UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO ACORN, WYVONIA PICKETT, CALLIE DAVIS, FLORIDA WASHINGTON, and JOAN BANKS, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 05 C 3049
v.	)	
THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD"), and ALPHONSO JACKSON, in his official capacity as Secretary of HUD,	)	Judge Manning
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

Introduction

Plaintiffs' opposition memorandum evidences their basic unwillingness to accept the fact that Congress changed the rules governing HUD's disposition of multifamily projects. Incredibly, plaintiffs ask this court to ignore fundamental principles of statutory construction which require a literal interpretation of the words in the flexible authority provision. Plaintiffs advance several arguments in support of their untenable position that Congress could not have possibly meant to empower the Secretary to manage and dispose of multifamily properties "**notwithstanding any other provision of law**." Despite their vociferous protests, plaintiffs cannot escape the clear statement of Congressional intent expressed in the plain statutory language, namely that the Secretary is vested with the ability to balance competing interests and priorities and adopt disposition plans without regard to contrary requirements that may be contained in any other law. Consequently,

plaintiffs' challenge to HUD's future disposition plans for the Lawndale project cannot be sustained and their amended complaint should be dismissed.

Argument

I. Congress Has Given the Secretary of HUD Broad Flexible Authority in Setting the Terms and Conditions Governing HUD's Disposition of Multifamily Projects.

A. Plaintiffs cannot avoid the plain meaning of the statute.

Plaintiffs argue that the flexible authority provision in 12 U.S.C. § 1715z-11a(a) (hereinafter, "section 204") must be read in the context of other laws addressing the need for affordable housing and setting forth the requirements HUD must follow to meet those goals. (Br. at 7-8). However, the plain statutory language demonstrates that the opposite is actually true.

In the clearest possible terms, Congress provided HUD the discretion to determine the terms and conditions of its disposition of multifamily properties by relieving it of any obligations that may exist in any other law. In other words, the purpose of section 204 is to allow HUD to operate without being constrained by other laws. HUD cited ample case law in its opening brief in support of the position that use of a notwithstanding provision signals Congress' intention that the provisions of the "notwithstanding" section trump conflicting provisions of any other law. *See Conyers v. Merit Sys. Protection Bd.*, 388 F.3d 1380, 1382 (Fed. Cir. 2004) (the "'notwithstanding *any other provision of law*' language [in a statute] renders inapplicable general federal statutes that otherwise would apply") (emphasis in original); *Springs v. Stone*, 362 F. Supp. 2d 686, 698 (E.D. Va. 2005) (when Congress confers broad discretion upon an agency notwithstanding "*any* other provision of law," that means "those provisions of law that would otherwise constrain the [agency's] discretion. . . do not apply") (emphasis in original); *Tucker v. Ridge*, 322 F. Supp. 2d 738, 743 (E.D. Texas 2004) (when

Congress uses a "notwithstanding" clause, "the court must assume that Congress means what it says --namely, that the law applies even when it would violate otherwise applicable statutes" such as the Rehabilitation Act).

Contrary to plaintiffs' arguments, the Supreme Court has made it clear that "notwithstanding" clauses are to be read broadly. While it is true that *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993) involved a "notwithstanding" clause in a contract, the Court specifically relied upon its prior precedent when reviewing *statutes*, as well as prior appellate court analysis of *statutes* which use "notwithstanding any other provision," to determine what that term means:

> As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. *See Shomberg v. United States*, 348 U.S. 540, 547-48 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language. . . to supersede all other laws, stating that "'[a] clearer statement is difficult to imagine.'" (collecting cases).

Id. at 18. Furthermore, as the Supreme Court explained, "the word 'any' has an expansive meaning." *Dept. of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002). Therefore, a plain reading of the flexible authority provision in section 204 is that Congress provided HUD the power to dispose of multifamily properties like the Lawndale project on whatever terms and conditions the Secretary of HUD may determine notwithstanding "any" other law.

The mere fact that Congress passed section 204 with no comment or direct legislative history — as plaintiffs point out (Br. at 5) — is of no consequence since "reference to legislative history is inappropriate when the text of the statute is unambiguous." *Rucker*, 535 U.S. at 133-34. Here, the statutory language Congress employed is remarkably clear. HUD's interpretation of the scope of

its authority, *i.e.,* that it may dispose of multifamily housing on whatever terms and conditions it deems appropriate, is consistent with the plain language of the statute. Moreover, plaintiffs have cited nothing in the legislative history of section 204 to support their argument that Congress intended to do anything other than what the statute's enacted language plainly says.

B. HUD's Exercise of its Discretion under Section 204 Does Not Lead to Absurd Results in this Case.

In an effort to avoid the plain meaning of section 204, plaintiffs state that Congress could not have intended to relieve HUD of all constraints on its discretion in the disposition of multifamily properties because that would lead to absurd results. (Br. at 8-9). The principal relief sought in plaintiffs' amended complaint is HUD's compliance with the requirement in section 203 to enter into a new 15-year housing assistance ("HAP") contract for project-based Section 8 with the entity that ultimately acquires title to the Lawndale project. (Pls.' Am. Compl. ¶¶ 1-2, 46, 50). The allegedly absurd result plaintiffs seek to avoid in this lawsuit is Lawndale's current residents receiving tenant-based Section 8 rental assistance rather than project-based Section 8 rental assistance. However, the evolution of section 204, as seen in a series of HUD appropriations acts, clearly illustrates that the manner in which HUD plans to exercise its flexible authority—replacing project-based Section 8 with tenant-based assistance—is not absurd. Instead, it is completely consistent with Congressional intent.

Plaintiffs' argument must be considered within the context of the general operation of the multifamily mortgage insurance programs administered by HUD. The National Housing Act, 12 U.S.C. § 1701, *et seq*., created a number of multifamily mortgage insurance funds and programs to encourage the private ownership and management of affordable housing. In general, the programs

operate in the following way. HUD provides mortgage insurance on loans to develop multifamily properties as affordable housing. If the owner/mortgagor of an insured property defaults on its mortgage loan, the lender/mortgagee assigns its interest in the mortgage to HUD and HUD pays the lender/mortgagee's claim for the balance due under the mortgage note. *See* 12 U.S.C. § 17151; 24 C.F.R. § 202.259(b)(2)(iv). The assigned mortgage is then an asset of the fund that insured the mortgage. HUD will exercise its authority under section 204 and determine and term and conditions of its management and disposition of the mortgage. For example, HUD may sell the mortgage note in a notes sale; or take a deed in lieu of foreclosure and later resell the property; or foreclose and sell the property at the foreclosure sale; or bid the indebtedness at a foreclosure sale, acquire title, and then resell the property at a later date.

In some cases, as is the situation with the Lawndale project, the owner of a property that is the subject of an assigned mortgage is receiving a project-based Section 8 subsidy for some or all of the housing units in the development pursuant to a HAP contract with HUD. (Pls.' Am. Compl. ¶¶ 42-44; Br. at 3). Since a project-based Section 8 HAP contract is between HUD and the owner of the property, the particular contract with that owner terminates when, as part of the disposition process, the owner is divested of its interest in the property. At that time, HUD may decide to provide an alternate form of rental assistance to the residents of such a development.

As plaintiffs point out, the enactment of the Disposition Reform Act of 1994 (hereinafter, "section 203") relieved HUD of some of the costly requirements contained in the former law governing HUD's management and disposition of multifamily properties and assigned loans. (Br. at 4-5). However, section 203 retained many requirements that HUD undertake time consuming, complex procedures to develop a disposition plan for each property and that, in most situations,

HUD must enter into a new 15-year HAP contract with the purchaser of a property. (Pls.' Am. Compl. ¶¶ 45-50; 12 U.S.C. § 1701z-11, *et seq.*).

Language allowing HUD to disregard the requirements of section 203 in its management and disposition of properties first appeared in Public Law 104-19, which is commonly referred to as the "1995 Rescissions Act." Enacted just 15 months after section 203 became law, the purpose of the 1995 Rescissions Act was to save federal dollars by rescinding over $5 billion dollars in funds previously appropriated for HUD programs. The Act specifically provides that in allocating $1,115 billion dollars of the rescinded funds, "the Secretary may reduced the appropriations needs of the Department by "(1) waiving. . . and *(2) managing and disposing of HUD-owned and HUD-held multifamily properties without regard to any other provision of law.*" (emphasis added).

Section 1003 of the 1995 Rescissions Act clearly indicates a Congressional preference for the replacement of project-based Section 8 rental assistance with tenant-based Section 8 rental assistance, stating that "for actions initiated by the Secretary on or before September 30, 1995," unless deemed "infeasible by the Secretary," the budget authority recaptured by the termination of a project-based HAP contract may only be reused to fund tenant-based rental assistance. *See* 42 U.S.C. § 1437f(z).

Then, on January 26 1996, the Balanced Budget Downpayment Act, I, was enacted to appropriate funds for a period of fiscal year 1996. Pub. L. No. 104-99 (1996). Section 401 of the Act extends HUD authority "[d]uring fiscal year 1996" to "manage and dispose of multifamily properties owned by the Secretary . . . and multifamily mortgages held by the Secretary without regard to any other provision of law." HUD's flexible authority to manage and dispose of multifamily properties was continued for "fiscal year 1997 and fiscal years thereafter" in section 204

of the Department of Veterans Affairs and Housing and urban Development, and Independent Agencies Appropriation Act, 1997. Pub. L. No. 104-204 (1996). This Act codified the flexible authority provision at 12 U.S.C. S 1715z-11(a).

Plaintiffs characterize section 204 as "a single fragment of a provision in an appropriation" (Br. at 2) and, as such, not important enough to allow the absurd result that would obtain from its literal interpretation. The only result challenged by plaintiffs is the exercise by HUD of its discretion under section 204 and its decision not to enter into a new long-term HAP contract for project-based Section 8 with the future owner(s) of the Lawndale project. Clearly the evolution of section 204 described above supports HUD's position that the plain meaning of section 204 allows HUD to determine the terms and conditions of the disposition of the Lawndale property.

Realizing the cost saving benefit of providing HUD the discretion to determine the terms and conditions under which it would manage and dispose of HUD-held loans and HUD-owned properties was the reason the flexible authority provision was part of the 1995 Rescissions Act. The 1995 Rescissions Act's prohibition on the use of funds (made available based on the termination of a project-based Section 8 HAP contract) for any purpose except to provide tenant-based assistance indicates that Congress did not object to HUD using its new flexible authority to replace project-based rental assistance with tenant-based rental assistance. In addition, given that the 1995 Rescissions Act was enacted only 15 months after section 203 became law, it is reasonable to assume that Congress fully understood that it was negating the section 203 requirement that HUD enter into new 15-year HAP contracts for project-based section 8. Since Congress had rescinded the funding necessary to comply with that section 203 requirement, it provided to HUD the authority to dispose of properties in a more cost effective manner.

Of course, initially the flexible authority provision was adopted to cover the period between July 27 and September 30, 1995. It was then reconsidered and reenacted by Congress for fiscal year 1996 and then permanently adopted and codified by section 204. The time between the original and permanent enactments of the flexible authority provision certainly allowed Congress time to consider and determine, based on HUD's record, if the agency would exercise this authority in a manner that struck a sensible balance between the goals of preserving affordable housing, prudently managing the insurance fund, and protecting the rights of residents in formerly insured properties. Congress did not find that the exercise by HUD of this authority caused absurd results.

For the past ten years, every HUD appropriation has included provisions which indicate Congressional support for the plan to dispose of multifamily properties without a long-term, project-based Section 8 contract.[1] Indeed, each year Congress appropriates funds that HUD may use to relocate and provide tenant-based assistance to those who previously benefitted from a terminated HAP contract for project-based rental assistance. Congressional intent gleaned from provisions of the appropriations acts refutes the argument that it is absurd to provide tenant-based assistance to the residents of Lawndale when the existing HAP contract terminates upon the transfer of ownership.

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[1] Section 405 of the Balanced Budget Downpayment Act, I, Pub. L. No. 104-99 (1996) provides for the transfer of the budget authority remaining under a terminated project-based HAP contract in order to provide tenant-based rental assistance. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (1996) appropriates $400 million dollars to provide tenant-based Section 8 assistance to four categories of families, including residents to be relocated in connection with a terminated HAP contract for project-based Section 8. The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204 (1996), under the heading "Prevention of Resident Displacement," provides Section 8 funds "for use in connection with expiring or terminating section 8 subsidy contracts" including to "relocate residents of properties that are owned by the Secretary and being disposed of. . ." Each subsequent appropriation act contains the same or similar language.

Plaintiffs argue next that the court must reject an "expansive reading of the flexible authority provision" because such a reading would absurdly immunize HUD officials who engage in criminal activity, *e.g.*, violations of the laws governing the expenditure of appropriated funds and conflicts of interest. (Br. at 8-9). This argument assumes that HUD officials cannot be trusted to act lawfully, so Congress could not have intended to provide HUD officials the unfettered discretion contained in the flexible authority provision. While certainly offensive, the court need not determine whether the plaintiffs' suggested hypothetical exercises by HUD of its flexible authority would cause the alleged absurd results, as the court's role is to adjudicate the specific controversy before it, not engage in speculation about hypothetical applications of statutory language. *See FCC v. Pacifica*, 438 U.S. 726, 743 (1978) ("[W]e will not pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable. . . but will deal with these problems if and when they arise.")

Moreover, there is nothing absurd about a Congressional decision that HUD should be free to dispose of multifamily properties without the constraints imposed in other federal laws. As the Supreme Court explained in a case relied on by plaintiffs where it refused to nullify a statute because it would have a hard or unexpected effect:

> Laws enacted with good intentions, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982), *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The Court rejected the contention that it could ascribe a purpose to Congress

which was contrary to the straightforward terms of the statute, holding that "[i]t is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not." *Griffin*, 458 U.S. at 574.

C. The Express Language of Section 204 Illustrates Congress' Intent to Confer Unfettered Discretion Upon HUD in its Disposition Decisions.

The annual appropriations acts for fiscal years 2001 through 2005 each contain the following language limiting HUD's flexible authority under section 204: "notwithstanding any other provision of law," in its disposition of multifamily loans and properties that are "occupied primarily by elderly or disabled families," HUD must maintain as project-based Section 8 all units previous covered by a project-based HAP contract unless that option is not feasible. Clearly Congress understood that the flexible authority provision in section 204 allowed HUD to dispose of properties without maintaining project-based rental assistance or the inclusion of this new requirement governing the disposition of properties occupied by the elderly and disabled would be redundant.

Plaintiffs suggest that the enactment of subsection (b), which "explicitly references the Disposition Reform Act," clarifies that Congress did not intend to provide the Secretary the discretion to manage and dispose of properties without regard to the requirements contained in section 203 and other laws. (Br. at 5). To the contrary, as with Congress' express preservation of project-based section 8 rental assistance for elderly and disabled individuals in subsection (a), subsection (b) makes it clear that Congress knew how to say exactly what it meant.

Congress enacted the Disposition Reform Act, or section 203, in 1994. That statute provides, among other things, that within 30 days after HUD becomes the owner of a multifamily property, it must

notify the local government of its right to purchase the property for a 90-day period of time. 12 U.S.C. § 1701z-11(i). Two years later, in 1996, Congress enacted section 204, which confers upon the Secretary discretion to dispose of multifamily properties notwithstanding the provisions in any other law. In 2000, Congress amended section 204, adding subsection (b) which provides, among other things, that "notwithstanding the authority under subsection a," when HUD has owned a multifamily housing project (as defined in subsection b(1) of Section 203) for a period of six months, it must notify the local government of its right to purchase that property.

Clearly, section 204(b) would be redundant if HUD were still obligated by section 203 to notify local governments of their right to purchase HUD-owned properties. In addition, unless Congress understood that subsection (a) of section 204 relieved HUD of its obligation to comply with other laws, there was no need for inclusion of the clause "notwithstanding" clause in subsection (b). That Congress chose to include in section 204(b) a reference to the definition of a "multifamily housing project" contained in section 203 suggests only that Congress thought it was a good definition, not that Congress wanted HUD to continue to comply with the burdensome terms of section 203 when it disposed of multifamily properties. Because section 203 has not been abolished, HUD can still choose to use the disposition tools in that statutory provision. But adoption of section 204(b) clarifies the Congressional intent and understanding that subsection (a) negates any requirement to comply with the requirements of section 203 or any other law that constrains HUD's discretion in disposing of multifamily properties.

D. Congress' Grant of Unfettered Discretion in Section 204 Cannot Be Reconciled with the Mandates of Section 203 or Other Federal Statutes.

As HUD has already shown, the clear purpose of the flexible authority provision is to release the Secretary from constraints contained in other laws. Plaintiffs nonetheless argue that to avoid a

repeal by implication, the court should allow HUD to exercise its flexible authority only *after* it has first demonstrated its compliance with the mandates of all other federal housing statutes. (Br. at 9-12). But a repeal by implication is justified "when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). That is undoubtedly the case here.

Section 203 established detailed methods and requirements for the disposition of all HUD-owned multifamily properties, and mandated the use of those methods in all multifamily dispositions. For example, 12 U.S.C. § 1701z-11(h)(1) provides that contracts for project-based rental assistance provided pursuant to that section "*shall* have a term of 15 years" except in limited circumstances (emphasis supplied). The mandatory nature of this and other similar provisions of section 203 is plainly in conflict with the power vested in the Secretary under section 204(a) to dispose of multifamily properties "on such terms as [he or she] may determine, notwithstanding any other provision of law." Because of this "irreconcilable conflict," section 204 repeals section 203 to the extent that it was the sole means by which HUD was able to dispose of multifamily properties. HUD contends that it may continue to regard section 203 as a guide when disposing of multifamily properties, but it is not required to comply with its terms.

E. Congress Properly Conferred Authority upon the Secretary to Dispose of HUD-owned Multifamily Properties.

Plaintiffs' claims of "unconstitutional delegation of legislative power" are specious and unsupported by any case law. (Br. at 12). As HUD has already set forth, its operation of the multifamily mortgage insurance programs created by the National Housing Act necessarily includes responsibility for the management and disposition of loans it holds and properties it owns, which are assets of the insurance fund. It is certainly not an unconstitutional delegation to give the head of an

agency authority to make judgments about the best way in which to manage one aspect of a program it operates.

II. Judicial Review of the Agency's Decision Is Unavailable.

Plaintiffs contend that HUD's actions are subject to review under the APA because there is sufficient law to apply. (Br. at 13). However, section 204 provides the Secretary with such unfettered discretion in setting the terms and conditions of the sale of multifamily properties that there is no law for a court to apply in reviewing a HUD disposition decision under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. HUD's future disposition plans for the Lawndale project is "agency action committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and therefore beyond the scope of judicial review.

Plaintiffs have cited nothing in their brief that convincingly demonstrates the 5 U.S.C. § 701(a)(2) exception to review is not applicable in this case. Indeed, plaintiffs principally rely on the rationale adopted by the appellate courts in *United States v. Winthrop Towers*, 628 F.2d 1028 (7th Cir. 1980) and *United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 494 (8th Cir. 1981), in contending that even in the face of a broad notwithstanding provision, there is adequate law to review HUD's disposition decision. (Br. at 13). However, in his concurring opinion to *United States v. OCCI Co.*, 758 F.2d 1160 (7th Cir. 1985), Judge Posner set forth his view that *Winthrop Towers* and *Victory Highway Village*, *supra*, were improperly decided:

> I do not know what constructive contribution this or any other court can make to the achievement of the national housing goals by reviewing HUD's decision to foreclose for conformity with the generalities of § 1441. There is no definite standard for a reviewing court to apply, and, given the lack of such a standard, little likelihood that a responsible reviewing court will ever invalidate, under § 1441, a decision to foreclose. . . *If ever there was a case where judicial review was unavailable because 'agency action is committed to*

> *agency discretion by law' 5 U.S.C. § 701(a)(2), which is an exception to the presumption of judicial reviewability designed precisely for cases where "statutes are drawn in such broad terms that in a given case there is no law to apply," this is the case.*

OCCI, 758 F.2d at 1167. (emphasis supplied).

HUD submits that section 204, with its "notwithstanding any other provision of law" clause is similarly drawn in such broad terms that practically speaking, there is no law for the court to apply in reviewing the propriety of HUD's future disposition decision with respect to the Lawndale project. Indeed, *Mays v. Cuomo*, a district court decision cited and discussed by HUD in its opening brief is directly on point, and follows the reasoning set forth by Judge Posner in his concurring opinion in *OCCI*, *supra.* Thus, the court should reject plaintiffs' attempt to circumvent the intent of Congress expressed through the plain statutory language of the flexible authority provision by seeking judicial review of decisions committed to agency discretion by law.

Conclusion

For the foregoing reasons, the court should enter an order granting HUD's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

were served pursuant to the district court's ECF system as to ECF filers, if any, and were sent by first-class mail on August 10, 2005, to the following non-ECF filers:

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