District Court Rules Demolition of RHS Development Violates Fair Housing Act

On March 11, 2004, Judge Catherine D. Perry of the United States District Court for the Eastern District of Missouri issued a decision in *Owens v. Charleston Housing Authority*, No. 1:01CV70 (E.D. Mo. Mar. 11, 2004).[1] The case involves a challenge to a public housing authority's (PHA) decision to vacate and demolish a housing development that is the subject of a Section 515 Rural Housing Service (RHS) insured mortgage and a project-based Section 8 subsidy contract. A bench trial was held in the case in July 2003. The decision is an important partial victory and may be of use to other advocates seeking to use civil rights laws to preserve federally assisted housing.

Facts of the Case

Charleston Apartments is a fifty-unit housing complex of duplexes, triplexes and single-family buildings developed in 1970 in Charleston, Missouri. It was purchased by Charleston Housing Authority (CHA) in 1981 and converted into a Farmer's Home Administration (FmHA)[2] mortgaged project-based Section 8 substantial rehabilitation project. The loan promissory note was for a term of fifty years, with final payment due in 2031.

In February 2000, CHA resolved to prepay the balance of the loan, not to renew the Section 8 housing assistance payments (HAP) contract, and to demolish Charleston Apartments. High density, a history of crime and drug activity, and the limited availability of funding available to improve the development were the purported reasons for this decision. At the time of the resolution, forty-seven of the fifty units of the development were occupied.

According to an analysis of CHA and federal data prepared by expert witness Andrew A. Beveridge, a professor at the City University of New York, the demolition of the development threatened a disparate adverse impact on African American families in the region.[3] Forty-six of the forty-seven households residing in Charleston Apartments were headed by African Americans. While African Americans comprised only 19.2 percent of the total population of Mississippi County, the county in which Charleston is located, 87.3 percent of the families on waiting lists for CHA housing[4] were headed by African Americans. African-American households in the county tended to have lower incomes than households overall and, thus, tended disproportionately to be income-eligible to reside in Charleston Apartments. According to the United States Census 2000 figures, while 40.3 percent of all households in the county were low-income,[5] 63.5 percent of African-American households fell into this category. Some 26.7 percent of all households were very low-income,[6] compared to 47.3 percent of African-American households. In the extremely low-income[7] category, 16.2 percent of all households met this description, compared to 32.4 percent of African-American households. In addition, among low-income households in the county, African-American households experienced higher rates of housing problems related to affordability, overcrowding or substandard conditions (69 percent) than households overall (56 percent).

Owens is the first final judicial decision, of which NHLP is aware, holding the demolition of federally assisted housing as the basis for fair housing disparate impact liability.

The plaintiff residents and the fair housing organization Housing Comes First[8] asserted claims against Charleston Housing Authority (CHA) alleging, *inter alia*, violations of the Fair Housing Act based on disparate racial impact of the demolition scheme,[9] the affirmative fair housing provisions of the Quality Housing and Work Responsibility Act of 1998,[10] the Emergency Low Income Housing Preservation Act (ELIHPA),[11] Section 8 program requirements,[12] and the Uniform Relocation Act (URA).[13] Plaintiffs also asserted claims against the Department of Housing and Urban Development (HUD) for violations of

[1]A copy of the decision will be available to Housing Justice Network members on the NHLP Web site at http://www.nhlp.org/pres/cases/.

[2]FmHA was the predecessor to RHS.

[3]A copy of Beveridge's expert report will be available to Housing Justice Network members on the NHLP Web site at http://www.nhlp.org/pres/cases/.

[4]CHA does not administer a housing choice voucher program.

[5]I.e., at or below 80 percent of area median income (AMI).

[6]I.e., at or below 50 percent of AMI.

[7]I.e., at or below 30 percent of AMI.

[8]Plaintiffs were represented by Legal Services of Eastern Missouri, Legal Services of Southern Missouri and NHLP.

[9]42 U.S.C.A. § 3604(a) (West 1994).

[10]42 U.S.C.A. § 1437c-1(d)(15) (West 2003).

[11]42 U.S.C.A. § 1472(c) (West, WESTLAW through P.L. 108-209 (excluding P.L. 108-203) approved 03-19-04).

[12]These included, in particular, resident notice requirements under 42 U.S.C.A. § 1437f(c)(8) (West 2003), enhanced voucher requirements of the Multifamily Assisted Housing Reform and Affordability Act (MAHRAA), 12 U.S.C.A. § 1715z-1b (West, WESTLAW through P.L. 108-209 (excluding P.L. 108-203) approved 03-19-04), and terms of the HAP contract requiring vacant units to be "rented up."

[13]42 U.S.C.A. §§ 4601 *et seq.* (West, WESTLAW through P.L. 108-209 (excluding P.L. 108-203) approved 03-19-04).

Section 8 program requirements and HUD's affirmative duty to further fair housing under the Fair Housing Act.[14]

The District Court's Decision

In its March 11 decision, the district court ruled against the plaintiffs on their claims based on housing program requirements, but also ruled that CHA's conduct violated the Fair Housing Act and fair housing provisions of the QHWRA. Regarding the program claims, the court concluded that the plaintiffs had no right to enforce ELIHPA or provisions of the HAP contract. It concluded that enhanced voucher protections do not apply in situations like that of Charleston Apartments where a development owner seeks to demolish rather than convert housing. It rejected the plaintiffs' URA claim, based on its conclusion that operating account funds were not "federal financial assistance," the use of which were sufficient to trigger application of the Act. The court further concluded that the plaintiffs' APA claims against HUD failed in particular because HUD did not have the right to require CHA to renew its HAP contract for Charleston Apartments.[15]

However, the court ruled in favor of the plaintiffs on their fair housing claims against CHA. The court concluded, based on the expert witness evidence, that the plaintiffs "easily met the burden of showing a prima facie case of disparate impact" under the Fair Housing Act.[16] The court rejected the justifications put forth by CHA to rebut the plaintiffs' prima facie showing, finding that CHA relied on faulty or nonexistent evidence. Having concluded that the plaintiffs established a violation of the Fair Housing Act, the court concluded that CHA had also violated its affirmative duty to further fair housing under the QHWRA.[17]

Dismayingly, while the court concluded that CHA's plans to vacate and demolish Charleston Apartments violated the Fair Housing Act and fair housing provisions of the QHWRA, it declined to award specific injunctive relief to correct these violations, such as an order directing CHA to continue to operate the development and rent up vacant units. Instead, the court issued a declaration essentially amounting to a general declaration that CHA comply with the Fair Housing Act.[18] The plaintiffs have filed a motion with the district court seeking an amendment of the judgment to provide specific injunctive relief.

Conclusion

While the decision clearly has serious shortcomings, it stands as an important, albeit partial, proof of concept regarding the use of civil rights litigation to preserve federally assisted housing. *Owens* is the first final judicial decision of which NHLP is aware that holds the demolition of affordable housing as the basis for fair housing disparate impact liability.[19] It may be of particular use in the demolition or conversion of public housing. The court's unfavorable conclusions regarding ELIHPA and other housing statutes would not apply in the public housing context.

CHA has attempted to appeal the district court's decision to the Eighth Circuit Court of Appeals. ■

Tenth Circuit Allows Section 236 Prepayment Over HUD Objections

Reversing a district court decision that had upheld HUD's refusal to permit conversion of a federally subsidized development to market-rate use, the United States Court of Appeals for the Tenth Circuit has recently ruled that the applicable laws do not allow HUD to withhold approval of the prepayment. The decision, Aspenwood Investment Co. v. Martinez, 355 F.3d 1256 (10th Cir. 2004), is significant not just because it reflects the prevailing trend in statutory construction to hold legislative and regulatory drafters to an impossibly high standard of exactitude, avoiding any judicial duty to interpret language in a fashion faithful to the underlying program or policy goals. It also reflects a profound ignorance or misunderstanding of key elements of the statutory and regulatory framework that should have been part of the judicial decision-making process and produced precisely the opposite result. The decision demonstrates once again that violating the law can still pay off handsomely.[1]

The owner of a Section 236 property in Glenwood Springs, Colorado, had sought to prepay its HUD-insured mortgage, eliminating the HUD rent and occupancy restrictions. Because the property still had a Rent Supplement contract that could provide deep subsidy assistance to very low-income tenants and applicants, HUD properly refused to grant approval, contending that the

[14]These claims were asserted via the Administrative Procedure Act, 5 U.S.C.A. § 702 (West, WESTLAW through P.L. 108-209 (excluding P.L. 108-203) approved 03-19-04). HUD's affirmative fair housing duty is imposed under 42 U.S.C.A. § 3608(e)(5) (West 1994).

[15]Owens v. Charleston Hous. Auth., No. 1:01CV00070, slip op. at 10-12, 18-27 (Mar. 11, 2004).

[16]*Id*. at 14. For a discussion of the legal standards and rules of decision in fair housing disparate impact cases, see NHLP, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners*, 31 HOUS. L. BULL. 73, 73 (Apr. 2001) (one of two parts).

[17]*Owens*, slip op. at 13-18.

[18]*See id*. at 27.

[19]Similar litigation, on a much larger scale, is pending throughout the country, in cities such as Baltimore, Chicago, Miami, St. Louis, and elsewhere.

[1]*See, e.g.*, NHLP, *First Circuit Refuses Remedies for Improper Opt-Out Notice*, 33 HOUS. L. BULL. 426 (Oct. 2003).