

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-1087

JEAN MASSIE, et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, et al.,

Appellees.

APPEAL FROM THE FINAL ORDER OF THE U.S. DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA AT C.A. 06-1004 ENTERED
ON OCTOBER 31, 2008

**AMICI CURIAE BRIEF OF NATIONAL HOUSING LAW PROJECT AND
HOUSING PRESERVATION PROJECT IN SUPPORT OF APPELLANTS
SEEKING REVERSAL**

James R. Grow (Cal. Bar #83548)
National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610
(510) 251-9400 Ext. (3)104

Counsel for *Amici Curiae*
National Housing Law Project and
Housing Preservation Project

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE.....1

ARGUMENT.....2

 I. Congress Has Repeatedly Sought To Assure Preservation of
 Section 8 Contracts.....2

 II. Section 311 Applies Despite HUD’s Abatement and Purported
 Termination of the Section 8 Contract.....5

 III. HUD’s Position Is Not Entitled to *Chevron* Deference.....9

CONCLUSION.....12

CERTIFICATIONS.....13

TABLE OF AUTHORITIES

STATUTES	PAGE
42 U.S.C. §§ 1437f(f)(6) and (7)	6
12 U.S.C. Section 1701z-11(c)	8
Pub.L.No. 109-115, Title III, Section 311 (2005)	2,4,5,9,12
Pub. L. No. 106-74, Sec. 531 (1999)	3
Pub. L. No. 106-377, § 233 (2000)	4
Pub. L. No. 107-73, Title II, § 212 (2002)	4
Pub. L. No. 108-7, Div. K, Title II § 213 (2003)	4
Pub. L. No. 108-199, Div. G, Title II, § 212 (2004)	4
Pub. L. No. 108-447, Div. I, Title II, § 211 (2005)	4
LEGISLATIVE HISTORY	
Senate Committee on Appropriations, Report No. 106-161 (1999)	3
Senate Report No. 109-109, Title III, Tenant-Based Rental Assistance (2005)	4,6
House Conference Report No. 109-307 (2005)	6
HUD GUIDANCE	
Notice, Fiscal Year 2006 Property Disposition Program (May 31, 2006)	2,4,5,6,7, 8,9,11
HUD Handbook 4315.1	6

CASES

Chevron v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984)

9,11

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The National Housing Law Project is a charitable non-profit law firm seeking to advance housing justice for low-income people by increasing and preserving the supply of decent, affordable housing, minimizing involuntary displacement, and ensuring tenants' rights to fair treatment. The Housing Preservation Project is a non-profit public interest law firm working in Minnesota and nationally to preserve and expand the supply of affordable housing. Both organizations work nationally, providing technical assistance on preservation programs and financing to organizations representing residents and preservation purchasers, and litigating a wide variety of preservation issues.

Over the last year, both organizations have repeatedly encountered situations similar to this case in which the United States Department of Housing and Urban Development (HUD) has misapplied, or refused to apply, the provisions of Section 311 of the 2006 HUD Appropriations Act and its successors. As a result, our preservation objectives have been impeded and the low-income residents receiving our assistance have been denied a very important tool for preserving their homes and the affordable housing supply.

Amici's position is that HUD's legal assertions with regard to Section 311 and HUD's relocation obligations are contrary to clear Congressional intent. Unfortunately, the District Court's agreement with HUD in this case is based in

substantial part on a serious misreading of the relevant legislative history. This Court's reversal of the judgment below will help ensure effectuation of Congress' intent to preserve these housing resources.

SUMMARY OF ARGUMENT

This appeal concerns the application of Section 311 of Pub.L. No. 109-115 to the disposition by the United States Department of Housing and Urban Development (HUD) of the Third East Hills Park ("the project") Section 8 development. At the time of its adoption, Section 311 was simply the latest in a long line of efforts by Congress to assure that project-based Section 8 Housing Assistance Payment ("HAP") contracts, like that at this property, would be preserved for the long term if at all feasible. Not only did HUD ignore its obligations in this case, it issued a May 31, 2006 Notice directing HUD staff to ignore the statute in similar cases. The District Court's endorsement of HUD's actions is grounded in a serious misreading of the relevant legislative history.

ARGUMENT

I. Congress Has Repeatedly Sought To Assure Preservation of Section 8 Contracts.

Section 311 is part of a consistent pattern of recent Congressional actions to require HUD to preserve project-based assistance whenever possible, rather than replacing it with tenant-based assistance. Section 311 must be interpreted

accordingly. With the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act, Pub. L. No. 106-74, Sec. 531 (Oct. 20, 1999) (“21st Century Act”), Congress addressed the possibility of replacing terminated project-based Section 8 assistance with tenant-based vouchers. In doing so, Congress made clear that vouchers were only to be viewed as a last resort—HUD’s first duty is to preserve project-based subsidies wherever possible. In approving S. 1596, the Senate’s version of the 21st Century Act, the Senate Committee on Appropriations emphasized:

The Committee believes that HUD must first make *every effort* to renew the expiring section 8 contracts which are attached to this assisted housing, especially those projects located in low vacancy areas, including those in high cost urban areas...

Senate Committee on Appropriations Report No. 106-161 on S.1596, “Housing Certificate Fund (Including Transfer of Funds), Committee Recommendation” (Sept.16, 1999), p.32 (emphasis supplied) (available via GPO website at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:sr161.106.pdf).

Beginning in 2001, Congress included in each HUD Appropriations Act a provision nearly identical to Section 311, requiring preservation of project-based

assistance, but only for properties for the elderly or people with disabilities. *See* Pub.L.No. 106-377, § 233 (2001 HUD Appropriations Act).¹

In 2006, Congress extended this requirement to all properties in the 2006 HUD Appropriations Act, Pub.L.No. 109-115, Sec. 311. The Senate Appropriations Committee said the following about tenant protection vouchers, made available to local Public Housing Authorities (PHAs) to provide tenant-based assistance to residents of HUD-assisted projects where it was not possible to preserve project-based assistance:

The Committee also remains concerned that HUD is not committed to maintaining section 8 project-based housing and may be encouraging owners to opt out of the program. This would be a tremendous mistake since affordable housing needs are growing while the stock of affordable low-income housing is shrinking...The Committee also directs GAO to assess HUD's efforts and success in preserving HUD-assisted low-income housing, especially section 8 project-based housing...

Senate Report No. 109-109, at p. 144.² This consistent pattern demonstrates Congressional intent to permit the replacement of project-based assistance with tenant-based vouchers, as happened in this case, only as a last resort. This case,

¹ *See also* Pub.L.No. 107-73, Title II, § 212 (2002); Pub.L.No. 108-7, Div. K, Title II § 213 (2003); Pub.L.No. 108-199, Div. G, Title II, § 212 (2004); Pub.L.No. 108-447, Div. I, Title II, § 211 (2005), all available through <http://thomas.loc.gov/home/approp/app08.html>.

² Senate Report No. 109-109, Title III, Tenant-Based Rental Assistance, Committee Recommendation, available at: <http://thomas.loc.gov/cgi-bin/cpquery/R?cp109:FLD010:@1%28sr109%29>

unfortunately, demonstrates that Congress' concern about HUD's lack of commitment to maintaining Section 8 project-based housing was well founded.

II. Section 311 Applies Despite HUD's Abatement and Purported Termination of the Section 8 Contract.

As finally enacted in 2006, Section 311 of Pub.L.No. 109-115 provides:

Notwithstanding any other provision of law, in fiscal year 2006,³ 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. To the extent the Secretary determines that such a multifamily property owned or held by the Secretary is not feasible for continued rental assistance payments under such section 8, based on consideration of the costs of maintaining such payments for that property or other factors, the Secretary may, in consultation with the tenants of that property, contract for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance.

HUD's contention that Section 311 does not apply here is that the statute requires only that rental assistance "payments ...that are attached to any dwelling units" be maintained.

However, the May 31, 2006 Notice regarding the 2006 property disposition program upon which HUD relies is quite clear that what Section 311 requires HUD to maintain during the disposition process is "the project based Section 8 HAP

³ Similar language has been included in subsequent HUD appropriations enactments.

contract.” Appendix, Vol. II, p. 86a (May 31, 2006 HUD Notice, Fiscal Year 2006 Property Disposition Program).

As described above, Congress’ intent with Section 311 and its predecessors was to maintain project-based assistance where feasible by continuing the HAP contracts. Both the Senate Report and the House Conference Report characterize the obligation created by Section 311 as maintenance of or continued “project-based *assistance*.”⁴ The Section 8 statute defines “project-based assistance” as that provided through contracts to make assistance payments to owners and “tenant-based” as assistance provided through the voucher program. 42 U.S.C. §§ 1437f(f)(6) and (7), (d)(2), and (o). In focusing on the use of the term “payment,” apparently for purposes of this litigation only, HUD ignores both the obvious intent of Congress and its own policy set out in the May 31 Notice.

A final problem with HUD’s position is that, when HUD takes ownership of a property, all project-based Section 8 payments are immediately abated. HUD does not make Section 8 payments to itself. *See* HUD Handbook 4315.1, “Multifamily Property Dispositions – Management,” Section 5-21 and Appendix 5-4.⁵ Thus, if the statute had the narrow meaning asserted by HUD in this case, Section 311 would never apply to disposition of HUD-owned property. This

⁴ House Conference Report No. 109-307, p. 276; Senate Report No. 109-109, p 18, both available through <http://thomas.loc.gov/home/approp/app08.html>.

⁵ Available on the HUD website at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4315.1/index.cfm>.

abatement has been standard HUD practice for years (the Handbook is dated 11/93) and Congress certainly did not intend Section 311 to have the absurd result that the statute could never apply to precisely those situations to which it was intended to apply.

HUD also argues that Section 311 could not apply to the foreclosure sale because the HAP was terminated in March of 2006, seven months prior to the foreclosure sale. But Section 311 applies to HUD's actions "in...disposing of multifamily property." HUD's activities "in disposing of multifamily property" begin far before the foreclosure sale and necessarily include HUD's decisions on what to do with project-based Section 8 contracts. The May 31, 2006 Memorandum on which HUD relies states that Section 311 requires HUD to maintain the HAP contract on properties for which HUD holds the mortgage "and is in the process of disposing the property at foreclosure." Appendix, Vol. II, p. 86a (May 31, 2006 HUD Notice, Fiscal Year 2006 Property Disposition Program). The language of the Act and the Memorandum clearly refer to more than the moment in time at which the property changes hands; the language refers instead to HUD's disposition process. The HUD Memorandum describes this extended disposition process which begins with a recommendation to foreclose, and includes notifications, hearings, right to cure, ongoing administration of the mortgage and

HAP contract, and analysis whether to retain the HAP contract.⁶ Appendix, Vol. II, pp. 84a-90a (May 31, 2006 HUD Notice, Fiscal Year 2006 Property Disposition Program). During this process, the owner has a right to cure the defaults “prior to and up to the actual foreclosure sale.” Appendix, Vol. II, p. 85a (May 31, 2006 HUD Notice, Fiscal Year 2006 Property Disposition Program). This cure may include making all required repairs. *Id.* Section 311’s reference to “in...disposing of multifamily property” applies to HUD decision-making regarding retention of the HAP contract during this process and requires HUD to retain the contract if feasible and to conduct a feasibility analysis in order to determine that the HAP will not be retained. HUD’s Statement of Material Facts submitted with its summary judgment motion below indicates that the disposition process was underway as early as February, 2005 when “the director of HUD’s...Multifamily Property Disposition Center requested a series of documents...in connection with its referral of the project for foreclosure.” Appendix, Vol. II, p. 255a, Paragraph 27 (HUD Statement of Material Facts). Thus the disposition process was underway well before the termination of the HAP contract. After the passage of Section 311, an analysis of the feasibility of maintaining the HAP and consultation with the tenants should have been part of this disposition process. However, it

⁶ *See also* 12 U.S.C. Section 1701z-11(c) laying out extensive procedural steps defining “disposition of property” which culminate with the foreclosure sale but involve substantial steps prior to the sale.

appears that HUD, acting on the policy set out in the May 31, 2006 Notice, terminated the contract without following the process for compliance with Section 311 set out in the Notice because it had abated the contract earlier.

HUD's argument that it was not required to comply with Section 311 is pure bootstrapping. In effect, HUD's position in this litigation, as well as its assertion in the May 31 Notice that a Section 8 contract which has been abated and will be terminated will not be maintained, amounts to the absurd assertion that: "HUD need not comply with a statute that limits HUD's ability to terminate a section 8 contract in disposing of this property in any situation in which HUD has terminated that section 8 contract in the process of disposing of this property." The statute was obviously passed to curb HUD's predilection for terminating project-based assistance during this disposition process. To accept HUD's argument that it can avoid Section 311 by terminating a HAP contract anytime prior to sale enables unilateral evasion of the law that would render the statute meaningless.

III. HUD's Position Is Not Entitled to *Chevron* Deference.

HUD asserts that its position, set out in the May 31, 2006 Notice, that it need not apply Section 311 to Section 8 contracts with respect to which the agency had already decided that abatement and termination was proper, is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The District Court agreed, adopting HUD's position set out above, based on a serious misreading of the legislative history of Pub.L.No. 109- 115.

The District Court focused on discussions in both the House and Senate Committee Reports of a switch from funding a "unit based" system back to funding a "budget based" system. However, these discussions involved two different methods for funding *for the tenant-based housing choice voucher program* run by PHAs. The "unit based" funding simply meant funding based on the cost per unit for the units administered in the previous year; while the "budget based" method focuses on the total cost of the program in the previous year, regardless of the number of units assisted. Both funding mechanisms apply only to the tenant-based voucher program and have nothing to do with project-based Section 8 HAP contracts at issue here.

The Court apparently mistook the term "unit based," as applied to the voucher program, to mean "project-based" as applied to those HAP contracts directly between HUD and the owners of multifamily housing. Because the programs are completely separate, the funding descriptions regarding the voucher program are irrelevant to the project-based program. In fact, as cited above, in discussing tenant protection vouchers, the Senate Committee made quite clear its preference for project-based contracts over tenant protections vouchers, which HUD issued to displaced tenants in this case.

HUD and the District Court suggest that HUD's refusal to maintain through the disposition process a Section 8 contract which has been abated is justified because HUD should not reward owners who let their properties fall into disrepair. But that is not at all what is meant by complying with Section 311, even in cases where a Section 8 contract has been abated for failing to make repairs. Section 311 applies to the disposition of properties with HUD-held mortgages or that HUD owns. Properties do not become HUD-held, and are not foreclosed upon, unless there are serious problems. So Congress certainly intended Section 311 to apply to such properties. As the May 31 Notice makes clear, after a disposition "the purchaser will ensure that all units under the Section 8 HAP contract meet the Department's Uniform Physical Inspection Standards before Section 8 assistance is provided after a foreclosure or HUD-owned sale." The point of the disposition process is to assure that physical deficiencies are corrected. The point of Section 311 is to assure that Section 8 contracts are maintained in post-foreclosure disposition properties so that rehabilitation can preserve affordable housing.

HUD's position is not entitled to *Chevron* deference because the agency position set out in the May 31, 2006 Notice is not based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Indeed, the May 31 Notice clearly indicates that the HUD will not follow the clear Congressional directive if, as was the case here, it had already decided to abate the Section 8 contract.

CONCLUSION

For the reasons set out above, the District Court erred by deferring to HUD's interpretation of the applicability of Pub.L.No. 109-115, Section 311. This statute, requiring HUD to maintain a Section 8 contract during the disposition process if feasible, applies when HUD has ceased payments on a Section 8 contract prior to HUD's foreclosure of the mortgage. The judgment should therefore be reversed.

Respectfully submitted,
September 3, 2009

s/ James R. Grow
James R. Grow (Cal. Bar #83548)
National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610
(510) 251-9400 Ext. (3)104

Counsel for *Amici Curiae*
National Housing Law Project and
Housing Preservation Project

CERTIFICATIONS

I hereby certify that the word count of this brief is 2,554 words, within the required page and word count limit.

I also certify that I am admitted to the bar of this Court.

I also certify that the PDF file and hard copies are identical and that a virus check was performed using Norton 360 Antivirus software, version 1.3.3.5 (2009).

Respectfully submitted,
September 3, 2009

s/ James R. Grow _____
James R. Grow (Cal. Bar #83548)
National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610
(510) 251-9400 Ext. (3)104

Counsel for *Amici Curiae* National
Housing Law Project and Housing
Preservation Project

CERTIFICATE OF SERVICE

I, James Grow, an attorney, certify that on September 3, 2009, in the matter of Massie, et al, v. U.S. Department of Housing and Urban Development, No. 09-1087, I caused the following documents:

1. Amici Curiae Brief of National Housing Law Project and Housing Preservation Project in support of Appellants.

to be filed electronically through the ECF System of the Clerk of the United States Court of Appeals for the Third Circuit, and that ECF will send an e-notice of the electronic filing to the following:

Donald Driscoll, Esq.	ddriscoll@cjplaw.org
Kevin L. Quisenberry, Esq.	kquisenberry@cjplaw.org
Robert L. Eberhardt, Esq.	Robert.Eberhardt@usdoj.gov
Megan E. Farrell, Esq.	Megan.Farrell@usdoj.gov

Dated: September 3, 2009

s/ James R. Grow
James R. Grow (Cal. Bar #83548)
National Housing Law Project
614 Grand Avenue, Suite 320
Oakland, CA 94610
(510) 251-9400 Ext. (3)104

Counsel for Amici Curiae
National Housing Law Project and
Housing Preservation Project