IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JEAN MASSIE, SHIRLEY SOWELL, DALE PEOPLES, LOUISE BRANDON, ZETTA BRANDON, ALINE REID, YUGONDA ALICE and YEVORN GASKINS on behalf of themselves and all others similarly situated, and THIRD EAST HILLS PARK, Inc., Plaintiffs, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and its Secretary, ALPHONSO JACKSON, Defendants.	Civil Action No. 06-1004 Class Action J. Ambrose

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Plaintiffs, by their counsel, file this Response in Opposition to Defendants' Motion to Dismiss and in support thereof state as follows:

I. Introduction

In this case, the Plaintiffs have challenged the way in which the Defendants (hereafter "Defendants" or "HUD") have acted to facilitate the demolition and redevelopment of Third East Hills Park under different ownership.

In particular, the Plaintiffs have:

1. challenged the Defendants' sale of Third East Hills Park without requiring as a condition of the sale the continuation of project-based rental assistance to the property, in violation of HUD's mandatory duties under Section 311 of Public Law 109-115;
2. challenged the manner in which Defendants have displaced approximately eighty seven (87) African American households from their homes and community:

a. in declaring all 140 units of Third East Hills Park to be in noncompliance with HUD contracts after inspecting only approximately 23 units, in violation of applicable contract provisions;

b. in failing to provide residents with the opportunity to object to displacement and prevent the erroneous deprivation of their leasehold property interests, in violation of the Due Process clause of the Fifth Amendment to the U.S. Constitution;

c. in failing to take all steps feasible to minimize displacement and ensure continued housing opportunities for all residents in their improving community, in violation of the Uniform Relocation Act and applicable regulations and the Fair Housing Act and applicable regulations;

d. in failing to provide relocation assistance and services as required by law in order to minimize the hardships of displacement and assure the provision of relocation housing options which provide fair housing choice, in violation of the Uniform Relocation Act and applicable regulations and the Fair Housing Act and applicable regulations;

3. challenged HUD's abatement of Section 8 rental assistance payments to every unit of the property based on inspections of less than 20 percent of all units, in violation of applicable contract provisions;

4. challenged HUD's decision to pursue foreclosure of Third East Hills Park without providing an opportunity to object to the alleged factual predicate for foreclosure in order to prevent the erroneous deprivation of shareholders' ownership property interests, in violation the Due Process clause of the Fifth Amendment to the U.S. Constitution; and have

5. challenged HUD's refusal to either hire professional management for the property, as requested by the owner, or to directly assume management responsibilities, after having taken control of and frozen all financial resources available to the owner to cure any alleged deficiencies and after having cancelled ongoing work orders which were underway at the property to cure any alleged defaults, resulting in the steady degradation of conditions at the property, in violation of HUD's mandatory duties under 12 U.S.C. § 1701z-11 and applicable regulations.[1]

In their motion to dismiss, the Defendants' argue that this Court is without jurisdiction to adjudicate these claims, and the Plaintiffs are without any legal recourse at all, because HUD had complete discretionary authority pursuant to 12 U.S.C. § 1715z-11a(a) to disregard any laws, contractual obligations or Constitutional provisions HUD saw fit.

The Defendants' position is without merit. In proceeding with foreclosure and a negotiated sale of the property to the Urban Redevelopment Authority of Pittsburgh, the Defendants elected to operate under the requirements of the Section 1701z-11 of the U.S. Housing Act, which establishes mandatory management and disposition responsibilities, making the "flexible authority" provision of Section 1715z-11a(a) inapplicable to this case. Even if the Defendants had elected to proceed under Section 1715z-11a(a), however, HUD is required nevertheless to comply with its own management, disposition, fair housing and relocation regulations. Even if Section 1715z-11a(a) were otherwise applicable, this provision of law does not give HUD the discretion to disregard its contractual and Constitutional provisions. Moreover, Section 1715z-11a(a) has been superseded by subsequent legislation, 109 P.L. 115, §

[1] The Plaintiffs reference hereby the allegations set out in their Complaint (Doc. 1), Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2, as corrected in Doc. 6) and as set out in the hearings of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction conducted on July 27, 2006 and August 4, 2006, respectively.

311, which requires HUD to maintain project based rental assistance payments in managing and disposing of any multifamily property in fiscal year 2006. Therefore, Defendants' motion to dismiss should be denied.

II. Standard of Review

In considering whether a complaint should be dismissed for failure to state a claim upon which relief can be granted, the court must consider only those facts alleged in the complaint, as well as all reasonable inferences, and accept all of the allegations and inferences as true. Unless the plaintiff can prove no set of facts in support of the claims that would entitle her to relief, the complaint should not be dismissed. *See, e.g.*, ALA Inc. v. CCAIR, Inc., 29 F.3d 855 (3rd Cir. 1994).

In considering whether a complaint should be dismissed for lack of subject matter jurisdiction, wherein plaintiffs factual allegations have not been controverted, as in this proceeding, these allegations shall be taken as true. *See* Mortensen v. First Federal Savings and Loan, 549 F.2d 884, 892 n. 17 and n. 18 (3rd Cir. 1977), citing Doctors, Inc. v. Blue Cross, 490 F.2d 48, 50 (3rd Cir. 1973).

III. This Court has Jurisdiction to Determine the Merits of Plaintiffs' Claims.

Subject matter jurisdiction to resolve the merits of the Plaintiffs claims is vested in this Court pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343(a)(4) (civil rights); 42 U.S.C. § 3613(a)(1)(A) (fair housing); 28 U.S.C. § 1346(a)(2) (contract).

IV. Section 702 of the Administrative Procedure Act and Section 1702 of the U.S. Housing Act Explicitly Waive HUD's Sovereign Immunity.

The Administrative Procedure Act, 5 U.S.C. § 702, was amended in 1976 by adding the following pertinent provision: "An action in a court of the United States seeking relief other than

money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party."

12 U.S.C. § 1702 likewise explicitly waives HUD's sovereign immunity: "The Secretary shall, in carrying out the provisions of this title and titles II, III, V, VI, VII, VIII, IX, and XI be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."

V. Plaintiffs Are Entitled to Judicial Review of Defendants' Agency Actions under the Administrative Procedure Act.

The Administrative Procedure Act provides for comprehensive judicial review of agency actions. *See, e.g.,* Yeboah v. INS, 2001 U.S. Dist. LEXIS 17360 (E.D. Pa. 2001) and cases cited therein. The APA expressly provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. In exercising judicial review, "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." 5 U.S.C. § 706. In resolving the case, "[t]he 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…." *Ibid.*

Thus, the Administrative Procedure Act operates as a general presumption of judicial reviewability of all final agency actions. *See, e.g.,* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). The Act provides for appropriate relief, with two narrow exceptions: 1) when the applicable statutes specifically preclude judicial review; or 2) the agency actions challenged are committed to agency discretion by law. *See* 5 U.S.C. § 701(a).

In its brief, HUD relies on (and in doing so expands) the U.S. Supreme Court's holding in Heckler v. Chaney, 470 U.S. 821 (1985), to support its conclusion that HUD's actions in this case are not reviewable under the APA because the actions the Agency has taken to dispose of Third East Hills Park and its residents were committed to agency discretion by law.

In Heckler v. Chaney, the U.S. Supreme Court recognized an exception to the general presumption of reviewability of agency action under the APA in the instance of discretionary agency decisions not to take enforcement action. The Court cited cases which had determined that such non-enforcement decisions were generally committed to an agency's absolute discretion. *Id* at 831; United States v. Batchelder, 442 U.S. 114, 123-124 (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Confiscation Cases, 7 Wall. 454 (1869). After discussing several reasons for the general unsuitability of review in these instances—first, that such decisions not to enforce often involve a balancing of factors and ordering of priorities which are peculiarly within the agency's expertise, such as determining the agency's best use of limited resources, and second, that an agency's failure to take enforecement action is less culpable and less susceptible to judgment by the court than when it takes actions—the Court concluded that "an agency's decision not to take enforecement action should be presumed immune from judicial review under §701(a)(2)." Heckler, 470 U.S.

at 832. The Court, nevertheless, emphasized that a decision not to take enforcement action is only presumed unreviewable; the presumption may be rebutted where there are applicable guidelines for the agency to follow in exercising its enforcement powers. *Id* at 832-833.

In 1987, two years after Heckler v. Chaney, the U.S. Circuit Court of Appeals for the Third Circuit reviewed the application of Heckler to §701(b) in a context other than an instance of agency discretion not to pursue enforcement action. *See* Chong v. Director, United States Info. Agency, 821 F.2d 171 (3rd Cir. 1987). In Chong, the Third Circuit Court reviewed a challenge to the discretionary decision of the United States Information Agency (USIA) not to give a favorable recommendation for a requested waiver of the two-year home-country residence requirement of 8 U.S.C. § 1182(e). In analyzing the application of §701, the Court noted:

> This case presents the tension between two provisions in the Administrative Procedure Act (APA). Section 701(a)(2) of Title 5 of the United States Code precludes judicial review of any 'agency action [which] is committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). Section 706(2)(A), however, permits judicial review of agency action found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A).

Id. at 175. Reflecting upon the rationale of Heckler, the Court stated:

> We agree with Judge Oakes' concurrence in Dina v. Attorney General, that Heckler v. Chaney does not stand for the proposition that section 701(a)(2) precludes judicial review in a large number of cases. *See Dina*, 793 F.2d at 477. Moreover, we believe that Chaney did not change the presumption of reviewability of agency action under the APA. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410…(1971); Abbot Laboratories v. Gardner, 387 U.S. 136, 141…(1967); Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 578 (3rd Cir. 1979). Chaney merely held that when Congress does not provide guidelines for the exercise of enforcement discretion, an agency's refusal to institute proceedings is presumptively unreviewable under § 701(a)(2). *See* Heckler v. Chaney, 470 U.S. at 838.

Ibid.

Pointing to the language of 8 U.S.C. § 1182(e), USIA maintained that there was "no law to apply" because section 1182(e) merely states "that . . . upon the favorable recommendation of the Director of the United States Information Agency," the Attorney General may grant a waiver of the two-year foreign residency requirement. *Ibid* (internal citations omitted). Considering this argument, the Court noted that this statutory language alone certainly provided no guideline to the USIA on how to decide its recommendations, and likewise set forth no standards against which a court may judge whether the USIA abused its discretion. *Id.* at 175-176. The Court found, however, that The USIA itself had adopted regulations which delineated the procedure it must use to review waiver requests. *Id.* at 176. Consequently, the Court held that these regulations provided sufficient guidance to make possible judicial review under an abuse of discretion standard. In doing so, the Court noted that this holding was "consistent with Local 2855, AFGE (AFL-CIO) v. United States and Hondros v. United States Civil Service Commission, 720 F.2d 278 (3rd Cir. 1983), in which the Third Circuit Court prescribed three criteria to be considered when determining the reviewability of an agency action. *Ibid.*

> To be held unreviewable, an agency action must 1) involve broad discretion not just some discretion, 2) be 'the product of political, military, economic, or managerial choices that are not really susceptible to judicial review,' and 3) the challenge to such action must not involve 'charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command.' The challenge in the instant appeal involves a charge that the USIA did not conform to its own regulations governing its recommendation function.

Chong, 821 F.2d at 176 (internal citations omitted). *See also* M.B. v. Quarantillo, 301 F.3d 109, 113 (3rd Cir. 2002) ("[W]e have adhered to the Supreme Court's presumption in favor of judicial action. Thus, this Court has held that where regulations list factors an agency must consider in

reaching a decision, there is sufficient guidance for a court to determine whether the agency had acted arbitrarily and capriciously.") (internal citations omitted).

The Third Circuits' jurisprudence on the applicability of agency regulations in reviewing agency action under the APA reinforces the U.S. Supreme Court's long-held principle that a federal agency is obliged to abide by the regulations it promulgates. *See, e.g.,* Vitarelli v. Seaton, 359 U.S. 535, 545, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959); Service v. Dulles, 354 U.S. 363, 372, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 267, 98 L. Ed. 681, 74 S. Ct. 499 (1954); *See also* Whitaker v. Clementon Housing Authority, 788 F. Supp. 226 (D. NJ. 1992) ("Here, there is no question that the statute itself does not provide guidelines for HUD to follow in overseeing and monitoring the administration of the section 8 program by local housing authorities, but plaintiff has asked us to look beyond the statute to rules promulgated by HUD itself—in the form of a handbook—in order to find judicially manageable standards by which to judge HUD's action. Clearly, in cases that do not involve refusals to enforce, rules and policy statements promulgated by the agency itself may provide such standards. 'Once an agency has declared that a given course is the most effective way of implementing a statutory scheme [through the promulgation of regulations or announcement of policies], the courts are entitled to closely examine agency action that departs from this stated policy.'") (internal citations omitted).

The Supreme Court's rulings on agency discretion in the cases of INS v. Yang, 519 U.S. 26 (1996), and Vitarelli v. Seaton, 359 U.S. 535 (1959), are likewise instructive in instances when an agency declares its intent to follow a general policy by which its exercise of discretion will be governed. In Yang, the Court held that although its discretion may be unfettered at the outset, if an agency "announces and follows—by rule or by settled course of adjudication—a

general policy by which its exercise of discretion will be governed, an irrational departure from that policy…could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act…." Yang at 32.

In Vitarelli, the Court, citing earlier precedent, held that while the Secretary of the Department of the Interior had the power to discharge summarily an employee in the petitioner's status without the giving of any reason, the Secretary in fact decided to give a reason, and since that reason was national security, the Secretary was obligated to conform to the procedural standards he had formulated for the dismissal of employees on security grounds. Vitarelli at 539 ("Having chosen to proceed against petitioner on security grounds, the Secretary here, as in Service v. Dulles, was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily."); *see also* Sameena Inc., v. United States Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations "tends to cause unjust discrimination and deny adequate notice" and consequently may result in a violation of an individual's constitutional right to due process.").

HUD's reliance on the limited principle enunciated Heckler v. Chaney is misplaced. Neither of the two narrow exceptions contained in §701 to the presumption of judicial review apply in the present case.

a. Contrary to Defendants' Assertion, the "Flexible Authority" Provision of 12 U.S.C. § 1715z-11a(a) Does Not Apply to This Case Because Defendants Elected to Pursue Foreclosure and Negotiated Sale of the Property Under the Requirements of 12 U.S.C. § 1701z-11.

HUD argues that this Court is not permitted to review the claims raised by the Plaintiffs because HUD's actions are insulated from review by 12 U.S.C. § 1715z-11a(a). When HUD officially notified the units of general local government of its intent to foreclose on the property, however, HUD wrote:

> The Multifamily Property Disposition Reform Act of 1994 **requires** that the U.S. Department of Housing and Urban Development (HUD) provide the unit of general local government notice of HUD's intent to foreclose on a mortgage held by HUD. This is your notification that HUD has initiated foreclosure proceedings against the owner of Third East Hills Park Apartments….(emphasis added)" See Exhibit A, attached hereto.

The "Multifamily Property Disposition Reform Act of 1994" is codified at 12 USC § 1701 *et seq.* Relevant to the Plaintiffs claims, and unlike the "flexible authority" provision of §1715z-11a(a), §1701-11 of the Act creates non-discretionary duties on HUD's part to maintain multifamily properties in a decent, safe and sanitary condition, occupy these units to the greatest extent possible and do so for the purpose of maintaining these units as rental or cooperative housing. 12 USC § 17012-11(d)(2). It could do so directly or through a comprehensive management contract or by requiring that the owner enter into such a contract. 12 USC § 1701z-11(d)(1) and (2). If the owner is unable to do so and HUD does not otherwise contract for management services, HUD is required to undertake the above management responsibilities directly. 12 USC § 1701z-11(d)(3). The Plaintiffs have alleged that HUD failed to take any of these actions and instead withheld maintenance, capital improvements and the funding for these, coerced the vacation of units by notifying resident they were being displaced and refused to approve professional management and refused to contract for this directly. Rather than preserving affordable rental or cooperative housing, it has acted to achieve the opposite through its foreclosure action.

Further, by electing to proceed under §1701z-11, HUD was not shielded by §1715z-11a(a) to disregard its non-discretionary duties under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. and implementing regulations, and the Uniform Relocation Act and implementing regulations.

Because HUD announced and followed the policies of the Multifamily Property Disposition Reform Act of 1994, by which its exercise of discretion would be governed, any irrational departure from that policy, as HUD now argues it has done, is reviewable by this Court under the Administrative Procedure Act. Yang; Vitarelli.

b. Even If It Had Elected to Proceed under 12 U.S.C. § 1715z-11a(a), HUD Is Required Nevertheless to Comply with Its Own Regulations.

Regardless of whether a statute provides an agency with discretion in carrying out its functions, an agency is obligated to comply with its own rules and regulations. Vitarelli; Dulles; Accardi; Whitaker; Sameena Inc. In the context of an APA challenge to agency action, agency rules and regulations which provide judicially manageable standards may be used by the Courts to review the challenged action under 5 U.S.C. § 706. Chong; Quarantillo.

On December 27, 1999, HUD promulgated regulations implementing the "flexible authority" provision of §1715z-11a(a). *See* 24 CFR 290.1; 64 FR 72410, 72412. In promulgating this regulation, HUD limited its exercise of the discretion otherwise authorized under §1715z-11a(a). Section 1715z-11a(a) provides as follows:

> 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…and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law…(emphasis added).

The regulation promulgated by HUD to implement this "flexible authority" provides, however: "With respect to the **disposition of** multifamily projects under subpart A, HUD may follow any other method of disposition, as determined by the Secretary (emphasis added)." 24 CFR 290.1.

By limiting this implementing regulation to disposition only, HUD has eliminated its otherwise "flexible authority" to manage multifamily properties it owns or to which it holds a mortgage, thereby leaving in place HUD's non-discretionary management-related duties under 12 U.S.C. § 1701z-11. *See also* 24 CFR 27.50 ("When the Secretary is the purchaser of the security property, the Secretary shall manage and dispose of it in accordance with…12 U.S.C. § 1701z-11 and in accordance with 24 CFR part 290."). As stated in the preceding section, the Plaintiffs have alleged that HUD violated its non-discretionary management-related duties under §1701z-11 by exercising control over the property and its finances but failing to maintain the property in a decent, safe and sanitary condition, occupy the vacant units to the greatest extent possible and do so for the purpose of maintaining these units as rental or cooperative housing.

Similarly, HUD has promulgated regulations implementing non-discretionary duties under the Fair Housing Act and Uniform Relocation Act which are generally applicable to all HUD activities. *See generally* 24 CFR § 5.105 (applicability of the Fair Housing Act) and 24 CFR Part 100 (Fair Housing Act requirements in HUD activities); *see generally* 24 CFR 42.1(a) (applicability of Uniform Relocation Act to HUD-assisted programs and projects) and 49 CFR Part 24 (Uniform Relocation Act requirements); *see also* HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition, Chapter 1, § 1-1. HUD is obligated to comply with these self-imposed rules regulations. They provide sufficient standards by which this Court may evaluate the Plaintiffs claims that the manner in which Defendants have displaced the African American community of Third East Hills Park—without taking all steps feasible to

minimize displacement and ensure continued housing opportunities for all residents in their improving community and without providing relocation assistance and services as necessary to minimize the hardships of displacement and assure the provision of relocation housing options which provide fair housing choice—violated HUD's non-discretionary duties under its own fair housing and relocation rules and regulations.[2]

c. Even If §1715z-11a(a) Were Otherwise Applicable to This Case, This Provision of Law Does Not Grant HUD the Discretion to Violate Applicable Contract Provisions.

Even if HUD had unfettered discretion, notwithstanding any other provision of law, to manage and dispose Third East Hills Park as the Secretary saw fit, this did not give the HUD the discretion to violate its applicable contract provisions.

The Plaintiffs have alleged that by issuing a notice of displacement, placing a relocation company onsite and taking steps to displace all residents from the property after inspecting only small percentage of total occupied units (approximately 23 units out of 110), HUD acted in

[2] Specifically, the Plaintiffs have alleged that the way in which HUD has acted to facilitate the demolition and redevelopment of Third East Hills Park under different ownership by displacing the residents of Third East Hills Park and taking the property through foreclosure violated HUD's non-discretionary duties under: 24 CFR § 100.50(b)(2); 24 CFR § 100.50(b)(3); 24 CFR § 100.70(a); 24 CFR § 100.70(b); 24 CFR § 100.400(b); HUD Handbook 1378, Chapter 2, § 2-2; 49 CFR § 24.205(a); 49 CFR 24.205(a); HUD Handbook 1378, Chapter 2, § 2-2(a)-(d); 49 CFR 24.205(a); 49 CFR 24.205(a); HUD Handbook 1378, Chapter 2, § 2-2(e); 49 CFR § 24.205(c); HUD Handbook 1378, Chapter 2, § 2-5; 49 CFR 24.205(c)(2)(i); HUD Handbook 1378, Chapter 2, § 2-5(b); 49 CFR 24.205(c)(2)(i); 49 CFR 24.205(c)(2)(ii)(A); HUD Handbook 1378, Chapter 2, § 2-5(d); 49 CFR 24.204(a); 49 CFR Part 24 APPENDIX A; 49 CFR 24.205(c)(2)(ii)(B); HUD Handbook 1378, Chapter 2, § 2-5(f)(2); 49 CFR 24.205(c)(2)(ii); HUD Handbook 1378, Chapter 2, § 2-5(f)(1); 49 CFR 24.403(a)(4); 42 U.S.C. § 4626(a); 49 CFR § 24.404; HUD Handbook 1378, Chapter 3, § 3-6; 49 CFR § 24.404(c); 49 CFR § 24.204(b); HUD Handbook 1378, Chapter 2, § 2-5(a); 49 CFR 24.205(c)(2)(ii)(D); HUD Handbook 1378, Chapter 2, § 2-5(f)(5); 49 CFR 24.205(c)(2)(v); HUD Handbook 1378, Chapter 2, § 2-5(f)(3); 49 CFR 24.205(c)(2)(iv); HUD Handbook 1378, Chapter 2, § 2-5(g)(3); HUD Handbook 1378, Chapter 2, § 2-2(c); 49 CFR 24.301, 302, 402-404; HUD Handbook 1378, Chapter 3; 49 CFR 24.301; HUD Handbook 1378, Chapter 3, § 3-2; 49 CFR 24.302; HUD Handbook 1378, Chapter 3, § 3-2(b)(1); HUD Handbook 1378, Chapter 3, § 3-2(b)(1); 49 CFR 24.402; HUD Handbook 1378, Chapter 3, § 3-4; 9 CFR 24.402(b); HUD Handbook 1378, Chapter 3, § 3-4(b); 9 CFR 24.402(c); HUD Handbook 1378, Chapter 3, § 3-4(c); HUD Handbook 1378, Chapter 2, § 2-3(a); 49 CFR 24.203(a); HUD Handbook 1378, Chapter 2, § 2-3(a)(2)(a); 49 CFR 24.203(b); HUD Handbook 1378, Chapter 2, § 2-3(b); HUD Handbook 1378, Chapter 2, § 2-3(b)(1); 49 CFR 24.203(b); HUD Handbook 1378, Chapter 2, § 2-3(b)(2); 49 CFR 24.203(c)(3); HUD Handbook 1378, Chapter 2, § 2-3(c)(3); HUD Handbook 1378, Chapter 2, § 2-3(c)(2); 49 CFR 24.203(c)(3); 49 CFR 24.5; HUD Handbook 1378, Chapter 2, § 2-3(d).

violation of the Housing Assistance Payments contract (attached hereto as Exhibit B). Paragraph 4.d(2) of this contract permits HUD, at most, to relocate those individual residents who live in units which has been inspected and shown not to be in decent, safe and sanitary condition.

Further, the Plaintiffs have alleged that by abating the project based assistance payments to each and every unit of the property based on inspections of less than 20 percent of all units, thereby eliminating most of the revenue available to cure any alleged deficiencies, HUD acted contrary to the Section 8 contract. The Section 8 contract permits, at most, abatement of subsidy for individual units which have been inspected and determined to be out of compliance.

Even if §1715z-11a(a) were applicable to this case, it does not give HUD "flexible authority" to disregard applicable contract provisions. These contractual claims raise disputed issues of material fact for which dismissal under a Rule 12 motion is not appropriate.

d. Even If §1715z-11a(a) Were Otherwise Applicable, This Provision of Law Does Not Grant HUD the Discretion to Violate Applicable Constitutional Provisions.

Likewise, §1715z-11a(a) does not vest HUD with unfettered discretion to violate provisions of the Constitution.

The Plaintiffs have alleged that HUD's displacement of residents without affording them an opportunity to object the factual predicate for displacement in order to prevent the erroneous deprivation of their vested leasehold property interests violated the Due Process clause of the Fifth Amendment to the U.S. Constitution. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.").

Further, in HUD's notice of default to the owner (attached hereto as Exhibit C), HUD notified the owner that, "[b]efore instituting foreclosure proceedings…HUD will provide you with an opportunity to show *legal* reasons why foreclosure should not take place (emphasis original)." The Plaintiffs took advantage of this opportunity to argue legal reasons, but they also sought to challenge the factual basis for foreclosure, arguing that repairs had been made which corrected deficiencies noted in HUD's inspections and arguing that irregularities were present in the inspection results. For example, the inspection scores had been reduced because of safety bars on ground floor windows which were previously installed at HUD's direction. The Plaintiffs have alleged that by pursuing foreclosure without providing an opportunity to object to the factual predicate for foreclosure, in order prevent the erroneous deprivation of shareholders' vested ownership property interests, HUD violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Id.*

Since HUD chose a non-judicial procedure for foreclosure, the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. 3701-3717, HUD's was required by its own implementing regulations to "provide to the mortgagor an opportunity informally to present reasons why the mortgage should not be foreclosed" prior to commencing foreclosure. 24 CFR 27.5. This opportunity for predeprivation review is not limited to *legal* reasons. HUD was required to comply with its own regulation. *See* Vitarelli, 359 U.S. at 547 (Where a prescribed procedure is intended to protect the interests of a party before the agency, even if generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.); *see also* NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971) (an agency's failure to follow its own regulations "tends to cause unjust discrimination and deny adequate notice" and consequently may result in a violation of an individual's constitutional right to due process.).

Moreover, the Plaintiffs contractual claims against HUD raise justiciable questions of Constitutional impropriety on HUD's part. *See* Lynch v. United States, 292 U.S. 571, 579 (1934) ("valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.").

e. Section 1715z-11a(a) Has Been Superseded by Subsequent Statute, 109 P.L. 115, § 311, with Respect to Any Discretion HUD May Otherwise Have Had to Refuse to Require the Continuation of Project Based Rental Assistance to Third East Hills Park Following the Sale of The Property.

Section 1715z-11a(a) was enacted into law in the Department of Veterans Affairs, and HUD and Independent Agencies Appropriations Act of 1997. On November 30, 2005, Congress enacted new legislation, the "Schumer Amendment," which requires HUD during fiscal year 2006, "notwithstanding any other provision of law," to reconvey multifamily properties with continued project-based rental assistance or to consult with the tenants of the property on an alternative program of rental assistance. 109 P.L. 115, § 311 ("Notwithstanding any other provision of law, in fiscal year 2006, in managing and disposing of any multifamily property that is owned or held by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payments under section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property.").

This law is dramatic, in that it ensures that any affordable housing development sold by HUD during this fiscal year will continue to be utilized, and assisted, as affordable rental housing following the sale. It provides protections for residents against the deprivation of their leasehold interests, as well as preserves scarce affordable housing recourses.

HUD does not dispute that it failed to require, as a condition of the sale of this property, that project based rental assistance continue at the property. Nor does HUD dispute that it failed to consult with residents on an alternative rental assistance program.

Rather, in defense for failing to comply with its mandatory duties under the §311, HUD argues that it had terminated the Section 8 contract and that it neither owned nor held the property prior to termination, thereby making §311 inapplicable. The Plaintiffs have alleged, however, that HUD never terminated the section 8, but instead, following notice, abated the assistance payments. The Plaintiffs have further alleged that HUD in fact held the property as mortgagee in possession (yet failed to comply with its non-discretionary management related duties under §1701z-11).

Therefore, at a minimum, there are material facts in dispute as to whether HUD violated §311, making resolution this issue on the basis of a Rule 12 motion inappropriate.

WHEREFORE, Plaintiffs respectfully request this Court to dismiss the Defendants Motion to Dismiss and proceed to the merits of this case.

Respectfully submitted,

/s/ Kevin Quisenberry Date: 11/16/06 (12:36 a.m.)

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