IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COLATTA DEAN, et al.,	:	
Plaintiffs,	:	
v.	:	**Civil No. CCB-03-1381**
MEL MARTINEZ, et al.,	:	
Defendants.	:	
	:	

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MEMORANDUM OF LAW IN SUPPORT
OF (1) MOTION FOR PARTIAL SUMMARY JUDGMENT AND
(2) OPPOSITION TO MOTION TO AMEND COMPLAINT

I. Introduction

The present first amended complaint, the one upon which the May 2003 preliminary injunction hearing proceeded, contained seven causes of action. The third, fourth and fifth causes of action were dismissed at the preliminary injunction hearing. That left the following alleged causes of action:

First – Violation of Uniform Relocation Assistance Act

Second – Violations of HUD Relocation Regulations

Sixth – Violation of Fair Housing Act

Seventh – Violation of Multifamily Housing Property Disposition Reform Act.

Parsing through these allegations, and considering the matters presented at the preliminary injunction hearing, it became clear that the plaintiffs' claims focused on four principal issues: (1) whether the tenants received adequate relocation services during the relocation process; (2) whether the relocation forced tenants into more severely impacted areas of Baltimore in violation of law; (3) the adequacy of the plaintiffs' ability to participate in the process that resulted in the disposition plan; and (4) the content of the disposition plan, specifically the affordability criteria. These discrete aspects of the case were not, in the first amended complaint, organized by "Count" or "Cause of Action."

Regrettably, the proposed second amended complaint, the subject of the instant motion for leave to amend, employs the same manner of pleading as the first amended complaint. It makes no change of form or substance in the allegations against the federal defendants. This proposed second amended complaint contains 11 Causes of Action.

The first and second causes of action mirror the first and second in the first amended complaint. The eighth cause of action restates the alleged Fair Housing Action claim from the prior count 6. The eleventh cause of action restates the Multifamily Housing Property Disposition Reform Act claim from the prior count 7. The balance of the proposed second amended complaint consists of allegations directed against the City of Baltimore.

The motion to amend as to the Federal Defendants should be denied because, as regards three of the four principal areas of complaint, the present uncontradicted record establishes that the plaintiffs cannot prevail. The allegations about whether the tenants received adequate relocation services during the relocation process -- issue 1 -- principally appear in counts one and two, the counts that allege violations of HUD regulations. These counts, however, should be dismissed because there is no independent basis of federal jurisdiction accorded by the regulations. See infra at 3-4. To the extent that one analyzed the uncontradicted facts in light of the APA, the record establishes without cavil that HUD provided the relocation services called for by the relevant regulations. Infra at 5-12. Next, the allegation that the tenants were not able to participate in the process leading up to the disposition plan -- issue 3 -- cannot now withstand analysis given the facts as developed since the preliminary injunction hearing. HUD distributed and made available to tenants, their counsel, and all other interested parties, copies of all material needed to comment on the disposition plan, including the affordability criteria. These plaintiffs and their counsel made comments and participated

fully in that process. See infra at 15. Finally, as regards the content of the plan, the affordability criteria (issue 4), because this Court only has jurisdiction under the Administrative Procedure Act, and because the APA only permits suit when there is "no other remedy at law," and because there is a remedy at law against the City of Baltimore, the Court lacks jurisdiction. See infra at 17-21, 27-28. This, of course, assumes that plaintiffs can overcome the issues of justiciability and can state a cause of action. As we describe below, plaintiffs are unable to meet these hurdles. See infra at 21-27.

Thus, as we explain in greater detail below, as regard the Federal Defendants, there is really only one live issue, whether the relocation forced tenants into more severely impacted areas of Baltimore and whether such is even actionable. The government submits that the Court should enter an order dismissing the compliant in its entirety as regards each other issue.

II. Argument

A. Counts 1 and 2: Violations of Regulations

In their first and second causes of action, plaintiffs attempt to state a claim under the Uniform Relocation Assistance Act ("URA"), 42 U.S.C. § 4601 et seq., and under HUD relocation regulations, 24 C.F.R. § 290.17(d). There is no waiver of sovereign immunity in these provisions. The URA and the cited regulations fail to waive sovereign immunity. See United States v. 249.12 Acres of Land, 414 F. Supp. 933 (W.D. Okla. 1976); Singleton Sheet Metal Works, Inc. v. City of Pueblo, 727 F. Supp. 579 (D. Colo. 1989). Nothing in the URA or in the regulations authorizes a law suit against the United

States. The 249.12 Acres of Land case arose when, in the course of a condemnation, the defendants raised the issue of payments to the under the URA. The Court reached the sovereign immunity argument and noted that there, as here, the claim for relocation benefits "is against the United States."

> The United States may not be sued without its express consent. ... The URA does not expressly waive sovereign immunity. Nor does it appear that any other applicable statute waives the United States immunity in this case. Thus, there is no basis for this Court to take original jurisdiciton of a URA claim.

414 F. Supp. at 934-935.

As a backup, counts I and II implicate the APA. See paras. 89 and 94. The plaintiffs would have it that some aspect of either the URA or some other regulation was violated in connection with HUD's effort to relocate Uplands tenants from what was undisputably unsafe housing conditions at Uplands A and B. One reads the first two causes of action in vain for specificity about what that violation might be. In the First Cause of Action, plaintiffs complain about not having been able to relocate to comparable safe, sanitary and decent housing. See para. 83. Yet, strikingly, and reflecting HUD's largely successful relocation efforts, plaintiffs are compelled to admit that only "Some plaintiff and members of the UATA" have been unable to relocate successfully. And as we know from the history of this litigation, with certain of the holdover tenants having decided not to pay rent, some tenants have simply elected not to cooperate with the relocation effort and remain out of a belief that they can create facts on the ground through the litigation.

The balance of the allegations in the First Cause of Action do not elucidate that manner in which it might be contended that relocation efforts violated some part of the URA. Paragraph 84 complains that HUD failed to assess Uplands' residents needs and preferences. Paragraphs 85 and 86 round out count I by alleging that HUD failed to provide a reasonable opportunity to find decent, safe and sanitary housing not located in an area of minority concentration. Nothing in the Second Cause of Action adds or changes these allegations. Here, plaintiffs allege that HUD's regulations incorporate the URA, see para. 91, without citing any other regulation that they contend may have been violated. Thus, count 2 only amplifies the allegations of count I.

We respectfully submit that the uncontradicted facts establish that plaintiffs cannot, as a matter of law, establish that HUD failed to assess tenants' needs or failed to provide a reasonable opportunity to relocate to acceptable housing. Even before HUD assumed mortgagee-in-possession it was working to establish lines of communication with tenants. Throughout the MIP period HUD kept tenants informed about the future of Uplands though regular meetings and notices and flyers, advising Uplands residents of developments as they happened: the assumption of MIP, the decision to foreclose, the closure and relocation of residents.

On November 7-8, 2001 letters in the form below were sent to all Uplands residents:

> Please be advised that the U.S. Department of Housing and Urban Development (HUD) intends to foreclose on **Uplands A Apartments** within the next few months.

As a result of our decision to initiate foreclosure, we are developing terms and conditions for the foreclosure sale. At this time, these terms and conditions consist of the following:

a. The property must be maintained as affordable housing for 20 years.

b. Tenants currently receiving project based rental assistance will receive assistance under the Section 8 Housing Voucher programs, if the assistance is available and the tenant is eligible for the program to be utilized.

c. The purchaser will be required to perform all repairs necessary to ensure that **Uplands A Apartments** meets all applicable State and Local Codes, and HUD repair requirements. If relocation is necessary as a result of repair, assistance will be provided to tenants in the form of:

1. Advisory services, including housing counseling, referrals to suitable decent, safe, and sanitary replacement housing, and fair housing-related advisory services.
2. Payment for actual reasonable moving expenses, as determined by HUD.
3. The opportunity to relocate to a suitable decent, safe and sanitary dwelling unit in a HUD-owned multifamily project, public housing project, or other HUD subsidized multifamily housing project, if available.
4. Such other federal, State or local assistance as may be available.

If you have any questions or would like to provide input into this process, please call **Anita McDonald, Senior Realty Specialist** on **(404) 331-5001, extension 2306.**

Exhibits 1 & 2 (original emphasis). The announcement specifically advised that tenants could have input into the process. Id. at 2.

Thereafter, there followed a long series of notices to tenants and meetings related to the foreclosure and its implications for the Uplands tenants. We list these in chronological order:

February 11, 2002: Notice to Uplands residents, stating in part:

> The U.S. Department of Housing and Urban Development ("HUD"), which has been operating the Uplands Apartments complex since January 1, 2001, has decided to relocate the residents of the complex in the near future.
>
> * * *
>
> There will be a general meeting for Uplands residents in the next thirty (30) days to announce the details of the resident relocation and the benefits that will be available. Notices will be posted and also placed in the door of each resident with the date, time and place of the meeting.

Exhibit 3. The attached agenda for the meeting is entitled "HUD Update for Upland Apartment Complex." Id. at 2. Robert Iber ("Iber"), Director, HUD Multifamily Program Center, and Donna Binder, also from the Baltimore HUD office, addressed the meeting.

February 28, 2002: Resident Relocation Meeting about, inter alia, the resident relocation process including rights and responsibilities, a section 8 overview, and question and answer session. The notice read in part:

> On Thursday, February 28, 2002, representatives of HUD, ARCO Management and the Housing Authority of Baltimore City, will meet with Uplands residents. They will answer questions regarding the upcoming relocation of residents from the complex. The meeting agenda will include information pertaining to benefits available to assist you in locating suitable new housing arrangements. We will also discuss how you may qualify for a section 8 voucher to help pay your rent.
>
> There will be two (2) meeting sessions, so that residents can choose between a late afternoon and an early evening meeting to best match their schedules. Each session is expected to last around 90 minutes.

Exhibit 4. HUD representatives attended and discussed a variety of issues including the resident relocation process including rights and responsibilities. Id. at 2.

On or about **March 1, 2002** a newsletter was available to residents from ARCO Management ("ARCO"), HUD's management agent at Uplands. Exhibit 5. This

newsletter, which was passed out at one of the February meetings, described ARCO's goal as trying to make the relocation process as easy as possible. It then summarized the relocation services available to tenants. These included relocation orientation, resident counseling, housing locator services, and relocation services. Id. at 1-2. Four pages of "frequently asked questions" were then answered. These answers included the information that HUD would pay relocation benefits, and gave dollar amounts. The answers become quite detailed in places and provide a wealth of information, information too burdensome to summarize in the text of this pleading but that is well worth the Court's attention. Id. at 3-6.

May 20, 2002: Resident Relocation Meeting at the New Palmist Baptist Church providing residents with information about the relocation of Uplands residents and resources available for rental and home ownership assistance. Iber, the Director of HUD Baltimore Multifamily Program Center, attended to give an update on the foreclosure/relocation process. Representatives of ARCO attended to discuss relocation issues. Representatives of the Housing Authority of Baltimore City ("HABC") attended to give updates and discuss relocations/vouchers. Exhibit 8 at 2.

July 25, 2002: A Housing Fair was held at the Uplands relocation office. The announcement read, in part:

> If you have not found a new home, please be sure that you attend this housing fair. Locations are available in Baltimore City and surrounding counties. Representatives of apartment complexes will be present to discuss their properties and your housing needs, and to take applications on the spot!

Exhibit 7.

September 23, 2002: A meeting was held to discuss resident relocation issues. The notice read, in part:

> The deadline for relocation (move-out) from the Uplands apartments complex will be extended beyond September 1st and the new date will be announced at the next tenants association meeting. There will also be additional information about housing resources available to you, and persons who will respond to your questions, and can assist you in getting through the application process for section 8 vouchers.
>
> * * *
>
> Uplands residents who have not made progress in finding suitable housing to live in after leaving Uplands, should stay in regular contact with the Uplands relocation office.
>
> * * *
>
> There will be tours of properties with apartments for seniors and disabled, and other outreach resources, so be sure that the relocation office knows what you're interested in and how they can reach you, so they can contact you when these opportunities come up.

Exhibit 8.

October 18, 2002: An "urgent notice" to remaining tenants of Uplands was posted. Exhibit 9. The notice stated that HUD strongly encouraged all residents to relocate to alternative hosing by November 30, 2002. It advised that HUD had employed professional Relocation Coordinators to assist residents. The notice advised tenants whom they should contact. The notice gave deadline dates:

> **At this time, HUD expects that the foreclosure of Uplands will occur in January 2003. The relocation assistance now available to you will not be guaranteed after the foreclosure date.** Starting in December 2002, preparations will be made for the foreclosure and transfer of the property, and Relocation Effort will begin winding down in time for January 2003 foreclosure.

> HUD and the Relocation Coordinators are working hard with all residents, and are willing to make an extra effort for anyone with special needs – **but you must tell them how they can help you.**

Id. (original emphasis).

November 18, 2002: Important Notice to the Remaining Residents of Uplands A&B Apartments:

> As you know, effective January 1, 2001, the U.S. Department of Housing and Urban Development ("HUD") assumed day-to-day responsibilities for the operation of Uplands A & B Apartments through ARCO Management Group, a HUD contractor. We are moving closer to the foreclosure of the complex, and the relocation efforts are continuing for those people still residing at Uplands. The relocation office is open five days a week, at 516 Glen Allen Rd., Unit B. Their phone number is (410) 233-9113. Come in or call to make an appointment.

Exhibit 10 (original emphasis).

November 18, 2002: An urgent notice to remaining Uplands Tenants. Exhibit 11.

The notice reviewed HUD's role in Uplands and emphasized again the existence of deadlines and the need to relocate:

> **Although it is still preferable for Uplands residents to relocate when possible by the November 30, 2002 target date, nobody will be put out of as of November 30 if they are tenants in good standing. However, you should continue to do the best you can to make other housing arrangements. The property will not remain open indefinitely.**
>
> * * *
>
> **At this time, HUD expects that the foreclosure of Uplands will occur in January 2003. The relocation assistance now available to you will not be guaranteed after the foreclosure date**. HUD expects to include relocation provisions in its contract of sale for Uplands, but the exact benefits and onsite coordinators that are now available may not still be available after the property is foreclosed and sold.

Id. (original emphasis).

November 21, 2002: Relocation Meeting to discuss current status, the relocation process and to answer questions. Like all other such resident relocation meetings, Mr. Iver from HUD attended and gave a current status report of the foreclosure and relocation processes. Other HUD employees described the resident relocation process in more detail. HABC representatives described the section 8 process. Exhibit 12.

January 23, 2003: Urgent Notice to Remaining Tenants. Like many of the prior "urgent notices" this notice recapped the events about HUD's assuming responsibility for Uplands. In more urgent tones, however, this notice spoke to the continued need to relocate:

> **As you are aware, several deadlines have passed that were meant to put a time limit on the relocation process for Uplands residents. The great majority of residents have already moved to replacement housing, but a number of families are still living at Uplands.** ***You must continue to search actively for appropriate housing because the complex will not be open indefinitely!***
>
> * * *
>
> **At this time, HUD expects that the foreclosure of Uplands will occur in Winter-Spring of 2003.** ***The relocation assistance now available to you will not be guaranteed after the foreclosure date***.

Exhibit 13 (original emphasis).

The numbers reflect the success of the relocation effort. When HUD became mortgagee in possession in January 2001, there were 642 occupied units at Uplands. By the time of the filing of the first amended complaint, 26 families remained. Since the preliminary injunction hearing, the relocation efforts have continued. As plaintiffs'

counsel noted in their February 2, 2004 status report, this complex housed "hundreds of families when these relocation processes started" and now "a mere handful of families are remaining." The prior January 23, 2004 status report provided details as to "each tenant household remaining at the Uplands" [sic]. The status report enumerated only 8 tenants and families, further reflecting HUD's successful efforts from the time of the injunction hearing through the sale to the City of Baltimore to assist tenants in relocating.

Against these uncontradicted facts, plaintiffs are only able to offer evidence that some tenants either had unhappy experiences with the relocation effort in terms of interacting with HUD and ARCO, or that some tenants relocated to a residence that they now find unacceptable for one reason or another. Assuming arguendo that there may have been some dissatisfaction with the relocation process, it is difficult to imagine undertaking such a relocation project as this while completely pleasing all parties. Indeed, assuming arguendo that some Uplands tenant moved to residences that they ultimately decided were inadequate, for whatever reason, fails to show that relocation services were not provided. To the extent that plaintiffs allege that HUD violated some regulation by failing to provide relocation assistance, the uncontradicted facts prove the contrary. HUD, in fact, provided relocation assistance and fulfilled its obligations under the URA and other regulations. There is no basis for a finding of an APA violation in regard to the actual provision of relocation assistance as alleged in the First and Second Causes of Action of the second amended complaint.

B. "Notice" Allegations

Certain aspects of the first amended complaint and the proposed second amended complaint allege a failure to give the tenants, plaintiffs and any other interested persons notice about the disposition of the property and an opportunity to be heard. Thus, for example, in plaintiffs' eleventh cause of action alleges, in part, that HUD violated the Multifamily Housing Property Disposition Reform Act of 1994:

> b. By contracting to sell the property to the City of Baltimore without developing a disposition plan that included or considered tenant input.
>
> c. By developing and instituting a plan to dispose of the property without providing notice to tenants of both the initial and final plan for disposition and failing to provide tenants with information as to the general terms and conditions of the sale, future use and operation of the project, the time by which comments must be submitted and providing access to the full disposition recommendation and any other information concerning the sale.

Second Amended Complaint, ¶¶ 144 b. and c.

When the Court held the hearing on the preliminary injunction, the foreclosure had not occurred. HUD was not the owner, it was the mortgagee in possession ("MIP"). Its intention at that time, as described at the preliminary injunction hearing, was to bid in the mortgage at the foreclosure and, if it were the high bidder, resell the property to the City of Baltimore as soon as possible. As MIP – not owner – HUD had no obligation under the Multifamily Housing Property Disposition Reform Act or the applicable regulations to develop a disposition plan.

> Prior to the sale of a multifamily housing project <u>that is owned by the Secretary</u>, the Secretary shall develop an initial disposition plan for the project that specifies the minimum terms and conditions of the Secretary for

> disposition of the project, the initial sales price that is acceptable to the Secretary, and the assistance that the Secretary plans to make available to a prospective purchaser in accordance with this section.

12 U.S.C. § 1701z-11(c)(2)(D)(emphasis supplied). Regulations repeat this language:

> Before disposing of a HUD-owned multifamily housing project, HUD will develop an initial and a final disposition plan for the project that specifies the minimum terms and conditions for the disposition of the project, the sales price that is acceptable to HUD, and the assistance that HUD plans to make available to a prospective purchaser.

24 C.F.R. § 290.15(a)(emphasis supplied).

HUD voluntarily agreed at the hearing to undertake a disposition plan in the event that it won the bid at foreclosure with its mortgage. The disposition plan is attached at Exhibit 21. Of particular interest in Exhibit 21 is a June 26, 2003 document entitled: "Initial Disposition Plan." This documents answers the questions plaintiffs, or anyone else for that matter, might have had about the general terms and conditions of the sale, and future use and operation of the project.

Copies of the Disposition Plan were sent to Current and Former Uplands A & B tenants on June 26, 2003. Exhibit 21.[1] Written comments were solicited by this letter, with HUD requesting responses within 30 days. Id. A copy was also sent to plaintiffs' counsel in this case as well as UATA, the organizational plaintiff. Id. UATA responded with comments on July 25 and July 30. Exhibits 22 & 23. UATA was also able to submit additional comments when HUD re-noticed the Initial Disposition Plan on August 29 and

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[1] The exhibits cited in this memorandum of law are not sequential, for reasons having to do with file maintenance in the United States Attorney's Office. The exhibits are numbered 1-14 and 21-26.

extended the time for comment. Thus UATA provided comments again on September 27. Exhibit 24. Some of the plaintiffs individually submitted comments. Exhibit 25 (Sandra Smith, Ronicia Lewis, Nicole Sewell, Lena Boone). As a result of this process, HUD developed a Final Disposition Plan. Exhibit 26.

In the face of these uncontradicted facts, the defense submits that claims about notice and an opportunity to be heard cannot be maintained and should be dismissed with prejudice.

C. "Affordability Criteria"

The Eighth Cause of Action in the second amended complaint implicates provisions of the contract between HUD and the City of Baltimore. Specifically:

> Both HUD's transfer the Uplands to the City and the restrictions it has imposed on the City require the demolition of the property, including its 583 units of project based subsidized rental unites. Neither its plan for the transfer of the property to the City nor its requirements for the successful bidder provide for the replacement of those units at rents that are affordable to the plaintiffs and other low and very low income African American members of the UATA. By vacating the Uplands Apartments and removing the residents, by imposing restrictions on a subsequent purchaser and/or disposing of the property on the terms and under consideration between HUD and the City which will substantially reduce the number of rental units available to low and very low income African Americans on the Uplands site and in the surrounding racially diverse neighborhood, defendants are making housing unavailable to the plaintiffs, other members of the UATA, and other very low African Americans on account of their race and are discriminating int he terms and conditions of sale or rental of a dwelling. In doing so, defendants are also violating their statutory duty to further fair housing.

Second Amended Complaint, ¶ 134 (emphasis added). In essence, plaintiffs seek to complain about the "restrictions" that appear in contract documents between it and the City of Baltimore: the affordability criteria.

The effort to posit a claim about the affordability criteria, and the transfer to the City of Baltimore, should fail on this uncontradicted record. First, there is no waiver of sovereign immunity in the Fair Housing Act, the Multifamily Housing Property Disposition Reform Act, or anywhere other than in the APA, and therefore review is governed by well-known APA-principles. APA review establishes that serious justiciability issues should prevent this Court from considering this challenge, that plaintiffs fail to state a claim upon which relief can be granted, and that even if one reached the APA, there is another remedy at law, precluding APA relief.

1. Only the APA Waives Sovereign Immunity

It is axiomatic that in order to sue the United States, there must be a specific grant of a right of action against the government. United States v. Testan, 424 U.S. 392, 400 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941)(waivers of sovereign immunity are not implied and are to be strictly construed). Waivers of sovereign immunity cannot be implied but must be unequivocally expressed. United States v. Mitchell, 445 U.S. 535, 538 (1980). Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990); Department of Energy v. Ohio, 503 U.S. 607, 615 (1992). The government's consent to be sued is to be strictly construed in favor of the sovereign. Unite States. v. Nordic Village Inc., 503 U.S. 30, 34 (1992); Kabakjian v. United States, 267 F.3d 208, 211 (3rd Cir. 2001); Ardestani v. INS, 502 U.S. 129, 137 (1991).

The plaintiffs appear to contend that the Fair Housing Act, 42 U.S.C. § 3601 et seq., allows an independent basis of jurisdiction. In fact, however, no provision states that

a claim may be made against the Secretary, HUD, or any other agency of the federal government. There is no language in the FHA that authorizes suit against HUD. Recognizing this, the cases hold that there is no waiver of sovereign immunity in the Fair Housing Act. Pleune v. Pierce, 697 F. Supp. 113, 119-120 (E.D.N.Y. 1988); Tinsely v. Kemp, 750 F. Supp. 1001, 1009-1010 (W.D. Mo. 1990). One court put it in typical succinct fashion:

> Federal defendants assert that they enjoy sovereign immunity to the claims asserted. ... Plaintiffs do not argue the question of sovereign immunity under the FHA, apparently conceding the issue. In any event, the FHA does not include a waiver of sovereign immunity. Almonte v. Pierce, 666 F. Supp. 517, 524 (S.D.N.Y. 1987).

Bennett v. New York City Housing Authority, 248 F. Supp. 2d 166, 169-170 (E.D.N.Y. 2002). The gravamen of these decisions is that Congress did not waive sovereign immunity under the FHA.

To the extent that the plaintiffs allege the affordablity criteria fail to provide replacement units that are affordable or located in an ethnically diverse area, this claim greatly resembles the kinds of claims made against HUD when, for example, it is alleged that HUD has failed to cause local housing authorities to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." See Latinos Unidos de Chelsea (LUCHA) v. Secretary of Housing and Urban Development, 799 F.2d 774, 791 (1st Cir. 1986), citing and quoting, 42 U.S.C. § 3608(e)(5).

Section 3608 creates no private cause of action against federal funding agencies

under Title VIII. LUCHA, 799 F.2d at 791-794. In LUCHA, the Court recognized the existence of other judicial opinions suggesting the existence of an independent private right of action against the government under section 3608. The court, however, demonstrated that at best the opinions were ambiguous as to whether they found a private right of action or whether their review was conducted pursuant to the APA. See id. at 792 (citing cases). The court conducted its own examination of the question and held that "there is no private right of action under section 3608(d)." Id. at 792. The Court was particularly influenced by the "multi-faceted enforcement scheme expressly set out in the statute." Id.

The First Circuit had occasion to reiterate its holding in LUCHA one year later in NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149, 152-155 (1st Cir. 1987).

> The NAACP argues the district court's dismissal of its case is wrong because Congress, in enacting Title VIII, implicitly created a "private right of action" allowing it to enforce "directly" the obligations that Title VIII imposes upon the federal government. ... The short, conclusive answer to this argument, however, is that this court has recently held that Congress did not create any such direct private cause of action under Title VIII. ... .
>
> In fact, it is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the federal government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for conformity with statutory obligations without any such "private right of action."

NAACP, 817 F.2d at 153. The court proceeded to discuss the APA and observed, inter alia, that the cases finding a private right of action do not involve a right of action against

the federal government but against a non-federal person. Id. The court rejected the few cases that find a private right of action under Title VIII because they failed to consider the role of the APA. Id. at 153-154, citing, Young v. Pierce, 544 F. Supp. 1010, 1017-1019 (E.D. Tex. 1982).

The First Circuit is not alone in its holding that Title VIII excludes a private right of action independent of the APA. The court in Marinoff v. U.S. Department of Housing and Urban Development, 892 F. Supp. 493 (S.D.N.Y. 1995), aff'd, 78 F.3d 64 (2d Cir. 1996), held that there was no private cause of action under Title VIII against HUD for its decision not to pursue plaintiff's alleged discrimination claim through the administrative channels. "[P]laintiff may not sue HUD under [Title VIII] because [Title VIII] provides no express or implied rights of action against HUD." Id. at 496. See also, Pleune v. Pierce, 697 F. Supp. 113, 119-120 (E.D.N.Y. 1988). In Pleune, the court followed LUCHA, and cited opinions from a variety of districts and circuits that similarly hold no private right of action exists. Id. at 119-120, citing, Montgomery v. United States Department of Housing and Urban Development, 645 F.2d 291, 297-298 (5th Cir. 1981)(Hill, J. dissenting); Givens v. Chaires, No. 3-83-0131-H, slip op. at 9-10 (N.D. Tex. Jan. 23, 1984); Nabke v. HUD, 520 F. Supp. 5, 8-9 (W.D. Mich. 1981); Anderson v. City of Alpharetta, 737 F.2d 1530, 1534 (11th Cir. 1984); Alschuler v. HUD, 686 F.2d 472, 476, 477-478 (7th Cir. 1982); Business Association of University City v. Landrieu, 660 F.2d 867, 873 (3d Cir. 1981).

Numerous other judicial opinions have agreed that the FHA contains no waiver of

sovereign immunity. E.g., NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149, 152 (1st Cir. 1987)(non-monetary claims: citing Latinaos Unidos de Chelsea en Accion v. Secretary of Housing and Urban Development, 799 F.2d 774, 791-793 (1st Cir. 1986)); Bennett v. NYCHA, 248 F. Supp. 2d 166, 170 (E.D.N.Y. 2002)(same in case involving monetary claims citing Almonte v. Pierce, 666 F. Supp. 517, 524 (S.D.N.Y. 1987)); Gregory v. South Caroline Department of transportation, 2003 WL 22517600 *3-*4 (D.S.C. Oct. 29, 2003)); Furtick v. Medford Housing Auth., 963 F. Supp. 64 (D. Mass. 1997); Boyd v. Browner, 897 F. Supp. 590 (D.D.C. 1995)(monetary claims).

The final claim in the second amended complaint alleges violations of the Multifamily Housing Property Disposition Reform Act of 1994, 12 U.S.C. § 1701z-11, and the regulations thereunder, 24 C.F.R. Part 290. Nothing in the language of that section or the regulations, however, waives sovereign immunity and we are aware of no judicial opinion holding that these provisions waive sovereign immunity.

In sum, whether one couches the analysis in terms of a waiver of sovereign immunity (depriving the Court of jurisdiction), or in terms of failure to state a claim (Rule 12(b)(6)) because there is no implied cause of action, the result is the same. Separate and apart from the APA there is no ability of the instant plaintiffs to bring suit against the instant defendants. To the extent that the plaintiffs contend that some other provision vests this Court with jurisdiction, the contention should be rejected.

2. Justiciability and Standing

We submit that doctrines of justiciability should cause the Court to hesitate before hearing further challenges to the affordability criteria. While it appears, based on the record from the preliminary injunction hearing, that plaintiffs would like to argue that different affordability criteria should have been employed, there are a series of problems associated with the effort to litigate this issue now.

Plaintiffs lack standing to litigate about the terms of a contract between the City of Baltimore and HUD. The contract between HUD and the City of Baltimore incorporating the affordability criteria was executed at the end of 2003. Title to Uplands transferred in early January 2004. Thus, plaintiffs with this claim seek to insert themselves into the midst of that contractual relationship. Courts that have considered similar kinds of challenges have concluded that tenant plaintiffs lack standing to challenge such contractual terms and relationships.

In McGrath v. Department of Housing and Urban Development, 722 F. Supp. 902 (D. Mass. 1989), HUD entered into a Voluntary Compliance Agreement ("VCA") with the Boston Housing Authority. Plaintiffs alleged that the VCA contained provisions that fostered racial compacting within Boston. Id. at 903. A specific target of the VCA was its mandate of a city-wide public housing list, which replaced development-specific lists and which plaintiffs alleged discriminated against white and minority applicants. Id. at 904. The court found that plaintiffs lacked standing because there was no injury and no "fairly traceable causal connection" between the challenged conduct and the alleged injury. Id. at

905-906. Nor, the court specifically held, would the remedy plaintiffs sought redress the alleged injury. Id. at 906.

A long line of cases has held that tenants may not bring challenges to aspects of the relationship between the project owner and HUD embodied in the Regulatory Agreement, even when such relates to the amount of rent charged them. See, e.g., Reiner v. West Village Associates, 600 F. Supp. 233 (S.D.N.Y.)(tenants had no standing to complain about rent charges in excess of that allowed under the Regulatory Agreement), aff'd, 768 F.2d 31 (2d Cir. 1985). As the District Court in Reiner wrote:

> The defendants correctly assert that every federal court that has considered the issue of whether tenants are "intended" or "third party" beneficiaries of Regulatory Agreements entered into between HUD and project owners under HUD's various mortgage insurance programs have held that they are not. See, e.g., Falzarano v. United States, 607 F.2d 506, 511 (1st Cir.1979) (§ 221(d)(3) program, below-market interest rates for insured mortgages, 12 U.S.C. § 17151(d)(3)); Ellis v. HUD, 551 F.2d 13 (3d Cir.1977), aff'g, No. 75- 1721 (E.D.Pa. April 8, 1976) (§ 220 program, mortgage insurance for projects built in urban renewal areas, 12 U.S.C. § 175k); Harlib v. Lynn, 511 F.2d 51, 55-56 (7th Cir.1975) (§ 221(d)(3) program); LeGrand Reed v. Esplanade Gardens, Inc., No. 80 Civ. 3780 (S.D.N.Y.1981) (§ 223(f) program).

600 F. Supp. 238.

The Fourth Circuit in Perry v. Housing Authority, 664 F.2d 1210 (4th Cir. 1981), followed this line of authority, holding that tenants could not state a claim based on the public housing authority's Annual Contribution Contract with HUD, holding that a District Court in the Fourth Circuit followed in 1995. Simmons v. Charleston Housing Authority, 881 F. Supp. 225, 232 (S.D.W.Va. 1995).

The basic legal requirements for standing are well established. An association has

standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). With respect to individuals' standing, "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant ... and [2] that the injury fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (internal quotation marks and citations omitted); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). According to the Fourth Circuit: "[t]hese three prongs are most commonly referred to as (1) injury in fact, (2) traceability, and (3) redressability." American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517 (4th Cir. 2003).

Given the near-complete uncertainty about the nature of a redeveloped Uplands, plaintiffs are unable, as a matter of law, to establish either of the three elements of standing insofar as a challenge to the affordability criteria are concerned. The affordability criteria are ceilings, not floors, meaning that it would be permissible for a redeveloped project to contain many if not all of the elements plaintiffs would like to see. The development process at the local level is ongoing, with the City of Baltimore

undertaking through its processes to determine what the reconstructed project will look like. It may very well be that the project includes affordable housing units of the type and quantity that plaintiffs desire. It may transpire that the redeveloped site has no negative impact on racial diversity. Given these uncertainties, it is far from clear what remedy this Court could fashion now. The prayer for relief in the Amended Complaint gives no insight into the specific kind of remedy plaintiffs might request. On this point, it appears merely to request a declaratory judgment that the Fair Housing Act is violated and an injunction against proceeding with foreclosure.

3. No Fair Housing Act Cause of Action

The Fair Housing Act prohibits, in essence, discrimination in the sale or rental of housing. 42U.S.C. § 3604. The Act makes it unlawful, on the basis of race, color, religion, sex, familial status, or national origin (a) to refuse to sell or rent, (b) to discriminate in the terms, conditions, or privileges of sale or rental, (c) to publish discriminatory notices or advertisements, and (d) to represent that housing is unavailable. The Act contains further restrictions as regards disability discrimination, which do not appear to pertain to this complaint.

HUD has taken no step that falls within any of the proscribed conduct under the FHA, rendering it impossible for this Court to find that HUD has, in this way, violated the APA. HUD's contract with the City of Baltimore is attached at exhibit 7. Riders 3 and 13 contain the affordability criteria. The City agrees to demolish existing units and to redevelop the property with up to 900 rental/single-family homeownership units on the

same site, of which up to 900 units can be affordable housing. Not less than 74% of the 900 units shall be developed as affordable; 26% may be built at market rate.

Rider 13 allows the City to request changes. "The total number of units to be rebuilt may be decreased if the City's master plan determines that a lesser number of units are appropriate, and the [City] notifies HUD and HUD approves prior to [the City] initiating any new construction." Id. Rider 13, ¶ 1.

Newly constructed units will first be marketed to all interested former Uplands residents. Id. Rider 13, ¶ 4. "The [City] will first contact all such former residents upon completion of the new development, or any substantial development component thereof, to be considered for occupancy in the newly constructed property, before considering any new applicants for tenancy." Id.

Nothing in the record before the Court suggests that HUD, or the City (to the extent that it is even possible to divine how the City will redevelop the property), will impose any rule or restriction that would implicate any of the FHA's unlawful practices. Nothing in the contract documents restricts participation in a redeveloped Uplands on any basis at all.

Nor is it possible, at this stage of things, for plaintiffs to assert a claim about the overall effect of a redeveloped Uplands depriving them of housing. The Contract of Sale recognizes that the City's planning process is underway. Insofar as the undersigned counsel is aware, the City's planning has yet to mature to a point where one can determine the number of units, let alone the affordabiity of the units, to be developed. Plaintiffs offered no evidence at the hearing on their preliminary injunction in this regard and, in the

months since then, have similarly not advised about the City's intentions. Given the fact that HUD's affordability criteria are only ceilings, and given the unpredictablity of what a redeveloped Uplands will look like, we submit that plaintiffs are unable to sate a claim upon which relief can be granted under the APA.

4. Other Remedy at Law is Available

Assuming (1) that APA review alone applies and (2) that plaintiffs are able to state a claim under the FHA by virtue of the nature of a redeveloped Uplands, the Court should dismiss any such claims against HUD because "there is [an]other adequate remedy." 42 U.S.C. § 704.

The APA conditions judicial review on the absence of "other adequate remedy." Id. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Id. The cases generally hold that courts will decline invitations to review agency action when the plaintiffs have an other adequate remedy in a court. See, e.g., New York City Employees' Retirement System v. Securities and Exchange Commission., 45 F.3d 7, 14 (2d Cir. 1995)(shareholder action against corporation an adequate alternative to APA review of agency's no action letter); Gillis v. United States Department of Health and Human Services, 759 F.2d 565, 575 (6th Cir. 1985)(private suits against hospitals for violations of Hill-Burton Act an adequate alternative to APA review of agency's actions); Council of and for the Blind v. Regan, 709 F.2d 1521, 1531-1532 (D.C. Cir. 1983)(same). This requirement, that there be no other avenue for relief, has been commonly applied where, as

here, plaintiffs may obtain redress elsewhere, even where the party must raise the issue as a defense to suit. E.g., Hitachi Metals, Ltd. v. Quigg, 776 F. Supp. 7, 9-10 (D.D.C. 1978)(availability of patent invalidity as a defense in a potential infringement action constitutes another adequate remedy to APA review of agency action).

In the event the City of Baltimore causes a redevelopment of Uplands that comes to generate exposure under the FHA for reducing the amount of low-income housing stock, plaintiffs could bring a claim, either in this Court or in State court, against the City of Baltimore. We express no opinion about the merits of such a claim at this point. Given the present undecided stage of planning, and the impossibility of determining what the replacements will be, the defendants submit that no such cause of action can be stated now. However, in the event that such a cause fo action ripens to maturity, the City of Baltimore and its respective developments agencies would be natural respondents.

III. Conclusion

The Court should grant this motion.

Respectfully submitted,

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