

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

F I L E D

JAN 15 2002

U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
CAPE GIRARDEAU

FRANCES HINES, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 CHARLESTON HOUSING)
 AUTHORITY, et al,)
)
 Defendants.)

Case No. 1:01CV70 CDP

MEMORANDUM AND ORDER

Plaintiffs seek to prevent the deterioration and demolition of Charleston Apartments, a low-income apartment complex in **Charleston**, Missouri. Housing Comes First is a nonprofit corporation whose mission includes the preservation of affordable housing for low-income **families** in Missouri, Francis Hines, **Essie McCatrey**, Timothy Owens, Priscilla Johnson and Danny Hines are **African-American** residents of the housing complex. The Charleston Apartments are owned and operated by defendant Charleston Housing Authority (CHA), a public housing agency', under two federal programs. One is a project-based rent subsidy program administered by the defendant Department of Housing and Urban

'Defendant Paul Page is the executive director of Charleston Housing Authority and is sued in his official capacity.

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Development', and ~~the other~~ is a project mortgage financing program administered by the U.S. Department of Agriculture through its Rural Housing Services division.

When this case was initially filed, plaintiffs sought injunctive relief primarily to prevent CHA from evicting tenants and demolishing the apartment complex in April of 2001. Plaintiffs also asked me to order HUD to continue making rental assistance payments to residents of Charleston Apartments pending the resolution of this lawsuit. At the June 18, 2001 preliminary injunction hearing of this matter, I was informed that CHA had abandoned its plans to relocate tenants and demolish the apartment complex and that HUD had agreed to continue making rental assistance payments for all occupied units and had made other rental assistance available to tenants for use in locating alternative housing. Thus, the only remaining issue for me to decide at the preliminary injunction phase of this proceeding is whether I should order CHA to "rent up" the vacant units at the Charleston Apartments.³

To be entitled to this relief, plaintiffs must show a likelihood of success on

²Mel Martinez, Secretary of HUD, is also sued in his official capacity.

³Any order requiring CHA to lease the vacant units would also require CHA to repair damaged units and market the apartments as requested by plaintiffs. Such an order would also require HUD to provide rental assistance for those newly-leased units. For ease of reference, however, I will simply refer to all of these activities as "renting up" the vacant units.

the merits of **this** claim, not any other claims which might have supported injunctive relief absent the stipulation of the defendants. Because it is far **from** certain that plaintiffs will prevail on the merits of this claim and the defendants have **voluntarily** agreed to preserve the status quo pending final disposition of this **case**, I **find** that the risk of substantial harm that would be imposed if CHA is required to “rent up” vacant units on a preliminary basis far outweighs the public interest in preserving low-&come housing and the potential harm to plaintiffs if this **affirmative** relief is not **granted**. Accordingly, I will deny **plaintiffs’** motion for preliminary injunction.

Facts

The apartment complex at issue in this case was constructed in the 1970s and consists of nine **four-plex** buildings, *one* duplex and twelve single family units. CHA purchased the complex on April **27, 1981** and converted it to a Section 8 project-based substantial **rehabilitation** project.’ CHA financed the purchase through a SO-year **loan** from the Farmers Home Administration (**FmHA**) under § 515 of the Fair Housing Act of **1949, 42 U.S.C. § 1485**, which authorizes loans to public, private **and** non-profit borrowers for the purpose of providing low

‘Under **this** program, repealed by Congress in **1983**, HUD agreed to provide project-based assistance to private owners or housing authorities following the substantial **rehabilitation of** a rental project.

or moderate income **housing**.⁵ The Rural Housing Services, an agency of the USDA, administers **FmHA loans** such as the one made **to** the housing authority.

In connection with **the** loan financing, CHA executed a loan resolution, promissory note and deed of trust (collectively referred to as the "loan agreement"). The loan **agreement** calls for interest-only payments for the first year of the loan and then 588 **installment** payments. The note contains an unequivocal right to prepay and also provides that the prepayments do not obviate **CHA's** obligation to make each separate installment payment when due. The deed of trust obligates CHA to use the property as low-income housing for 20 years, or until April 27, 2001. As of February 2000, CHA had reduced the balance of this loan to less than \$2,000 due to **extra** payments made since 1981.

Section 8 of the **U.S. Housing Act of 1937, 42 U.S.C. §1437f**, is administered by HUD and provides **federal** rental assistance to private landlords on behalf of low-income families. There are two types of Section 8 assistance: project-based, which is attached to the structure; and portable, which moves with the tenant. To facilitate **use** of the project for low-income families, on April 27, 1981, the Charleston Housing Authority entered into a twenty-year Housing

⁵CHA owns and manages other multifamily developments funded through HUD's public housing **programs**.

Assistance Payment (HAP) contract with **HUD** for Section 8 project-based rental assistance. Under the terms of the **HAP** contract, which expired on its own terms on April 26, 2001, HUD agreed to provide assistance payments to CHA to cover the difference between the market rental for all 50 units of the apartment complex and the amount of rent that a low-income tenant could afford to pay.

When a project-based HAP contract nears its expiration date, a project owner has several options to renew or not to renew. For the substantial rehabilitation program at **issue** in this **case**, renewal is at the sole option of the **owner**. If the contract expires, neither **HUD** nor the owner has any contractual obligation to renew it or to enter into a new HAP contract. A project owner who **elects** not to renew a project-based HAP contract must provide one-year advanced written notice to HUD and the tenants of the decision, including the following statement:

If the Congress **makes funds** available, the owner and **[HUD]** may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination **[HUD]** will provide tenant-based rental 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.

42 U.S.C. § 1437f(c)(8)(A). If this notice is not provided, the owner may not evict the tenants or increase their rent payment until one year after such notice is

provided, during which time **HUD** may allow the owner to renew the **HAP** contract under such terms and conditions as HUD may require. 42 U.S.C.

§ 1437f(c)(8)(B).

If an owner opts out of a project-based HAP contract, HUD is authorized to provide Section 8 assistance to the residents. This assistance is provided to tenants in the form of **regular** vouchers authorized under 42 U.S.C. §1437f(o), or “enhanced” vouchers under 42 U.S.C. §1437f(t).⁶

A borrower under the rural rental housing program may also request to prepay its mortgage loan in less than 50 years. All requests to prepay such mortgage loans must be processed by the USDA pursuant to the Emergency Low Income Housing Preservation Act (**ELIHPA**), 42 U.S.C. § 1472(c), and its implementing regulations. **ELIHPA** was enacted to preserve the availability of low-income housing by restricting a project owner’s ability to prepay a § 5 15 loan. The project owner must submit a pm-payment request to the USDA, which cannot approve it until certain statutory **requirements** have been met. First, the USDA

“**Enhanced**” vouchers increase the amount of assistance to cover the difference between the **regular** voucher payment and a higher proposed rent for a unit previously assisted under the HAP contract. This “enhancement” is available only to the family residing in the unit at the time the HAP contract expires and is available only so long as that **family** continues to live there. 42 U.S.C. § 1437f(t)(1)(C).

must determine whether the project is needed for low-income housing and whether the prepayment will have a material effect on minority housing needs. See 42 U.S.C. §§ 1472(c)(1)(A) and (5)(G)(ii). Based on these determinations, the prepayment request still **cannot** be approved unless **the** borrower agrees to certain **restrictions**, such as offering to sell the project for 180 days to qualified nonprofit and public entities or entering into a restrictive-use agreement. See 42 U.S.C. § 1492(c)(5)(A). Throughout this process, tenants must receive ongoing notification of the status of the request. See 7 C.F.R. § 1965.206(b)(2) and (6).

On February 14, 2000, by adopting Resolution 604, **CHA** determined to pay off the loan agreement, **not** seek renewal of the HAP contract and demolish the Charleston Apartments. **CHA** has not rented any vacated or vacant apartment since the adoption of Resolution 604. As of June 8, 2001, nine apartments were occupied.

On or about April 24, 2000, Paul Page advised HUD of **CHA's** decision not to renew the HAP contract effective April 26, 2001. In this letter, Page advised HUD that **CHA** had adopted a preference for **its** public housing **units** for **families** involuntarily displaced by private or **government** action and that no qualified families from Charleston Apartments would be without housing assistance.

CHA also included with this letter a copy of its one-year notice to **the**

residents of Charleston Apartments dated April 20, 2000, which advised them of the decision to terminate the HAP contract, The one-year notice **states** in relevant part:

Since we do not intend to renew this project-based contract upon its expiration, it is our understanding that, subject to availability of appropriations, [HUD] will provide tenant-based rental assistance to **all** eligible residents currently residing in a Section 8 project-based assisted unit. This **tenant-based** assistance will enable eligible residents to choose the place they wish. to rent, which is not likely to include the dwelling unit in which they currently reside . . . **Please** remember that rental. assistance will continue to be provided **on** your behalf for one year, In addition, if Congress makes **funds** available, we may agree to a renewal of the contract with HUD, thus avoiding contract termination **all** together. However, the [Board] has resolved to opt out of the HUD Section 8 contract, vacate the project and demolish it . . .”

Although 42 U.S.C. §1437f(c)(8) required CHA to tell the residents that it was “likely” that they would be **able** to remain at Charleston Apartments **after** the HAP contract expired, Page testified that he modified the **statutory** language to say that it was “not likely” because **CHA** did not want to mislead the residents about its plans to demolish the complex.

Between February and April of 2000, Page met with HUD about **CHA's** decision to opt out of the HAP contract and to demolish Charleston Apartments. During this time, HUD also had the opportunity to review **CHA's** one-year notice to tenants of Charleston Apartments. HUD determined that it was consistent with

notification requirements, In December of 2000, Page submitted to HUD a 120-day written notice **confirming CHA's** intent to opt out of the HAP contract. CHA also provided a 120-day written confirmation notice to tenants of the apartment complex. The content of the 120-day notice to tenants was essentially the same as its one-year notice.

CHA also contacted the USDA about **its decision** to pay off the loan. By letter dated December 1, 2000, CHA filed a prepayment request with the USDA to comply with the requirements of the Emergency Low Income Housing Preservation Act (ELIHPA), 42 U.S.C. § 1472(c), The USDA subsequently notified each tenant of Charleston Apartments of the request for prepayment. On April 18, 2001, the USDA **acknowledged** the pre-payment request and sought additional information from CHA, which has yet to provide it. The USDA has 180 days in **which** to make a decision on a prepayment request, but that time does not begin to run until **all** of the requested information has been received. The USDA has not made a decision on the pre-payment request. CHA now contends that the final payment is not a prepayment, but is instead a regular **installment** payment that it is obligated to provide -- and that the USDA is required to accept -- under the terms of the loan agreement. This "**pre-payment/final** payment" issue is the subject of the action **filed** by CHA against the USDA which plaintiffs move

to consolidate with this case.

On June 1, 2001, **CHA** adopted Resolution 639, which revokes Resolution 604 and the plan to **demolish** the apartment complex. On June 15, 2001, **CHA** placed plaintiff Moore in **an** apartment and advanced her on the waiting list over others, including Wanda Griffin. Because of this action, plaintiffs move to join Griffin as a plaintiff in their proposed second amended complaint. Plaintiff Priscilla Johnson was **also** moved to a single family unit on June 15, 2001.

This action was filed on April 26, 2001. Plaintiffs' complaint alleges nine claims against the CHA and two claims against HUD. Count I of the complaint is a § 1983 claim and alleges that **CHA** violated the requirements of § 5 15 of the Fair Housing Act, its implementing regulations and **ELIHPA** by failing to: lease vacant units and maintain the property; include with its **pre-payment** request proposed notification language in compliance with **ELIHPA** and its regulations; and offer to **sell** Charleston **Apartments** to qualified non-profit organizations, Count II is a **claim** for breach of the loan resolution and promissory note, which plaintiffs claim they have standing to enforce as third-party beneficiaries.

In Count III, plaintiffs make a § 1983 claim that CHA violated Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437(f), and **its** implementing regulations by: **failing** to lease the vacant units; purporting to terminate the contract without

proper notice; and, refusing to offer enhanced vouchers and the choice to remain in the apartment complex to residents. Count IV states that **CHA's refusal** to accept enhanced vouchers and to allow residents to remain in the apartment complex interferes with **plaintiffs'** efforts to obtain rent subsidies in violation of the Housing and **Community Development Act of 1978, 12 U.S.C. §1715z-1b**. Count V claims that **CHA's** actions have deprived the plaintiffs of their property interest in continued occupancy at Charleston Apartments in violation of the Fourteenth Amendment.

In Count VI, plaintiffs allege that the CHA violated the Uniform Relocation Act, 42 U.S.C. § 460 1 **et seq.**, because it failed to: assess the needs of the residents before deciding to terminate the HAP contract and demolish **the** apartments; **give** the residents reasonable opportunities to relocate to **decent dwellings not located** in areas of African-American concentration; provide comparable **replacement** housing; and **inform** the residents of maximum replacement housing payments for which they may be **eligible**. Count VII alleges that **CHA** violated the Missouri Administrative Procedure Act by depriving **plaintiffs** of **their** property without due process of law.

In Count **VIII**, plaintiffs claim that **CHA** did not administer the Section 8 housing program in a manner designed to **affirmatively further** fair housing as

required by the Quality Housing and Work Responsibility Act of 1998, 42 U.S.C. § 1437c-1(d)(15), because it failed consider the racial and socio-economic effects of opting out of the HAP contract and demolishing the apartment complex. Count IX alleges that CHA violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) and (b) by: failing to lease and maintain the apartments; failing to provide the information necessary for the USDA to prepare a pre-payment report; failing to offer the apartment complex for sale to non-profit organizations; providing inadequate notice to opt-out of the HAP contract; and, refusing residents the choice to remain at the complex with enhanced vouchers.

Plaintiffs bring two claims against HUD. Count X alleges that HUD's failure to consider the racial and socio-economic effects of its decision to approve the non-renewal of the HAP contract violated the Fair Housing Act, 42 U.S.C. § 3608(e)(S), and the Administrative Procedure Act (APA), 5 U.S.C. § 701. In Count XI, plaintiffs challenge HUD's approval of CHA's one year opt-out notice under § 706(2)(A)-(D) of the APA.

Plaintiffs sought a temporary restraining order, which was denied after a hearing on the same date. In their amended motion, plaintiffs seek a preliminary injunction that:

- 1) enjoins CHA from demolishing Charleston Apartments and

implementing Resolution 604;

- 2) enjoins **CHA from** evicting, inducing or encouraging residents to move out of the apartment complex;
- 3) requires **CHA** to lease, operate and maintain **all** 50 dwelling units at Charleston Apartments;
- 4) requires CHA to lease, operate and maintain **all** dwelling units at the complex as subsidized housing;
- 5) requires **CHA** to **advertise** the vacant units for rent;
- 6) requires **CHA** to offer the vacant units first to eligible families on the waiting list without prejudice to their position on the list if they **refuse** to rent a vacant unit; and
- 7) requires HUD to take **all** steps to treat the HAP contract as still in effect or requires HUD and the housing authority to execute a renewal HAP contract pending the conclusion of this action,

After expedited discovery, a hearing on plaintiffs' motion for preliminary injunction was held on June 18, 2001. The **parties** presented testimony, exhibits and a stipulation of facts during the hearing, all of which I have considered in reaching my decision.

Discussion

Before turning to plaintiffs' motion for preliminary injunction, I must first address plaintiffs' motions to amend their complaint and consolidate this action with Charleston Housing Authority v. United States Department of Agriculture

1:01 CV101, also pending before me. Both motions will be granted.

A. Motion to Amend

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely given when justice so requires.” Plaintiffs seek leave to amend their complaint to add Tisha Smith and **Yolanda** Clark as additional plaintiffs and to supplement the first amended complaint with **additional** facts. Smith and Clark are applicants on the waiting list for low-income housing who claim that they have been injured by the failure to “rent up” vacant units at Charleston Apartments. Defendants oppose joinder of the additional plaintiffs because the motion to amend was filed “**after** the discovery cut-off date and **after** the trial.” (Def. Obj. at 2). This is not true. The motion was filed **after** discovery for the preliminary injunction phase of this case was closed, but no other discovery deadlines or a trial date have been set. Defendants will not be prejudiced by the joinder of additional plaintiffs at this stage of the proceedings.

Moreover, defendants cannot claim that they are unfairly surprised by the joinder of these plaintiffs because the original and first amended complaints contain allegations about the housing authority’s failure to “rent up” vacant units at the apartment complex, and this issue was the focus of the preliminary injunction hearing. Finally, to the extent that defendants are disputing the

accuracy of certain additional factual allegations or the plaintiffs' ability to ultimately prevail at trial on some of the claims asserted in the proposed complaint, these arguments are an insufficient basis upon which to deny leave to amend. Accordingly, I will grant plaintiffs leave to file the second amended complaint.

B. Motion to Consolidate

Rule 42(a) of the Federal Rules of Civil Procedure governs consolidation of cases and provides as follows:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Fed. R. Civ. P. 42(a). The Court has broad discretion to order consolidation. See Enterprise Bank v. Saettle, 21 F.3d 233, 235 (8th Cir. 1994).

Plaintiffs move to consolidate this action with a related lawsuit filed by CHA against the USDA. CHA opposes this motion as "interjecting irrelevant and immaterial issues" into **its** action against the USDA over payment of the loan, despite the fact that it has moved to dismiss **plaintiffs'** claims in this case for failure to **join the** USDA. I cannot understand how, on the one hand, the pre-payment issue is necessary to adjudicate **CHA's** liability in the instant dispute (so

necessary, in fact, that I should dismiss plaintiffs' claims for failing to join the USDA), but on the other hand, this lawsuit is also "irrelevant" to the later-filed case involving the same pre-payment issue.

Moreover, counsel for **CHA** specifically contemplated consolidation of the two cases at the preliminary injunction hearing before it even filed its case against the USDA:

[MR. OLIVER]: No, **ma'am**. Actually what **I am suggesting in the motion, or I tried to suggest** is that this Court should stay these **proceedings** unless those problems [between **the** housing authority and the USDA] are resolved, or **alternatively nor go** forward until USDA is made a party so we know what their position is.

[THE COURT]: And how long would it take to do both of those things?

[MR. OLIVER]: I have no idea. I have no idea whether Mr. Price is authorized to accept service for USDA. If he is, **I could sue USDA by 5:00 this afternoon, and you can consolidate them. I'd be glad to do that,**

(Tr. at 11) (emphasis added).

These cases **involve** common questions of law and fact, so the motion to consolidate will be granted. Because these issues will now be adjudicated in one proceeding, I will deny plaintiffs' motion to intervene, For the same reason, I will also deny **CHA's** motion to dismiss the action for failure to join an indispensable party.

C. Motion for Preliminary Injunction

The standards governing preliminary injunctive relief are well-settled and require me to consider: (1) the likelihood that the movant will succeed on the merits of its claim, (2) the threat of irreparable harm to the movant, (3) the balance between that harm and the injury that granting the injunction may inflict on other interested parties, and (4) whether the issuance of an injunction is in the public interest. United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1178-79 (8th Cir. 1998); Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The court must examine each factor in determining “whether the balance of equities weighs toward granting the injunction.” United Indus. Co., 140 F.3d at 1179. As I stated earlier, to be entitled to an affirmative injunction requiring **CHA** to “rent up” the vacant units at the housing complex, plaintiffs must demonstrate a likelihood of success on the merits of the claim that would entitle them to that relief. Because they cannot, the motion for preliminary injunction must be denied.

Although plaintiffs interpret several of the cited statutes as requiring **CHA** to lease all vacant units’, only the regulations accompanying Section 8 of the U.S.

For example, plaintiffs argue that Section 515 requires the housing authority to rent up the vacant units because it states that the units “shall not be made available for occupancy by persons and families other than very low income

Housing Act, 42 U.S.C. § 1437f, contain such an explicit directive:

(a) Availability of units for occupancy by **Eligible Families**. During the term of the [HAP] 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 . . .; (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 . . . **Failure** on the part of the owner to comply with these requirements is a violation of the [HAP] contract and grounds for all available legal remedies, including specific performance of the Contract, suspension or debarment **from** HUD programs, and reduction of the number of units under the Contract as set forth in paragraph (b) of this section.

24 C.F.R. § 880.504. As **defendants** point out, however, this regulation is subject to enforcement by HUD and may be modified under certain circumstances. See 24 C.F.R. § 880.504. Because the decision to enforce (or not enforce) these

persons and families . . . ,” see 42 U.S.C. § 1485(p)(3), and that **ELIHPA** imposes the same obligation because 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). Plaintiffs also state that “USDA regulations” require the housing authority to rent up the vacant units to facilitate the sale of the project, but they cite no actual regulations in support of that statement (**Pls.** Proposed Findings at 27). I am not making a decision at this time whether these statutes might ultimately encompass the injunctive relief sought by plaintiffs, but they do not provide the explicit “rent up” obligation claimed by plaintiffs. in addition, plaintiffs have cited no cases where this type of injunctive relief was granted under these statutes.

regulations is committed to **the** discretion of HUD, it is not clear to me that I have the authority to **provide** the requested relief. See Hill v. Group Three Housing Development Corp., 799 **F.2d** 385,396 (8th Cir. 1986) (HUD's decision not to take action against Section 8 owners for alleged statutory violations is **committed** to the agency's absolute discretion and is not subject to judicial review).

Nor is it clear that HUD has the authority to require CHA to "rent up" the vacant units, because the HAP contract expired on its own **terms**. HUD's legal relationship with CHA was **based** on this contract, as it is with any private owner of an apartment complex receiving Section 8 project-based assistance. CHA had the sole right to elect not **to** renew the HAP contract and it chose *not* to do so. Plaintiffs contend that the **HAP** contract remains in effect **because CHA's one-year** notice to **the** tenants was defective. Even if **the** notice were defective -- an issue I cannot decide on a preliminary basis -- the statute does not prevent **the** expiration of the HAP contract, Instead, it merely prevents the owner **from** evicting tenants or increasing rental **payments** until such *time* as **the** owner has provided **the** notice and one year has elapsed. 42 U.S.C. **§1437f(c)(8)(B)**.

Moreover, the Eighth Circuit has held that individual plaintiffs lack standing to enforce the provisions of Section 8 directly, Hill, 799 **F.2d** at 394-95 (no implied private right **of** action under Section **8**), or sue under the

Administrative Procedure Act for **HUD's** failure to enforce Section 8 regulations. **Id.** at 396 (**HUD's** decision not to take enforcement action **is** not subject to judicial review). Although plaintiffs in this case seek to enforce the statutory provisions through § 1983 instead of as an implied cause of action as did the **plaintiffs in Hill**, the analysis to determine whether the violation of a particular statute gives rise to liability under § 1983 is **similar. Id.** at 395 n.10. "In each case the **inquiry** focuses on congressional intent." **Id.** Because the Eighth Circuit has already decided that Congress intended HUD, rather than private litigants, to enforce Section 8, **see id.** at 394-95, it is doubtful that plaintiffs have standing to maintain their claims under § 1983 either. Plaintiffs failed to address this issue in any of their briefs and have fallen far short of demonstrating that they are likely to succeed on the **merits** of these **claims.**⁸

Plaintiffs also contend that an injunction requiring CHA to "rent up" the vacant units is necessary because the resulting income stream **will** make the project more attractive to prospective **buyers.**⁹ Plaintiffs contend that **CHA** is

⁸**Plaintiffs** have a similar problem with **ELIHPA**, which does not expressly grant a private cause of action.

⁹**Plaintiffs** offered no evidence about how the absence of an existing income stream would "frustrate" a not-for-profit corporation's ability to purchase the complex and operate it as a low-income housing project. 42 U.S.C. § 1472(5)(C) details the financial subsidies and incentives available to a qualified non-profit

required to offer the property for sale before its pre-payment request may be approved by the USDA under **ELIHPA**. While this may be true, the primary difficulty with this claim is **that** it may not be ripe for judicial review. The USDA has neither accepted nor rejected **CHA's** pre-payment request. In fact, there is now a dispute before me about whether **CHA** is even required to submit a pre-payment request to the USDA before it can pay off the loan. **The** USDA may ultimately grant plaintiffs the relief they seek and require the CHA to offer the housing project for sale to a non-profit corporation in accordance with ELIHPA. Because the USDA is the **agency** entrusted to enforce the provisions of the statute, it would be improvident for me to grant injunctive relief and short-circuit the administrative process designed to address these issues,

In addition, I find that plaintiffs do not face irreparable harm if the **injunction** is not granted. CHA has rescinded its plans to demolish the apartment complex, so plaintiff tenants do not face eviction and continue to receive rental assistance **from** HUD. The primary harm cited by plaintiffs is the deterioration and "on-going loss of their community" brought on by the refusal to lease vacant

purchaser, which are similar to those incentives that were made available to **CHA** when it purchased the apartment complex. Plaintiffs did attempt to equate vacancy with deterioration of the complex (which could **have** some impact on the resale potential of the property), but the evidence on this point was equivocal at best.

apartments. Plaintiffs, however, do not have a constitutional **right** to housing of a particular quality or **in a particular** neighborhood, **see Lindsey v. Normet**, 405 U.S. 56, 74 (1972), (no **constitutional** guarantee of access to dwellings of a particular quality), nor have they **demonstrated that this** alleged **harm** amounts to a violation of Section 8's **requirement that** project owners provide "decent, safe, **and sanitary**" housing. **See** 42 U.S.C. §1437(e) and 24 C.F.R. § 882.109. It is difficult to see how this alleged harm could support entry of the preliminary injunction. As for the newly-joined plaintiffs who are on the waiting list for housing, they **currently** have housing and will not be homeless absent injunctive **relief**. Under these **circumstances, I do not find that** the plaintiffs will suffer irreparable **harm** if the injunction is not **granted**.

In contrast, the defendants could suffer substantial harm *if* the **injunction** were granted. As defendants point **out**, if CHA is forced to "rent up" vacant units and **it** is ultimately determined -- either by the USDA or this Court -- that **it** was not required to do so, then CHA **and HUD** are faced with the responsibility of meeting the housing needs of both existing and additional tenants. In addition, CHA would be required to expend resources to make these units habitable when it **might not** ultimately be required to do so. Although affordable housing is certainly an important public interest, in light of the fact that plaintiffs admittedly

could not identify any **individual** on **CHA's** waiting list who is currently without housing, I believe that the balance of **harms** weighs against granting the injunction. Because the defendants have already agreed to maintain the status quo pending resolution of these issues, I do not believe that the facts warrant the extraordinary relief sought by the plaintiffs. Accordingly, I will deny the plaintiffs' motion for **preliminary** injunction.

D. Motions to Dismiss

CHA has filed numerous motions to dismiss. They are **meritless** and will be denied, I have already decided that plaintiff Housing Comes First has standing to bring its claims, so defendants' motion to dismiss on that basis will again be denied.

In denying preliminary injunctive relief, I expressed my doubts about, whether plaintiffs may have standing to bring their Section 8 and ELIHPA claims, but those issues have not been properly presented to me for ruling at this time. Therefore, to the extent defendants seek dismissal of those claims for lack of standing, I will deny the motion without prejudice subject to being raised again at a later time. I also observe that plaintiffs' **ELIHPA** claims may not be ripe for judicial action. Because CHA has brought an action against the USDA relating to payment of the loan and I have consolidated that case with this one, the USDA is

now a party to this action. Therefore, before I decide whether to dismiss or **to stay** plaintiffs' **ELIHPA** claims **on** ripeness grounds, I will **afford** the USDA an opportunity to be heard on this issue. To the extent that **defendants** seek dismissal of plaintiffs' ELIHPA claims on the ground that they are not ripe for judicial review, the motion will be denied without prejudice subject to being raised again at a later time after proper briefing.

I also do not believe that plaintiffs' claims are mooted by the passage of Resolution 639. Although I believe that fact is relevant in a determination of whether to issue a **preliminary** injunction, it does not **mean** that plaintiffs' underlying action is mooted. Defendants' motion to dismiss on **grounds** of **mootness** will be denied.

CHA and Page also move to dismiss the remainder of plaintiffs' claims for failure to state a claim. I find that plaintiffs have stated claims under these **various** federal housing statutes. Defendants really seek dismissal of these claims because they do not believe that plaintiffs will ultimately prevail. This is not the proper standard to determine if a complaint states a claim, so the motion to dismiss for failure to state claims under the Fourteenth Amendment, the Uniform Relocation Act, the Missouri Administrative Procedure Act, the Quality Housing and Work Responsibility Act, Title **VIII** of the Civil Rights Act of 1968, 12 U.S.C. § 1715z-

lb, and for breach of contract'* **is denied.**

HUD argues that it has sovereign immunity **from** suit on plaintiffs' **APA** claims and that its actions are unreviewable. I **do not** believe that the issue of whether I have jurisdiction to review HUD's enforcement decisions can be resolved at this time, The parties briefed this issue in connection with the motion for preliminary injunction and not as a motion to dismiss or motion for **summary** judgment, While I did consider this factor in denying preliminary injunctive relief to plaintiffs, I do not believe it is appropriate to dismiss plaintiffs' complaint against HUD on this basis at this time."

HUD also argues that the waiver of sovereign immunity contained in 5 U.S.C. § 702 of the **APA** is subject to the limitation on judicial review in § 704, which permits judicial *review* **under** the **APA** only if there is no other adequate remedy in court, HUD contends that plaintiffs have an adequate **remedy in court** since they are *redly* seeking the same relief against HUD and CHA. Because plaintiffs are not seeking the same relief against both parties, I reject HUD's

¹⁰**CHA** also **argues** that **plaintiffs** do not have standing to enforce the loan agreement, Because plaintiffs have pleaded that they are third-party beneficiaries entitled to enforce the provisions of the loan agreement, the breach of contract claim cannot be dismissed for failure to state a claim at this time.

¹¹**HUD** can raise this argument again in a motion to dismiss or for **summary** judgment.

argument that plaintiffs' **claims** are barred by sovereign immunity. Moreover, as HUD concedes, the federal housing statutes contain alternate waivers of sovereign immunity.

E. Motion for Protective Order

On November 7, 2001, **CHA** filed with the **Court** a document entitled "Answers and Objections **and** Request for Protective Order with Respect to Plaintiffs' Second Request for production of Documents." A review of this document reveals that it is not really a motion at all, but is simply **CHA's** discovery response **that** should not have been filed with the Court. The parties are reminded of their obligations to comply with all provisions of the Federal Rules of Civil Procedure and the Local Rules of this Court, including Local Rules 26-3.02 and 37.3.04.

Accordingly,

IT IS HEREBY ORDERED **that plaintiffs'** motion for leave to file a second amended complaint and add party plaintiffs **[#38]** is granted,

IT IS **FURTHER ORDERED** that plaintiff's motion to consolidate **[#43]** is granted and this case is consolidated with Charleston Housing Authority v. USDA, Cause Number 1: 01 CV 101 CDP, for all purposes.

IT IS FURTHER ORDERED that from this date forward all papers shall be filed in this case only, that no further pleadings or papers be filed in Cause Number 1:01CV101 and that Cause Number 1:01CV101 is administratively closed.


IT IS **FURTHER** ORDERED that the motion to intervene as party defendants filed by Frances Hines, Timothy Owens, Priscilla Johnson, Essie ~~Mc~~Catrey, Danny Hines, Tisha Smith, Yolanda Clark, and Housing Comes First[#6] in Cause Number 1:01CV101 is denied.

IT IS **FURTHER** ORDERED that plaintiffs' motions for preliminary injunction [#1 and #19] are denied.

IT IS **FURTHER ORDERED** that defendant Charleston Mousing Authority and Paul Page's motion to dismiss [#22] is denied in part, denied as moot in part and denied without prejudice in part as set forth above.

IT IS **FURTHER** ORDERED that defendant Charleston Housing Authority's motion for protective order [#45] is denied as moot.

A separate order setting this case for a Rule 16 scheduling conference is entered this same date.



CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 15th day of January, 2002.