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Cover: William Byron Rumford, Sr. Plaza, Berkeley, California.

A 43-unit LIHTC development with one-, two- and three-bedroom units. Owned by South Berkeley Community Housing Development Corporation.

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District Court Concludes HUD May Be Liable for Baltimore Segregation

In the latest episode of *Thompson v. United States Department of Housing and Urban Development*, a long-running federal case in Baltimore holding the Department of Housing and Urban Development (HUD) liable for violations of the Fair Housing Act,¹ the United States district court has recently denied HUD's motion for summary judgment on issues raised by the remedial phase of the case, and the case will now proceed to trial.² The court's decision addressed a host of important issues for advocates involved in housing and civil rights litigation, reviewed below.

The Prior Proceedings

Prior to the Supreme Court's 1954 ruling in *Brown v. Board of Education*, federal and local government agencies within Baltimore, not unlike many American cities, were plagued with institutionalized racism—the targets of which were usually African Americans. Effects of this institutionalized racism persist today. In 1995, African-American residents of Baltimore City public housing initiated a class action lawsuit asserting various constitutional and statutory claims against the City of Baltimore, the Housing Authority of Baltimore City ("HABC" or "Local Defendants") and HUD ("Federal Defendants"). Specifically, the plaintiffs alleged that the defendants' maintenance of a segregated affordable housing system violated the Fair Housing Act (FHA) and other civil rights and housing statutes, and their constitutional equal protection rights.

In June 1996, the parties entered into a Partial Consent Decree to settle certain claims concerning the demolition of particular developments and replacement housing obligations. The remaining issues, plus issues later raised by the Partial Consent Decree, then proceeded to trial for determination of liability, where the court held that:

1. The Local Defendants had no liability.
2. HUD was liable for violating its duty to affirmatively further fair housing under the FHA, 42 U.S.C.

¹On January 6, 2005, the court issued its "Liability Decision," published as *Thompson v. United States Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (hereinafter *Liability Decision*). For a thorough analysis of the Liability Decision, see NHLP, *HUD Liable for Failing to Address Baltimore's Segregated Housing System*, 35 HOUS. L. BULL. 70, 71 (2005).

²*Thompson v. United States Dep't of Hous. & Urban Dev.*, No. MJG-95-309 (D. Md. Jan. 10, 2006) (order denying Federal Defendant's motion for summary judgment and permitting Federal Defendant to reopen the record to present evidence and arguments pertaining to liability under § 3608(e)(5)) (hereinafter *Summary Judgment Decision*).

§ 3608(e)(5). While the court found no proof presented of intentional discrimination by HUD, the court specifically faulted HUD's failure adequately to consider a regional approach to desegregating public housing.

3. A decision on plaintiffs' equal protection claim against HUD would be deferred until after the trial on remedies.³

Several months later, HUD sought summary judgment on several pending remedial phase issues, giving rise to the decision that is the subject of this article. Specifically, HUD again challenged the court's original finding that it had violated the FHA. In the alternative, HUD argued that, even if the court's liability finding was correct, no remedy was available under the Administrative Procedure Act (APA).⁴

Challenging the FHA Violation

HUD's primary contention was that it cannot be liable for an FHA violation because of its limited role with regard to public housing in Baltimore.⁵ HUD essentially argued that because it did not directly build public housing, it had no obligation or opportunity to develop public housing in any particular location in the region. Because Congress assigned this role to state and local agencies, not to the federal government, HUD could not be faulted for its failure to perform that role.

Consistent with its prior opinion, the court rejected this argument, due to HUD's control over federal housing funding for the region and its authority to set conditions for those funds. Because of HUD's ability to influence Baltimore's local housing policies, the court concluded that the FHA required HUD to at least consider regional approaches when exercising its considerable leverage over public housing in a manner that did not perpetuate the historical segregation patterns in public housing. This ruling remains important to advocates addressing housing and civil rights issues: federal agencies can be held statutorily liable for FHA violations when they have considerable influence over a state or local government's policies and practices and fail to use this influence to reduce, or at a minimum not perpetuate, racial segregation.

Nevertheless, in order to insure that it was fully informed on all the issues presented, the court allowed HUD to reopen the record and present additional evidence

³See generally *Liability Decision*, *supra* note 1.

⁴See generally 5 U.S.C. §§ 701-706 (2006).

⁵HUD also argued that Plaintiffs' Pretrial Memorandum did not assert a § 3608(e)(5) claim against them, and therefore they were not given adequate notice to defend against such a claim. The court rejected this argument, noting that Plaintiffs' Pretrial Memorandum made several references to both the FHA claim and the regionalization issue. Moreover, because HUD never objected to consideration of regional approaches during the trial and, in fact, engaged the issue on its merits, the court was well within its discretion to consider the claim.

and arguments pertaining to the § 3608 affirmatively furthering claim. The court may then later reconsider its decision.

The APA and Remedy Preclusion

The earlier Liability Decision concluded that plaintiffs could pursue their statutory claims against HUD under the APA, which permits claims by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."⁶ However, HUD contended that even if the court was correct in concluding that it had violated the FHA, the remedies sought were precluded by Supreme Court precedents interpreting the APA. Moreover, under the circumstances, HUD further argued that the plaintiffs' constitutional claims were also subject to certain APA limitations. As described below, the court rejected both of these preclusion arguments.

HUD argued that because it did not directly build public housing, it had no obligation or opportunity to develop public housing in any particular location in the region.

First, seeking to narrow the scope of the APA, HUD asserted that the Supreme Court's decision in *Norton v. South Utah Wilderness Alliance* (hereinafter *SUWA*) precluded the requested remedy.⁷ In *SUWA*, the Court held that a "claim under 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."⁸ HUD urged *SUWA* as a bar to plaintiffs' § 3608 affirmatively furthering claim that had been brought under the APA, asserting that APA review is only proper upon a showing that the agency failed to take a discrete action—and no such showing was made here.⁹ In HUD's view, plaintiffs' § 3608 claim was precluded under the APA because it was a broad programmatic challenge, not a discrete agency action.

Rejecting HUD's interpretation, the court concluded that it could properly proceed under § 706(2) of the APA. The court recognized that the cumulative effect of HUD's practice of not adopting a regional approach to desegregation perpetuated long-term and region-wide segregation in Baltimore. As such, the court explained that judicial

⁶5 U.S.C. § 702 (2006).

⁷*Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

⁸*SUWA*, 542 U.S. at 64.

⁹See 5 U.S.C. §§ 706(1) or 706(2) (2006).

review was “appropriate ... because HUD’s liability under § 3608(e)(5) was based on HUD’s actions and long-term patterns.”¹⁰ Consequently, “[t]he instant lawsuit is, in essence, one to ‘set aside’ HUD’s practice in regard to decision making, a practice that constituted an abuse of HUD’s discretion. This conclusion accords with the APA, which defines ‘agency action’ to include a ‘failure to act.’”¹¹ Moreover, this conclusion is consistent with other decisions finding that *SUWA* does not prevent a court from reviewing whether HUD has met its statutory duty to affirmatively further fair housing.¹²

HUD also contended that because the plaintiffs’ constitutional claims arose under the APA, these claims were subject to purported APA limitations as well. Specifically, HUD argued that (a) plaintiffs lacked a non-statutory basis for their constitutional claim; (b) sovereign immunity bars any independent constitutional claim; and (c) because plaintiffs have alternate remedies available, the APA bars assertion of direct constitutional claims.¹³ Here, too, the court rejected each of HUD’s arguments, holding that plaintiffs’ constitutional claims were not constrained by any APA limitations.

First, the court concluded that because plaintiffs had presented a potentially valid constitutional equal protection claim under the Fifth Amendment and because that claim was not precluded by either the APA or the FHA, that claim could be pursued independent of the APA. HUD may thus be held liable for both statutory and constitutional violations.¹⁴ Moreover, for this type of constitutional claim, the plaintiffs need not establish HUD’s discriminatory intent because, “[w]hile an affirmative discriminatory act must be purposeful, there is no similar ‘intent’ element concerning the abdication of duties stemming from past discriminatory acts.”¹⁵ Therefore, “[i]f HUD failed to meet its constitutional obligation to remove vestiges of prior *de jure* segregation from the Baltimore Region there could be liability even without a present discriminatory intent.”¹⁶

In addition, the court rejected HUD’s sovereign immunity and alternative remedy arguments. First, with regard to sovereign immunity, the court pointed out that APA Section 702 provides a general sovereign immunity waiver for all claims against the federal government

¹⁰Summary Judgment Decision, *supra* note 2, at *10.

¹¹*Id.* at *11.

¹²*Id.* at *13 (quoting *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898 (8th Cir. 2005)).

¹³*Id.* at *17.

¹⁴*Id.* at *18 (citing cases).

¹⁵*Id.* at *19 (quoting *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)).

¹⁶*Id.* at *20.

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Publication Announcement

A Right to Housing: Foundation for a New Social Agenda

Edited by Rachel G. Bratt, Michael E. Stone
and Chester Hartman • Temple University Press
448 pages • \$40.00 paper/\$99.50 cloth

In the 1949 Housing Act, Congress declared “a decent home and a suitable living environment for every American family” our National Housing Goal. Today, more than half a century later, upwards of 100 million people in the United States live in housing that is physically inadequate, unsafe, overcrowded, or unaffordable.

The contributors to *A Right to Housing* consider the key issues related to America’s housing crisis, including income inequality and insecurity, segregation and discrimination, the rights of the elderly, as well as legislative and judicial responses to homelessness. The book offers a detailed examination of how access to adequate housing is directly related to economic security.

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where equitable relief is requested, including constitutional claims such as plaintiffs' Fifth Amendment claim.¹⁷ Second, the court quickly dismissed HUD's alternative remedy argument—that the existence of alternative remedies precludes relief for constitutional violations brought under the APA—finding it unsupported in statutory text or case law.¹⁸ Moreover, to counter HUD's related argument that HUD's compliance with its constitutional duties was unreviewable under the APA per the holding in *Heckler v. Chaney*,¹⁹ the court relied on its earlier ruling rejecting the same HUD contention concerning its statutory duties and the general presumption favoring judicial review of constitutional claims.²⁰

The court directly challenged the premise of HUD's contention that segregation was limited to Baltimore City.

Scope of Available Remedies

Finally, the court addressed HUD's contention that the only available remedy was a "remand" to HUD. In the court's view, HUD was arguing essentially that the court was powerless to order HUD to do or consider anything, an effective immunity from the court's equitable powers.²¹ The court stated that it has equitable powers to develop remedies appropriate to the statutory and constitutional violations found, including violation of the FHA duty to affirmatively further fair housing and any constitutional duty to remedy prior intentional segregation.

Moreover, rejecting HUD's attempt to limit the scope of the remedy to the alleged location of the illegal acts in Baltimore City, the court directly challenged the premise of HUD's contention that segregation was limited to that location:

The Federal Defendants' argument is based upon the false premise that the original segregation was limited to Baltimore City. Indeed, the essence of the segregation was to keep African-American residents of public housing in the Baltimore Region concentrated in black ghettos within Baltimore City and out of white neighborhoods in the

city and the counties. The absence of a substantial number of African-American public housing residents in the counties is an indication of the presence, not the absence, of race based segregation in the Baltimore Region.²²

Given the facts here, including HUD's jurisdiction over the metropolitan region, the court reiterated the propriety of a remedy reaching beyond the city border.²³

What's Next

The court has permitted HUD to reopen the record to present evidence and arguments pertaining to its liability under the FHA affirmatively furthering claim under § 3608(e)(5). The court may then reconsider its liability finding. Should the court again conclude that HUD is liable, the remedial phase trial will take evidence on what actions should be required to ensure that HUD considers a regional approach to public housing desegregation. In addition, the court will hear evidence of any prior consideration of regional approaches by HUD, or its failure to do so. This evidence will also influence the court's ultimate decision on plaintiffs' constitutional claim that HUD's prior actions were motivated by intentional racial discrimination, potentially creating even more expansive remedies.

Conclusion

Thompson demonstrates the obdurate behavior and ornately contrived legal sophistry that the federal government will employ in order to avoid responsibility for racial discrimination in its housing programs. It also shows the skill and persistence of effective advocacy to counter HUD's seemingly endless supply of diversionary tactics, and to create for the court an alternative vision of what is possible, and what the law requires. Because the Baltimore situation is not unique among metropolitan areas throughout the country, many await news on *Thompson's* next chapter. ■

¹⁷*Id.* at *22.

¹⁸*Id.* at *25.

¹⁹470 U.S. 821 (1985).

²⁰*Summary Judgment Decision, supra* note 2, at 26.

²¹*Id.*

²²*Id.* at *30-31.

²³*Id.* at *31. Also in this context the court rejected HUD's attempt to obtain summary judgment by obtaining a favorable "unitary status" determination for the region, as is now done in some school desegregation cases, where a court finds that the vestiges of prior discrimination have been eradicated to the extent practicable. *Id.* at 32-34.