UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

COLATTA DEAN et al.,	*	
	*	
Plaintiffs,	*	
	*	CIVIL ACTION NO.: CCB 03-1381
	*	
v.	*	
	*	
MEL MARTINEZ, et al.,	*	
	*	
Defendants	*	
	*	

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PLAINTIFFS' SECOND MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

The individual plaintiffs in this action are residents of the Uplands Apartments ("Uplands"), a sprawling, garden-apartment style, 979 unit complex occupying over 52 acres in West Baltimore. Plaintiff Uplands Apartments Tenants' Association ("UATA") is an association of current and former Uplands tenants. Plaintiffs have brought this action to redress three problems: their forced relocation from the complex to housing that is not comparable, safe, sanitary or decent; the denial of protections the law affords tenants threatened with displacement in situations like this, including meaningful involvement in the development of a disposition plan; and the outcome of HUD's flawed disposition process which significantly reduces the number of affordable units available to low income, minority residents in a more diverse community and, as a result, forces those residents into concentrated minority areas. The first problem -- the U.S. Department of Housing and Urban Development's ("HUD") threat to move plaintiffs to a

motel for thirty days and cut them off from further relocation assistance thereafter -- was temporarily averted when HUD agreed to the entry of a temporary restraining order prohibiting that relocation pending a hearing on all of plaintiffs' claims for preliminary relief. This brief therefore addresses the remaining two sets of plaintiffs' concerns and focuses on the reasons why this Court should enjoin the foreclosure sale on the Uplands properties, currently scheduled for June 2.[1]

As set forth below, plaintiffs contend that HUD did not provide them with the protections afforded them under the Multifamily Disposition Act, 12 U.S.C. § 1701z-11. First, HUD failed to adhere to its own regulations governing the notice required to be provided to tenants displaced by the sale of a HUD-held property. 24 C.F.R. § 290.11. Its failure to adhere to its own notification requirements in and of itself mandates postponement of any sale. Moreover, from the start, tenants were frozen out of the process that contemplates their involvement. They have been denied the right to provide appropriate and timely input in the development of the Uplands disposition plan. And HUD has ignored its obligation to make sure, before issuing Section 8 vouchers to displaced residents, that there is sufficient affordable rental housing in the Uplands market area to ensure use of vouchers. Those omissions contravene its disposition obligations.

These are not simply procedural niceties; they have very real and illegal consequences. The results of this procedurally defective process also violate plaintiffs'

[1] The issues raised in their first brief regarding the propriety of forcing plaintiffs to move when they do not have a comparable safe, sanitary or decent replacement dwelling will, of course, be part of the subject of the preliminary injunction hearing on May 29. The facts and arguments set forth in that brief are incorporated herein by reference but will not be restated. The only additional argument set forth here that relates to the relocation effort is set forth at section 3, infra, which explains why the relocation process has and continues to violate plaintiffs' rights under fair housing laws.

rights under Title VIII of the Civil Rights Act of 1968. To make way for a rebuilt Uplands, plaintiffs are being relocated in lower income, African American neighborhoods. They have little prospect of return to the new Uplands under the terms that HUD has established for the developer of new housing on the site. Although dubbed "affordable", examination of the foreclosure sale terms reveals that the rebuilt property can be marketed exclusively to middle to upper-middle incomes and at unit rents which exceed rents for which subsidies could be used, thereby freezing out these plaintiffs. The effect on them is discriminatory, perpetuates segregative housing patterns and deprives them of the opportunity to participate in the growth and further diversification of the Uplands area. It also fails to discharge HUD's affirmative duty to further fair housing strategies. In sum, the disposition of this large, prime tract of real estate has run roughshod over the rights of long-term, minority residents, paving the way for up-scale development that will leave them by the wayside.

Plaintiffs have raised substantial, serious and difficult questions on the merits of this case. The balance of hardship tips decisively in their favor. Under these circumstances, this Court should enter an Order prohibiting defendant HUD from relocating plaintiffs to housing that is neither comparable to their Uplands housing nor decent, safe and sanitary, and further prohibiting defendant from foreclosing on the property on June 2. HUD must step back to its planning stages, provide residents with its disposition plan and solicit and meaningfully consider their input. Then, within the discretion afforded it, it must ensure that its final disposition plan provides the tenant protections required under the Disposition Act and comports with fair housing requirements. It must discharge its obligations under the law.

II. Statement of Facts

The Uplands Apartments were built in 1949 and rehabilitated in 1973. The sprawling complex consists of 205 two and three story buildings sitting on approximately 52.6 acres of gently rolling hills in West Baltimore. The property borders middle class and affluent communities, including Ten Hills and Hunting Ridge, and is located close to stores, schools, a library, shopping and medical clinics and transit, upon which many of the plaintiffs depend. See Plaintiffs' Memorandum in Support of [First] Motion for Temporary Restraining Order and Preliminary Injunction ("Memo I") at pp. 2-5 and accompanying Affidavits. Uplands provided project-based subsidized housing to over 500 families, most of whom were African American.

Over the years, the project was allowed to deteriorate, until HUD was forced to step in and manage the property. Id. There is no doubt that it is not in good condition. There is also no doubt that the property now offers a developer or the City a unique and highly desirable opportunity for very attractive and lucrative housing. As the City's RFP for a Master Planner emphasizes, the site has incredible advantages. Its "wooded, park-like" character makes it aesthetically attractive. Id. at Ex. 7, p. 1. It provides access to public transportation and highway links to the Baltimore-Washington corridor. Id. It is next to private, commercial developments for shopping. Id. And it abuts "stable" neighborhoods, "characterized by a high proportion of homeownership in detached and rowhouse units; tree-lined older-suburb street patterns which follow the rolling terrain; and strong civil engagement, cohesiveness and pride." Id. at 1-2. Middle and upper middle income families live in those abutting neighborhoods, which include those that are racially diverse.

Uplands' proximity to strong, integrated neighborhoods is particularly unique when one considers Baltimore's long history of segregated housing. That dubious legacy is well documented. See, e.g., Power, "Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913", 42 U. Md. L. Rev. 289 (1983)("Apartheid"). Local laws, followed by clearly segregationist rental and lending practices, insured racial segregation in private housing transactions. See generally, "Apartheid". The consequences of this unflattering history are even now visible and present. Communities that began as racially segregated have remained so. Indeed, an Analysis of Impediments to Fair Housing Choice in the Baltimore Metropolitan Region identified "defacto [sic] racial segregation in public and assisted housing" as one of the impediments to fair housing choice in the Baltimore region.[2] Exhibit 23 at p. 84. One of the most visible of these is Cherry Hill, in southeast Baltimore. It was built to provide housing for blacks, ex. 28, and continues to be a virtually all African American neighborhood. As set forth below, many former Uplands occupants were pressured and steered to replacement housing in Cherry Hill. Infra at 22-23; Lee Affidavit at ¶ 4; R. Jefferson Affidavit at ¶ 6; Robinson Affidavit at ¶ 1; Minor Affidavit at ¶ 6.[3]

Uplands is one of the few developments that provided housing opportunities for low income African Americans outside of historically segregated areas and afforded its black residents ready access to important amenities, employment opportunities, better schools and attractive, open space. Its uniqueness makes its loss particularly significant. The fact that it borders integrated housing and economic opportunity for low income

[2] The study was conducted in 1996 by Ardinger Consultants & Associates in response to a HUD requirement that communities engage in fair housing planning. Ex.23 at 7-8. (For ease of reference, plaintiffs' exhibit numbers will continue in sequence from where they left off in Memo I.)

[3] Except for the Minor and Robinson Affidavits, the Affidavits accompany Memo I.

African Americans means that, consistent with its statutory duties, HUD should have been particularly vigilant to preserve the fair housing opportunities the site offers.

Ever since it assumed mortgagee-in-possession status for Uplands, HUD has been planning for its disposition. Ex. 13. Since at least September 2001 it has been engaged in negotiations with the City about the terms under which it would convey the property. Memo I at 3-5; Exs. 5, 6,13,16, 17, 18, 19, 20. The City's initial proposals, which appeared to include the preservation of significant numbers of affordable units, have been watered down in density and affordability. Id. This change in focus followed "the many community meetings we have held, the correspondence we have received and the phone calls we have answered that the overwhelming sentiment of the community is for a much higher percentage of market rate homeownership housing." Memo I, Ex. 8. The City expressed "hope that HUD will consider the community sentiment in reviewing our preliminary proposal." Id.

Since HUD does not actually have title to the property as mortgagee-in-possession, it must acquire title before it can transfer the property to the City. It has scheduled a foreclosure sale for June 2, at which it intends to bid up to the amount of the outstanding indebtedness. If it is the winning bidder, it intends to convey the property to the City for a nominal amount within hours of its acquisition. Exs. 16, 17, 18. However, it cannot be assured that it will be the highest bidder. In the event that it is outbid, the successful purchaser must adhere to certain terms and conditions for the property. A copy of those terms and conditions is attached to Memo. I as exhibit 9. The bid package contains restrictions on the future development of the property. Rider 2 sets forth requirements regarding the "affordability" of units. However, as discussed below and set

forth in Ex. 24 (analysis of the "affordability" restrictions prepared by Wes Finch, the Uplands Apartments Tenant Association Development Advisor), the "affordability" provisions enable a developer to develop the site for middle to upper income homeownership and/or rentals. While HUD has refused to reveal the terms it is negotiating with the City, it has said that those terms would be substantially comparable to those imposed on a private developer. The last City proposal available to plaintiffs similarly would enable the City to develop the property with new housing, marketed primarily to middle and high-income homebuyers who can afford units ranging in price from $95,000 to $295,000. See Memo I, Ex. 8.

These terms did not arise from a process that included current Uplands residents. Despite their requests to participate in the process, their input was not sought.[4] Instead, HUD informed tenants that, due to health and safety concerns, HUD would start relocating them in February, 2002. Memo I at 3, Ex. 2,3,4. It informed tenants that eligible tenants would receive Section 8 vouchers as part of the relocation process. Id. at Ex. 2, 4. The notices announcing the relocation deadlines developed an increasingly urgent tone over time, including, in January, 2003, the ominous warning that "relocation assistance now available to you will not be guaranteed after the foreclosure date". Id. at Ex. 4. Residents panicked. Fearful that they would wind up homeless, they allowed themselves to be pushed to sub-standard housing far from their children's schools, doctors, work and familiar surroundings. Memo. I at 6-7, 9-14 and Affidavits cited

[4] In April, 2003, HUD indicated that it would accept written comments from Uplands tenants. However, without concrete information regarding HUD's proposed disposition plan(s), their ability to provide meaningful input was significantly constrained. They could only guess at the precise terms of a plan. The details of the plan are, of course, key to its impact on tenants. Thus, an offhand invitation to tenants to submit comments did not satisfy HUD's legal requirement to elicit timely and appropriate input on their disposition plan. 12 U.S.C. § 1701z-11(c)(2)(D).

therein. While plaintiffs are still reviewing the list of relocation addresses recently received from HUD, it appears, and plaintiffs expect to be able to demonstrate at the hearing, that most of the former Uplands tenants were relocated in poorer areas with high minority concentration.

Plaintiffs and members of the UATA would like to return to the neighborhood in which many have spent years. They want to live and raise their children in a diverse community. They need the access to transportation, employment, good schools and their long-term doctors. L Dean Affidavit at ¶ 10; Lee Affidavit at ¶ 11; Lewis Affidavit at ¶ 8; Jefferson Affidavit at ¶ 10; Boone Affidavit at ¶ 13; Robinson Affidavit at ¶ 2. They are all, however, low income persons. They will not be able to afford to buy homes that cost well over a hundred thousand dollars. They will not be able to pay monthly rents of between $940 (for an efficiency) to $1,346 (for a three bedroom apartment) which is what the bid package permits as the most "affordable" option. Ex. 26. They will not be able to return under the terms of HUD's current bid package or a similar contract with the City. Instead, they are looking to a future in a poor, African American neighborhood, far from everything that provided stability and opportunity in their lives. They will thus continue to live in poor, minority areas and suffer the ill and lasting effects of discriminatory conduct.

III. Argument

The standard for issuance of a preliminary injunction in the Fourth Circuit are set forth in Memo I and need not be repeated here. Memo I at 13-14, 17. Plaintiffs readily meet the standard with respect to their challenges to the impending foreclosure sale. Here, too, the balance of hardship tilts decisively in their favor and they raise grave and

serious questions going to the merits. Indeed, plaintiffs expect that this Memorandum and the testimony they will provide at the May 29 hearing will go beyond the showing they need to make for issuance of a preliminary injunction and will demonstrate that they are likely to succeed on the merits of their claims.

A. The Loss to Plaintiffs Forced to Inferior Neighborhoods and Deprived of the Opportunity to Return to Their Community Far Outweighs the Harm to HUD of Postponing the Uplands Sale and Reworking its Terms.

1. If the foreclosure sale goes forward, plaintiffs will lose the opportunity to live in an integrated community and will have been relegated to poor minority neighborhoods, thereby perpetuating segregation.[5]

HUD has the power and the responsibility to dictate the terms on which the Uplands will be conveyed to either the City or a private developer. The terms it has chosen to impose in its bid package make it virtually impossible for plaintiffs to return to the community in which many have lived for years and increase the likelihood that they will remain indefinitely in the poorer, impacted neighborhoods to which they have or are being relocated.

As set forth in the Memorandum of Wes Finch, the "affordability restrictions" in the bid package give a developer extraordinary latitude to create a predominantly, if not exclusively, up-scale, middle to upper-middle-class community on the site. First, it does not require that any particular number of units be built, or that a portion must be rental housing. Memo I, Ex. 9, Rider 2 ("Rider 2"). Second, 26% of whatever number of units

[5] Plaintiffs demonstrated in Memo I how forcing them to move to a substandard dwelling, including the threatened motel, would cause them substantial hardship and violate the law. Those arguments apply equally to other non-comparable dwellings, including inferior housing in inferior neighborhoods. For example, plaintiff Robinson must travel for approximately an hour to take her son to a school in the Uplands neighborhood.. She works part time as a school crossing guard in the Uplands community and must either find someplace to stay between her two half hour shifts at eight in the morning and two fifty in the afternoon or ride a bus back to Cherry Hill. Her apartment in Cherry Hill is severely mice infested, and lacks air conditioning, which she hopes will not aggravate her son's asthma. Robinson Affidavit at ¶ 4.

it decides to build may be unrestricted market rate units. Id.[6] Third, another 23% (31% of 74%) can be targeted to persons or families with annual incomes between 80 and 115% of the area median. Rider 2. The area median is $ 67,300 for a family of four. Ex. 26. At 115% of median, pricing for this additional 23% of the units could be marketed to a family of four with an income of up to $77,400. Id. Assuming the family spends 30% of its income for housing, the family could qualify for a mortgage for a home that costs $294,000. Id. There is an obvious incentive to a developer to maximize the units at the upper end of the permissible range. Even if homes for something less than $294,000 were built, there is an unbridgeable gap between what a developer could build and what Section 8 recipients, such as plaintiffs here, can pay. Finally, there is no requirement when and in what sequence units should be built.[7] Therefore, the developer could build the market rate units and the units for persons at or near 115% of median immediately, and postpone, perhaps indefinitely, construction of the remaining units. Id.

Even if the remaining 51% of the units were built, the affordability restrictions exceed the HUD fair market rent Section 8 payment standard and the Housing Authority of Baltimore City's even higher Section 8 payment standard.[8] Id. Thus, by definition, those remaining "affordable" units are out of reach for virtually all former Uplands who are Section 8 voucher holders. Thus, although the bid package gives former Uplands tenants preference in applying for the affordable units at the rebuilt Uplands, Ex. 9, Rider 4, this is an empty promise; former tenants will almost assuredly not have a shot at any

[6] The City anticipates catering to middle and upper income families. Its proposal to HUD included 40 market rate homes selling at $295,000, with its least costly homes marketed at $95,000. Memo I, ex. 8.
[7] Indeed, nothing needs to start for a year and a half; a developer only has to complete demolition within 18 months of closing. Memo I, Ex. 9, p. "Use Restrictions".
[8] The payment standard is the maximum section eight voucher payment HUD will allowed to be made for rent and utilities.

new unit under these terms.[9] Finally, it is noteworthy that HUD explicitly rejected the option of requiring the purchaser to assure that a certain number of units would be available to very low-income families, leaving the box for that requirement unchecked. Rider 2.

While plaintiffs do not know the terms to which HUD and the City have or will agree, HUD officials have indicated that they expect those terms to be similar to those set forth in the bid package. What we do know is that the City's latest proposal (which HUD stated that it rejected as a too-extreme repudiation of affordable housing) provided even fewer opportunities for low income residents, including the plaintiffs in this case, to return to the site. Memo. I, Ex. 8 (proposing units ranging from a low of $95,000 to a high of $295,000).

Plaintiffs will be forced to remain where they have been able to find landlords to take their section 8 vouchers -- poorer, highly concentrated minority areas. They will lose the invaluable proximity to their jobs, doctors, schools and community ties. See e.g., Boone Affidavit at ¶ 4; R. Jefferson Affidavit at ¶ 4; Jones Affidavit at ¶ 4; Lewis Affidavit at ¶ 4; Lee Affidavit at ¶ 3. Those losses cause immediate hardship as well as the incalculable future detriment to themselves and their children. See also Robinson Affidavit at ¶ 2 (has to travel two hours daily to school and work; child will lose opportunity to attend preferred school); Minor Affidavit at ¶ 6. The damage is lifelong and multi-generational.

[9] In deposition testimony provided in a different lawsuit, HUD's Director of the Maryland Multifamily hub stated that HUD desired that Uplands residents would have the opportunity to return. Ex. 12 at 175-76. See also 185. However, when pressed as to how HUD would implement that goal, she indicated HUD would essentially leave it to the City to develop. Id. at 177-78.

2. HUD's harm in sustaining the financial expense of holding Uplands for a longer time if an injunction issues is far less grievous than the potential damage to plaintiffs.

In contrast to the lifelong deprivations plaintiffs and members of the UATA will endure if this injunction does not issue, the hardship to HUD will be the additional cost of holding the property until it properly develops a disposition plan that meets its fair housing obligations. As set forth in Memo I at p. 16, that financial harm (small for such a large federal defendant) is eclipsed by the staggering deprivations plaintiffs will endure if forced out of the neighborhood permanently.

B. Plaintiffs have a substantial likelihood of succeeding on the merits of their claims.

1. Defendant has failed to comply with its pre-foreclosure notice requirements.

Even without getting to the more complex fair housing issues, HUD's own mistake -- its failure to provide tenants with the pre-foreclosure notice its regulations specify -- should prevent it from moving forward at the foreclosure sale.

Under 24 C.F.R. § 290.11, HUD sets forth its specific requirements regarding disposition-related notices for HUD-held multifamily projects and mortgages. Pre-disposition notification is to be delivered or mailed to each unit in the project. 24 C.F.R. § 290.11(c)(1). Where, as here, HUD is mortgagee-in-possession, the notice is also to be posted in the project office and accessible locations around the project. Id. The notification is to occur at least 60 days before HUD forecloses on the project. 24 C.F.R. § 290.11(b)(1). Required contents for its notices are:

> . . .the general terms and conditions concerning the sale, future use, and operation of the project as proposed by HUD; . . . the time by which any offers must be made or any comments must be submitted; and . . . that the full disposition recommendation and analysis and other supporting information will be available for inspection and copying at the HUD Field Office.

24 C.F.R. § 290.11(d).

Plaintiffs do not recall receiving such a notice. See e.g. Minor Affidavit at 8.[10] Plaintiffs have never been afforded an opportunity to review any disposition recommendation nor told when comments regarding the information in the pre-foreclosure notice should or could be provided to HUD.[11] Indeed, since neither the bid package nor any disposition plan was disclosed to plaintiffs or the public, it is difficult to fathom how HUD could have issued a notice prior to late April when it published the terms of the foreclosure sale. It is axiomatic that agencies are required to adhere to their own regulations. United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 3101-02 (1974). HUD's failure to do so here means that it cannot proceed with the sale for which the notice is a condition precedent.

This is not a mere technicality. It embodies the consistent theme that runs throughout the disposition statutes and regulations that tenant input is needed and important to HUD's decision-making process. It affords tenants one last opportunity to provide HUD with their response to the proposed disposition of their homes. As set forth below, such opportunities are to be afforded residents at various stages of the disposition process and, at each such stage here, the requirement was blatantly ignored. The result is a plan which fails to comport with HUD's fundamental mission -- to provide adequate, affordable housing and further fair housing to low income persons -- and fails to adhere

[10] HUD has indicated it expects to provide such notices in response to plaintiffs discovery requests. However, by the date plaintiffs agreed to file this brief, they had not received documents in response to their request.

[11] Additional notice requirements are set forth in the regulations governing the Multifamily Housing Foreclosure Act ("MHFA"). To simplify the notification process, the MHFA and other notices can be combined. 24 C.F.R. § 290.11(a). The notice regarding the technicalities of the foreclosure process required by the MHFA was sent to tenants on or about May 15, 2003 and contained none of the information required in the pre-foreclosure notification requirements of 24 C.F.R. § 290.11. In any event, May 15th was not 60 days prior to the sale.

to fair housing laws against which its conduct must ultimately be measured. The failure to provide residents with the pre-foreclosure notice HUD requires of itself should be reason enough to stop the sale until HUD complies with its own, simple, straight-forward regulation.

2. HUD failed to comply with those portions of the Multi-family Property Disposition Act and its own disposition regulations that safeguard the needs of potentially displaced residents.

In the National Housing Act, Congress declared that the general welfare and security of the Nation and the health and living standards of its people require housing production … sufficient to remedy the serious housing shortage, the elimination of substandard housing…and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family…" 42 U.S.C. § 1441. The National Housing Act requires HUD to exercise its powers, functions, and duties " consistently with the national housing policy declared by this Act.…" Id. See also United States v. Winthrop Towers , 628 F.2d 1028 (7th Cir. 1980). In exercising his discretion to dispose of HUD-acquired property, the Secretary must act, whenever possible, in a manner which is consistent with the objectives and priorities of the National Housing Act. Russell v. Landrieu, 621 F.2d 1037 (9th Cir. 1980). Furthermore, the Secretary must exercise his discretion in a manner consistent with the Multi-Family Disposition Act ("Disposition Act"). 12 U.S.C. §1701z-11. The Disposition Act identifies among its goals adherence to the goals of the National Housing Act, protection of the financial interests of the government, promoting the goals of preserving low income housing, minimizing involuntary displacement and supporting fair housing. 12 U.S.C. § 1701z-11(a). The protections it provides reflect those goals.

a. HUD failed to provide residents with an opportunity for input into the Uplands disposition plan

HUD's failure to provide a pre-foreclosure notice, supra, was but the last in a series of steps that ignored the tenants' legal rights to have a voice in the disposition process that affects them so directly. Tenants, like other stakeholders, are intended to have an opportunity to help shape the disposition plan for the property. Although the statute confers significant latitude on the agency to decide on a disposition plan, it builds in checks and balances to make sure that the plan is not developed without meaningful consideration of the needs and interests of potentially displaced residents. 12 U.S.C. § 1701z-11(c)(2)(A) and (D) require the Secretary to develop a disposition plan for a project prior to its sale, and further require appropriate and timely tenant input into such disposition plans. See also 24 C.F.R.§ 290.15. 12 U.S.C. § 1715z-1b also guarantees tenants a right to adequate notice of, reasonable access to, relevant information about and an opportunity to comment on HUD's disposition of a project owned by the Secretary.[12] This is not to be an empty formality; such comments must, by law, be considered by the Secretary in arriving at his disposition decision. Here, HUD failed to solicit tenant input in developing the disposition plan. Tenants learned of the terms on which HUD proposed to sell the property when its bid package was published on HUD's website on or about April 28, 2003. Although they have been told orally that any contract with the City will be substantially similar to the bid terms , they have not been provided with the terms HUD has proposed to the City.

[12] If HUD acquires the property and transfers it to the City, the project will be "owned by the Secretary" and therefore subject to the Act. An immediate conveyance to the City which does not afford tenants the comment opportunities required by the statute or the Secretary the opportunity to consider those comments meaningfully violates the law and evades its clear protective intent.

As set forth above, the latitude afforded by the terms and conditions of the sale permits a developer to build a middle to upper-middle income development with substantially fewer, relatively expensive units. Three bedroom homes could be marketed for the site at almost $300,000 and still meet the 115% of median requirement. Ex. 26. Even if units at 30% of 80% of median were built, rents tailored to persons at that income level would exceed the amount payable by a Section 8 recipient. Id. Thus, the rent for the least expensive of the rebuilt housing at Uplands would exceed that for which a Section 8 voucher could be used. Id. And the annual income needed to support such payments is higher than those of plaintiffs and most of the former Uplands residents.

Had they been afforded the opportunity to comment on HUD's plan, residents would have been able to demonstrate the impact these choices would have on the lower income Uplands residents who wanted to retain an opportunity to return. They could have proposed alternative mixes of more expensive and truly affordable housing for HUD's consideration to meet HUD's fiscal or other interests as well as the needs of the displaced community. The absence of this dialogue, anticipated and required by statute, allowed HUD to avoid consideration of alternatives to provide adequate housing to the population whose interests it is intended to protect. Although the law does not require HUD to adopt a specific plan, the "failure to consider the effects of [its choice]… or… consider alternatives that might be consistent with the polices of the National Housing Act…" as well as the failure to afford tenants their legally protected opportunity for meaningful input raise serious and grave questions as to whether the Secretary abused his discretion. Walker v. Pierce, 665 F. Supp. 831, 839 (N.D. Cal. 1987).

b. HUD further violated the statute and abused its discretion by issuing vouchers to the residents without insuring that they could find affordable housing in the market area.

The Multi-family Disposition Act and its implementing regulations at 24 CFR 290.21 recognize that, if tenants are displaced in a HUD disposition, particularly when they are being forced to move from a subsidized property to private housing subsidized by tenant vouchers, they need to have somewhere to go. The law therefore requires HUD to assess whether there is a market for the use of tenant vouchers before it sends tenants off to find replacement housing. Only if there is an inadequate supply of housing for which vouchers can reasonably be expected to be used, may HUD replace tenants' project based assistance with the vouchers.[13] 12 USC 1701z-11(e)(2)(A) and (f)(6)(B).

24 CFR 290.3 defines markets that do not have an adequate supply of rental housing as being "tight markets". These markets have low levels of rental vacancy rates; low levels of production or little or no growth; rent increases that exceed normal increases commensurate with the cost of operating rental housing; a significant number of households holding section 8 vouchers who are unable to find adequate housing… [and are those where] PHA data show[s] a lower average percentage of units under lease and a longer time required to find units. 24 C.F.R. 290.3.

[13] Project based vouchers are fixed to a unit. While there is a project based contract in place, that unit will remained subsidized and available to the plaintiffs and other residents of the Uplands. The resident has a right to continued occupancy, absent a breach. A tenant-based voucher is a piece of paper which authorizes the bearer to rent an apartment on the private market up to the payment standard. A landlord's decision to rent to a voucher holder is voluntary and the owner can decide not to renew a lease usually at the of the lease term. The voucher holder has a limited time (sixty days in the city and thirty in most of the counties) to find a new home. The voucher holder has to go through a delicate dance coordinating the landlord and the local PHA to ensure that the rent, lease and condition of the unit meet the approval of the PHA before the tenant can move into his home. If the search and acquisition is not concluded prior to the tenants date to move then they are rendered homeless though they may still have their voucher. If they do not find a new home within sixty to one hundred and twenty days then they lost their assistance and may well become homeless.

HUD has decided to dispose of the Uplands and has issued vouchers to the residents including most of the plaintiffs. However, to plaintiffs' knowledge, HUD did not determine that an adequate supply of rental housing existed in the Uplands market. Indeed, the facts are to the contrary. HUD knew that the Baltimore market had become "tight" and that the supply of affordable housing was not adequate to meet the need. On August 13, 2001, HUD's senior Project Manager in the Baltimore Multifamily Center told the HUD central office that 708 vouchers must be reserved in anticipation of the relocation of residents as a result of possible foreclosure and/or other enforcement action. Ex.13. However, just four days earlier, on August 9, 2001, Paul T. Graziano, Executive Director of the Housing Authority of Baltimore City wrote to HUD asking for authority to raise the voucher payment standard because, despite the fact that its voucher payment standard was at 110% of fair market rent, fewer than 75% of families issued vouchers between October 1, 2000 and April 30, 2001 had been able to locate housing within the 120 day initial period of validity of their housing vouchers. Ex.14. According to Mr. Graziano, the rate had plummeted, so that "the current success rate for voucher holders is 38.7%." Id.

In October 2001, the Housing Authority of Baltimore City ("HABC") proposed that, in regard to multifamily projects that HUD was vouchering out, "HABC be allowed to use its existing voucher allocation rather than new Multifamily funds… because the city is not using all of their voucher allocation."[14] Ex.15. The inability of residents to find

[14] Willie Spearmon at HUD's central office did not think the proposal was a good idea because he thought the underutilization of vouchers raised questions about HABC's performance and he assumed there was a need for the assistance in the community. He was correct in both assumptions. HUD's Inspector General had issued a scathing report about deficiencies in HABC's Section 8 program relating to administration and performance. The consolidated plan for Baltimore City identified the demand for housing assistance for very low income households as overwhelming. Exs. 15, 24, 25.

housing where they could use vouchers continued into 2002, well after HUD made its first announcement to Uplands residents that they would be relocating through the issuance of vouchers. In July 2002, in a HUD Advisory Letter sent out to FHA-Affiliated Multifamily projects in the Baltimore Area, HUD, acknowledging the tight rental market, asked apartment owners to consider a trial period of participation in the Section 8 voucher program. Ex. 27. Indeed, Mary Ann Henderson, director of the Maryland Multifamily Hub, testified in another case that HUD was aware of problems with the City's voucher program that were further hampering its relocation of Uplands tenants. Ex. 12 at pp. 160-165.

It appears as though many former Uplands residents did not use their vouchers to move to replacement housing. According to one set of several inconsistent reports given to the tenants concerning voucher use, 116 out of 484 residents through December 13, 2002 relocated without the use of a voucher. Ex. 21. No data has been provided to-date to explain why these residents did not use a voucher. However, the tight Baltimore market left few opportunities for displaced Uplands residents. For example, Plaintiff Daisy Robinson received her voucher on May 9, 2002. However, she did not move into her housing until December 2002. She received one -120 day extension on her voucher as she looked for housing. Ultimately, the housing she was able to find was in Cherry Hill, to which she was pushed by HUD's relocation agent, Ms. Ross. Robinson Affidavit at ¶ 1. As the rental market becomes tighter because more assisted housing is leaving HUD's inventory and will not be available to voucher holders, ex. 12 p. 89-102, and because the year trial period of participation in the Section 8 voucher program by those

landlords who responded to HUD's appeal will soon end, former Uplands residents will face even more difficulty in using their vouchers.[15]

In light of the known realities of the tight Baltimore market, the decision to issue vouchers to hundreds of Uplands tenants does not appear to have a rational basis. Certainly it does not appear that the Secretary engaged in the analysis required by statute and regulation. Under these circumstances, plaintiffs have raised serious questions as to whether the decision of the Secretary was arbitrary and capricious and not in accordance with the National Housing Act and the Disposition Act. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).

3. HUD's relocation of Uplands' residents to areas of minority concentration and its foreclosure of their return to a more integrated community violates fair housing laws.

Title VIII of the Civil Rights Act of 1968, the "Fair Housing Act", 42 U.S.C. § 3601 et. seq., was enacted to achieve the ambitious goal of "fair housing throughout the United States". 42 U.S.C. § 3601. In furtherance of this goal, it outlaws discrimination in the sale or rental of a dwelling because of race, color, gender, familial status, national origin or other prohibited factors. 42 U.S.C. § 3604(a), (b). It also imposes an affirmative obligation on HUD to further affirmatively the purposes of the law. 42 U.S.C. § 3608(e)(5). This Circuit and others have recognized that, to fulfill this overarching goal, Congress intended to "promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.'" Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977)("Arlington

[15] Since voucher holders' leases end after a year, former Uplands tenants who have found housing, whatever the quality, have an uncertain future. In an increasingly tighter market, they have less and less assurance that they will be able to use their vouchers when their current leases expire.

II"), quoting Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973). See also Smith v. Town of Clarkton, 682 F. 2d 1055, 1068 (4th Cir. 1982); Resident Advisory Board v. Rizzo, 425 F. Supp. 987, 1015-16 (D.C. Pa. 1976)(U.S. has duty under Fair Housing Act to aid in the elimination of racial concentration in its cities). Courts are to interpret the Act broadly to effectuate its intent. Arlington II, 558 F. 2d at 1289.

Plaintiffs have alleged that defendants' relocation of current and former tenants to impoverished African-American neighborhoods and the effect of the terms on which defendants propose to convey the Uplands Apartments violates the Act. Amended Complaint at ¶¶ 105 - 111. They assert that defendants' conduct supports three distinct bases of liability: it has a discriminatory effect on them, it perpetuates patterns of segregative housing and violates HUD's duty to further affirmatively fair housing. Amended Complaint at ¶ 110. We address each of these bases in turn. What this analysis makes abundantly clear is that plaintiffs have raised multiple serious and grave challenges to defendants' conduct, which more than warrant the preliminary relief they seek.

A. HUD's plans and its relocation of Uplands residents has a discriminatory effect on them.

In Smith v. Town of Clarkton, supra, 862 F.2d at 1066, this Circuit adopted the four-pronged test developed in Arlington II to determine whether a practice violates the Fair Housing Act because of its discriminatory effect: the strength of the showing of discriminatory effect; whether there is some evidence of discriminatory intent; defendant's interest in taking the challenged action; and whether the plaintiff seeks to compel affirmative relief or restrain interference with contemplated actions. See also

Betsey v. Turtle Creek Associates, 736 F. 2d 983, 989 (4th Cir. 1984); Arlington II, supra, 558 F. 2d at 1290; Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1295-96 (D. Md. 1993). The first criterion -- the strength of plaintiffs' showing of discriminatory effect -- can be met in one of two ways. It is met when, viewing the circumstances from the point of view of the individuals affected by the action, Betsey, supra, 736 F. 2d at 987, the conduct had a disproportionate impact on one racial group over another. Id., Arlington II, supra, 558 F. 2d at 1290. It may also be met when it perpetuates segregation and thereby prevents interracial association. Betsey, supra, 736 F. 2d at 987; Arlington II, 558 F. 2d at 1290. In Clarkton, the fact that blacks were disproportionately affected by the obstacles posed to building low income housing satisfied the "disproportionate impact" prong of the discriminatory effect analysis. Clarkton, supra, 682 F.2d at 1065-66.

Plaintiffs readily make out a prima facie case of discriminatory effect. With respect to the first prong, the vast majority of displaced Uplands residents are African American. They have been, or are in danger of being forced to poor, exclusively African American neighborhoods.[16] See e.g. Blount Affidavit at ¶ 4; C. Dean Affidavit at ¶ 7; L. Dean Affidavit at ¶ 6; Lee Affidavit at ¶ 6; Lewis Affidavit at (misnumbered) ¶ 3; Boone Affidavit at ¶ 6; Robinson Affidavit at ¶ 1. Thus, even more than in Clarkton, this policy zeros in on an almost exclusively minority group. The situation presented here also satisfies the alternative measure because it perpetuates segregation. By forcing plaintiffs to poorer, black neighborhoods, HUD reinforces long-standing patterns of segregative housing.

[16] Plaintiffs intend to demonstrate the pervasiveness of this displacement to poorer, minority areas at the hearing on this motion, based on information only recently obtained in discovery.

The second prong of the Clarkton/Arlington II analysis -- evidence of discriminatory intent -- is generally considered the least important to the equation. Potomac Group Home Corp., supra, 823 F. 2d at 1296 ("[s]everal courts have observed that the intent component of the [Clarkton] test is 'the least important' and that 'the absence of such proof weighs only slightly against granting relief."); accord Arlington II, 558 F. 2d at 1292. Although plaintiffs have not alleged discriminatory intent in this case, the sordid history of segregation in Baltimore is relevant to this consideration. De facto discrimination was an identifiable barrier to fair housing as late as 1996. Ex. 23 at 84. Displaced plaintiffs have been forced to relocate in areas of high minority concentration, poorer and less desirable than Uplands and lacking its more diverse, more affluent neighbors. Compare Resident Advisory Board v. Rizzo, supra, 425 F. Supp. at 1006-07 (Like other major northeastern cities, Philadelphia had a history of segregated public and private housing, which meant that opposition to (and inaction in light of) efforts to provide public housing in integrated neighborhoods violated the fair housing act).

The third prong, defendants' interest in taking the challenged action, is, frankly, not entirely clear to plaintiffs and needs to be explored through more extensive discovery. However, serious questions arise about the basis for HUD's decision regarding the terms of the Uplands sale. HUD does not consider impediments to fair housing when disposing of a property. Ex. 12 at 251. It does not appear to reflect consideration of the impact of loss of the units on the availability of affordable housing to low income residents. Indeed, HUD did not assess the effect of the loss of 900 subsidized units at Uplands. Ex. 12 at 205. The absence of significant effort to protect the affordability of rebuilt Uplands units and, indeed, to leave significant leeway for a middle to upper middle income

development appears to arise from its desire to save HUD money and deference to the City. Mary Ann Henderson, HUD's Director of the Maryland Hub explained that HUD's concerns were financial:

> When we're disposing of a property, its viewed more as a business transaction. Our goal, we've had an ownership that's failed and we're trying to sell this property in the open market with as few restrictions as possible because we want to try to recapture what we've lost on the property. And so the one area that HUD tends to be very private-sector-like is in the disposition of property. And that is to sell it and get the best we can get back for it. So there's really, while there may be some social purpose involved on occasion with a property, typically it's really about trying to get as much back that we can from our losses.

Ex. 12 at 251-52. HUD also wanted to leave the City with flexibility to meet its needs. Those needs, according to Ms. Henderson, are the City's need for economic development and improvement of the neighborhood for people in the surrounding neighborhoods. Id. at 174-77. The City, however, appears to be backing away from an initial commitment to maintaining truly affordable housing in light of community pressure. Memo I, ex. 8. In case after case, community pressure emerged as the motivator for municipal and HUD action that thwarted fair housing goals. See e.g., Clarkton, supra, 682 F. 2d at 1063; Rizzo supra, 425 F. Supp. at 1018-19; see also Potomac Group Home Corp., 823 F. Supp. at 1290. And in those cases, capitulation to community pressure violated the Fair Housing Act. While still unclear, the information available about HUD's underlying considerations in developing the terms of the sale suggests that it is not directed to further fair housing goals, but to recover its losses and enable the City to placate the concerns of surrounding communities.

With respect to the fourth prong, unlike Clarkton, plaintiffs are seeking affirmative relief, rather than non-interference with ongoing efforts. However, this is not a case in which plaintiffs are asking the Court to dictate the housing choices for Uplands. They are not asking the Court to define what constitutes an acceptable fair housing plan for Uplands. Rather, given the fact that HUD is planning to dispose of the property, they are asking this Court to send HUD back to the drawing table, to develop a plan that affords plaintiffs the legal protections due them. Therefore, although the burden on plaintiffs is greater if they are seeking affirmative relief, the type of relief sought here is not the intrusive directive to build a certain number of units in a certain place that gives courts pause.

Thus, even at this early stage of these proceedings, plaintiffs make a strong showing of discriminatory effect. Upon such a showing, the burden shifts to defendants to present proof to avoid liability. While defendants have the opportunity to make such a showing at a trial on the merits of this matter, plaintiffs have certainly raised very serious questions which, when coupled with the harm they will sustain if the sale of the property proceeds, warrants issuance of this preliminary injunction.

B. HUD's plan has a segregative effect.

Instead of enabling low income black residents to escape the confines of slum ghettos, HUD's relocation efforts and its failure to set meaningful affordability criteria for the rebuilt Uplands has sent plaintiffs right into the kind of living environment that the Fair Housing Act condemns. See supra at 22.[17] Redevelopment activities that create more concentrated minority populations are "at variance with the national housing

[17] Plaintiffs expect to show at the May 29 hearing that these individuals' experiences are representative of the relocation patterns of Uplands residents overall.

policy" and violate the Act. Shannon v. United States Department of Housing and Urban Development, 436 F. 2d 809, 820-21 (3rd Cir. 1970). Foreclosing the opportunity of returning to their old neighborhood once it is rebuilt and consigning them to poorer areas of intense minority concentration reinforces Baltimore's historic patterns of segregation in housing and should not go forward. See also Rizzo, supra (cancellation of a controversial housing project in a predominantly white area deprived the lowest income black households in Philadelphia of the opportunity to live outside of black, impoverished neighborhoods and therefore ran counter to duty to eliminate segregated housing).

C. HUD's relocation of Uplands residents and its disposition of the property fail to discharge its affirmative duty to further fair housing.

Congressional concern over the widespread problem of community resistance to integration of low income housing which, in turn, prevents low income black residents to escape "slum ghettos", caused it to enact Section 3608(d)(5) of the Fair Housing Act[18]. Resident Advisory Board v. Rizzo, supra, 425 F. Supp. at 1014-15. That provision requires HUD to act affirmatively to correct the problem and imposes on the Secretary a duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter. . . ." To discharge this duty, HUD must consider the racial impact of its decisions regarding public or subsidized housing, Shannon, supra, 436 F. 2d at 821-22 and avoid further concentration of minority housing. It does not appear that it has done either here. As in Rizzo, it moved black plaintiffs to black neighborhoods and has failed to take steps to

[18] The provision is now codified at 42 U.S.C. § 3608(e)(5) and, to avoid confusion, that later codification will be used here.

enable them to return to a rebuilt Uplands in a more integrated environment. Its action is as illegal today as it was over twenty-five years ago.

CONCLUSION

In an effort to shed an expensive and undeniably deteriorating housing complex, HUD has ignored the needs and interests of the tenants it has displaced. It has made no effort to obtain tenant input and participation in its disposition planning efforts. It has not made any effort to preserve for them a realistic opportunity to benefit from the rebuilding of Uplands. Nor has it complied with its basic obligation under law to ensure that the market will support their use of vouchers. Instead, it is about to sell the property at auction with use restrictions that enable a developer to market it to middle and upper middle income persons and exclude the residents who lived there for years. In doing so, it thwarts the ability of former Uplands tenants, who are black, to move back to their improving neighborhood from poorer, minority concentrated areas where they have been forced to relocate. The result raises profound questions about HUD's adherence to its own rules and regulations and to the basic principles of fair housing. An injunction should issue to preserve the status quo pending full development of the record and a trial on the merits of this case.

Dated: May 21, 2003

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Gregory Leo Countess, Bar No. 11431
Hannah E. M. Lieberman, Bar No. 05456
Legal Aid Bureau, Inc.
500 E. Lexington St.
Baltimore, MD 21202
(410) 539-5340
(410) 539-1710 (fax)
Attorneys for Plaintiffs Colatta Dean, et. al.