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

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

The Plaintiffs respectfully request this Court to reconsider, pursuant to Federal Rule of Civil Procedure 59, its Opinion and Order of January 19, 2007 dismissing the above action under F.R.C.P. Rules 12(b)(1) and 12(b)(6) and marking this case closed.

Specifically, the Plaintiffs request the Court to reconsider its holdings that: 1) the Plaintiffs failed to state a claim for a violation of 109 P.L. 115, § 311; 2) the Court does not have jurisdiction to review the Plaintiffs' claim that the Agency failed to follow its own regulations implementing/exercising its "flexible authority" under 12 U.S.C. § 1715z-11a(a); and 3) the Court does not have jurisdiction to review of the Plaintiffs' claims for relief under the Due Process Clause. In the alternative, the Plaintiffs request the Court to reconsider its 12(b)(6) dismissal of their 109 P.L. 115, § 311 claim without permitting a curative amendment.

In support of their motion for reconsideration, the Plaintiffs state:

I. The Plaintiffs Have Stated a Claim for a Violation of 109 P.L. 115, § 311.

For the Court to grant a motion to dismiss pursuant to Rule 12(b)(6), it must "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The threshold inquiry in resolving a motion to dismiss is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *See* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds,* Davis v. Scherer, 468 U.S. 183 (1984). "The court must accept as true all [of the plaintiff's] well-pleaded factual allegations and draw all reasonable inferences in favor of the complainant." Elmore v Cleary, 399 F3d 279, 281 (3rd Cir. 2005).

Although HUD in the present case did not formally declare it was assuming Mortgagee in Possession status and although it failed to exercise this status to address injurious conditions (Doc. 1, ¶ 122), the Agency was not required by statute or regulation to do so in any formal manner. Instead, as pled (Doc. 1, ¶¶ 115, 116, 121, 122 and 134), HUD exercised control over financial and management decisions and took physical possession of a portion of this development as only an owner or mortgagee in possession could do. As pled, HUD in fact held the property as a mortgagee in possession.

In Paragraph 115 of their Complaint, the Plaintiffs alleged that "HUD exercised control over the finances and management of the properties (sic), canceling existing work orders and freezing funds for capital improvements to the property." (Doc. 1, ¶ 115). In Paragraph 116, the Plaintiffs alleged that in doing this HUD "effectively removed any ability of the Coop to cure the alleged default…." (Doc. 1, ¶ 116). In Paragraph 134, the Plaintiffs alleged that HUD took physical possession of a portion of the property "and set up a relocation office onsite, creating pressure for residents to relocate...." (Doc. 1, ¶ 134). In Paragraph 121, the Plaintiffs alleged that while it exercised such control over the property, the Agency "failed to take steps under the

mortgages and other agreements which could have prevented displacement while curing any alleged defaults." (Doc. 1, ¶ 121).

As to why HUD's actions were inappropriate, the Plaintiffs alleged in Paragraph 122 that HUD "could have (and should have)" exercised mortgagee in possession status "in order to redirect the management and capital expenditures of the property, fix alleged defaults and steward the project in the right direction (emphasis added)," not that HUD had not exercised mortgagee in possession control in other respects. (Doc. 1, ¶ 122).

In dismissing the Plaintiffs' §311 claim under Rule 12(b)(6), the Court reasoned and found that:

> "A review of the Complaint reveals, however, that Plaintiffs did not allege that HUD was a mortgagee in possession, but rather that HUD could have, and should have, taken over the property as mortgagee in possession. *See,* Complaint, ¶122. Thus, according to the Complaint, HUD was not a mortgagee in possession. Therefore, I agree with Defendants that §311 does not apply because HUD did not own or hold the property at issue. Accordingly, I find that Plaintiffs have failed to state a claim for a violation of §311."

(Doc. 33, pp. 12-13).

Although the Plaintiffs can understand how a reading of the first clause of the first sentence of Paragraph 122 of their Complaint might lead the Court to conclude "that Plaintiffs did not allege that HUD was a mortgagee in possession, but rather that HUD could have, and should have, taken over the property as mortgagee in possession," this first clause of the first sentence of Paragraph 122 was not intended to be read, nor should it be read, in isolation. The full text of Paragraph 122, and the immediately preceding Paragraph and Paragraphs 115, 116 and 134, clearly demonstrate that the Plaintiffs pled that HUD held managerial, fiscal and physical control over the property as only an owner or mortgagee in possession could do but

failed to take steps to preserve the property, in fact taking the opposite course. This is why the Plaintiffs argued in response to Defendants' first motion to dismiss that "[t]he 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) [emphasis added]." (Doc. 22, p. 18).[1]

Therefore, dismissal of the Plaintiffs §311 claim should not be entered unless it is clear "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim that would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

In the alternative, if this Court determines the first clause of the first sentence of Paragraph 122 to mean that "according to the Complaint, HUD was not a mortgagee in possession," then the Plaintiffs request the Court to provide leave to amend the Complaint to cure the perhaps in-artful wording of this clause. *See* Wallace v. Federated Dep't Stores, Inc., 2007 U.S. App. LEXIS 947, 5-6 (3d Cir. 2007) and cases cited therein ["If a complaint is vulnerable to dismissal for failure to state a claim, a District Court must first permit the plaintiff a curative amendment. This is true even if the plaintiff does not seek leave to amend (internal citations omitted)"].

[1] Regarding the Defendants' argument to this Court that §311 does not apply to HUD's disposition of multifamily mortgages held by the Agency, it should be noted that this argument directly contradicts the Agency's own interpretation of the application of §311 as communicated to the Agency's field offices by Memorandum on May 31, 2006. *See* Exhibit 1, Page 4, Section V attached hereto ["In accordance with Section 311 of the Department's FY 2006 Appropriations Act, PublicLaw 109-115, 119 Stat. 2936 (2005), the Secretary is required to maintain the project-based Section 8 HAP contract in any multifamily property that the Secretary owns or for which the Secretary holds the mortgage and is in the process of disposing the property at foreclosure (emphasis added)."].

Further, although the Court did not address this argument in its Opinion, the Plaintiffs reiterate here that even if HUD had the authority to abate the Section 8 contract based on an inspection of a few units, it took action to abate this contract, not terminate it. (Doc. 1, ¶¶ 113, 114).

II. The Court Has Jurisdiction to Review the Plaintiffs' Claim that the Agency Failed to Follow Its Own Regulations Implementing/Exercising the Agency's "Flexible Authority" under 12 U.S.C. § 1715z-11a(a).

In dismissing the Plaintiffs' claims that HUD failed to follow its own regulations, the Court agreed with HUD's argument that:

> "the last clause of the [flexible authority] statute, 'notwithstanding any other provision of law,' mandates that it overrides all other earlier statutes and regulations…[and] that the flexible authority statute commits the decision on the disposition of multifamily mortgages at issue herein to the discretion of the Secretary such that they are not reviewable under the APA."[2]

(Doc. 33, p. 8) [emphasis added]. The Court reiterated its holding that the "notwithstanding any other provision of law" clause overrides all other earlier regulations at page 10 of its Opinion.

However, following the passage of §1715z-11a(a), HUD did promulgate regulations implementing/exercising the discretion it was given under the flexible authority statute and in the present case failed to follow these regulations.

In their response to Defendants' first motion to dismiss, the Plaintiffs argued that "[o]n December 27, 1999," over three (3) years after the enactment of the flexible authority statute on September, 1996 (104 P.L. 204), "HUD promulgated regulations implementing the 'flexible authority' provision of §1715z-11a(a). *See* 24 CFR 290.1; 64 FR 72410, 72412." In doing so, HUD prescribed the terms and conditions under which it would manage and dispose of multifamily properties and mortgages as authorized by §1715z-11a(a). (Doc. 22, p. 12).

The regulation promulgated by HUD on December 27, 1999 implementing/exercising its "flexible authority" under §1715z-11a(a) provides: "With respect to the disposition of multifamily projects under subpart A, HUD may follow any other method of disposition, as

[2] Again, this argument directly contradicts the Agency's own interpretation of the application of §311 as communicated to the Agency's field offices by Memorandum on May 31, 2006. *See* footnote 1 above.

determined by the Secretary (emphasis added)." 24 CFR 290.1. Thus, in promulgating this regulation, HUD exercised its undefined discretion under §1715z-11a(a) to "dispose of multifamily properties owned by the Secretary…on such terms and conditions as the Secretary may determine." However, at the same time, HUD reinstated the previous, non-discretionary requirements regarding the Agency's management of multifamily projects and management and disposition of multifamily mortgages. It stated that "[t]he requirements of this part supplement the requirements of 12 U.S.C. 1701z-11 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…." 24 CFR 290.1. Had HUD determined it would no longer honor the terms of 12 U.S.C. § 1701z-11 and its regulations implementing this statute, the Agency would not have referred to them as "requirements."

Therefore, this Court has jurisdiction to review whether the Agency followed its own regulations promulgated to implement the flexible authority statute. *See* Service v. Dulles, 354 U.S. 363 at 379, 380, n. 23 and 388 (1957) (The U.S. Supreme Court rejected the holdings of the District Court and Court of Appeals that the Secretary of State lacked the authority to impose binding rules that would limit the discretion delegated by Congress in the McCarran Rider, which provided that "notwithstanding the provision of…any other law, the Secretary of State may, in his absolute discretion,…terminate the employment of any [Foreign Service Officer]…." The Court stated, "[w]hile it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so…and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."); *see also* Stehney v. Perry, 101 F.3d 925 at 932, 933-934 (3d Cir. 1996) and cases cited therein ["The courts also have

power to review whether an agency followed its own regulations and procedures…. The district court…held that under § 701(a)(2), NSA security clearance decisions are 'committed to agency discretion by law,' and are not reviewable. But whether or not security clearance decisions are committed to NSA's discretion, the agency must still follow its own regulations and may be sued for failure to do so (internal citation omitted)."].

III. The Court Has Jurisdiction to Review the Plaintiffs' Claims for Relief under the Due Process Clause.

In dismissing the Plaintiffs' due process claims, the Court reasoned and found:

> "Plaintiffs argue that because they were not afforded the opportunity at the foreclosure hearing to provide factual objections to the foreclosure, their due process rights were violated. To that end, Plaintiffs argue that their right to the same stems from the Foreclosure Act, 12 U.S.C. § 3701-3717, and a regulation implementing the same, 24 CFR 27.5. In response, Defendants argue that § 1715z-11a(a)'s "notwithstanding any other provision of law" clause applies to the Foreclosure Act and its implementing regulations such that the APA waiver does not apply to Plaintiffs' due process claim. …I agree with Defendants."

(Doc. 33, p. 11).

The Court's holding that §1715z-11a(a)'s "notwithstanding any other provision of law" clause applies such that APA waiver of sovereign immunity does not apply to Plaintiffs' due process claims is contrary to the jurisprudence of the U.S. Supreme Court and the Third Circuit Court of Appeals.

In Webster v. Doe, 486 U.S. 592 (1988), the Supreme Court held that even if a statute grants an agency absolute discretion precluding judicial review of the merits of agency decisions, the federal courts may still consider constitutional challenges arising from the exercise of discretion, at least absent clear congressional intent to preclude such review. The court held, "where Congress intends to preclude judicial review of constitutional claims its intent to do so

must be clear." Webster, 486 U.S. at 603. The court noted that this "heightened showing" is required "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Ibid.* Since §1715z-11a(a) does not expressly preclude judicial review of constitutional claims arising from HUD's exercise of discretion under the "flexible authority" clause, sovereign immunity does not preclude judicial review of the Plaintiffs' constitutional claims. *Accord* Stehney v. Perry and cases therein, 101 F.3d at 934 ("Nor does § 701(a)(2) preclude judicial review of constitutional challenges to an agency's exercise of discretion…. Since there is no statute expressly precluding judicial review of colorable constitutional claims arising from NSA's security clearance procedure, sovereign immunity does not preclude judicial review of Stehney's constitutional claims.").

Further, in characterizing the Plaintiffs' due process claims as "stemm[ing] from the Foreclosure Act," the Court appears to have relied on Defendants' characterization of these claims in Defendants' reply brief:

> "The Plaintiffs' only Due Process objection…is that TEHP's [foreclosure] hearing was limited to "legal reasons" and HUD would not consider "factual objections" to the foreclosure…. Thus, Plaintiffs' Due Process claim is based on a violation of TEHP's rights under 24 CFR 27.5, a regulation implementing the Foreclosure Act. Section 1715z-11a(a) affords HUD the discretion to determine the terms and conditions of foreclosure **notwithstanding any other provision of law**. Thus, the terms and conditions of the foreclosure are committed to agency discretion by law."

(Doc. 30, p. 9) [emphasis added].

This characterization of the Plaintiffs' due process claims—that their only due process claim is based on a violation of 24 CFR 27.5—simply misconstrues the claims raised. The Plaintiffs' due process claims do not stem from the Foreclosure Act and implementing

regulations. Rather, Plaintiffs' due process claims stem from property interests independent of this statute which are subject to the protection of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment prohibits federal actors from depriving any person of a property interest without due process of law. U.S. Const., Amend. V ("No person shall…be deprived of…property, without due process of law"); s*ee, e.g.*, Matthews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of…'property' interests within the meaning of the Due Process Clause of the Fifth…Amendment.").

Application of this prohibition requires a "familiar" two-step analysis. First the court must determine whether the asserted interests are encompassed within the Constitution's protection of (life, liberty, or) property. If protected interests are implicated, the court then must decide whether the procedures implemented provided due process of law as required by the Constitution. *E.g.* Robb v. Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984), citing Board of Regents v. Roth, 408 U.S. 564, 569-72, (1972) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

In its seminal case on the nature and sources of property interests protected by due process, Board of Regents v. Roth, the U.S. Supreme Court stated the Constitution's "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms." Board of Regents v. Roth, 408 U.S. 564, 576 (1972).[3] Evaluating its prior decisions on the subject, the

[3] The Supreme Court reasoned, "to determine whether due process requirements apply in the first place, we must look…to the nature of the interest at stake. We must look to see if the interest is within the [Constitution's] protection of liberty and property…. 'Liberty' and 'property' are broad and majestic terms. They are among the 'great [constitutional] concepts…purposely left to gather meaning from experience…. They relate to the whole

Court explained, "[c]ertain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The Court then identified sources to which courts should look to determine a plaintiff's entitlement to a claimed property interest:

> "Property interests…are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Ibid., citing Goldberg v. Kelly, 397 U.S. 254 (1970).

In this case, the Plaintiffs have alleged, as a result of the actions/omissions of Defendants, the deprivation of property interests which derive from the applicable mortgage documents and the substantive, factual statutory prerequisites before foreclosure may occur, which prerequisites remain in place following HUD's exercise of discretion pursuant to the flexible authority statute. The flexible authority provided in §1715z-11a(a) is not self-executing. Rather, HUD would have to exercise its discretion under the statute to remove the requirement that there be a default before foreclosure may occur. HUD has not done this.

Once a protected property interest is established, due process analysis requires an evaluation of whether the process through which the alleged deprivation(s) occurred provided the plaintiff with the process which was due under the Constitution.

The U.S. Supreme Court "consistently has held that some form of hearing is required

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domain of social and economic fact….' Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause…must be given some meaning." Board of Regents v. Roth, 408 U.S. at 571-72 (1972).

before an individual is finally deprived of a property interest. *E.g.* Mathews v. Eldridge, 424 U.S. at 333. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Ibid.* "[T]he decisionmaker's conclusion…must rest solely on the legal rules and evidence adduced at the hearing." Goldberg v. Kelly, 397 U.S. at 271. "The hearing, moreover, must be a real one, not a sham or a pretense." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951); *accord* Town of Castle Rock v. Gonzales, 545 U.S. 748, 782 (2005).

This evaluation generally requires the court to consider three factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Matthews v. Eldridge, 424 U.S. at 335 citing Goldberg v. Kelly, 397 U.S. at 263-271.

The consideration of the process due is a matter of federal Constitutional deliberation. It does not hinge on procedures otherwise provided by statute or regulation. The property interests and the procedures required by the Constitution to deprive them are distinct. Once established, federal Constitutional law, not statutes, determines what procedures are due. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 539-541 (U.S. 1985). In this case, substantive rights creating the Plaintiffs' property interests survive HUD's exercise of discretion under the flexible authority statute. The procedures provided in the Multifamily Mortgage Foreclosure Act and regulations are not relevant in the Court's consideration of what procedures are constitutionally required before Defendants may deprive Plaintiffs' property interests.

By creating the predicate for foreclosure and preventing the Plaintiffs from challenging

that predicate the Defendant provided no *meaningful* opportunity to protect against the erroneous deprivation of property interests resulting from the Agency's actions. Mathews v. Eldridge. The process provided, which prohibited factual objections, denied Plaintiffs of their right to a hearing and decision based on the law and *evidence*. Goldberg v. Kelly. This was nothing more than a sham or mere pretense. Joint Anti-Fascist Refugee Comm. v. McGrath; Town of Castle Rock v. Gonzales.

Moreover, as the Third Circuit Court has alternatively recognized, "a violation by an agency of its own rules can provide a basis for reversal of the agency action." Lojeski v. Boandl, 788 F.2d 196, 199 (3d Cir. 1986). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Ibid*., citing Morton v. Ruiz, 415 U.S. 199, 235 (1974), Service v. Dulles, 354 U.S. 363 (1957) and United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); *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.). This is why the Plaintiffs alternatively argued in their opposition to Defendants' first motion to dismiss that the Agency's failure to adhere to its own procedures at 24 CFR 27.5, in and of itself, constituted a violation of due process.

Wherefore, the Plaintiffs respectfully request that this Honorable Court reconsider the portions of its January 19, 2007 Opinion and Order holding that: 1) the Plaintiffs failed to state a claim for a violation of 109 P.L. 115, § 311; 2) the Court does not have jurisdiction to review the Plaintiffs' claim that the Agency failed to follow its own regulations implementing/exercising its "flexible authority" under 12 U.S.C. § 1715z-11a(a); and 3) the Court does not have jurisdiction

to review of the Plaintiffs' claims for relief under the Due Process Clause, and deny Defendants' motion to dismiss (Doc. 13) as to these counts. In the alternative, the Plaintiffs respectfully request this Court to reconsider its dismissal of their 109 P.L. 115, § 311 claim without permitting a curative amendment.

Respectfully submitted,

/s/ Kevin Quisenberry Date: January 29, 2007

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