UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

PEOPLE TO END HOMELESSNESS, INC.	)	
	)	
V.	)	C.A. No. 01-
	)	
MEL MARTINEZ, in his official capacity as Secretary of the United States Department of Housing and Urban Development; the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DEVELCO SINGLES APARTMENT ASSOCIATES; DEVELCO MODERN APARTMENT ASSOCIATES; DEVELCO APARTMENTS, INC.; DEVELCO FAMILY APARTMENTS ASSOCIATES; HEDCO LTD; and WOONSOCKET HOUSING AUTHORITY	)	

MEMORANDUM OF LAW IN SUPPORT OF

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff moves, pursuant to Federal Rule of Civil Procedure 65(a) for a temporary restraining order and preliminary injunction to preserve the status quo by keeping seven project-based Section 8 contracts in effect at four low income housing developments in Woonsocket, Rhode Island covering 171 apartments (referred to herein as the "Develco Projects"). Without a temporary restraining order the contracts will permanently expire on May 31, 2001, resulting in the permanent loss of 171 project-based Section 8 units, more than 10% of Woonsocket's project-based Section 8 housing stock.

The Court should act to preserve the status quo to prevent the defendants from completing an illegal opt out of these 171 apartments from the project-based Section 8 program. Before an owner of project-based Section 8 units can opt out of the Section 8 program, the owner must give the affected tenants one year's notice of the opt out under federal law, and two years notice under state law. The only notice sent to the tenants stating that the owner was opting out of the Section 8 program was dated April 16, 2001, a mere six weeks before the Section 8 contracts expire; and that notice was sent by the Woonsocket Housing Authority.

Defendants Martinez and HUD have acted unlawfully and facilitated the illegal opt out by permitting the owners of the 171 units to rely on a May 1, 1999 notice to renew the Section 8 contracts, instead of requiring the Owners to send a new notice stating they were opting out of the Section 8 contracts, in violation of the U.S. Housing Act, 42 U.S.C. § 1437f(c)(8). Defendants Martinez and HUD have also acted unlawfully by 1) failing to ensure that the Owners do not interfere with the efforts of tenants to obtain rent subsidies; 2) failing to consider the racial, socioeconomic and disability related effects of the Owners' opt out as required pursuant to HUD's duty to affirmatively further fair housing; and 3) failing to act consistently with and further the policies and goals of the National Housing Act. Defendants Martinez's and HUD's actions are reviewable pursuant to the Administrative Procedure Act, 5 U.S.C. § 702.

The actions and inactions of defendants Develco Singles Apartments Associates, Develco Modern Apartment Associates, Develco Apartments, Inc., Develco Family Apartments Associates (collectively, the "Develco Entities" and Hedco, Ltd. (collectively with the Develco Entities referred to as the "Owners") violate the United States Housing

Act, the Housing and Community Development Amendments of 1978, as amended, and the Rhode Island Affordable Housing Preservation Act of 1988, R.I.G.L. §34-45-1 et seq.

Defendant Woonsocket Housing Authority's actions violate the Housing and Community Development Amendments of 1978, as amended and WHA's duty under the Fair Housing Act to affirmatively further fair housing. 42 U.S.C. § 3608(d)(5).

Not only is the opt out illegal, but the loss of those project-based subsidies will cause irreparable harm to plaintiff, by thwarting its mission to expand and preserve the supply of low income housing, and by adding to the number of low income persons seeking plaintiff's assistance to find decent, safe and affordable housing.

By this motion, plaintiff asks the Court to enter a temporary restraining order and preliminary injunction:

a. enjoining defendants Develco Singles Apartments Associates, Develco Modern Apartment Associates, Develco Apartments, Inc., Develco Family Apartments Associates and Hedco, Ltd. (collectively referred to as the "Owners") from opting out of their Section 8 contracts until such time as they have provided tenants with lawful and adequate notice of those actions;

b. enjoining defendants Martinez and HUD from accepting the Owners' request to opt out of their Section 8 contracts until such time as the Owners have complied with the applicable federal and state notice requirements and HUD has considered the socioeconomic, racial and disability-related effects of the opt out;

c. enjoining defendants Martinez and HUD from allowing the Section 8 contracts with the Owners to expire and require them to keep those contracts in full force and effect until such time as the Owners and have complied with the applicable federal and state notice requirements and HUD has considered the socioeconomic, racial and disability-related effects of the opt out; and

d. enjoining WHA from issuing Section 8 Housing Choice Vouchers to the tenants of the Develco Entities and from taking any further actions to qualify said tenants for those Section 8 vouchers.

RELEVANT FACTS

This action concerns the permanent loss of 171 project based Section 8 apartments in Woonsocket, Rhode Island. As of 1995, there were a total of 1,333 project-based Section 8 in Woonsocket, of which 686 are reserved for the elderly and handicapped and 647 are designated for families. Declaration of Catherine L. Rhodes, May 30, 2001, par 28 (hereafter PEH Coordinator Declaration). Thus, the Develco Projects comprise over 10% of Woonsocket's project-based housing stock. *Id.*

Plaintiff People to End Homelessness, Inc. (hereinafter "PEH") is a nonprofit corporation whose mission is to preserve and expand the supply of low income housing in Rhode Island and build the capacity of low-income residents to participate in and affect the outcome of changes that may occur in their housing. Declaration of Catherine L. Rhodes, coordinator, (hereinafter "PEH Coordinator Declaration") para. 1,5 attached at Exhibit "E." PEH carries out its mission in several ways including: providing transitional housing for homeless men and families, helping homeless people find permanent housing; educating low-income residents of HUD-financed housing and other

types of affordable housing regarding their rights as tenants and their right to participate in the housing programs that benefit them, increasing resident participation in these programs through resident organizing and the establishment of resident associations, and helping residents and resident associations to form partnerships with housing agencies and community groups to promote resident participation and to preserve development undergoing or at high-risk of the loss of HUD affordability programs. PEH Coordinator Declaration, para. 6.

To further its mission to protect and expand the supply of low income housing PEH has worked to educate tenants in projects with expiring Section 8 contracts to inform them of their rights, and to insure their active participation in discussions with HUD and owners. Id., at PAR. 8-9. PEH has undertaken this activity to prevent owners from opting out of their Section 8 contracts. When owners opt out of their contracts, the supply of low income housing decreases, thus exacerbating the shortage of affordable housing for low income Rhode Islanders. *Id.* At 11..

Sometime in the early 1970's, each of the Develco Entities (i.e., the defendants who are the Owners of the Develco Projects other than HEDCO, Ltd.) received financing for the acquisition and rehabilitation of 171 apartments in Woonsocket. Upon information and belief, beginning sometime in the mid-1970's, each of the Develco Entities obtained a Section 8 housing assistance payment contract ("HAP Contract") from HUD. Since at least t he mid-1970's and up through the present, the Develco Entities and HUD have executed numerous successive HAP Contracts. Sometime in 1995, defendant HEDCO purchased the Develco Entities by order of the Bankruptcy Court of the District of Rhode Island.

The HAP Contracts provide for rental subsidies in return for the agreement by the Develco Entities to: (i) rent to very low income families (as such term is defined by HUD); (ii) charge such families no more than 30% of their adjusted income as rent; and

(iii) be subject to additional regulation by HUD. The rental subsidy takes the form of a monthly cash payment for each apartment covered by the HAP Contract in an amount equal to the difference between 30% of the tenant's adjusted gross income and rent levels determined by HUD.

At the present time, there are seven separate HAPs covering the developments owned by the Develco Entities. The most recent HAP Contracts were entered into between HUD and the Develco Entities on or about March 16, 2001, for a term commencing March 1, 2001 and expiring on May 31, 2001. Complaint ExhibitS 1A-1G. HAP Contract number RI43-M000-060 covers Develco Singles. HAP Contract number RI43-M000-085 covers Develco Modern. HAP Contracts numbers RI43-L000-014 and RI43-M000-061 cover Develco Apartments. HAP Contracts numbers RI43-L000-028, RI43-L000-065 and RI43-M000-093 cover Develco Family. The HAP Contracts executed between Develco Singles and HUD subsidize all 52 apartments owned by Develco Singles. The HAP Contracts executed between Develco Modern and HUD subsidize all 49 apartments owned by Develco Modern. The HAP Contracts executed between Develco Apartments and HUD subsidize all 23 apartments owned by Develco Apartments. The HAP Contracts executed between Develco Family and HUD subsidize all 47 apartments owned by Develco Family.

For at least the last year HUD and the Develco Project Owners have been negotiating terms by which the Develco Projects would remain in the project-based Section 8 program. Complaint, Exhibit 4. Those negotiations followed a notice allegedly sent to the Develco Project tenants on May 1, 1999 which indicated that the Develco Project Owners intended to renew the project-based Section 8 contracts through either June or August of 2000. Seven identical notices were allegedly sent on May 1, 1999, one for each of the seven separate HAP contracts covering the Develco Entities. Complaint Exhibit 2.. The May 1, 1999 notices were silent about any decision by the Develco Projects' Owners not to renew the Section 8 contracts.

On or about April 16, 2001, the WHA sent a notice to the Develco Project tenants stating that HEDCO "has chosen not to renew its Contract with the Department of HUD." Complaint Exhibit 3.. No mention is made of any Section 8 Contract in the April 16, 2001 notice. The April 16, 2001 notice was the first and only notice received by the tenants regarding the Owners' decision to opt out of their Section 8 contracts.

Despite the fact that a large number of Spanish speaking tenants live in the Develco Projects, the notice from WHA was entirely in English, with the exception of the words "NOTA IMPORTANTE" [IMPORTANT NOTICE] appearing in bold at the top of the April 16, 2001 notice. PEH Coordinator Declaration, par. 21.. The April 16, 2001 notice also states that tenants at the Develco Entities' developments would be eligible to receive Section 8 Housing Choice Vouchers so long as the tenants met certain eligibility requirements. However, the eligibility requirements were not listed in the April 16, 2001 notice. The April 16, 2001 notice warns tenants that if they did not attend a meeting on April 21, 2001 that they would be "responsible for your entire rent."

The effect of these defective notices on the tenants with whom PEH has communicated has been dramatic. They are very confused about the plan to issue them tenant based Section 8 vouchers. PEH Coordinator Declaration, par. 21.. Many tenants do not understand the difference between project-based Section 8 assistance and tenant based Section 8 assistance. *Id*, at par. 21. In the wake of these notices, the Tenants did not know what to do. Several tenants indicated to plaintiff that WHA informed them that if they were not using their vouchers at their current Develco Project apartments by June 1, 2001, that they would have to move out of the Develco Projects. The confusion was compounded by the short time between the April 16, 2001 notice and the June 1, 2001

deadline by which people had to make very important decisions about their living arrangements. *Id.* at 21. Additionally, because the notices did not give the name or phone number of any person or agency to call for assistance or information they did not know who to talk to about their concerns.

To avoid the very confusion among tenants described above, both Congress and the Rhode Island General Assembly enacted laws to regulate the process by which an owner of a project-based Section 8 development may opt out of the Section 8 program. The laws are designed to give tenants and government housing agencies time to restructure the projects and avoid an opt out, or to give tenants time to prepare for a change in their housing assistance should an opt out become unavoidable.

Under federal law an owner may decide not to renew a Section 8 contract and may opt out of the program only after giving the affected tenants one year's notice of the opt out. Section 1437f(c)(8) of the United States Housing Act codifies the one year notice requirement:[1]

> (8)(A) Not less than one year before termination of any contract under which assistance payments are received under this section, other than a contract for tenant-based assistance under this section, an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that, if the Congress makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any number or years, with payments subject to the availability of appropriations for any year.

[1] The one year notice requirement has changed over the years from one year to 180 days and back to one year. The law in effect presently and on May 1, 1999 required the Owner to give a year's notice to the tenants of any opt out from the Section 8 program.

> (B) In the event the owner does not provide the notice required, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.
>
> (C) Any notice under this paragraph shall also comply with any additional requirements established by the Secretary.
>
> (D) For purposes of this paragraph, the term "termination" means the expiration of the assistance contract or an owner's refusal to renew the assistance contract, and such term shall include termination of the contract for business reasons.

The notice statute in effect at the time of the May 1999 notice also required the owner to provide the reasons for termination in sufficient detail to allow a determination as to whether the termination was lawful and whether there were additional actions which could be taken to avoid termination. 42 U.S.C. § 1437f(c)(8), as amended October 21, 1998.

The one year federal notice requirement was also specifically incorporated into the most recent HAP contracts between the Owners and HUD. All seven HAP contracts contain the following provision:

> In accordance with Section 8(c)(8) of the United States Housing Act of 1937, the owner shall provide, at a minimum, a one year written notice to HUD and each assisted family about the termination of this Contract. The notice shall comply with HUD regulations and other requirements, including any amendments or changes in the law or HUD requirements.
>
> If the owner fails to provide this notice in accordance with HUD requirements, the owner may not increase the tenant rent payment for any assisted family until such time as the owner provides the written notice and one year has elapsed from the date that the notice was provided.
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> Housing Assistance Payments Contract, March 16, 2001, ¶9 (Complaint Exhibit 1a).

The Rhode Island General Assembly adopted a two year notice requirement of any Section 8 opt out when it enacted the Affordable Housing Preservation Act of 1988, codified at R.I.G.L. § 34-45-1 et seq. The two year notice requirement is found in R.I.G.L. § 34-45-5 which states:

> (a) Not less than two (2) years prior to terminating any contract under which rental assistance payments are received under § 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, an owner shall provide written notice to the [Rhode Island Housing and Mortgage Finance] corporation, specifying the reasons for the termination with sufficient detail to enable the corporation to evaluate whether the termination is lawful and whether there are additional actions that can be taken by the corporation to avoid the termination. The corporation shall review the owner's notice, and shall consider whether there are additional actions that can be taken by the corporation to avoid the termination.
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> (b) Within thirty (30) days of the owner's notice the corporation shall issue a written finding of the legality of the termination and the reasons for the termination, including the actions considered or taken to avoid the termination.
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> (c) For purposes of this section, "termination" means the expiration of the § 8 assistance contract or an owner's refusal to renew the § 8 assistance contract.
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> (d) Within twenty-four (24) hours of providing the corporation with the notice required by this section, the owner shall:
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> (1) Send a copy of the notice, by registered or certified mail, return receipt requested, to the tenant association of the development, and
>
> (2) Post a copy of the notice in a conspicuous place in common areas of the development.

In addition to requiring a two year notice of any Section 8 opt out, the Affordable Housing Preservation Act requires the Owner who has given such notice and plans to opt out to give a second "notice of intent" to tenants 90 days before the opt out is to become finalized. The notice of intent is designed to advise the tenant to apply for various forms of "tenant protection assistance" that an Owner must provide to the tenants affected by the opt out. For any tenant who decides to move out of the assisted housing

development, the owner shall provide the tenant with relocation assistance equal to the lesser of $500, or a sum equal to a security deposit and first and last month's rent (the latter if required by a new landlord), plus an additional $450 for moving expenses. R.I.G.L. § 34-45-11(d)(1). For any tenant who decides to remain in the assisted housing development, and who is current in rent payments and has not violated any other material term of the lease, the owner is required to offer the tenant a one year lease (and in certain instances a two year lease) where the tenant continues to pay as rent 30% of their income, and beyond the first year rent can be increased only as much as the increase in the consumer price index. R.I.G.L. §§ 34-45-11(d)(2), (e), (f).

Aside from being untimely, the May 1, 1999 and April 16, 2001 notices fail to comply with federal and state laws regarding notice on several respects. The May 1, 1999 notices:

a. Fail to inform the tenants that the Develco Entities would not renew its Section 8 contracts upon the expiration of the contract and to give the reasons for the termination;

b. were not signed;

c. were not translated into any language other than English; and

d. were not, on information and belief, sent to RIHMFC by the Owners at the same time they were allegedly sent to the tenants.

The April 16, 2001 notice contains no information for tenants on how to apply for "tenant protection assistance" that the Owners are required to make available to the tenants under Rhode Island law. Nor does the April 16, 2001 notice give the tenants the required one or two years notice of the Owner's decision to opt out of their Section 8 contracts.

As of the date of this motion, the Owners have not sent any written notice to the tenants at the four developments owned by the Develco Entities stating that the Owners decided to opt out of the Section 8 contracts covering those four developments. Since the

Owners intentions to opt out of the Section 8 contracts only became known after April 16, 2001, neither plaintiff, HUD, nor RIHMFC had any time to pursue any alternative course of action to the opt out, such as purchase of the Develco Entities' developments by a buyer committed to keeping the Section 8 contracts in place.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER MUST ISSUE BECAUSE PLAINTIFF HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS AND THE BALANCE OF HARDSHIP TIPS IN THEIR FAVOR.

The First Circuit has "repeatedly instructed" that in determining whether to grant a preliminary injunction, the court shall consider four factors: (1) the likelihood of plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff in the absence of an injunction, (3) the balance of equities, and (4) the public interest. *Cablevision, Boston v. Public Improvement Commission of the City of Boston,* 184 F.3d 88, 95 (1st Cir. 1999). The most important of these four factors is likelihood of success. *Ross-Simons of Warwick, Inc. v. Baccarat*, 102 F.3d 12 (1st Cir. 1996) ("Likelihood of success is the main bearing wall of the four-factor framework.")

A. Plaintiffs Have Established That They Will Likely Succeed on the Merits of Their Claims Against Defendant Owners.

Based on the fact that Defendant Owners have issued clearly deficient opt-out notices and the clarity of the applicable laws, Plaintiffs can establish that they will likely prevail on the merits on each of their claims.

1. Defendant Owners Have Not Complied with State and Federal Law Governing Section 8 Opt Out Notices.

Recognizing that an owner may decline to renew a Section 8 project-based contract at the expiration of its term and thereby affect the supply of low-income affordable rental housing, Congress required that project owners deciding to terminate their Section 8 contracts provide written notice to the Secretary and the tenants involved of the proposed termination not less than one year before termination of any contract under which assistance payments are received. 42 U.S.C. § 1437f(c)(8)(A) (as amended October 21, 1998). The notice statute in effect at the time also required the owner to set out the reasons for non-renewal (this requirement was eliminated by amendment effective 10/20/99). Congress also required 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).

The Secretary has established a number of "additional requirements." First, a notice of intent to opt-out must be on the Owner's or duly authorized representative's letterhead , must be signed, and must be served by delivery directly to each unit in the project or mailed to each tenant. *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, HUD Office of Multifamily Housing, Section 11-4-B (attached hereto as Mem. Exhibit 1). Second, the Renewal Policy notes that "if the population of the property speaks a language other than English, Owners are strongly encouraged to provide the notification letters in the appropriate language(s)." *Id.* Third, a project owner's issuing notices of intent to terminate Section 8 contracts "must also comply with any State or local notification requirements." *Id.*, at Section 11-4-G; HUD Notice 99-36, XVI-G (attached hereto as Mem Exhibit 2); HUD Notice 98-34, V (attached hereto as Mem. Exhibit 3). That would include the two year notice of opt out required by the Rhode Island Assisted Housing Preservation Act, 34-35-1 et seq, described above.

Strict compliance with notice requirements governing termination of federal subsidies is required where those notice requirements are intended t o provide the person or entity who is being put on notice with an opportunity to *do something* to prevent or affect the termination of the subsidy. *215 Alliance v. Cuomo*, 61 F.Supp.2d 879 (D.Minn. 1999). In *215 Alliance*, low-income residents of a subsidized complex challenged the sufficiency of a project owner's notice which, like the ones at issue here, failed to clearly state the owner's intent to refuse to renew the section 8 contracts. Rather the notice was of the renewal of the contracts, with an indication that there was no guarantee of renewal in the future. Id. at 881..

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.)

Strict compliance is required not only with notice requirements governing notices to *tenants*, but also with notice requirements governing notices to relevant *public entities* such as HUD and RIHMFC. In *215 Alliance*, the project owners also failed to provide HUD with the requisite one-year notice of their intent to refuse renewal of the HAP contracts. *Id.* at 886. In requiring strict compliance with the requirement to notify HUD of an owner's intent to opt out of a Section 8 contract, the court noted that:

> HUD's failure to enforce that requirement allowed the owners to avoid renewal of the HAP contracts in the fall of 1997 and thus deprived the

> tenants of time to find a suitable buyer for the facility or, at a minimum, to seek and secure other suitable housing. While the statute requires notice to HUD, it does so to protect the interests of the tenants by giving HUD an opportunity--and a mandate--to negotiate with landlords and to seek to prevent termination of the contracts. The notice requirement, then, was not something HUD could, in its discretion, waive.
>
> *Id.* at 887.

In this case, the May 1, 1999 letters sent to the individually named plaintiffs purporting to give notice of the Owners' intents to terminate their federal subsidies do not comply with the federal and state notice requirements set forth above. The Develco Entities sent only one notice on May 1, 1999 to tenants living at the four subsidized housing complexes regarding the future status of the Section 8 contracts, and that notice said the Section 8 contracts were going to be renewed. The May 1, 1999 notices fail to inform the tenants that the Develco Entities would not renew its Section 8 contracts upon the expiration of the contract, they provided no reasons for non-renewal; they were not signed; were not translated into any language other than English; and were not, on information and belief, sent to RIHMFC by the Owners.

A HUD published Notice, H 98-34, effective through May 31, 1999, provided a sample notification letter to the tenants in which the owner is to select alternative paragraphs providing either for renewal or for termination of the section 8 contract. (attached mem. Exhibit 2, attachment 3). The sample opt out notice clearly states "we do not intend to renew the contract when it expires." The owner declined to use this language or any other language which clearly indicated an intent to opt out. A HUD letter dated May 29, 2001 (attached as Complaint Exhibit 4) clearly demonstrates that the owner had not, in fact, formulated any intent to opt out at the time of the May 1999

notices. The letter states that the owner decided to opt out only "after lengthy discussions with HUD." The May 1999 letter did not notify the tenants or HUD of the owners intent to terminate the section 8 contract because the owner had not yet made that determination. Whenever the determination was made after the lengthy discussions with HUD, that determination was certainly not communicated to the tenants.

On or about April 16, 2001, the WHA sent a notice to the tenants who live at the Develco Entities' developments. Complaint Exhibit 3. The April 16, 2001 notice was the first and only notice received by the tenants regarding the Owners' decision to opt out of their Section 8 contracts. The April 16, 2001 notice states only that HEDCO "has chosen not to renew its Contract with the Department of HUD." No mention is made of any Section 8 Contract in the April 16, 2001 notice. Although the words "NOTA IMPORTANTE" appear in bold at the top of the April 16, 2001 notice, that notice was not translated into any language other than English. The April 16, 2001 notice states that tenants at the Develco Entities' developments would be eligible to receive Section 8 Housing Choice Vouchers so long as the tenants met certain eligibility requirements. However, the eligibility requirements were not listed in the April 16, 2001 notice. The April 16, 2001 notice warns tenants that if they did not attend a meeting on April 21, 2001 that they would be "responsible for your entire rent." The April 16, 2001 notice contains no information for tenants on how to apply for "tenant protection assistance" that the Owners are required to make available to the tenants under Rhode Island law. As of the date of this request that a temporary restraining order and preliminary injunction be granted, the Owners have not sent any written notice to the tenants at the four developments owned by the Develco Entities stating that the Owners decided to opt out

of the Section 8 contracts covering those four developments. Since the Owners intentions to opt out of the Section 8 contracts only became known after April 16, 2001, neither plaintiffs, HUD, nor RIHMFC had any time to pursue any alternative course of action to the opt out, such as purchase of the Develco Entities' developments by a buyer committed to keeping the Section 8 contracts in place.

The Owners failed to notify RIHMFC of their intent to terminate their subsidies, which inhibited RIHMFC's ability to send to the Owners' a list of entities who were interested in purchasing the developments and maintaining their affordability, "thus deprived the tenants of time to find a suitable buyer for the facilit[ies]." *215 Alliance,* 61 F.Supp.2d 879, 887.

These notice provisions were intended to give tenants and public entities an opportunity to get information, inform interested purchasers, and plan for housing needs. For these reasons, they demand strict compliance. Because Defendants' notices are clearly defective, Plaintiffs will more than likely prevail on these claims 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.

2. **By Issuing Defective Notices, the Defendant Owners Have Interfered with Plaintiffs' Efforts to Obtain Enhanced Voucher Rent Subsidies.**

In passing Section 202 of the Housing and Community Development Amendments of 1978, Congress recognized "the importance and benefits of cooperation and participation of tenants in creating a suitable living environment in multifamily housing projects and in contributing to the successful operation of such projects,

including their good physical condition, proper maintenance, security, energy efficiency, and control of operating costs." 12 U.S.C. § 1715z-1b(a). 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. The notices discussed *supra* 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...")

By failing to provide tenants with lawful, translated 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.

B. Plaintiffs Have Established That They Will Likely Succeed on the Merits of Their Claims Against Defendant Martinez.

The Administrative Procedures Act (APA), 5 U.S.C. § 702, *et seq*., authorizes courts to set aside federal agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or in excess of statutory jurisdiction, authority or in violation of statutory right." 5 U.S.C. § 706(1) and (2). To determine whether an agency's decision complies with the arbitrary and capricious standard, the First Circuit has stated that it considers, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992).

The APA provides an express right of action to persons aggrieved by HUD acts or omissions that are inconsistent with its statutory and regulatory obligations. 5 U.S.C. § 702; *Aujero v. CDA Todco, Inc.* 756 F.2d 1374 (9th Cir. 1985) (low-income elderly residents of federally-funded development had right under APA to sue HUD regarding mandatory meal policy). In many housing cases, the courts have provided relief to tenants where HUD abused its discretion or where its acts or omissions were found in violation of or inconsistent with its statutory obligations. See *National Tenants Organization, Inc. v. Department of Housing and Urban Development,* 358 F. Supp. 312 (D.D.C. 1973), *remanded without opinion,* 505 F.2d 276 (D.C. Cir. 1974) (court found violation of Administrative Procedures Act where HUD failed to follow mandatory statutory obligation limiting all public housing rents to one-fourth of "family income" and authorizing certain deductions in the calculation of rent); *Findrilakis v. Secretary of Housing and Urban Development*, 357 F. Supp. 547 (N.D. Cal. 1973) (court enjoined

enforcement of HUD circular on basis that it was inconsistent with the National Housing Act in that it that excluded from eligibility for rental subsidy units the very persons that Congress mandated be given a preference for such units); *Abrams v. Hills*, 415 F. Supp. 500 (C.D. Cal 1976), *aff'd* 547 F. 2d 1062 (9th Cir. 1976), *cert. granted sub nom.* (appellate court upheld lower court's finding that HUD abused discretion by refusing to apply an operating subsidy to assist with utility and property tax expenses in developments assisted under Section 236 of the National Housing Act and upheld order requiring HUD to take actions consistent with statute, including retroactive payment of subsidy amount.)

Plaintiffs here can establish that HUD committed multiple abuses of discretion and violations of its statutory obligations by allowing the opt-outs to proceed when it had notice that they were based on unlawful notices,. and by taking related actions without considering HUD's affirmative duty under the Fair Housing Act to consider the racial, socioeconomic, and disablilty related impacts and without considering the national housing goals.

1. Defendant Martinez Has Failed to Ascertain Whether Federal and State Notice Requirements Have Been Complied With.

As set forth in section I.A.1 of this Memorandum, the purported opt-out notices issued by defendant owners do not comply with state or federal law. To reiterate, the notices violate federal law which requires owners provide a notice of intent to refuse to renew a section 8 contract, to provide the reasons for non-renewal and to comply with any additional requirements established by the Secretary (*see* 42 U.S.C. § 1437f(c)(8)(c)) including the requirements that project owners "must also comply with any State or local

notification requirements" per HUD Directive 99-36, XVI-G, and that such notices be on the owners' official letterhead and signed. *See HUD Section 8 Renewal Guide, §11-4-B.*.

HUD may not waive enforcement of opt-out notice requirements. *215 Alliance, supra*, 61 F.Supp.2d 879 (HUD had no discretion to waive notice requirements because HUD's failure to enforce 42 U.S.C.A. 1437f(c)(9) deprived the tenants of time to find a suitable buyer for the facility, to negotiate with the owners to seek to prevent the termination of the contract, or to seek and secure other suitable housing and that consequently). Here, not only did HUD fail to ascertain whether its own requirements regarding opt-out notices were being complied with as it did in *215 Alliance*, it also appears to be *facilitating* the unlawful opt-out. HUD's acts are contrary to law, and an abuse of its discretion.

2. **Defendant Martinez Has Failed to Prohibit the Owners from Interfering With Tenants' Efforts to Obtain Rent Subsidies.**

In order to carry out the purpose of Section 202 of the Housing and Community Development Amendments of 1978 –"to recognize the importance and benefits of cooperation and participation of tenants in creating a suitable living environment in multifamily housing projects and in contributing to the successful operation of such projects" Congress provided, *inter alia*, that, "[t]he Secretary shall assure that . . . project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance." 42 U.S.C.A. 1715z-1b(a) and (b)(2).

As set forth above, the fact that the opt-out notices lacked critical information and were not translated into languages other than English impeded, and in some cases,

completely robbed plaintiffs and other residents of the ability to find out about their rights regarding enhanced vouchers, and consequently to obtain those vouchers. Though HUD apparently received these notices and was therefore put on notice of these notice defects, it did nothing to correct them and thus breached its statutory obligation to assure that the owners did not so interfere with Plaintiffs' rights to obtain subsidies.

Even if the court finds that HUD considered the national housing goals prior to entering into the use agreements, the *act* of signing the use agreements is inconsistent with National Housing Act goals insofar as it will likely render the units ineligible for Section 8 voucher assistance, remove the current affordability programs from the property without proper notice and permit a prospective buyer to step ahead of potential non-profit purchasers that would keep the properties affordable to low income persons. Such inconsistency is also an abuse of discretion. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980) (court denied HUD and other defendants' motion to dismiss on grounds that allegations that HUD failed to consider and implement alternatives consistent with the National Housing Act, if true, would constitute an abuse of discretion under the APA and held that "Secretary must act, whenever possible, in a manner which is consistent with the objectives and priorities of the National Housing Act.") *See also Commonwealth of Pennsylvania v. Lynn* 501 F.2d 848, 855 (D.C. Cir. 1974) (HUD acts taken without consideration of or in conflict with National Housing act "will not stand"); *Cole v. Lynn* 389 F.Supp. 99 (D.D.C. 1975) (demolition of multifamily housing enjoined because HUD failed to consider whether alternatives might better serve the goals of the National Housing Act).

3. **The Decisions of Defendant Martinez to Permit the Owners to Withdraw the Properties from the Federal Housing Programs**

were Undertaken Without any Consideration of the Racial and Socio-Economic Impact of These Actions in Violation of HUD's Affirmative Duties Under the Fair Housing Act.

Under 42 U.S.C. § 3608(e)(5), HUD is required to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of the [Fair Housing Act]." The obligation to affirmatively further fair housing has been universally construed to mean more than an obligation simply to refrain from engaging in illegal discrimination. *See NAACP v. Secretary of Dept. of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) ("[E]very court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others).").

HUD's duty to affirmatively further fair housing requires it, at a minimum, to examine the fair housing impact of its decisions with clear and open eyes. It must have in place procedures for evaluating the fair housing implications of its actions and to employ these procedures to inform the decisions it makes. HUD "must utilize some institutionalized method whereby . . . it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under . . [the Fair Housing Act]." *Shannon v. HUD*, 436 F.2d 809 (3d. Cir 1970) at 821. This means keeping necessary statistics and conducting studies at significant decision-making junctures, such as deciding to allow a subsidized housing project to prepay its mortgage and opt out of the subsidy program. In *Shannon*, the court required HUD to conduct a study of the effect of a new development on the racial composition on the surrounding area. More recently, in *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991), the court

found that HUD had acted arbitrarily and capriciously in failing to consider the impact of a mixed-use development on the racial composition of surrounding neighborhoods.

In this case, HUD was aware or should have been aware that the withdrawal of the four developments from the federal low-income housing programs implicated significant fair housing issues. According to HUD regulations in effect at the time that the developments were designated to receive federal housing assistance, the developments were required to be evaluated with respect to a set of "Project Selection Criteria." 24 C.F.R. § 200.710, 37 Fed. Reg. 205 (Jan. 7, 1972). These criteria were intended to advance eight categories of civil rights and other objectives, including "providing] minority families with opportunities for housing in a wide range of locations." *Id.* at 2.

There is no evidence that HUD collected statistics or conducted any type of study prior to accepting the owner's deficient notice of intent not to renew its subsidy contract. HUD accepted said defective notices as sufficient, apparently, without any regard to whether this action would cause a disparate impact upon minorities and/or disabled persons. Under these facts, it is clear that HUD has violated its affirmative obligation to further fair housing under 42 U.S.C. § 3608(e)(5), and thereby acted in a manner which was arbitrary, capricious, abusive of its discretion, or otherwise not in accordance with law in violation of the federal Administrative Procedure Act, 28 U.S.C. § 701, *et seq.*

Because of HUD's failure to affirmatively further fair housing goals before approving this improper opt-out and because the termination of the Section 8 contract by all defendants will have a disparate impact on racial/ethnic minorites and/or disabled

persons, the plaintiffs will likely succeed on the merits of their claims under the Fair Housing Act.

C. Plaintiffs Indisputably Will Suffer Irreparable Harm If Injunctive Relief Enjoining Defendants' Unlawful Termination of Federal Subsidies Is Not Granted, While Defendants Will Remain at the Status Quo If Preliminary Relief Is Issued, and Thus the Balance of Hardships Tips Sharply in Plaintiffs' Favor.

Plaintiff PEH will suffer irreparable harm to both its mission and its members if the Defendants' unlawful termination of federal subsidies is not enjoined. PEH is an organization whose mission is to expand and preserve the supply of affordable housing for low-income persons in Rhode Island. (PEH Coordinator Declaration . ¶ 5). Its membership consists mostly of homeless and formerly homeless persons. (Id.). PEH carries out its mission in a number of ways, including helping homeless people find permanent housing. (Id. at ¶ 6). If the Defendants are not enjoined from terminating the section 8 contracts on these properties, the housing will be permanently lost as a long-term affordable housing resource in an area with an already short supply of affordable housing. (Id. at ¶¶ 15, 28). Therefore, PEH's mission will be frustrated and its members harmed by the loss of housing, a harm continuously recognized by many courts. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Project Basic Tenants Union v. R.I. Housing*, 636 F.Supp. 1453 (D.R.I. 1986)(organization assisting members to find affordable housing injured by defendants' efforts to block construction of housing development*); Hispanics United of Dupage County v. Village of Addison*, 958 F.Supp. 1320, 1330 (N.D. Ill. 1997); *215 Alliance v. Cuomo*, 61 F.Supp. 2d 879 (D.Minn. 1999).

If injunctive relief is not granted, the harm will most certainly be irreparable as the section 8 contracts are set to terminate in a matter of three days.

By contrast, even in the unlikely event the Plaintiff ultimately does not prevail on its legal claims against Defendants, Defendants will not suffer any significant harm if forced to comply with the applicable notice requirements. The Owners would continue to receive rental subsidy payments from HUD. Therefore, the balance of hardships in this case tips decisively in favor of granting Plaintiff's application for a restraining order and motion for preliminary injunction.

II. BECAUSE PLAINTIFFS MEET THE PRELIMINARY INJUNCTION STANDARD, THE COURT MUST FIND THAT THEY ALSO MEET THE STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

As cited earlier, the standard for issuance of temporary and preliminary injunctive relief is: "(1) the likelihood of plaintiff's success on the merits; (2) the threat of irreparable harm to the plaintiff in the absence of an injunction; (3) the balance of equities; and (4) the public interest." *Cablevision, Boston v. Public Improvement Commission of the City of Boston,* 184 F.3d 88, 95 (1st Cir. 1999). *See also I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 33 (1st Cir. 1998).

Plaintiffs have met the standards for issuance of temporary and preliminary injunctive relief, accordingly, the court should issue a temporary restraining order enjoining Defendants from proceeding with the termination of their federal subsidies until the hearing on the preliminary injunction motion.

III. THE BOND REQUIREMENT SHOULD BE WAIVED BECAUSE PLAINTIFFS ARE INDIGENT AND BRING THIS ACTION IN THE PUBLIC INTEREST.

Crowley v. Local No. 82, Furniture & Piano, 679 F.2d 978 (1st Cir. 1982) affirmed the district court's decision not to require that plaintiffs post a bond, pursuant to Fed. R. Civ. P. 65(c). In doing so the court cited numerous cases which, ". . .illuminate the considerations relevant to the bond requirement." *Id.* at 1000. Citing a line of cases, it noted that, ". . . no bond is required in suits to enforce important federal rights or 'public interests'." Id. at. *See Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis. 1975); *Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971). The court further stated that, "Moreover, some of these cases involved indigent plaintiffs, from whom it would be unjust to require security." *Id.* At 1000. *See Bartels v. Biernat*, 405 F. Supp. at 1019; *Bass v. Richardson*, 338 F. Supp. at 491. The *Crowley* court suggested that,

"A district court should take into account the following factors in deciding whether to require a bond. . . at least in noncommercial cases, the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. . . in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. One measure of the impact lies in a comparison of the positions of the applicant and the enjoined party. . . Three of the factors that the district court applied – burden of compliance on defendants, plaintiffs' ability to pay, and impact on plaintiffs' rights – reflected these considerations." *Id.* At 1000.

Courts have frequently waived the bond requirement for indigent plaintiffs. *See e.g. Wayne Chemical, Inc. v. Columbus Agency Services Corp.* 567 F.2d 692, 701 (7th

Cir. 1977).. The reason for such a waiver is obvious. "Poor persons . . . are by hypothesis unable to furnish security as contemplated in Rule 65(c), and the court should order no security in connection with this preliminary injunction." *Bass v. Richardson*, 338 F.Supp. 478, 490 (S.D.N.Y. 1971), *quoting Denny v. Health and Social Services Board*, 285 F.Supp. 526, 527 (E.D. Wis. 1968).

Courts have also waived the bond requirement or required only a nominal bond for nonprofit public interest organizations where such organizations are unable to post a substantial bond and where the likelihood of success on the merits tips in their favor. *Van de Kamp*, 766 F.2d 1319, 1326 (allowing nonprofit environmental group to proceed without posting a bond where the "public interest" supports the preliminary injunction); *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 331 F.Supp. 925 (D.C.D.C. 1971) (ordering nonprofit environmental group to post bond of $1.00). Even where the potential financial injury to a company is great, courts have ordered the payment of only nominal bonds in order to avoid stifling the intent of the remedial statutes under which a case is brought. *See Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167 (D.C.D.C. 1971) (requiring environmental organization to post a bond of $100 instead of the $750,000 for the first month and $2,500,000 for each month thereafter requested by the defendant as compensation for its estimated loss of revenue).

The nonprofit plaintiff People to End Homelessness is unable to post a bond, as it has no income available for such purpose. . PEH Coordinator Declaration, para. 30. The requirement of a bond would stifle the purpose of the remedial housing acts under which Plaintiff People to End Homelessness brings these claims since this "'concerned private organization[]' would be precluded from obtaining judicial review of the defendants'

actions." *Natural Resources Defense Council, Inc.*, 337 F.Supp. at 169. Because the Plaintiffs have demonstrated their inability to post a bond, as well as a clear likelihood of success on the merits, the bond requirement should be waived.

CONCLUSION

Plaintiff has established that they will likely succeed on the merits of their claims. Plaintiff has also established that unless Defendants are enjoined from terminating their federal subsidies and selling their properties the Plaintiff will suffer irreparable harm, while Defendant will suffer virtually no harm at all if the requested relief is granted. Thus Plaintiff has met, if not exceeded, the applicable standards to support the issuance of a temporary restraining order and preliminary injunction. Accordingly, Plaintiff respectfully requests the Court to issue the injunctive relief requested in its motion for a temporary restraining order and preliminary injunction.

PLAINTIFF

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_____

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2001 I caused to be hand delivered the within memorandum of law, together with the Complaint, and supporting affidavits the persons listed below at the addresses indicated.

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