accept the voucher.[9] In the court's words, "[i]f a landlord's obligation to accept enhanced vouchers upon opt-out was merely voluntary, then § 1437f's grant to the tenant of the right to remain would be illusory," noting that the right to elect to remain appears within the enhanced voucher subsection of the statute and hence cannot be divorced as the owner contended.[10] The court also found unpersuasive the owner's attempt to rely on the generally voluntary nature of an owner's participation in the voucher program, distinguishing the additional protections afforded by the entirely separate enhanced voucher statute.

Although because of the statute's clarity it was unnecessary to do so, the court also pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide and in a separate notice that owners are obligated to accept the vouchers, to which it would defer. Additional support came from the court's view of the statute's legislative history.

An additional question raised by the litigation was the duration of the owner's duty to accept the enhanced voucher, specifically at the point of lease expiration. Employing a similar analysis as used for the duty to accept, the court found it illogical to provide a right to remain but not recognize a duty to offer a lease renewal, referring to the absence of any time-limit language in the statute as further support. Buttressing this conclusion, the court pointed to HUD's reasonable interpretation in the Section 8 renewal policy guide.[11]

After issuing the declaration that the refusal violated the statute and the permanent injunction requiring acceptance of the voucher, the court reserved plaintiff's claim for attorney's fees and costs. The owner has since filed an appeal of the judgment with the United States Court of Appeals for the Second Circuit, but no stay of the injunction has been issued. ■

[9]*Jeanty*, 2004 WL 1794496, at *3 (citing 42 U.S.C. § 1437f(t)(1)(B): "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project.").

[10]*Id.*

[11]*Id.* at *5 (citing SECTION 8 RENEWAL POLICY GUIDE, *supra* note 6, at ¶ 11-3B).

Federal Court Rules that HUD Violated Federal Disposition Act

Residents of a large HUD-owned multifamily property have successfully challenged HUD's sale of the property to the City of Baltimore for demolition and redevelopment as middle-income housing. Dean v. Martinez, 366 F. Supp. 2d 477, 2004 WL 2115605 (D. Md. Sept. 21, 2004). Although their complaint raised many other significant claims and related issues, this is the first judicial decision in more than a decade that has found that the Department of Housing and Urban Development (HUD) violated the federal property disposition statute. The court also kept alive the tenants' Fair Housing Act claims against HUD and the city, leaving them for later resolution.

Factual and Legal Background

At issue in the case was HUD's proposed disposition of the Uplands, a 979-unit property in western Baltimore that was originally insured and subsidized by HUD under the Section 236 program, and subsequently assisted under the Section 8 Loan Management Set-Aside program for almost all of the units. After default, the mortgage was assigned to HUD and HUD assumed control of the property as mortgagee-in-possession (MIP). When the default was not cured, HUD scheduled a foreclosure sale for June of 2003, as part of a plan to acquire title and immediately transfer the property to the city for demolition and redevelopment. The city's redevelopment plan proposed that only a small portion of the replacement units, funded in part with up-front grants from HUD totaling $36 million, would be affordable to very low-income families like those who formerly resided in the property. Tenants were to be receive vouchers to find housing on the private market.

While it was in control as MIP for more than two years prior to foreclosure, HUD moved to vacate the property, offering most tenants vouchers to move, along with some relocation assistance. Most residents moved without vouchers and relocation assistance. Many moved to surrounding counties due to the tight rental market in the city. Prior to relocating tenants or encouraging them to leave, HUD did not conduct a market analysis to determine the availability of affordable housing to voucher holders or the voucher success rate, which reportedly had hovered below 50% in the city. Prior to the foreclosure, about forty tenant families, primarily African-American, senior, disabled, and single-parent households, did not move. Many had been denied vouchers by the PHA or could not use them to lease up in the market due to poor credit. Even those with vouchers faced the prospect of relocation to areas of concentrated poverty or substandard housing. HUD then informed the remaining residents they would be moved to a hotel, and offered time-limited relocation assistance.

Prior to the foreclosure, HUD took the position that tenants had no right to be consulted regarding the planned foreclosure and disposition process, nor any guaranteed right to return following redevelopment. At this time, HUD failed to provide residents with notice of the proposed general terms and conditions concerning the foreclosure and acquisition and retransfer plan, as well as specific information regarding the future use and operation of the project, or any opportunity to comment. HUD performed no analyses concerning the feasibility of using vouchers in the local market, local housing needs or any fair housing impacts.

Facing the foreclosure and the threat of imminent displacement and the long-term loss of their homes, the remaining tenants got organized. After establishing a tenants association, they developed their own preservation plan, seeking to preserve some number of units affordable to Section 8-eligible tenants at the redeveloped site, using tools that included the existing Section 8 contract, up-front grants and project-based vouchers, in partnership with an experienced developer.

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When neither HUD nor the city were willing to revise the terms of the demolition and redevelopment plan prior to the scheduled foreclosure sale, the tenants filed suit to challenge the plan, including its relocation component, naming both HUD and the city as defendants. The suit claimed that the plan violated the Multifamily Housing Property Disposition Act,[2] the Fair Housing Act,[1] and the Uniform Relocation Act,[3] entitling the tenants to relief under the federal Administrative Procedure Act.[4]

The residents first sought preliminary relief against the June 2003 foreclosure sale, but the court denied the motion, so HUD acquired title to the property at the foreclosure sale. Within a month, HUD issued an initial disposition plan, disclosing an intent to sell the property to the city for $10 and provide an up-front grant for redevelopment. In exchange, HUD proposed to require the city to maintain at least 74% of the redeveloped units as "affordable housing," generally for families earning no more than 80% of area median income. However, up to 31% of these "affordable" units could be targeted to families earning up to 115% of area median income (AMI).[5] The remaining 26% of the units could be sold or rented at market rates. The initial plan proposed no deeper targeting of the units to very-low or extremely low-income families. Former tenants would have a first option to rent or buy these redeveloped units, although the only provision to accomplish this would be a clause preventing the new owner from discriminating against voucher holders. The plan indicated that the city would assume relocation responsibilities for any tenants remaining on the premises when HUD eventually transferred the property to them.

HUD then distributed this initial plan to the remaining tenants for a thirty-day comment period, although without informing tenants that the full record was available for their review. The Uplands Tenants Association and individual tenants filed comments, primarily opposing the demolition decision and the high affordability standards for the redeveloped property, which made illusory the right to return to the redeveloped property. HUD then reopened the comment period, apparently in order to make available the full administrative record.

HUD issued a final disposition plan virtually identical to the initial plan in all major respects, making no reference to the tenant comments, and then sold the property to the city in January 2004. The city then condemned the property as unsafe, ordering tenants to vacate within ten days. Over the next two months, the tenants vacated the property, and the city prepared to schedule demolition and solicit redevelopment proposals.

Since preliminary relief was denied, the parties filed cross-motions for summary judgment, which the court considered in this opinion. The tenants sought to have HUD's disposition plan set aside or invalidated under the APA, and HUD sought to have the tenants' claims dismissed or decided in its favor. At this point the court was not considering any motion filed by the city. The court considered several of the tenants' arguments: (1) that HUD violated the procedural requirements of the federal disposition statute, (2) that HUD failed to comply with its duty to further fair housing, and (3) that HUD's relocation activities were inadequate under relocation and fair housing laws.

The federal disposition statute requires that HUD develop a disposition plan containing certain terms, that tenants be given the opportunity to comment, and that HUD consider those comments. In addition, the statute requires that HUD's plan must address eight specific goals, while choosing the least costly means of doing so. Those goals include preserving affordable housing, maintaining properties in decent condition and minimizing the need to demolish them, minimizing involuntary displacement, supporting fair housing strategies, and acting consistently

[1]12 U.S.C.A. § 1701z-11 (West 2001).

[2]42 U.S.C.A. §§ 3601, 3608(e)(5) (West 1994).

[3]42 U.S.C.A. §§ 4601, 4625 (West, WESTLAW through P.L. 108-356, approved 10-21-04).

[4]5 U.S.C.A. § 702 (West, WESTLAW through P.L. 108-356, approved 10-21-04).

[5]Dean v. Martinez, 336 F. Supp. 2d 477, 481 (D. Md. 2004).

with local housing market conditions. The tenants claimed that HUD violated this statute because it neither considered their comments, nor addressed these goals.

The court began its analysis of this claim by emphasizing that the APA standard of judicial review is highly deferential to the agency. On whether HUD violated a legal duty to consider the tenants' comments, the court found HUD's treatment of the tenants' comments acceptable, although perhaps less than desirable, pointing out that HUD solicited comments, extended the comment deadline, prepared a summary of tenant concerns, and stated that they had been considered. The court did not believe that the statute requires an explicit response to the tenants' comments, and thus granted HUD's motion on this aspect of the claim.

However, on the issue of whether HUD adequately considered the goals expressed in the disposition statute, the court granted partial summary judgment to the tenants, finding insufficient support in the record. HUD had argued that its decision was consistent with the statute because the record reflected the prohibitive cost of maintaining and repairing the property. On this point, the court clearly and convincingly rejected HUD's myopic view:

> Such cost concerns, while relevant in light of the statute's command that HUD act "in the least costly fashion among reasonable available alternatives," 12 U.S.C. § 1701z-11(a)(3), may not by themselves justify HUD's action. HUD, rather, was obligated to determine that the cost of maintaining and rehabilitating the property "outweigh[ed] other goals expressed in the statute." [citing cases].[6] Because there is no evidence to suggest that HUD attempted such a weighing of competing statutory considerations, the only reasonable interpretation of the record is that HUD's action was arbitrary and capricious.

336 F. Supp. 2d at 484.

The court appeared especially astounded by HUD's failure to document consideration of the statutory goals in light of its earlier explicit discussion of them at the preliminary injunction hearing held prior to the foreclosure sale. Another aspect of this problem was whether HUD considered the statutory goals when developing the weak affordability standards in the final disposition plan and contract with the city. The court found no evidence in the record to support HUD's decision that a mix of 74% "affordable" and 26% market-rate was appropriate, or that 80% of AMI is the appropriate targeted income level for "affordable" units, despite a local HUD official's assertion that tenants could use vouchers in the local market because all units were within the local payment standard.

As is customary, when in trouble on the merits, HUD sought to have the claims dismissed on procedural grounds. The first contention was that the tenants allegedly lacked standing because their injury was speculative. In other words, until the city establishes affordability standards, it remained unclear whether the tenants could return with their vouchers to the redeveloped site. The court rejected HUD's ploy, stating that the affordability criteria cannot be separated from other aspects of HUD's disposition, and that in any event the plaintiffs' temporary displacement from HUD's decision sufficed to confer standing to challenge it. HUD's second procedural defense, related to the standing claim, was that the tenants' claims were not yet ripe because the extent of their injury remains unknown until the city finalizes its redevelopment plan. This too was rejected, because HUD's decision was complete, and postponing review would cause hardship for several parties to the transaction.

The court thus set aside the disposition decision and remanded the case to HUD for reconsideration in light of the statutory objectives.

The tenant's second claim, also brought under the APA, alleged that HUD had violated its duty to affirmatively further fair housing because it failed to consider the fair housing implications of its disposition decision.[7] Because almost all of the former Uplands tenants are African-American, the effect of the plan, especially the weak affordability standards for the redeveloped site, will be to force the tenants into higher-poverty and racially concentrated census tracts. HUD again sought to defend this claim on procedural grounds, beyond the standing and ripeness issues already raised and rejected by the court. HUD's additional contention was that the APA doesn't permit review of HUD's decision because the tenants have an adequate remedy for their injuries under their fair housing claim against the city. The court had no trouble rejecting this defense, because the action challenged was HUD's own, not that of a regulated entity. The court also recognized that HUD's fair housing duties are broader than the city's,[8] requiring HUD to take steps to ensure fair housing, not just avoid discriminating.

Evaluating the merits of the claim, the court denied HUD's motion for summary judgment, finding the record devoid of any evidence supporting the consideration of fair housing policies when developing the plan and its affordability criteria. In the court's words,

[6]In fact, the court's instruction that, if properly documented, HUD could allow cost to outweigh the other goals is apparently incorrect. The cases cited for this proposition were decided in 1985 and 1987, prior to Congress' revision of the statute in 1988 to specifically reject cost as the predominant factor in disposition decision-making. Pub. L. No. 100-242, § 181, 101 Stat. 1815, 1868 (1988).

[7]42 U.S.C.A. § 3608(e)(5) (West 1994).

[8]*Dean*, 336 F. Supp. 2d at 487 (citing Darst-Webbe Tenant Ass'n Bd., 339 F.3d 702, 713-14 (8th Cir. 2003)); NAACP v. HUD, 817 F.2d 149, 157-160 (1st Cir. 1987).

there was no evidence to suggest that HUD considered the impact of the city's redevelopment plans on the racial composition of the Uplands area and other neighborhoods—something HUD was obliged to consider not only as a matter of its "affirmative[ ]" duty under § 3608(e)(5), but also because "supporting fair housing strategies" is a specified goal under the Disposition Act, *see* 12 U.S.C. § 1701z-11(a)(3)(G)."[9]

At the same time, the court declined to issue summary judgment in the tenants' favor on this claim, largely because of uncertainty surrounding whether individual programmatic decisions, rather than patterns or policies, are vulnerable to affirmatively furthering claims. The court effectively instructed HUD to consider the fair housing implications of its decision on the remand, since fair housing is one of the statutory disposition goals, and indicated that it would review that explanation later.

The final claim raised by the motions was whether HUD's relocation activities were in compliance with the requirements of the Uniform Relocation Act (URA)[10] and fair housing laws. The court considered only the URA claim, because HUD had not sought judgment on the relocation component of the fair housing claim, and in any event that aspect would be reevaluated on the administrative remand. After noting the extensive actions required by the URA (e.g., moving expenses and comparable replacement dwellings), the court apparently bought HUD's characterization that the claims were those of a few disgruntled tenants. The court found that HUD's URA duties under § 4625(c)(3) are satisfied if tenants are given a "reasonable opportunity" to locate comparable replacement housing. In other words, in this court's view, so long as the prescribed services are "made available," the duty is satisfied, even though the results fail to match. The court also stated that comparability does not require equivalence. Apparently, the court chose to overlook the fact that of the approximately 600 vouchers made available for tenants in the 979-unit property, less than 300 were actually leased up in the market by former Uplands tenants. Finding no URA violation, the court entered judgment for HUD.

In a novel twist, although finding HUD's disposition decision illegal and setting it aside, the court did not set aside the sale of the property to the city. Rather, it simply remanded the decision to the agency for further consideration. Ostensibly, the court left the sale in place in order to avoid hardship to the city in the event that HUD might be able to justify the decision with a different record. Apparently, the court will permit HUD to revisit the statutory goals afresh, and if it can develop a sufficient record to justify the original or a revised plan under those goals, the sale could proceed. ■

[9]*Dean*, 336 F.Supp.2d at 488.

[10]42 U.S.C.A. § 4625 (West, WESTLAW, through P.L. 108-356, approved 10-21-04).

Supreme Court Agrees to Hear Oil Industry's Rent Control Case

On October 12, 2004, the United States Supreme Court granted a petition for certiorari filed by the state of Hawaii in *Lingle v. Chevron USA, Inc.*[1] The Court will review the decision of the Ninth Circuit Court of Appeals in a case brought by Chevron USA, Inc. challenging a Hawaii statute, which set rent caps for service stations that are leased from oil companies, among other regulations. The Ninth Circuit ruled that the statute and regulations were an unconstitutional regulatory taking. The issues before the Supreme Court relate to the standard by which the Ninth Circuit analyzed the statute before holding it to be unconstitutional. Should the Supreme Court uphold the Ninth Circuit's decision, the power of state and local legislative bodies to enact economic measures that seek to benefit the public good would be significantly curtailed.

Background and Evolution of the Case

The Ninth Circuit states in its opinion that, in 1997, the Hawaii legislature enacted Act 257 in response to the high cost of gasoline.[2] According to Hawaii, the act was enacted primarily for the broader purpose of stabilizing "the present structure of the retail market for gasoline, preserving the long-term benefit for consumers of multiple retail vendors and averting the economic harm that would occur if the retail market, like the wholesale market, were to become concentrated in the hands of the few oil companies serving the islands."[3]

While regulating the maximum rent that an oil company can charge dealers for leasing its service stations, Section 3(c) of the act, among other things, caps rent at: (1) 15% of the dealer's profit on gasoline sales; (2) 15% of the dealer's gross sales on other products; and (3) a percentage increase equal to increases the oil company may be required to pay on its ground lease.[4] Absent Act 257, Chevron's rental charge would require lessee-dealers to pay a monthly rent consisting of an escalating percentage of the lessee-dealer's gross margin on actual gasoline sales.[5] In lease agreements, all lessee-dealers are required to submit to a supply contract to provide necessary product demand at the stations.[6] Chevron admitted that it relies on monies earned through its supply contract, and not rents, to make

[1]Lingle v. Chevron USA, Inc., 363 F.3d 846 (9th Cir. 2004), *cert. granted* (U.S. Oct. 12, 2004) (No. 04-163) *sub nom.* Chevron USA, Inc. v. Bronster.

[2]Chevron USA, Inc. v. Bronster, 363 F.3d 846, 848 (9th Cir. 2004).

[3]Petitioners' Petition for a Writ of Certiorari at 2, Lingle v. Chevron USA, Inc. (No. 04-163).

[4]*Lingle*, 363 F.3d at 848.

[5]*Id.*

[6]*Id.*