

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

COLATTA DEAN et al.,	:	
<i>Plaintiffs,</i>	:	
v.	:	Civil No. CCB-03-1381
MEL MARTINEZ, et al.,	:	
<i>Defendants.</i>	:	
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**DEFENDANTS' RESPONSE TO SEPTEMBER 21, 2004 COURT ORDER
AND MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

The Government, through its counsel, Allen F. Loucks, United States Attorney for the District of Maryland, and Jennifer Wright Burke, Assistant United States Attorney for said District, hereby responds to the Court's Order dated September 21, 2004 and moves for an order dismissing this case for lack of subject matter jurisdiction or in the alternative for summary judgment.

I. Federal Defendants are Entitled to the Dismissal of Plaintiffs' Claims Regarding the Multifamily Housing Property Disposition Reform Act or in the Alternative, Summary Judgment Should Be Entered in Their Favor On Those Claims

On September 21, 2004, this Court ordered the Federal Defendants, the Department of Housing and Urban Development (HUD) to provide the Court with a more complete explanation of the analysis it undertook in consideration of the Multifamily Housing Property Disposition Reform Act and its consideration of the fair housing implications of its decision regarding the Uplands property. This Response provides the requested information.

In determining how to dispose of the multifamily housing project known as "Uplands",

HUD considered and took the following action with respect to the Multifamily Housing Property Disposition Reform Act (“Disposition Act”) goals¹:

(A) Preserving Certain Housing So That It Can Remain Available To And Affordable By Low-Income Persons

After learning that the owner of the Uplands had failed to maintain that property in a decent, safe and sanitary condition, HUD declared a default and took over the project in furtherance of its goals to provide decent, safe and sanitary living conditions to the tenants. Exhibit 1, Affidavit of Robert Iber ¶ 4. On or about January 1, 2001, HUD became the mortgagee-in-possession (“MIP”) of Uplands. Despite the deplorable conditions of the Uplands project, HUD’s initial thought was to preserve the property.² *Id.* To that end, HUD hired a contractor to perform a repair survey to determine the feasibility and costs of repairing the property. *Id.* That repair survey revealed, as was indicated by the management contractor (ARCO), the massive extent of the physical deficiencies at the property. *Id.*; Exhibit 2, Repair Surveys; Exhibit 3, Security Reports from ARCO and EDI, Inc. In order to make necessary repairs to the Uplands so that they were minimally safe and sanitary, HUD would have had to pay \$30,000,000. *Id.* This amount would not have included the full cost to rehabilitate the properties. Exhibit 1, ¶14. At the time, HUD was spending \$343,000 per month just on operation and management costs. Exhibit 1, ¶¶ 9, 12. Given the severely dilapidated

¹The Federal Defendants provide this information to the Court as ordered; however, they do not admit that they are bound by the Multifamily Housing Property Disposition Reform Act (“Disposition Act”) in the disposition of HUD-owned multifamily housing projects. 12 U.S.C. § 1715z-11a; Exhibit A, William Mays v. Andrew Cuomo, Case No. C-01-96-929 (S.D. Ohio 1998) (unpublished); see also Part II of this Memorandum, incorporated herein by reference.

² The Uplands were built back in the 1940's, and had already been rehabilitated in the 1970's.

conditions of the Uplands, HUD determined that it was unsafe to leave the residents at the property and began substantial relocation efforts. Exhibit 1, ¶4.

HUD ultimately made the determination that preserving the Uplands was not the most feasible, economically viable option. *Id.* HUD's non-preservation decision considered the estimated cost to repair and rehabilitate the Uplands, as well as local land use requirements. Exhibit 1, ¶4. Exhibit 2; Exhibit 4, Letter dated November 29, 2001 from Baltimore City to HUD; Exhibit 5, Letter dated August 7, 2002 from Baltimore City to HUD; and Exhibit 6, Letter dated November 26, 2002 from Baltimore City to HUD; Exhibit 7, Form 9650 Analysis from Atlanta PD Center. Consequently, a functional obsolescence determination was made regarding the property. Exhibit 1 ¶4.

The physical conditions at Uplands had deteriorated dramatically and required constant repair of basic systems such as heating and air conditioning, plumbing and electric. Exhibit 8, February 8, 2002 Memorandum from Atlanta Multifamily Property Disposition Center entitled "Justification for Relocation of Residents"; Exhibit 8. Although a large maintenance staff worked to repair heating units and other components, it was impossible to keep up with the failures without totally replacing the heating systems at an average cost of \$600 per unit. Exhibit 8. The Director of Maintenance anticipated that 900 units would need to be replaced in the complex. Exhibit 8. In addition, the pipes had become infiltrated with roots. Exhibit 8. The sewage problems resulting from clogged drains caused water damage from overflowing commodes which in turn, caused ceilings to fall into lower apartments. Exhibit 8.

Electrical problems stem from both halves of this very large complex receiving service from a single main distribution center on the Uplands B Property. Exhibit 8. Two transformers needed

to be replaced immediately at a cost of \$5,000 each. All of the 40 transformers needed to be replaced as soon as possible. Exhibit 8. Roofs needed to be replaced on all 900+ units. The estimate for roof replacement was \$1,517,700. Exhibit 8. All of the brick mortar areas needed to be repaired. Exhibit 8. Window replacement was a necessity and would cost approximately \$2,442,400. Exhibit 8. These are just some of the costs needed to repair Uplands. Total costs to repair the existing Uplands structures would be in excess of \$30,000,000. Exhibit 8; Exhibit 1, ¶14. In addition to the damaged infrastructure and major systems, the Uplands were small units with dated kitchens, all of which would have to have been updated for long-term use. Id. In addition, the Uplands would have had to be renovated after all the major repairs were made.

HUD also met with numerous developers regarding preserving the buildings versus rebuilding the Uplands. These included: Landex, Pinnacle, William Smith Co., Bank of America, Humphrey Companies, Streuver Brothers, Eccles and Rouse. Id. All of the developers expressed to HUD that the only way to redevelop the Uplands site for long-term viability was demolition. Exhibit 1, ¶4.

HUD's Property Disposition staff then became involved in decision-making over the future of Uplands, because the Uplands had experienced many serious simultaneous failures - physical, financial, environmental, and so on. Exhibit 9, Affidavit of Joseph Baum ¶5. HUD currently has no choice but to recognize these realities, and implement a plan for the site using the tools at its disposal (in particular, the inclusion and enforcement of various provisions in the contract of sale), thereby producing a result that would advance as many of the Department's objectives as possible. Exhibit 9, ¶5. HUD has considered additional issues such as: (1) density reduction of a project with nearly 1000 units; (2) redevelopment of housing containing obsolescent unit designs that are over

50 years old; (3) how to address major systems breakdowns that required daily attention to keep residents from being without electricity, hot water, and heat; and (4) generally, the best overall approach for future use of this site. Id. The various ideas and options were filtered through and balanced against such concerns as preserving housing affordability for low-income households, minimizing involuntary relocation, revitalizing, stabilizing and integrating residential neighborhoods, promoting Fair Housing and minimizing demolition of multifamily housing. Id.

HUD, although no longer the owner of the Uplands, must approve the Master Plan of the new owner, the City of Baltimore, before redevelopment can begin.

HUD had attempted to preserve low-income housing by negotiating with the City to determine the number of affordable units that would be available to low-income persons on the new Uplands site. In 2001, under the guidance and direction of the Atlanta Property Disposition Center, the Baltimore HUD Office entered into a period of discussion and negotiation with Baltimore City housing officials regarding the City's decision to exercise its Right of First Refusal to acquire the Uplands property. Exhibit 9, ¶ 6. The City's initial reaction was favorable, but a transfer of such size and consequence required attention to numerous details. Exhibit 9, ¶ 6. In the opinion of both HUD and the City, the estimated \$30 million cost of repairing the complex, including replacement of malfunctioning major systems, made demolition and new construction the more feasible option. Exhibit 9, ¶ 6. Mindful of its desire to preserve affordable housing for low-income persons, HUD began working with the City in order to determine the number of affordable housing units that could be preserved without re-creating the social ills that had derived from a concentration of poverty in the Uplands project, contributing to its deterioration and need for demolition. Exhibit 1, ¶¶ 9, 10. Their question was not: "Will affordable housing be constructed as part of the new Uplands?", but

instead, “How many new affordable units will be constructed at Uplands?”. Id. HUD and the City believed that reducing the total number of units would give the project a better chance of long-term viability. Id. at 10. HUD also wanted to help revitalize the neighborhood, believing that this would result in a greater socio-economic and racial mix at the Uplands, which previously had been overwhelmingly low-income and 99% minority tenants. Id. at 9.

Thus, HUD began negotiations with the City regarding the number of units of affordable housing to be constructed on the new Uplands site. Instead of specifying a set number of affordable units, HUD generally indicated a percentage of affordable units relative to the total number of units to be built on the site. HUD also defined what it means by “affordable.” Exhibit 1, ¶39. In order to determine what is “affordable” to low-income persons, HUD uses a defining factor called “Area Median Income” (AMI). Id. AMI is used in federal housing programs to determine eligibility. Id. The AMI establishes tables that contain median household income data differentiated by family size. Id. HUD issues AMI data annually. Id. The incomes referred to are calculated by using census data as a baseline, and adding Census Current Population Survey income data and American Community Surveys data. Id. Local area update factors are then used to calculate the median income for specific geographic areas. Id. Once median income by household size is established, HUD then applies certain arithmetic factors to median income to define eligibility for various programs. Id.

In general, HUD uses the definition of "affordable" as found at 12 U.S.C. § 1701z-11 (b) (5), but it has made adjustments on a case by case basis under of 12 U.S.C. § 1701z11 (f) (6) (A) (ii), as well as the flexible authority of 12 U.S.C. § 1715z-11a and 24 CFR 290.1, to support the Department's objective of providing mixed income developments where appropriate. Exhibit 10, Affidavit of William H Melvin ¶6. "Affordable" housing was generally defined by Atlanta Property Disposition as housing (sale or rental) targeted to households with incomes up to 80% of AMI.

Exhibit 9, ¶ 7. This definition of affordable housing was used in addressing projects other than Uplands which were going through disposition, such as Lakeside/Riviera, Reiman Block, Kensett House, Manchester Square, Freedom, Stephens Square, and Sentinel Court. Id. HUD's Atlanta PD office also customarily identified an additional bracket, representing incomes between 80% and 115% of AMI, as a sub-category of affordability that could be incorporated into a contract-of-sale's "Affordability Rider." Id. This additional category made it possible to price a portion of the re-developed units (again, either rentals or home-ownership) somewhat higher than the others, by targeting a higher income bracket and furthering integration of the neighborhood. Id. The results would be rents or prices that, based on HUD's knowledge of local rents and housing costs from the media and other observations, often approached market levels for the surrounding area, while the units retained the "affordable" designation that enabled them to qualify for Up-Front Grant assistance. Id.

In discussions and correspondence with City officials, the Department's initial affordability breakdown proposed 85% affordable and 15% market rate units. Id. In addition, of the 85% affordable units, some 15% could be targeted to the 80-115% of AMI income bracket. Id. This breakdown was expressed in percentages so that it was applicable to whatever the total number of re-developed units the City decided to place at the site. Id. The City initially agreed to this breakdown, and proposed to replace the existing 989 units at Uplands "A" and "B" with 1000 units comprised of 850 affordable rentals (apartments and townhouses) and 150 home-ownership units, of which 100 would be market rate. Id.

Over time, the City's response, especially to HUD's proposed affordability language, changed. HUD believed that the change was the result of internal discussions over the contours of a proposed mixed-income development at the Uplands site, and also was influenced by considerable feedback

received from representatives of homeowner groups from the neighborhoods surrounding Uplands (feedback that was also directed at HUD). Id. In addition, HUD staff was concerned about the City's intent to maintain site-density with 1000 re-developed units. Id. The City subsequently proposed a plan that provided for somewhat fewer units overall and for 80% of the units at the Uplands site to be priced at market rate ("unrestricted"), and only 20% proposed to be affordable under any of HUD's designations. Id. HUD vetoed that proposal given the Uplands' history and HUD's perception of the need for affordable housing in Baltimore City, although HUD welcomed the reduction in the number of units. Id. HUD also did not believe that the City should turn away from the Up-Front Grant funds (effectively \$40,000 per rebuilt affordable unit) by producing a preponderance of market-rate units on the Uplands site. Id.

HUD determined that for the Uplands, it would change the mix to 74% affordable and 26% market after reviewing several data sources. Exhibit 1, ¶41. HUD staff reviewed census data to determine income levels for the communities surrounding the Uplands. Id. HUD also reviewed the sales prices of houses in those communities. Id. The data was reviewed to determine the income level that would be required to purchase homes at sales prices in the communities surrounding the Uplands. Id. The income mix including the "high affordable" (80% to 115% AMI) units allowed for a balance of households more reflective of the surrounding home-ownership communities. Id. In addition, HUD staff reviewed market data for existing rental properties. Exhibit 1, ¶ 42.

In regard to the survey of the local rental market, HUD used its knowledge of the local market to identify apartment complexes in the area near the Uplands. Id. HUD staff then contacted the rental offices for each of the 17 identified apartment properties and asked about rental rates for various bedroom sizes. Id. That information was compiled in a one page market survey. Id.;

Exhibit 11, Rental Market Survey Summary. The Housing Authority of Baltimore City was then contacted to determine the current Section 8 Voucher Payment Standard by bedroom size for that area. Id. After comparing this data with the rents from the market survey, HUD staff concluded that all of the rental rates (except for the one-bedroom size at one property) fell within the payment standard. Id. HUD determined that any rental property built in the area would have to set its rents within the market and the current market rents were within the voucher payment standard. Id.

HUD received feedback from advocates for the tenants at Uplands who wanted move-back opportunities that would be within their reach financially. Exhibit 9, ¶ 7. HUD absorbed all of these perspectives into the decision-making process, and arrived at a breakdown of 74% **affordable**, of which 31% could be targeted to the 80-115% AMI income bracket; and 26% **market rate** units. Id. That breakdown meant that 51% (a majority) of the total number of units would be targeted at household incomes not exceeding 80% of AMI; another 23% of the total number of units would be targeted at the higher-affordable income bracket of 80-115% of AMI; and that 26% of the total would have no pricing restrictions at all. Id.

In making this proposal, HUD also considered certain practical matters. First, 74% of the units, those which were deemed affordable, would be eligible for up to \$40,000 each in Up-Front Grants. Second, the combined total of the unrestricted and the higher-affordable units - some 49% of all the units - would effectively be at or near-market in their pricing, which would provide for a very significant income mix of tenants or purchasers. Third, the affordable units pegged at no more than 80% of AMI would probably be within the financial reach of many Section 8 voucher holders (and in particular low-income former Uplands residents who have vouchers). Id.

HUD also worked with the President of the Uplands Tenant Association (and many of her constituents) and earned their confidence that HUD was working in good faith regarding the provisions for affordability, while at the same time allowing the City to reduce the concentration of poverty and plan responsibly for the re-development of this important site. Id. Even Karen Forbes, Affordable Housing Specialist of Legal Aid, agreed there needs to be a balance of affordable housing and unrestricted units.. Exhibit 12, Baltimore Sun, February 10, 2003, Redevelopment ‘Opportunity’ At Uplands, quoting Karen Forbes of Legal Aid as saying that her goal for the Uplands is “to bring as many affordable units back to the property as possible without creating this concentration of poverty.”

HUD has several programs that define low-income eligibility as at or below 80% AMI. Those programs include the Section 8 program which was in place at Uplands prior to the relocation. 42 U.S.C.A. § 1437a 3(b)(2). Further, 12 U.S.C. § 1701z11(b)5 defines low income as 80% of AMI. The following are examples of previous deals where HUD provided flexibility when defining affordable housing to include varying percentages of units affordable to household between 80-115% of the AMI, as well as several examples where a varying percentage of the units have been permitted at market rates (no restrictions):

Maclay I,	Harrisburg, PA	20% at 80%-115%	June 2003
Maclay II,	Harrisburg, PA	20% at 80%-115%	June 2003
Renaissance Apts.	Pittsburgh, PA	15% at 80%-115%	March 2004
Medgar Evers	New York City	10% at 80%-115%	May 2003
Gates Avenue	New York City	10% at 80%-115%	May 2003
Beekmans	New York City	25% at 80%-115%	February 2003
Lockwood Plaza P	Providence, RI	10% at 80%-115%	September 2001
Lakeside Apt.	Baltimore, Maryland	15% at 80%-115%	May 1999
Clifton Terrace	Washington, DC	10% at 80%-115%	September 2001
Jaycee Progress II	Chattanooga, TN	5% at 80%-115%	August 2001
Brick Towers	Newark, NJ	15% at 80%-115%	September 2002

Holiday Lakes	Pompano Beach	15% at 80%-115%	September 2002
Freedom Apts.	Baltimore, Maryland	20% at 80%-115%	June 2002
Rac Gardens	New York City	10% at 80%-115%	December 2001
Jefferson Village	Richmond, VA	70% at Market Rate	September 1996
Capitol Hill East	Landover, MD	60% at Market Rate	September 1996
Park Sixteen	Oxon Hill, MD	60% at Market Rate	September 1996
Skytower	Washington, DC	23% at Market Rate	November 1997

Exhibit 10, ¶ 7.

These proposed Uplands redevelopment affordability provisions were agreed to by Baltimore Program Center Director Robert Iber and forwarded to Atlanta and Headquarters for concurrence before being communicated to Baltimore City officials. Exhibit 9, ¶ 8. A decision was also made by Baltimore HUD to go on the record, in a letter to the Commissioner, strongly encouraging the City, in its "master planning" process for the site, to consider providing for not only an income mix, but also for a mix of elderly and non-elderly units, and for a combination of rental and for-sale housing units. Id. In addition, a provision was added to the contract requiring advance marketing of affordable units to former Uplands residents. Id. The contract's Redevelopment Rider provides that HUD must approve the City's Final Re-development Plan at the conclusion of the planning process; future proposed substantive changes are also subject to advance written HUD approval. Id. The City ultimately agreed to the provisions that HUD proposed for the Contract of Sale requirements and to receive Up Front Grant monies. City officials also bear responsibility to act within the law, including being subject to consent decrees arising from recent housing litigation. Id.

The affordability language adopted by HUD and the City for the Uplands contract of sale strikes a balance between interests of the former residents of the complex in having move-back opportunities (along with housing for other low, and very-low, income households), and the interests

of the City and neighborhoods surrounding Uplands in revitalizing a community with newly constructed housing featuring a genuine income-mix that will integrate the neighborhood, strengthen the tax base, spur private investment, lessen violent crime and repair the damage done by a decades-long decline in the physical property and the quality of life there. Exhibit 9, ¶ 10. HUD retains approval rights of the ultimate re-development plan as a safeguard but defers to City officials to implement the re-development within reasonable and thoughtful parameters. Id.

HUD also attempted to preserve affordable housing for low-income persons on the new Uplands site by including certain additional parameters in the Contract for Sale with Baltimore City. Exhibit 9, ¶ 9. With respect to preservation of affordable housing for low-income persons, HUD contracted to provide funds to the City in the form of Up-Front Grants for redevelopment of the Uplands with “affordable” units. HUD has contacted with the City to pay it \$40,000 per each completed “affordable” unit on the former Uplands property. Exhibit 13, Attachment C, Upfront Grant Agreement for Uplands B; Exhibit 14, Attachment C, Upfront Grant Agreement for Uplands A. This amount was contained in the Contract of Sale. It could be used to build affordable units on Uplands A in the total amount of \$18,360,000, and affordable units on Uplands B in the total amount of \$17,640,000, for a total pledge of \$36,000,000. Exhibit 9, ¶ 4; Exhibit 13; Exhibit 14; Exhibit 15, Contract of Sale - Rider 9 of 13 - Upfront Grant Agreement.

The Uplands Apartments Tenant Association (UATA)/Legal Aid recommended that HUD set affordability at 30% to 50% of AMI and that at least 500 affordable units be constructed on site. Exhibits 16, letter dated July 25, 2003; Exhibit 17, letter dated September 27, 2003. Additionally UATA and Legal Aid recommended that the City address the availability of affordable housing through Master Planning and use Up Front Grant (UFG) funds off-site to create affordable housing.

Id. All of Legal Aid’s items would be achievable under the IDP, except the use of UFG funds off-site, as the statute does not permit such use. 12 U.S.C. § 1715z-11a. Rent levels affordable to families earning 30% to 50% AMI are clearly allowed under the affordability standard defined as “up to 80% of AMI.” HUD had consistently advised the City, both verbally and through the Redevelopment Rider to the Contract, that it could change HUD’s redevelopment plan after the conclusion of Master Planning. Due to large holding costs, HUD did not want to hold the property until the conclusion of Master Planning.

In order to insure the “affordability” of a redeveloped Uplands to former residents, the Department took steps in the Initial Disposition Plan (“IDP”) and Contract Of Sale (“COS”).³ Id. at 8; Exhibits 15, Exhibit 18, Initial Disposition Plan. The Contract contains a provision against discrimination against voucher holders.⁴ Id. All former Uplands residents were given the opportunity to apply for a voucher. Id. The Section 8 voucher payment standard is used to calculate housing assistance payment that the public housing agency (PHA) will pay for a unit. Id. at 43.

HUD considered and acted toward “preserving certain housing so that it can remain available to and affordable by low-income persons” in making its determination to demolish and rebuild the Uplands with 74% of the total units designated as affordable.

³It is worth noting that HUD has a great deal of experience in providing financing for the development of affordable housing in Maryland. Exhibit 1, ¶7.

⁴The range of possible payment standard amounts is based on HUD’s published fair market rent (FMR) schedule for the area in which the PHA has jurisdiction. Id. FMRs are based on either the 40th or 50th percentile of rents charged for standard rental housing in the area. Id. A PHA may set its payment standard amounts from 90 percent to 110 percent of the published FMRs and may set them higher or lower with HUD approval. Id. Section 8 voucher holders, such as former Uplands residents, can only use the vouchers in properties that have rents that fall within the payment standard. Id.

(B) Preserving And Revitalizing Residential Neighborhoods

The IDP agreed to by the City of Baltimore and HUD will preserve and revitalize residential neighborhoods in and around the Uplands. The Uplands complex had a negative impact on the neighborhood as evidenced from numerous meetings and correspondence from Baltimore City officials, community groups, residents and from HUD staff's general knowledge of the market and area. Exhibit 1, ¶9; Exhibit 19, letter dated June 5, 2002, letter from Neighborhood Housing Services of Baltimore, encouraging HUD to reduce density, build home-ownership, and not rehabilitate existing structures; Exhibit 20, letter dated January 15, 2002; Exhibit 21, e:mail dated March 6, 2003; Exhibit 22, letter dated March 6, 2003; Exhibit 23, letter dated April 30, 2003; Letter dated May 12, 2003; Exhibit 24, letter dated July 18, 2003; Exhibit 25, letter dated August 28, 2003; Exhibit 26, package of letters received in response to IDP and HUD's summary of those responses. Stabilization and revitalization of the surrounding neighborhoods should be a priority and would only be accomplished through a redevelopment and integration of the Uplands site and surrounding area, which would include demolition of the existing obsolete complex.

In reaching its ultimate determination HUD considered, among other things, Baltimore City officials' stance that demolition of the Uplands was key to neighborhood revitalization. Exhibits 4, 5, 6; Exhibit 24, letter dated February 3, 2003; Exhibit 28, letter dated March 19, 2003. City Officials also discussed the need to de-concentrate low-income housing and have an income mix on the site. They requested that the property to be predominantly market rate in order to integrate the site which was 99% minority tenants. Id. Meetings were held on October 18, 2002, November 7, 2002, February 14, 2003, March 6, 2003, and May 15, 2003 to implement an IDP that would revitalize the area. Exhibit 1, ¶9

The local community made it clear that Uplands was having a severe negative impact on the neighborhood and that demolition of the property was their preferred redevelopment. Id.; Exhibits 19-26. They requested that no rental housing be built on the Uplands and that there be no “affordable” housing on the site. There were numerous meetings with and correspondence from the Southwest Development Committee and its members encouraging HUD to reduce density, build home-ownership, and not to rehabilitate existing structures.⁵ Exhibits 19-26.

Meetings were held with community groups on January 28, 2002, February 25, 2002, October 15, 2002, and March 10, 2003 to discuss their concerns and ideas for a revitalized area. Exhibit 1, ¶9. There were also numerous meetings with representatives of New Psalmist Baptist Church, including their attorney, Ed Smith, and Pastor Walter Thomas. Id. The Church, with a 5000 member congregation, is immediately adjacent to the property. Id. The Church’s view was that Uplands was having a negative impact on the neighborhood and that demolition and reconstruction was the best way to revitalize the community. Id. Eight of the State of Maryland delegates and Senators supported that demolition to revitalize Uplands. Exhibit 25, Letter dated August 28, 2003; Exhibits 12, 29, Baltimore Sun articles dated February 10, 2003, and May 29, 2003, discussing Mayor O’Malley’s and Commissioner Graziano’s redevelopment plans and community desires for revitalization. In response to the IDP, thirteen letters were received from different community groups surrounding the property requesting immediate demolition of the property and respect of the Master Planning process. Id.; Exhibits 19-26.

⁵ The Southwest Development Committee is an umbrella group representing eighteen community associations surrounding the Uplands property.

In July 25 and September 27, 2003 letters, the UATA (Legal Aid) recommended preservation of the units instead of demolition. Despite evidence to the contrary, UATA claimed that there was no proof that the Uplands were unfit for rehabilitation and argued that HUD should pay \$36,000,000 to repair Uplands because it was “economically feasible” for HUD to do. Id. UATA (Legal Aid) also requested HUD to hold on to the property until the Master Planning is completed. Id. This argument was contradictory to the express desires of Baltimore City officials and the surrounding community. It also would have required HUD to continue to hold the property at a cost of over \$343,000 per month. Baltimore City’s promises for the completion of Master Planning had slipped by almost 1 year by the time of the sale. Exhibit 1, ¶19. Leaving the property vacant and boarded in the community causes additional negative impact on the neighborhood. Id.

The Uplands complex was a high crime area as noted in the initial ADT report. Exhibit 8. In the year 2000, two murders and two shootings occurred on the property. Eighteen aggravated assaults on the property were reported to officials. Exhibit 8. Occurrences of larceny, robberies and one car jacking occurred on the property. Exhibit 8. When HUD took on Mortgagee-In-Possession status on January 1, 2001, a professional security company reported several incidents of drug dealing, thefts, a stabbing and various assaults on the Uplands property. Exhibit 8. Demolishing Uplands and rebuilding with fewer total units integrated into a mixed-income community would help revitalize Uplands and decrease the high crime rate. Exhibit 8.

The affordability mix recommended by HUD would ensure that more rebuilt units at the site would be affordable and allow for a large infusion of Up Front Grant funds. HUD’s plan also gave the City and subsequent developers the latitude to design and build a mix of rental and home-ownership housing. This approach presents the greatest opportunity to preserve, revitalize and

integrate the neighborhood. HUD recognized that the affordability mix if proposed was not precisely what the City, community, or Legal Aid requested. Therefore, HUD struck a balance after weighing all factors described herein. HUD properly rejected Legal Aid's demand that HUD require replacement of 500 to 900 units of housing affordable to families earning 30% to 50% of AMI, because this would only re-establish a concentration of poverty in the neighborhood. Exhibit 1, ¶10. The history of Uplands, Baltimore City's experience with other housing projects and HUD's experience nationwide, shows that such properties are not viable and have a negative impact on neighborhoods. Id.

When dealing with units of local government, each negotiated sale is a unique transaction. HUD's policy is to support on-going local community revitalization efforts which will, depending on the specific circumstances, allow: (1) subsidized properties to be upgraded to provide improved living environments; (2) demolished and rebuilt; and (3) density reduced, or in some cases, the property used as a park or open space to reduce density concerns. Exhibit 10, ¶8. HUD's ultimate decisions are based in large part on perceived needs of the local government, which, HUD believes, is in a better position to determine the plan of action that best fits the long term needs and plans of the neighborhood. Id.

HUD's decisions regarding Uplands were made partly in reaction to deterioration in basic living conditions at the project, and the costs needed to repair just the main systems. Exhibit 9, ¶3; Exhibit 3. HUD's concerns were heightened by the large number of residents and the fact that HUD provided hundreds of thousands of dollars annually to the project as Section 8 rental subsidies. Exhibit 9, ¶3. In addition to the detrimental physical conditions present at the complex, HUD considered the problems of serious criminal activity occurring there. Id. HUD's primary

responsibility was to protect Uplands tenants by ensuring decent, safe and sanitary housing. HUD was aware that its actions -- or inaction -- had an impact on the surrounding neighborhood. Id. Neighboring residents were aware of conditions at Uplands, and had communicated their concerns to HUD as provider of the Section 8 rent subsidies, and in HUD's role of overseeing Uplands' FHA mortgages. Id. ; Exhibits 19-26.

(C) Maintaining Existing Housing Stock In A Decent, Safe, And Sanitary Condition.

Due to the poor physical condition of Uplands, HUD declared the ownership in default of its regulatory agreement and instructed the lender to accelerate the mortgage. There is no argument about the deplorable conditions of the Uplands. HUD became MIP to protect the health and safety of the residents. While MIP HUD's contractor ARCO repaired emergency health and safety problems, the repair survey commissioned by HUD indicated that it would have cost close to \$30 million just to repair the property to a safe condition. Exhibit 1, ¶13; Exhibit 2. That figure included repairing the major systemic problems of failing boilers in the heating system, underground water piping, roofs and windows, and kitchens. Id. The cost to repair the property and the poor conditions of the property led HUD to relocate the residents. Exhibit 8, William Melvin's February 8, 2002, memorandum entitled Justification for Relocation of Residents. Maintaining the property was nearly an impossible task and was extremely expensive. Id. For example, the monthly holding cost of \$343,000 was prohibitive. Id.

The Repair Survey provided the costs to repair, not rehabilitate, the property to long-term viability. Exhibit 2. With that in mind, and in consideration of the City's express desire for demolition, and the fact that residents were expected to be relocated prior to sale, HUD made the determination to not preserve, or continue to maintain, the property. Exhibit 7, Form 9650 for non-

preservation determination; Analysis in Part A of this Memorandum. Because the cost to repair before the sale was too great for HUD, consistent with the non-preservation determination, HUD determined that demolition was warranted. Exhibit 1, ¶13. As discussed above, demolition would allow for the greatest flexibility in revitalization for the community. Id. It is questionable whether any party in control of the Uplands could have provided decent, safe, and sanitary housing without \$30 million or greater infusion of funds. Id. Demolition, and redevelopment, as required in the IDP and COS, would ensure return of decent, safe and sanitary, and a low-income housing to the site. Id. This in turn would help to stabilize and enhance the surrounding neighborhoods. Id.

The demolition and rebuilding of Uplands would destroy current low-income housing that was decent, safe or sanitary. The Uplands was obsolescent, deplorable and unsanitary. HUD determined that it would provide, as part of a new Uplands, a stock of affordable housing units that would be decent, safe and sanitary. To that end, HUD contracted to provide the City with \$40,000.00 per newly constructed unit of affordable housing on the Uplands site. See Exhibits 17, 13, 14; Part A of this brief analyzing the balancing of the factors which are also applicable here.

(D) Minimizing The Involuntary Displacement Of Tenants.

HUD considered and balanced, among other things, its interest in minimizing involuntary displacement of tenants against the cost of repairing Uplands, and revitalizing and integrating the neighborhood. HUD's decision was to require demolition and rebuilding of Uplands, and to help remaining tenants relocate to alternative housing. (This balancing analysis has been discussed in detail in earlier sections of this memorandum and is incorporated herein by reference).

At the time of the IDP, there were twenty-six resident families remaining in the Uplands, out of an original 660, among 989 units. Exhibit 1, ¶5. The COS contained provisions requiring that

upon concluding the sale and taking possession, Baltimore City would freeze the rents of these remaining residents and conduct a relocation under the Uniform Relocation Act. Id. ¶16. HUD wanted to ensure that any remaining families received the full benefits to which they were entitled. Id. It should be noted that at the time of the announcement that all residents would be moving from the property and receiving relocation assistance, most expressed relief that they would be leaving the poor conditions at Uplands. Id. ¶17.

HUD offered Section 8 vouchers to any resident who qualified for one. HUD made 650 vouchers available and 500 were requested. Id. ¶ 20, 30. Of those issued, 230 were used in relocation, and 55 were used outside of Baltimore City. Id. ¶30. HUD made numerous attempts to help tenants find suitable housing. HUD and its relocation contractor sent repeated notices of available services to tenants beginning in late 2001, and meetings with tenants were held on several occasions. Staff invested substantial effort in assisting tenants who took advantage of their services. Depositions of former Uplands tenants indicate that relocation staff members were available for individualized discussions of tenant needs and housing options. Jones Dep at 10, Defendant Reply Ex. 32, Dean Dep at 14-15; Def’s Reply Ex. 35. HUD had no obligation to ensure that tenants actually received housing meeting all of their preferences; the agency’s duty was simply to assure a “reasonable opportunity” to do so. Dean v. Martinez, CCB-03-1381 , Memorandum Order dated September 21, 2004 (citing Boston v. United States, 424 F. Supp. 259, 267 (E.D. Mo. 1976)); 42 U.S.C. § 4625(c)(3). When a determination is made that demolition of an existing project, and rebuilding is the better, more viable option, displacement of tenants usually cannot be avoided. HUD and its contractor did what they could to help any tenants find alternative housing. HUD considered this factor and balanced it against the other factors. HUD concluded that demolition and moving the

residents was the best alternative for all the reasons stated above.

(E) **Maintaining Housing For The Purpose Of Providing Rental Housing, Cooperative Housing, And Home-Ownership Opportunities For Low-Income Persons.**

As discussed previously, HUD determined that Uplands could not be maintained in its present condition and demolition was the most feasible, cost-effective option to ensure long-term viability of low-income affordable housing on that property. A newly constructed, revitalized and integrated Uplands will maintain a level of low-income rental opportunities. Exhibit 15, 18. While the number of overall rental units will be reduced, the new Uplands will also provide cooperative housing and home-ownership opportunities for low-income persons did not exist on the former Uplands property. Exhibits 15, 18.

Additionally, the COS contains a rider prohibiting discrimination against voucher holders. Exhibits 15, 18. All eligible former Uplands residents were provided the opportunity to qualify for a voucher. Exhibit 1, ¶20. Furthermore, the newly constructed affordable housing units will be marketed to former residents before sales and rentals are offered to the general public. Exhibits 15, 18. HUD performed a rental survey of the housing market surrounding the Uplands. Exhibit 1, ¶19; Exhibit 11. Based upon HUD's knowledge of the rental market, a list of decent rental properties was developed. Id. HUD staff then called the 17 properties on the list and obtained current rental rates. Id. That information was placed on a chart. Exhibit 11. HUD then contacted the Baltimore City Director of the Section 8 program and obtained the voucher payment standard for the area in which Uplands is located. Exhibit 1, ¶19 A comparison of the rental rates at the 17 properties revealed that the rental rates for every property (except for the one-bed room size at one property) fell within the current voucher payment standard. Id.

HUD staff believed that any rental property built on the site of Uplands must have rental rates affordable within the general rental market in the area. Exhibit 1, ¶19. Even new products, with newer amenities, must set their rental rates within the market structure. Id. HUD could justify charging more, but if it were to charge a large percentage more than the highest rent in the market, it would have trouble attracting renters. Id. In essence, HUD would price itself out of the market. Additionally, HUD sets the Section 8 vouchers with market rates so if the market rates in the Uplands area go up, generally the Section 8 voucher payment goes up. Id. HUD staff gained this information from financing and providing of over 400 rental housing properties over the past 30 years, all in the Maryland market; in excess of 200 of the properties either underwritten or asset-managed in the Baltimore market. Id. HUD routinely works with rent increases, appraisals, and market studies that all use market comparability to set rents. Id. HUD properly concluded that current market conditions dictated that the Uplands replacement housing must have rents within the voucher payment standard and former Uplands renters with vouchers would have an opportunity to apply to return. Id.

The negotiated contracts of sale with local or state governments typically contain terms and limitations addressing such issues as affordability, non-discrimination toward Section 8 voucher holders, and other provisions consistent with HUD's objectives. Exhibit 9, ¶4. These contracts are the only ones that can also include provisions for Federal ("UpFront") re-development grants. Id. Such grants, up to \$40,000 per completed unit, are frequently crucial ingredients in enabling major re-development projects to proceed. Id. The greater the affordable character of the finished units, the more critical such grants are to the prospects for implementation and economic viability. Id. HUD's contract to provide Upfront Grants funds in the amount of \$40,000 per newly constructed

affordable unit on the Upland's property will help to ensure rental and home-ownership opportunities for low-income persons on the new Uplands site.

(F) Minimizing The Need To Demolish Multifamily Housing Projects

The Department considered preservation of Uplands as discussed in detail in Part A. However, a number of factors led to its conclusion that the best opportunity to redevelop the property would start with demolition of the structures on the site. See Analysis in Part A. Potential developers, community groups, and Baltimore City officials provided these views. See Analysis in Part A. Additionally, the property was expected to be vacant by the time of conveyance, rendering any impact of demolition on existing residents as minimal.⁶

In negotiations with HUD, Baltimore City officials made it clear that the only way they would take the property was if HUD demolished the property or paid for the demolition. Exhibit 4; Exhibit 30, October 18, 2002 Meeting Memo. The City believed that the long term viability of the project depended on a newly constructed and integrated Uplands. Exhibit 1, ¶22. HUD would not agree to these conditions due to the cost; however, HUD did agree to allow the use of UFG funds to cover demolition. Id.; Exhibit 15. It was less costly to allow the use of UFG funds than for HUD to demolish or provide funds for the demolition from another source (in addition to the UFG). Exhibit 1, ¶22. It also was less costly to allow for demolition than for the repair and revitalization of the property. Id. HUD's cost of demolition at the time was approximately \$3,000.00 per unit, versus at least \$29,702.00 per unit (\$29,157,049.00 divided by 979 units) for repair, **not rehabilitation.** Id.; Exhibit 2. Had HUD sold the property with a repair requirement, the City would

⁶At the time of the IDP, the Uplands properties were largely vacant due to relocation of the tenants by HUD due to the unsafe living conditions at the property.

have requested additional funding from HUD to cover the repair costs. Id.

The letters from the UATA urged the Department not to demolish the property and allow for repair. Exhibits 16, 17. Based on the issues discussed above, it was determined that demolition was the best option for redevelopment, while revitalizing the community and at the least cost. Exhibit 1, ¶23. Thus, HUD considered “minimizing the need to demolish multifamily housing projects” and balanced it against the additional factors; however, demolition was the best strategy toward providing a revitalized, integrated Uplands that would be in a decent, safe and sanitary condition.

(G) Supporting Fair Housing Strategies⁷

There are several fair housing issues that were considered and affirmatively endorsed in developing the IDP and COS for Uplands. The analysis has been given in great detail in previous sections, and is incorporated herein, so will only be outlined here. HUD has made affirmative efforts to provide open and integrated mixed housing which would minimize the concentration of low income, minority persons on the Uplands property;

- HUD affirmatively endorsed non-discrimination by including a provision against discrimination in both the Contract of Sale and the Deed. Exhibits 15, 18.
- HUD has contracted to provide the City with \$40,000.00 for each newly constructed affordable housing unit rebuilt on the Uplands property. Id.; Exhibits 13, 14;
- HUD has contracted to ensure that all former residents will be given the first opportunity to return to the rehabilitated, affordable housing before the units are rented or sold to the public. Id.;
- HUD affirmatively furthered fair housing by providing housing choice through

⁷Federal Defendants incorporate herein their discussion of and arguments in support of their compliance with the Fair Housing Act as outlined and briefed in Part III.

vouchers. Exhibit 1;

- HUD determined from its rental market analysis that rents of replacement housing on Uplands would be within market range and within voucher payment standard of Baltimore City. Exhibits 1, 11;
- HUD weighted the cost to repair and revitalize the Uplands compared to the cost to demolish and rebuild a new community. Part A;
- HUD affirmatively took steps to try to help former tenants find alternative housing. Part D;
- HUD affirmatively further fair housing when it intervened and took over the Uplands property and began repairing the property in an attempt to make it decent, safe and sanitary for the tenants. Part A;
- HUD affirmatively furthered fair housing when it made a determination and a plan for the Uplands property in an attempt to begin the demolition and new construction process so that tenants could occupy the new Uplands as soon as possible. Plaintiffs, through Legal Aid, however, have hindered that process. Exhibits 1, 15, 18.

Although relocation of residents was not initiated as part of the disposition of the property, the result was to provide housing choice to the residents. Exhibit 1, ¶26. The project-based Section 8 subsidy for the residents of the Uplands was restricted to that property. *Id.* Prior to HUD becoming MIP and committing voucher funding, residents did not have the choice to move to another location. *Id.* If they left the property, they left their subsidy behind. *Id.* HUD made the decision to sell the property with rental subsidies, and that all former Uplands residents who applied and met the eligibility requirements would receive housing subsidies in the form of a Section 8 rental housing voucher. The residents would be able to use the Section 8 vouchers to obtain standard, permanent replacement housing. The Contract of Sale and Deed contain a provision against discrimination against Section 8 rental housing voucher holders. This would allow former Uplands residents to return to the new development on the Uplands site. HUD's use of rental subsidies,

therefore, support the fair housing strategies. HUD was not obligated to commit the voucher program funding. The commitment to do so was made to assure that no family would lose their housing rental subsidy because of the decision to sell Uplands. As a result, equal accesses to housing opportunities were created when HUD made the decision to sell the property to the city of Baltimore.

Moreover, residents were free to select the location of their replacement housing. Exhibit 1, ¶¶27. Relocation services included a one-on-one interview to determine housing and family needs and desires, in addition to assistance with locating housing that met their needs and desires. Id. While HUD's relocation contractor took the interview information into account in assisting the family, the resident made the ultimate choice, from available alternatives, thus ensuring housing choice. Id.

Relocation deconcentrated the predominantly minority population of Uplands. Exhibit 1, ¶¶25, 26, 28. Review of a list of forwarding addresses for residents revealed that the majority stayed in Baltimore City and the surrounding metropolitan area. Exhibit 32. Prior to relocation, the minority concentration of Uplands property was approximately 99%. Exhibits 32-33. The Uplands census tract revealed that 2804.04 was 97% minority. Id. The census tracts surrounding Uplands ranged from 81% to 99%. At the time, Baltimore City's minority population was 68%. Id. Therefore, the effect of the relocation was that many former Uplands residents moved to less minority concentrated areas. Id.

A current review of the forwarding addresses of Uplands relocated families revealed that 559 families relocated and provided a forwarding address. Exhibits 32, 33. Of the 559 families, 115 or 21% stayed in the same zip code. Id. Analysis of the zip codes against 2000 census data reveals

that at least at least 236 families moved to zip codes that were less “minority impacted” than the Uplands zip code. Id.

Replacement rental housing at the Uplands will have rents within the voucher payment standard (see discussion in Part E above) because HUD has contracted to provide the City with \$40,000.00 per newly constructed affordable housing unit on the Uplands site. Former Uplands residents were given the opportunity to receive a voucher. Furthermore, HUD contracted so that replacement housing cannot discriminate against voucher holders. HUD also contracted so that former residents will be given the first opportunity to return to the replacement affordable housing before units are rented or sold to the public.

UATA/Legal Aid recommended a right of return to former Uplands residents (residents at the time of HUD taking MIP). This was considered, but the practical effect would be that the rebuilt Uplands would then have approximately 720 units set aside for low income persons, severely restricting the redevelopment opportunities for the site and recreating the minority and economic concentrations of the former project. Exhibit 1, ¶31. The rebuilt Uplands will have significantly fewer units overall. Therefore, not all of the previous tenants (approximately 660) could return even if all the units were set aside as affordable. Id. In addition, such a right of return would negate the ability of developers to market the property to the broadest market, including those least likely to apply. Id. The recommendation was considered and a determination was made to give interested, former residents the opportunity to apply before marketing commenced to the general public. Id.

Baltimore City’s Consolidated Plan, covering the period of July 2000 through July 2005, indicates the following steps that it will take to promote fair housing: (1) Outreach to Section 8 landlords in non-concentrated and low poverty areas; (2) Expand affordable housing by underwriting

capital costs associated with the development of housing; (3) Expand housing choice through counseling efforts; and (4) Support the development of housing for mixed populations. Exhibit 1, ¶32. These strategies are consistent with the IDP and COS. Exhibits 6, 7.

(H) Disposing Of Such Projects In A Manner Consistent With Local Housing Market Conditions.

The flexible approach taken by HUD towards property disposition includes a belief in the appropriateness of deferring to City planners and Housing officials, who have a "street level" familiarity of housing needs and possibilities within the City; who operate within the framework of formal "comprehensive plans" submitted to such HUD program areas as Community Planning & Development and Fair Housing in order to meet Federal requirements or to receive grant funding; and who bear a responsibility to act within the law, being subject to consent decrees arising from recent housing litigation. Baltimore City, as transferee, must adhere to the language of the Contract of Sale. Exhibit 9, ¶ 9. With regard to affordability, the Uplands contract contains certain *parameters*; specifically, a category not exceeding 80% of AMI, and another category covering 80-115% of AMI, which allow the City to establish a framework within those limitations to meet housing needs that have been "vetted" during the City's "Master Planning" process. Such a detailed framework can include goals or requirements targeting households with incomes at, say, 30%, 50%, and/or 60% of AMI in producing a more detailed blueprint of the site's redevelopment. *Id.* This is all subject to HUD's final approval. *Id.*

The local housing market near the Uplands property is a mix of rental and home-ownership. A review of census data from the communities surrounding Uplands revealed that the percentage of each tract's population that had incomes of less than 80% AMI and varied from a high of 75% (the

tract where Uplands is located) to a low of 41% (tract encompassing Ten Hills). The specific 2000 Census data is as follows (Exhibit 32):

<u>Census Tract</u>	<u>Population % <80% Median Family Income (also AMI)</u>
2803.04	73%
2803.03	54%
2501.02	60%
2501.01	61%
2008	74%
2803.01	41%
2803.02	54%
2006.01	75%

The affordability requirements in the COS with Baltimore City require that 51% of the units be affordable up to 80% AMI. Exhibit 15. The City could target an additional 23% of the units to families earning up to 115% AMI. Id. The 51% was considered to be consistent with the surrounding area, while recognizing that keeping 23% of the high affordable units at 80% to 115% AMI would draw populations of slightly greater than the surrounding area (74%). Since the City and community were expressing a desire for a higher portion of “market” rate units, the affordability was adjusted to create a mix close to that of the surrounding market, while preserving the opportunity to reach the higher end of the market. The affordability mix also allows the City to target a large proportion of affordable units to receive the UFG benefits. The result is the benefit of UFG funds for affordable units while keeping within the general income character of the market. See generally, Exhibit 9. The recommendations of the UATA/Legal Aid for between 500 and 900 units affordable to families earning between 30% to 50% AMI was considered to be inconsistent with HUD and City’s housing objectives.

II. Federal Defendants Are Entitled To The Dismissal of Plaintiffs' Claims Regarding The Disposition Act Pursuant To Federal Rule Of Civil Procedure 12(b)(1).

HUD uses the Disposition Act and the regulations contained in 24 CFR § 290 *et seq.* as a guide when making disposition decisions. If the Disposition Act and regulations conflict with neighborhood revitalization goals of the unit of local government, and where appropriate as determined by the Secretary, HUD utilizes the discretionary authority granted to the Secretary under 12 U.S.C. § § 1701z-11a, and 1701z-11(f), and 24 CFR 290.1. Exhibit 10, ¶ 5. Section 204 of the 1997 Appropriations Act provides the following:

§1715z-11a. Disposition of HUD-owned properties.

(a) Flexible authority for multifamily projects. During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter the provisions of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), and multifamily mortgages held by the secretary on such terms conditions as the Secretary may determine, notwithstanding any other provision of law.

This gives the Secretary “unfettered discretion” in establishing the terms of the management and disposition of property and mortgages of multifamily properties, and supercedes 12 U.S.C. 1701z-11a. The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (P.L. 104-204); William Mays v. Andrew Cuomo, Case No. C-01-96-929 (S.D. Ohio 1998).

William Mays v. Andrew Cuomo, Case No. C-01-96-929 (S.D. Ohio 1998), attached as Exhibit A, is a case very similar to the present case. In Mays, plaintiffs were residents of three

multifamily housing projects in Ohio which had been foreclosed by HUD. HUD instituted the foreclosure because the owner of the projects failed to maintain the buildings. HUD decided not to impose low-income use restrictions *i.e.*, restrictions ordering the buyer to maintain the property as affordable housing for low income persons. Id. at 2-3. Plaintiffs filed a lawsuit to try to impose low-income use restrictions and project-bases Section 8 assistance conditions on the property. Id. at 1. The court granted HUD's motion to dismiss based on lack of subject matter jurisdiction, FRCP 12(b)(1). In so holding, the court determined that it lacked jurisdiction under the Administrative Procedure Act because Section 204 of the Fiscal Year 1997 HUD Appropriations Act (PL 104-204, 110, STAT. 2878), provides the Secretary of HUD with complete discretion in setting the terms and conditions of the sale of HUD owned multifamily properties, and the Secretary's exercise of that discretion is beyond the scope of judicial review. Id. The court went on to hold that the plain language of §204 of the 1997 HUD Appropriations Act indicated Congress' intent that it supersede the statutory provision governing management and disposition of HUD multifamily projects set forth at 12 U.S.C. § 1701z-11 and the implementing HUD regulations promulgated at 24 CFR Part 290. Id. at 9-10. The court concluded that the 5 U.S.C. § 701(a)(2) exception to judicial review was applicable in the case because the Secretary's exercise of his discretion in setting the terms and conditions of disposition constitutes agency action committed to agency discretion by law. Id. at 10-11.

Additionally, in Guity v. Martinez, 2004 WL 1145832 (S.D.N.Y. May 20, 2004) plaintiffs sought to enjoin HUD from foreclosing and selling a housing project in New York City. Plaintiffs claimed that HUD acted arbitrarily and capriciously, and violated various provisions of 12 U.S.C. § 1701z-11a pursuant to the foreclosure and terms of sale of the property. Id. at *3. After plaintiffs'

request for a temporary restraining order was denied, the property was sold. HUD then filed a motion to dismiss their complaint as moot. The court dismissed plaintiffs' complaint holding that the Secretary had broad discretion in the foreclosure and sale of HUD owned multifamily properties. Id. at *4. Specifically, the court held "that 12 U.S.C. 1715z-11a gave the Secretary broad discretionary power in determining the manner in which HUD disposes of properties." The court ruled that since the grant of discretionary power was intended to improve the Secretary's efficiency in property disposition, the Secretary could chose to foreclose and sell a property under either 12 U.S.C. 1701z-11 or 12 U.S.C. 3701 *et seq.* once HUD adhered to the statutory notice requirements. Id.

HUD has interpreted the "notwithstanding any other provision of law" language in Section 204 to mean any other provision of law specifically applicable to HUD, but not to other statues of general applicability. Exhibit 10, ¶9. Thus, based on the statutes and the above-cited case law, the Federal Defendants in this case move under Federal Rule 12(b)(1) for dismissal of the Plaintiffs' action regarding the Disposition Act, the Uniform Relocation Act, and other claims specifically based on violations of law specifically applicable to HUD based on lack of subject matter jurisdiction.

**III. Federal Defendants Are Entitled To Summary Judgment On Plaintiffs’
Claims Regarding Allegations Of Violations Of The Fair Housing Act.⁸**

HUD is vested with considerable discretion in how it chooses to implement the various and often competing goals of the national housing policy when disposing of multifamily projects owned by the Secretary or subject to a mortgage held by the Secretary. 12 U.S.C. § 1715z-11a; William Mays v. Andrew Cuomo, Case No. 1-96-929 (SD Ohio May 21, 1998); Cowherd v. U.S. Department of Housing and Urban Development, 827 F.2d 40 (7th Cir. 1987). “The reasonable inference to be drawn from the language of the statute and the legislative history is that Congress has vested the Secretary with discretion in deciding in a particular case which of the “competing goals” are to be furthered and which are not. For example, the Secretary may, in certain circumstances, choose a course of action concerning a particular multifamily housing project that is cost-effective, even though that course of action does not further the housing-related needs enumerated in the statute. Id. 12 U.S. C. § 1701z-11(a) vests the Secretary with discretion to make such decisions.” Frisby v. U.S. Department of Housing and Urban Development, 755 F.2d 052, 1056 (3d. Cir. 1985). “There is, of course, no requirement that the specific course of action taken by the Secretary in fact further all of those objectives.” Id. at 1057.

HUD’s actions are only subject to judicial review to determine whether HUD has exceeded statutory authority or acted arbitrarily. Fidelity Federal Savings and Loan Ass’n v. De La Cuesta,

⁸It should be noted that there is no private right of action or waiver of sovereign immunity under Title VIII. “Congress did not create any such direct private cause of action [against the federal government] under Title VIII and therefore a direct claim against HUD is barred by sovereign immunity.” N.A.A.C.P. v. Secretary of Housing and Urban Development, 799 F.2d 774, 791-92 (1st Cir. 1986); Furtick v. Medford Housing Authority, 963 F. Supp. 64, 72 (D. Mass. 1997). Whether Plaintiffs seek damages or injunctive relief against HUD does not change the result. The only possible waiver and limited scope of review is under the APA, as already noted by this Court. Memorandum Opinion dated September 21, 2004.

458 U.S. 141 (1982). Agency action is entitled to a presumption of regularity. The burden of proof rests with the party alleging irregularity. Schweiker v. McClure, 456 U.S. 188 (1982).

HUD's decision regarding foreclosure and disposition of the Uplands must not be set aside on grounds that HUD acted arbitrarily or capriciously if the decisions are rational, based on relevant factors and within the agency's statutory authority. Motor Vehicles Mfgs. Ass'n v. State Farm Mut., 463 U.S. 29 (1983). In considering whether agency action is rational, a reviewing court must determine whether the agency considered the relevant data and articulated an explanation establishing a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156 (1962).

For all the reasons previously stated, HUD did consider the goals of fair housing in making its determination to approve the demolition and rebuilding of the Uplands. HUD determined that a new, rebuilt, open and integrated Uplands would further fair housing strategies. The fact that Plaintiffs or the Court may disagree with HUD's conclusion is not sufficient to overturn HUD's decision. Under the APA, the Court is not free to substitute its judgment of that of the Agency's and must employ a deferential standard of review.

Under the Fair Housing Act ("FHA"), HUD has an affirmative duty to integrate. Otero v. New York City Housing Authority, 484 F.2d 1122, 1133 (2nd Cir. 1973). While the FHA was designed primarily to prohibit discrimination in the sale, rental, financing or private housing and to provide federal enforcement procedures for remedying this discrimination so that minorities would not be condemned to remain in urban ghettos, FHA also requires consideration of the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Id. "Action must be taken to fulfill, as much as possible, the goal of open,

integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.” Id. at 1134 (citations omitted). “To allow housing officials to make decision having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.” Id.

“Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. Otero, 484 F.2d at 1133; Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970) (holding that eliminating “undue concentration of persons of one racial group or socio-economic status removes the potential for urban blight” and furthers national housing policy). “The purpose of racial integration is to benefit the community as a whole, not just certain of its members.” Otero, 484 F.2d at 1133.

HUD staff in Baltimore, Atlanta and Washington, D.C. had numerous meetings and conference regarding issues surrounding the Property Disposition Act goals and Fair Housing. Exhibit 1, ¶37. Those issues were considered and discussed before arriving at the Final Disposition Plan and the Contract of Sale. Id. Specifically, HUD determined that the Uplands could not be preserved in a cost effective manner which would have been consistent with revitalization plans for

the local neighborhoods. Id. Although resident relocation had already been largely completed, the completion of relocation was deemed to be in the best interests of the residents. Id. After making that determination, HUD looked to using its past practices, existing statutes, and local government desires for community revitalization, to craft a disposition plan that preserved affordability and gave the site an opportunity for meaningful and viable long term redevelopment and revitalization. Id. Review of census data, market conditions, and resident comments, led to contract provisions that should ensure that the rebuilt Uplands would have affordable units similar to the surrounding market. Id. The disposition also supports important fair housing strategies such as deconcentration, housing choice, non-discrimination, integration and an opportunity to return. Id.

HUD also was concerned that the rebuilt Uplands should reflect the desires and needs of the community, which would be achieved through Master Planning. Both Baltimore City officials and participants in the Master Planning process had advised HUD that former Uplands residents were invited to, and participated in, the process. Exhibit 1, ¶38. It was HUD's goal to give the City the opportunity to achieve a viable, community responsive, redevelopment, while ensuring that the property remained predominantly available as affordable housing. Id. HUD's decisions regarding the Uplands after balancing the Disposition Act goals and HUD's consideration of the fair housing implications and issues in this case are consistent with other cases in which the courts have determined that HUD exercise of its discretionary power to sell a housing project to a private owner was a rational choice based on the facts of the particular cases.

In Frisby v. U.S. Dept of HUD, 755 F. 2d 1052 (3^d Cir. 1985), plaintiffs brought a class action suit to enjoin the sale of a multifamily housing project by the Secretary of HUD. Id. The property was sold to a private developer without rehabilitation requirements or Section 8 vouchers

being attached. Id. The district court refused to grant the injunction and the Court of Appeals for the Third Circuit affirmed that decision. Id. The court held that the decision to sell was justified since the record showed that it was the most cost effective alternative. Frisby, 755 F.2d at 1057. The court considered HUD's sale of the property and held that "the Secretary balanced the cost-effectiveness...against the competing goals furthering housing-related objectives...." Id. Additionally, the court held that while the Secretary is obligated to consider all the factors, the statute's legislative history suggests that the Secretary is vested with authority to "choose a course of action that is cost-effective even though that course of action does not further the housing-related needs enumerated in the statute." Frisby, 755 F.2d at 1056. Therefore, the Secretary could make a reasonable determination that furthering a particular objective is not feasible so that he does not have a duty to further that objective. Id. at 1057. "HUD's disposition of the Uplands property may be set aside only if it was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is highly deferential. Dean v. Martinez, Case No. CCB-03-1381, Memorandum Opinion, September 21, 2004. So long as HUD "considered the relevant data and articulated an explanation establishing a 'rational connection between the facts found and the choice made, HUD's actions must be upheld.'" Frisby v. HUD, 755 F.2d 1052, 1055 (3d Cir. 1985) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

In Cowherd v. U.S. Dept. of HUD, 827 F. 2d 40 (7th Cir. 1987), the court held that HUD's exercise of its discretionary power to sell a housing project to a private owner was a rational choice based on the facts. *Id.* In Cowherd, the tenants of a HUD owned housing project sought to enjoin the sale of the property to a private developer. Id. at 41. The district court ruled in favor of HUD's

decision to sell. Id. The U.S. Court of Appeals for the Seventh Circuit affirmed the trial court's ruling. First, the court held that HUD is vested with considerable discretion to implement the competing goals of the national housing policy. Id. Secondly, the court held that HUD's action was rational since all the relevant factors were considered. The decision to sell without rental subsidies was based on the poor history of the project and the excessive cost of renovation. Thus, in the court's view, there was a "rational connection between that facts found and the choice made." Id. at 43. The court also held that although the goals of 12 U.S. C. § 1701z-11a are important, HUD is not required to meet these goals regardless of cost. Therefore, consistent with Frisby, the excessive cost of rehabilitation was a relevant factor in HUD's decision to sell the project and was not bound to provide rental subsidies to ensure "fair housing." Id.

Mays v. Cisneros, No. 1-96-929, (S.D. Ohio May 21, 1998) HUD Docket No. 96-0167 (7th Cir 1998) and Guity v. Martinez, 2004 WL 1145832 (S.N.D.Y. May 20, 2004) also provide guidance in defending HUD's foreclosure and terms of the sale of the Uplands. The issue in Mays was whether the applicable statute and regulations could be used to assess the terms of HUD's disposition of the subject property or whether this decision is committed to agency discretion by law. Id. Plaintiffs in Mays sought to compel HUD to impose low-income use restrictions on the foreclosure sale of the property. HUD filed a motion to dismiss based on the court's lack of subject matter jurisdiction. HUD contended that 12 U.S.C. 1715z-11a provides the Secretary with "unfettered discretion" in management and disposition of property and mortgages. Therefore the court had no law or standard to apply in reviewing this decision. Id. The court reasoned that the statutory language, "...notwithstanding any other provision of law," demonstrated Congressional intent that the Secretary could exercise his discretion in disposing of multifamily housing projects

unencumbered by any statutory or regulatory guidelines. Id. Therefore the court held that the statutory language grants full discretion to HUD and precluded judicial review. Id.

In Guity plaintiffs sought to enjoin HUD from the foreclosing and selling a housing project in New York City. Plaintiffs claimed that HUD acted arbitrarily and capriciously and violated various provisions of 12 U.S.C. 1701z-11a pursuant to the foreclosure and sale of the property. Id. at *3. After plaintiffs' request for a temporary restraining order was denied, the property was sold. HUD then filed a motion to dismiss their complaint as moot. The court dismissed plaintiffs complaint holding that the Secretary had broad discretion in the foreclosure and sale of HUD owned multifamily properties. Id. at *4. Specifically, the court held "that 12 U.S.C. 1715z-11a-(a) gave the Secretary broad discretionary power in determining the manner in which HUD disposes of properties." Id. The court ruled that since the grant of discretionary power was intended to improve the Secretary's efficiency regarding property disposition, the Secretary could chose to foreclose and sell a property under either 12 U.S.C. 1701z-11 or 12 U.S.C. 3701 *et seq.* once HUD adhered to the statutory notice requirements. Id.

Even though Frisby and Cowherd were decided before the Multifamily Property Disposition Reform Act of 1994⁹, the rationale of both cases is consistent with the legislative history of the 1994 Act. The Act was amended to provide greater flexibility in the disposition of HUD-owned multifamily properties and to reduce the costs of holding and maintaining property in the Department's inventory. See S. REP. NO. 103-174, at 235 (1993). Considering that over \$800 million would accrue to HUD once troubled projects were sold, the Act empowers the Secretary to

⁹Pub. L. 103-233, 108 Stat. 342, approved April 11, 1994 (the "1994 Act"). Section 101 of the 1994 Act replaces Section 203 of the Housing and Community Developments of 1978.

make a “business decision” that is cost effective.⁹ Id. Admittedly the Act’s goals may be competing but the Secretary is obligated to protect the federal financial interest. Id. Due to the excessive costs of rehabilitating and maintaining the project, the decision to sell was the “least costly among reasonable alternatives.” H.R. REP. NO. 366(X) (1993). HUD considered the relevant factors in the disposition of the Uplands, including both costs, and integration and revitalization of the area. Thus, there was a rational connection between the facts found, the choice to foreclose, and the terms of the sale of Uplands. HUD did not act arbitrarily or capriciously.

The record shows that tenants of Uplands received appropriate notice and were afforded the opportunity to comment on the proposed sale. Dean v. Martinez, Case No. CCB-03-1381, Memorandum Opinion, September 21, 2004. Additionally, HUD provided considerable relocation assistance, eligible tenants received Section 8 vouchers, and a sizable portion of the redeveloped project would be maintained as affordable housing for twenty-five years.

HUD has affirmatively furthered fair housing in its decision to tear down and rebuild Uplands. “Low-income minority individuals have no constitutional right to be furnished safe, sanitary and decent housing by metropolitan housing authority or by the Department of Housing and Urban Development, they were constitutionally and by statute entitled only to be free of any impediment or conduct on part of defendants for discriminatory reasons to deny them “fair” housing otherwise reasonably available to those in same position. “Jaimes v. Toledo Metropolitan Housing Authority, 758 F.2d 1068 (6th Cir 1985)). “Fair Housing Act (FHA) is a comprehensive open housing law, which is intended to promote open, integrated, residential housing patterns, and to

⁹H. R. REP. NO. 103-366(X) (1993) – additional views of Hon. Richard Baker – expressing concern that the cost savings of the legislation could be elusive if the Secretary’s flexibility was impeded.

prevent increase of segregation, in ghettos, of racial groups whose lack of opportunities FHA was designed to combat. Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238 (E.D.N.Y. 1998). Integration is a goal of FHA. Jorman v. Veteran's Administration, 579 F. Supp. 1407 (N.D. Ill. 1984). Discrimination in the sale or rental of housing is prohibited. Inquiry under disparate treatment analysis of claim of violation of FHA is whether similarly situated persons or groups are subject to differential treatment. Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993).

In this case it could be argued that former Uplands tenants are actually in a better position than similarly situated persons or groups because the Disposition Plan not only contains a provision whereby the newly constructed Uplands must first be marketed to interested former tenants, but it also contains a non-discrimination clause mandating that new owners of the newly constructed Uplands cannot discriminate against Section 8 voucher holders. Exhibit 18. Former tenants who were relocated were offered the opportunity to qualify for Section 8 vouchers. Exhibit 1. These actions taken by HUD affirmatively furthered fair housing and demonstrate that HUD did not violate the Fair Housing Act. Additionally, HUD affirmatively furthered fair housing when it negotiated with the city for a larger number of affordable units on the newly developed Uplands site. Originally the City demanded that only 25% of the units be designed affordable. HUD demanded and received a commitment from the City that 74% of the units which will be built on the Uplands site will be affordable. Exhibits 1, 4, 5, 6, 27, 28.

Courts have held that where HUD and other government housing authorities demolish and rebuild properties as part of an urban renewal and integration program, they have affirmatively furthered fair housing. Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974), on remand, 394

F.Supp. 1151; Otero v. NYCHA, 484 F.2d 1122 (2nd Cir. 1973); Little Earth of United Tribes Inc. v. U.S. Dept of Housing and Urban Development, 878 F.2d 236 (8th Cir.), rehearing denied, cert denied, 494 U.S. 1078 (1989) (“HUD was entitled to foreclose mortgage on American Indian housing project, due to demonstrable mismanagement and failure of project, despite claims that such foreclosure would violate occupants civil rights and the APA.”)

Plaintiffs’ attorneys claimed at the preliminary injunction hearing that “this is not a case in which plaintiffs are asking the Court to dictate the housing choices for Uplands.” Preliminary Hearing May 2004, Transcript at 25. Plaintiffs claim they are “not asking the court to define what constitutes an acceptable fair housing plan for Uplands” *Id.* They are instead asking the “Court to send HUD back to the drawing table, to develop a plan that affords plaintiffs the legal protections due them.” Further, plaintiffs claim that “... the relief sought here is not the intrusive directive to build a certain number of units in a certain place that gives courts pause”; however, that is exactly what the Plaintiffs are asking this Court to do. HUD gave consideration to the Property Disposition Act goals in light of costs, neighborhood revitalization efforts and its flexible authority to dispose of multifamily housing projects. HUD affirmatively furthered fair housing. In working with the City, HUD developed a plan to redevelop and revitalize the substandard Uplands. Plaintiffs take issue with the number of affordable units that will be available at the newly developed Uplands (74%) and they take issue with HUD’s definition of “affordable” housing; in this instance, up to 80% of AMI. They are asking this Court to issue a ruling telling HUD what “affordable” should be in this case, and to dictate many units should be deemed “affordable” under that definition in the newly developed Uplands. That would be improper under the APA.

In this case, the Uplands was a 900 plus unit apartment complex whose tenants were mostly low-income minorities. The 900 plus units were found to be in serious disrepair at which point HUD took over as mortgagee-in-possession. After a determination was made that the Uplands were not in a decent, safe and sanitary condition, it was determined that the Uplands should not be rehabilitated (again) and instead should be torn down and a new residential community developed. This determination was not arbitrary and it was not capricious.

Plaintiffs also claim that HUD violated the Fair Housing Act because former residents were forced to more racially impacted areas than was the Uplands. This is simply untrue. Exhibit 31-32. Uplands was 99% minority residents. Id. Baltimore City is 68% minority residents. Exhibit 31. Attached as Exhibits 11 and 31 are charts of all the new locations of former Uplands residents and the break-down by minority percentages. The Court can see these allegations by the former tenants are unfounded. Id. Plaintiffs submitted affidavits wherein two previous residents are “upset” because their new residences are not as convenient. There is no right to “convenience” under the FHA. There is no statute, regulation or other directive that demands the Secretary relocate residents to a new residence in the same neighborhood, or just as close to their work, school and shopping as the residents were previously, or that failing to do so is a violation of Fair Housing Act or any other law. What the Court will notice is that nowhere in the affidavits is there a discussion of discrimination based on race, and/or a discussion that tenants were made to relocate because of their race. HUD relocated the residents because the conditions of the Uplands were not decent, safe and sanitary. Preliminary Hearing Transcript at 151-152; Letter from Upland tenants February 4, 2003 “we the residents of Uplands Apartments have been living under horrendous conditions for the last few months.” Preliminary Hearing Transcript at 19. Tenants who were relocated out of Uplands are not

“worse off” in their new communities than they were in Uplands for purposes of the Fair Housing Act. The chief complaint from those affiants is that they are not as close to work, shopping and school as they had been at Uplands. One affiant states that she is in worse housing because her kitchen doesn’t have a window and the air conditioning is a problem. However, tenants at the Uplands complained that their heat did not work, they did not have water, and raw sewage backed up in their apartments which made conditions deplorable. Plaintiffs’ motions state over and over again how deplorable the conditions were at Uplands, yet they claim that they are now “worse off” in their new residences. These claims are unfounded and unsupported in the record and they should be dismissed.

IV. CONCLUSION

For the reasons set forth above, the Federal Defendants respectfully requests the Court enter judgment in their favor on each and every claim made by the Plaintiff and dismiss this case with prejudice.

Respectfully submitted,

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