

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

FILED  
KENNETH J. MURPHY

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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OHIO  
WESTERN DIVISION CINCINNATI

William Mays, et al. )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Andrew Cuomo, in his official )  
 capacity as Secretary of the )  
 United States Department of )  
 Housing and Urban Development, )  
 )  
 Defendant. )

Case No. C-1-96-929

Judge	4878
Mag.	
Journal	
Issue	CMTC
Docketed	

O R D E R

Plaintiffs are three tenants who individually reside in one of three multifamily housing projects in Cincinnati Ohio.<sup>1</sup> Defendant has foreclosed on these projects, acquired them in the foreclosure sale, and agreed to sell them to the Cincinnati Metropolitan Housing Authority ("CMHA"). Plaintiffs have initiated this suit in an attempt to compel Defendant to impose low-income use restrictions and project-based Section 8 assistance conditions on any foreclosure or sale of the properties. Defendant has filed this motion to dismiss alleging that the Court lacks subject matter jurisdiction.

<sup>1</sup>Plaintiff William Mays resides at Lexington Apartments on Forest Avenue (29 units); Plaintiff Janine Flint resides at Virginia Apartments on Rockdale Avenue (36 units); and Plaintiff Beverly Johnson resides at St. Mark's I Apartments on Ridgeway Avenue (14 units). (Doc. 13, Amended Complaint ¶ 10-12).

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## I. STATEMENT OF FACTS

In 1993, Arthur Schreiber owned the buildings. (Doc. No. 13, Amended Complaint ¶1). Due to Mr. Schreiber's poor maintenance and failure to tender mortgage payments, Defendant sought control of the 79 low-income family rental units as mortgagee-in-possession. (Id. at ¶2). Defendant and a group of low-income tenants who resided in these buildings filed a lawsuit seeking court approval of a takeover by Defendant. (Id.). The court, finding that Mr. Schreiber had defaulted on his contract, ordered that Defendant be appointed the mortgagee-in-possession. (Id.). Defendant immediately assumed control of the properties and spent several million federal dollars to rehabilitate the units. (Id. at ¶3). Under Defendant's direction, the units were "decent, sanitary, and safe." (Id.).

Defendant decided to sell the units through a nonjudicial foreclosure sale. (Id. at ¶4). Originally, Defendant scheduled the sale for September 24, 1996, but it was canceled when Mr. Schreiber filed for bankruptcy under Chapter 13. (Id.). In early 1997, the U.S. Bankruptcy Court dismissed the bankruptcy action, and the foreclosure sale was rescheduled for March 13, 1997. (Id.).

Defendant conducted a disposition analysis of the projects and determined the terms of the sale. (Id.). Defendant decided not to impose low-income use restrictions, i.e., restrictions ordering the buyer to maintain the property as affordable housing

for low-income persons. (Id.). In addition, Defendant decided to convert the project-based Section 8 rental assistance into tenant-based Section 8 certificates<sup>2</sup>, available to current, eligible tenants and valid for two years. (Id.). Plaintiffs complain that some tenants are not eligible for a Section 8 certificate and will be displaced. (Id.). Further, some tenants may use their certificates and move to another location. (Id.). Plaintiffs predict that without project-based rental subsidies, the three projects will fail financially. (Id.). Defendant approved a disposition plan for the projects<sup>3</sup>. (Doc. No. 9, Exhibit 6). At the foreclosure sale, HUD was the successful

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<sup>2</sup>Section 8 assistance may be project-based or tenant-based. (Doc. No. 9 at 7 n.6). Section 8 project-based assistance allows the tenants who occupy each of the 79 units to pay only 30% of their income for rent. (Doc. No. 13, Amended Complaint at ¶ 22). The federal government pays the difference between the tenant's contribution and the rent. (Id.). When a tenant vacates a unit, the new tenant receives the same 70% assistance. (Id.).

Section 8 tenant-based assistance provides assistance to a specific family, rather than a specific housing development or unit. (Doc. No. 9 at 7 n.6). The family may rent any decent, safe, and sanitary housing unit within prescribed fair market rentals anywhere in the jurisdiction of a housing authority that runs a certificate or voucher program. (Id.).

<sup>3</sup>The Cincinnati Office of the United States Department of Housing and Urban Development has summarized the disposition plan as follows:

[W]e recommend [that HUD] bid [for these projects] at the foreclosure sale. Upon acquisition, close on the sale of all four projects with the local public housing authority - CMHA. Sale price of \$300,000. Each project receive[s] certificates for all of their units for two years. Recapture of existing Section 8 to assist in the certificate funding...

(Doc. No. 9, Exhibit 6).

bidder. (Doc. No. 9 at 4).

Plaintiffs claim that Defendant's decision to sell the projects without any low-income use restrictions or project-based rental assistance is arbitrary, capricious, or an abuse of discretion and contrary to 12 U.S.C. §1701z-11, 24 C.F.R. §290 et seq. (Doc. No. 13). Plaintiffs request that the Court enter a declaratory judgment to that effect. (Id.). Further, Plaintiffs request that the Court enter temporary, preliminary, and permanent injunctions ordering Defendant to impose low-income use restrictions and adequate project-based Section 8 assistance as conditions of any foreclosure or other sale of the properties. (Id.).

Contending that the Court lacks subject matter jurisdiction, Defendant has filed this motion to dismiss under FRCP 12(b)(1). According to Defendant, the disputed actions are not subject to judicial review under the Administrative Procedure Act ("APA").

## II. ANALYSIS

FRCP 12(b)(1) motions to dismiss for lack of subject matter jurisdiction may attack the complaint on its face or may attack the existence of subject matter jurisdiction in fact. RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996). In considering a facial attack, the Court must consider the allegations of the complaint as true and construe them in the light most favorable to the non-moving party. United

States v. Ritchie, 15 F.3d 592, 598 (6th Cir.) (citing Scheuer v. Rhodes, 416 U.S. 232, 235-37, 94 S.Ct. 1683, 1686-87, 40 L.Ed.2d 90 (1974)), cert. denied, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994)).

When a motion to dismiss mounts a factual attack, the Court is free to weigh the evidence and satisfy itself as to the validity of its own jurisdiction. RMI Titanium Co., 78 F.3d at 1134. The Court does not presume that the plaintiff's allegations are true, and the existence of disputed material facts will not prevent the Court from evaluating the merits of the jurisdictional claims. Id. In weighing the evidence to resolve the disputed jurisdictional facts, the Court has discretion to consider affidavits and documents outside the complaint. Cleveland Area Local, Am. Postal Workers Union v. United States Postal Serv., 968 F.Supp. 1199, 1201 (N.D. Ohio 1997). Further, the plaintiff bears the burden of proof that jurisdiction does exist. Id.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702. There is a "'basic presumption of judicial review.'" Lincoln v. Vigil, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). However, judicial review of agency action is not available "to the extent that--(1) statutes



preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). To preclude judicial review, a statute must either be specific in withholding review or must, upon its face, offer "'clear and convincing evidence'" of an intent to preclude review. Abbott Labs. v. Gardner, 387 U.S. 136, 141, n.2, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) (citation omitted).

Under § 701(a)(1), one must interpret the applicable, substantive statute to determine whether Congress intended to preclude judicial review of certain actions. Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Pursuant to § 701(a)(2), agency action is not subject to review "where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Lincoln, 508 U.S. at 191, 113 S.Ct. at 2030-31 (quoting Heckler, 470 U.S. at 830, 105 S.Ct. at 1655). This rare exception to judicial review applies in those instances where statutes are drawn so broadly that in a given case there is no law to apply. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820-21, 28 L.Ed.2d 136 (1971) (citation omitted). Judicial review of an agency action is available only where there are:

"standards, definitions, or other grants of power [that] deny or require action in given situations... A meaningful standard does not exist where the applicable law is so broadly drawn that the court has no standard or substantive priorities against which to measure an agency's discretion... If regulations do not

provide guidance about specific legal standards for judicial review, agency action is immune from such review.'"

Joelson, 86 F.3d at 1418 (quoting Madison-Hughes v. Shalala, 80 F.3d 1121, 1127 (6th Cir. 1996)). If no judicially manageable standards exist for judging how and when an agency should exercise its discretion, then it is impossible to evaluate an agency decision for abuse of discretion. Heckler, 470 U.S. at 830, 105 S.Ct. at 1655.

The issue here is whether the applicable statutes and related regulations provide meaningful standards by which to assess the terms established by the Secretary for the disposition of low-income projects or whether this decision is committed to agency discretion by law. Defendant directs the Court to the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 ("the 1997 Appropriations Act"). Section 204 of the 1997 Appropriations Act provides the following:

FLEXIBLE AUTHORITY. During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.

Pub. L. No. 104-204, 110 Stat. 2874, 2894 (1996).<sup>4</sup> Defendant

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<sup>4</sup>12 U.S.C.A. §1715z-11a provides as follows:

During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned

submits that Congress, through §204, has provided Defendant with "unfettered discretion" in establishing the terms of the management and disposition of property and mortgages, and, therefore, the Court has no law or standard to apply in reviewing these decisions. (Doc. No. 9 at 10). Furthermore, Defendant contends that the language of §204 indicates Congress' intent that §204 supersede the statutory, i.e., 12 U.S.C. § 1701z-11, and regulatory, i.e., 24 C.F.R. Part 290, provisions addressing the management and disposition of multifamily properties. (Doc. No. 9 at 8-9).

In response, Plaintiffs submit that §204 does not apply to this situation. (Doc. No. 11 at 4-6). Plaintiffs correctly state that §204 applies to the management and disposition of multifamily properties owned by the Secretary and multifamily mortgages held by the Secretary. (Id. at 5). Plaintiffs assert that the situation at hand involves a nonjudicial foreclosure of property which is not included in §204. (Id.). According to Plaintiffs, the dispute is the forced sale of property, owned by Mr. Schreiber, as a result of default. (Id.). In support of

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by the Secretary, including, for fiscal years 1997 and 1998, the provision of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation or demolition, and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.

this argument, Plaintiffs emphasize that they initiated this action prior to the foreclosure sale and agreed to allow the foreclosure to proceed on the understanding that the conversion of the Section 8 rental assistance would be an issue preserved for the Court. (Id. at 6).

Plaintiffs' attempt to redefine the dispute is not well-taken. The disputed decision is not the decision to foreclose privately-owned property. The dispute involves the terms established for the management and disposition of mortgages held by Defendant and of property in which Defendant was a mortgagee-in-possession and then owner.

Plaintiffs also contend that 24 C.F.R. 290 provides the Court with specific law to apply in determining whether Defendant abused his discretion. (Doc. No. 11 at 11). However, by the language used in §204, Congress clearly illustrated its intent that §204 preempt other statutes and regulations such as 24 C.F.R. 290. The clause which reads "notwithstanding any other provision of law" clearly exhibits this intent. Congress has stated explicitly that §204 preempts any other statute or regulation, including those which may define standards restricting the Secretary's authority. See Crowley Caribbean Transport, Inc. v. United States, 865 F.2d 1281, 1283 (D.C. Cir. 1989) (citations omitted) (concluding that, with regard to the phrase notwithstanding any other provision of law, "'[a] clearer statement is difficult to imagine.'"); See also Johnson v. Orr, 780 F.2d 386, 393 (3d Cir. 1986) (stating that the language,

"notwithstanding any other provision of law" establishes that other statutes may not preempt the terms of that section and, thus, when a conflict arises between that section and another statute, the terms of the section must be followed), cert. denied, McDaniel v. Johnson, 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986); New Jersey Air Nat'l. Guard v. Federal Labor Relations Authority, 677 F.2d 276 (3d Cir. 1982), cert. denied, American Fed'n. of Gov't. Employees, AFL-CIO, Local 3486 v. New Jersey Air Nat'l Guard, 459 U.S. 988, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982).

Preempting other provisions of law, §204 authorizes Defendant, in making these decisions, to use his discretion, unencumbered by any statutory or regulatory guidelines. The Sixth Circuit, in Madison-Hughes v. Shalala, 80 F.3d 1121, 1128 (6th Cir. 1996), provided examples of language that has been interpreted as granting discretion to the agency and precluding judicial review: "'shall deem ... necessary or advisable,'" Webster v. Doe, 486 U.S. 592, 600, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988); "'as [the president] deems necessary,'" Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1507-08 (11th Cir.), cert. denied, 502 U.S. 1122, 112 S.Ct. 1245, 117 L.Ed.2d 477 (1992); "'if the Secretary determines' that certain conditions exist," State of N.D. ex rel. Bd. of Univ. and School Lands v. Yeutter, 914 F.2d 1031, 1035 (8th Cir. 1990), cert. denied, North Dakota Bd. of Univ. & School Lands v. Madigan, 500 U.S. 952, 111 S.Ct. 2258, 114 L.Ed.2d 710 (1991); "'as the

Secretary believes appropriate," Columbia-Greene Medical Center Inc. v. Sullivan, 758 F.Supp. 821, 823 (N.D.N.Y. 1991).

The language in §204 grants discretion to HUD and precludes judicial review. Section 204 is entitled "FLEXIBLE AUTHORITY." Pub. L. No. 104-204, 110 Stat. 2874, 2894 (1996). It provides that the Secretary may dispose of property "on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." Id. The language, "as the Secretary may determine," is analogous to the language in the above cases, which were cited with approval by the Sixth Circuit. Thus, just as the language in those cases foreclosed the application of judicial review, §204 forecloses the application of judicial review here.

Plaintiffs have failed to establish that the Court has jurisdiction over this matter. See Madison-Hughes, 80 F.3d at 1130 (citing Rogers v. Stratton Industries, Inc., 798 F.2d 913, 915 (6th Cir. 1986); Moir v. Greater Cleveland Regional Transit Authority, 895 F.2d 266, 269 (6th Cir. 1990)).

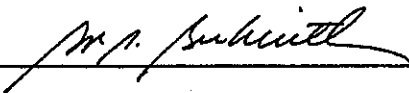
### III. CONCLUSION

For the reasons provided above, the Court hereby **GRANTS** Defendant's motion to dismiss based on lack of subject matter jurisdiction, FRCP 12(b)(1). Defendant's Motion for Summary Judgment is deemed **MOOT**. Defendant's Motion to Stay Discovery or for Summary Judgment (Doc. No. 19) is deemed **MOOT**. Plaintiffs'

Motion to Compel Answers to Interrogatories and Production of Documents (Doc. No. 20) is deemed MOOT. Plaintiffs' Motion to Continue Ruling on Summary Judgment Pending Completion of Discovery (Doc. No. 22) is deemed MOOT.

IT IS SO ORDERED.

May 21, 1998  
Date

  
Sandra S. Beckwith  
United States District Judge