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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH ARMS TENANT ASSOCIATION, MANZANITA ARMS TENANT ASSOCIATION, CALIFORNIA COALITION FOR RURAL HOUSING PROJECT, VIRGINIA BREIMANN, RITA JANSSEN, SHERRY LAUTSBAUGH, and KATHY POUNDS,

Plaintiffs,

-v-

MEL MARTINEZ, in his official capacity as Secretary of the Department of Housing and Urban Development; KENNETH ARMS LIMITED PARTNERSHIP; RANCHO ARMS LIMITED PARTNERSHIP; SAN JUAN LIMITED PARTNERSHIP; MANZANITA ARMS LIMITED PARTNERSHIP; NATIONAL HOUSING PARTNERSHIP; and DOES I - XX, Inclusive,

Defendants.

CASE NO. CIV S-01-0832 LKK JFM

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DATE: June 18, 2001
TIME: 10:00 a.m.
CTRM: (4) Hon. Lawrence K. Karlton

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INTRODUCTION

If the termination of federal subsidies and sale of the defendant properties are permitted to go forward, 351 units of subsidized housing will be forever lost from Sacramento County's already scarce stock of affordable housing.

The defendant Owners seek to persuade this Court that no harm will result from these transactions because existing low-income tenants will be provided vouchers, and because the Intervenor-Purchaser has "obligated itself to maintain the affordability of the projects." But even a cursory study of the voucher program reveals it to be less protective than the existing federal subsidies, and a review of the purchaser's alleged "affordability obligation" reveals it to be a sham agreement which permits rents to be set *above market rate*, thereby effectuating the permanent loss of 351 affordable units. That being the case, to say that existing and future tenants won't be harmed by the proposed transactions is like saying that union workers and job-seekers are not harmed by the closing of a union plant, so long as they are provided with an opportunity to apply for the part-time, minimum wage jobs that spring up in its wake.

It is important to keep in mind that the potential loss of affordable units could have been -- and could still be -- prevented if the defendants were to come into compliance with the federal and state statutory schemes that are in place for the express purpose of preserving affordable housing. Under those schemes, the Owners ought to have provided lawful notice of their intent to terminate the subsidies and sell their properties not only to the tenants, but also to the relevant public entities who are charged with the duty of meeting the housing needs of low-income persons. Had the public entities received proper notice, they could have harnessed their resources to preserve the affordability of the housing.

The Owners also ought to have afforded a right of first refusal to the many nonprofit and for-profit developers who have indicated their intent to truly preserve the affordability of Sacramento's at-risk affordable housing. One such developer of affordable housing, the Sacramento Mutual Housing Association (SMHA), has already declared to this Court that had it been notified of the availability of the four defendant properties, it would have been interested in exploring the possibility of purchasing them. (See Declaration of Rachel Iskow, Exhibit "T" to Plaintiffs' Memorandum in support of Application for a TRO.) Indeed, the Executive Director of SMHA declares that if given the opportunity to do so now, she would pursue the possibility of purchasing the developments so as to preserve them as affordable housing.

Id. The Owners' failure to provide nonprofits with an opportunity to purchase the four buildings harms the existing and future tenants who would have benefitted from such a sale.

There is also much that HUD ought to have done to prevent the imminent loss of housing with which low-income tenants are now faced. First, HUD ought not to have approved the Owners' termination notices, as soon as it determined that they were out of compliance with state and federal notice requirements. Second, HUD ought to have taken measured steps to evaluate the proposed transaction, including an evaluation of its racial and socioeconomic impacts, prior to rushing into the execution of four sham "affordability agreements." Had HUD taken the measured steps that are required by law, it surely would not have approved and facilitated a sale that has the effect of raising rents above market rate -- a result which is directly contrary to the goals of the National Housing Act.

Here, the plaintiffs have demonstrated that they will suffer immediate injury on the day that the federal subsidies are terminated and the buildings are sold. And in demonstrating that the defendants have not even remotely complied with many of the applicable notice requirements (let alone substantially complied), plaintiffs have made out a probability of success on the merits. For these reasons, plaintiffs respectfully request that this Court issue a preliminary injunction against the defendant Owners and HUD, enjoining them from terminating the mortgage assistance and Section 8 contracts which currently subsidize the four properties, and from selling the properties.

ARGUMENT

I. DEFENDANT HUD'S MOTION TO DISMISS MUST BE DENIED BECAUSE HUD HAS WAIVED SOVEREIGN IMMUNITY.

Defendant HUD argues that it is immune from suit because the waiver of sovereign immunity in 5 U.S.C. § 702 is subject to the limitation on judicial review in § 704 to "agency action for which

there is no other adequate remedy in a court." [1] HUD's position is that an injunction preventing the owners from prepaying and opting out of the section 8 contracts "provides the exact same relief" as an injunction against HUD, barring an APA claim against HUD under § 704. HUD's argument fails both because, for a number of reasons, § 704 is inapplicable here and because federal housing statutes provide alternative waivers of sovereign immunity to that in § 702.

Section 702 was amended by Congress in 1976 in order to broaden judicial review of administrative actions by "eliminating" the defense of sovereign immunity where plaintiffs seek relief against the United States other than money damages. Bowen v. Massachusetts, 108 S.Ct. 2722, 2731 (1988). The intent of Congress in adopting the "no other adequate remedy" provision of § 704 was that the APA not provide additional remedies in those situations in which Congress has already provided special and adequate review procedures. Id., at 2736-37. There are no such special and adequate review procedures available for plaintiffs' claims against HUD. The Supreme Court noted in Bowen that:

> The exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.

Id. at 2737. The Supreme Court has repeatedly admonished that the "Act's generous review provisions must be given a hospitable interpretation." Id.

In *Bowen*, the issue was whether an issue of agency statutory interpretation involving a grant to a state was required to be heard by the federal Court of Claims rather than District Court. The Supreme Court held that it was not, for two reasons also relevant here. First, the Court of Claims could not grant the same relief that plaintiffs were seeking. Id. at 2737-38. Contrary to HUD's assertion, the plaintiffs are not seeking the same relief from HUD that it seeks against the private defendants. Plaintiffs seek to enjoin the defendant Owners from prepaying the mortgages and opting out of the section 8 contracts until they have given proper notice of those actions. Plaintiffs seek to enjoin HUD from proceeding to effectuate the replacement of project based subsidies with tenant based vouchers

[1] Defendant HUD also appears to have made a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, though its Memorandum of Law does not discuss that motion, nor does it give any insight into the undisputed facts upon which it relies. This Court should not entertain Defendant's motion for summary judgment for two reasons. First, Defendant's failure to comply with the local rules requiring a statement of undisputed facts, as well as its utter failure to brief the motion, renders meaningful argument on the motion impossible. Second, Plaintiffs maintain that numerous material facts remain in dispute, and that this matter cannot be finally resolved without further discovery.

until proper notices have been provided, until HUD has determined that the sale transaction meets the requirements of 12 U.S.C. § 1701z-11(k), until HUD has considered a Transfer of Physical Assets (TPA) application from the private defendants in accordance with HUD rules, and until HUD has properly considered the fair housing implications of each of these actions as well as their implications for the goals of the National Housing Act. These claims against HUD have the potential for a longer term protection of the low income character of these properties than do the federal claims against the private defendants. The relief sought from HUD is simply not the same relief as that which could be afforded in a suit against only the private defendants. See also, New York City Employees' Retirement System v. S.E.C., 45 F.3d 7, 14 (2nd Cir. 1995), cited by HUD, indicating that an adequate legal remedy against another defendant is one which provides the "same relief" and "all the relief" sought against the federal agency.

Second, because of specific issues in Bowen, there was some doubt about whether the Court of Claims could enter even a money judgment in favor of the plaintiffs, whereas the Supreme Court had already determined that the injunctive relief sought in district court was appropriate. Id. at 2738. Here, plaintiffs seek injunctive relief against both federal and non-federal defendants based on a variety of statutory and regulatory authority, most of which applies in somewhat different ways to federal and non-federal defendants. The private defendants, of course, contend that the claims against them should be dismissed. Hypothetically, the dismissal sought by HUD could leave the plaintiffs in the position of having no remedy against the private defendants in the event that all claims against them were dismissed, while at the same time a valid and substantial claim against HUD was dismissed because plaintiffs supposedly had adequate remedies against the private defendants. Congress obviously did not intend such an absurdity. The Supreme Court in *Bowen* found that it was not consistent with Congressional purposes to use § 704 to put plaintiffs in a position where they had only claims less certain of success than those under the APA. Id. 2738-39.

Certainly, this Court cannot dismiss the APA claims against HUD without first determining that the remaining claims against the private defendants are just as likely to survive motions to dismiss and for summary judgement, to provide a basis for preliminary and permanent injunctive relief, and to provide an equally effective remedy.

In Katz v. Cisneros, 16 F.3d 1204, 1209 (Fed. Cir. 1994), plaintiff challenged HUD's application of regulations to a contract between the parties with claims based both on the contract and on the regulations. HUD argued that plaintiff's claim was essentially a contract claim for which a suit in the Court of Claims was an adequate remedy. The court rejected HUD's argument, not just because the Court of Claims could not provide the equitable relief sought by plaintiffs, but also because the nature of the claims which the Court of Claims could consider was narrower than those which the District Court could. While the Court of Claims could interpret the contract at issue, only the District Court could rule on the lawfulness of HUD's interpretation of regulations which were embodied in the contract and this ruling would have impact on the ongoing relationship between the parties which a contract interpretation would not. Id. This principle was applied in Jackson Sq. Associates v. HUD, 869 F.Supp. 133, 139-40 (W.D.N.Y. 1994), where HUD argued, based on § 704, that the District Court could hear plaintiff's contract claim against HUD but could not hear related claims based on HUD's interpretation of statutes and regulations. The court rejected the argument based on the principle announced in Katz that in determining whether alternative relief was adequate, the court was required to compare the nature of the claims that would be reviewed under the alternative theory of relief to those which would be reviewed under the APA.

Similarly, in this case, the plaintiffs seek relief against HUD under a number of statutes and federal rules which apply to HUD but not to the private defendants (42 U.S.C. § 3608; 12 U.S.C. § 1701z-11(k)) or which impose different duties on HUD than on the private defendants (§ 1715z-1b; the TPA rules; the statutes and rules relating to the vouchering out process). Claims against the private defendants seeking adequate notice of the prepayment and opt out obviously do not have the same potential to affect the ongoing relationship of the parties as claims seeking HUD's compliance with § 3608, § 1701z-11(k), the requirements of the National Housing Act, and the TPA rules. As in Katz and Jackson Sq. Associates, the court must reject HUD's immunity defense based on § 704.

Finally, only HUD can provide the funds to continue the section 8 contracts after the expiration date. An order to the defendants to renew the contracts will be ineffective if HUD refuses to do so. Thus, HUD is necessary to provide effective relief in this case and a lawsuit involving only the private defendants cannot provide an adequate remedy as required by § 704 for that reason alone.

In light of the above, the cases cited by HUD are not persuasive. In both American Disabled v. HUD, 170 F.3d 381 (3rd Cir. 1999) and Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999), the plaintiffs sought an order that the federal agen
cies pursue against local defendants the same cause of action which plaintiffs had, or could have, pursued against those defendants. These cases thus differ fundamentally from this one, in which plaintiff brings substantially different claims against, and seeks significantly different relief from the federal defendants than the private defendants.

HUD has also waived sovereign immunity under two other relevant statutes. Under 42 U.S.C. § 1404a, HUD waives immunity "with respect to its functions under the United States Housing Act of 1937." The Section 8 statute, 42 U.S.C. § 1437f, is part of the United States Housing Act of 1937 and HUD has waived immunity with respect to plaintiffs' federal claims related to HUD's administration of the Section 8 program. Under 12 U.S.C. § 1702, HUD waives immunity with respect to carrying out the provisions of Title II and certain other titles of the National Housing Act. The section 236 mortgage insurance program, 12 U.S.C. § 1715z-1, is included in Title II of the National Housing Act and HUD has thus waived immunity with respect to federal claims involving prepayment of the insured mortgages on these properties.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

In their opposition papers, the Owners assert that the proposed termination of federal subsidies and sale of the properties will not harm existing tenants because those tenants will be "fully protected under the statutory scheme of tenant-based assistance." (Owners' Opposition Brief, p. 7.) Not only is this assertion inaccurate as to current tenants, but it also ignores the immediate harm that *future* tenants will suffer as a result of the loss of subsidized units, as well as the harm suffered by both current and future tenants as a result of the lost opportunity to bid on the defendant properties to preserve them as affordable housing.

A. Future tenants will be harmed by the irretrievable loss of subsidized units.

In focusing their opposition on the harm that will result to current tenants, defendants fail to even acknowledge the harm that will result to future tenants as a result of the irretrievable loss of 351 subsidized

housing units.[2] The need for affordable housing in Sacramento County is staggering, as evidenced by the fact that there are currently in excess of 35,000 families on a wait list for Section 8 vouchers. (See Silvina Martinez, *Housing Hunt Grows Harder: Holders of Section 8 Voucher Subsidies Are Unable to Find Affordable Apartments in the Capital's Tight Rental Market*, SACRAMENTO BEE, April 17, 2001, attached to plaintiffs' Application for TRO as Exhibit "Q.") The loss of 351 units of affordable housing will make it that much harder for low-income households to put a roof over their heads.

To understand how the loss of units will occur, it is important to understand the difference between project-based Section 8 contracts and tenant-based Section 8 vouchers. Under the project-based program, HUD provides subsidies which attach directly to the dwelling unit for the benefit of the family who resides in that unit. See 24 C.F.R. § 886.109(a). Therefore, when a tenant vacates a unit that is subsidized by a project-based Section 8 contract, that unit remains subsidized and available for residency by another low-income family. By contrast, with tenant-based Section 8 assistance, participants are provided vouchers, which are subsidies that attach to the tenants, as opposed to the units. See 24 C.F.R. Part 982. When a voucher-holder vacates a unit, the voucher-holder retains the subsidy, and the unit reverts to market rate.

For an illustration of the loss of units that results from "vouchering out" a development, we need only to look to the example of the Governor's Village Apartments, a complex purchased by Intervenor-Purchaser Bridge Partners in 1999. Prior to January 1999, the Governor's Village Apartments were called the Washington Square Apartments. (See Declaration of Charlotte Delgado, ¶ 3., attached hereto as Exhibit "A".) For many years, the Washington Square Apartments had operated as affordable housing under the presence of a project-based Section 8 contract which covered all 103 units. As a result of that project-based contract, all 103 households paid only one third of their income as rent. (Delgado Decl., ¶ 3.)

[2] The interests of future tenants are represented in this action by the two Tenants Associations, which were formed for the purpose of preserving the complexes for low-income residents of the Sacramento Area. Complaint at ¶¶ 13, 14. The interest of future tenants is also represented by plaintiff CCRHP, whose primary mission is to preserve and facilitate the production of affordable housing for low-income persons, particularly those in HUD-assisted housing.

In 1999, the Washington Square Apartments were purchased by Bridge Partners and renamed Governor's Village. Bridge Partners decided not to renew the project-based Section 8 contract. (Delgado Decl., ¶ 4.) As a result, the subsidies that attached to the 103 units were terminated and lost.

Bridge Partners did, however, permit tenants who qualified for enhanced vouchers to remain in their units. (Delgado Decl., ¶ 4.) While almost all of the 103 households qualified for and received tenant-based vouchers in 1999, there are currently only 29 households in Governor's Village who are voucher-holders. (Delgado Decl. ¶ 4.) The remaining 74 units have converted to market rate housing.

The conversion of 74 units to market rate has been effectuated in a number of ways. First, most of the tenants who have left their units since 1999 have done so because they were elderly or disabled, and needed to live in environments that provided higher levels of care. For example, many of them have left the buildings to live in nursing homes, or to move in with family. (Delgado Decl. ¶ 6.) Some tenants in subsidized units have moved since 1999 because of the lack of maintenance in their units. (Delgado Decl. ¶ 8.) Finally, some subsidized tenants may have moved because they don't feel welcome. (Delgado Decl. ¶ 10.) This hostility to subsidized tenants is demonstrated in the different level of services and amenities that they receive, versus those given to the market rate tenants. (Delgado Decl. ¶ 11.)[3]

The rent on a market rate two-bedroom apartment at the Washington Square Apartments is currently $835, but is being increased effective June 2001. (Delgado Decl. ¶ 4.) Even at $835, per month, such a rent is higher than the average apartment rent in Sacramento County, which was $784 in May 2001. (See Andrew Page, *Capital-area Apartment Rents Jump*, SACRAMENTO BEE, May 7, 2001, attached hereto as Exhibit "B".)

B. Current and future tenants will be harmed by the lost opportunity to bid on the properties, or to encourage nonprofit purchasers to bid on the properties.

[3] For example, all of the market rate apartments have been re-painted and have new carpeting. By contrast, the apartment of a voucher-holder hasn't been re-painted in the eleven years that she's lived there. (Delgado Decl. ¶ 11.) Likewise, all the market rate apartments have received new refrigerators, stoves, and lighting fixtures. By contrast, a voucher-holder only got a new stove once hers failed inspection (even though it hadn't worked properly for a long time), and when she requested a new light fixture in her kitchen, she didn't receive the fluorescent lighting that the market rate apartments did; she just got a new light fixture with a 35 watt bulb in it. (Delgado Decl. ¶ 12.) The market rate apartments also have new bathroom and kitchen cabinets, (Delgado Decl. ¶ 13.) while a voucher-holder who put in a request for a new bathroom over a year ago, just found out that her request was denied. (Id.)

Under state law as it existed in 2000, and as it continues to exist in 2001, prior to disposing of an assisted housing development, an owner of assisted housing was required to provide "an opportunity to purchase the development" to four categories of potential purchasers, including the tenant associations of the developments. Cal. Govt. Code § 65863.11(b)-(c) (amended 2001). To facilitate that process, an owner was required to issue a notice to each "qualified entity" that appears on a list that is maintained by the Department of Housing and Community Development (HCD). Id. § 65863.11(f). "Qualified entities" were defined as those entities capable of managing the property, and agreeable to obligating themselves to maintain the affordability of the housing development for persons and families of low or moderate income and very low income. Id. § 65863.11(d)(1)-(2). As discussed in more detail in section III.A.4 of this memorandum. U.S. Housing Partners is not a "qualified purchaser" and therefore its offer to purchase the four properties did not relieve the owners of their obligation to provide an opportunity to purchase the developments to the four categories of potential purchasers, nor did it relieve them of the obligation to provide notice of such opportunity to "qualified entities."

As a result of the Owners' failure to afford a right of first refusal to qualified purchasers, including the tenants associations, those potential purchasers have lost the opportunity to bid on the properties in the hope of preserving them as affordable housing. The denial of a right to participate in a legally mandated bidding process is a cognizable harm that can only be remedied by injunctive relief. See Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991) (en banc). In Glenwood Bridge, a contractor sought to enjoin the City from rejecting its low bid on a construction project, and awarding the contract, after rebidding, to another contractor. While recognizing that the plaintiff could be compensated in part by money damages, the court held that injunctive relief was also necessary.

> We do not believe that [money damages] will compensate Glenwood Bridge for being denied its right to bid on a legal contract. While money damages may compensate Glenwood Bridge for the profits it would have made had the City not rejected all bids, without a preliminary injunction the City will award to some other contractor a contact which, if Glenwood Bridge prevails on the merits, will contain an illegal labor stabilization agreement. A preliminary injunction, however, will prevent the City from awarding a contract on which, in essence, Glenwood Bridge is precluded from bidding...A preliminary injunction both protects this interest in participating in a legal bidding process and ensures that the contract awarded will be a legal one. It makes little sense to us not to consider this fact in the irreparable harm analysis.

Id. at 372-373.

Here, as in Glenwood Bridge, plaintiffs will be harmed if the defendant Owners sell their properties to the Intervenor-Purchaser as that sale will close the door on the possibility of preserving the developments as affordable housing. Therefore, this Court must issue a preliminary injunction to protect the "interest in participating in a legal bidding process" and to ensure that the deal that results will be a legal one.

C. The loss of the current federal subsidies will harm existing tenants.

There is no doubt that the provision of tenant-based assistance is intended to mitigate some of the harm that is worked on tenants by the termination of subsidies that attach to their developments. However, there is also no doubt that tenant-based vouchers are *inferior to and less protective than* the existing subsidies in the following ways.

1. Voucher assistance is subject to appropriations.

An noted by defendant HUD, the Section 236 loans which subsidize the four properties are not scheduled to mature until dates ranging between December 1, 2013 and March 1, 2015. See HUD's Opposition Brief, pp. 10-13. Therefore, if the Section 236 loans were not prepaid, the tenants would be assured of the affordability of their housing for at least 12 to 13 more years.

By contrast, like all vouchers, Congress only authorizes assistance for "enhanced vouchers" for one year at a time, through annual appropriations. Therefore, the termination of the federal mortgage subsidies harms tenants by depriving them of the *guarantee* of affordable housing for at least the next 12-13 years.

2. Tenant-based vouchers can be used only so long as the underlying rent is deemed reasonable by the administering Housing Authority.

While the "enhancement" provided by an enhanced voucher permits a tenant to use his or her voucher in apartments where the rent exceeds the applicable payment standard set by the local Public Housing Authority, that enhancement is not without its limits. Rather, a tenant is able to use an enhanced voucher only if the rent on the dwelling unit is "reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market." 42 U.S.C. §1437f(o)(10)(A). See also 24 C.F.R. § 982.507(b) ("[T]he PHA may not approve a lease until the PHA determines that the initial rent to owner is a reasonable rent.")

While plaintiffs would like to believe that these provisions require owners to maintain "reasonable" rents, the clear language of the statute does not support such an interpretation. Rather, the language of the statute and implementing regulations does not bar a landlord from raising the rent to an unreasonable level; it only bars a PHA from permitting a tenant to use a voucher in an apartment where the rent is unreasonable. That being the case, "if the PHA determines the proposed rent is not reasonable, the owner must lower the rent *or the family will have to find another unit in order to benefit from the voucher subsidy*." HUD PIH Notice 2000-9, page 7 (emphasis added), attached in the Appendix of Additional Authorities.

While the Intervenor-Purchaser has apparently received approval from the local Public Housing Authority for the rents it proposes to charge in its first year, there is nothing to say that next year, or the year after, it won't raise rents to a level where the Housing Authority will deny that approval. At such time, the purchaser would be free to refuse to lower the rents, and the tenants would be forced to leave their homes and use their vouchers elsewhere. Although the tenants may not suffer any tangible harm as a result of the conversion to vouchers until sometime in the future, even a delayed harm is cognizable in federal court. Walker v. Pierce, 665 F.Supp. 831, 843 (N.D.Cal. 1987).

3. Tenant-based vouchers are provided only to "eligible" applicants.

In order to receive tenant-based vouchers, existing tenants will have to demonstrate their eligibility. Contrary to the representations of Defendant HUD, the standards governing *initial eligibility* for tenant-based assistance are different from and more stringent than the standards governing *ongoing eligibility* for project-based assistance.[4] As a result, existing tenants who are currently benefitting from the project-based assistance program may be found to be ineligible for vouchers.[5]

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[4] For example, under the tenant-based assistance program, applicants can be denied vouchers if the Public Housing Authority (PHA) determines that a member of the household has "been arrested for or convicted of violent criminal activity within the three year period prior to the date of their application for tenant-based assistance." See The Housing Authority of the City and County of Sacramento's Section 8 Administrative Plan, effective January 11, 2000, page 15-5, attached in the Appendix of Additional Authorities; see also 42 U.S.C. § 13661(c). By contrast, federal law governing project-based Section 8 subsidies does not permit the termination of ongoing assistance on the grounds of a household member's *previous* arrest or conviction.

[5] While defendant Owners make much of the fact that "[P]laintiffs do not identify a single tenant who has applied to HUD under the enhanced voucher program and who has been denied assistance," (Owners' Opposition Brief, p. 6) their protestation is premature given that Plaintiffs' applications for vouchers have yet to be processed by the Public Housing Authority.

4. Voucher-holders can be evicted for no cause after the first year of their tenancy.

Tenants who reside in complexes that are subsidized by either Section 236 loans or project-based Section 8 assistance can be evicted only for cause. See 24 C.F.R. Part 247; 24 C.F.R. § 886.128. By contrast, voucher-holders are protected against no-cause evictions *only during the first year of their tenancy*. HUD PIH Notice 96-23, attached in the Appendix of Additional Authorities. Because defendant HUD maintains that "enhanced voucher assistance is the same as regular housing choice voucher tenant-based assistance...except the rental housing assistance payment is calculated to include an enhancement" (HUD Opposition Brief, page 6), it would follow that an enhanced voucher-holder can likewise be evicted for no cause after the first year. The deprivation of legal protections, including protection against no cause evictions, constitutes irreparable harm. Walker, 665 F.Supp. at 843.

III. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS AGAINST THE OWNERS

A. The owners have not complied with state notice requirements.

Under state law, owners of federally assisted multifamily developments are required to issue three separate and distinct notices prior to terminating their federal subsidies or selling their properties. See Cal. Govt. Code § 65863.10 -.11 (amended 2001).[6] Specifically, such owners are required to issue notices to: (1) tenants; (2) public entities; and (3) entities who have expressed an interest in purchasing the developments. As described below, the Owners have not issued any notices to public entities or to interested purchasers, nor have they substantially complied with their obligation to send notices to the affected tenants.

1. State notice and right of first refusal provisions are not preempted by federal law.

[6] The state statutes governing notices of termination or prepayment of governmental assistance and the right of first refusal were amended by the California Legislature, effective January 1, 2001. Because the events which triggered the notice requirements took place before January 1, 2001, plaintiffs assert that the old notice requirements apply.

As a threshold matter, plaintiffs must respond to the Owners' contention that federal law preempts any state law notice requirements with respect to these HUD-subsidized developments. While their contention is apparently based both on express preemption and conflict preemption, neither preemption theory is supportable.

a. The state notice requirements are not expressly preempted by federal law.

In support of their theory of express preemption, the Owners cite to Section 232 of the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), codified at 12 U.S.C. § 4122. However, the California notice law, as applied to prepayments of HUD-subsidized mortgages, is not expressly preempted by Section 232 for four distinct reasons.[7]

First, Congress never intended to preempt state and local laws in circumstances where the federal LIHPRHA program is no longer regulating or funding preservation or conversions. Section 232 is one small part of the comprehensive LIHPRHA program enacted in 1990 to address the threat of the large-scale loss of HUD-subsidized multifamily developments throughout the country. LIHPRHA sought to balance the goals of preserving housing and providing fair compensation to owners. Recognizing that prepayments would rarely be approvable, Congress provided owners with additional financial incentives to preserve the affordability of the developments, through HUD-approved plans of action based upon market-value appraisals. Thus, the federal government both regulated the exit or preservation of these developments with HUD-subsidized mortgages, and provided the funding necessary to operate the program.

One part of the comprehensive program was the preemption provision, Section 232, which rendered ineffective certain state and local laws restricting prepayments if such laws were targeted exclusively at LIHPRHA-eligible buildings, defined as "eligible low-income housing". The purpose of this provision was to prevent state and local governments from adopting restrictions on prepayment that would unfairly target only LIHPRHA-eligible properties, to reduce their value and the level of incentives which LIHPRHA might otherwise provide.

[7] Additionally, no express preemption could conceivably apply to California's notice requirements applicable to Section 8 opt-outs or terminations, as they are not within the purported coverage of LIHPRHA's Section 232(a).

However, beginning in 1996, Congress adopted a series of funding and policy decisions that rendered LIHPRHA inoperable. Congress began to short-fund the program in 1996, and starting in FY '98, Congress provided no funding to operate LIHPRHA.[8] Thus, although LIHPRHA has never been formally repealed, these subsequent Congressional enactments have rendered the program inoperable and impliedly repealed.

In the absence of a functional and federally funded LIHPRHA program, there is no reason for a solitary component, Section 232, to remain effective. In circumstances where federal law no longer regulates conversions to market or funds incentives to preserve affordable housing, Congress cannot have intended to invalidate state and local enactments addressing the procedural requirements for conversion, such as the California notice law.

The second reason demonstrating a lack of express preemption is that there is very strong evidence that in passing Section 232, the purpose of Congress was *not* to preempt statutes like the California notice requirements. Analysis of the preemptive effect of a federal statute "start[s] with the assumption that the historic police powers of the state[9] are not to be superseded by….Federal Act unless that is the clear and manifest purpose of Congress." Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2617 (1992).

The legislative history of LIHPRHA makes it clear that such laws were not intended to be preempted. The Conference Report on LIHPRHA states:

> In the event of prepayment, HUD would have several tools to protect the existing tenants and assist the affected community in replacing the stock. The tenant protections build upon provisions contained in the House bill as well as in State laws such as the Maryland Assisted Housing Preservation Act.[11]

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[8] Beginning in 1996, Congress began reducing funding for LIHPRHA and permitting owners of covered projects to prepay their subsidized loans. Pub. L. No. 104-120, §§ 2(b), 110 Stat. 834 (Mar. 28 1996); Pub. L. No. 104-134, §§ 101(e), Title II, paragraph entitled Annual Contributions for Assisted Housing, 110 Stat. 1321 (Apr. 26, 1996) ($624 million); Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996) ($350 million to fund primarily transfers); Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997) (no preservation funding, only $10 million for transaction costs); Pub. L. No. 105-276 (Oct. 21, 1998) (no funds); Pub. L. No. 106-74, 113 Stat. 1047 (Oct. 20, 1999) (no funds); Pub. L. No. 106-377, 114 Stat. 1441 (Oct. 27, 2000) (no funds). All statutes cited to herein are attached in the Appendix of Additional Authorities.

[9] Regulation of housing and protection of tenants are "significant and uniquely local interests with which the [federal] courts should not lightly interfere." Kargman v. Sullivan, 552 F.2d 2, 11 (1st Cir. 1977) (also observing that federal subsidized housing policy is "superimposed and consciously interdependent with the substructure of local law relating to housing" and given a conflict in this area, "reconciliation is to be preferred to complete ouster of state law").

[10] The Maryland statute, that was specifically cited, was adopted in 1989, the year before Congress enacted LIHPRHA. Like the California statute, this state statute includes a requirement that an owner provide notice to local government and the tenants, and a right of first refusal provision. Md.Ann.Code Art 83B, §§ 9-

H.R. Conf. Rep. No. 943, 101st Cong., 2d Sess. at 466 (1990), 1990 U.S. Code Cong. & Admin. News 6070, attached in the Appendix of Additional Authorities.

Thus, Congress explicitly intended that LIHPRHA provide protection to tenants, which built upon protections already provided in various state statutes. It could not be more clear that Congress did not intend to preempt such state statutes, but rather intended LIHPRHA to work in conjunction with them. It is equally clear that Congress intended that such state statutes were not considered to conflict with a federal policy of uniform national application of LIHPRHA provisions.

103; 9-104. If the Maryland law was not intended to be preempted, then it should be clear that the California law, which likewise requires notice of prepayment, is certainly not preempted.

The third reason demonstrating a lack of express preemption is that Section 232(a) itself does not cover state-imposed procedural requirements. Section 232(a)(1) provides that "[n]o State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that--(1) restricts or inhibits the prepayment of any mortgage described in section 4119(1) of this title (or the voluntary termination of any insurance contract pursuant to section 1715t of this title) on eligible low income housing..." 12 U.S.C. § 4122(a)(1). The California notice law does not "restrict or inhibit" prepayment, but instead merely requires that owners complete certain steps such as giving notice of their intent to prepay and afford a right for first offer to entities which commit to maintain affordability. See, e.g, Lifgren v. Yeutter, 767 F. Supp. 1473 (D.Minn.1991) (a similar federal statute requiring owners of Farmers' Home Administration properties to give notice of prepayment and offer the project for sale to qualified purchasers does not "inhibit" prepayment).

The fourth reason that express preemption is inapplicable is because Section 232(b) specifically exempts laws of general applicability such as the California notice law. The Owners cite only to the first half of the preemption provision, Section 232(a) of LIHPRHA. This selective excerpt completely ignores the expression of Congressional intent in section 232(b) of LIHPRHA,[11] or its legislative history. Section 232(b) conclusively demonstrates that Congress did not preempt state and local legislation covered by Section 232(a) unless such legislation *specifically targets* LIHPRHA-eligible properties. Because the California notice law covers many properties in addition to formerly LIHPRHA-eligible properties and is thus a law of general applicability, it is not preempted by Section 232.

Section 232(b) expressly allows state and local laws to remain in force so long as they are not inconsistent with the provisions of the Act and are of general applicability:

> *This section [section 232]shall not prevent the establishment, continuing in effect, or enforcement of* any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subtitle, such as any law or regulation relating to building standards, zoning limitations, health, safety, or habitability standards for housing, rent control, or conversion of rental housing to condominium or cooperative ownership, *to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and nonassisted housing*.

12 U.S.C. § 4122(b) (emphasis added).

[11] 12 U.S.C. § 4122(b).

Section 232(b) is an explicit exemption, permitting otherwise preempted but important state and local laws of general applicability to remain in force to protect tenants in LIHPRHA-eligible developments, notwithstanding Section 232(a). Its reach must be construed "in light of the presumption against preemption of state police power." Cipollone, 112 S.Ct. at 2618.[12]

The California notice law is a state law of general applicability within the meaning of Section 232(b). It requires notices of conversion of other federally subsidized developments not covered by LIHPRHA (*e.g.*, such as HUD Section 202 and Rural Housing Services units.), terminations of more than 100,000 project-based Section 8 rental assistance units, and terminations of thousands of units with restrictions under the Low-Income Housing Tax Credit program. Because the California notice law as amended applies to much more than just LIHPRHA-eligible housing and does not exclusively target HUD-subsidized LIHPRHA-eligible housing for regulation, it meets the specified "general applicability" criterion for exemption from LIHPRHA preemption.

b. There is no conflict preemption.

Conflict preemption does not exist here. As potentially applicable to prepayment buildings, where Congress has already explicitly addressed the scope of preemption (as in section 232, discussed supra), conflict preemption should not be used to invalidate what Congress has not directly prohibited. Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2618 (1992). Compare Geier v. American Honda Motor Co., 529 U.S. 861,120 S. Ct. 1913 (2000) (where express preemption clause coexists with savings provision, conflict preemption may still lie). Once Congress has spoken, those state laws falling outside Congress' expressed intent create no irreconcilable conflict with any permissible federal objectives.

Second, the owner's vague allegations of conflict are insufficient to displace the valid exercise of state authority expressed in the state notice requirements governing prepayments. Similarly, those allegations are insufficient to preempt the state requirements applicable to Section 8 opt-outs or terminations.

[12] The subsequent Conference Report language on LIHPRHA, as amended, explained that "[LIHPRHA] would preempt State and local laws that target only prepayment projects for special treatment. Laws applicable to both assisted and nonassisted housing would be in full force." H.R. Conf. Rep. No. 943, 101st Cong., 2d Sess. 458, 460 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, 6070, 6165 (emphasis added). Thus, so long as a state or local law applies to more than just LIHPRHA-eligible housing, Section 232(b) clarifies that the state or local law is not preempted.

As to the state law's coverage of Section 8 terminations, the owner's reliance on Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S.Ct. 1483 (1995), is misplaced. Freightliner held that no preemption occurred, in part because the court found no irreconcilable conflict: "it is not impossible for petitioners to comply with both federal and state law." Id. at 289. Here as well, there is no conflict between federal and state law, as both seek to preserve affordable housing and compliance with both is certainly possible. The owner asserts that the federal government favors market-rate conversions with tenant-based assistance, and that the California law is just a "state version" of the defunded LIHPRHA program. The state law is nothing like LIHPRHA: it does not "lock" any projects into their current status -- owners can convert, subject to compliance with the specified notice procedures. The owner's selective characterization also ignores important recent Congressional steps to preserve HUD-assisted housing. See, e.g., the "Mark Up to Market" program permitting additional financial incentives to preserve project-based Section 8 contracts, established by the "Preserving Affordable Housing for Senior Citizens and Families in the 21st Century Act," Pub. L. No. 106-74, §531, 113 Stat. 1109 (1999), amending §524(a) of the Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, Title V (1997), codified at 42 U.S.C. §1437f note.

Even if federal law permits some conversions and provides some tenant protections, because the federal government does not want to universally assume the price tag for preservation, this would not imply a federal intent to displace state and local solutions. Even when housing remains under a federal program, such general program provisions are insufficient to preempt state or local laws governing that housing. See, e.g., Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104 (N.J. 1999) (upholding state nondiscrimination law against general conflict preemption claim that was based on federal laws for the Section 8 voucher program). Certainly general laws and policies must be insufficient to preempt where properties are departing the federal program.

2. The Owners have utterly failed to comply with their obligation to send notices to "public entities."

Plaintiffs allege that the defendant Owners have failed to even remotely comply with their obligation to send notice to public entities of their intentions to terminate federal subsidies and sell their properties.[13] See Complaint, ¶¶ 51-54. See also Letter from the Department of Housing and Community Development (HCD) to Anne Pearson, attached as Exhibit "R." to Plaintiffs' Application for TRO (indicating that the only communications it had received from any of the defendant Owners were two notices from the Kenneth Arms Limited Partnership which failed to include the information required of notices to public entities.) In response to plaintiffs' allegations, the defendant Owners do not even attempt to demonstrate that they have sent the required notices, because no such notices have been sent.

As distinguished from the notices to tenants, the notices to public entities were required to contain additional information, including the number of affected tenants in the project; the number of units that are government assisted and the type of assistance; the number of the units that are not government assisted; the number of bedrooms in each unit that is government assisted; the ages and income of the affected tenants; a brief description of the owner's plans for the project, including any timetables or deadlines for actions to be taken and specific governmental approvals that are required to be obtained; the reason the owner seeks to terminate the subsidy contract or prepay the mortgage; and any contacts the owner has made or is making with other governmental agencies or other interested parties in connection with the notice. Cal. Govt. Code § 65863.10(c)(2) (amended 2001).

The Owners' failure to comply with their obligation to notify public entities of their planned termination of federal subsidies is a significant violation of the notice statute in that it significantly impairs the ability of local governments to plan for the housing needs of their constituents. For example, state law requires that a jurisdiction include in the housing element of its General Plan an analysis of existing housing developments that are eligible to change from very low-income housing units during the next ten years due to termination of subsidy contracts, mortgage prepayment or expiration of restrictions on units. Cal. Govt. Code § 65583(a)(8). Enforcement of these obligations is overseen by HCD. Therefore, unless the relevant jurisdictions and HCD receive notice of the owner's intent to opt out of a Section 8 contract or

[13] Specifically, these notices must be filed with "the mayor of the city in which the assisted housing development is located, or if located in an unincorporated area, with the chairperson of the board of supervisors of the county, with the appropriate local public housing authority, if any, and with the Department of Housing and Community Development. Cal. Govt. Code § 65863.10(c)(1) (amended 2001).

prepay a subsidized mortgage, those jurisdictions will be unable to comply with their obligation to develop an accurate housing element which sets forth the housing needs of its residents by income category and serves as the basis for adoption of plans and policies to meet those needs, and HCD will be unable to enforce those obligations.

Because the Owners have not even remotely complied with their obligation to notify public entities, plaintiffs have demonstrated a likelihood of success on the merits of this notice claim.

3. The Owner's notices to tenants do not substantially comply with state law.

The Owners emphasize that they have sent four separate notices to tenants concerning the prepayment of federal mortgage assistance and non-renewal of Section 8 assistance. What the Owners fail to mention is that *not one of these notices* has complied with the applicable state and federal laws governing notice of termination of housing subsidies, and contrary to the Owners' suggestion, four defective notices are not better than one. The net effect of this series of defective notices is a notice-version of water torture which serves only to alarm existing tenants, rather than to educate them about their available remedies.

In plaintiffs' Complaint and application for injunctive relief, plaintiffs relied only on the most recently issued notices under the theory that those notices superseded the previous notices. One notice cannot be substituted for another where statutory time requirements have not been met. Smith v. Board of Supervisors of the City and County of San Francisco, 265 Cal.Rptr. 466 (1st Dist. 1989).

However, Plaintiffs are more than happy to explain the ways in which each of the previous notices were defective. Specifically:

- **The July 2000 notices** attached to the Owners' Opposition Brief as Exhibit "A" failed to include: 1) the current rent and anticipated new rent for the unit on the date of termination of federal subsidies; 2) a statement that a copy of the notice would be sent to the city, county, public housing authority, and department of Housing and Community Development (HCD); 3) a statement of the possibility that the housing may remain in the federal program if the owner elects to do so under the terms of the federal government's offer; 4) the name and telephone number of the city, county, local public housing authority, HCD, and a legal services organization that can be contacted to request additional information about an owner's responsibilities and the rights and obligations of an affected tenant, in violation of Cal. Govt. Code § 65863.10 (b) (amended 2001).

- **The August 2000 notices**, attached to the Owners' Opposition Brief as Exhibit "B" failed to provide one year's notice of the Owners' intent to opt out of their Section 8 contracts, as required by 42 U.S.C. § 1437f(c)(8)(A). They also failed to include the name and telephone number of the County and of a legal services organization that can be contacted to request additional information about an owner's responsibilities and the rights and obligations of an affected tenant, in violation of Cal. Govt. Code § 65863.10 (b) (amended 2001).

  While the August 2000 notices did include a statement of the current and anticipated new rent for the units on the date of nonrenewal of the Section 8 contract, those statements *grossly* underestimated the actual rent increase. For example, the August 2000 notice to residents of the Kenneth Arms Apartments advised them that the rents on one-bedroom units would increase from $455 to at least $464 (a 1.97% increase) and rents on two-bedroom units would increase from $514 to at least $524 (a 1.94% increase). However, according to the Intervenor-Purchaser, the new rents will in fact rise to $550 for one-bedrooms and $650 for two-bedrooms. (See Rent Approval Letter from SHRA to Bridge Partners, attached to Steve Klein's Declaration as Exhibit 1.) The actual rents to be charged represent increases of 20.88% and 26.46 respectively.

- **The October 2000 notices**, attached to the Owners' Opposition Brief as Exhibit "C" failed to include:1) the current rent and anticipated new rent for the unit on the date of termination of federal subsidies; 2) a statement that a copy of the notice would be sent to the city, county, public housing authority, and department of Housing and Community Development (HCD); 3) the name and telephone number of the city, county, local public housing authority, HCD, and a legal services organization that can be contacted to request additional information about an owner's responsibilities and the rights and obligations of an affected tenant, in violation of Cal. Govt. Code § 65863.10 (b) (amended 2001).

- **The November 2000 notices**, attached to the Owners' Opposition Brief as Exhibit "D" were identical in all material respects to the July 2000 notices, and contain the same four defects.

Defendants argue that this series of defective notices "substantially complies" with the state notice requirements. Defendants are wrong, both as to the standard of compliance that is required, and as to whether that standard is met.

While "substantial compliance" with statutory requirements is normally all that is required, a more heightened level of compliance is required where the intent of the statute can only be served by demanding strict compliance with its terms. Downtown Palo Alto Com. for Fair Assessment v. City Council, 225 Cal.Rptr. 559, 563 (1st Dist. 1986). Thus, the paramount consideration is the objective of the statute. Id. at 564.

The original version of the state statute requiring notification to residents of multifamily housing was enacted in 1989-1990 through the passage of Senate Bill 1913. See 1990 Cal. Stat. 1438 (S.B.1913.), attached in the Appendix of Additional Authorities. Not only did Senate Bill 1913 amend the Government

Code to require notice to residents of multifamily housing of an owner's intent to terminate federal subsidies, but it also made findings and declarations of the Legislature concerning the anticipated loss of affordable housing units for lower income persons due to the conversion to market rate of certain subsidized housing units. Specifically, S.B. 1913 included the following legislative findings:

> The Legislature finds and declares that within the next 20 years nearly 117,000 units of low-income housing subsidized by the federal Department of Housing and Urban Development will be eligible for conversion to market rate housing...Should the owners of the units be allowed to prepay the federally subsidized loans or fail to renew the Section rental subsidies, these units are in danger of becoming unaffordable to lower income tenants since the owners would no longer be obligated to charge below market rate rents to the tenants. Thus, it is anticipated that there will be an enormous loss of affordable decent, safe, and sanitary housing for lower income persons.
>
> The Legislature further finds that it is of *paramount importance* that prior to an owner being allowed to convert a federally subsidized building, *tenants and other interested persons and organizations have access to information concerning buildings eligible for conversion and access to information concerning tenants' rights and housing preservation alternatives when the conversion is imminent. The information and assistance can aid in the deterrence of conversion of the existing affordable housing stock*. The Legislature finds that the provision of information, accessible to the citizenry of the state, would address this need.

1990 Cal. Stat. 1438 (S.B.1913), § 2, codified at Cal. Health & Safety Code § 50850 (emphasis added.)

While the original notice requirements sunsetted in 1995, they were re-enacted in 1998 through the passage of Assembly Bill 1701. According to the Report of the Assembly Committee on Housing and Community Development, supporters of the bill noted that the "longer-term comprehensive notice protections that were once in state law need to be reinstated with the continual downsizing of the U.S. Department of Housing and Urban Developments's budget and the even increasing risk of termination of many federally-subsidized housing units. Over 44% of these units in California are occupied by senior citizens who face potential displacement. *Tenants in federally-subsidized housing need as much notice as possible as do governments and housing authorities* that must assist tenants in finding other affordable housing. Comm. Rep. CA A.B. 1701 (1998) (emphasis added), attached in the Appendix of Additional Authorities.

In 2000, the state notice statute was amended by S.B. 1572 to require that notice be made one-year prior to an owner's termination of federal subsidies. According to the Senate Committee Report, the "goal of [the] bill is to make the notification process more user-friendly for owners, *without sacrificing the flow of information that helps tenants understand and deal with their situation and that helps state*

and local governments address the loss of affordable housing stock." Comm. Rep. CA S.B. 1572 (2000) (emphasis added), attached in the Appendix of Additional Authorities.

As evidenced by the legislative findings of S.B.1913, and the subsequent committee reports, the intent of the state notice statute was to give tenants the information they need so as to be able to "aid in the deterrence of conversion of the existing affordable housing stock" or "find alternative housing." The "flow of information that helps tenants understand and deal with their situation" can only be achieved if owners are required to strictly comply with the notice requirements. For example, if owners fail to advise tenants of the name of Legal Services organizations, as required by § 65863.10, tenants cannot access information concerning tenants' rights so as to protect themselves during this process.[14] Likewise, if owners fail to *accurately* advise tenants of the amount by which their rents will be increased, tenants will be unable to determine whether they need to find alternative housing.

While 215 Alliance v. Cuomo, 61 F.Supp.2d 879 (D.Minn. 1999) looked at the level of compliance that is required of federal notice provisions, its logic is equally instructive in determining the level of compliance that should be required of the state notice provision. There, in rejecting HUD's argument that the notice was sufficient because the tenants knew that their position was precarious and that "something was afoot," the court held that compliance with the "clear language of the statute" was necessary because "the statutory notice requirement was [not] intended as a measure of courtesy to HUD tenants; rather, it was clearly intended to provide tenants affected by a change in their subsidy status an opportunity to *do something* to prevent that change." Id. at 887 (emphasis in the original.) Just as the federal notice requirements are intended to give tenants and opportunity to *do something* to protect their homes, so too the state notice requirements seek to provide tenants with the information and time necessary to affect their own lives. For these reasons, the state notice requirements should be construed to require strict compliance, and the notices at issue should be found to fail that strict test.

[14] While Plaintiffs ultimately retained Legal Services of Northern California (LSNC), some of them did not retain LSNC until as late as April 2001. Had they been notified of the existence of LSNC in any one of the notices issued in July, August, October or November 2000, they could have retained counsel earlier, and possibly asserted their legal rights prior to the defendant Owners' negotiation of the proposed sale agreement. Therefore, plaintiffs have suffered actual prejudice as a result of this notice violation.

However, even if this Court determines that the state notice provisions require only substantial compliance, that level of compliance has not been met by the notices at issue. Substantial compliance will suffice if the purpose of the statute is satisfied, Downtown Palo Alto Comm. for Fair Assessment, 225 Cal.Rptr. 559, but substantial compliance means actual compliance in respect to that statutory purpose. International Longshoremen's & Warehousemen's Union v. Board of Supervisors, 171 Cal.Rptr. 875 (4th Dist. 1981) citing Stasher v. Harger-Haldeman, 22 Cal.Rptr. 657 (1962). The doctrine of substantial compliance excuses technical imperfections only after the statutory objective has been achieved. Id.

Where the statutory objective is to educate and inform people in order that they may meaningfully exercise their legal rights, a notice which omits detailed information that is statutorily required does not meet that objective, and does not "substantially comply." Smith, 265 Cal.Rptr. 466.

In Smith, plaintiffs sought a preliminary injunction preventing the San Francisco Board of Supervisors from holding a hearing on various reductions in medical and health services provided by the City on the grounds that the notice issued by the Board prior to the hearing did not contain all of the "detailed information" about the proposed reductions, as required by state law. In evaluating the sufficiency of the notice, the court noted that "where the statute required a "detailed" notice, a notice that contains only the "major ideas or concepts" is not sufficient." Id. at 473. Because the statutory requirement of sufficient notice was intended to educate the public about the proposed reductions in health services and allow the public enough time to prepare for the hearing, the court concluded that the insufficient notice did not fulfill the purposes of the statute. Id. at 474. Moreover, the court concluded that the notice defect was not cured by later issuance of a compliant notice, insofar as the subsequent notice was not timely. Id.

As in Smith, the statutory notice provisions at issue here require the communication of "detailed information," the purpose of which is to educate tenants so that they can adequately prepare to either take steps to preserve their housing, or make alternative arrangements. That purpose has not been met by the series of notices which have repeatedly failed to communicate to tenants information about *how* their housing will be affected, and *who* they can contact for additional information, and potentially legal

representation. For these reasons, the notices do not even substantially comply with the applicable state notice law.

4. Bridge Partners is not a "qualified purchaser" and therefore the Owners have failed to comply with their obligation to notify interested entities of their right of first refusal.

The defendant Owners' position is that the proposed sale of the four properties is "exempt from state law right of first refusal requirements" because the proposed purchaser is a "qualified entity." (See Owners' Opposition Brief, page 10.) The Intervenor-Purchaser likewise maintains that it is a "qualified entity" because it went through an "elaborate process"[15] to establish a fair and reasonable income affordability restriction." (Intervenor-Purchaser's Opposition Brief, page 10.) However, the Intervenor-Purchaser does not meet the definition of a "qualified purchaser" under either the 2000 or the 2001 version of the state law, and therefore the defendant Owners are not relieved of their legal requirement to afford a right of first refusal to entities who are truly interested in maintaining the affordability of the properties.

Under the 2000 version of the right of first refusal law, in order to be a "qualified entity," a prospective purchaser of an assisted housing development had to agree to obligate itself to maintain the affordability of the development "for persons and families of low or moderate income and very low income."[16] The parameters of that obligation were made clear by the additional requirement that the "development shall be continuously occupied in the approximate percentages that those persons and families occupied that development on the date the owner gave notice of intent or the approximate percentages specified in existing use restrictions, whichever is higher." Cal. Govt. Code § 65863.11(d)(2) (amended 2001). Therefore, under the 2000 version of the law, an entity was a "qualified" purchaser only if it promised to keep the development affordable to very low, low and moderate income households, in the percentages that those households occupied the developments when the owner sent his notice of intent.

[15] While "review[ing] California law" and "look[ing] to federal regulations" does not sound like such an "elaborate process," the Intervenor-Purchaser needed only to look at the language of the state statute itself.

[16] "Very low income" persons and families are defined in the Government Code by reference to the California Health and Safety Code as those whose incomes do not exceed 50 percent of Area Median Income (AMI). Cal. Govt. Code § 65863.11(a)(6) (amended 2001), referencing Cal. Health & Safety Code § 50052.5. *See also* California Code of Regulations, Title 25, section 6926, attached in the Appendix of Additional Authorities to Plaintiffs' Application for TRO.

Here, the use agreements executed by HUD and U.S. Housing Partners fail to obligate the new purchaser to maintain that level of affordability. Rather, the use agreements effectively convert the properties to *entirely moderate income* developments, by setting all rents for new tenants at 30 percent of 80 percent of Area Median Income.

The Intervenor-Purchaser, through some artfully deceptive excerpting, would have this Court believe that the right of first refusal law was amended in 2001 to permit a developer to be defined as a "qualified purchaser" by agreeing to maintain the affordability of the housing development for *moderate income households alone*. (See Intervenor's Opposition Brief, page 8, emphasizing the fact that the state law was amended to require a maintenance of affordability for households "of very low, low, or moderate income," rather than for households of "low or moderate income and very low income.")

However, this amendment is of no significance given that ongoing level of affordability that is required in order to qualify an entity as a "qualified purchaser" is still keyed to the percentage of low, very low and moderate income families who occupied the development on the date the owner gave notice of intent. Specifically, the amended statute (excerpted here *in its entirety)* continues to require that a qualified purchaser agree to:

> (2) Agree to obligate itself and any successors in interest to maintain the affordability of the assisted housing development for households of very low, low, or moderate income for either a 30-year period from the date that the purchaser took legal possession of the housing or the remaining term of the existing federal government assistance specified in subdivision (a) of Section 65863.10,whichever is greater. *The development shall be continuously occupied in the approximate percentages that those households who have occupied that development on the date the owner gave notice of intent or the approximate percentages specified in existing use restrictions, whichever is higher.*

Cal. Govt. Code § 65863.11(e)(2) (emphasis added.)

Because the use agreements set rent for *all* new tenants at 30 percent of 80 percent of Area Median Income, they do not effectively maintain the affordability of the complexes for *all* of the income groups that currently occupy the buildings, including the very low income named plaintiffs. Therefore, the Intervenor-Purchaser cannot be defined as a "qualified purchaser" under the amended statute, and the defendant Owners have in no way complied with their legal obligation to provide a right of first refusal to interested entities, as required by Cal. Govt. Code § 65863.11.

Additionally, if the 2001 version of the right of first refusal law applies to the use agreements in question, as urged by the Intervenor-Purchaser, that party should acknowledge that in order to qualify as a "qualified purchaser" under the amended law, a prospective purchaser must also agree to "the renewal of rental subsidies" (i.e. project-based Section 8 assistance), should they be available. Cal. Govt. Code § 65863.11(e)(2) (2001). Because the Intervenor-Purchaser has not agreed to assume the Owners' project-based Section 8 contracts, it can not fit into the 2001 definition of a "qualified purchaser."

B. In failing to comply with state notice requirements governing notices of intention to opt out of Section 8 contracts, Owners have also violated Federal notice requirements.

Federal law governing Section 8 opt out notices requires that a notice of an owner's intent to terminate a Section 8 contract comply with "any additional requirements established by the Secretary." 42 U.S.C. § 1437f(c)(8)(C). Thus, in passing § 1437f, Congress explicitly authorized the Secretary of HUD to promulgate additional notice requirements. HUD responded to this Congressional authorization of rule-making power by publishing PIH Notice 99-36. In that Notice, under a subsection entitled "Other Requirements," HUD indicated that project owners issuing notices of intent to terminate Section 8 contracts "must also comply with any State or local notification requirements." (See HUD Directive 99-36, XVI-G, attached to Plaintiffs' Application for TRO in the Appendix of Additional Authorities.)

Rules contained in HUD directives have the force of law where those directives: 1) are issued pursuant to HUD's rule-making power; and 2) are mandatory rather than advisory. Thorpe v. Housing Authority of the City of Durham, 89 S.Ct. 518 (1969) (enforcing a HUD circular which directed federally subsidized Housing Authorities to provide tenants with reasons for proposed evictions.) Here, HUD's promulgation of a rule requiring project owners to comply with state and local laws was expressly authorized by Congress in its passage of the Multifamily Assisted Housing Reform and Affordability Act of 1997, codified at 42 U.S.C. § 1437f(c)(8)(C) (requiring that project owners comply with "any additional requirements established by the Secretary.") Additionally, that requirement is mandatory, rather than advisory, as evidenced by the fact that HUD PIH Notice 99-36 "defines" (rather than "informs") Owners' notification responsibilities, PIH 99-36, II-C, and specifies that owners "*must* also comply" with any State or local requirements. PIH 99-36,XVI-G (emphasis added).

Therefore, in failing to comply with "any state or local notification requirements," the Owners have failed to comply with 42 U.S.C. § 1437f.

C. In sending defective notices, Owners have interfered with tenants' access to enhanced voucher housing subsidies, in violation of 12 U.S.C. § 1715z-1b.

To support and encourage tenant participation in multifamily housing projects, Congress specifically prohibited project owners from "interfer[ing] with the efforts of tenants to obtain rent subsidies or other public assistance." *Id.* at § 1715(b)(2).

By providing the Tenants with severely defective notices, as discussed supra, the Owners have interfered with the efforts of tenants to obtain rent subsidy vouchers. These notices not only advised tenants that the owners would be terminating their subsidies, but they also advised tenants of the availability of replacement enhanced voucher subsidies, as required by law. See 42 U.S.C. § 1437f(c)(8)(A) (requiring owners to advise tenants by notice that "in the event of termination [of a project based Section 8 contract] the Department of Housing and Urban Development will provide tenant-based assistance to all eligible residents...")

Of the many defects contained in the notices, the Owners' failure to advise tenants of the name and telephone number of the city, county, local public housing authority, HCD, and the local legal services organization, has most seriously impacted the Tenants' ability to apply for enhanced vouchers, as that information is required to be provided so that tenants can contact those entities "to request additional written information about an owner's responsibilities and the rights and options of an affected tenant." Cal. Govt. Code 65863.10(b)(6) (amended 2001.) In the absence of that information, Plaintiffs who had pressing questions and concerns about their eligibility for the vouchers that are referenced in the notices did not know who to call. See Breimann Decl. attached to Plaintiffs' Application for TRO as Exh. "A."

By failing to provide tenants with lawful notices, Defendant Owners have interfered with the Tenants' abilities to obtain rent subsidies, in violation of Section 202 of the Housing and Community Development Amendments of 1978, 12 U.S.C. § 1715z-1b(a). Thus, Plaintiffs would more than likely prevail on this claim and be entitled to injunctive relief, i.e. enjoining Defendants from proceeding with the

opt-out and prepayments altogether, until proper notices are issued to both the tenants and to the applicable public entities.

IV. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS ON THEIR CLAIMS AGAINST HUD.

Plaintiffs establish that HUD has played an active and affirmative role with respect to the opt-outs, pre-payments and sale of the four properties herein in violation of its own notice rules and the other applicable laws and authorities set forth below. Further, it is evident that HUD has taken these actions without considering and in a manner that is inconsistent with the goals of the National Housing Act and the Civil Rights Act making all such actions sanctionable under the Administrative Procedures Act. Accordingly, plaintiffs have demonstrated a likelihood of success as to each of their claims against HUD.

A. HUD failed to comply with federal opt-out notice requirements in violation of the APA.

As established above, the Secretary of HUD exercised the authority Congress granted it to make it mandatory for owners of properties with project-based Section 8 subsidies who wish to opt-out of the program to adhere to state notice requirements in addition to the federal notice requirements. See Section III. B. above. This notice requirement, contained in HUD Directive (PIH) 99-36, XVI-G, has the force of law because it was issued pursuant to HUD's rule-making power and is mandatory. See Thorpe, supra., 89 S.Ct. 518 (1969). [get sct cite]

Nevertheless, HUD argues that the notice requirements of 99-36 do not apply to its own conduct in accepting and approving the defective opt-out notices. In other words, HUD argues that it should not be made to follow its own rules. This argument must be rejected lest it result in an outcome that would be inconsistent with a number of relevant court decisions.

In rejecting HUD's attempt to disavow its own handbooks and concluding that HUD had a duty under the national housing policies to establish a foreclosure avoidance procedure for HUD subsidized properties, the court in Brown v. Lynn, 385 F.Supp. 986 (N.D. Ill. 1974), held:

> . . .HUD may not hide behind its own alleged subversion of the national housing policy. For HUD to argue its guidelines for servicing these programs are only suggestions which it needs not and will not enforce, regardless of the apparent impact upon the supposed beneficiaries of these programs, only exposes the likelihood that HUD has failed to act in furtherance of the congressionally-mandated housing policy. Id. at 998.

See also Silva v. East Providence Housing Authority, 390 F.Supp. 691 (D.R.I. 1975), subsequent decision, 423 F.Supp. 453 (D.R.I. 1976) remanded on other grounds, 565 F.2d 1217 (relying on HUD Handbook which provided that termination should be last resort, court held that HUD had not considered all relevant factors when terminating a contract for the development of a Public Housing project); Tenants for Justice v. Hills, 413 F.Supp. 389, 391 (E.D. Pa. 1975) (court extensively relied upon HUD's property disposition handbook in enjoining disposition of property based on HUD's failure to consider factors listed in handbook); Tenants and Owners in Opposition to Redevelopment v. HUD, 406 F.Supp. 1024 (N.D. Ca. 1973), subsequent opinion, 406 F.Supp. 960 (N.D. Cal. 1970) (court relied upon HUD regional circular in concluding that HUD's reasoning process in approving a relocation plan was irrational); and Kent Farm Co. v. Hills, 417 F.Supp. 297 (D.D.C. 1976) (court preliminarily enjoined HUD foreclosure on grounds that it was inconsistent with foreclosure moratorium embodied in telegram from HUD central office, even though moratorium had not been formally promulgated or published.)

In addition to these authorities, a review of the facts in this case reveal the absurdity of HUD's attempts to side step its own notice requirements. A HUD employee from the Sacramento HUD office involved in reviewing the opt-out notices herein was familiar with the applicable state law requirements and even sent correspondence to defendant owners, through their common general partner, giving advice about compliance with such notices. See Exhibits "V" and "W" attached to Plaintiffs' Opening Brief. Yet when that same HUD office received the defective opt-out notices at issue here, it did not merely ignore them--it approved and effectuated the notices by facilitating the opt-out and the conversion of the Section 8 project-based units to the Housing Choice program.

1. HUD's approval of the defective Section 8 opt-out notices is reviewable.

Next, relying on Heckler v. Chaney, 105 S.Ct. 1649 (1985), HUD claims that its actions with respect to the opt-out notices are not subject to judicial review because they were strictly decisions not to enforce the law. In fact, HUD's actions with respect to the defective notices were to approve them affirmatively, thereby effectuating the opt-outs. The Supreme Court in Heckler described affirmative acts of approval, which are reviewable, as the "opposite" of refusals to enforce. Id. at 830. Thus the actions herein do not fall within the Heckler exception and are reviewable by this

court.

a. The Heckler exception to reviewability is a very narrow one and HUD's attempts to use it to escape judicial review have been rejected in many similar housing cases.

There is a general presumption that all agency decisions are reviewable under the APA. Traynor v. Turnage, 108 S.Ct. 1372, 1378 (1988). The exception is "when review is precluded by statute or 'committed to agency discretion by law.'" Heckler, supra. at 826, citations omitted; see also 5 U.S.C. Sec. 701(a)(1) and (2).

Further, the language "committed to agency discretion by law" has been narrowly interpreted, applicable only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Heckler, at 1655 *;* Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814, 820-21 (1971). Moreover, if the agency act in question involves a question of approval under a statute that sets clear guidelines for determining when such approval should be given, the Heckler exception does not apply at all. See Heckler, supra, 105 S.Ct. at 1655, distinguishing Overton Park, supra.

The presumption of reviewability operates with "particular vigor" in the area of public housing. Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Cir. 1968); Silva v. East Providence Housing Authority, supra, 423 F.Supp. at 459 (D.R.I. 1976). Indeed, in many cases involving the enforcement of housing rights, courts have rejected arguments by HUD that its actions are exempt from judicial review on the grounds of agency discretion to enforce. See Kirby v. HUD, 675 F.2d 60 (3d. Cir. 1982) on remand, 563 F.Supp. 248 (W.D. Pa. 1983), vacated and remanded, 745 F.2d 204 (3d. Cir. 1984).[17] (Though the federal statutes governing the provision of funding for housing developments for the elderly and disabled appeared to be the type committed to agency discretion, HUD's discretion must be exercised in a manner consistent with the national housing objectives set forth in applicable statutes, and thus its decisions even under such discretionary authority were reviewable); Russell v. Landreiu 621 F.2d 1037, 1041 (9th Cir. 1980) (tenants in former low-income housing project, which had been foreclosed by HUD and conveyed to a purchaser, sued to enjoin the sale and proposed rent increases by the purchaser;

[17] The court of appeals reversed the district court's finding of non-reviewability and remanded the case for determination of whether HUD abused its discretion. On remand, the district court found no abuse of discretion. Plaintiffs appealed again and the court of appeals found that the district court erred in finding no abuse of discretion and remanded the case a second time.

HUD's motion to dismiss denied on grounds that HUD's failure to consider and implement alternatives consistent with the National Housing Act, if true, would constitute abuse of discretion.)

b. HUD's actions in facilitating the conversion from Section 8 project-based to the tenant-based housing voucher program based on the opt-out notices at issue constitute an approval and thus do not fall under the Heckler exception.

As in Overton Park, supra, the HUD acts in this case were not a refusal to enforce, but rather an approval of the opt-outs based on defective notices. Plaintiffs contend that HUD in fact effectuated the opt-outs by taking the following actions, among others: 1) determining the number of vouchers needed at each property and completing the preliminary forms necessary to convert the subsides from the HUD multi-family program (which covers the project-based subsidies) to the HUD public housing program (which covers the voucher program, among others); 2) determining the appropriate public housing authority to administer the voucher contracts and then contacting the PHA for such purpose; 3) issuing and reviewing the required forms necessary for the PHA to take on the issuance and administration of the voucher contracts; 4) determining and implementing the budget authority requirements for the conversion for project-based to tenant based section 8 subsidies at the four developments and reserving tenant-based funds for such purpose; and 5) authorizing the public housing program to assign tenant-based Section 8 funds to the local HUD public housing program staff. See HUD Section 8 Renewal Policy, Attachment 4: Overview of Conversion Procedure - Conversion from Project-based Contract to Rental Voucher Assistance, attached in the Appendix of Additional Authorities.[18]

c. There is "law to apply" in determining the propriety of HUD's actions.

Even if the court deems HUD's actions with respect to the opt-out notices as "enforcement" actions, they do not fall under the narrow Heckler exception because 1) there is no statute or any other indication of any legislative intent precluding review of HUD's enforcement duties with respect to the applicable opt-out notice provisions; and 2) there is clear law to apply, i.e. law against which HUD's actions can be measured by this court.

[18] Because the Sacramento Housing and Redevelopment Agency (SHRA) has been identified as the PHA to administer the enhanced vouchers in this case and because it has taken some preliminary steps toward processing applications for the vouchers, although those vouchers have not yet been issued, plaintiffs reasonably assume that HUD has completed these steps.

In U.S. v. Winthrop Towers, 628 F.2d 1028 (7th Cir. 1980), the court held that the district court erred in concluding that there was no law to apply so that a decision by HUD to foreclose a federally insured mortgage could not be reviewed. Citing to the National Housing Act, 42 U.S.C. sec. 1441, specifically, the requirement that HUD exercise its powers and perform its duties "consistently with the national housing policy declared by this Act," the court concluded that HUD's decision to foreclose could be reviewed to determine whether it was consistent with national housing objectives. Id. at 1034-35.

The preamble of the National Housing Act provides:

> *The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production* and related community development *sufficient to remedy the serious housing shortage*, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, *and the realization as soon as feasible of the goal of a decent home and a suitable living environment of every American family*, thus contributing to the development and redevelopment of communities and to the advancement of growth, wealth, and security of the Nation. 42 U.S.C. sec. 1441 (emphasis added).

These national housing objectives include the following: 1) private enterprise shall be encouraged to serve as large a part of the total need as it can; and 2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need. Id.

Similarly, the introductory paragraph of the Section 8 statute states: "[F]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance of the provision of this section." 42 U.S.C. 1437f(a).

Further, the language in the specific Section 8 notice laws relied upon by plaintiffs, particularly when viewed in the context of the above introductory paragraph and the language of the National Housing Act "raise a legal issue which can be reviewed by the court by reference to statutory standards and legislative intent." Clary v. Mabee, 709 F.2d 1307, 1309 (9th Cir. 1983) (citations omitted).[19]

The questions relevant to the notice issue here are: 1) were HUD's actions consistent with the federal notice requirements and 2) were HUD's actions in facilitating a conversion based on defective notices consistent with objectives of National Housing Act? Clearly the federal notice requirements and the National Housing Act are "laws to apply" in determining the propriety of HUD's actions. Thus,

[19] The court held that HUD's method for calculating utility allowance was reviewable in light of alleged inconsistency with statutory provisions governing tenants' contribution to rent. Id.

whether or not HUD's actions regarding the defective notices herein are characterized as refusals to enforce or not, the narrow Heckler exception does not apply.

2. HUD abused its discretion in disregarding the defective notices and then facilitating the conversion to the Section 8 voucher program based on those notices.

As set forth above, an agency commits an abuse of discretion when it acts inconsistently with the law, in this case, laws that the agency itself promulgated, and with the objectives of the National Housing Act. See 5 U.S.C. Sec. 706. HUD abused its discretion by not only effectuating the opt-out process based on what it knew or should have known to be defective notices. To find otherwise means that HUD may not only disregard its own rules, but may, with impunity, act directly contrary to these laws and rules. In this case, the effect of HUD's actions enabled the violators of those rules to profit at the cost of substantially diminishing or placing at risk subsidies for vulnerable low-income tenants, and facilitating the loss of already scarce affordable housing units. Plaintiffs have, at the very least, demonstrated a probable success on the merits on this issue.

B. HUD approval of the defective opt-out notices violated 12 U.S.C. Sec. 1715z-1b and thus must be set aside under the APA.

12 U.S.C. Section 1715z-1b provides in relevant part:

(b) Rights of tenant

The Secretary shall assure that– . . .

(2) project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance. 12 U.S.C. Sec. 1715z-1b.

As plaintiffs set forth in Section III. C. above, the opt-out notices issued by the defendant owners interfered with the efforts of tenants to obtain their enhanced voucher subsidies because the notices failed to provide critical information to the affected tenants about public entities, including the local public housing authority and the local legal services organization from whom the tenants have the right to request written information about their rights and options and the owner's responsibilities in the event of a termination of project-based subsidies in the developments where they reside. See Cal. Govt. Code § 65863.10(b)(6) (amended 2001). Accordingly, HUD's approval of these defective notices without addressing this interference constituted a failure to meet its statutory obligation under 12 U.S.C. Sec. 1715z-1b.

HUD raises the same arguments with respect to plaintiffs' claim under this statute as it does with respect to plaintiffs' claim that HUD violated the federal notice laws: that it is not required to comply with its own federal notice requirements; that its actions regarding the notices are not reviewable under Heckler; and that there is no law to apply to determine whether HUD abused its discretion or not. Plaintiffs establish in the previous section that HUD most certainly must comply with its own federal notice requirements. As to HUD's second argument, Heckler does not apply. First, the conduct at issue is HUD's approval and effectuation of the opt-outs based on defective notice, not an agency refusal to enforce, and thus the conduct does not fall within the narrow Heckler exception. Second, even assuming arguendo that HUD's conduct was a refusal to enforce, there is "law to apply" against which the court may judge HUD's conduct. Indeed, the language creating an affirmative duty on HUD's part is very clear: "The Secretary *shall assure* that. . . project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance." Sec. 1715z-1b (emphasis added). Finally, under the authorities cited in the previous section, the court may review HUD's conduct to determine whether or not it is consistent with the National Housing Act goals. Here, when presented with notices whose defects interfered with plaintiffs' right to obtain enhanced vouchers, HUD did nothing to address this interferences. Rather, if effectuated and approved the very instruments of this interference. Accordingly, the court should set HUD's approval of the notices aside.

C. HUD violated 12 U.S.C. Sec. 1701z-11(k)(2) by approving the sale of subject properties even though the sales transaction involves additional subsidy funds and the post-sale rental housing terms will be less advantageous to existing and future tenants as compared to the current rental terms.

HUD asserts that 12 U.S.C. Sec. 1701z-11(k)(2), which prohibits HUD from approving the sale of a subsidized property where the sale transaction involves the provision of additional subsidy funds and the post-sale rental housing terms are less advantageous to current and future residents of the property than the current terms, does not apply in this case because "there will be no reason for HUD to approve or disapprove the sale" since "the owners of the four apartment complexes intend to prepay their four mortgages prior to selling the four properties." HUD's Opposition Brief, p. 25. It is difficult to fathom on what basis defendant HUD makes this argument. Either 1) HUD does not consider its execution of the four use agreements to constitute an approval of the sale of the properties to Bridge Partners, or 2) it is

hoping that the its eleventh hour claim that the HUD employee who signed the use agreements lacked authority to do so, allows HUD to evade liability.

HUD cannot credibly rely on the first rationale. As U.S. Housing Partners' General Partner Steven S. Klein states: "U.S. Housing Partners submitted the proposed Use Agreements to HUD *and ultimately obtained the agency's approval* as evidenced by execution of the Agreements by HUD representative." Klein Decl., para. 24 (emphasis added). Klein further explains that "U.S. Housing Partners will record the subject Use Agreements as part of its purchase of the properties if California law is deemed by the Court to be applicable to the purchase of the properties." Klein Decl., para. 26.

As for the second possible rationale, the language of the statute simply states that the Secretary "may not approve the sale. . ." There is nothing in the language of the statute that distinguishes between authorized and unauthorized approval. If the effectiveness of the statute depended upon whether approval was "authorized", existing and future tenants harmed by allegedly unauthorized approvals of sales that resulted in poorer rental terms, no matter how egregious, would have no remedy.

Next, HUD argues that the subsidy extension of the Section 8 contract which will benefit the contemplated new owner is not an "additional subsidy" because "it does not involve new federal dollars into the developments." HUD Opposition, p. 26. Again, HUD's argument does not make sense. HUD provided short-term project-based Section 8 contracts, i.e. *additional monies* in the form of project-based section 8 subsidies effective through October 31, 2001, to all of the subject properties except for San Juan Apartments. See HUD's Opposition, Declaration of Woodrow Wilson paras. 26, 31, and 36. Further, no one is disputing that the sale was to take place no later than May 31, 2001 (at least until the filing of this action and the issuance of the TRO). Thus, HUD understood that U.S. Housing Partners would purchase the property prior to the end of the term of the short-term Section 8 contracts, i.e. prior to the end of the term of the Section 8 extensions. Looking both at the fact that HUD had to spend *additional monies* on the new short-term Section 8 leases and that the defendants contemplated that there would be a new beneficiary with respect to the Section 8 subsidy, i.e. U.S. Housing Partners, the new short-term contracts should be categorized as "additional subsidies."

Finally, defendant HUD argues that the provision of the Section 8 contract extensions had no relation to the sale transaction. This is clearly contradicted by the fact that HUD had already signed the Use Agreements at the time the extensions were provided and that, as clearly indicated in the briefs of

defendant owners and defendant-purchaser, the sale, opt-outs and prepayments were all part of the same transfer process.

As set forth above in detail Plaintiffs' Opening Brief (see pps. 24-25) the rental terms for existing and future tenants are clearly less advantageous than the current terms which offer true long-term affordability. Thus, HUD's approval of the sale violated the Sec. 1701z-11(k)(2) and must be set aside under the APA.

D. The use agreements at issue herein should be deemed void on the grounds that HUD abused its discretion in executing them; however, regardless of whether they are valid or invalid, HUD's actions in executing the use agreements and holding them out as valid until after the filing of this action caused serious harm to plaintiffs.

For the nine months since HUD executed the use agreements at issue herein, and despite having received written communications from plaintiffs challenging, among other things, the terms of the use agreements and the validity of the use agreements, HUD has held these agreements out as valid, apparently with the approval of the head HUD counsel in Sacramento and HUD counsel in Washington D.C., and used them as a justification for facilitating the sale of the subject properties from defendant owners to Bridge Partners. Now, only after the filing of this action and the Court's issuance of the temporary restraining order herein does HUD conveniently claim that the HUD employee who executed these use agreements did not have the authority to do so.

Plaintiffs agree that the use agreements should be deemed void, but on grounds of abuse of discretion, not the post-hoc and self-serving reasoning offered by HUD. As set forth above, HUD's execution of the use agreements violated both the federal statute (12 U.S.C. Sec 1701z-11(k)(2)) which prohibits HUD from approving such a sale when it puts current and future tenants at a disadvantage with respect to rental housing terms, as well as the federal laws which require compliance with state notice requirements, including notices which permit certain entities to exercise their right of first refusal. See 42 U.S.C. 1437(f)(c)(8)(C) and HUD Notice 99-36, XVI-G. Thus, HUD's execution of the use agreement was "in excess of statutory jurisdiction, authority or in violation of statutory right" and may be set aside by this court under the Administrative Procedures Act. 5 U.S.C. Secs. 706(1) and (2). See also 215 Alliance, supra. at 887 (failure to meet obligation regarding federal notice provisions is abuse of discretion.) Further, as set forth in plaintiff's opening brief, HUD failed to consider national housing goals prior to

executing the use agreements, and acted inconsistently with these goals in executing agreements that will forever eliminate 351 units of affordable housing from the already scarce affordable housing market in Sacramento. Such failure and inconsistency constitutes an abuse of discretion under the APA. See Plaintiff's Opening Brief, pp. 26-27 citing, among other cases, Walker v. Pierce, 665 F.Supp.831, 839 (N.D. Cal. 1987) and Russell v. Landrieu, 621 F.2d 1037 (9th Cir. 1980).

Regardless of whether the use agreements were "authorized" or not, HUD and the private defendants have held them out as valid for the past nine months, and in so doing have caused and is continuing to cause irreparable harm. Neither HUD nor any of the other defendants should be able to use the voidability of the use agreements to claim that the use agreements did not cause plaintiffs such harm. As stated by the defendant-purchaser, " U.S. Housing Partners received HUD approval of the Use Agreements, which U.S. Housing Partners then relied upon in considering itself to have satisfied the requirements of a qualified purchaser since U.S. Housing Partners now had HUD approval of the continuation of affordability as requried under the statute." (Declaration of U.S. Housing Partners General Manager Steve Klein in support of Defendant Purchaser's Opposition, para. 24.) But for HUD's approval of the use agreements, defendant-purchasor would not have deemed itself a "qualified purchaser" under California law, albeit incorrectly, and could not have pursued the purchase of the subject properties. See Plaintiff's Opening Brief, Exhibit "X." This, coupled with defendants' unlawful failure to notify valid potential qualified purchasers who would actually keep the rents affordable, deprived plaintiffs of a critical opportunity to solicit and negotiate with such potential purchasers.

HUD entered into these use agreements, which it should have known to be sham attempts to circumvent the California Right of First Refusal Statute, in violation of HUD's affirmative duty under § 3608 of the Fair Housing Act (see discussion below) and the goals of the National Housing Act. U.S. Housing Partners' brief demonstrates that the buyer relied extensively on this HUD approval to effectuate the purchase agreement of the properties, in violation of the California Right of First Refusal statute. Thus, whether or not the Use Agreements are void, HUD's violations of § 3608 and the National Housing Act in this respect have led directly to the plaintiff's injuries and therefore provide a basis for plaintiffs' requested relief.

E. HUD failed to abide by its Transfer of Physical Assets procedures governing the sale of a HUD-insured project.

Established HUD procedures require owners wishing to sell a HUD-insured project to complete a Transfer of Physical Assets (TPA) application. HUD Handbook No. 4350.1, Chapter 13, Sections 2 and 3 and Appendix "C", attached in Plaintiffs' Appendix of Additional Authorities. HUD is then required to engage in careful consideration of such an application, including a review of transferee's suitability to participate in HUD programs, an evaluation of the current and proposed management, a physical inspection and determination of needs for repair, a check on the availability of repair/replacement funds, and a determination whether the proposed action complies with HUD Legislative, Regulatory and Administrative requirements. Id., Section 3 and Appendix "A"; See also 24 C.F.R. 200.217. Further, "the purchaser is not authorized to transfer any interest in, take possession of, or assume the burdens and benefits of ownership of the subject project without the prior written approval of HUD." Chapter 13, *supra*., Appendix A, Section II .

Here, there is no indication that the defendant owners completed the required TPA application nor that HUD did any review as required under the TPA Directive. See Plaintiffs' Opening Brief, Exhibit "U," Declaration of Anne Pearson, para. 3. Evidently, per the existence of the executed Use Agreements, HUD approved the transfer without going through these steps.

Thus, HUD abdicated its obligation under the law by ignoring the TPA requirements, approving the pre-payment notices and facilitating the conversion of the long-term project-based subsidies (which would otherwise not expire until between the years 2013 and 2015) and its actions must be set aside under the APA.

F. HUD has violated its affirmative duties under the Fair Housing Act by approving and facilitating the sale of the properties without first considering the racial and socioeconomic effects of its actions.

In approving the proposed sale of the four properties and executing four "use agreements" without first considering the racial and socioeconomic effects of those transactions, HUD has violated its affirmative duty under 42 U.S.C. § 3608(e)(5) to further fair housing in its administration of the federal housing programs.

1. HUD's approval of the sale and execution of the Use Agreements were discretionary acts which triggered its fair housing obligations.

HUD argues that its "duty to affirmatively further fair housing … does not … include an obligation to examine the racial and socio-economic effects of the withdrawal of the developments from the federal housing programs." See Defendant HUD's Opposition Brief in at 29-30 (internal quotes omitted). HUD claims that such an examination would be "futile" because it had no discretion to act other than it did. See id.

HUD's position is without merit. HUD's decision to approve the sale was in no way dictated by any legal authority. On the contrary, HUD's Transfer of Physical Assets (TPA) procedures accord it substantial discretion to approve or disapprove sales of HUD-insured properties. See Section IV. E. above. In this case, a similar discretionary decision is required under 12 U.S.C. § 1701z-11(k)(2) in determining whether the sale will result in rental housing less advantageous to current and prospective tenants. [20]

HUD also had utter discretion in its decision to facilitate this sale by signing "use agreements" with the Intervenor-Purchaser, thereby permitting enabling the Owners to circumvent state law requirements. HUD now claims that these "use agreements" are unenforceable for technical reasons. Regardless of the enforceability of the "use agreements," HUD's decision to encourage and facilitate the sale of the Properties by signing these agreements was a discretionary decision. In making such discretionary decisions in the administration of its programs, HUD is required to act affirmatively to further the purposes of the Fair Housing Act.

2. HUD Failed to Consider the Fair Housing Effects of Its Decisions.

HUD has approved and facilitated the sale of four developments that will result in the loss of 351 subsidized homes from the federal housing stock. A thorough review of HUD's files reveals that HUD did this without performing an examination of the racial and socioeconomic effects of its decisions. (See Pearson Decl., attached to Plaintiffs' Application for TRO as Exhibit "U".)

Prior to the enactment of the Civil Rights Acts of the 1960s, "the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical

[20] Elsewhere in its brief, HUD argues it need not comply with 12 U.S.C. § 1701z-11(k)(2) because HUD expects that the Properties will no longer be subject to insured mortgages at the time their sale will be completed. Such a decision not to comply with statutory requirements on the basis of prognostication is certainly a "discretionary" decision.

conditions of buildings, remain blind" to the racial effects of their decisions; but "[t]oday such color blindness is impermissible." Shannon v. U.S. Dept. of Hous. and Urban Dev., 436 F.2d 809, 820 (3rd Cir. 1970). The purpose behind Congress's imposition of an affirmative duty to further fair housing on HUD was to counteract the historical "bureaucratic myopia" suffered by the department by requiring HUD to take into account the effect of its decisions on "the racial and socio-economic composition of affected areas." See Anderson v. City of Alpharetta, 737 F.2d 1530, 1535 (11th Cir.1984).

HUD cannot administer its programs as if the Fair Housing Act did not exist. In this case, it should have been especially aware that the withdrawal of the four developments from the federal housing programs would have significant fair housing implications. Under HUD regulations then in effect, the Properties were originally developed as affordable housing to advance civil rights objectives. See 24 C.F.R. § 200.710, 37 Fed. Reg. 205 (Jan. 7, 1972) ("Project Selection Criteria" for the Section 236 Program). For over two decades, the Properties have been subject to Affirmative Fair Housing Marketing Plan requirements intended to promote patterns of integrated housing and fair and equal access to housing for all families. See 24 C.F.R. § 886.321(a), 44 Fed. Reg. 70365 (Dec. 6, 1979), as amended. The Properties are currently home to high proportions of elderly and disabled residents. Indeed, three of the four named plaintiffs in this action are elderly, and all four plaintiffs are physically disabled. See Complaint, ¶¶ 15 - 18. Additionally, high proportions of persons protected by the Fair Housing Act rely on the Properties for decent and affordable housing.

HUD has performed no fair housing analysis in this case. It has therefore violated its obligations under 42 U.S.C. § 3608(e)(5), and thereby has acted in a manner that is arbitrary, capricious, abusive of its discretion, or otherwise not in accordance with law in violation of the Administrative Procedure Act, 28 U.S.C. §§ 701, et seq.

G. HUD's failure to even consider whether the subject properties were eligible for its program known as "Mark-up-to-Market" which would provide financial incentives for the owners to stay in the project-based Section 8 program was inconsistent with the objectives of the National Housing Act.

Opting-out of the Section 8 program is but one of several options that owners of properties with project-based Section 8 have at the time their subsidy contract expire. Another option is to apply for the Mark-Up-to Market Program under which HUD can increase Section 8 rent levels up to comparable

market rents, thus giving owners of properties that meet certain criteria whose current Section 8 rent levels are below market rate incentive to stay in the Section 8 program. Section 8 Renewal Guide, Ch. 3, Sec. 3-1, attached in the Appendix of Additional Authorities. Even for properties that do not meet all the baseline eligibility criteria for participation in the Mark-Up-To-Market Program, "[t]o protect those most vulnerable and in an effort to further preserve affordable housing," Congress gave the Department the discretionary authority to extend the option of marking rents up to market. Id. at Sec. 3-3. The vulnerable populations which this discretionary authority is intended to benefit are defined as tenants of properties with a high percentage (at least 50%) of the units rented to elderly families, disabled families, or large families (five or more persons). Id.

Despite the fact that according to HUD's own statistics, at least three of the properties were receiving below market rate rents, (see Individual Project Data prepared by the California Housing Partnership Corporation based on HUD statistics from January 2000, Exhibit "C,"), are occupied by vulnerable populations described above (another consideration for eligibility under Chapter 3, Sec. 3-1 of the guide), there is no indication that HUD explored this option at all with the defendant owners. Rather, based upon defective notices, HUD approved Use Agreements which will permanently eliminate 351 affordable unit, and facilitated the conversion of this precious affordable housing stock to tenant-based assistance. HUD's failure to even consider alternatives consistent with the National Housing Act under the authorities cited above constituted an abuse of discretion under the APA. See Russell v. Landreiu, supra, 621 F.2d at 1041.

CONCLUSION

Plaintiffs have established that they will likely succeed on the merits of their claims. Plaintiffs have also established that unless Defendants are enjoined from terminating their federal subsidies and selling their properties the Plaintiffs will suffer irreparable harm, while Defendant will suffer virtually no harm at all if the requested relief is granted. Accordingly, Plaintiffs respectfully request the Court to issue such injunctive relief to 1) enjoin Defendant Owners from prepaying their federally subsidized mortgages, terminating their Section 8 contracts, and selling their properties until they have provided lawful notice of their actions and have afforded a right of first refusal to interested entities; 2) enjoin Defendant Martinez from approving any of the Defendants' aforementioned activities until Defendant has ensured that Defendant Owners have

complied with applicable laws, and has itself undergone the proper procedures to approve the termination of federal subsidies and transfer of physical assets which are subsidized by HUD.

Dated: June 4, 2001

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

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