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

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

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PLAINTIFFS' REPLY TO DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

Defendants have raised a variety of legal arguments in an effort to defeat plaintiffs' motion for a preliminary injunction. They range from allegations of rather trivial pleading defects (e.g., combining assertions of violations of the APA and the Fair Housing Act in a single claim) to more substantive legal arguments. Due to time constraints, this reply only addresses several of defendants' legal arguments. Plaintiffs will present their response to defendants' various other arguments at the hearing tomorrow.

ARGUMENT

I. The Flexible Authority Statute Does Not Repeal the Multifamily Housing Property Disposition Act.

Defendants maintain that section 204 of the VA and HUD appropriations act of 1997, codified at 12 U.S.C. § 1715z-11a, ("Flexible Authority Statute") effectively

overruled the Multifamily Housing Property Disposition Reform Act, 12 U.S.C. § 1701z-11, ("MHPDA"). The crux of Defendants' argument is that the phrase in the Flexible Authority statute indicating the Secretary can dispose of multifamily properties "on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law" granted the Secretary unfettered discretion to manage and dispose of multifamily properties as he or she deems fit, without any standards or review. HUD's arguments ignore long-standing doctrines of statutory construction, and disregard its own regulations that indicate clear intent for the Flexible Authority Statute and the MHPDA to coexist.

The simple answer to HUD's argument is that the Flexible Authority statute is inapplicable to the violations asserted in this case. Although plaintiffs do challenge the terms and conditions on which the Secretary proposes to transfer the Uplands property, their challenge to the terms of the transfer is based on fair housing grounds. Specifically, they contend that the defendants' action has forced plaintiffs to relocate to areas of high minority concentration and precludes them from returning to their former, more diverse community. Plaintiffs' challenge under the Multifamily Property Disposition Act is not solely to the terms of the transfer but to the process the Secretary undertook (or failed to undertake) when HUD decided to dispose of Uplands. Specifically, plaintiffs contend that the failure to develop a disposition plan and obtain tenant input into that plan, as well as the failure to determine whether market provides an adequate supply of habitable, affordable rental housing in which residents can use Section 8 vouchers to replace their former project-based housing, violates the Act. Those actions are not the terms or conditions of the disposition but the process the Secretary must go through in order to

inform his decision regarding those terms and conditions. In other words, the Flexible Authority statute, by its terms, does not purport to address the process to which the Secretary must adhere, but the ultimate decision regarding the terms on which it disposes of the property. However, even if the failings challenged by plaintiffs did fall within the ambit of the language of the Flexible Authority statute, the statute does not nullify the MHPDA, as set forth below.

A. <u>The Rules of Statutory Construction Disfavor Finding Repeal by Implication</u>.

The Flexible Authority Statute contains no language indicating the specific intent of Congress to directly repeal the MHPDA. Nowhere in Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction or in Defendant's Motion to Dismiss or, In the Alternative, For Summary Judgment (hereinafter "HUD's Opposition"), does HUD specifically argue that the MHPDA has been repealed by implication. However, that is the operative effect of its argument. The burden of overcoming the strong presumption against implied repeal lies with HUD. As set out below, HUD has failed to meet its burden.

The Fourth Circuit Court of Appeals addresses the rules of statutory construction and explains the strong disfavor and presumption against repeal by implication in <u>United States v. Mitchell</u>, 39 F.3d 465, 472 (4th Cir.1994), *cert. denied*, <u>Mitchell v. U.S.</u>, 515 U.S. 1142(1995)) (holding that subsequently promulgated regulations did not repeal by implication applicability of criminal statute regarding importing merchandise):

> At the outset, we note that a " 'strong presumption' " exists against repeal by implication, *Blevins v. United States,* 769 F.2d 175, 181 (4th Cir.1985) (quoting *Ely v. Velde,* 451 F.2d 1130, 1134 (4th Cir.1971)), and that it is " 'a cardinal principle of statutory construction that repeals by implication are not favored,' " *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48

> L.Ed.2d 540 (1976) (quoting *United States v. United Continental Tuna Corp.,* 425 U.S. 164, 168, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976)). When two acts touch upon the same subject, both should be given effect if possible, *United States v. Borden Co.,* 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939), because the rationale of the presumption [against implied repeal] ... is not that Congress is unlikely to change the law ... but rather, that Congress "legislate [s] with knowledge of former related statutes," and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. *United States v. Hansen,* 772 F.2d 940, 944-45 (D.C.Cir.1985) (quoting *Continental Ins. Co. v. Simpson,* 8 F.2d 439, 442 (4th Cir.1925)), *cert. denied,* 475 U.S. 1045, 106 S.Ct. 1262, 89 L.Ed.2d 571 (1986)…..

Id. at 472. As explained by the 2nd Circuit, repeal by implication is especially disfavored when the later statute is enacted in an appropriations bill (the Flexible Authority Statute was enacted through a VA and HUD appropriations bill):

> To resolve the ambiguity of section 226, we turn to canons of statutory construction. We begin with the important principle that repeals by implication are not favored. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *Morton v. Mancar*i, 417 U.S. 535, 549, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). This is especially true when the provision advanced as the repealing measure--here section 226--was enacted in an appropriations bill. *See United States v. Will,* 449 U.S. 200, 221- 22, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980); *Tennessee Valley Auth.,* 437 U.S. at 190, 98 S.Ct. 2279; *Calloway v. District of Columbia,* 216 F.3d 1, 9-10 (D.C.Cir.2000).
>
> While Congress may amend or repeal a statute by means of an appropriations bill, its intention to do so must be clear. *See Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 440, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992) ("Congress ... may amend substantive law in an appropriations statute, as long as it does so clearly.")…

Auburn Housing Authority v. Martinez, 277 F.3d 138, 144-145 (2nd Cir. 2002). The Fourth Circuit in Mitchell sets out the considerations necessary to overcome the presumption against implied repeal, as established by the Supreme Court:

> Thus, a repeal by implication will only be found when there is clear legislative intent to support it. *United States v. Joya-Martinez*, 947 F.2d 1141, 1144 (4th Cir.1991). Or, stated differently, a later act will not repeal an earlier one in the absence of a clear and manifest intention of Congress. *Borden,* 308 U.S. at 198, 60 S.Ct. at 188. A court may find the requisite degree of intent when (1) " 'the two acts are in irreconcilable conflict,' " or (2) " 'the later act covers the whole subject

> of the earlier one and is clearly intended as a substitute.' " *Radzanower,* 426 U.S. at 154, 96 S.Ct. at 1993 (quoting *Posadas v. National City Bank of New York,* 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936))…
>
> Statutory provisions will not be considered to be in irreconcilable conflict unless there is a "positive repugnancy" between them such that they "cannot mutually coexist." *Radzanower,* 426 U.S. at 155, 96 S.Ct. at 1993. …

Mitchell, 39 F.3d at 172.

Further, even if an irreconcilable conflict exists, the more specific statute may be controlling even if enacted later in time. See Mitchell at 474-475 (citing Farmer v. Employment Sec. Comm'n of N.C., 4 F.3d 1274, 1283 (4th Cir.1993) (when statutes are in irreconcilable conflict, "statutes narrowly applicable to the circumstances at hand control over more generalized provisions"); Radzanower, 426 U.S. at 155 (" '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment'" (*quoting* Morton v. Mancari, 417 U.S. 535 (550-551)).

B. The Strong Presumption Against Repeal by Implication Applies to Statutes Containing the Phrase "Notwithstanding Any Other Provision of Law."

The above principles are applied even when the later enacted statute purports to apply "notwithstanding any other provision of law."

In fact, in Auburn Housing Authority v. Martinez, 277 F.3d 138, 144-145 (2nd Cir. 2002), the Second Circuit Court of Appeals addressed this very issue with regards to such a "notwithstanding any other provision of law" contained in the 1999 VA and HUD Appropriations Act, the very same type of appropriations bill as in the present case. In Auburn Housing Authority, HUD argued that section 226 of the appropriations act effectively repealed section 519(n) of the Quality Housing and Work Responsibility Act of 1998. The language of section 226 of the appropriations act states:

> **Notwithstanding any other provision of law**, no funds in this Act or any other Act may hereafter be used by the Secretary of Housing and Urban Development to determine allocations or provide assistance for operating subsidies or modernization of certain State and city funded and locally developed public housing units, as defined for purposes of a statutory paragraph, notwithstanding the deeming by statute of such units to be public housing units developed under the United States Housing Act of 1937, unless such unit was so assisted before October 1, 1998.

Id. at 141-142 (emphasis added). Despite this language, the Second Circuit concluded that HUD did not overcome the strong presumption against implied repeal, placing significant emphasis on the fact that sections 226 and 519(n) were enacted on the same day and as part of the same legislation. As explained more fully below, the Flexible Authority Statute and the MHPDA were amended on the same day and as part of the same legislation, the VA and HUD Appropriations Act of 1999 (the same legislation at issue in Auburn Housing Authority).

The U.S. District Court, Eastern District of Virginia, address the question of implied repeal in the face of a "notwithstanding any other provision of law" provision in Medina v. U.S., 92 F.Supp.2d 545 (E.D. Va. 2000) (underlying complaint later dismissed on other grounds in Medina v. U.S., 259 F.3d 220 (4th Cir. 2001)). The court concluded:

> *[T]he United States fails to overcome the presumption against implied repeal. The United States submits that "***notwithstanding any other provision of law***" serves as a clear mandate from Congress and adopting Mr. Medina's reading of the statute undermines Congress' intent and the orderly course of removal actions. However, this Court disagrees. In order to effect a repeal, Congress should have stated that it intended to repeal the FTCA as it related to aliens*. As it stands, the statute as well as the legislative history is devoid of such a statement that repeals subject matter jurisdiction for FTCA claims… Furthermore, the IIRIRA and the FTCA are not in conflict…

Id. at 550 (emphasis added).

Similarly, the Ninth Circuit Court of Appeals in Northwest Forest Resource Council v. Glickman, 97 F.3d 1161, 1166 (9th Cir. 1996), overturned the District Court

for having erroneously "simply concluded that the 'notwithstanding' language preempts all regulations that 'obstruct the subsequent statute's objectives.'" Id. at 1166.-1167. The Court concluded that the "notwithstanding" language is "not necessarily preemptive," and that implied repeal is still disfavored and would be found "only if no other construction is possible." Id.

C. Applying the rules of statutory construction, the MHPDA has not been repealed by implication.

Applying the above principles, the Flexible Authority statute, 12 U.S.C. § 1715z-11a, clearly does not act as a repeal of the MHPDA, 12 U.S.C. § 1701z-11. First, the plain language of the statute does not reflect any express or mandatory Congressional intent to repeal the specific and detailed MHPDA. Rather, the language is general and permissive:

> During the 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 provision 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 and conditions as the Secretary may determine, notwithstanding any other provision of law.

12 U.S.C. § 1715z-11a (emphasis added). Nowhere in the statutory language is the express intent to repeal the MHPDA stated.

The necessary intent for implied repeal is also not present. The Supreme Court has set out the factors to be considered for overcoming the strong presumption against implied as follows:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Radzanower, 426 U.S. at 154 (*quoting* Posadas v. National City Bank, 296 U.S. 497, 503 (1936)) (emphasis added).

In considering the first factor, the Flexible Authority Statute and the MHPDA are clearly not in irreconcilable conflict, but rather, the exact opposite is true. The Flexible Authority Statute was enacted as section 204 of the VA and HUD 1997 appropriations bill (approved September 26, 1996, Pub. L. 104-204). HUD issued notice of a final rulemaking action in December 1999, through which HUD apparently intended to implement the Flexible Authority statute. 64 FR 72410 (Dec. 27, 1999). HUD amended and revised the existing 24 C.F.R. § 290.1 to reads as follows:

> The requirements of this part supplement the requirements of 12 U.S.C. 1701z-11 [i.e., The Multifamily Housing Property Disposition Reform Act] for the management and disposition of multifamily housing projects and the sale of HUD-held multifamily mortgages. The goals and objectives of this part are the same as the goals and objectives of 12 U.S.C. 1701z-11, which shall be referred to in this part as "the Statute." With respect to the disposition of multifamily projects under subpart A, HUD may follow any other method of disposition as determined by the Secretary.

24 C.F.R 290.1 (12/27/1999) (emphasis added). Rather than indicating an irreconcilable conflict and intent to repeal the MHPDA and corresponding regulations contained in part 290, HUD expressly harmonizes the flexible authority statute with the MHPDA. The amended regulation, which HUD apparently intended to implement the Flexible Authority Statute, specifically states that the "**requirements of this part supplement the**

requirements of 12 U.S.C. 1701z-11 [the MHPDA]", and that "the goals and objectives of this part are the same as the goals and objectives of [the MHPDA]". Id. (emphasis added) In Mitchell, the Fourth Circuit relied on the fact that the goals of two statutes in question were not in conflict in reaching a conclusion that irreconcilable conflict did not exist for purposes of repeal by implication. Mitchell, 39 F.3d at 475. In the present case, not only are the MHPDA and the flexible authority statute not in conflict, they are explicitly harmonized. The modified regulation "supplements" rather than supplants the MHPDA and its regulations. 24 CFR 290.1. HUD's modified regulation, by its own terms, continues to recognize that the provisions of the MHPDA are "requirements" that are simply supplemented by its authority to create additional methods of disposition. Id.

The language added to 24 CFR 290.1 in 1999 explains "HUD may follow any other method of disposition as determined by the Secretary." The permissive language of both the Flexible Authority Statute and this regulation ("may" as opposed to "shall") further indicate no intention to repeal the MHPDA. Rather, the language in the Flexible Authority Statute simply provides HUD with authority to implement additional regulations, after required notice and opportunity to comment as required by the Administrative Procedures Act and 24 CFR § 10.1, in order to develop additional methods of disposition. In fact, HUD has done just that. In the same rule making action in which HUD amended 24 C.F.R. § 290.1, it added an additional "method of disposition" to part 290, 24 CFR 290.27 (Up-Front Grants and Loans in the Disposition of Multifamily Projects).

Significantly, neither the statute nor the regulation use the term "discretion," nor permit *ad hoc* disposition of multifamily properties. Both require the Secretary to create

"terms and conditions" or to establish or determine some alternate "method" of disposition. When an agency is given the authority to create such terms and conditions or methods it cannot do so capriciously. The Supreme Court has recognized that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left implicitly or explicitly, by Congress.'" Morton v. Ruiz, 415 U.S. 199, 231 (1973). In Morton v. Ruiz, the Court stated: "[t]he Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of ad hoc unpublished determinations." Morton v. Ruiz at 232.

The second factor for overcoming the strong presumption against implied repeal, whether the statute "covers "the whole subject of the earlier one and is clearly intended as a substitute…," Radzanower, 426 U.S. at 154, is also not present in the Flexible Authority Statute or its implementing regulation. The implementing regulation of the Flexible Authority Statute begins by explicitly stating "requirements of this part supplement the requirements of [the MHPDA]." 24 CFR 290.1. The use of the word "supplement" cannot make it more clear that the Flexible Authority Statute does not cover "the whole subject matter" of the MHPDA and is not intended to be a substitute for the MHPDA.

In its own notice of final rulemaking action, HUD continues to list 12 U.S.C. 1701z-11 (the MHPDA) as authority for 24 CFR part 290. The fact that the MHPDA requirements are specifically referred to by HUD as a continuing basis of authority to dispose of multifamily properties leaves no doubt that the Flexible Authority Statute was

not intended to repeal the MHPDA. As the Fourth Circuit has noted, if Congress intended to suspend or repeal the specific statutory and regulatory provisions of the MHPDA, it would have said so. Mitchell, 39 F.3d at 472.

As additional evidence of the lack of intent to repeal the MHPDA, the VA and HUD Appropriations Act of 1999 (two years after the VA and HUD Appropriations Act which included the Flexible Authority Statute) includes both an amendment to the Flexible Authority Statute, PL 105-276, Title II, § 206, Oct. 21, 1998 (amended to include application to fiscal year 1999) and to paragraph (g) of the MHPDA, PL 105-276, Title V, § 514(b)(2)(C), Oct. 21, 1998. (related to protection for unassisted very low-income tenants). If, as HUD argues, the intent of the Flexible Authority Statute enacted in section 204 of the VA and HUD Act of 1997 is to repeal the MHPDA, it makes no sense that a provision of the MHPDA would be amended at the same time that the Flexible Authority Statute was amended, again by a VA and HUD Appropriations Act, two years later. As the Second Circuit Court of Appeals concluded, "[t]he doctrine against repeals by implication is especially strong in this case, where the two provisions were enacted on the same day as part of the same statute." Auburn Housing Authority v. Martinez, 277 F.3d 138, 150 (2nd Cir. 2002).

Further, HUD itself continues to recognize the requirements of the MHPDA and corresponding regulations. In September 13, 2001 letters, HUD provides notice of initiated foreclosure proceedings. In those letters, HUD explicitly recognizes that the provisions of the MHPDA continue to be requirements: "The Multifamily Property Disposition Reform Act of 1994 requires that the U.S. Department of Housing and Urban Development (HUD) provide…notice of HUD's intent to foreclose on a mortgage held

by HUD." Also, in the deposition of Robert Iber, HUD Director of Project Management for the Baltimore Multifamily Program Center, Mr. Iber recognizes that the procedures set out in 24 CFR part 290 still apply. Iber Deposition at 128, 130.

Thus, neither factor for overcoming the strong presumption against implied repeal is present in the Flexible Authority Statute. As stated by the Supreme Court, "when two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective." Radsanower, 426 U.S. at 155. A proper reading of the statutes indicates that the MHPDA and corresponding regulations survive in their entirety, and that the Flexible Authority Statute simply provides authority for HUD to develop additional methods of disposition pursuant to the rulemaking requirements of the APA and 24 C.F.R § 10.1.

D. HUD's Interpretation of the Flexible Authority Statute Creates Agency Decision Making Authority that is Inherently Arbitrary.

Defendants argue that the Flexible Authority statute repeals the MHPDA and accompanying regulations in 24 CFR part 290. In fact, HUD goes so far as to argue that "[t]here is no law to apply and thus the decision [related to disposition of multifamily projects] is not reviewable." Such unfettered discretion cannot be allowed.

The essence of an arbitrary and capricious decision is that it is made at will or without principle. Even if a decision is rational or reasonable, it cannot be made on an ad hoc basis.[1] The Supreme Court has recognized that such ad hoc, unprincipled determinations are inherently arbitrary, hence the requirement that administrative

[1] The issue is not whether a particular decision was reasonable. As the Court noted in Morton v. Ruiz, "agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation . . . but also to employ procedures that conform to law. . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination . . . cannot be made on an ad hoc basis. . . . : 415 U.S. 199 at 231.

agencies publish their substantive policies. Morton v. Ruiz, 415 U.S. 199, 231 (1973). Similarly, adoption of the Administrative Procedure Act represents a national policy designed to prevent such decision making.

HUD maintains its interpretation of the Flexible Authority Statute is entitled to deference pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Chevron deference does not apply here.

HUD is not entitled to Chevron deference in this case, where its interpretation of legislation is merely a litigation position advanced by counsel. Defendants' position here is far weaker than it was in the case of Christensen v. Harris, 529 U.S. 576, 577 (2000), where the Supreme Court refused to apply Chevron deference to agency interpretations of law "contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law."

Before giving deference to the Agency's interpretation, such interpretation and/or policy statements must be adopted or promulgated so as to have the effect of law. As the A.P.A. and HUD's own regulation (24 C.F.R. 10.1) make clear, that requires a rulemaking.

Further, Chevron deference is not appropriate here because the meaning of the Flexible Authority statute is plain: it authorizes the HUD Secretary to set out terms for additional methods for multifamily property disposition, through appropriate rulemaking, that are consistent with the MHPDA. It does not allow HUD to do what it pleases, without regulation or review.

However, if this Court finds that the Flexible Authority statute is ambiguous, Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984) provides

that "the question for the court is whether the agency's answer is based upon a permissible construction of the statute." HUD's interpretation that it can make dispositions without adopting any method or procedure in advance, and that its decisions are not reviewable, is not tolerated by basic tenets of judicial review. As such, no deference to such a statutory interpretation by HUD is warranted. As stated in City of Kansas City v. HUD:

> The agency construction for which HUD seeks deference was never promulgated by the Secretary, or his designee, nor by administrative regulations, nor by decisions in agency adjudications; rather, agency counsel contends that the 'permissible construction of the statute' for which it seeks approval is the agency's litigation posture in this case. For purposes of Chevron, this is patently insufficient.

City of Kansas City v. HUD, 923 F.2d 188, 192 (D.C. Cir. 1991). Thus, this Court must reject HUD's post-hoc rationalization.

If it is HUD's position that it has promulgated a sufficient implementing regulation to afford HUD unfettered discretion, such argument fails. As explained above, the amended regulation, 24 CFR 290.1, maintains the existing statutory and regulatory framework under the MHPDA. The phrase added to the regulation in 1999, which HUD apparently intended to implement the Flexible Authority Statute, is that "…HUD may follow any other method of disposition, as determined by the Secretary." As set out above, this language must be interpreted as simply allowing HUD the authority to develop additional methods of disposition, through appropriate rulemaking. It cannot be interpreted to allow HUD the ability to do whatever it wishes, without standards, regulations or review.

In fact, HUD's "amendment" of 24 C.F.R. § 290.1 is itself invalid. Specifically, HUD did not comply with the notice and comment requirements of 24 C.F.R. § 10.1 and

the APA. The only proposed rule implementing the Flexible Authority statute was published in the Federal Register on July 15, 1999 at 64 Fed. Reg. 38284. The proposed rule provided notice and sought comment *only as to requirements for up-front grants*, 24 C.F.R 290.27. Thereafter, the final rules published by HUD on December 27, 1999 (Final Rule at 64 Fed. Reg. 72412) included the above revision to 24 C.F.R. 290.1 that had not been identified or disclosed in any way in the July notice of Proposed Rulemaking. The final rule added the sentence, "HUD may follow any other method of disposition, as determined by the Secretary" despite the fact that the change had not been put forth for notice and comment in the proposed rule.

II. HUD's Actions Are Subject to Review Under the Administrative Procedure Act.

Defendants argue that their decisions related to disposition of multifamily housing properties are not reviewable under the APA. HUD argues that the Flexible Authority Statute falls within the exception to judicial review set out in 5 U.S.C. § 701(a)(2) which provides that agency actions are not subject to review when "the agency action is committed to agency discretion by law." As recently explained by the U.S. District Court, District of Columbia, HUD overstates this exception to presumed judicial review:

> The APA carves out an exception to judicial review "to the extent that ... agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2)…. *"As the Supreme Court has instructed, 'we begin with the strong presumption that Congress intends judicial review of administrative action." ' INOVA Alexandria Hospital v. Shalala,* 244 F.3d 342, 346 (4th Cir.2001) (quoting *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986)); *see also Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975) (*government bears "heavy burden of overcoming the strong presumption" in favor of judicial review*). *This presumption of judicial review is overcome by "clear and convincing evidence of a contrary congressional intent*." *Bd. of Governors Fed. Reserve Sys. v. Mcorp Fin., Inc.,* 502 U.S. 32, 44 (1991). *Accordingly, the APA's exception to judicial review is a "very narrow*

> *exception*," reserved for "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971) (citation omitted)… In *Heckler v. Chaney,* 470 U.S. 821 (1985), the Court stated that the "committed to agency discretion" exception to APA judicial review applies where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion." ' *Id...*
>
> *… In the absence of clear congressional intent to preclude review, judicial review is available to hold an agency to the procedural and substantive standards contained in its own regulations governing administrative action, even where the statute grants the agency absolute discretion over administrative decisions. See Center for Auto Safety v. Dole,* 828 F.2d 799, 807 & n. 11 (D.C.Cir.1987). "[E]ven if the underlying statute does not include meaningful (or manageable) standards, 'regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review." ' *INOVA Alexandria Hospital,* 244 F.3d at 346 (quoting *CC Distribs., Inc. v. United States,* 883 F.2d 146, 154 (D.C.Cir.1989)).

Capital Area Immigrants Rights Coalition v. U.S. Dept. of Justice, 2003 WL 21196684 (D.D.C. 2003) (emphasis added). In the present case, HUD has failed to meet its "heavy burden of overcoming the strong presumption in favor of judicial review" Id.

As explained above, the MHPDA has not been repealed by implication. As such, there is an underlying statute that provides meaningful standards. Further, even if the Flexible Authority Statute is determined to apply, and not the MHPDA, HUD continues to bind itself to all the regulations contained in 24 C.F.R. Part 290. If the regulations in part 290 are no longer considered applicable, APA review is still available, as explained below.

HUD has expressly bound itself to promulgate regulations in discretionary matters – even those exempt from rulemaking requirements under the Administrative

Procedure Act. HUD's regulations setting forth guidelines governing its promulgation of regulations states:

> It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not otherwise be subject to rulemaking by law or Executive policy.

24 C.F.R. § 10.1. Insofar as Congress conferred authority on HUD to "manage and dispose of multifamily properties…on such terms and conditions as the Secretary may determine," then the APA and 24 C.F.R § 10.1 imposes on Defendants a clear duty to promulgate a rule or regulation on how Defendants will exercise that authority to dispose of the properties owned at the time, or that it will own in the future (i.e. the establishment of "terms and conditions"). HUD has not done so, in violation of the APA, section 706(2)(D) (allowing reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law).

The Court's power to review – and set aside -- Agency actions under the A.P.A. is broad, extending well beyond just the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" clause. In its entirety Section 706 provides:

> § 706. Scope of review
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> **(B)** contrary to constitutional right, power, privilege, or immunity;
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> **(D)** without observance of procedure required by law;
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. HUD's actions are reviewable under the APA on several grounds. HUD's actions were taken without observance of "procedure required by law," are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," are "unsupported by substantial evidence" and are "unwarranted by the facts."

Even if this Court accepts HUD's argument that its actions in disposing of multifamily properties are discretionary under the Flexible Authority Statute, and that the regulations contained in 24 CFR Part 290 do not apply, the APA still provides for judicial review. A Congressional grant of authority allowing HUD to exercise discretion is not equivalent to license for the agency to act without principle; when an Agency exercises Congressionally delegated authority, it does so within a framework or "intelligible principle" to guide its actions, other than the grant of authority. Absent the existence of such principle(s), the grant of discretionary authority would be unconstitutional.[2] In the

[2] Legislative power is vested in Congress pursuant to Article I of the United States Constitution. An unfettered or standardless grant of discretion would be an unconstitutional and unenforceable delegation of legislative authority. Congress must provide an agency with at least a guiding "intelligible principle" in order for a broad delegation of power to be an enforceable delegation of Constitutional authority. Panama Refining Co. v. Ryan, 293 U.S. 388; 55 S. Ct. 241; 79 L. Ed. 446 (1935), A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529; 55 S. Ct. 837, 843, 79 L. Ed. 1570 (1935) ("The Congress is not permitted to abdicate or transfer to others the essential legislative functions with which it is vested").

instant action, the operative principles within which HUD's disposition actions must be scrutinized by the Court, even if the MHPDA and regulations in 24 CFR Part 290 are determined not to apply, include:

(1) the goals of the National Housing Act; and

(2) the requirements of the Fair Housing Act.

A. Actions and Decisions by HUD are Reviewable Under the APA to Determine Whether Consistent with the Objectives of the National Housing Act:

HUD's actions fail to abide by Congressional mandate that disposition must be consistent with the goals of the National Housing Act. Specifically stated in 24 C.F.R. § 290.1 is the requirement to carry out the disposition of multifamily properties consistent with the National Housing Act. Further, Courts have repeatedly recognized that HUD must abide by its requirements in order to fulfill its essential function. *See e.g.:* Lee v. Kemp, 731 F. Supp. 1101 (D.C. Cir. 1989); Russell v. Landrieu, 621 F. 2d 1037 (9th Cir. 1980).

Congress has declared and repeatedly reaffirmed that the policy underlying the National Housing Act is:

> . . . that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and otherwise inadequate housing through the clearance of slums and other blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . .

42 U.S.C.A. § 1441. In U.S. v. Winthrop Towers, 628 F.2d 1028 (7th Cir.1980), the Seventh Circuit overturned the district court conclusion that the relevant statutes

(containing "notwithstanding any other provision of law" language) gave HUD "blanket authorization" to foreclose a mortgage "with no restrictions or standards whatsoever," and therefore that the exception to review under Section 701(a)(2) of the APA applied. Id. at 1033. The Seventh Circuit reversed, holding that HUD's decision to foreclose may be reviewed under the APA to determine whether it is consistent with the objectives of the National Housing Act. Id. at 1034-1036.

B. Actions and Decisions by HUD are Reviewable Under the APA to Determine Compliance with the Fair Housing Act.

The abuse of discretion and arbitrariness surrounding HUD's actions is perhaps most exemplified by its HUD's disregard of some of its most fundamental and precious responsibilities: furtherance of fair housing and prevention of discrimination against protected classes under Title VIII of the Civil Rights Act of 1964. Better known as the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* places an affirmative duty on HUD to administer its programs in a manner by which to "affirmatively further" fair housing, while ensuring that it does not intentionally or otherwise causes discriminatory injury. 42 U.S.C. § 3604(e)(4).[3] In the case of Resident Advisory Board v. Rizzo, the Third Circuit expressly held that:

> [t]he discretion of HUD to choose the methods of achieving the national housing objectives 'must be exercised within the framework of the national policy against discrimination in federally assisted housing, 42 U.S.C. § 2000d, and in favor of fair housing. 42 U.S.C. § 3601. When [a] ...

[3] Executive Order 11063, issued in 1962, similarly directs "all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race." Regulations adopted by HUD pursuant to this order are very broad, and extend the obligation to prevent discrimination to Public Housing Authorities and private owners participating in HUD programs. 24 C.F.R. Part 107.

> decision is made without consideration of relevant factors, it must be set aside.

Resident Advisory Bd. v. Rizzo, 594 F.2d 126 (3d Cir. 1977), *quoting* Shannon v. HUD,439 U.S. 1002 (1978). HUD has failed entirely to undertake such an analysis in order to ensure that the disposition in this case would affirmatively further fair housing, and its decision and actions are detrimental to fair housing goals. Indeed, HUD's own witness testified that it set the terms and conditions of its contracts with the City without considering their racial impact. Iber Deposition at 238.

Title VIII of the Civil Rights Act of 1968, (better known as "The Fair Housing Act") prohibits discrimination:

> against any person in the terms, conditions, or privileges of sale and rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604 (b).

The operative provision of the Fair Housing Act bars both intentional and unintentional acts of discrimination in sale or rental of housing and applies to both government and privately owned or operated units. Resident Advisory Bd. v. Rizzo, 594 F.2d 126 (3d Cir. 1977); See also, Stackhouse v. DeSitter 620 F. Supp 208 (ND Ill 1985); Metropolitan House Development Corp. V. Village of Arlington Heights 558 F.2d 1283 (7th Cir. 1977) (recognizing clear Congressional intent that the language of the Fair Housing Act be broad and inclusive, subject to generous construction and read expansively in order implement the goals of the Act.)

The Third Circuit has held that the mandates of the Fair Housing Act apply to Defendants HUD and the Secretary of HUD with respect to all of HUD's programs and

duties. Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809, 816 (3rd Cir. 1970) The Third Circuit has held that under Title VI of the Civil Rights Act of 1964 (prior to the Fair Housing Act), the Secretary of HUD was already "…directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such actions." Id. . Thereafter, with the enactment of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, the Secretary of HUD was now "directed to act affirmatively to achieve fair housing." Id.

HUD argues that sovereign immunity bars Plaintiff's claims under the Fair Housing Act. By HUD's own previous acknowledgment, it is subject to review under the APA for violations of the Fair Housing Act. The court in Tinsely v. Kemp, 750 F.Supp. 1001 (W.D. Mo. 1990) explains:

> HUD argues that sovereign immunity bars the claims under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and Title VIII of the Fair Housing Act of 1968 (42 U.S.C. §§ 3604(a) and 3608(d)). However, **HUD also acknowledges in its motion and reply to plaintiffs' response that the civil rights claims could be brought under 5 U.S.C. § 702**…HUD's acknowledgement is consistent with several cases. *See Young v. Pierce,* 628 F.Supp. 1037, 1058 (E.D.Tex.1985), *vacated on other grounds,* 822 F.2d 1368 (5th Cir.1987); *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 690-691, 69 S.Ct. 1457, 1461-1462, 93 L.Ed. 1628 (1949); *See also, Dugan v. Rank,* 372 U.S. 609, 621-622, 83 S.Ct. 999, 1006-1007, 10 L.Ed.2d 15 (1963); *Gautreaux v. Romney,* 448 F.2d 731, 735 (7th Cir.1971); *United States v. Yonkers Board of Ed.,* 594 F.Supp. 466, 469 (S.D.N.Y.1984).
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> Plaintiffs oppose the motion to dismiss on sovereign immunity grounds. However, they ask in the alternative for leave to amend their complaint to insert the reference to Section 702 so they can maintain their civil rights claims. Rule 15, Fed.R.Civ.P., provides that leave to amend will be granted freely when justice requires. The intent of the complaint is obvious, so the amendment would be almost a formality. Nevertheless, plaintiffs' basis for bringing civil rights claims against a federal agency should be established explicitly in their complaint. Accordingly, leave will be granted to amend the complaint.

Id. at 1009-1010 (emphasis added). Similarly, in Pleune v. Pierce, 697 F.Supp. 113 (E.D.NY. 1988), the court agreed that challenges to HUD under the Fair Housing Act "can be made only pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706…" Id. at 119. Thus, even if sovereign immunity bars claims against HUD under the Fair Housing Act itself, the APA provides for judicial review of HUD decisions and actions to determine compliance and furtherance of the Fair Housing Act objectives. HUD incorrectly argues that Plaintiffs have not clearly pled an APA cause of action. In their Amended Complaint, Plaintiff's set out a cause of action alleging violations of the Fair Housing Act and specifically pled that the violations are "arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law, in violation of the Administrative Procedures Act." Plaintiffs' Amended Complaint at 32. Under the standard described above in Tinsely, HUD is clearly on notice as to the intent of Plaintiff's complaint, including its APA claims.

CONCLUSION

For the foregoing reasons, Plaintiffs request that Defendants Motion to Dismiss or, In the Alternative, for Summary Judgment, be denied.

Respectfully submitted,

Dated: May 28, 2003

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