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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FEDERAL DEFENDANTS' (1) REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND (2) OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. Introduction

Cross motions for partial summary judgment are pending. The federal defendants' motion attacked three of the four major areas of the complaint (relocation assistance, plaintiffs' participation in the decision making process, and the affordability criteria). While the plaintiffs have advanced argument in response to each of these three areas, they have moved for summary judgment, arguing (1) that the Department of Housing and Urban Development ("HUD") failed to "consider" their comments, and (2) that in determining the affordability criteria, HUD did not consider statutory criteria.

For the reasons that follow the Court should grant the federal defendants' motion and deny the plaintiffs' cross motion.

II. Relocation Assistance

The second amended complaint seeks in Counts I and II to impose liability for failure to provide the kind of relocation assistance required by the Uniform Relocation Assistance Act ("URA") and the implementing regulations. The federal defendants established that there was no waiver of sovereign immunity in either the URA or the regulations. Def. mem. at 4-5. Plaintiffs have conceded that the Administrative Procedure Act ("APA") is the only basis for federal jurisdiction. See pl. opp.[1] at 6.

Limiting the analysis to APA review has significant implications. Under 5 U.S.C.

[1] The term "pl. opp." is intended to refer to the February 26, 2004 "Plaintiffs' Opposition to the HUD Defendants' Motions for Partial Summary Judgment and Reply to their Opposition to Motion for Leave to Amend."

§ 706, the reviewing court shall either "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action and findings, and conclusions, found to be" arbitrary, capricious, an abuse of discretion, not in accordance with law, unconstitutional, in excess of statutory authority, procedurally problematic or, for rulemaking, unsupported by the record. The provision of relocation services is not rulemaking. Nor does it constitute "findings" and "conclusions" capable of being labeled "arbitrary," etc. The only aspect of the APA that appears to apply is § 706(1): compelling agency action "unlawfully withheld or unreasonably delayed."

Most published opinions involve a rule or some other formal action. In crafting standards of review, some Courts have attempted to distinguish between action "unlawfully withheld" and "unreasonably delayed." E.g., Forest Guardians v. Babbitt, 164 F.3d 1261, 1271-1272 (10th Cir. 1998). Other courts have developed criteria for consideration to determine whether delay is excessive. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1226 (10th Cir. 2002). These kinds of cases seem inapposite to the APA analysis facing this Court because the instant record demonstrates that HUD provided relocation services and that, therefore, services were neither delayed nor withheld.

It is undisputed that many people more than simply these few plaintiffs resided at Uplands. Many people took advantage of the relocation services offered. Some of those persons testified at the hearing before this Court in May 2003 on plaintiffs' motion for

preliminary injunction. They, and many Uplands tenants like them, had good experiences with the relocation. When assessing whether an agency has withheld or unreasonably delayed action it would unfairly constrict the analysis if the Court only considered the experience of the few complaining plaintiffs. The federal defendants described and quoted that evidence in detail, showing the numerous communications and efforts that HUD and its relocation contractors made to publish the availability of services. Def. mem. at 5-13. Notice after notice went out; meeting after meeting occurred. The relocation contractors were on site. HUD staff became personally involved in these efforts, often on behalf of the very plaintiffs in this case. The plaintiffs seem to recognize the force of this argument when they admit in a footnote that if one considered the entire tenant experience, HUD's efforts met with success. Pl. opp. at 34 n.26.

And so, against the backdrop of the more general experience of tenants at Uplands, one turns to the evidence that plaintiffs say proves HUD failed to offer adequate relocation services. Plaintiffs cite the affidavit testimony of six named plaintiffs. Pl. opp. at 33-35. Out of the hundreds of families moved, and in a 12-plaintiff case, plaintiffs are able only to cite snippets of nearly 12-month old affidavits from these six persons. Plaintiffs' inability to identify other persons or provide anything better than stale affidavits is telling.

Turning to the content of the affidavits, that testimony fails to establish that URA services were not provided. Plaintiffs claim that the URA requires a "determination" of

the tenants' needs and desires. Pl. opp. at 32. Yet, the affidavits cited show that HUD considered these tenants' needs. Ms. Minor and Ms. Robinson are cited as complaining about Cherry Hill's distance from their employment or children's schools. Pl. opp. at 33. Minor acknowledged in the same affidavit that "Cherry Hill was a last resort." Exhibit ¶ 6. She was referred unsuccessfully to several other apartments first. Id. ¶¶ 2, 4, 5. Similarly, Robinson was not "directed" at the outset to Cherry Hill. Exhibit 29 ¶ 3. She looked for other locations "for many months" without success. Id. In fact, Ms. Robinson actually found an apartment that suited her, but lost it when the Housing Authority of Baltimore City failed to contact the landlord. Id. Mr. Jefferson too was sent other places than Cherry Hill and looked at numerous other homes on the west and northwest sides of Baltimore. Exhibit 30 ¶ 5, 6.

Deposition testimony from some of these persons, and other plaintiffs, further establishes that HUD and its contractors provided URA relocation services. Each of the plaintiffs who testified on deposition knew HUD created a Relocation Office. Exhibit 27 (Lavinia Dean) at 19-20; exhibit 31 (Katrina Minor dep.) at 18; exhibit 32 (Ann Jones dep.) at 10; exhibit 33 (Lena Boone dep.) at 12; exhibit 34 (Sandra Smith dep.) at 18-19; exhibit 35 (Colatta Dean dep.) at 14-15; exhibit 36 (Ronicia Lewis dep.) at 10-13.

At the Relocation Office, staff interviewed tenants or had them complete questionnaires. According to plaintiff Ann Jones:

> Q. And did they indicate that there would be an office with people who would help find apartments and the like?

A. Um-hum.

Q. Did you ever visit the Relocation Office?

A. Yes.

Q. And did someone sit down with you and discuss with you what you needed and where you were interested in going?

A. Ms. Parker did, yes.

Q. Ms. Parker did. And when you talked to Ms. Parker, did she provide you with any places where you might want to look for apartments?

A. Yes, but there wasn't enough space.

Q. There wasn't enough space, okay. So do you recall how many places she sent you to?

A. Maybe about three. She called herself while I was in the office.

Exhibit 32 at 10. Ms. Jones also called several and went to look at one apartment in Carriage Hill. Id. at 11. She liked Carriage Hill and the unit there; it was "right by the office." Id. at 13. A difficulty with the voucher prevented her from moving in. Id. at 11-12.

Plaintiff Colatta Dean heard about the Relocation Office and made an appointment. Exhibit 35 at 12-13. When her appointment came up in October, she went in for her interview. Id. at 13. She vaguely recalled filling out "some kind of application or something that they gave you, and you had to fill out stating what you needed or what you were looking for." Id. at 13-14.

Q. Okay. And were you given some assistance in trying to find some

housing?

A. Well, I mean, as much as they promised us that they were supposed to have done, honestly, I could say no; you know what I'm saying? Relocation would call and see if you found anything. When they would say they might have a listing up there, you know, I picked up a sheet of paper with a couple, you know, places listed on there.

Q. Okay.

A. Cynthia Parker, she was with Relocation. She called me a couple times and gave me certain landlords or, you know, numbers or something I could call –

Q. Right.

A. – you know what I'm saying, to see if they had anything available.

Id. at 14-15. Plainly, the Relocation Office provided the service to which plaintiffs claim the URA entitled them: a consideration of their interests and needs. See pl. opp. at 32.

The Relocation staff had money to give to Uplands tenants to defray the costs of transportation and applications. Colatta Dean received $400 from this fund. Exhibit 35 at 20. Others receiving monetary assistance in this regard included plaintiff Ronicia Lewis (exhibit 36 at 9), and Sandra Smith (exhibit 34 at 20). Plaintiff Lena Boone acknowledged that HUD offered money but she interpreted it as a threat. Exhibit 33 at 13-14.

The Relocation Office provided lists of apartments and houses. Plaintiff Sandra Smith received a list from HUD directly, and was also assisted in some degree by the Relocation Office, although she admitted that she did "[a] lot on my own ... ." Exhibit 34

at 22.

Q. Did you feel that they steered you into any one location more than others?

A. The listings I had were all over.

Q. Okay.

A. I just didn't like the areas. They were all over in –

Q. What areas didn't you like?

A. Eastside. They had some in Bel Air, Woodlawn had quite a few.

Exhibit 34 at 23. Plaintiff Katrina Minor also received lists of addresses:

Q. Did anyone ever help you or provide you with addresses of possible places where you could move?

A. Yes.

Q. Okay. Did anyone ever discuss with you what your needs were for housing, in terms of how large and what locations you were interested in?

A. Relocation Office had some contacts, and they would, like, if you went into – which I was a person, I would stop in there when I had time. They would say, "Well, we have something such and such."

* * *

Q. So you kept in touch with the Relocation Office?

A. Yes.

Q. And the home that you eventually found in Cherry Hill at 3231 Gulfport Drive, was that through the Relocation Office, or was that something you found on your own?

A. The Relocation Office had some contacts with them.

Q. Okay. How many places did you look at before you found where you wanted to move?

A. A lot. ... .

Exhibit 31 at 18-19. The Relocation Office also appears to have passed out booklets with addresses of apartments. Some found them "useless." See, e.g., exhibit 33 (Lena Boone dep.) at 12. That said, even these tenants kept in touch with the Relocation Office, in Ms. Boone's case stopping in when she walked by because it was on her way to get her daughter. Id.

This testimony shows that the Relocation Office was there for the Uplands tenants. So too was HUD. The testimony of individual plaintiffs confirms that HUD employees individually played a not insubstantial role. For example, Colatta Dean waxed rhapsodic about the assistance she received directly from HUD staff, especially Joe Baum. Exhibit 35 at 15-16 ("I feel as though Joe [Baum] helped more so than anyone else did." Id. at 16.) She was not alone in her appreciation of Mr. Baum's efforts.

Q. Have the people at HUD been trying to help you with some of the issues like the credit issues?

A. Yeah, definitely.

Q. Who has helped you?

A. Well --

Q. Joe [Baum]?

A. Yeah. And what's his name, Reggie Shriver. ... .

Exhibit 27 at 26 (Lavinia Dean dep.). See also exhibit 37 (Iber dep.) at 107 (describing relocation assistance provided directly by HUD employees). For one tenant, Colatta Dean, HUD paid approximately $15,000 to renovate the house to which she ultimately relocated. Exhibit 41 ¶ 16. The defense detailed many of these efforts in the Spring 2003 opposition to the plaintiffs' motion for preliminary injunction.

It is quite difficult, based on this record, to conclude that URA assistance was "withheld" or "delayed." Perhaps for this reason, plaintiffs seem to advance a back up argument to the effect that unless HUD and its contractors actually succeeded in moving a particular tenant, a de facto withholding or delay of services occurred. Plaintiffs note that some tenants found the lists of apartments useless and moved on their own, without having received some aspect of the relocation assistance that others enjoyed. Some moved without using section 8 vouchers. Plaintiffs embroider this thesis when they suggest in a footnote that subsequent compliance does not "erase" HUD's liability for violations as to those who moved without required assistance. Pl. opp. at 34-35 n.26. In other words, although HUD and its contractors provided relocation assistance, unless the tenant actually used it and benefitted from it directly, URA services are unlawfully "withheld" or "delayed."

No authority supports the plaintiffs' argument. Nor does it withstand analysis. HUD made resources available but could not force tenants to employ them. Nor could

HUD guarantee that all interactions with landlords, the City housing bureaucracy, or even the Relocation Office itself would be wrinkle free. The plaintiffs would apparently have the Court translate their high standard for trouble-free relocation services into a low threshold for liability, with the Court finding that services were "withheld" or "delayed" whenever a tenant located alternative housing in some way other than through the offices of the relocation contractors or HUD.

Setting aside the lack of authority, it takes only a modest amount of imagination to see where this argument leads. If Courts measure "withheld" and "delayed" by the level of success achieved from provision of the service, many agencies that provide multifarious services, but whose efforts may not be crowned with complete "success," potentially become subject to APA challenges. Absent authority, the Court should avoid this result.

There is no genuine issue of material fact. Relocation services consonant with the URA and the regulations were neither withheld nor delayed. Summary judgment should be granted as to Counts I and II.

III. "Notice" Allegations: Consideration of Comments

Count X of the second amended complaint proceeds under the APA to allege violations of the Multifamily Housing Property Disposition Reform Act, 12 U.S.C. § 1701z-11. Second amended complaint ¶ 145. The federal defendants argued that, as a matter of law, HUD's development and circulation of a disposition plan, coupled with the

receipt of comments from interested parties, established that plaintiffs could not maintain a claim. See def. mem. at 13-16. In response, plaintiffs argue that HUD failed to "consider" either their comments or the statutory goals, and seek partial summary judgment on this basis. Pl. opp. at 8-22; pl. mem.[2] at 5-12. The record belies plaintiffs' argument.

A. Standard of Review

Plaintiffs touch only briefly on the applicable standard of review, citing a few discrete cases but not putting them in any larger context. See pl. opp. at 7, 15-16, 16-17; pl. mem. at 4-5, 11-12, 12-13. The "arbitrary and capricious" standard of review is highly deferential to the accused agency. Environmental Defense Fund, Inc. v. Costle , 657 F.2d 275, 283 (D.C. Cir. 1981)(quoting Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)). Judicial review of an agency's action presumes the action to be valid. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971). The standard is a narrow one, which forbids a court from substituting its judgment for that of the agency. Id. at 416. Further, courts may not substitute their judgment "even though [it] might otherwise disagree [with that agency's action]." Environmental Defense Fund, Inc., 657 F.2d at 283 (citing United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749 (1972)). The burden of overcoming this presumption of validity lies with the party challenging the

[2] The term "pl. mem." refers to "Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment Against the Federal Defendants."

agency decision. Bagdonas v. U.S. Dept. of Treasury Bureau of Alcohol, Tobacco and Firearms , 884 F. Supp. 1194, 1198 (N.D. Ill. 1995). "The agency need only offer a rational basis for its action." Natural Resources Defense Council v. U.S. E.P.A., 806 F. Supp. 1263, 1272 (E.D. Va. 1992)(citing Bowman Transp. Inc. v. Arkansas-Best Freight Sys. Inc., 419 U.S. 281, 290 (1974)).

Though the actions of an agency must be based on the consideration of relevant statutory factors and standards, Central Elec. Power Co-Op v. Southeastern Power Admin., 338 F.3d 333 (4th Cir. 2003), judicial review of an agency action to determine if it was arbitrary and capricious is not expansive. The action of an agency will only be set aside if a review of the record below reveals that the challenged conduct is so lacking in evidentiary support that the action is arbitrary, capricious or an abuse of agency discretion. Overton Park, Inc., 401 U.S. at 416. An agency's decision should be upheld if the conclusions reached are rationally supported. United States v. Allegheny-Ludlum Steel Corporation, 406 U.S. 742, 749 (1972).

B. Contemporaneous Documents Show HUD Considered Plaintiffs' Comments

As plaintiffs are compelled to admit, at least in part, the record shows that HUD in fact considered their comments. In their papers, plaintiffs even describe some of the contemporaneous documentary evidence of that consideration. Pl. opp. at 13-14. Two documents from the summer of 2003 are of especial note. Exhibits 39 & 40. The first is a "List of considerations expressed in written comments regarding Initial Disposition

Plan." This 3 ½ page document describes comments that HUD received. The comments submitted by plaintiff Uplands Apartments Tenants Association appear on pages 2-4. Several community associations commented that they desired to be included in discussions about the Master Planning Process. Several comments also requested that demolition start immediately on the vacant structures because of crime, gang members and drug dealing. One comment insisted that demolition be accomplished by August 30, 2003.

The second document relates to HUD's assessment of the rents that the Uplands area market would bear. HUD intended to determine the extent to which tenants with section 8 vouchers might afford to relocate to a redeveloped Uplands. As expressed on the document, HUD concluded that all or nearly all apartments in the neighborhood are affordable at 50% of area median income.

This documentation standing alone suffices, as a matter of law, to show that comments were considered. In an APA analysis, the level of documentation will depend on the nature of the agency action. Thus, formal rulemaking has a high standard of documentation. Formal adjudication has a similarly high set of requirements. HUD's action here -- determining proper affordability criteria for a project that is still in the planning process at the City -- more closely resembles informal adjudication. The substantive statute, 12 U.S.C. § 1701z-11, contains nothing that describes the level of documentation required. The level of informality means that opinions involving full-

blown rulemaking or formal adjudications are inapposite. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971)(APA provisions requiring explanation in rule making and formal adjudication do not apply to informal adjudication).

Informal adjudication does not require a complete record. "In any formal adjudicatory proceedings a record must be compiled; however, the APA does not require that a record be compiled in informal proceedings." Stein, Mitchell & Mezines, 6 Administrative Law, § 52.01, at 52-3 (2003).

> The Administrative Procedure Act requires judicial review to be based on the agency's "record" of its proceedings. The Act does not, however, refer to a record being compiled, except with respect to formal proceedings requiring a trial-type of hearing. Nevertheless, the courts do offer review of informal rulemaking and informal adjudications, and in each of these cases documents representing the agency record are placed before the court.

Id. at 52-3 to 52-7 (footnotes omitted). The APA allows for informal adjudication and leaves the production of a record to agency discretion and nothing in the APA requires a record for informal adjudication. Id. § 52.03, at 52-27.

In light of these standards, no provision of law required that HUD produce a "better" record. Such is especially the case where the challenge stated in these Counts of the Complaint are procedural, with the highly focused complaint that the comments were not "considered." The challenge for the Court as to count X of the second amended complaint is initially to determine whether the record, such as it is on informal adjudication of this kind, shows that HUD considered plaintiffs' comments. These two documents show that this consideration occurred.

C. Direct Oral Explanation From the Director of Multifamily Housing

Assuming arguendo that the Court determined that more were required to show that HUD considered plaintiffs' comments, the Court may resort to alternatives in cases involving informal adjudication, such as testimony.

> The [Supreme] Court has laid down no guidelines for what should be contained in the record, but it has made clear that if the record is insufficient for the reviewing court to make a determination, it may not conduct its own fact finding proceedings. If further facts are needed to complete the record, it is up to the agency, not the court, to add material. At most, if the agency has not offered an explanation for its action, the court may take testimony, but only for the purpose of having the individuals who made the decision explain the action, not for the purpose of developing facts for or against the agency decision.

Stein, Mitchell & Mezines, 6 Administrative Law §52.03, at 52-27 to 52-33 (2003)(footnotes omitted).

Discovery occurred before the preliminary injunction hearing. The Director of Multifamily Housing for HUD in Baltimore, Robert Iber, testified during two days of deposition. Iber's testimony establishes that HUD considered these plaintiffs' comments. See pl. opp. at 11-12 (list of comments supposedly ignored), pl. mem. at 7-8 (same). The defense concedes that Iber testified prior to the summer 2003 notice and comment period for the disposition plan. It is an artifact of the procedural posture of this case that deposition testimony from this HUD designee was taken prior to publication of the disposition plan for comment. This procedural posture, ironically enough, gave the plaintiffs a complete opportunity to discover HUD's view about their comments even

before the disposition plan was circulated. Plaintiffs took advantage of the opportunity and learned how HUD had considered all these matters.

When it then came time to comment on the disposition plan, plaintiffs simply repeated the identical comments. Thus, as we establish below, HUD had considered the very points plaintiffs raised -- and even communicated to the plaintiffs its position as to each -- even before the disposition plan was distributed for comment approximately two months later.

Proceeding informally, and assuming arguendo that the Court found the documentary evidence inadequate as a record, an agency may rely on deposition testimony, even where the testimony occurs prior to circulation of the disposition plan, when the comments received in response to the disposition plan are identical to those about which the agency designee testified. The goal, the Stein treatise suggests, is for the Court to understand the agency's thought process. Specifically, in the context of the count of the complaint presently at issue, which complains about whether comments were considered, the Court needs to know if HUD considered the plaintiffs' comments. It matters not when that consideration happened.[3] No authority cited by plaintiffs supports the proposition that an agency that is trying to get things done with expedition,

[3] Plaintiffs themselves make argument about matters HUD considered that occurred before the disposition plan was circulated, suggesting strongly that plaintiffs agree with the defense on this point. See pl. opp. at 13-14 (discussing the worksheet, Form 9650).

proceeding informally, must build a formal record that it considered the same issues over and over again. Overton Park, by contrast, supports the proposition that such is not required.

One of the best examples of plaintiffs repeating the same comment, again and again, irrespective of the quality of HUD's answer, is in the comment about Up Front Grants, to which we next turn. Iber testified that the statute precluded the suggestion plaintiffs offered. Despite that clear answer, plaintiffs continued to assert the position and HUD, not surprisingly, felt constrained against adopting it. After showing that these plaintiffs would have the Court brand HUD as arbitrarily and capriciously ignoring their concerns for allegedly failing to consider a comment that the statute precluded, we take the balance of the plaintiffs' list of points, see pl. opp. at 11-12, pl. mem. at 7-8, in their general order of appearance.

1. "Up Front Grants:" Comments About Off Site Affordable Housing

Plaintiffs point to a comment that the disposition plan allows 900 units but the City and HUD have assumed there would be fewer and that no provision is made for use of funds for off site affordable housing. Pl. opp. at 12; pl. mem. at 7. The point appears to be a suggestion that HUD failed to consider the comment about the total number of units, with plaintiffs desiring that the 900 be retained. Plaintiffs repeat this point when they argue that the record "lacks an adequate supporting analysis ... why the up-front grant option for 900 units was selected." Pl. opp. at 20-21.

To fully understand this point, one needs to know that the funding mechanism from HUD to the City hinged on the number of units to be redeveloped at Uplands, with HUD paying the City $40,000 per unit. Multiplying 900 units times $40,000 leads to the maximum amount of the grant reservation: $36 million. Plaintiffs apparently worried that by reducing the number of units, the amount of funds from HUD would fall, along with the overall potential for "affordable" housing alternatives on site. This leads to what one can only describe as a creative suggestion by plaintiffs: that HUD and the City use the money "saved" through the reduction of units on site by developing other housing alternatives off site.

Iber testified to these matters. First, as regards the number of units on site, Iber explained HUD's assessment about the number of units the redeveloped Uplands could comfortably contain. Exhibit 37 at 170-181. Iber described how HUD reached its conclusions in this regard based on its experience and conversations with developers like Streuver Bros., Eccles and Rouse. Id. at 171. It would not be possible to hold that HUD failed to consider this aspect of plaintiffs' concerns.

As regards plaintiffs' creative suggestion, however, Iber explained that the statute prohibited it.

> Q. We spoke yesterday about HUD's concerns about reducing the density of the housing on the site.
>
> A. Yes.
>
> Q. Thank you. And so if HUD were to reserve 36 million dollars in

Up Front Grants for the site, but in fact the site were only redeveloped with let's say 600 units, what would happen to the 300 units for which Up Front Grants were not used?

A. I believe those funds would be recaptured and not available. They would not be available for the property. And I believe in answer to your question, they would be recaptured back to HUD's funding.

Q. Do you have an understanding about whether they would be available for any other development off site?

A. Yes.

Q. You have an understanding. What is the understanding?

A. That the Up Front Grant Funds cannot be used for any off-site development.

Q. And is that pursuant to a HUD policy?

A. I believe that is pursuant to the statute.

Exhibit 38 at 204-205 (emphasis added).

This colloquy is perhaps the best example of plaintiffs' repeating comments. On day two of Iber's deposition, on May 27, 2003, plaintiffs' heard him testify that the statute does not permit the concern they express. Heedless of this considered response to their comment by the HUD Director of Multifamily Housing, on July 25, 2003 plaintiffs articulated the same point to HUD when HUD put the disposition plan out for comment. Pl. ex 1 at 2, 6-7. Plaintiffs asserted the same point in their September 27, 2003 comments. Pl. ex. 2 at 3. Then, in this Court, plaintiffs inexplicably claim that HUD acted arbitrarily and capriciously when it failed to consider whether these funds could be

used off site. Like moths to a flame, plaintiffs simply assert over and over again that HUD ignored them when, in fact, HUD gave a conclusive and final answer, an answer under oath. The answer simply was not the one plaintiffs wanted to hear.

2. Comments About Tight Rental Market and Use of Section 8 Vouchers

The first two bullet points in plaintiffs' lists, pl. opp. at 11-12, pl. mem. at 7-8, involve the assertion that HUD failed to take into account the tight rental housing market, as evidenced in part by the claim that several hundred tenants did not use section 8 vouchers. Plaintiffs reiterate this point when they argue that HUD did not comply with the "required assistance" provisions of § 1701z-11(e) by failing to determine that there was an adequate supply of low-income housing. Pl. opp. at 19-20.

In fact, HUD did consider these matters. It did so in connection with the then ongoing process of relocating tenants from Uplands. HUD was aware of market conditions generally. HUD knew that other multifamily projects – Freedom, School 181, and Kensett House – had been taken out of the market. Exhibit 37 at 35. In connection with these and other projects, HUD had experience with relocating tenants and, as Iber testified, HUD knew the market. Id. at 133-134. HUD had experience with the demolition hundreds of units at the Riverdale project. Id. at 59. HUD had also successfully relocated Uplands tenants. By the time of Iber's deposition in May 2003, only about 24 families remained at Uplands. Id. at 83.

Iber testified specifically on day one of his deposition about HUD's assessment of

the housing market. Iber explained that HUD had considered the concern expressed about the rental market getting tighter and that nonetheless HUD knew the market could handle the relocation. Id. at 93-96; exhibit 42 at 136-138. "The rental market had been at that time getting tighter. We had been working on some other relocations before that, that indicated to us that that [sic] may have an impact on the market." Id. at 93. HUD recognized that a tighter market renders affordable units more difficult to find. Id. at 94. HUD knew that some section 8 landlords had difficulty getting paid, which tended further to restrict affordable housing. Id. at 94-95. In essence, Iber and HUD understood throughout this process that by virtue of having relocated tenants not only from Uplands but the other projects, fewer units would be available. Id. at 96.

As regards the concern about tenants not being able to use section 8 vouchers, Iber's testimony established that HUD also considered this concern. Id. at 107-110. At least part of the problem lay with the Housing Authority of Baltimore City's inability to process vouchers timely. Id. at 110. Delays in inspections of units by HABC inspectors also caused problems. Id. at 111. HUD recognized that counseling services and other support services were available for tenants who wanted to use them. Id. at 111-113.

Plaintiffs challenge HUD for failing to consider obtaining information as to section 8 voucher usage rates. Iber testified that although a request was made for data about voucher usage, HUD considered the information about sheer numbers of vouchers used to be of little utility. Exhibit 38 at 286-292.

Q. And did it help HUD determine what, as you said, resulted in Section 8 vouchers? Is that what you mean?

A. No. Because without doing further analysis, it is a bare number and it doesn't really tell you much of anything.

Id. at 288.

Q. What other research would you need to do to determine the extent to which former Uplands residents were able to use their vouchers?

A. You'd have to interview each family.

Id. at 291-292. In HUD's view, the sheer number or percentage of vouchers used reveals little without qualitatively different information about why the vouchers were not used, information difficult to come by and for which HUD, at that time, lacked resources to obtain. Id. at 291 ("[HUD's] focus was on working with the families that were remaining [at Uplands, to help them find alternative housing]."). Ironically enough, these very plaintiffs' continued presence at Uplands and their refusal in some cases to move or even to consider moving until the last minute[4] consumed HUD resources and made it difficult to take an analysis about voucher usage to a meaningful next level.

In one particular colloquy during Iber's deposition, it became clear that plaintiffs' believed that they had exhausted the subject of the use of section 8 vouchers:

[4] The plaintiffs have criticized the defense for the comment that some plaintiffs seem insistent on staying at Uplands to create facts on the ground. Lavinia Dean made her position clear: "I've always said I wasn't leaving Uplands until they kick me out." Exhibit 27 at 22. The sets of contretemps surrounding the City's mid-winter efforts to condemn Uplands certainly reinforces this impression.

Q. We talked a fair amount this morning about your concerns about whether Uplands tenants were going to be able to use their Section 8 vouchers to find replacement housing.

A. Yes.

Q. I don't want to go through what your concerns were. We did that.

My question is whether HUD made a determination as opposed to your just having concerns about whether there was, in fact, sufficient habitable, affordable rental housing to assure Uplands tenants that they could use their vouchers?

A. Based on our knowledge of the market and the sources that we checked with and our experience with prior relocations, we would be able to successfully relocate all the residents from the Uplands.

Q. Was that, you said we determined, was that the product of a formal analysis?

A. Based on checking with the sources that we did, and our knowledge of the market, and the relocations that we had conducted, we determined that there were sufficient relocation resources.

Q. Is there a document that reflects that analysis?

A. No.

Exhibit 37 at 133-134 (emphasis added).

Clearly, HUD considered the stated concern about the availability of affordable rental units and the use of section 8 vouchers.

3. Comments About the Affordability Criteria

A series of bullet points in plaintiffs' papers involve the affordability criteria. The very next two bullet points involve the alleged failure of the affordability criteria to

"insure" that low income tenants could return to a redeveloped Uplands or to "guarantee" housing for persons whose incomes do not exceed 50% of area median income. A later bullet point notes the comment that the plan fails to guarantee rental housing. Yet another notes the plan should establish a minimum number of units guaranteed to be affordable irrespective of the total number of other units developed. A final bullet in the list notes the comment that the plan fails to ensure that affordability restrictions that guarantee housing for persons at or below 50% area median income survives the City planning process by foreclosing change on this aspect of the development plans. Plaintiffs repeat this point when they argue that "the affordability criteria appear to depart from the agency's standard practice, without explanation." Pl. opp. at 21, 21-22.

The gravamen of these collective points is that there is no certainty about what will be developed, that the plan should contain a level of certainty, and that it was arbitrary for HUD to allow the disposition plan to go forward with these uncertainties. Putting the concern in terms of "insure" and "guarantee" tellingly reveals the set of assumptions motivating plaintiffs in this case. As these points appear substantially to overlap, we address them collectively.

First, as one reviews even the plaintiffs' list of the statutory goals or considerations, e.g. pl. opp. at 17, the list contains no reference to guarantees. Were it the case that HUD had in fact not considered these comments, especially as they relate to guarantees, the Court would be hard pressed to find that such constituted arbitrary and

capricious conduct, or conduct not in accordance with law; it is not arbitrary to fail to consider comments that do not relate to the statutorily expressed goals.

Nevertheless, HUD did consider the affordability issue. HUD made a "non-preservation determination." Exhibit 38 at 232-235.

> Q. What's that [a non-preservation determination]?
>
> A. That is a determination that the property is not going to be preserved as low income housing.

Id. at 234. Having made a "non-preservation determination," HUD next had to consider what its position would be as regards a redeveloped Uplands. Reduced to their essentials, these comments attack that aspect of HUD's consideration by focusing on the affordability criteria themselves. Yet, Iber testified about how HUD arrived at the 26% market, 74% affordable agreement with the City. Id. at 195-201, 212-216 . The City advised that it needed a higher percentage of market rate units for the project to be financially viable. HUD did not accept the City's assertions. HUD conducted its own evaluation, obtaining market and census data for the surrounding communities and making a comparison of income levels with the 15% figure. Id. at 224. As a result of HUD's analysis, HUD increased the amount of "affordable" housing over that which the City requested and did not depart significantly from its original proposal to the City of 15% market, 85% affordable. Exhibit 41 ¶ 6.

HUD also recognized that the City's master planning process continued. HUD understood that no one could rule out the prospect that low income, affordable apartments

will be developed at Uplands. The affordability criteria contained in the contract with the City constituted ceilings, not floors, and within those ceilings HUD believed persons of good will could redevelop to include affordable housing. The plaintiffs' comments are essentially an expression of mistrust for that planning process, a mistrust not shared by HUD. The statutory goals include many factors, not the least of which is "preserving and revitalizing residential neighborhoods" by, in HUD's assessment in this case, giving the City flexibility in its planning process. Id. at 152-155. A relatively long colloquy ensued in the Iber deposition on this point, with Iber testifying about the affordability criteria and HUD's desire to give the City "the maximum under the current unit flexibility to fit whatever they felt they could make work on the site under the affordability constraints." Exhibit 37 at 181, 181-185.

Dissatisfied with this explanation, plaintiffs challenge HUD for its alleged failure to consider whether former Uplands tenants would be able to return. They claim HUD failed to consider their position. The record shows they are wrong. Iber testified that HUD did consider this and concluded that some would be able to return. Exhibit 38 at 235-238.

> Q. Mr. Iber, do you know when HUD was developing the document that became the contract ... did HUD consider what the impact of the use restrictions would be on the ability of former Uplands residents to return to a rebuilt Uplands?
>
> A. I remember that was a matter of discussion.
>
> * * *

Q. And what was the content of the discussion?

A. I remember generally that we wanted to ensure that there was an opportunity for return for Uplands residents.

* * *

Q. Did you talk at all about whether the terms and conditions in Rider three would make a rebuilt Uplands affordable to former Uplands tenants?

A. Yes.

Q. And what, if anything, did HUD determine in that respect?

A. That there would be the opportunity for some residents to return to a rebuilt Uplands.

Id. at 236-238. Accord exhibit 42 (preliminary injunction testimony of Iber) at 181-183.

4. Comments About Racial and Economic Diversity

Next, plaintiffs point to a comment that the plan failed to assess the loss of Uplands' tenants' ability to live in a racially and economically diverse community near schools, work and services. Once again, one reads the list of statutory goals in vain for these factors. Pl. opp. at 17. No factor in 12 U.S.C. § 1701z-11 requires the consideration of a racially and economically diverse community. The closest one comes from the text of the statute is "supporting fair housing strategies," language that does not clearly command what the plaintiffs seek. School, work and services are similarly not addressed in the statutory criteria.

For this reason, irrespective of the record in this case, plaintiffs' claim that HUD

failed to consider race rings hollow on the law. E.g. pl. opp. at 4. On the facts, however, it simply fails to reflect the true state of the record. Iber testified that HUD was aware that Uplands was nearly 100% minority and that surrounding areas ranged from 60-90% minority. Exhibit 37 at 158-159. As set forth in some detail above, moreover, HUD knew the market around Uplands. Id. at 133-134. The APA does not render this knowledge and understanding irrelevant to the analysis simply because HUD gained it before the solicitation for comments.

5. HUD Retaining Ownership

Plaintiffs commented that HUD should retain ownership of the property until the City planning process is complete and fault HUD for failing to consider this point. Yet, as HUD has stated in this case, it spent approximately $300,000 per month while serving as mortgagee in possession. "It is costing the Department money to hold a mortgage that we're not receiving payment on, and we want to get to foreclosure as quickly as possible." Id. at 27. HUD considered this comment, and rejected the suggestion.

6. Abandoned Comments

Notably, plaintiffs have abandoned one of their more significant attacks on HUD's process. One perennial comment was that HUD should rehabilitate the existing project buildings instead of permitting demolition and reconstruction. Pl. ex. 1 (July 25, 2003 letter to HUD) at 3-4; pl. ex. 2 (Sept. 27, 2003 letter to HUD) at 4-5. Although this comment appears in the plaintiffs' letters to HUD, it is absent from the list of comments

complained of in plaintiffs' present motion and opposition. Pl. opp. at 11-12, pl. mem. at 7-8.

As it happens, Iber testified at length about HUD's consideration of this issue in the first day of his two-day deposition. Exhibit 37 at 74-78. It would have cost $30 million simply to bring the property up to a decent standard. Id. at 75.

> Based on that cost, and our determination that, based on hearing from ARCO, our managing agent, that all of the systems had failed, that the buildings were functionality obsolete, that based on what it would cost for someone to acquire and to fix up to code or decent safety standards or $30 million, we decided it was not feasible to try to sell the property and have it repaired, much less for any long-term viability. The $30 million is just to bring it up to a decent standard. And the decision was made to demolish.

Id. at 74-75; see also id. at 84 (all major systems at Uplands failed). Plaintiffs apparent decision to abandon this point is significant because the quality of the record mirrors the record as regard the other comments that HUD supposedly ignored. Given this concession, sub silentio, it becomes ever more difficult, if not impossible, for plaintiffs to carry their burden to meet the high arbitrary-and-capricious standard.

D. HUD Declaration About What it did With the Comments

Assuming arguendo that all of the foregoing is deemed insufficient evidence of consideration, the attached affidavit from HUD indicates expressly what HUD did with the comments it received in response to the disposition plan. Exhibit 41. This affidavit is precisely the kind envisioned by the Stein treatise, Overton Park and Camp v. Pitts, 411 U.S. 138, 143 (1973)("If…there was such failure to explain administrative action as to

frustrate effective judicial review, the remedy was not to hold a de novo hearing but…to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary."). It establishes, to the extent that any doubt remained, that HUD considered these comments.

E. Affordability Criteria: Statutory Goals Were Considered

Plaintiffs contend that the decision to select the affordability criteria fails to reflect the statutory criteria. Pl. opp. at 17-19; pl. mem. at 12-15. The record shows they are wrong.

The first criterion in the statute to which plaintiffs point, 12 U.S.C. § 1701z-11(a)(3)(A), is preserving certain housing so that it can remain available to and affordable by low-income persons." HUD considered this goal. Iber testified on deposition that HUD made a non-preservation determination. Exhibit 38 at 232-235. In this context, HUD specifically considered whether low income tenants would be able to afford to return to a redeveloped Uplands, concluding that the rents would probably be within the section 8 voucher payment standard. Exhibit 38 at 235-238. HUD reconsidered this matter in response to comments received on the disposition plan:

> 8. As the affordability and opportunity to return were key components of resident and UATA comments, HUD staff surveyed the local rental market. That survey included rental rates for bedroom sizes at each of the surveyed properties. Those rates were compared to the voucher payment standard for Baltimore City. The survey revealed that every bedroom size rental rate for each of the 17 properties, except one bedroom size at one property, were within the voucher payment standard. (Note that current review indicates that all of the unit rental rates fall within the

> voucher payment standard.) The consideration was that most, if not all, of the former and current Uplands' residents should have been income eligible for vouchers. Any rental property built on the site, no matter what the income requirements, would have to have rents affordable in the market. Although it is difficult to predict what will happen in the three or more years when a property may be rebuilt on the site, the market will determine rents and current data revealed that all market rents were within the voucher payment standard. It was noted that one of UATA's desired changes to the IDP was to set the affordability standard at the voucher payment rate.
>
> 9. HUD also had included in the contract with Baltimore City the clause that the owner of the site could not discriminate against voucher holders. Hence the conclusion was that any person with a voucher would be able to apply for any rental unit on the Uplands site. The contract also included language that required the owner to contact all former Uplands residents at the commencement of accepting applications at the replacement housing.

Exhibit 41 ¶¶ 8-9; exhibit 42 at 181-182 ("The belief was that under the provision in the bid package, and the nondiscrimination against voucher holders that there would be an opportunity for residents to return."). In short, HUD's market rental analysis, coupled with the non-discrimination language in Rider 2 to the Contract with the City, plus the requirement that the redeveloped Uplands be marketed to former tenants first, exhibit 41 at ¶ 14, shows HUD considered this goal.

The second goal is "preserving and revitalizing residential neighborhoods." HUD concluded that it was better to rebuild than to rehabilitate dilapidated structures. Exhibit 37 at 74-75; exhibit 42 at 151. The original owner had been unable to sell the property. HUD's contractor reported that the only means to deal with the property effectively was to demolish it and rebuild. Rebuilding would revitalize the entire neighborhood. While

plaintiffs may have desired a different outcome HUD considered this criterion and did not act capriciously.

The third criterion is "maintaining existing housing stock in a decent, safe and sanitary condition." HUD has not agreed to allow the City to use the Uplands site for a purpose other than housing, thus maintaining housing stock. Further, HUD has concluded that rents at the redeveloped Uplands would probably be within the reach of section 8 voucher holders. Exhibit 38 at 235-238; exhibit 41 ¶¶ 8-9; exhibit 42 at 181-183. Plainly, HUD has considered this criterion.

The fourth criterion is "minimizing the involuntary displacement of tenants." HUD relocated most Upland tenants even before the preliminary injunction hearing because of the atrocious conditions. Exhibit 41 ¶¶ 2-5. The parties do not appear seriously to dispute that conditions at Uplands failed the "decent, safe and sanitary" test. The record in this case confirms that state of affairs. Since the sale to the City conditions have not improved. HUD considered this criterion, but had to move tenants because Uplands was no longer habitable.

The fifth criterion is " maintaining housing for the purpose of providing rental housing, cooperative housing, and homeownership opportunities for low-income persons." The affordability criteria permit the construction of rental and ownership units. HUD concluded that section 8 voucher tenants would be able to afford the rents. The affordability criteria contain language prohibiting discrimination against voucher holders.

HUD considered this goal.

The sixth criterion is "minimizing the need to demolish multifamily housing projects." By now it should be plain that HUD considered the condition of Uplands in determining whether it needed to move the tenants. The conditions at Uplands also informed HUD's assessment of whether it made sense to attempt to rehabilitate existing structure, or whether it made more sense to demolish the project and start anew. This criterion was considered.

The seventh criterion is "supporting fair housing strategies." Because HUD evaluated the market at Uplands and determined that section 8 voucher tenants would be able to afford the likely rents, it determined that minorities would be able to return, and that the redeveloped Uplands would not exclude minorities. Including the language prohibiting discrimination against voucher holders supported this fair housing strategy.

The final criterion is " disposing of such projects in a manner consistent with local housing market conditions." The affordability criteria served this goal. As Iber testified, HUD evaluated local market conditions and arrived independently at the 26% market, 74% affordable terms. Exhibit 38 at 195-201, 212-216.

HUD does not dispute that reasonable minds can differ about how to consider these matters. The APA, however, imposes liability for arbitrary decision making, which did not occur here.

F. Plaintiffs' Inapposite Argument

Plaintiffs' disagreement with the affordability criteria stems at least in part on their assessment that their expert, Wesley E. Finch, better understands the market and the likely nature of a redeveloped Uplands. Such was plaintiffs' presentation at the preliminary injunction hearing. Similar argumentation appears in the instant papers. See, e.g., pl. opp. at 8 n.6. Plaintiffs would apparently seek to have the Court substitute its judgment for that of the agency, a step that published opinions generally shun. See supra at 11-12. The instant record presents, in essence, differing opinions on the technical aspects of rental market prognostication. When agencies act on forecasts, some persons may disagree. Disagreement, however, generally does not show that the agency arbitrarily and capriciously failed to do its job. Natural Resources Defense Council, 806 F. Supp. at 1272, quoting, Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983).

In Natural Resources Defense Council v. E.P.A., the court was asked to invalidate an agency's decision outlining dioxin water quality criteria. 806 F. Supp at 1266. Though the plaintiffs in Natural Resources Defense Council alleged that the agency disregarded opposite authority, the court held that a myriad of authority exists on the issue in question. Id. at 1276. In dismissing the challenge to the agency's ruling, the court held that the "EPA's approval was both reasonable and scientifically defensible… [and that they could] not disturb an administrative judgment of this type." Id. at 1275. Thus, the deference afforded an agency determination exists regardless of, if not because of, the

existence of opposite authority. To hold otherwise would render all agency action open, in essence, to de novo review in court.

Next, relying on inapposite authority, plaintiffs contend that HUD has "failed to delineate and make explicit the basis on which discretionary action is taken." Pl. mem. at 5, citing, Dunlop v. Bachowski, 421 U.S. 560 (1975), quoting, DeVito v. Schultz, 300 F. Supp. 381, 383 (D.D.C. 1969). Both Dunlop and DeVito, however, apply exclusively to distinguishable fact patterns, namely, the Secretary of Labor's alleged failure to initiate civil lawsuits in the wake of contested union elections. In fact, the court in Dunlop explicitly limited its ruling to decisions dealing with like fact scenarios. Dunlop, 421 U.S. at 569-71.

Plaintiffs reliance on City Federal Savings and Loan Association v. Federal Home Loan Board, 600 F.2d 681 (7th Cir. 1979), is also misplaced. Pl. mem. at 5. Though City Federal does indicate that a court will not simply "infer facts," id at 689, the decision includes a deeper description of a court's obligations when reviewing agency actions under the arbitrary-and-capricious standard.

> The more difficult issue is the adequacy of the reasons submitted by an agency in a specific case, when the action is based on informal proceedings. Certainly no precise formula can be prescribed….We recognize that the administrative record may show so little controversy that the basis of an agency action is obvious from the record, with no need for an express explanation by the agency….Thus, in light of the varying need for an explanation of agency action, failure to give express reasons for action does not in itself constitute an abuse of discretion.

Id. at 689 (citations omitted). Plaintiffs' selective quoting does not do justice to the

opinion's expression of the standard of review and heightened deference accorded agency decision making.

A better summation of a court's obligation to review a decision under the APA's arbitrary-and-capricious standard is found in Camp v. Pitts, 411 U.S. 138, 143 (1973). There a suit was brought to compel the Comptroller of the Treasury to issue a bank charter. Id. at 138. In finding that the APA "unquestionably applies" to the review of the Comptroller's decision, id. at 140, the Court found that the administrative record, though including only "a brief letter [from the Comptroller], which stated in part: '(W)e have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable,'" may have served as adequate justification of the Comptroller's denial. Id. at 138-39. The Court held that:

> The explanation may have been curt, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review.

Id. at 138-139.

A more accurate summation of the deference afforded agency decision making and documentation also appears in Project B.A.S.I.C. v. Kemp, 721 F. Supp. 1501 (D. R.I. 1989), on which plaintiffs rely extensively. In B.A.S.I.C., an unincorporated tenant's union sought to halt the demolition of a housing project by claiming that HUD, in collaborating with a city housing agency, acted arbitrarily and capriciously by

implementing a demolition plan without consulting residents as required by 42 U.S.C.A. § 1437p. Id. The B.A.S.I.C. court thoroughly reviewed the record and issued a scathingly blunt assessment of the defendant's efforts to "consult" with the affected residents:

> Although I do not find that the consultation with tenants was exemplary, especially in light of the fact that the [defendant] solicited very little of the input it received, it is true that the [defendant] had before it the views of those tenants and groups who opposed the demolition. What is unmistakably clear, however, is that the [defendant] did not incorporate any of the suggestions of the demolition opponents into its application. … It is ludicrous to suggest that this proposal, submitted in late August 1987, was adopted in part by the [defendant]. The [defendant's] plan was already fully formulated, as shown by the fact that the [defendant] had earlier applied for funds for demolition of the three high-rises. The [defendant] is to be faulted for its bare-bones, lackadaisical efforts to develop its application in consultation with tenants and tenant councils.

Id. at 1512. In a clear showing of the deference afforded agency decisions under arbitrary and capricious standard, the court nonetheless concluded that, "based on the administrative record which indicates some effort to gain input from tenants, [we] do not find that the decision to approve the application despite the limited amount of tenant consultation was arbitrary or capricious." Id.

The B.A.S.I.C. decision is applicable to the instant facts. First, as in B.A.S.I.C., the instant plaintiffs allege that HUD arbitrarily and capriciously formulated a disposition plan without adequately considering the comments of certain residents. Plaintiffs do not dispute that HUD solicited comments from Uplands residents twice. The B.A.S.I.C. court found that "merely having the views of those tenants and groups who opposed the demolition [defendant]" before HUD overcame an arbitrary and capricious challenge. Id.

at 1512. Even when it "was unmistakably clear…that the [defendant] did not incorporate any of the suggestions of the demolition opponents into its application," the B.A.S.I.C. court refused to characterize HUD's actions as arbitrary and capricious. Id. Thus, even assuming arguendo, that plaintiffs' allegations are accurate, they fall within the kind of administrative action that passed APA muster in B.A.S.I.C.

Second, as in B.A.S.I.C., the instant plaintiffs rely on a statutory provision calling for the solicitation of comments and the adequate consideration of those comments to justify their allegations. Any challenge to the adequacy of the consideration pales in comparison to the deficiencies alleged in B.A.S.I.C. Further, the statute relied upon by the plaintiffs in B.A.S.I.C. called for "consultation" with the affected residents, well in excess of the instant statute's mandate of mere "consideration." Thus, using the B.A.S.I.C. court's reasoning as a guide, HUD met its statutory obligations.

The plaintiffs attempt to support their allegation that HUD did not adequately consider the comments of the Uplands tenants with Kent Farm Co. v. Hills. 417 F. Supp. 297 (D.D.C. 1976). In Kent Farm, the owner of a housing community sought an injunction to prevent HUD from foreclosing on the project and selling it at auction. Id. at 300. Though Kent Farm offers some superficial similarities to the instant facts, the case is distinguishable on numerous grounds.

First, the Kent Farm court relied on HUD's failure to adhere to a self-imposed moratorium on foreclosures to grant the injunction. 417 F. Supp. at 301. Quoting a

telegram circulated to all regional administrators clearly articulating the moratorium, the court held that HUD failed to justify a departure from that specific policy and thus may have violated its congressional directive. Id. The instant plaintiffs point to no such HUD policy in effect, nor could they. Iber, HUD's designee testified that HUD did not rely blindly on the City's assessment of the needs for a redeveloped Upland. HUD did its own assessment and changed the City's proposal. Further, HUD in fact considered the comments the plaintiffs made. HUD simply came to a different conclusion than that which plaintiffs would have preferred. That reasonable minds could differ does not render HUD's decision arbitrary and capricious. Rather, HUD's decision to dispose of the Uplands Project in favor of mixed-income housing and the placement of residents in traditional neighborhood housing through the use of section 8 vouchers represents a "reasoned, and nonarbitrary application" of its mission that is wholly "consistent with underlying congressional intent." Id. (citations omitted).

The adequacy and safety of the housing at issue in Kent Farm differed remarkably from that of Uplands. The Kent Farm court stated, "The Kent Farm project essentially is providing decent, safe, and sanitary living quarters for low and moderate income families…." 417 F. Supp. at 300. In prefacing its decision, the Kent Farm court narrowed the scope of its ruling by holding, "[b]efore [HUD] acts because of default on a project clearly otherwise meeting housing objectives…it must take…steps to assure continuity of the decent, safe, sanitary, low-cost housing then being provided." Id. at 301.

Yet Uplands was neither decent, safe, or sanitary. Uplands fell into irreversible disrepair and represented an immediate health hazard to tenants. Whereas the Kent Farm decision contemplated a HUD foreclosure on an otherwise safe, sanitary, and decent living quarters, Uplands failed these criteria.

The Kent Farm decision also referenced HUD's failure to plan for particular contingencies. 417 F. Supp. at 300. In evaluating HUD's consideration of alternatives to foreclosure, the Kent Farm court held, "[t]here…is no plan for operating and managing the property after foreclosure, no allegation of Section 8 funds to it, no arrangement with local public housing authorities." Id. at 302-02. Here, however, the facts of the instant case indicate just the opposite. HUD arranged for and financed the relocation of hundreds of families from unsafe housing in Uplands to residential accommodations utilizing the section 8 voucher program. HUD has articulated a complete disposition plan. This extensive preparation and planning further serves to distinguish this case from Kent Farm.

Finally, Kent Farm does not appear to reflect Fourth Circuit law. This divergence is recognized in a Sixth Circuit case weighing the disparity among Circuits with regard to a plaintiff's ability to seek judicial review of a HUD decision to foreclose. United States v. Yellowbird Ltd., 1992 WL 1258511, *3 (S.D. Ohio1992).

> [T]he Seventh and Eighth Circuits have recognized that HUD's decision to foreclose may be reviewed…. United States v. Antioch Found., 822 F.2d 693 (7th Cir.1987); United States v. Victory Highway Village, Inc., 662 F.2d 488 (8th Cir.1981)…. Other federal courts have followed the Seventh and Eighth Circuits

> and have required HUD to apply its foreclosure policies in a reasoned and non-arbitrary manner. Kent Farm Co. v. Hills, 417 F. Supp. 297 (D.D.C. 1976); United States v. American Nat'l. Bank & Trust Co., 443 F. Supp. 167 (N.D. Ill.1977). In contrast, several cases have uniformly held that a HUD decision to foreclose is not reviewable. United States v. Sylacauga Properties, Inc., 323 F.2d 487 (5th Cir. 1983); United States v. Woodland Terrace, Inc., 293 F.2d 505 (4th Cir.), cert. denied, 368 U.S. 940 (1961).

Id. Thus, though distinguishable on its facts, the questionable status of Kent Farm in the Fourth Circuit serves to further diminish its significance.

Plaintiffs also quote Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983), which involved the revocation of an established rule mandating that new motor vehicles produced after a certain date be equipped with passive safety restraint systems. Id. at 35. In using State Farm, the plaintiffs have misapplied the decision's reasoning to wholly dissimilar facts. The decision can be distinguished in a host of ways. A dispositive distinction, however, is that the case involved formal rulemaking, an entirely different aspect of administrative procedure from that involved in the instant case.

Plaintiffs next rely on DeLoss v. Department of Housing and Urban Development, 714 F. Supp. 1522 (S.D. Iowa,1988). Pl. mem. at 11-12. However, DeLoss involved a fact scenario in which an agency representative misapplied "accepted HUD methodology to accurate and undisputed facts." Id. at 1533. DeLoss dealt with a HUD decision to support the building of new senior housing in an area where a significant amount of such housing already existed. Id. at 1534. In finding that HUD disregarded standard

procedures promulgated in an internal "Processing Handbook," the court noted that "the combined presence of market rate tenants and actual vacancies at [other local housing projects], along with the similarly reduced levels of assisted occupancy at other government-subsidized projects in the [] area, indicates that there was not a sustainable demand for assisted occupancy for [more] additional subsidized units…." Id. The court found that the agency had purposefully adhered to "materially erroneous factual propositions, most of which ran 'counter to the evidence before the agency.'" Id. at 1533 (citation omitted).

The DeLoss court was dealing with a setting in which an agency had clearly chosen to disregard clear evidence that other housing was available and chose to subsidize the construction of new housing units. Id. at 1532. The instant plaintiffs point to nothing beyond their expressed dissatisfaction to support their contention that HUD purposefully omitted of relevant data in formulating the disposition plan. Pl. mem at 12. Plaintiffs are similarly unable to allege that any HUD policy or procedure was violated that would conform the instant facts to those of DeLoss. Id. at 1532. It is also critical to note that "the DeLoss apartments constitute[d] decent, safe and sanitary housing, and most if not all of them [were] suitable for occupancy by elderly persons." Id at 1524. Thus, it is understandable that the agency's decision in DeLoss to disregard undisputed contrary information and to discount clear agency policy in opting to subsidize senior housing when suitable alternatives were available may have drawn judicial rebuke.

However, the instant facts present few, if any, similarities to the facts of DeLoss. Beyond the plaintiffs' noted dissatisfaction, there is no alleged undisputed evidence supporting an alternative position. In addition there is no internal HUD policy violated and, unlike DeLoss, there is no clear alternative policy or procedure to which the plaintiffs can point for support of their contention that HUD acted improperly in developing the disposition plan.

IV. Justiciability: Judging the Uncertain

The City has not finalized its plans for Uplands. Contrary to plaintiffs' description of the affordability criteria as "the baseline," pl. opp. at 27, they are ceilings, not floors. Within the ceilings a redeveloped Uplands could include much of what the plaintiffs presently demand. See generally exhibit 41. Plaintiffs resort in part to ad hominem arguments, labeling this position "disingenuous," pl. opp. at 27, even though the only evidence they cite is a June 2003 newspaper article. Id. The legal implication of this uncertainty about what a redeveloped Uplands would look like is two fold: (1) plaintiffs lack standing because they cannot show injury and (2) plaintiffs cannot show a Fair Housing Act violation.

Plaintiffs initially appear to misunderstand the basis of the motion because they make arguments about how the recent relocation from Uplands to racially impacted areas is actionable injury. Pl. opp. at 26, 30 ("Plaintiffs have also alleged ... HUD's decisions ... have sent [them] into the kind of ghettoized living environment that the Fair Housing

Act condemns."), 22-31. The federal defendants, however, sought partial summary judgment on the selection of the affordability criteria and not as to where tenants may have been relocated, as to the "right of return" issue as opposed to the "diaspora" issue. To the extent that plaintiffs raise objections based on the relocation of Uplands tenants in 2002-2003, the arguments miss the point of the motion.

The point of the motion is that absent knowledge of what will be rebuilt one cannot determine whether the redevelopment itself will injure plaintiffs have been injured (for standing purposes) or whether it will adversely impact them in their ability to return (for Fair Housing Act purposes). HUD concluded low-income tenants would be able to afford to use section 8 vouchers to return. Plaintiff's expert, Mr. Finch, agreed that it was "possible" for a developer to include low-income housing and make money and that one could not tell what a redeveloped Uplands would resemble. Exhibit 43 (Finch testimony) at 100, 107. What the record does not and cannot establish is the extent to which "low-income" housing will be redeveloped on site. One therefore cannot say that the affordability requirements "effectively foreclose" the "right of return." Pl. opp. at 24.

Citing NAACP v. Secretary, 817 F.2d 149 (1st Cir. 1987), plaintiffs would proceed in the face of the uncertainty as to redevelopment. But in the cases cited, there were extant facts about whether a wrong had taken place. The grants in NAACP had been already awarded and concluded. Here, it is a challenge at present to know how to draw lines. Without knowledge about how many "low-income" (however that term may be

defined) units will be constructed, how can one assess whether, to use plaintiffs' terms, HUD has "guarant[eed] ... certain fair housing minima?" Pl. opp. at 27. Plaintiffs do not appear to contend that HUD violates the Fair Housing Act unless the redeveloped Uplands contains the exact same number of low-income housing opportunities as before. Plaintiffs' own suggestions about remedies, tinkering with the affordability criteria, for example, pl. opp. at 26 n.22, acknowledge that a redeveloped Uplands will contain fewer low-income units. Plaintiffs accordingly acknowledge that some line divides the lawful amount of reduction from the unlawful amount. Until the facts settle, and permit an analysis based on certain plans, the present litigative enterprise has little or no connection to reality.

The APA provides several mechanisms by which Courts can avoid this kind of uncertainty. First, where the law provides for another adequate remedy, no APA action may lie. 5 U.S.C. § 704. The related concept of ripeness also serves to avoid abstract litigation:

> Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

National Park Hospitality Ass'n v. Department of Interior, 123 S. Ct. 2026, 2030 (2003) (citation omitted).

These considerations combine in this case to compel the conclusion that litigation

about whether a redeveloped Uplands violates anyone's rights is premature. Here, with the City of Baltimore making the decisions about how to redevelop Uplands, with the Court having granted the motion to amend the complaint to include the City as a defendant, and with the Fair Housing Act undisputably applying to municipalities, there is no need to litigate in a vacuum.

Plaintiffs contend that this argument "would effectively nullify HUD's duty to affirmatively further fair housing." Pl. opp. at 31. Yet even the history of the briefing in this case suggests that plaintiffs have overstated their position. HUD has not contended that § 704 precludes review of whether it considered comments or the statutory goals. And one can readily envision other kinds of HUD action, capable of APA review, to which § 704's restriction would not apply. Where, as here, plaintiffs tacitly admit that some diminution in the number of low-income housing units at Uplands is not unlawful, and where a third party actually before the Court will decide the number of such units to develop, § 704 compels the conclusion that plaintiffs' action appropriately lies against the third party. To hold otherwise would threaten to make HUD the guarantor of the conduct of persons and institutions over which it has, in effect, little if no control, merely because HUD were in some manner involved in a transaction.

The Uplands disposition is not finalized and any decisions to be made concerning what is actually built are in the control of a separate defendant, the City of Baltimore. The disposition plan, in essence, offers a mere skeleton of what a rebuilt Uplands will

constitute. Though the plaintiffs hypothesize, through their expert, as to what a "new" Uplands will look like, their speculations are based in mere conjecture as the City of Baltimore has not offered a definitive outline of a rebuilt Uplands. Simply put, the plaintiffs have failed to present an agency action that is final and not dependent upon future uncertainties.

V. Conclusion

The Court should grant the federal defendants' motion for partial summary judgment and deny the plaintiffs' motion for partial summary judgment.

Respectfully submitted,

Thomas M. DiBiagio
United States Attorney

By:_____
Allen F. Loucks
Assistant United States Attorney
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692
(410) 209-4800