IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MILDRED TAYLOR, JUANITA OLIVAS, RAMSAY DECKER III, NORMA FRY, ROBERT VIGUE, MARTHA HILSTAD, and BEATRICE MORGAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MEL MARTINEZ, in his official capacity as Secretary of the Department of Housing and Urban Development; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendants.

Civ. No. 02-1120-AA

OPINION AND ORDER

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AIKEN, Judge:

On August 16, 2002, plaintiffs filed a class action complaint alleging violations of the United States Housing Act of 1937, 42 U.S.C. § 1437 et seq., and the Fair Housing Act (as codified under Title VII of the Civil Rights Act of 1968), 42 U.S.C. § 3601 et seq., against the United States Department of Housing and Urban Development (HUD) and its Secretary. Plaintiffs allege that housing subsidies to which they were entitled were less than the amount mandated by federal law, thus resulting in plaintiffs paying excessive rent. Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706, plaintiffs seek a declaration that HUD's policies for calculating the amount of the subsidies were unlawful and an injunction that requires HUD to reimburse plaintiffs for the unlawfully withheld subsidies. Defendants move to dismiss plaintiff's Complaint on grounds that sovereign immunity bars the relief sought, and that plaintiffs fail to state a claim upon which rel ef may be granted. Defendants' motion is granted, in part.

STATUTORY AND REGULATORY BACKGROUND

In the 1950s and 1960s, Congress enacted legislation to fund low-income housing projects. Under Section 221(d)(3) of the Housing Act, housing project owners obtained HUD-insured mortgages and in most cases signed a deed of trust with a private lending institution. Owners and developers of housing projects received below-market interest rates. 12 U.S.C. § 1715*l*(d)(3). In exchange for the HUD-insured mortgage, the owner entered into a "regulatory agreement" with HUD which included certain "affordability restrictions," including limits on tenant income levels, rental rates, and the rate of return.

Under the Rental Supplement program, HUD provided rental assistance to owners of Section 221(d)(3) housing. 12 U.S.C. § 1701s. Project

owners with Rental Supplements contracts generally could not prepay their HUD-insured mortgage for twenty years without HUD approval. By prepaying the mortgage, a project owner could terminate the affordability restrictions. Many Section 221(d)(3) owners subsequently converted their Rental Supplement contract to the Section 8 Loan Management Set-Aside Program. 24 C.F.R. Part 886, Subpt. A. Under the Set-Aside program, HUD directly paid project owners the difference between the actual rental rate, i.e., the "contract rent" and the tenant's share of the rent. 24 C.F.R. § 866.109(a). This program is project-based rather than tenant-based, meaning that the subsidy funds vouchers for qualified housing projects rather than for individual tenants.

The Section 8 Moderate Rehabilitation Program was enacted as part of the Housing Act of 1937. See 42 U.S.C. § 1437f. Unlike the Loan Set Aside Program which HUD administers directly, the Section 8 tenant-based subsidies are administered through local public housing authorities (PHAs). HUD provides the funding and enters into annual contributions contracts with PHAs to fund a specified number of Section 8 vouchers for individual tenants. 42 U.S.C. § 1437f(b).

To participate in the Section 8 tenant-based program, an eligible family submits an application to the PHA. The PHA awards the subsidies, in the form of vouchers, as they become available. If the tenant finds an eligible dwelling unit, the PHA enters into a Housing Assistance Payment contract with the landlord. The landlord then receives a monthly voucher from the PHA for a portion of the tenant's contract rent. Contract rent is calculated in accordance with HUD regulations. So long as the rent does not exceed the payment standard, the tenant's contribution is the greatest of: 1) thirty percent of the tenant's

monthly adjusted income; 2) ten percent of the monthly income, or 3) the designated amount of housing welfare benefits received by the tenant. 42 U.S.C. § 1437f(o)(2)(A). The PHA then pays the landlord the difference between the monthly rent and the tenant's contribution.

In 1996, Congress enacted the Housing Opportunity Program Extension Act, Pub. L. 104-120, 110 Stat. 834. This act allowed Section 221(d)(3) project owners to prepay their mortgages without HUD approval, as long as the owner agreed to forbear rent increases for 60 days after the prepayment was effective and to provide notice to residents who could be affected by rent increases.

In the late 1990s, various appropriation acts enabled PHAs to make "enhanced" Section 8 subsidies to owners who had prepaid Section 221(d)(3) mortgages. See Pub. L. 104-134, § 101(e), 110 Stat. 1321 (1996); Pub. L. 104-204, Title II, 110 Stat. 2883-85 (1996); Pub. L. 106-65, 111 Stat. 1351 (1997); Pub. L. 105-276, 112 Stat. 2469 (1998). The enhanced Section 8 vouchers were intended to offset rent increases occurring within one year after mortgage prepayment, if the increase resulted in a tenant paying in excess of 30 percent of monthly adjusted income. These appropriation acts also provided that if the contract rent exceeded the payment standard by which the amounts of enhanced vouchers were calculated, the actual rent was deemed to be the applicable standard.

Under HUD's interpretation of these acts, adjustments to the payment standard were limited to the owner's first rent increase made within one year after mortgage prepayment. In other words, the first rent increase following prepayment of the mortgage became the voucher payment standard which determined the amount of subsidy paid to a project owner on behalf of the tenant. However, the payment standard

and the amount of the enhanced vouchers would not be adjusted to offset further rent increases. Notice PIH 98-19 (Apr. 3, 1998). In such situations, HUD determined that "the family must decide whether to move to a less expensive unit or pay for the increase in rent out of pocket." Id. at p. 17; see also Notice PIH 99-16 (Mar. 12, 1999).

On October 20, 1999, Congress enacted the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act, which provided permanent statutory authority for enhanced vouchers to tenants impacted by mortgage prepayments. Pub. L. 106-74, § 538, 113 Stat. 1122 (1999). This act made enhanced payment standards applicable to all rent increases implemented after mortgage prepayment. Further, the Act reiterated that if the rent exceeds the applicable payment standard, the voucher payments must be calculated using a payment standard that is equal to the actual rent of the dwelling unit. 42 U.S.C. § 1437f(t)(1)(B).

To implement the Act, HUD directed the PHAs to make the necessary adjustments to the payment standard as of the first regular annual recertification date for each family rather than as of the effective date of the Act. Notice PIH 2000-9, pp. 35-36 (Mar. 7, 2000). HUD subsequently directed that PHAs use the actual rent amount to calculate the enhanced voucher amount. Notice PTH 2001-41, pp. 34-35 (Nov. 14, 2001).

FACTUAL ALLEGATIONS

Plaintiffs Mildred Taylor, Robert Vigue and Beatrice Morgan are current tenants of Washington Plaza Apartments in Portland, Oregon, and plaintiff Ramsay Decker is a former tenant at Washington Plaza. Plaintiffs Juanita Olivas, Norma Fry and Martha Hilstad are current tenants of Park Genesee Apartments in San Diego, California.

Until March 7, 1997, Washington Plaza was financed through a HUD-insured mortgage bearing market interest rate under Section 221(d)(3). Rentals were made available to low and moderate-income tenants and required HUD-approved rents that were substantially below market rates. The Washington Plaza project received assistance under a Rent Supplement contract that was later converted to a project-based contract under the Section 8 Loan Management Set Aside program. All 75 housing units at Washington Plaza were covered under the Section 8 contract.

In March 1997, the owner of Washington Plaza prepaid the Section 221(d)(3) mortgage, eliminating restrictions for low andmoderate-income occupancy and permitting the owner to increase each tenant's rent to market rates upon expiration of the Section 8 contract. The project-based Section 8 contract for Washington Plaza expired in August 1997 and was not renewed by the owner and rents were subsequently raised.

The Housing Authority of Portland, a PHA, issued enhanced tenant-based vouchers to residents of Washington Plaza who had lived in the building before the prepayment of the Section 221(d)(3) mortgage and the expiration of the Section 8 contract. Plaintiffs allege that from January 1999 through August 2000, HUD policies prevented additional rent and utility increases at Washington Park Plaza to be deemed the applicable payment standard. As a result, plaintiffs Taylor, Decker, Morgan, and Vigue were required to pay the rent and utility increases in excess of 30 percent of their income.

Until December 18, 1996, Park Genesee was financed through a HUD-insured mortgage bearing market interest rate under Section 221(d)(3). Like Washington Park Plaza, rentals were made available to low and moderate-income tenants and required HUD-approved rents that were substantially below market rates. The Park Genesee project received

assistance under a Rent Supplement contract that was converted to a contract under the Section 8 Loan Management Set Aside program. All 170 housing units at Park Genesee were covered under the Section 8 contract.

In December 1996, the owner of Park Genesee prepaid the Section 221(d)(3) mortgage, eliminating the restrictions for low and moderate-income occupancy and allowing the owner to increase each tenant's rent to market rates upon expiration of the Section 8 contract. The project-based Section 8 contract for Park Genesee expired in August 1997 and was not renewed by the owner.

On September 1, 1997, the San Diego Housing Commission issued enhanced tenant-based vouchers to residents of Park Genesee who had lived there before the prepayment of the Section 221(d) (3) mortgage and the expiration of the Section 8 contract. Plaintiffs allege that on September 1, 1333, the Park Genesee owner raised the rent in excess of the monthly voucher payment standard by $117. As a result of HUD policies preventing the rent increase to be deemed the payment standard, Plaintiffs Olivas, Fry, and Hilstad were required to pay $117 per month in addition to their contribution equaling 30% of their monthly income.

Plaintiffs seek a declaration that HUD's policies violated federal law. Plaintiffs claim that as a result of HUD policies preventing the gross rent increases from being considered the payment standard, their rent was not fully subsidized as required by federal. Plaintiffs also seek injunctive relief requiring HUD to identify each class member whose subsidy was unlawfully withheld, locate and notify each class member of his or her right to reimbursement, and reimburse each class member in the amount of the unlawfully withheld subsidy.

DISCUSSION

Defendants move to dismiss on the ground that the APA's waiver of

sovereign immunity is limited to actions "seeking relief other than money damages." See 5 U.S.C. § 702. Defendants emphasize that plaintiffs do not challenge the current amounts of their enhanced vouchers, but that plaintiffs seek reimbursement for previously inadequate voucher payments. Thus, defendants argue that plaintiffs essentially seek money damages to compensate them for the excess rent they paid. As such, defendant argues plaintiff's claims are barred by sovereign immunity.[1]

In determining what constitutes "money damages" under § 702, the Supreme Court has held a plaintiff may recover only "specific relief" in the form of a statutory or contractual entitlement rather than "substitute relief" in the form of money damages. See Deoartment of Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999); Bowen v. Massachusetts, 487 U.S. 879, 895 (1988).

> [T]he term 'money damages' . . . we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a specific loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.

Bowen, 487 U.S. at 895 (internal quotation marks and citations omitted).

In Bowen, the State of Massachusetts challenged a final order of the Secretary of Health and Human Services which issued a ruling of

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[1]Defendants also argue that plaintiff cannot rely on 42 U.S.C. § 1404a to establish a waiver of sovereign immunity. This section provides that HUD "may sue or be sued only respect to its functions under this chapter, and sections 1501 to 1505 of this title." 42 U.S.C. § 1404a. Section 1404a has been interpreted to waive sovereign immunity in suits based on HUD's functions under the Housing Act of 1937, 42 U.S.C. § 1437, et seq. United States v. Adams, 634 F.2d 1261 (10th Cir. 1980). Here, plaintiffs' allegations pertain to HUD's functions under the Housing Act. However, defendants contend and plaintiffs concede that plaintiffs enjoy no private cause of action under the Housing Act or under Title VII with respect to their Fair Housing Act claim. Therefore plaintiffs must seek recovery pursuant to the APA. See Plaintiff's Response to Defendant's Motion to Dismiss, p. 21.

disallowance and refused to reimburse the State for certain Medicaid expenditures. The State sought declaratory and injunctive relief, including reimbursement for the expenditures. Bowen, 487 U.S. at 888-89. The district court set aside the Secretary's decision of disallowance and the First Circuit affirmed. In upholding the decision, the Supreme Court explained that the district court did not award money damages, but rather an "adjustment . . . in the size of the federal grant payable to the State." Id. at 893. Therefore, the Court found that the State's suit did not seek "money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [sought] to enforce the statutory mandate itself, which happens to be one for the payment of money." Id. at 900. Even though the ruling would ultimately result in reimbursement for the state, the Court reasoned that this result was "a mere by-product" of "reviewing the Secretary's interpretation of federal law." Id. at 910.

In Blue Fox, a contractor defaulted on a contract with a subcontractor to pay for work performed on an Army project. 525 U.S. at 257-58. The subcontractor sought to enforce an equitable lien against the Army to recover the amount owed by the contractor. Id. at 258. The Supreme Court found that the equitable lien constituted "a claim for money damages; its goal is to seize or attach money in the hands of the Government as compensation for the loss resulting from the default of the prime contractor." Id. at 264. Accordingly, the Court held that the subcontractor's attempt to enforce an equitable lien "falls outside of § 702's waiver of sovereign immunity." Id.

Defendants contend that plaintiffs' claims do not seek specific relief for which they were originally entitled. Defendants argue that, unlike Bowen, plaintiffs do not seek to enforce a statutory or

regulatory provision which mandates the payment of money. Rather, like Blue Fox, defendants argue that plaintiffs seek reimbursement to compensate them for out-of-pocket rental expenses incurred as a result of HUD's unlawful payment standard policy. Defendants maintain that the most plaintiffs **could claim entitlement to is increased voucher payments** from the PHAs to their landlords. Thus, defendants argue that the monetary reimbursement plaintiffs seek from HUD is more akin to money damages to substitute for their specific loss.'

In response, plaintiffs argue that defendants' motion to dismiss should be denied solely by fact that they seek a declaratory judgment authorized by the APA. Plaintiffs emphasize that a declaratory judgment does not implicate sovereign immunity and suggest that if the court finds HUD's actions violate the APA, the court may then fashion whatever relief it finds appropriate. Plaintiffs suggest that "rather than order HUD to reimburse plaintiffs for illegally withheld enhanced voucher subsidies, the court could order HUD to issue directives to all affected PHAs to provide such reimbursement from funds under their control and to monitor compliance with this directive." Plaintiff's Memorandum in

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'Defendants rely upon the Ninth Circuit's ruling in Cal-Almond, Inc. v. Department of Agriculture, 67 F.3d 874 (9th Cir. 1995), which held that sovereign immunity barred a claim brought by almond handlers against the USDA. **The handlers sought reimbursement for monies paid for** third-party advertising under a USDA marketing order that was found to violate the handlers' First Amendment rights. The Ninth Circuit found that the relief sought constituted money damages and could not be recovered under the APA. Cal-Almond, 67 F.3d at 878-79.

However, the Supreme Court vacated this decision and remanded the case back to the Ninth Circuit. Department of Agriculture v. Cal-Almond, Inc., 521 U.S. 1113 (1997). On remand, the Ninth Circuit found that the USDA marketing order did not violate the handlers' First Amendment rights and did not revisit the issue of whether sovereign immunity barred the relief sought. Cal-Almond Inc. v. U.S. Dept. of Agr., 192 F.3d 1272 (9th Cir. 1999). Even though the Ninth Circuit's ruling on the sovereign immunity issue was not overruled explicitly, the ruling was vacated and cannot be considered binding precedent.

Opposition to Defendant's Motion to Dismiss, pp. 5-6.

It is true that plaintiffs seek a declaratory judgment that HUD's payment standard policy for enhanced Section 8 vouchers was unlawful.[3] However, plaintiffs' Complaint does not seek an order directing HUD to order the PHAs to provide reimbursement to plaintiffs through funds under their control. It remains an open question whether the court could order alternative forms of relief upon a finding that HUD's policies were unlawful. Regardless, plaintiffs' Complaint explicitly seeks relief in the form of monetary reimbursement from HUD, and I find it appropriate to determine whether sovereign immunity bars the injunctive relief sought at this stage of the proceedings.

Plaintiffs also argue that their claims for injunctive relief fall within § 702's waiver of sovereign immunity, because they merely seek to enforce a statutory mandate that they pay nor more than 30 percent of their income in rent. Plaintiffs rely on the Third Circuit's ruling in Zellous v. Broadhead Associates, 906 F.2d 94 (3rd Cir. 1990), where the court found that the APA waived sovereign immunity in a case seeking reimbursement for inadequate Section 8 utility allowances.

In Zellous, plaintiffs were tenants in a privately-owned and managed housing projects with rents subsidized directly by HUD. Id. at 95. The tenants claimed that HUD, together with the housing project's owners, violated the Housing Act and implementing regulations by failing to make timely adjustments in their utilities allowance. Id.

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[3] HUD's directive that the enhanced payment standard applies only to the first rent increase after mortgage prepayment was held to be arbitrary and capricious in 215 Alliance v. Cuomo, 61 F. Supp. 2d 879 (D. Minn. 1999). There, the district court found that "HUD's Policy Statement violates the plain meaning of the statutory language1 Specifically, HUD's Policy Statement relies upon a tortured definition of 'rent' which cannot be rationalized in the context of the rest of the statutory language." Id. at 888.

Consequently, HUD did not provide the project owners with enhanced vouchers to which plaintiffs claimed they were entitled. Id. The tenants sought reimbursement from HUD for the amount of utility allowance they should have received. Id.

As defendants do here, the defendants in Zellous argued that the plaintiffs' claims fell outside the APA's waiver sovereign immunity, because they sought monetary damages. Id. at 96. Citing Bowen, the Third Circuit disagreed: "In our case, the tenants do not seek compensatory damages for injuries they allegedly suffered as a result of HUD's failure to make timely adjustments in the utilities allowance. They seek to enforce both prospectively and retrospectively the mandate" that tenants pay no more than thirty percent of their income toward rent. Id. at 98. The court reasoned that monetary reimbursement merely required HUD to pay expenses that it would have paid had it "implemented timely utility allowance adjustments." Id. at 99 (citing Bowen, 487 U.S. at 894 (quoting School Committee of Burlinston v. Department of Education of Massachusetts, 471 U.S. 359, 370-71 (1985))).[4]

I decline to apply the reasoning in Zellous to the facts of this case. Unlike Zellous, here HUD did not provide the voucher payments directly to the project owners. Rather, HUD provided funding to the

[4]In School Committee, the Court ruled that the Education of the Handicapped Act authorized a court to order school authorities to reimburse parents for their expenditures on private special education for a child if the school's individualized education program was inadequate. 471 U.S. 369-70. However, in that case the Act provided that a reviewing court "shall grant such relief as the court determines is appropriate." Id. at 369; 20 U.S.C. § 1415(e)(2). Further, the Supreme Court relied on legislative history that "[s]uch a post hoc determination of financial responsibility was contemplated . . . ." School Committee, 471 U.S. at 370. Here, the APA does not confer broad discretion to award "appropriate relief" and plaintiffs present no authority suggesting that direct reimbursement from HUD for inadequate vouchers was contemplated under the Housing Act.

PHAs, which then calculated and issued the voucher payments. The fact that HUD is not statutorily required to provide subsidies directly to plaintiffs or their landlords necessarily "transforms the character of the relief they seek into a substitute remedy." Zellous, 906 F.2d at 98. Although plaintiffs were entitled by statute to pay a limited amount in rent, I cannot find that enforcement of this statute under these facts "happens to" result in monetary reimbursement from HUD. Bowen, 487 U.S. at 900.

Plaintiffs emphasize that the PHAs' calculations were made pursuant to HUD policy, and that the PHAs must comply with HUD policy. However, plaintiffs do not seek a form of relief that is "a mere by-product" of judicial review of such policy. Id. at 910. For example, plaintiffs do not request an injunction requiring HUD to amend the effective date of the "correct" payment standard and to direct the PHAs to recalculate payment vouchers accordingly. See Katz v. Cisneros, 16 F.3d 1204, 1208 (Fed. Cir. 1994) (holding that sovereign immunity did not bar claims of housing developer who sought to compel HUD to recalculate contract rents in accordance with HUD regulations and reimburse the developer monies under the proper calculation; claims were not for money damages but for compliance with applicable regulations).

Rather, as pleaded in their Complaint, plaintiffs seek an order requiring HUD to reimburse plaintiffs for the increased rents they paid as a result of HUD's unlawful payment standard. No matter how the court views it, plaintiffs do not seek injunctive relief to which they were specifically entitled; rather, they seekmoney damages to substitute for their inadequate voucher payments. Accordingly, I find that plaintiffs' claims for injunctive relief are barred by sovereign immunity.

Defendants also move to dismiss for failure to state a claim under

Federal Rule of Civil Procedure 12(b)(6). Defendants argue that plaintiffs cannot obtain relief under the APA, because plaintiffs fail to identify the statutory authority that mandates or even authorizes direct voucher payments from HUD to individual tenants.

The APA authorizes judicial review of a "final agency actions" or an agency's alleged failure to act. 5 U.S.C. § 704; see also 5 U.S.C. § 551(13) (defining agency action as including the failure to act); Ecology Center, Inc. v. United States Forest Service, 192 F.3d 922, 924-25 (9th Cir. 1999). A court may "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), or "declare unlawful and set aside agency actions" which are arbitrary and capricious or not in accordance with law. Id. § 706(2).

I agree that plaintiffs fail to establish that direct reimbursement by HUD is an agency action which the court may compel as unlawfully withheld. However, plaintiffs assert a cause of action for declaratory relief, and - in response to defendants' motion - identify alternative forms of equitable relief should they prevail. Whether the court could compel forms of relief other than monetary reimbursement is not properly before it. Therefore, I decline to dismiss plaintiffs' case.

CONCLUSION

Defendant's Motion to Dismiss (doc. 19) is GRANTED, in part. Plaintiffs' claims for injunctive relief are HEREBY DISMISSED.

IT IS SO ORDERED.

Dated this 6 day of June, 2003.

Ann Aiken
United States District Judge