IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

FRANCES HINES, TIMOTHY OWENS PRISCILLA JOHNSON, ESSIE McCATREY, DANNY HINES, ANGELA MOORE and HOUSING COMES FIRST, Inc., A Missouri non-profit corporation, Plaintiffs, v. CHARLESTON HOUSING AUTHORITY, A municipal corporation; PAUL PAGE, in his official capacity As Executive Director of the Charleston Housing Authority; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and MEL MARTINEZ, in his official capacity as Secretary of the United States Department of Housing and Urban Development, Defendants.	))	Case No. 1:01CV00070CDP

PLAINTIFFS' POST-HEARING BRIEF AND RESPONSE TO DEFENDANT CHARLESTON HOUSING AUTHORITY AND PAUL PAGE'S MOTIONS TO DISMISS

The Plaintiffs in this case submit this post-hearing brief in support of their motion for preliminary injunction and in response to Defendant Charleston Housing Authority and Paul Page's (to be referred to collectively as "CHA" or "the Housing Authority Defendants) motions to dismiss. Pending final resolution of this matter, Plaintiffs seek an order from this Court compelling the Defendants to operate and maintain Charleston

Apartments in a manner to provide housing to the greatest number of low income families possible, to refrain from displacing any families from their homes, and to comply with federal housing program requirements, particularly those intended to protect residents and to preserve affordable housing.

In this brief, Plaintiffs first address the standards for granting preliminary relief under *Dataphase Systems v. C. L. Systems*, 640 F.2d 109 (8th Cir. 1981) (*en banc*) in Part I. CHA's motions to dismiss under Fed.R.Civ.P. 19 and 12 and the supporting arguments in its trial brief are discussed in Parts II and III. In Parts IV- VII, Plaintiffs respond to Defendant HUD and Martinez's (to be referred to collectively as "HUD" or "the HUD Defendants") arguments raised in their trial brief as to sovereign immunity and Plaintiffs' claims under the Administrative Procedure Act.

I. THE *DATAPHASE* BALANCING TEST FAVORS GRANTING PRELIMINARY RELIEF TO THE PLAINTIFFS IN THIS CASE.

Decisions on motions for preliminary relief are governed by a four-factor balancing test: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Systems v. C. L. Systems*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*). All four factors favor granting the preliminary injunction sought by the Plaintiffs.[1]

A. The Plaintiffs Face Irreparable Harm Despite the Rescission of Resolution No. 604.

[1] The Plaintiffs here also rely on the authorities cited in their earlier memorandum of law in support of their motions for temporary restraining order and preliminary injunction.

The Plaintiffs in this case face the loss of their community and of the guaranteed affordability of their homes. The loss of an affordable, subsidized home is a severe and irreparable injury. *See, e.g., McNeil v. New York City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985); *Johnson v. United States Dept. of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984); *Edwards v. Habib*, 366 F.2d 628, 630 (D.C. Cir. 1965).

CHA has rescinded Resolution No. 604, but as Plaintiffs argue in III.A. *infra*, Resolution No. 639 still directs the CHA Executive Director to "explore and pursue … the elimination of nine (9) 4-plex building," a total of 36 dwelling units. At the same time, the Plaintiffs' best opportunity to see that the guaranteed affordability of their homes is preserved continues to be in jeopardy. As the Plaintiffs explain in their Trial Brief at 8-11, Charleston Apartments is subject to several federal statutes designed to preserve federally assisted housing developments. For example, the Emergency Low Income Housing Preservation Act of 1987, 42 U.S.C. § 1472, imposes federal mortgage prepayment requirements designed to limit the displacement of families and ensure that a Rural Housing Service (RHS) development needed for affordable housing in a community is preserved as affordable housing either by providing incentives to the current owner or allowing the development to be sold to a buyer who will continue to operate it as affordable housing.

CHA has and continues to frustrate the purposes of this statute failing to operate Charleston Apartments at full occupancy, allowing the development to stand largely empty and deteriorate, and by refusing to extend its Section 8 Housing Assistance Payments (HAP) contract with HUD. As the Plaintiffs argue below and in their Trial

Brief, CHA has violated federal law in undertaking all of these actions. Defendants HUD and Martinez (referred to collectively as "HUD" or "the HUD defendants") have committed related violations. These actions cause current and on-going harm to the Plaintiffs in this case because they will inexorably foreclose the possibility of a buyer being able to purchase and operate Charleston Apartments as affordable housing. Without the guaranteed source of income from an active Section 8 Housing Assistance Payments (HAP) contract, with a regular cash flow from tenant rents and HAP subsidies for occupied units, it will be extremely difficult for a prospective buyer to be able to purchase Charleston Apartments and to operate it as affordable housing for the types of low-income families it serves and is intended to serve. CHA's failure to maintain the development and its inevitable physical deterioration over time will make the prospect of a purchase even more remote as time passes.

B. The Balance of Harms and Injuries Favors the Plaintiffs Because the Relief Sought by the Plaintiffs Would Impose No Hardship on the Defendants.

All the Plaintiffs seek in this case is an order compelling the Defendants to comply with their legal obligations. Further, the Defendants in this case can comply with their obligations with minimal hardship. An order requiring HUD to extend Charleston Apartments' Section 8 contract would pose no hardship to the agency since HUD has stipulated to providing subsidy payments for occupied Charleston Apartments dwelling units. *See* Stipulation of Uncontested Facts at ¶ 32 (Jun. 18, 2001). A Section 8 HAP contract is crucial because it will allow CHA to rent the development to low income families without depleting the project's cash reserves, provide proper maintenance, and

enable a buyer to purchase the development for the purpose of continuing to operate it as affordable housing. An informal agreement between HUD and CHA to provide and accept subsidies without a Section 8 HAP contract in place is of no use to a prospective buyer. Such an informal agreement provides little on-going assurance to residents and families in need of affordable housing of the continued affordability of Charleston Apartments.

An order requiring CHA to operate Charleston Apartments at full occupancy would no significant hardship on the housing authority. First, CHA would receive Housing Assistance Payments for the units it rents. These subsidies, along with tenant rents, are more than sufficient to operate the development, which has generated a budget surplus over each of the past three years. *See* Plaintiffs' Exh. 39-41. Second, any maintenance or repairs Charleston Apartments may require prior to families moving in may be paid for out of the development's cash reserves, which exist exactly for such purposes. [2] As of February 14, 2000, these reserves amounted to over $146,000. *See* Plaintiffs' Exh. 6. In his deposition, Defendant Page stated that units at Charleston Apartments were not severely deteriorated and could readily be made habitable. *See* Plaintiffs' Exh. 68 at 114 (L 9-25) and 115 (L 1-2). Third, requiring that the units be rented maintains the status quo ante prior to CHA's illegal conduct by forestalling the deterioration of the units through vacancy.

[2] In Resolution No. 639, CHA raised for the first time concerns over asbestos and lead paint in certain Charleston Apartments units. In his deposition, Defendant Page said nothing of asbestos or lead paint. *See* Plaintiffs' Exh. 68 at 114 (L 9-25) and 115 (L 1-2). Further, HUD's Real Estate Assessment Center (REAC) Inspection Summary Report of November 27, 2000 includes no findings of lead paint or asbestos in Charleston Apartments. *See* Plaintiffs' Exh. 47. CHA has produced no evidence to support its claim that lead paint or asbestos are present in Charleston Apartments. To the extent that unhealthful conditions may exist at Charleston Apartments, CHA may use funds from the development's reserves to pay for remediation.

C. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

For the reasons stated below and in the Plaintiffs' Trial Brief, the Defendants' legal arguments are without merit and the Plaintiffs have a substantial likelihood of success on the merits of their claims.

D. The Public Interest Favors Granting the Relief the Plaintiffs Seek.

Plaintiffs here seek to compel CHA and HUD to comply with their legal obligations. "[I]t is of the utmost interest to the public that administrative bodies obey the law." *Ross v. Community Services, Inc.*, 396 F. Supp. 278, 288 (D.Md. 1975).

Further, as CHA concedes in its Trial Brief at 19, there is a "strong public interest" in affordable housing. Such interest is particularly strong in Charleston, where the need for affordable housing is especially acute. *See* First Amended Complaint at 20-21. Mississippi County has "severe" needs with respect to the affordability, supply, and quality of housing available to low income families. *See* CHA FY 2001 Annual Plan ("PHA Plan") at 9, Plaintiffs' Exh. 18. According to CHA documents, there are between 63 and 84 families on the waiting list for admission into CHA-operated housing. *See id.* at 10; Plaintiffs' Exh. 59. Despite this, CHA has embarked on a course of action that has reduced the amount of affordable rental housing available to low income families in Mississippi County by some forty units.

II. CHA'S MOTION TO DISMISS FOR FAILURE TO JOIN USDA AND ITS SECRETARY MUST BE DENIED BECAUSE PLAINTIFFS' INTERESTS ARE ALIGNED WITH USDA'S AND DISPOSITION OF THE CASE WITHOUT USDA WILL NOT SUBJECT CHA TO A SUBSTANTIAL RISK OF MULTIPLE OR INCONSISTENT OBLIGATIONS.

CHA argues that the USDA and its Secretary Ann Veneman are necessary and indispensable parties under Fed R.Civ. P. 19 (a) because (1) a determination by this Court that CHA's tender of the final payment on the promissory note payable to the USDA prior the note's maturity was not a prepayment would impede the ability of the Secretary and the USDA to enforce USDA regulations and USDA's claimed rights under the Loan Resolution, Promissory Note and Deed of Trust (the "Loan Agreement"); and (2) leave CHA at risk of incurring double, multiple or inconsistent obligations because of the prospect that "CHA could be forced to litigate [the same issues] with USDA in another Court … and be possibly subject to an inconsistent result." (Motion to Dismiss, Page 2). CHA's arguments are without merit.

If CHA wants to add claims against USDA, it is free to attempt to do so. Adding USDA as a defendant to this action is not the Plaintiffs' duty, as the Plaintiffs currently have no claims against USDA.

In determining whether a party is a necessary party, the focus is on the relief between the parties to the action and not on the speculative possibility of further litigation between one of those parties and an absent party. *LLC Corporation v. The Pension Benefit Guaranty Corp*., 703 F.2d 301 (8th Cir. 1983); *Geissal v. Moore Medical Corp*. 927 F.Supp 352 (E.D. Mo. 1996) aff'd 114 F.3d. 1458) (former employee's preexisting health plan insurer was not necessary party in action against former employer for refusing to provide continuation of insurance coverage under COBRA). Here, complete relief may be granted between Plaintiffs and Defendants without USDA's joinder. CHA may be ordered to rent up the Charleston Apartments and /or enjoined from demolishing the units pending CHA's compliance with the Emergency Low Income Housing Preservation Act

of 1987 (42 U.S.C. § 1472c) and the notice requirements of 42 U.S.C. § 1437f without USDA in the suit.

Plaintiffs' First Amended Complaint does not allege any wrongdoing on the part of USDA or challenge its regulations. Instead, USDA's interests and those of the Plaintiffs are aligned since Plaintiffs seek to enforce the same rights that USDA would assert were it a party. *See Edgecomb v. Housing Authority of Town of Vernon,* 824 F. Supp. 312, 314 (D. Conn. 1993)(plaintiffs were not required to join HUD in action against defendant housing authority for alleged violations of HUD regulations because plaintiffs were not specifically challenging the constitutionality of the regulations); *Gwartz v. Jefferson Memorial Hospital Association,* 23 F.3d. 1426, 1429 (8th Cir. 1994)(disposition of physician's wrongful termination complaint against hospital would not as a practical matter impair or impede physician's professional corporation's ability to protect its interest because physician had same interest in establishing the facts that his professional corporation had); and *Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919 (11th Cir. 1982) (where defendants advanced the same position that the absentee parties would have taken, and their interests were coextensive, disposition of action would not as a practical matter impair or impede the interests of the absentee parties).

While USDA may have an interest in the Loan Agreement and enforcing its regulations, its absence from the case will not impair its ability to protect that interest. If the Court rules in favor of CHA and finds that no prepayment has occurred, USDA can bring its own action for declaratory and injunctive relief against CHA if it chooses to do so since it will not be bound by any judgment. Further, such a judgment in favor of CHA will not practically impair USDA's ability to protect its interest.

A determination of this case in the absence of the USDA will not subject CHA to the risk of inconsistent or multiple obligations.

> It is important to note that the 'multiple liability' clause compels joinder of an absentee to avoid inconsistent *obligations*, and not to avoid inconsistent adjudications. It is not triggered by the possibility of a subsequent adjudication that may result in a judgment that is inconsistent as a matter of logic.

4 MOORE'S, FEDERAL PRACTICE AND PROCEDURE, § 19.03[4][d].

A party is subject to inconsistent obligations when compliance with one court order might result in breach of another. See *Martin v. Wilks*, 490 U.S. 755, 757 (1989). Here, CHA complains that it may be subject to an "inconsistent result" if it prevails on its defense that it is not making a prepayment, and USDA files a separate suit. Motion to dismiss, Page 2. But an inconsistent result (or adjudication) is not the same as an inconsistent obligation.

Where Rule 19 refers to multiple obligations, it compels joinder of an absentee whose nonjoinder threatens a party with a risk of paying double damages. *See Gwartz v. Jefferson Memorial Hospital*, 23 F.3d 1426, 1430 (8th Cir. 1994) and *Angst v. Royal Maccabees Life Ins. Co.*, 77 F. 3d 701, 705-706 (3d Cir. 1996). The Plaintiffs, however, are not seeking monetary damages against CHA. Therefore, there is no risk of CHA incurring multiple obligations or paying double damages.

If CHA is worried about a subsequent suit from USDA, then CHA can implead USDA. Plaintiffs, however, have no dispute with USDA and should not be compelled to join it. Indeed, USDA agrees with the Plaintiffs' position in this case. After a review of CHA's operation, USDA determined that the housing authority is "in non-compliance

with [its] Loan Agreement" and other program requirements because of its failure to make vacant units "available to prospective tenants." *See* Plaintiffs' Exh. 31.

III. PLAINTIFFS' CLAIMS ARE SUFFICIENT TO WITHSTAND CHA'S MOTION TO DISMISS.

Apart from its motion to dismiss for failure to join an indispensable party, discussed at II., *supra*, CHA cites no federal rules of civil procedure as the basis for its motions to dismiss. Plaintiffs must assume that CHA intended to bring the remainder of its motions pursuant to Fed.R.Civ.P. 12(b)(6).

In deciding a Fed.R.Civ.P. 12(b)(6) motion, the trial court's inquiry must focus on whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief. *See O'Dell v. McSpadden*, 780 F.Supp. 639, 642 (E.D.Mo. 1991), *aff'd*, 994 F.2d 843 (8th Cir.), *cert. denied*, 510 U.S. 895 (1993). The Plaintiffs rely on the authorities cited in their opposition to CHA's first motion to dismiss and emphasize that a motion to dismiss can be granted only in the unusual case where the allegations on the face of the complaint show that there is some insurmountable bar to relief. *See Travis v. Frank*, 804 F.Supp. 1160, 1163 (E.D.Mo. 1992); *Logan v. U.S.*, 792 F.Supp. 663, 665 (E.D.Mo.), *aff'd*, 978 F.2d 1263 (8th Cir. 1992). There is no such insurmountable bar in this case.

A. CHA' MOTIONS TO DISMISS FOR MOOTNESS, LACK OF RIPENESS, AND LACK OF JURISDICTION MUST BE DENIED BECAUSE CHA CONTINUES TO VIOLATE FEDERAL LAW AND BECAUSE THERE IS NOTHING TO PREVENT FURTHER UNLAWFUL CONDUCT.

After manipulating the waiting list to find housing for Angela Moore and revoking Resolution No. 604 one week and replacing it with a vague Resolution No. 639 directing Defendant Page to " explore and pursue" various options including the demolition of 36 dwelling units, CHA now moves to dismiss Plaintiffs' complaint on the grounds that there exists no case or controversy between the parties – that the dispute is "moot" and lacks ripeness. They also contend that Plaintiffs "have no cognizable interest which is capable of enforcement." Motion to Dismiss at 4-5.[3]

i. The Controversy Between the Parties Is Neither Moot Nor Lacks Ripeness.

"It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant…free to return to his old ways." *Friends of the Earth Incorporated v. Laidlaw Environmental Services, Inc*., 528 U.S. 167, 189 (1999) citing *City of Mesquite v. Aladdin's Castle, Inc*, 455 U.S. 283, 289 (1982). Therefore, the standard for determining whether a case has been mooted by a defendant's voluntary conduct is a stringent one: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, supra* at 189 quoting *United States v. Concentrated Phosphate Export Assn.* , 393 U.S. 199, 203 (1968) (internal quotes omitted). Essentially, the voluntary cessation doctrine is a evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Friends of the Earth, supra* at 213 (Scalia, dissent).

[3] HUD joins in these arguments. *See* HUD's Trial Brief pp 12-15 and 22-24.

In *City of Mesquite, supra*, the defendant city revised an ordinance to eliminate language which a District Court had found unconstitutionally vague. This revision occurred after the Court of Appeals had upheld the District Court's finding and certified the case to the Supreme Court for its review. The defendant City argued that the case was moot. However, the Supreme Court rejected this argument noting that the defendant's "repeal of the objectionable …language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *City of Mesquite, supra* at 289. *See also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656 (1993) (denying motion to dismiss case as moot where defendant city repealed ordinance which district court had found unconstitutional and replaced it with another ordinance).

Here, as in *City of Mesquite, supra* there is nothing to prevent Defendant CHA from revoking Resolution 639 and passing another Resolution to demolish all 50 Charleston Apartment units. Defendant Page admitted this in his testimony at the preliminary injunction hearing.

Indeed, Resolution 639 is vague about Defendant CHA's future intentions stating that the City will "explore and pursue" various options. None of these options appear to contemplate preserving the 9 four-plex buildings, making up over 70 percent of the development.

Meanwhile, Defendant CHA refuses to lease the 43 vacant Charleston Apartment units as it makes plans to demolish 30 units of adjacent public housing. This in a town with a severe shortage of affordable housing for low income families and a waiting list

for such housing numbering as many as 84 families who are primarily African-American. See Plaintiffs Exh. 18, (pages 9 and 44) and Plaintiffs' Exh. 58.

The individual plaintiffs have watched their community vanish before their eyes. At the preliminary injunction hearing, Plaintiffs Frances Hines and Timothy Owens testified that they desired to preserve all 50 Charleston Apartment units. Even though the Emergency Low Income Housing Preservation Act 42 U.S.C. § 1472(c) was passed to prevent displacement and preserve low income housing units such as the Charleston Apartments by requiring recipients of Section 515 loans to follow pre-payment regulations designed to limit displacement and preserve the housing by such measures as offering the units for sale to non-profit or public entities —CHA has refused to comply with the ELIHPA and its implementing regulations. Instead, CHA attempts to divert scrutiny of their legal violations with vague and unsupportable allegations about the constitutionality of ELIHPA as it engages in tactics — revoking Resolution 604, manipulating the waiting list, and purportedly withdrawing its prepayment application — to have Plaintiffs' suit dismissed so it may proceed with its original plans, the demolition of the Charleston Apartments.

CHA's refusal to rent the vacant units and repair damaged vacant units is part and parcel of its scheme to rid Charleston of these units — thwarting ELIHPA's preservation goal.

Clearly there is a case or controversy that is ripe for review. There are two factors relevant to a ripeness decision: the fitness of the issue for judicial resolution and the hardship to the parties of withholding court consideration. *Automotive Petroleum & Allied Ind. V. Gelco Corp*. 758 F.2d 1274, 1275 (8th Cir. 1985). Defendant CHA has

made clear that it has no intention of offering the Charleston Apartments for sale to a non profit entity or renting up the vacant units because it believes it has no obligation under ELIHPA or 42 U.S.C. § 1437f to do so. There is also a substantial probability that CHA, over the objections of Plaintiffs (and the needs as many as 84 families waiting for CHA housing), will demolish, at a minimum, the nine four-plex buildings at the Charleston Apartments.(36 units). *See Chevron U.S.A., Inc v. Traillor Oil Co*., 987 F.2d 1138, 1153-54 (5th Cir. 1993)(request for declaratory judgment with regard to obligation of investors and successors in lease interest was ripe for review where there was substantial probability that seller of lease would be required to plug and abandon wells). Finally, there remains the question of the disparate impact of CHA's actual and threatened conduct on African-Americans and Defendants' violations of the Fair Housing Act of 1968 42 U.S.C. §§ 3601, *et seq*. On these issues, "the lines are drawn, the parties are at odds and the dispute is real." *Capitol Indemnity Corp. v. Miles*, 978 F.2d 437, 438 (8th Cir. 1992).

Since February 14, 2000, 40 families have vacated the Charleston Apartments at the behest of CHA and its efforts to undermine its obligations under ELIHPA. Their units now lie fallow. One unit was damaged by a car months ago. Yet, it still remains unrepaired. Continued delay will mean additional vacancies and additional deterioration, and further destruction of the community and Charleston Apartments development which plaintiffs seek to save. For Housing Comes First, it also means additional diversion of time and money seeking to prevent the loss of affordable housing.

ii. The Plaintiff Residents and Plaintiff Housing Comes First Have Standing.

Notwithstanding this court's previous denial of CHA's motion to dismiss Housing Comes First's claims for lack of standing , Defendant CHA again raises the issue. Motion to Dismiss, page 5, fn1. Yet, as this Court noted in it June 7, 2001 Memorandum and Order:

> Where a fair housing organization such as Housing Comes First 'devote[s] significant resources to identify and counteract a defendant's unlawful practices' *Arkansas ACORN Fair Housing Inc. Greystone Development, Ltd. Co*., 160 F.3d 433, 434 (8th Cir. 1998) (quoting, *Havens,* 455 U.S. at 379), the injury in fact requirement is satisfied and the organization has standing to sue. 'That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not effect the nature of the injury suffered….' *Havens*, 455 U.S. at 379 n.20"

June 7, 2001 Memorandum and Order.

The parties have stipulated that Housing Comes First's mission includes, among other things, the preservation of affordable housing and the prevention of homelessness. Stipulation, ¶ 6. Housing Comes First's executive director Scott Mills testified that Housing Comes First has diverted "hundreds of hours" of time to the Charleston Apartments from other projects where it was engaged in counseling to respond to defendant CHA's decision to opt-out of its Housing Assistance Payment ("HAP") contract, its threatened demolition of the Charleston Apartments and the refusal to rent vacant units. It matters not that much of this time was devoted to legal efforts aimed at combating the discrimination, as these are lost opportunity costs and constitute an actual injury. *Arkansas ACORN Fair Housing*, 601 F.3d at 434; *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1989) (Posner, J.).

Mr. Mills also testified that the many hours spent at the Charleston Apartments has impaired Housing Comes First ability to service the needs of its other tenant organization members. As a result, Housing Comes First's ability to keep and recruit new members has been damaged.

In short, Defendants actions have caused a drain on Housing Comes First's resources and caused a concrete and demonstrable injury to Housing Comes First's activities. *National Federation of the Blind of Missouri v. Cross,* 184 F.3d 973, 979 (8th Cir. 1999), cert denied 528 U.S. 1022 (1999)("Standing may be found when there is a concrete and demonstrable injury to an organization's activites which drains its resources and more than simply a setback to its abstract social interest."). While Housing Comes First injury is significant, for standing purposes it need not measure more than an identifiable trifle. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 689 n. 14 (1973).

Housing Comes First's interest in preserving affordable housing and preventing homelessness and the request for declaratory relief in this action transcends the interests of individual plaintiffs and extends to all persons on the CHA waiting list who have been and will be effected by the Defendant CHA's actions – notably its refusal to lease vacant units and the inevitable demolition of all or a portion of the Charleston Apartments. See *215 Alliance, Community Stabilization Project v. Cuomo*, 61 F.Supp. 2d 879, 884 (D. Minn. 1999); *Hunt v. Washington State Apple Advertising Commission,* 423 U.S. 333, 343 (1977) and *National Com. To Preserve Social Sec. v. Bowen*, 735 F. Supp. 1069, 1084 (D.D.C. 1990)(where a plaintiff requests only declaratory and injunctive relief, and not damages, individual participation is generally not needed).

The individual Plaintiffs have also suffered "an injury in fact economic or otherwise" traceable to CHA's conduct. *Data Processing Service v. Camp*, 397 U.S. 150, 152 (1970). Their Charleston Apartment community has been practically emptied and left deserted by the defendants' conduct. Further, they, like Housing Comes First, have an interest in seeing that defendant CHA complies with its ELIHPA obligations so that the Charleston Apartments and the Plaintiffs' community are preserved. Defendant CHA's refusal to rent the vacant units and offer the units for sale and its refusal to maintain the development, which will inexorably lead to its deterioration, is thwarting ELIHPA's preservation objective and harms the individual Plaintiffs' interest in maintaining their homes and the surrounding complex as decent affordable housing.

Defendant CHA's asserts that there exists a "stand alone relationship" between between CHA and USDA and that plaintiffs lack standing to enforce the terms of the Loan Agreement. (Defendant CHA's Memorandum of Law at p. 11). However, this argument is patently false. The Deed of Trust expressly provides that tenants may enforce the use restriction requiring CHA to "use the housing for the purpose of housing people eligible for occupancy as provided in Section 515…and FmHA regulations then extant during the 20 year period beginning April 27, 2001 [sic]." (Plaintiffs Exh. 2, ¶ 27)

Hence, there is not a "stand alone relationship" between CHA and USDA. The individual Plaintiff (tenants) have standing to enforce the rights granted them under the Deed of Trust and ELIHPA – the same rights which the USDA may itself enforce should it choose to intervene in this action.

CHA's further argument that under *United States v. Winstar*, 518 U.S. 839 (1996), the FmHA regulations extant during the 20 year period cannot alter, modify or

obstruct the Loan Agreement between CHA and USDA is also wrong. In addition, such an argument is misplaced in an objection about standing. "Contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 41, 52 (1982). As explained in *Parkridge Investors Limited Partnership v. Farmers Home Administration* 13 F.3d 1192, 1198 (8th Cir. 1994):

> In *Merrion*, the Supreme Court observed that 'sovereign power…is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' 455 U.S. at 148 (quoted with approval in *Bowen*, 477 U.S. at 52). Thus 'contracts should be construed, if possible to avoid foreclosing exercise of sovereign immunity.' *Bowen*, 477 U.S. at 52-53.

In *Parkridge*, plaintiff claimed that the United States had violated plaintiff's substantive due process rights by enacting ELIHPA (and its implementing regulations) which modified plaintiff's unconditional right in its loan agreement with FmHA to prepay its loan. There, as in the instant case, the Parkridge's loan agreements made its contract "'subject to [FmHA's] future regulations which are not inconsistent with the express provisions hereof'" Id. at 1198. The Court, however, rejected Parkridge's argument pointing out that "[f]uture regulations of FmHA, however, are not synonymous with future acts of Congress. Congress cannot be said to have waived one of its most vital powers, that of enacting legislation, by virtue of this contract language." Id. Accord *Adams v. United States*, 42 Fed. Cl. 463, 484 (1998); See also *Grass Valley Terrace v U.S.*, 46 Fed. Cl. 629 (April 12, 2000) and *Franconia Assoc. v. U.S.*, 43 Fed. Cl. 702 (1999).

B. CHA'S MOTION TO DISMISS PLAINTIFFS' MISSOURI ADMINISTRATIVE PROCEDURE ACT CLAIM (COUNT VII) MUST BE DENIED BECAUSE THIS IS A NON-CONTESTED CASE FOR PURPOSES OF THE ACT.

Defendants argue that plaintiffs have not stated a claim under the Missouri Administrative Procedure Act because they have pled no facts which create the existence of a contested case. Motion to Dismiss, page 8. This argument is misplaced because CHA misunderstands the operation of the Missouri Administrative Procedure Act. This is a *non-contested* case, not a *contested* case, which would be treated differently under the Act.

Plaintiffs' claim is brought under §536.150 R.S.Mo which governs judicial review of *non-contested* cases. §536.150 R.S.Mo. provides in relevant part:

> When any administrative office or body existing under the constitution or by statute … shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person … and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction … and in any such review proceeding, the court may determine the facts relevant to the whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary or capricious or involves an abuse of discretion….

By its terms, §536.150 does not apply to contested cases reviewable pursuant to §536.100 to 536.140. §536.150.2. A "*contested* case" is a proceeding before an agency in which the legal rights, duties or privileges of specific parties are required by law to be determined after hearing. §536.010(2) (emphasis added). No such contested case exists here.

Instead, plaintiffs challenge the Housing Authority Defendants decision (i) not to lease vacant Charleston Apartment units and operate them as rental housing for low-income families; (ii) not to maintain the Charleston Apartments in good repair and to permit waste; (iii) to terminate the Section 8 HAP contract without proper notice; (iv) to implement and adopt a plan to demolish the Charleston Apartments; and (v) to refuse to issue enhanced vouchers. (Count VII, ¶103). This agency action is reviewable pursuant to §536.150 R.S. Mo. because there is no other provision for judicial inquiry into or review of such decision. Hence, Plaintiffs have sued for injunctive relief under §536.150 R.S. Mo. on the grounds that Housing Authority Defendants, by the foregoing conduct, have acted unconstitutionally, unlawfully, unreasonably, arbitrarily, capriciously and abused their discretion. *See State ex rel. Mary Smith v. Housing Authority of St. Louis County*, 21 S.W.3d 854 (Mo. App. E.D. 2000).

C. CHA'S MOTION TO DISMISS PLAINTIFFS' DUE PROCESS CLAIM (COUNT V) MUST BE DENIED BOTH RESIDENTS AND PERSONS AWAITING ADMISSION TO CHARLESTON APARTMENTS HAVE A LEGALLY PROTECTABLE INTEREST IN THEIR HOMES AND IN HOUSING AT CHARLESTON APARTMENTS.

Relying on *Hill v. Group Three Hous. Dev. Corp.*, 799 F.2d 385 (8th Cir. 1986), CHA contends that the Plaintiffs have no property interest in continued occupancy and no procedural due process interest in the preservation of Charleston Apartments. CHA's reliance on *Hill* in this case is misplaced and its motion to dismiss is without merit.

Hill involved a Section 8 project owner's rejection of applicants for housing based on adverse credit history, unfavorable references, etc. The Eighth Circuit found no property interest because, even though the applicants were income eligible for Section 8

housing, owners had discretion to deny applicants for such reasons. This discretion made whatever interest the applicants may have had too speculative and uncertain to rise to level of a property interest. *See Hill*, 799 F.2d at 392-3.

Here, there is nothing speculative or uncertain either for current residents or persons on a housing development's waiting list. *Hill* is wholly inapplicable to residents. Residents of Charleston Apartments have a real property interest in the continuing possession of their homes. Under HUD regulations, the tenancies of these residents may only be terminated by CHA for good cause with proper notice. *See* 24 C.F.R. § 880.607(b). Further, even if CHA has validly withdrawn Charleston Apartments from the project-based Section 8 program, residents have the right to remain at Charleston Apartments with "enhanced" tenant-based Section 8 vouchers. *See* FY 2001 *Military Construction* and FY 2000 *Emergency Supplemental Appropriation Act*, Pub. L. No. 106-246, § 2801 (July 13, 2000). RHS regulations guarantee residents the right of continued occupancy and a right to an administrative hearing prior to the termination of their tenancies for cause. *See* 7 C.F.R. Part 1930, Subpart C, Exh. B., ¶ XIV. Without question, residents' interest in continued occupancy and operation of the RHS and Section 8 affordable housing programs constitute legally protectable property interests. *See, e.g.*, *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981); *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774 (11th Cir. 1984).

Regarding "applicants," persons awaiting admission into Charleston Apartments are differently situated than the plaintiffs in *Hill*. Persons on the waiting list are not mere "applicants." Under HUD and RHS regulations, families may only be placed on a waiting list after they have been successfully screened—i.e., determined to be "eligible and …

otherwise acceptable," 24 C.F.R. § 880.603(b)(1),[4] and "eligible," 7 C.F.R. Part 1930, Subpart C., Ex. B., ¶ VI.F.1.c.—by CHA. Having been successfully screened and admitted to CHA's waiting list, persons on this list are entitled to their spot on it.

Persons entitled to participate in a governmental program have a property interest in continued participation that may be infringed upon only in accordance with the procedural Due Process requirements of the federal Constitution. *See Goldberg v. Kelly*, 90 S.Ct. 1011, 1018 (1970).

D. CHA'S MOTIONS TO DISMISS PLAINTIFFS' RHS PROGRAM CLAIMS (COUNTS I & II) MUST BE DENIED BECAUSE CHA IS SUBJECT TO "PREPAYMENT" RESTRICTIONS IN MAKING ITS 231ST LOAN PAYMENT.

In its motions to dismiss, CHA argues that its 231st payment was merely a "payment" and not a "prepayment" that would subject it to 42 U.S.C. § 1472 and RHS regulations. CHA's distinction is without legal basis and contrary to RHS regulations.

RHS regulations define a prepayment as "[a] loan that has been paid by the Borrower in full, before the loan maturity date." 7 C.F.R. § 1965.202. The fact that the Authority has continuously paid installments on the Charleston Apartments loan at an accelerated rate and that current balance on the loan is low is irrelevant to the determination of what constitutes a prepayment. The CHA's 231st payment would cause the loan to be paid in full before the loan's maturity date, which is not until 2031. The final payment is thus a "prepayment" within the meaning of the regulations. CHA, therefore, must comply with all the provisions of RHS regulations governing prepayment before the 231st payment may be made.

[4] This regulation is made applicable to the Section 8 Substantial Rehabilitation Program by 24 CFR § 881.601.

The interpretation of the prepayment requirements CHA argues that this Court should adopt would fatally undercut the practical effect of these requirements. According to CHA's logic, any owner of a Section 515 housing development could withdraw its development from the program regardless of the maturity date of the development's RHS loan in the space of two payments without submitting a prepayment application. All an owner would have to do is to make a large payment in the amount equal to the balance of the RHS loan less the amount of one regular payment. The owner could then make its next scheduled payment, which would be a "final payment" according to CHA, paying the loan in full without submitting a prepayment application to RHS. Under CHA's reasoning, ELIHPA is an effective nullity. Its provisions would be so easy to circumvent, the statute would never be able to preserve affordable housing or to provide any protection against displacement to low income families.

CHA's reliance on the Deed of Trust, which states that CHA is obligated to make payments, is misplaced. *See* Motion to Dismiss at 11. CHA is obligated to make loan payments as scheduled. It is also obligated to comply with RHS loan prepayment requirements. It has not done so. RHS has made no indication that it will take any adverse action against CHA based on its refusal to accept CHA's 231st payment without first complying with prepayment requirements. RHS has authority under the Deed of Trust to reschedule payments on the loan. *See* Plaintiffs' Exh. 3, ¶ 14(a).

E. CHA'S MOTION TO DISMISS PLAINTIFF'S CLAIM PURSUANT TO THE UNIFORM RELOCATION ACT (COUNT VI) MUST BE DENIED BECAUSE CHA RECEIVES FEDERAL FINANCIAL ASSISTANCE

Defendant CHA has moved to dismiss Plaintiff's Uniform Relocation Act (URA), 42 USC §§ 4601, *et seq.*, claim on the ground that CHA does not received the type of federal financial assistance that brings it within the ambit of the URA. CHA Motion to Dismiss, p. 7. Defendant's argument is both legally and factually wrong.

> The URA definition of Federal Financial assistance is broad. It is defined as
>
> > a grant, loan, or contribution provided by the United States, except any Federal guarantee or insurance, any interest reduction payment to an individual in connection with the purchase and occupancy of a residence by that individual, and any annual payment or capital loan to the District of Columbia.

42 USC § 4601. Plaintiffs' complaint alleges that CHA receives federal financial assistance from HUD and USDA for Charleston Apartments in the form, respectively, of Section 8 housing assistance payments and a Section 515 loan. Plaintiff's First Amended Complaint ¶¶ 44-45, 50. Both types of assistance fall squarely within the URA's definition of a "grant, loan or contribution provided by the United States, and do not fit within any of the narrow statutory exceptions. Indeed, USDA's Section 515 regulations expressly require CHA to comply with the URA. 7 C.F.R. § 1944.215 (v) (2000).

While the allegations in plaintiffs' complaint are sufficient to survive defendant's motion to dismiss,[5] the facts before the court fully support plaintiffs' claim that CHA receives federal financial assistance as defined by the URA and contradict defendants' bold and erroneous assertion that "Federal financial assistance is not being provided to

[5]Even if CHA's contention that it receives no federal funds were true, the determination of whether it receives federal funds is factual and thus not appropriate for disposition on a a motion to dismiss pursuant Fed.R.Civ.P.12(b)(6).

CHA." CHA motion to dismiss at p. 7. In fact, with the exception of a small amount of rent collected from its residents, CHA's operates solely on federal assistance.

CHA readily admits that at the time this action was commenced it received regular rental assistance payments pursuant to the Section 8 housing assistance payments (HAP) contract for Charleston Apartments. CHA Answer ¶ 30. The record also clearly discloses that Charleston Apartments is financed with a Section 515 loan from the USDA. Multiple Family Housing Project Budget for fiscal years ending December 1995 through 2000, Plaintiffs' Exhibits 39-45; Loan Resolution, Plaintiffs' Exhibit 2. Moreover, according to CHA's Annual Plan for Fiscal Year 2001, CHA received in excess of $1,196,000 in federal financial assistance to operate its public housing program for 2001. CHA Annual Plan for Fiscal Year 2001, p. 14-15, included as Plaintiffs' Exhibit 18. Interestingly, CHA's Annual Plan does not disclose that CHA is receiving any funding other that federal income. Thus, contrary to its assertion, CHA is, in fact, *exclusively* federally funded. *Id*. Therefore, CHA's motion to dismiss plaintiffs' URA claim should be denied.

F. CHA'S MOTION TO DISMISS PLAINTIFFS' CLAIM FOR INTERFERENCE WITH EFFORTS TO OBTAIN RENT SUBSIDIES (COUNT IV) MUST BE DENIED SINCE 12 U.S.C. § 1715z-1b IS APPLICABLE BY ITS TERMS

CHA motion to dismiss plaintiff's claim that it interfered with plaintiffs' efforts to obtain rent subsidies pursuant to 12 U.S.C.A § 1715z-1b on the ground that Charleston Apartments is not a "multi-family housing project" as defined by that statute is totally without merit.

12 U.S.C.A. § 1715z-1b defines a multifamily housing project as:

> [1] a project which is eligible for assistance as described in section 1715z- 1a(c) of this title or section 1701q of this title, *or [2] a project which receives project-based assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) or* [3] enhanced vouchers under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, the provisions of the Emergency Low Income Housing Preservation Act of 1987, or the Multifamily Assisted Housing Reform and Affordability Act of 1997.

12 USCA § 1715z-1b(a) (bracketed numbers and emphasis added).

Contrary to the plain meaning of the statute, namely that any one of three categories of projects fall within its coverage, the Defendant's erroneously read the statute to require that a single project meet all three requirements before it is categorized as a multifamily housing project within the meaning of the statute. Hence, they erroneously contend that plaintiffs' claim should be dismissed because they did not plead sufficient facts to support the contention that Charleston Apartments is a "multifamily housing project" as defined in the statute.

The defendants' error is obvious from a cursory reading of the statute. The three types of properties that are covered by the statute are clearly defined, and are made distinct by the fact that they are conjoined by an "or." Thus, contrary to defendant's claim, a project need only fall into one of the three categories to be covered by the statute.

Plaintiffs' complaint clearly alleges that Charleston Apartments receives project based assistance under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f). First Amended Complaint ¶ 29-35. Plaintiffs' allegation are therefore sufficient to support the cause of action and defendant's motion to dismiss should be denied.

G. CHA'S MOTION TO DISMISS PLAINTIFFS' 1437f CLAIM TO COMPLY WITH REQUIREMENTS OF THE SECTION 8 PROGRAM (COUNT III) MUST BE DENIED.

Defendant's seek to dismiss Plaintiffs' third claim on the grounds that the Section 8 contract between defendants CHA and HUD has been terminated as a matter of law and that, as a result, Plaintiffs cannot sustain their cause of action. Motion to Dismiss at p.11. Defendant's contention that the Section 8 Contract has been terminated has no legal merit and is factually disputed. Thus, it is not an appropriate subject of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

There is no dispute that at the time this litigation was commenced the Section 8 Housing Assistance Payments (HAP) contract between CHA and HUD was in effect. In their Complaint and in their Trial Brief in Support of Amended Motion for Preliminary Injunctive Relief (Plaintiffs' Trial Brief), Plaintiffs contended that the Section 8 contract could not be terminated without CHA providing a proper notice of termination to both HUD and the tenants and that CHA's notice of termination was defective. Plaintiffs' Trial Brief at p. 12-14. Accordingly, Plaintiffs argued that as a matter of law the contract between CHA and HUD could not have been legally terminated and continues to be in effect. *See 215 Alliance v. Cuomo*, 61 F.Supp.2d 879, 886-887 (D. Minn. 1999) (HUD could not in its discretion waive one year notice requirement and therefore HUD's approval of termination of HAP contract was illegal.)

Moreover, in their motion for temporary relief, Plaintiffs sought a temporary injunction against the termination of the HAP contract. At the hearing on the motion, this Court denied Plaintiffs's motion, in part, upon HUD's representation that it would continue to make housing assistance payments to CHA on behalf of the residents

remaining at Charleston Apartments. CHA, which did not contest HUD's representation or the maintenance of the status quo pending a hearing on a motion for preliminary injunction, now contends, with HUD's support, that the Section 8 HAP contract has been terminated. CHA Motion to Dismiss, p. 11, HUD Trial Brief, p.14. This is despite the fact that CHA and HUD have stipulated to continue to make and receive subsidies for the occupied units at Charleston Apartments. *See* Stipulation of Uncontested Facts at ¶ 32 (Jun. 18, 2001). CHA's contention should not now be allowed to form the basis upon which Plaintiffs' claim is dismissed.[6] Plaintiffs timely challenged the termination of the HAP contract and acquiesced in the continuation of the housing assistance payments pending the court's ruling on their motion for a preliminary injunction. Thus, at worst, the status of the contract remains at issue in this case.

As a matter of law, the HAP contract terms also limit the circumstances under which assistance to residents can be terminated. Under the contract CHA has agreed not to terminate "assistance on behalf of an assisted Family except in accordance with all HUD regulations and other requirements, in effect at the time of termination." HAP Contract ¶ 2.9, Exhibit 4 to Plaintiff's First Amended Complaint. In this case, HUD's requirements include the statutory provisions, regulations and other guides, adopted pursuant to 42 U.S.C § 1437f(c)(8), which prescribe the terms under which a Section 8 contract may be lawfully terminated. Since, as Plaintiffs contend, these conditions have not been met, the contract, according to its terms, may not be terminated.

[6]Not only are these arguments contrary to representations made to this Court, they are inherently inconsistent. HUD has no authority to make housing assistance payments on behalf of the residents of Charleston Apartments without a HAP contract continuing to be in effect.

Lastly, CHA also contends that once the HAP contract has been terminated the Plaintiffs, as a matter of law, cannot maintain their claim that it has an obligation to accept enhanced vouchers. CHA's erroneous contention only serves to highlight its complete lack of understanding of the statutory framework that Congress put in place to protect residents of developments receiving project based Section 8 assistance such as Charleston Apartments. The purpose of enhanced vouchers is to allow residents of projects whose owners have properly terminated their HAP contract to remain in their units. The enhanced voucher provides the residents with a voucher that has a higher value and thus enables the residents to remain in their units and pay rents higher than other vouchers holders can pay. Thus, the only time when enhanced vouchers can be issued is *after* termination of a project based Section 8 contract. Indeed, as 42 U.S.C. § 1437f(t) makes clear, the owner's obligation to accept vouchers only becomes effective upon an "eligibility event" which is defined, in part, as "the termination or expiration of the contract for rental assistance under section 8 of the United States Housing Act of 1937." 42 USC § 1437f(t)(2). Thus, in accordance with the statute, until the Section 8 contracted is properly terminated the obligation to issue enhanced vouchers does not accrue.

For these reasons, defendants' motion to dismiss Plaintiffs' third claim must also be denied.

H. CHA'S MOTION TO DISMISS PLAINTIFFS' CLAIM UNDER THE QUALITY HOUSING AND WORK RESPONSIBILITY ACT OF 1998 (COUNT VIII) MUST BE DENIED BECAUSE CHA HAS A DUTY AFFIRMATIVELY TO FURTHER FAIR HOUSING UNDER THAT IS ENFORCEABLE BY THE PLAINTIFFS.

CHA contends that it has no affirmative duty to further fair housing in its operation of Charleston Apartments because the planning provisions of the Quality Housing and Work Responsibility Act of 1998 do not apply to Charleston Apartments and that the Plaintiffs have no right to enforce these provisions in any case. CHA's position is incorrect. The housing authority has an affirmative fair housing duty that requires it to have in place a means by which to consider the racial and socioeconomic effects of its decisions. This duty is enforceable by the Plaintiffs pursuant to 42 U.S.C. § 1983 and the Missouri Administrative Procedure Act.

In 1998, Congress in the Quality Housing and Work Responsibility Act (QHWRA) required every public housing authority (PHA) to prepare and to submit for HUD approval an "annual public housing agency plan" detailing the housing needs in the public housing authority's jurisdiction and the authority's administration of its programs. 42 U.S.C. § 1437c-1(b). This annual public housing agency plan (PHA plan) is required to include

> [a] statement of the rules, standards, and policies of the public housing agency governing maintenance and management of housing owned, assisted, or operated by the public housing agency … and management of the public housing agency and programs of the public housing agency.

42 U.S.C. § 1437c-1(d)(5). Because Charleston Apartments is housing "owned, assisted, or operated" by CHA it is subject to the CHA's QHWRA-mandated PHA plan. Defendant Page's position, stated in his testimony at the preliminary injunction hearing, that CHA's PHA plan does not apply to Charleston Apartments because it is not part of the federal public housing program is without legal basis.

The QHWRA further requires a PHA to certify that it "will carry out the public housing agency plan in conformity with … the Fair Housing Act … and will

affirmatively further fair housing." *Id.* at § 1437c-1(d)(15). In carrying out this plan in regards to the management of Charleston Apartments, CHA must affirmatively further fair housing.

As explained in Plaintiffs' Trial Brief at 14, CHA's affirmative duty to further fair housing means that it must have in place procedures for evaluating the fair housing implications of its actions and use those procedures to inform the decisions that it makes. CHA "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. U.S. Dept. of Hous. And Urban Dev.*, 436 F.2d 809, 820 (3rd Cir. 1970). CHA has shown no method for gathering such information before it made its decision to vacate Charleston Apartments and remove it from the federal housing programs. CHA's Executive Director Paul Page in his testimony before this Court at the June 18, 2001 preliminary injunction hearing stated that the housing authority did not study the racial effect of its decision. This failure is a violation of CHA's affirmative fair housing duties under the QHWRA.

Congress has specifically allowed §1983 actions under these circumstances—i.e. when private parties challenge a PHA's compliance with PHA plan requirement. The statute provides that HUD is permitted to conduct a paper review of the PHA plans submitted to it, but that such review "shall not preclude … an action regarding such compliance under … 42 U.S.C. 1983." 42 U.S.C. §1437c-1(i)(4)(B).

In addition to a private claim under § 1983, Plaintiffs have a private claim under §536.150 R.S.Mo. against CHA for violation of its affirmative fair housing duties for the reasons stated in B., *supra*.

I. CHA'S MOTION TO DISMISS PLAINTIFFS' DISCRIMINATORY EFFECT CLAIM (COUNT IX) MUST BE DENIED BECAUSE PLAINTIFFS HAVE STATED A VALID CLAIM UNDER THE FAIR HOUSING ACT, TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968.

CHA argues that the Plaintiffs' discriminatory effect claim under Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, must be dismissed in light of *Alexander v. Sandoval*, __ U.S. __, 121 S.Ct. 1511 (2001). In the alternative, it argues that the Plaintiffs have not made allegations sufficient to support a claim of discriminatory effect under Title VIII.

The Plaintiffs do not base their motion for preliminary injunctive relief on their discriminatory effect claims against CHA under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, *et seq*. Plaintiffs discuss their discriminatory effect claims here only in response to CHA's motion to dismiss. Below, we demonstrate that Plaintiffs have made sufficient allegations to withstand CHA's motion to dismiss their Title VIII claims.

i. Standard for Title VIII Claims in the Eighth Circuit: Discriminatory Purpose Is Not Necessary.

The Eighth Circuit Court of Appeals has held that in a case under the Fair Housing Act

> the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. … The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.

U.S. v. City of Black Jack, Mo. ("Black Jack"), 508 F.2d 1179, 1184-5 (8th Cir. 1975). The Court explained:

> Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because… whatever our law was once, … we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id. at 1185 (citing *Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C.1967), *aff'd sub nom. Smuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969) (en banc)).

The Court of Appeals' decision in *Black Jack* was the first in a long series of federal appellate holdings that discriminatory effect without discriminatory purpose may violate the Fair Housing Act. *See, e.g., Langlois v. Abington Housing Authority*, (*"Langlois")* 207 F.3d 43, 51, n.4 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, (*"Huntington")* 844 F.2d 926, 934 (2nd Cir. 1988); *Resident Advisory Board v. Rizzo, ("Rizzo")* 564 F.2d 126, 148 (3rd Cir. 1977); *Betsey v. Turtle Creek Assocs., ("Betsey")* 736 F.2d 983, 988, n.5 (4th Cir. 1984); *Arthur v. City of Toledo, ("Arthur")* 782 F.2d 565, 575 (6th Cir.1986); *Metropolitan Housing. Dev. Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283, 1289–90 (7th Cir. 1977); *Gamble v. City of Escondido, ("Gamble")* 104 F.3d 300 (9th Cir. 1997); *Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, (*"Mountain Side")* 56 F.3d 1243, 1251 (10th Cir. 1995); *Jackson v. Okaloosa County*, (*"Jackson")* 21 F.3d 1531, 1543 (11th Cir. 1994). Every federal appellate court that has considered the issue has held that discriminatory effect alone is sufficient to establish liability under the Fair Housing Act.

ii. Alexander v. Sandoval *Has No Effect on Title VIII Claims.*

CHA relies on *Alexander v. Sandoval ("Sandoval")*, __ U.S. __, 121 S.Ct. 1511 (2001) for its argument that disparate impact is not a sufficient basis for a Fair Housing Act claim. It states in its motion that Sandoval holds that "no individual cause of action exists under the Civil Rights Act of 1968, except for intentional discrimination." *See* CHA Motions to Dismiss at 9. This is a blatantly inaccurate statement of the holding in *Sandoval*.

Sandoval was decided on the basis of Title VI of the Civil Rights of *1964*, *not* the Civil Rights Act of *1968*, as CHA claims in its motion. In *Sandoval*, the Court held that since there is no private cause of action for disparate impact without racially discriminatory motive under Title VI, *see Washington v. Davis*, 426 U.S. 229 (1976), no private cause of action for disparate impact can exist under federal regulations promulgated under Title VI. This is for the reason that only Congress, and not federal agencies, can create private causes of action.

Sandoval did not address Title VII of the Civil Rights Act of 1964, nor did it address Title VIII of the Civil Rights Act of 1968. Congress has permitted a private cause of action for disparate impact in employment under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Fair Housing Act has statutory language exactly similar to Title VII and for this reason has also been interpreted to permit a private cause of action for disparate impact in housing. *See generally Mountain Side*, 56 F.3d at 1251, n.7 (10th Cir. 1995) (citing *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir.1993)).

iii. Elements of a Prima Facie Case of Discriminatory Effect in the Eighth Circuit and the Eastern District of Missouri.

The Plaintiffs have sufficiently stated a claim of discriminatory effect in this case. "The Burden of proof in Title VIII cases is governed by the concept of the 'prima facie case.' " *Black Jack,* 508 F.2d at 1184. This prima facie test is similar to the effects test from Title VII case law. *See In re Malone ("Malone"),* 592 F.Supp. 1135, 1166, n. 21 (E.D.Mo. 1984). Under the effects test, the plaintiff must first establish a prima facie case of discriminatory effect:

> Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.

Black Jack, 508 F.2d at 1185.

The form of discriminatory effect on which Plaintiffs base their Title VIII claim is disparate impact, which involves an policy or practice that has a "disproportionate adverse impact on one race." *See Malone,* 592 F.Supp. at 1166. In the Eighth Circuit and the Eastern District of Missouri, disparate impact, and thus a prima facie case of discriminatory effect, may be shown by establishing either a *numerical* disparity with respect to the persons affected according to race or a *qualitative* disparity in regards to the harm experienced by persons of different races. In both situations, analysis of disparate racial impact is limited to the group actually affected by the defendant's policies or practices, not to the overall composition of a region or larger community. *See Malone, id.* In this case, CHA's policies and practices inflict both a numerical and a qualitative adverse disproportionate impact on African American families.

1. Numerical disparate impact.

Numerical disparate impact occurs when persons of protected classifications make up a greater *number* of the pool of persons adversely affected by a defendant's policy or practice than do persons of other classifications in the affected pool. *See Malone, id.*

Here, the African American residents of Charleston Apartments suffer numerically disparate impact. According to the CHA Minutes, at the time the Defendant chose to remove the development from the federal housing programs for the purpose of demolishing it, Charleston Apartments was home to 47 families. Forty-six of these families were identified as African American. *See* Plaintiffs' Exh. 6. Therefore, focusing on the group of persons to be affected, as required under *Malone*, the African American families of Charleston Apartments suffer disproportionate harm in the form of involuntary displacement from their homes and the guaranteed affordability Charleston Apartments provided at a rate of *46 to 1*.

Another group affected by CHA's decision to demolish Charleston Apartments are families on the waiting list for admission into CHA housing. African American families in this group will be impacted on a numerically disparate basis. CHA appears to maintain a single waiting list for admission into the housing it operates. This list is reported in CHA's annual PHA plan for the fiscal year 2001. According to CHA's plan, a total of 63 families are on CHA's housing waiting list.[7] Of these families, 55 are described by CHA as African American. *See* Plaintiffs' Exh. 18. Therefore, African American families on CHA's housing waiting list will suffer disproportionate harm in the form of lost opportunities for affordable housing at a rate of *55 to 8*.

[7] This figure may be as high as 84 families. *See* I.D, *supra.*

2. Qualitative disparate impact.

Qualitative disparate impact occurs when a defendant's practices cause disproportionately greater harm to people of protected classifications than to other persons in the group affected by a defendant's policy or practice. *See Black Jack*, 508 F.2d at 1186. In *Black Jack*, the Eighth Circuit Court of Appeals overruled the district court's finding that a zoning ordinance restricting the construction of a low-income housing project had no disparate impact because the "ultimate effect of this ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units" — even though fewer African Americans than non-minorities would be eligible for occupancy and the numbers of eligible African Americans and non-minorities were essentially proportional to the composition of the local population. *See also Huntington,* 844 F.2d at 929 (zoning restrictions preventing the construction of a subsidized project where 7% of all the town's families required subsidized housing, while 24% of African American families needed such housing).

Here, the low income families eligible for project-based Section 8 housing in Mississippi County, CHA's jurisdiction, comprise the group affected by CHA's plans to remove Charleston Apartments from the county's supply of affordable housing. CHA's plans will inflict a qualitatively disparate impact on African Americans in this affected group. This is because low income African American households in Mississippi County have a disproportionately greater need for affordable rental housing compared to the needs of the affected population as a whole. The Plaintiffs have alleged that according to

a tabulation of 1990 Census data prepared on behalf of HUD,[8] the most recent year for which such data is available, there are a total of 1,417 low-income renter households in Mississippi County. Of these 1,417 total households, 56% have housing affordability problems, meaning that these households pay more than 30% of their incomes for housing costs. A total of 417, or 29%, of these 1,417 renter households are headed by African Americans. Sixty-nine percent of these African American households pay more than 30% of their incomes for housing costs. In other words, African American renter households in Mississippi County eligible for Section 8 housing have a 23% greater need for affordable housing than do eligible renter households overall.

Plaintiffs' alleged Title VIII violations are more than sufficient to withstand CHA's motion to dismiss.

IV. HUD'S ARGUMENT THAT IT IS IMMUNE FROM SUIT IS WITHOUT MERIT BECAUSE CONGRESS 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. HUD's position is that an injunction preventing CHA from prepaying and opting out of the Section 8 contract "provides the exact same relief" as an injunction against HUD, barring an APA claim against HUD under § 704. HUD's argument fails both because § 704 is inapplicable here and because federal housing statutes provide alternative waivers of sovereign immunity to that in § 702.

[8] *See* Housing Needs Table (Comprehensive Housing Affordability Strategy Table 1C), http://webprod.aspensys.com/housing/chas/state.asp.

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 CHA. Plaintiffs seek to enjoin CHA from prepaying the RHS mortgage and opting out of the Charleston Apartments Section 8 contract, failing to operate Charleston Apartments at full occupancy, demolishing Charleston Apartments, and from undertaking any action that has a racially discriminatory effect or that is contrary to the CHA's affirmative fair housing duties.

Plaintiffs seek to enjoin HUD from failing to renew the Charleston Apartments Section 8 contract until proper notices have been provided and until HUD has properly considered the fair housing implications of its actions. 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 New York City Employees' Retirement System v. S.E.C.*, 45 F.3d 7, 14 (2nd Cir. 1995) (an adequate legal remedy against another defendant is one which provides the "same relief" and "all the relief" sought against the federal agency).

In addition, HUD's involvement is essential if the Charleston Apartments Section 8 contract is to remain intact. An order to CHA to renew the contract 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, HUD's reliance on *American Disabled for Attendant Programs Today v. HUD ("ADAPT")*, 170 F.3d 381 (3rd Cir. 1999) is unavailing. In *ADAPT*, the plaintiffs sought an order that the federal agencies pursue against local defendants the same cause of action which plaintiffs had, or could have, pursued against those defendants. *ADAPT* thus differs 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's reliance on *Heckler v. Chaney*, 105 S.Ct. 1649 (1985) is similarly misplaced. HUD misunderstands the narrow holding in this case as described in V., *infra*.

HUD has also waived sovereign immunity under 42 U.S.C. § 1404a, which states that 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.

V. HUD MUST REQUIRE THAT CHA MAINTAIN FULL OCCUPANCY AT CHARLESTON APARTMENTS

In opposition to plaintiffs claim that HUD has an obligation to force CHA to maintain Charleston Apartments fully occupied, HUD argues, erroneously, that plaintiffs' cannot maintain their claim because there is no express or implied right of action for plaintiffs to enforce 42 U.S.C. § 1437f and its implementing regulations. HUD's contention fails to acknowledge that the plaintiffs have stated a cause of action under the Administrative Procedure Act (APA) and, that agency action contrary to its regulations is reviewable under the APA. Moreover, HUD's argument that an agency's decision not to enforce a mandatory statute or regulation is judicially not reviewable is inconsistent with existing case law.[9]

It is a fundamental axiom of administrative law that administrative agency's actions are generally subject to judicial review under the Administrative Procedures Act (5 U.S.C. §§ 701 *et seq*.). *See, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988) (There is a general presumption that all agency decisions are reviewable under the APA); *see*

[9]HUD raises this last argument in that portion of its brief dealing with sovereign immunity. See HUD's Trial Brief at 16-17. Plaintiffs believe this issue is more appropriately discussed in conjunction with their APA claim and therefore respond to the argument here.

also HUD, *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 395-96 (8th Cir. 1986) (APA allows review of agency decisions).

In the instant case, plaintiffs have stated a cause of action under the Administrative Procedure Act for HUD's failure to enforce its regulations requiring CHA to maintain Charleston Apartments fully occupied. [cite]. HUD conveniently ignores this cause of action and instead proceeds to argue that plaintiffs have no implied private right of action to enforce 42 U.S.C §1437f and 24 C.F.R. §880.504. In support of its contention HUD cites to *Banks v. Dallas Housing Auth.,* 119 F.Supp.2d 636 (N.D.Tex.,2000) and *Perry v. Housing Authority of City of Charleston* 664 F.2d 1210 (4th Cir. 1981). While these cases held that residents of public housing have no implied private right of action, or third party beneficiary right, to enforce statutory obligations against public housing authorities, in neither of these cases was HUD a party and in neither case did the plaintiffs seek review of HUD's actions under the APA. Accordingly, HUD's efforts to undermine plaintiffs APA claims by contending that they do not have an implied private right of action to enforce the statute or that they are seeking to enforce some general constitutional right to decent safe and affordable housing is entirely misplaced.

Plaintiffs do not challenge HUD's contention, made elsewhere in its brief, that under certain limited circumstances agency action is not reviewable "when review is precluded by statute or 'committed to agency discretion by law.'" *Heckler v. Chaney,* 105 S.Ct. 1649 (1985), citations omitted; *see also* 5 U.S.C. Sec. 701(a)(1) and (2). However, contrary to HUD's claim, this case is not one that falls within these limited circumstances.

The statutory language "committed to agency discretion by law" has been narrowly interpreted and applied 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 law that sets clear guidelines for determining when such approval should be given, the *Heckler* exception does not apply at all. *See Heckler,* 105 S.Ct. at 1655, *distinguishing Overton Park, supra.*

Thus, even under *Heckler,* there is a strong presumption of reviewability, one that has operated with "particular vigor" in the area of federally assisted housing. *See 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)[10] ; *Russell v. Landreiu* 621 F.2d 1037, 1041 (9th Cir. 1980). *See Roman v. Korson,* 918 F.Supp. 1108, 1112 (W.D. Mich. 1995) (District court specifically rejected USDA efforts to interpose *Heckler* against a claim that it failed to enforce its regulations and permanently enjoined USDA's failure to enforce its regulatory duties).

[10]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.

In this case there is clear "law to apply." Plaintiffs seek enforcement of a specific and clear regulatory duty set out in 24 C.F.R. § 880.504(a).[11] That regulation provides that "[d]uring the term of the [HAP] Contract, an owner shall make available for occupancy by eligible families the total number of units for which assistance is committed under the Contract." It goes on to state that if HUD makes a determination that an owner is in default under this, or any other provision of the HAP contract, "HUD will notify the owner and the lender of the actions required to be taken to cure the default and of the remedies to be applied by HUD." 24 C.F.R. § 880.506(a). These regulations are clear and specific law to apply and do not vest HUD with discretion whether or not to enforce mandatory language requiring that the total number of units in a HAP contract be available for rent, and to notify the owners and lender (in this case RHS) when a default occurs with respect to the full occupancy requirements.

Roman v. Korson, 918 F.Supp. 1108 (W.D. Mich.1995) is particularly analogues to the instant case. In Roman, the Farmers Home Administration (FmHA)(the predecessor agency to the Rural Housing Service) had knowledge that certain farmers to whom it had made loans charged rent to farmworkers in violation of agency regulations. Under its regulations, FmHA had a regulatory obligation to write to borrowers who breached their no rent obligation and to inform them of their violation as well as of their obligation to roll back the illegally charged rent and to rebate or credit farmworkers the improperly charged rent. When several farmworkers sued the agency to enforce its regulations, the agency interposed *Heckler*, contending that the decision to enforce its

[11]The Supreme Court in *Heckler* recognized that, in addition to statutes, agency regulations may be looked to as the "law to apply." *Heckler* at 1658; *see also Heckler* at 1659 (Brennan, concurring).

regulations was discretionary and beyond the court's review. The District Court disagreed and held that the FmHA regulations in question were adequate "law to apply" and obligated FmHA to act. Accordingly, the court enjoined FmHA from continuing to violate its regulations.

In this case, HUD's duty is identical to that of FmHA. Whenever it has knowledge of a violation of the HAP contract it has an affirmative regulatory duty to advise the owner and its lender of the violation and to insist upon compliance with the HAP's full occupancy obligations. Here as in *Roman*, there is law to apply and HUD's failure to act is not within the agency's discretion. For these reasons, HUD has clear regulatory obligations that are reviewable pursuant to the APA.[12]

VI. HUD AND CHA MAY NOT TERMINATE THE HAP CONTRACT FOR CHARLESTON APARTMENTS BECAUSE PROPER LEGAL NOTICE HAS NOT BEEN PROVIDED

An owner who seeks to "opt out" of the Section 8 program must provide residents a one year notice of intent to terminate the contract. The content of that notice is specified by statute and by HUD regulations and guidance issued pursuant to the statute. Specifically, the statute provides:

> Not less than one year before termination of any contract under which assistance payments are received 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 . . .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

[12]CHA has independent obligations to comply with HUD regulations which are not effected by HUD's argument. See Plaintiff's Trial Brief at p. 11-12.

currently reside.

42 U.S.C. § 1437f(c)(8)(A). HUD's written guidance provides that HUD project managers "must review all Tenant Notification letter to ensure that they are consistent with the new FY 2000 law. If the letter is not in compliance with the new law then it should be returned to the Owner for corrections." Housing Notice 99-36, ¶ XVI-C, included as an attachment to HUD's Trial Brief.[13] Moreover, the same guidance provides that the one year advance notice "clock does not start until the corrected letter is provided to HUD and the tenants" and that short-term interim renewal contracts must be issued to ensure that a full and proper one year notice is given. *Id*.

In the instant case CHA did not provide HUD or the residents the proper notice and HUD's Trial Brief acknowledges as much. HUD Trial Brief, p.18-20. Contrary to statute, the notice to the residents of Charleston Apartments stated that it is not is likely that they will be able to remain in the unit in which they currently reside, thus causing many of the residents of Charleston Apartments to fear for their future security of tenure and to relocate to other housing. In an effort to circumvent the statute and its own guidance, HUD maintains that it has no authority to disapprove an "opt out" notice and that HUD's interpretation of the notice statute should be given deference. Neither argument has any merit.

As clearly set out in the HUD guidance, the review of the notice is mandatory for HUD staff and failure to comply with notice requirements must result in HUD's denial of termination of the contract until proper notice has been given and one year from the date of the notice has expired. As the court in *215 Alliance v. Cuomo*, 61 F.Supp.2d 879 (D.

[13] These requirements are consistent with HUD's guidance in the Section 8 Renewal Policy, §§ 8-1 and 11-4 ¶ D, issued January 2001, attached to HUD's Trial Brief.

Minn. 1999), held, the notice requirement "was not something HUD could, in its discretion, waive." *Id.* at 887.

Notwithstanding, HUD contends that its interpretation of the statute, namely, that it can authorize modifications of the statutory notice requirements, must be given deference. Plaintiffs do not disagree with the general proposition set out by HUD that when a statute is silent or ambiguous deference to an agency's interpretation is appropriate. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). However, in the instant case, neither the statute nor HUD's guidance is silent or ambiguous. The statute specifies the notice that must be given and HUD has no legal authority to waive these mandatory notice requirements. *215 Alliance v. Cuomo*, 61 F.Supp.2d 879, 887.

Moreover, HUD's reliance on more recent Section 8 Renewal Policy, Guidance for the Renewal of Project-Based Section 8 Contracts ("Section 8 Guide"), which was not in effect at the time CHA issued its notice, does not bolster its argument.[14] To the contrary, the language of the Section 8 Guide actually helps Plaintiffs' case, and does not support the agency's claim for deference. The current Section 8 Guide requires the notice to include a statement that it will "honor the residents' right to remain and will continually renew leases as long as the property is offered as rental housing." Section 8 Guide, §§ 1-4, 11-4. CHA's notices, to the contrary, flatly state that residents will "not likely" be allowed to remain in their homes, thereby failing to represent that it would honor the residents' right to remain in their units or CHA's obligation to continue to

[14]Technically, before this court may even look to HUD's Section 8 Guide, the Court must first determine that it is applicable to the CHA notices dated April 20, 2000 and December 20, 2000, prior to the issuance of the January 2001 Section 8 Guide.

renew leases. If HUD applied the requirements of the Section 8 Guide, it would be forced to reject CHA's notices, as its requirements are even more stringent than the older requirements in Housing Notice 99-36.

The fact that CHA did not intend to continue to operate the housing as rental housing does not provide HUD or CHA refuge from the Section 8 Guide. First, CHA has now changed its position and is ready to continue to operate at least parts of Charleston Apartments as rental housing. Thus the Section 8 Guide is fully applicable as to those residents. Second, CHA's intentions, in light of the USDA's statutory prepayment restrictions, were never particularly relevant. Before CHA could prepay its USDA loan and proceed to demolish the housing, it was and continues to be obligated to offer the housing for sale to a nonprofit or public entity that would continue to operate the housing as affordable housing and thereby protect the current residents. 42 U.S.C. § 1472(c), *see* Plaintiffs' Trial Brief p. 9-11. In other words, CHA's notice was more than merely technically deficient, it failed to inform residents that they had and have a real opportunity to remain in the housing with HUD assistance. Instead, as is evident, most of the Charleston Apartment residents, relying on the inaccurate notice information quickly vacated Charleston Apartments whenever the opportunity for other affordable housing presented itself. HUD's actions in approving the notice have had an effect on whether the project may be preserved as affordable housing. HUD took action to approve the notice and purportedly permit termination of the contract. These actions are in clear violation of the statute, HUD Notice 99-36 and the Section 8 Guide.

VII. HUD'S DECISIONS IN THIS CASE, INCLUDING ITS DECISION TO APPROVE CHA'S SECTION 8 OPT-OUT NOTICE, WERE SUBJECT TO

HUD'S AFFIRMATIVE FAIR HOUSING DUTIES UNDER 42 U.S.C. § 3608

HUD argues that its duty to affirmatively further fair housing does not extend to its decision to approve CHA's Section 8 opt-out notice. HUD's position is that it was required to approve the Owners' opt-out under 42 U.S.C. § 1437f(c)(8) and therefore "had no authority or right to consider other factors or impose other conditions in reviewing this notice." HUD's Trial Brief at 22.

The statute provides no such shield for HUD because HUD's approval of the opt-out were not dictated by 42 U.S.C. § 1437f(c)(8). Rather, this statute required HUD to *reject* the opt-out and prepayment for non-compliance with federal notice requirements. HUD's approval is contrary to statutory requirements and an abuse of HUD's discretion. *See 215 Alliance v. Cuomo*, 61 F.Supp.2d. 879, 887 (D.Minn. 1999). An abuse of discretion is an exercise of discretion and therefore triggers HUD's affirmative fair housing duties.

HUD cannot administer its programs as if the Fair Housing Act did not exist. 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 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).

In this case, HUD has approved a course of action that will result in the loss of dozens of subsidized homes. Even though the Charleston Apartments site was originally selected in accordance with Section 8 Substantial Rehabilitation "[s]ite and neighborhood standards" intended to advance civil rights objectives, HUD has performed no examination of the racial and socioeconomic effects of its decision to approve the CHA's deficient opt-out notice. *See* 24 C.F.R. § 881.206 (1981) (requiring that a Section Substantial Rehabilitation development site "[b]e suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968 [the Fair Housing Act], Executive Order 11063, and HUD regulations issued pursuant thereto.") Indeed, HUD has in place no institutionalized method for gathering the racial and socioeconomic information necessary to perform such an analysis. In its Trial Brief at 19, HUD points its recently issued *Section Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, which is supposed to "provid[e] comprehensive guidance" for the renewal of expiring properties, and the earlier administrative Notice 99-36. Neither of these documents includes a description of any fair housing analysis performed by HUD in implementing its policies on expiring affordable rental properties.

In addition, HUD's Factual Background discussion in its Trial Brief at 6-9 shows no indication that it performed any fair housing analysis in its decision to allow CHA to operate Charleston Apartments at less than full occupancy. This discussion further describes no steps taken by HUD to encourage CHA to keep Charleston Apartments in

the Section 8 program despite the fact that HUD knew or should have known that development was selected for participation in the program to advance civil rights objectives. If the Charleston Apartments' entry into the Section 8 program was expected to have fair housing effects, the development's exit from the program, should be expected to have fair housing effects — especially where the development's owner has violated federal law and program requirements.

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*.

VIII. CONCLUSION

For the foregoing reasons, CHA's motions to dismiss must be denied and the Plaintiffs should be granted preliminary injunctive relief.

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