In this case, CHA provided to both HUD and the tenants a purported one-year notice that modified the statutory language to read "which is not likely to include the dwelling unit in which you currently reside." According to the CHA, HUD approved the use of that language.

36. HUD may not waive statutory notice requirements, including those required in advance of Section 8 opt-outs. 215 Alliance v. Cuomo, 61 F. Supp.2d 879, 887 (D. Minn. 1999). The purpose of that language is to inform tenants that they have a statutory right to "elect to remain in the same project in which the family was residing" using the enhanced vouchers that must be issued in connection with the terminating HAP contract. 42 U.S.C. § 1437f(t)(1)(B). In this case, because a Section 515 prepayment transaction is involved, tenants are also likely to remain at Charleston Apartments because nonprofit and public agencies must be offered an opportunity to purchase the project under the ELIHPA preservation process.

37. When the notice given to HUD and to tenants pursuant to § 1437f(c)(8)(A) is defective, the clock for the one-year notice must be turned back, and it does not begin to run again until proper notice is given. Since the statutory notice must precede termination of the HAP contract by at least one year, the HAP contract on Charleston

Apartments continues by operation of law and has not terminated.⁵ See 215 Alliance, 61 F. Supp.2d at 883. The complex therefore remains subject to the full occupancy requirements of § 880.504.

38. Like HUD, the Housing Authority Defendants are subject to special affirmative fair housing duties. In 1998, Congress in the Quality Housing and Work Responsibility Act (QHWRA) required every public housing authority to prepare and to submit for HUD approval an “annual public housing agency plan” detailing the housing needs in the public housing authority’s jurisdiction and the authority’s administration of its programs. 42 U.S.C. § 1437c-1(b). QHWRA further requires each public housing authority to certify that it “will carry out the public housing agency plan in conformity with title VI of the Civil Rights Act of 1964, the Fair Housing Act, ... and will affirmatively further fair housing.” Id. at § 1437c-1(d)(15).

39. The courts have yet to define the scope of public housing authorities' duty under QHWRA to further fair housing affirmatively. However, it seems highly likely that the decades of case law interpreting HUD's affirmative fair housing duty under 42 U.S.C. § 3608(e)(5) will inform the same obligation imposed on local housing authorities.⁶ The duty to further fair housing affirmatively has been universally construed to mean more than a duty simply to refrain from engaging in illegal discrimination. See

⁵ HUD's Section 8 Renewal Guide provides that “[i]n order for an Owner to opt-out of the project-based Section 8 program, they must satisfy all notification requirements.” The term “opt-outs” is defined as a “conversion action where an Owner chooses to opt-out of certain programs by not renewing an expiring Section 8 or rent supplement program project-based contract.” See Ex. 1 attached hereto.

⁶ Indeed, some courts have held that housing authorities as well as HUD are subject to § 3608(e)(5) insofar as they administer HUD programs. See Otero v. New York City Housing Authority (“Otero”), 484 F.2d 1122, 1133 (2d. Cir. 1973). See also U.S. v.

e.g., NAACP v. Secretary of Hous. And Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987).

40. At a minimum, the obligation to further fair housing affirmatively requires an agency to examine the fair housing effects of its decisions with clear and open eyes. It must have in place procedures for evaluating the fair housing implications of its actions and use those procedures to inform the decisions that it makes. An agency "must utilize some institutionalized method whereby . . . it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under . . . [the Fair Housing Act.]" Shannon v. U.S. Dept. of Hous. And Urban Dev., 436 F.2d 809, 820 (3d Cir. 1970).

41. The evidence shows that the CHA did not have an institutionalized process for evaluating the relevant data and did not engage in a considered analysis of the racial and socioeconomic effects of Resolution 604 and its decision to prepay the Section 515 loan, opt out of the Section 8 contract, and vacate and demolish Charleston Apartments. Except for a single elliptical reference to the fact that "[a]ll except one (1) white family living in Charleston Apartments are minority race, African American," the record of its decision to remove Charleston Apartments from the federal affordable housing programs and to demolish the development is devoid of any assessment of the fair housing consequences of that action.

42. Plaintiffs have no adequate remedy at law.

43. The Housing Authority Defendants will suffer no hardship if the requested injunction is issued since it will merely require said Defendants to comply with

Charlottesville Redevelopment and Housing Authority ("Charlottesville"), 718 F.Supp.

their legal obligations under federal law and the Loan Agreement while their loan obligation remains unsatisfied and will restore the Charleston Apartments to its condition before the Housing Authority Defendants began implementing its plan to vacate and demolish the development.

44. Public interest will be served by granting the injunctive relief requested since it will relieve the acute shortage of affordable housing for low income families in Charleston, Missouri.

Therefore, in accordance with these findings,

IT IS ORDERED THAT until this Court shall enter a final Order and Judgment on Plaintiffs request for a Permanent Injunction or such earlier date as may be set by the Court :

1. Defendants Charleston Housing Authority and Paul Page and all other persons acting in concert or in participation with them are preliminarily enjoined from demolishing the Charleston Apartments or evicting (other than for good cause), inducing or encouraging any residents to move out of the Charleston Apartments. Further, Defendant Charleston Housing Authority and Paul Page shall immediately :

a. lease, operate, maintain and repair all 50 dwelling units at the Charleston Apartments in accordance with the Rural Rental Housing Program, the Section 8 Rehabilitation Program and all legal requirements applicable to the programs;

b. advertise the vacant units at the Charleston Apartments pursuant to Defendant Charleston Housing Authority's April 17, 1995 Management Plan and the Affirmative Fair Housing Marketing Plan; and

461, 464–467 (W.D.Va. 1989).

c. offer the vacant units at the Charleston Apartments with the lease addendum required under 7 CFR § 1965.206 (b)(5) first to eligible families on any waiting list maintained by the Charleston Housing Authority, giving those families the choice to lease such a unit or refuse it without prejudice to their position on the waiting list, and then to other eligible families;

2. Defendant U.S. Department of Housing and Urban Development shall take all steps necessary to treat the Housing Assistance Payment (“HAP”) contract as still in effect until such time as the validity of the Housing Authority’s attempt to opt out of the HAP contract is finally determined.

SO ORDERED:

Catherine D. Perry
United States District Judge

Dated: _____