

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIGHTON VILLAGE NOMINEE TRUST,)
c/o SENTRY PROPERTY MANAGEMENT)
CORP.,)
Plaintiff,)

v.)

ZYMA MALYSHEV, ITA SCHEGOLEV,)
LIPA SMOLYAR, SEMYON CHARNEY,)
SHEILA DATZ, LEV UMANSKY,)
NIKOLAY VIRINE, LEV FILYURIN,)
LAZAR MERLIS, LORRAINE MOONEY,)
LYUBOV SCHMIDT, SEMYON SHUSTER,)
LEONID VANINOV, SOLOMON VIKTOR, and)
NAUM MANDEL,)

Defendants and Third-Party Plaintiffs,)

v.)

MEL MARTINEZ, in his capacity as)
SECRETARY OF THE UNITED STATES)
DEPARTMENT OF HOUSING AND URBAN)
DEVELOPMENT,)

Third-Party Defendant.)

C.A. No. 00-12311-GAO

**THIRD-PARTY DEFENDANT'S REPLY TO MEMORANDUM
IN FURTHER SUPPORT OF HUD'S MOTION FOR SUMMARY JUDGMENT**

Background

Defendant Mel Martinez, in his official capacity as Secretary of the United States Department of Housing and Urban Development ("HUD"), by his attorney Michael J. Sullivan, United States Attorney for the District of Massachusetts, respectfully submits this Reply Memorandum of Law in further support of his Motion for Summary Judgment. The third-party plaintiffs seek to secure benefits and protections they believe they are



entitled to and claim have been denied by HUD. Plaintiffs have filed a Motion for Partial Summary Judgment against HUD, limited to their claims that HUD: 1) improperly approved the prepayment of a HUD-held mortgage on the property in violation of Section 250(a) of the National Housing Act; and 2) improperly agreed to the termination of a Housing Assistance Payments (“HAP”) Contract between HUD and the owner in violation of 42 U.S.C. § 1437f. In the third-party plaintiffs’ estimation, *but for* the alleged improperly-approved prepayment of the HUD-held mortgage and termination of the HAP contract, the third-party plaintiffs would still be receiving project-based Section 8 assistance (see: Third-party Plaintiffs’ Opposition Memo at p. 7). This erroneous assumption pervades the third-party plaintiffs’ arguments, and it forms the premise of their demand for relief. However, the Regulatory Agreement for the project does not mandate solely project-based Section 8 assistance throughout the term of the original 40-year mortgage. HUD cannot mandate that an owner renew a HAP contract once it expires, and even *if* Section 250(a) were applicable to the Brighton Village project the 1986 prepayment could still have been allowed. These factors taken individually or together still result in the third-party plaintiffs receiving tenant-based Section 8 assistance.

ARGUMENT

1. Tenant-Based Assistance Was Not Guaranteed Until 2020

Third-party plaintiffs contend throughout their Opposition to HUD's Summary Judgment Motion that without the prepayment of the HUD-held mortgage the Brighton Village project would have had project-based assistance until 2020 (see: Third-party Plaintiffs' Opposition Memo at p. 4). However, even if the prepayment had not occurred, the Regulatory Agreement appended to the Brighton Village mortgage (see: Administrative Record Tab 8) stipulated that as long as the mortgage covering the project was insured or held by HUD, the owner had to accept any offer to renew the HAP contract, *or* an offer by the Secretary to provide *any other* rental housing assistance, in lieu of Housing Assistance Payments. As such, if the prepayment had not occurred at the expiration of the HAP contract in 1995, although the owner of Brighton Village was mandated to accept any offer to renew the HAP contract, HUD in turn was not obligated to offer only project-based Section 8 assistance. Thus, there was never any obligation that project-based Section 8 assistance would be provided for the Brighton Village project until 2020 -- but only that some form of rental housing assistance was provided by HUD (see: Administrative Record Tab 8).

Even if the owner of Brighton Village had accepted the offer of a new HAP contract in 1995 for a four-year term (see: Administrative Record Tab 22), by 1999 HUD's authority to execute project-based assistance was pursuant to 524(a)(1) of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1998 Pub. L. No. 105-65, § 524(a), 111 Stat. 1344, 1408 (1997). Section 524(a)(1) granted HUD broad authority to provide assistance "in

accordance with terms and conditions prescribed by the Secretary.” The authority provided to HUD via Section 524(a)(1) may very well have led to a contract undesirable to the owner of Brighton Village which would have resulted in a conversion to tenant-based vouchers for the third-party plaintiffs. Furthermore, Congress enacted Section 524 of the Multifamily Assisted Housing Reform and Affordability Act (MAHRA), 113 Stat 1110-1116 (codified at 42 U.S.C. §1437f), as the mechanism through which HUD could enter into project-based housing assistance payment (HAP) contracts when current contracts came to the end of their term by the year 2000. This statutory scheme authorized HUD to enter into a new HAP contract *only when* an owner with an expiring contract requested HUD to do so.¹ In fact, if the owner does not request a new HAP contract, Section 524(d)(1) mandates conversion to the tenant-based HAP contracts.²

2. HUD Cannot Mandate a HAP Contract Renewal

Third-party plaintiffs also contend that in 1995 as the expiration date of the owner’s HAP contract drew near HUD failed to offer the owner the proper incentives to remain in the project-based Section 8 program (see: Third-party Plaintiffs’ Opposition at p.14). The owners were offered a new HAP contract in 1995 with contract rents at the

¹ Section 524(a)(1): Subject to paragraph (2), upon termination or expiration of a contract for project-based assistance under section 8 for a multifamily housing project (and notwithstanding section 8(v) of the United States Housing Act of 1937 for loan management assistance), the Secretary shall, at the request of the owner of a project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project. The assistance shall be under a contract having such terms and conditions as the Secretary considers appropriate, subject to the requirements of this section. This section shall not require contract renewal for a project that is eligible under this subtitle for a mortgage restructuring and rental assistance sufficiency plan, if there is no approved plan for the project and the Secretary determines that such an approved plan is necessary.

²Section 524(d)(1)--the Secretary shall make enhanced voucher assistance under section 9(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who upon the date of such expiration, is residing in an assisted dwelling unit in the covered project

level established by the local Public Housing Authority (“PHA”) at the time of the extension (see: Administrative Record Tab 17). However, the owner made a request for rents above the established contract level and at this point HUD requested additional information in the form of a budget in order to process the request (see: Administrative Record Tab 19). Once notified of the need for additional information, the owner requested that the tenants be given Section 8 vouchers at the expiration of the HAP contract in August 1995 (see: Administrative Record Tab 20). Third-party plaintiffs seem to believe that the incentives that HUD had to offer the owner to remain in the project-based Section 8 program were anything the owner requested without any justification. In fact, Brighton Village was purchased under the Property Disposition program (see: Administrative Record Tab 1) and specific procedures were in effect in 1995 for Property Disposition Section 8 contract renewals (see: Administrative Record Tab 32). The policy and procedure for handling Property Disposition Section 8 contracts was followed by HUD to the letter. The only “incentives” or options that could be offered to project owners such as the Brighton Village property were: (1) accepting an extension of the HAP contract at contract rents in effect at the time of the extension; or (2) the owner submitting documentation supporting the need for increases in contract rents. HUD was authorized to request the documentation via the Property Disposition Section 8 Contract Renewals memorandum, as well as HUD Handbook 4350.1, Rev-1, Chapter 7—Multifamily Asset Management and Project Servicing. The owner was specifically directed to HUD Handbook 4350.1 for guidance on the procedure to follow in submitting information related to a rent increase (see: Administrative Record Tab 19). The owner replied to this request by ceasing his participation in project-based Section 8

(see: Administrative Record Tab 20). The end of project-based assistance at Brighton Village was not the result of HUD failing to offer the owner enough incentives to continue participating in the program. To the contrary, the owner was offered what HUD was authorized to proffer, but the owner lacked the commitment to stay in the program. Once an owner declines the offer to remain in the program, the Property Disposition Section 8 Contract Renewals memorandum instructs HUD staff handling the contract renewal to close out the contract and issue tenant-based vouchers. HUD does not have the legal authority to compel an unwilling owner to renew a HAP contract or somehow to unilaterally prevent the contract from expiring.

3. Application of Section 250(a) Does Not Prohibit Prepayment

Third-party plaintiffs also assume not only that Section 250(a) of the National Housing Act, as amended, 12 U.S.C. §1715z-15(a), applied to the Brighton Village project but that its application would have resulted in no prepayment of the HUD-held mortgage. Even if the Section 250(a) were applied to the Brighton Village project, the prepayment could still have been approved by HUD. As a result, at the expiration of the 1995 HAP contract, the owners would have been offered a project-based Section 8 contract *and could still* have chosen to cease participation in the project-based Section 8 program -- resulting in the third-party plaintiffs' present status of receiving tenant based assistance. In essence, what this reveals is that the third-party plaintiffs' "but for" formulation—*i.e.*, but for HUD's allegedly illegal actions, third-party plaintiffs would still have project-based Section 8 assistance—is mistaken. The third-party plaintiffs' are seeking redress, not for an alleged harm done them by HUD, but, rather, to satisfy their erroneous sense of entitlement to a particular form of housing assistance—project-based

Section 8—that was never assured to be in place past the 1995 expiration of the HAP contract (even if HUD followed the statutes third-party plaintiffs' allege have been violated).

CONCLUSION

WHEREFORE, based upon the arguments and authorities submitted in HUD'S Motion for Summary Judgment with Supporting Memorandum of Law, and in this Reply, HUD respectfully requests this Court to dismiss the third-party plaintiffs' Complaint.

By his Attorney,

Michael J. Sullivan,
United States Attorney



Rayford A. Farquhar
Assistant U.S. Attorney
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3284

Of Counsel,

CAROLE W. WILSON
Associate General Counsel for Litigation

ANGELO AIOSA
Assistant General Counsel

STACEY E. SINGLETON
Trial Attorney


U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, D.C. 20410
(202) 708-0300

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
November 20, 2003

I, Rayford A. Farquhar, Assistant U.S. Attorney, do hereby certify that I have served a copy of the foregoing upon counsel of record, Ann Jochnick, Greater Boston Legal Services, 197 Friend Street, Boston, MA 02114.


Rayford A. Farquhar
Assistant U.S. Attorney