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

REPLE BRIEF OF APPELLANTS

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I. Introduction

Appellants seek this to Court compel two discreet actions HUD was legally required to take in disposing of their property for demolition and redevelopment: 1) maintain the Section 8 Housing Assistance Payments (HAP) contract at the site and 2) provide Uniform Relocation Act (URA) level relocation assistance. Compelling these actions is important not only because they are legally required but because doing so will ensure the opportunity for class members to regain an ownership or long-term affordable leasehold interest in their property and benefit from the extensive reinvestment in their community by HUD, the City of Pittsburgh and the private market.

In the alternative, this Court should remand this case to the District Court for relief or for resolution following the opportunity for discovery.

II. Scope and Standard of Review

The parties agree on the standard of this Court's review of the decision granting summary judgment to HUD. Class Brief pp. 8-9; HUD Brief pp. 3-5.[1] This Court is to review the cross-motions *de novo*, disregarding the opinions of the

[1] Appellants' brief to this Court will be cited as "Class Brief," Appellees' as "HUD Brief," and the Amicus parties' brief will be cited as "Amicus Brief." All citations preceded by the letters "AR" refer to pages of the "administrative record" which are included within Volume III of the Appendix. All citations preceded by the words "Docket No." docket number assigned to documents filed in the District Court which are included within Volumes I and II of the Appendix, as labeled in the Table of Contents to the Appendix.

District Court and applying the same standards the District Court should have applied. *E.g.* Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Tobey v. EXTEL/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993); Toledo Edison Co. v. ABC Supply Co., 46 Fed. Appx. 757, 759 (6th Cir. 2002); CMM Cable Rep v. Ocean Coast Props., 97 F.3d 1504, 1512 (1st Cir. 1996); Bailey v. Big Sky Motors (In re Ogden), 314 F.3d 1190, 1195 (10th Cir. 2002); Biagro Western Sales, Inc. v. Grow More, Inc., 423 F.3d 1296, 1301 (Fed. Cir. 2005).

"[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial… is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d at 573.[2] "Papers supporting the movant are closely scrutinized, whereas the

[2] Because the complaint was verified (Docket No. 2-2 (Verifications)), it is equivalent to an affidavit for summary judgment purposes. *E.g.*, Reese v. Sparks, 760 F.2d 64, 67 and n.3 (3d Cir. 1985).

opponent's are indulgently treated." 6 Moore's Federal Practice Par. 56.15(3), pp. 2123-2126. "If there is *any* evidence in the record from *any* source from which a reasonable inference in the respondent's favor may be drawn, the moving party simply cannot obtain a summary judgment." Graham v. F.B. Leopold Co., 779 F.2d 170, 172 (3d Cir. 1985) (emphasis original); Empire Electronics Co. v. United States, 311 F.2d 175, 179-181 (2d Cir. 1962) (collecting cases).

HUD implies that review of the APA claims before this Court is limited by 5 U.S.C. §§706(2)(A) and (E). HUD Brief p.4. Contrary to HUD's implication, Appellants do not seek to set aside discretionary agency action as arbitrary or capricious under §706(2)(A) or as unsupported by substantial evidence under §706(2)(E). Rather, the Appellant class seeks to compel, pursuant to 5 U.S.C. 706(1), discreet agency actions HUD was legally required to take by 109 P.L. 115, § 311 ("§311") and 24 CFR 290.17(d). *See, e.g.*, PGBA v. United States, 389 F.3d 1219, 1227 and n.5 (Fed. Cir. 2004) ("Section 706(1) does not address arbitrary and capricious agency conduct. Rather, it speaks to the situation in which an agency has improperly failed to act."); *accord* Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (Judicial review of agency inaction, on the other hand, is governed by a different standard [under §706(2)]…. [T]his standard…consist[s] of…whether the agency has violated its statutory mandate by failing to act."). Thus, this Court's only task is to determine whether the agency

failed to take an action required by law, "which includes, of course, agency regulations that have the force of law." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

Similarly, this Court's scope of review is not limited to the documents submitted by HUD to the District Court.

> [W]hen a court considers a claim [under Section 706(1)] that an agency has failed to act in violation of a legal obligation, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000); *see also* Independence Min. Co., Inc. v. Babbitt, 105 F.3d 502, 511 (9th Cir. 1997)….

San Francisco Baykeeper v. Whitman, 297 F.3d 877, 886 (9th Cir. 2002).

HUD clearly did not produce the whole record before it to the District Court. See Docket nos. 108-2 through 108-3; 116-2 through 116-9; and 133-3 through 133-6 (Appendices to: Class Concise Statement of Material Facts; Class Responsive Concise Statement to HUD's statement of facts; and Class Motion for Reconsideration). The District Court erred by entering summary judgment against the Class without considering this evidence and permitting discovery of other material evidence. See Dopico v. Goldschmidt, 687 F.2d 644, 654 (2d Cir. 1982):

> Determining what constitutes an agency's informational base is vital, for review must be based on the whole administrative record. Yet that determination may itself present a disputed issue of fact when there has been no formal administrative proceeding… [T]he District Court could not properly grant summary judgment when such a basic factual issue was in dispute….

Accord Higgins v. Kelley, 574 F.2d 789, 792-794 (3d Cir. 1978).

Moreover, judicial review under the APA is *de novo* when the facts underlying the agency action or inaction were adjudicatory in nature and the agency's fact-finding procedures were inadequate for aggrieved persons to dispute the facts. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *accord, e.g.*, NOW, Washington, D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services, 736 F.2d 727, 736-741 (D.C. Cir. 1984). The facts underlying HUD's decisions to withhold the HAP contract from the property at foreclosure and URA-level relocation assistance from displaced class members were adjudicatory in nature.

> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts.

NOW, Washington, D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services, 736 F.2d at 739 n. 95. HUD provided no opportunity for class members to object to the facts underlying these decisions. In fact, HUD did not notify class members of its reasons for these decisions or even

that it made the decision regarding relocation assistance. Therefore, review of these claims is *de novo*.

This Court should not perpetuate the error of the District Court by disregarding the affidavit and other material evidence submitted by the Appellant class, nor should this Court affirm summary judgment to HUD without remanding to allow discovery to Appellants.

If this Court finds that HUD failed to take the actions required by §311 and 24 CFR 290.17(d), as Appellants submit, then the Court must compel these actions. Once a court determines that an agency unlawfully withheld action, the APA *requires* the court to compel agency action. Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1998) (use of the word "shall" in §706(1) means courts "must compel agency action unlawfully withheld"); *accord* Miller v. Fed. Bureau of Prisons, 147 Fed. Appx. 302, 307 (3d Cir. 2005) ("The Supreme Court has articulated the mandatory nature of the word 'shall.'").

III. Claim to compel action required by 109 P.L. 115, §311.

HUD had a discrete, mandatory duty to maintain the project-based HAP contract at this property after foreclosure because the contract was attached to the property while HUD was in the process of disposing of the property, and HUD did not determine the property to be infeasible for this. In fact, HUD determined that it

was feasible to pay for the monthly debt service needed to amortize the cost of rehabilitating the property, and pay the ongoing operating expenses, with HAP contract rents. AR Bates 265 (Peer Analysis). Nevertheless, pursuant to its "long-standing policy" (Docket No. 116-8, p.2; AR Bates 298), HUD failed to preserve the HAP contract, in violation of its duty under §311.

This Court's only task is to determine whether HUD's failure to maintain the contract at the property violated a duty required by law.

> Identifying whether a mandatory duty exists is in essence an inquiry into legislative intent. Legislative intent may be revealed in the plain language of a single enactment…, or as is the case often times, by examining several legislative enactments side by side, Slatky v. Amoco Oil Co., 830 F.2d 476 (3d Cir. 1987)…, or by examining a legislative scheme as a whole, see Block v. Community Nutrition Institute, 467 U.S. 340, 349, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984)….

Abdul Qadir v. Gonzales, 2008 U.S. Dist. LEXIS 50355 (D.N.J. 2008).

That Congress intended to create a mandatory duty with §311 is clear. By enacting §311, Congress required HUD to maintain HAP contracts attached to multifamily properties in the process of disposition as a term of the sale, except when infeasible. This is clear on the face of the statute: "in managing and disposing of any multifamily property…the Secretary *shall* maintain…." 109 P.L. 115, § 311. This is also clear from the legislative context and history of §311. *Id.*, pp. 16-18; Amicus Brief, pp. 2-7. HUD, itself, understood this duty to be mandatory when reciting it in its May 31,

2006 Memorandum: "[i]n accordance with §311…the Secretary *is required* to maintain the project-based Section 8 HAP contract in any multifamily property…for which the Secretary holds the mortgage and is in the process of disposing the property at foreclosure." Docket No. 35, p. 9 (emphasis added) (not produced by HUD in the "administrative record," but produced by Appellants in the District Court).

Although Congress gave HUD discretion to establish factors other than cost for determining whether a multifamily property in the process of disposition remains feasible for assistance under the HAP contract, Congress removed any discretion HUD may have had to terminate HAP contracts absent a determination of infeasibility. *E.g.* Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1172 (10th Cir. 1997) ("While the Secretary is indeed free to implement an internal procedural mechanism of his own choice to determine [infeasibility], he is not free to change the standard…Congress had chosen…."). Therefore, HUD's argument that the Secretary had discretion to create "exceptional cases" in which HUD need not determine infeasibility before terminating the contract is flatly wrong. Appellees' Brief, p. 17.

This "exception" would swallow the rule, as HUD suspends HAP contract payments in every disposition, and §311 would never apply. *See* HUD Handbook

4315.1, "Multifamily Property Dispositions – Management," Chapter 5, §5-21(B)[3] and Appendix 5-4 and Chapter 7, §7-8(A)(2) and Appendix 7-1. Such an absurd "exception" is contrary to the unambiguous intent of Congress (*e.g.* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 and n.9 (1984); Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171 (1989)), beyond the meaning the statute can bear (*e.g.* MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994)) and frustrates the policy Congress sought to implement. *E.g.* Securities Industry Ass'n v. Board of Governors of Federal Reserve System, 468 U.S. 137, 143 (1984).

Attempting to escape this inevitable conclusion, HUD pitches three additional arguments why §311 either did not apply or was satisfied. First, HUD argues that because the disposition concluded on October 26, 2006, after the expiration of 101 P.L. 115 on September 30, 2006 and before Congress enacted its second 2007 Continuing Appropriations Resolution (101 P.L. 2, § 101(c)(9)), the mandate of §311 did not apply. HUD Brief, p. 35 and n. 8. HUD omits that Congress first reenacted the mandate of §311 for fiscal year 2007 on September 29, 2006, in its first Continuing Appropriations Resolution. 109 P.L. 289, Division B; *see* Docket No. 122, p. 1, n. 1 (Class Reply Brief opposing summary judgment);

[3]Available at http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4315.1/. All subsequent references to this **HUD Handbook 4315.1, "Multifamily Property Disposition-Management,"** may be found at this website.

see also Docket No. 120, pp. 1-2 (District Court Amicus Brief). This law applied all of the terms and conditions imposed on HUD's activities by the FY 2006 Appropriations Act to HUD activities until November 11, 2006. Thus the mandate of §311 was in place at the time of the foreclosure sale.

Second, HUD argues that "[t]he issue in this case [i]s whether the HAP contract was 'attached' to the Property *at foreclosure* [emphasis added]" and because HUD "terminated the HAP contract on March 10, 2006, [it was] no longer 'attached' to the Property on…the date of foreclosure." HUD Brief, pp. 28, 37. This argument is directly contradicted by both the plain language of §311 and the agency's own published interpretation of it. §311 requires HUD to preserve HAP contracts that exist at the time when HUD is "*managing and disposing of any multifamily property*," not at the time when HUD consummates the foreclosure sale. 109 P.L. 115, §311 (emphasis added). HUD expressly recognized this in its May 31, 2006 Memorandum: "In accordance with §311…the Secretary is required to maintain the project-based Section 8 HAP contract in any multifamily property…for which the Secretary holds the mortgage and *is in the process of disposing the property at foreclosure*." Docket No. 35, p. 9. In this case, HUD was in the process of disposing of the property from February 10, 2005 to October 26, 2006. The HAP contract was attached to the property during this process in fiscal year 2006. Therefore, HUD was required to maintain the contract as part of

the disposition because HUD did not find the property infeasible for this. By enacting §311, Congress simply prohibited HUD from terminating HAP contracts while in the process of disposition absent a determination of infeasibility.

HUD implies that the use of suspended HAP contract payments to relocate tenants to other housing because of exigent health/safety conditions is equivalent to terminating the contract, thereby severing it from the property. HUD Brief, pp. 36-37. Presumably, the implication is that the suspended payments will be forever dedicated to the relocation Vouchers. To the contrary, each fiscal year, HUD reserves a portion of its project-based appropriation for allocation to Housing Authorities to administer relocation Vouchers. 24 CFR 791.407(a)(2) (authorizing use of reserved project-based funds for relocation of tenants ue to substandard housing conditions during the fiscal year); 24 CFR 290.7(c) (authorizing HUD to "require the tenants [of a project-based Section 8 development] to vacate the premises and provide temporary relocation benefits as provided in § 290.17[(e)]…"). When this occurs, however, these relocation Vouchers are funded through the regular Voucher appropriation if the relocation goes into the next fiscal year. *See* 24 CFR 791.101 et seq. (describing annual allocation of Voucher appropriation). The project-based subsidy allocated to the HAP contract remains attached to the property, and the suspended payments must be restored to the owner upon completion of repairs. *See* HUD Handbook 4315.1, "Multifamily

Property Dispositions – Management," Appendix 3, ¶13, quoted at Class Brief, p. 21, n. 5. If the owner fails to make repairs, then HUD is responsible to do so in order to minimize permanent displacement and preserve the property for conveyance at foreclosure, unless, again, HUD determines this to be infeasible (which did not occur in this case) or makes an otherwise-permissible non-preservation determination (which did occur). *See* 24 CFR 290.17(b) (duty to take all steps feasible to minimize displacement); 24 CFR 290.25 (setting forth permissible bases for HUD not to repair the property or require this by the purchaser after foreclosure); AR Bates 298-299 (April 20, 2005 letter from HUD to the Urban Redevelopment: "Regarding…demolition…, HUD would have to make a non-preservation determination in accordance with the provisions of 24 CFR 290.25."). Although authorized not to preserve the buildings, §311 *required* HUD to preserve and convey the HAP contract with the property at foreclosure, because HUD did not determine the property to be infeasible for this. *Compare* 24 CFR 290.23 and 61 FR 11684, 11702, ¶ 31 (pre-§311 regulation *authorizing* HUD to provide project-based assistance to support the rebuilding of housing onsite following disposition).

HUD's final fallback argument is that it made an infeasibility determination on the basis of cost. In support of this argument, HUD avers that "needed repairs would cost almost twice the amount of the current mortgage…[and] repair costs

and operating expenses far exceeded…'as is' value." HUD Brief, p. 40. Even if true, which Appellants dispute (Docket No. 115, p. 11, n. 6), this is not the test HUD created for determining cost-feasibility:

> In conducting the feasibility analysis, the Property Disposition Center must demonstrate that a property meets one or more of the following criteria in order to warrant a determination of nonfeasibility:
>
> [(1)] The costs to rehabilitate the property make it economically *infeasible to pay the monthly debt service* needed to amortize the cost of rehabilitation *and pay the expenses of operating the property* on a monthly basis *at current Section 8 HAP contract rents.*
>
> The proposed rehabilitation costs will be determined by the Comprehensive Repair Survey….
>
> The operating costs will be determined by the Property Disposition Center's completion of the Peer Analysis….

Docket No. 35, Ex. 1, p. 6 (May 31, 2006 HUD Memorandum, emphasis added).

In this case, the Peer Analysis concluded that HAP contract rents were sufficient pay the debt service needed to amortize the cost of rehabilitation, as determined by the Comprehensive Repair Survey, as well as operating expenses. AR Bates 265 (Peer Analysis, bottom of page). The analysis found the property not only financially viable for this but that it would produce a "[c]ash throw-off after payment of estimated expenses" of "$343,938.52" per year. *Id.*[4] HUD's

[4] The Peer Analysis reached this conclusion without even considering the $1.8 million Rehabilitation Grant awarded to the property in May of 2001 to fund capital expenditures over the next twelve year period ($150,000 per year). AR Bates 945, ¶ I(A).

assertion to the contrary—that the "peer analysis demonstrate[ed] that repair costs and operating expenses…far exceeded potential property income"—**is just false**. HUD Brief, p. 40.

Even if HUD had determined the property infeasible for preservation of the HAP contract, its withholding of the HAP contract at foreclosure was unlawful because the agency failed to consult with residents regarding whether to "contract for project-based rental assistance payments with an owner or owners of other existing housing properties," i.e. for their benefit. 109 P.L. 115, § 311.

HUD argues that it satisfied this requirement by sending a letter to residents on June 22, 2006 with a copy of the overall disposition plan and giving a 30-day period to send in written comments. HUD Brief, p. 40. However, the disposition plan stated that HUD had already determined to terminate the HAP contract and provide vouchers. AR Bates 551. Nor did the letter or the plan make any reference to the possibility of HUD "contract[ing] for project-based rental assistance payments with an owner or owners of other existing housing properties." 109 P.L. 115, § 311; *see* AR Bates 550-553. By the time the letter was sent on June 22, 2006 the foreclosure sale was already "scheduled for the week of July 10, 2006." AR Bates 542 (letter form HUD to Urban Redevelopment Authority of Pittsburgh (URA)). By this time, HUD had already authorized payment of the upfront grant to URA (AR Bates 544), and URA had already

executed the contract provided to it by HUD for the sale of the property. AR Bates 541-542 (6/5/2006 letter from HUD to URA transmitting sale contract); AR Bates 547-548 (6/16/2006 letter from URA to HUD transmitting executed sale contract). This meaningless invitation to comment on the disposition plan did not, and cannot under any ordinary meaning of the phrase, satisfy the requirement that HUD, "in consultation with the tenants of th[e] property" determine whether to "contract for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance" to residents.

The only questions this Court must answer to resolve this claim are: 1) whether Third East Hills Park was in the process of disposition in fiscal year 2006; 2) if so, whether HUD determined the property to be infeasible for continued assistance under the HAP contract; and 3) if so, whether HUD consulted with affected tenant to determine which form of rental assistance to provide them (project-based or tenant-based). 109 P.L. 115, §311. The answers to these questions are yes, no and no. Therefore, HUD's failure to maintain the HAP contract at the property as part of this disposition was unlawful, and this Court must compel the agency to take this action.

IV. Claim to compel action required by 24 CFR 290.17(d)

HUD was required to provide Appellant class members with relocation assistance under 24 CFR 290.17(d) because HUD's decision to dispose of the

property for demolition and redevelopment rather than preserve it, even though this was feasible, is the only reason class members were permanently relocated from the property, and HUD provided financial assistance in connection with this. *Ibid.* ("The requirements of this paragraph apply to any displacement that results whenever…federal financial assistance…is provided in connection with the purchase, demolition, or rehabilitation of a multifamily property by a third party. A displaced person…[i.e. one who moves permanently as a direct result of this] must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the URA, implementing regulations…and this section....").

In its brief, HUD admits that it displaced class members from the property. HUD Brief, p. 43 ("HUD fully complied with the *requirements* for relocation assistance set forth in Section 290.17(c)..., [which] *require[d]* HUD to provide *displaced* residents with…the following relocation assistance…[emphasis added]."). As a matter of law, 24 CFR 290.17(c) applies only to "displacement." HUD defines "displacement" as "a permanent, involuntary move." HUD Handbook 4315.1, "Multifamily Property Disposition-Management," Chapter 13, Section 13-1. Thus HUD concedes that the District Court erred in holding that class members were not displaced persons within the meaning of §290.17(d) because they were not required to move.

HUD argues that §290.17(d) did not apply to this displacement because the agency did not act to "further a federal project," but rather "issued the notice of displacement because of its concerns over the health, safety and security of the residents." HUD Brief, p. 42.

To the contrary, health and safety conditions at the property had nothing to do with why class members were *permanently* displaced. HUD's authority to relocate residents *for health and safety reasons* is limited to *temporary relocation*. 24 CFR 290.7(c) ("Whenever HUD determines that there is an immediate threat to the health and safety of the residents, HUD may require the residents to vacate the premises and *shall provide temporary relocation benefits* as provided in § 290.17[(e)]…[emphasis added]."); *see also* HUD Handbook 4315.1, "Multifamily Property Disposition-Management," Chapter 10, §§ 10-1(E)[5] and 10-5(d)(5);[6] *accord* 24 CFR 290.17(b) (duty to take all steps *feasible* to minimize displacement unless a non-preservation determination furthers the other statutory goals) (emphasis added). HUD simply chose not to make the repairs it found to be *feasible*, or require this of the purchaser after foreclosure, because it intended the property to be demolished and redeveloped. But-for this non-preservation

[5] "HUD's repair responsibilities as manager/owner cannot be over emphasized…. Since HUD expects sponsors, owners, and managers of projects with insured or HUD-held mortgages to keep their projects fully repaired, field offices are expected to do no less for HUD-owned and MIP projects."

[6] "[Repair] work that is not completed by HUD in a rental housing project will be required to be completed by the new owner after the foreclosure…sale."

determination, permanent displacement would have been avoided.[7] HUD was authorized to make this non-preservation determination. 24 CFR 290.25 (authorizing HUD not to repair the property, or require this via disposition, when this is not feasible *or* when HUD makes another authorized determination); *see also* HUD Handbook 4315.1, "Multifamily Property Disposition-Management," Chapter 10, §10-2.[8] However, the agency was required to provide relocation assistance under 24 CFR 290.17(d) because it also provided funding for the redevelopment project.

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[7] Moreover, the owner had corrected all outstanding exigent health and safety ("EH&S") items at the property in compliance with 24 CFR 200.857(c)(2), as certified to HUD on September 27, 2004. Docket No. 116-5, pp. 1-35 (not included in "administrative record"). After accepting this certification, HUD neither re-inspected the property nor disputed the certification. *Contrast* Englewood Terrace Ltd. P'ship v. United States, 79 Fed. Cl. 516, *24-*26 (Ct. Cl. 2007). This is not surprising, since the "EH&S" issues identified in HUD's 9/22/2004 REAC inspection, the inspection HUD alleges to have triggered the relocation, consisted solely of: nine (9) "missing/inoperable smoke detectors;" two (2) "missing fuses;" eight (8) "missing/broken cover plates" on "outlets/switches;" eight (8) "A/C unit[s] in window[s], prevent[ing] egress," and one "missing tag" on a fire extinguisher. Docket No. 14, Exhibit 11, pp. 20-22 ("REAC EH&S Items Detail," not included in Administrative Record). These minor issues could have been (and were) easily addressed without having to permanently relocate residents. *See* Cheatham v. Donovan, 2009 U.S. Dist. LEXIS 81125, pp. 23-24 (E.D. Mich. Sept. 8, 2009) ("The Court…does not lightly question HUD's assessment of Parkview's physical disrepair. However, HUD's data simply does not support its conclusion about health and security risks to residents, or the extreme solution HUD proposes. Trip hazards, unsafe porches, broken toilets and worn paint are serious problems, but can be addressed without relocating residents.)

[8] "All MIP and HUD-owned residential units must be preserved…except that…demolition may be accomplished when appropriate and [when] such activities have received prior written approval [for a] 'Determination[] Not to Repair a Project'… [emphasis added]."

That HUD began *permanently* displacing residents in anticipation of (i.e. before) conveying the property with the up-front grant is of no moment. As the U.S. Supreme Court held in Alexander v. HUD, the Relocation Act is triggered by displacement that results from "an actual *or proposed*" acquisition, demolition or rehabilitation "for, or intended to further," or "motivated by" a federal "*program or project*." 441 U.S. 39, 63 (1979) (emphasis added). The implementing regulation defines a "program or project" as "any activity or *series of activities* undertaken by a Federal Agency or with Federal financial assistance *received or anticipated in any phase of [the] undertaking*." 49 CFR 24.2(a)(22) (emphasis added); *see* 24 CFR 42.1(a) (all "HUD-assisted programs and projects are subject to the…URA...."). To trigger 24 CFR 290.17(d), the federal funding need not *precede* the displacement; the regulation applies when federal funds are received or anticipated "in connection with" the actual or proposed "purchase [or] demolition…by a third party." *See also* HUD Handbook 1378.0, "Tenant Assistance, Relocation and Real Property Acquisition," Chapter 1, §1-4(DD) ("[A]ny activity '*in connection with*' a federally funded project can be subject to all regulations of that funding source even though the activity may not be directly funded by that source [emphasis added]."). [9] In this case, the federally funded activity and the permanent displacement are interdependent. *Id.* But-for the

[9] Available at http://www.hud.gov/offices/adm/hudclips/handbooks/cpdh/1378.0/.

displacement, demolition could not occur; but-for the proposed demolition, displacement would not have occurred.

The reason the Supreme Court found the URA inapplicable in Alexander is that, as to each property in question, HUD developed its proposal to dispose of the property, and initiated displacement, only after it had foreclosed on the mortgages, acquired the properties, attempted to manage and repair the properties and found this to be infeasible (1 year later for the D.C. property; 3 months later for the Indiana property). 441 U.S. at 44-45. At that time, the URA applied only to actual or proposed *acquisitions*. "Thus," the Court held, "a program developed after the agency procures the property will not suffice [to trigger the URA], even though it necessitates displacements, since that program could not have motivated the property acquisition." *Id.* at 63.[10]

The same was true in the Caramico case cited on page 42 of HUD's brief. In fact, in Caramico v. HUD, 509 F.2d 694 (2d Cir. 1974), the property acquired by HUD was never connected to a federally-funded project. Rather, the case involved whether the URA applied to displacement that resulted by operation of a HUD regulation requiring FHA-insured mortgagees to tender properties to HUD unoccupied before they could demand payment under the FHA mortgage insurance

[10] The Act was subsequently amended to apply also to actual or proposed demolitions and rehabilitations with federal funding received or anticipated in any phase. *See* 42 U.S.C. 4601(6)(A)(i)(II).

program. *Id.* at 696. Again, at that time, the URA applied only to acquisitions. Relying on the "thorough opinions" of the District Court (*Id.* at 697), the Court of Appeals found that such "[d]efault acquisitions" by HUD are "random and involuntary," and are not the sort of "conscious government decision" that trigger the Act, because HUD has no choice but to acquire the property once demanded by the FHA-insured mortgagee. *Id.* at 698-699. As the District Court described, however, "[t]he removal of people from existing housing in order to raze it and create new housing of a kind which may not be available to the displaced persons presents a substantially different situation for legislative treatment from the situation of residents removed in individual foreclosure cases." Caramico v. Romney, 390 F. Supp. 210, 215 (E.D.NY 1972).

In this case, unlike in Alexander or Caramico, HUD proposed to convey this property for demolition and redevelopment *before* it acquired the property (and provided the up-front grant) at foreclosure. See AR Bates 142-143 (Foreclosure Recommendation):

> Third East Hills Park is part of three affordable housing developments located on continuous sites. [First] East Hills Park apartments and Second East Hills Apartments have both been sold [by HUD, following foreclosure] to profit-motivated developers who were awarded [federal] low income tax credits, and these properties are undergoing substantial physical improvements over the next three years. [First] East Hills Park apartments has completed their physical improvements. *The current physical condition of Third East Hills Park will negatively impact the success of the other two properties if ownership is not changed…*

> At the top of the hill from these developments is a large church, abandoned commercial space, and an empty public housing hi-rise building. The Housing Authority plans to demolish the hi-rise building and plans are being discussed for the use of the commercial space *once the rehabilitation of the housing is completed*.
>
> It is the recommendation of the Pittsburgh Multifamily Program Center that the property be placed in foreclosure based upon technical defaults of the [HUD contracts].
>
> As a final recommendation, the Pittsburgh Multifamily Program Center *strongly feels that…the property be sold with the intention that some of the units will be demolished or downsized. We also recommend mixed housing with home ownership.*
>
> *The Pittsburgh Multifamily Program Center recommends: Negotiated sale to the City of Pittsburgh…. Units should be downsized or demolished to alleviate the high density of subsidized housing in the area. We also recommend mixed housing with ownership.*" AR Bates 142-143 (emphasis added).

In fact, HUD developed this plan *before* it declared the conditions default or began relocating residents. *I.d.* (Foreclosure Recommendation, *mailed on* November 10, 2004); *see also* Docket No. 108, p. 7, ¶31 (Appellants' Concise Statement of Material Facts)[11] *and* Docket No. 114, p. 10, ¶31 (HUD response: "The averments in paragraph 31 are admitted.").

[11] In paragraph 31, Appellants averred that approximately one month before declaring the default, William Melvin (HUD Disposition Director), Diana Grey (HUD Regional Director) and Jim Pollack (who inspected the property) and others discussed the status of the property by phone. The notes of this conversation reflect that although the 'units [were] repairable,' the 'City [was] interested' in the property for a 'tax credit deal,' and HUD would pursue 'foreclosure' and 'voucher out [the] residents.' *See* AR Bates 90.

That this plan was intended to further, or was motivated by, a program or project is undeniable. AR Bates 142-143 (Foreclosure Recommendation). See also AR Bates 469 (2/1/2006 memorandum drafted by HUD describing the East Hills Restoration Initiative coordinated principally by HUD, the City of Pittsburgh, Senator Rick Santorum's office and the FBI). This memorandum described Phase I of the Initiative. It was completed for circulation on October 3, 2005 and revised by HUD on November 2, 2005 and February 1, 2006. AR Bates 473. It identifies eight Federal, state and local entities and not less than eighty-one (81) individuals who had contributed to shaping Initiative and agreed to perform tasks identified for Phase I. AR Bates 468-473. Regarding the redevelopment of Third East Hills in relation to the neighboring redevelopment, the memorandum stated:

> A large vacant parcel which was once a shopping mall sits at the top of the hillside above these three projects [First, Second and Third East Hills], and can be developed by big box retailers, bringing employment opportunities to the neighborhood. *However, developers are wary of investing in that neighborhood until and unless the physical and social issues are resolved.*
>
> Substantial physical renovations are completed at [First] East Hills, now known as Maple Ridge, and are underway in the first of three stages at Second East Hills. A third complex called *Third East Hills is targeted for demolition and reconstruction following an imminent foreclosure. Federal funds (through Low Income Housing Tax Credits, Upfront Grants, and Section 8 rental assistance) will exceed $80 million at the completion of reconstruction.*

AR Bates 468 (emphasis added).

In fact, HUD was involved in developing this plan for the property *long before* it declared the default or initiated displacement. By August of 2003, and continuing through July of 2004, HUD participated in weekly meetings with the Urban Redevelopment Authority of Pittsburgh and the developers of the contiguous properties to draft a plan setting the course for redevelopment at these properties. Docket No. 116-6, pp. 2-4 (Affidavit of Jason M. Roth, an architect whose primary responsibility from August of 2003 to July of 2004 was heading this team in creating the East Hills Visioning Plan ("Visioning Plan"), a copy of which was attached to his affidavit as an exhibit (see Docket nos. 16-6 and 16-7)).

The Urban Redevelopment Authority of Pittsburgh commissioned the Visioning Plan to coordinate and guide the redevelopment efforts substantially underway the neighborhood, including: redevelopment of former East Gate Shopping Center by Operation Nehemiah; redevelopment of Second East Hills by Telesis Corporation (after foreclosure and conveyance by HUD); renovation of First East Hills by Winn Companies (after foreclosure and conveyance by HUD), in addition to the redevelopment of Third East Hills. Affidavit, ¶4; *accord* AR Bates 142-243 (Foreclosure Recommendation); AR Bates 468-469 (East Hills Restoration Initiative memorandum).

Lily Walker, who participated as the HUD project director for Third East Hills, explained in specifics why foreclosure was necessary for redevelopment to

occur at the property and how it could be used to convey the property to Telesis, Winn or another developer. Affidavit, ¶12. The taskforce ultimately agreed there was no other way to accomplish the necessary change at Third East Hills Park. Affidavit, ¶13. Consequently, the Visioning Plan called for the property to be demolished and redeveloped as rental and for-sale housing; it cited "HUD and private developer" as responsible to do this. Docket no. 116-7, p. 11 (printed as p. 36 in the Visioning Plan). The Plan was published on June 9, 2004. HUD included only two, random pages of the Plan in the "administrative record." AR Bates 240-241.

As explained by HUD, foreclosure was *necessary* to accomplish the redevelopment of the property for several reasons. First, when the property underwent Mark-to-Market restructuring in May of 2001—pursuant to which HUD restructured the mortgages, awarded a new 20-year HAP contract, and provided the $1.8 Million rehabilitation grant—a Use Agreement was incorporated into the mortgages. AR Bates 924-943 (Use Agreement); *see also* Docket no. 108, ¶¶1-6 (Appellants' concise statement of facts describing the Mark-to-Market restructuring) *and* Docket no. 114, ¶¶1-6 ("admitted"). This Agreement subjected the site to a use restriction whereby it could be used only as affordable rental housing with no reduction in the number of residential units (140) for thirty years. AR Bates 925 (Use Agreement, ¶4). This use restriction was binding on any

successors in title during the thirty year period. AR Bates 928 (Use Agreement, ¶13). Foreclosure was therefore necessary to extinguish this use restriction if the property was to be redeveloped with fewer, rental and for-sale dwellings. AR Bates 74 (7/12/2004 hand-written notes by William Melvin of conversation among HUD staff finding that the "use restriction" was "not a problem," as it was "tie[d] to deed" and would be extinguished by foreclosure.); AR Bates 602 (Final Disposition Plan, "The current Use Agreements will be removed from the property."); *see* HUD Handbook 4315.1, "Multifamily Property Disposition-Management," Chapter 2, §§2-4(A)(2) and (B)(1) ("Generally, foreclosures extinguish all liens and other contracts and agreements on the property…. Acquisition through non-foreclosure procedures…do not extinguish the liens, contracts and agreements on the property.").

Second, without foreclosure, the debts, liens and similar obligations tied to the property would survive any conveyance, and the new owner (including HUD) would be responsible to satisfy them. *Id.* In this case, these obligations included a net mortgage balance (including accrued interest) of at least $1,816, 078.16, in addition to any obligations to other creditors. AR Bates 262 (Statement of Indebtedness).

Third, without foreclosure, the transfer of ownership could not occur, which HUD and the taskforce deemed necessary to ensure the success of both this project

and the related projects. Docket No. 116-6, ¶¶ 9-13 (Affidavit of Jason M. Roth); AR Bates 142 (Foreclosure Recommendation: "Third East Hills Park will negatively impact the success of the other two properties if ownership is not changed….").

Appellants contend that the undisputed evidence in the "administrative record" shows that the class is entitled to judgment on this claim as a matter of law. At a minimum, this evidence demonstrates the existence of disputed issues of material fact as to: 1) whether the "administrative record" submitted to the District Court was the whole record before the agency; and 2) whether permanent displacement resulted from HUD's determination that the property should be demolished rather than repaired (even though repair was feasible) or from concern over exigent, health and safety issues (which the owner certified were corrected). Graham v. F.B. Leopold Co., 779 F.2d at 172 ("If there is *any* evidence in the record from *any* source from which a reasonable inference in the respondent's favor may be drawn, the moving party simply cannot obtain a summary judgment…[emphasis original]."). Furthermore, the District Court should not have granted summary judgment to HUD without considering the affidavit of Jason M. Roth and the other material documents submitted by Appellants, and it should not

have denied discovery to Appellants when it was clear the "administrative record" submitted by HUD was incomplete.[12]

Attempting to avoid these conclusions, HUD argues that Appellants cannot pursue this claim because they failed to exhaust an administrative remedy. HUD Brief, pp. 45-46. This argument fails. The regulations do not *require* administrative appeals; they *permit* them. 24 CFR 290.17(f) ("If a person disagrees… the person *may* file a written appeal…."); *see* Darby v. Cisneros, 509 U.S. 137, 154 (1993) ("[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly *required* by statute or when an agency rule *requires* appeal…[emphasis added]."). Moreover, HUD failed to notify residents of their right to utilize this procedure, as required by

[12] Additional facts material to this claim set out in Appellants' Concise Statement of Material Facts (Docket No. 108) help explain HUD's conduct in steering this property through foreclosure to demolition and redevelopment, including: accepting and then refusing to investigate the complaint filed by the owner against the management company for misuse of funds (¶20); refusing the owner's persistent requests for approval to replace the management company (¶¶22-26, 28), terminating the management company on November 19, 2004 (nine days after declaring the default) and subsequently refusing to approve new management (¶41-42, 50); directing the Cooperative to cease expenditures for repairs and seizing control of the property's assets (¶52); refusing to lease units (¶40) or use property resources to make repairs even for approximately 2½ years (¶53); continually communicating to each household by letter, phone and personal visit that they were required to leave the property and if they did not leave before the relocation deadline, they would not receive relocation assistance (see Docket No. 133-3 through 133-6, Relocation Records not included in the "administrative record"); and failing to inform residents that if they stayed on the property until the time of demolition they would receive full URA-level relocation assistance. See also Appellants' response to HUD's statement of facts. Docket No. 116.

49 CFR 24.203(a)(5). Furthermore, as a judicially-crafted doctrine, exhaustion is within the court's discretion to require. The District Court did not abuse its discretion by proceeding to the merits of this claim. Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) ("Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs."). Finally, HUD never even informed class members that it had determined them ineligible for URA-level assistance. It is precisely because HUD failed to provide an opportunity to object to the facts underlying its decision to withhold assistance that judicial review of this claim is *de novo*. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 415; NOW, Washington, D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services, 736 F.2d at 736-741.

HUD's final argument is that only "those [14] residents [who] declined to… to relocate" were entitled to URA-level relocation assistance and that "HUD fully complied with…Section 290.17(d)…with regard to [them]." HUD Brief, p. 46. Again, each of the other 38 class member were permanently relocated as a direct result of HUD's decision not to make repairs that were feasible because it intended to convey the property for demolition and redevelopment. Because HUD provided funding in connection with this, §290.17(d) applies to their displacement. Furthermore, this is in effect a waiver argument, i.e. that the class members who

heeded the **NOTICE OF DISPLACEMENT** (emphasis original) and the warning that relocation assistance was available for a limited time only waived their right to URA-level assistance by relocating prior to foreclosure. Without notice or their rights, no such waiver could be knowing or voluntary. With respect to the fourteen class members who remained at the time of foreclosure, HUD failed to provide for *ownership-level* URA relocation assistance. 49 CFR 24.2(20)(ii); 49 CFR 24.2(6)(viii)(A); 49 CFR 24.401.

It is clear that HUD chose not to repair or require repair of conditions at the property, even though it determined this feasible, because the agency was motivated to convey the property for demolition and redevelopment. This is the only reason displacement of class members was permanent. Because HUD provided financial assistance in connection with the purchase and demolition, its failure to provide relocation assistance under by 24 CFR 290.17(d) was unlawful, and this Court must compel the agency to do take this action at this time.

V. Due Process Claim

HUD argues that the Appellants have waived any ability to seek relief for this claim because they have so stipulated. Docket 104, pp. 18-19. To the contrary, Appellants do not seek to reverse the foreclosure sale. *See* Docket No. 93-2, ¶ 1 (Stipulation). They do not challenge the validity of the new owner's title/ownership to the property. *Id.* at ¶ 3. They do not seek relief that jeopardizes

the right/ability of Third East Hills Limited Partnership to redevelop the property. *Id.* at ¶ 2. In fact, compelling HUD to maintain a HAP contract at the property would ensure funding for the construction and operation of affordable rental units. The Urban Redevelopment Authority specifically requested this, but HUD declined, stating "continuance of Project Based Section 8 assistance is contrary to current HUD policy." AR Bates 298. Likewise, compelling HUD to provide ownership-level relocation assistance would help ensure a market for the for-sale units. Appellants expressly preserved their right to pursue relief for their injuries. Docket No. 93, p. 1 (Motion to Approve Stipulation). The Court is empowered to provide this equitable relief because it is commensurate with the injuries caused by HUD's deprivation of class members' property interests without due process of law. Bell v. Hood, 327 U.S. 678, 684 (1946); Simmat v. United States Bureau of Prisons, 413 F.3d 1225, 1231-33 (10th Cir. 2005); Jaffee v. United States, 592 F.2d 712, 717-19 (3d Cir. 1979), cert. denied, 441 U.S. 961.

HUD has never disputed that it deprived Appellants' ownership/proprietary and leasehold/possessory interests in the property. HUD has abandoned its prior argument that Appellants had no property interest in ongoing project-based rental assistance, for good reason. Virtually every court presented with this question has found that residents receiving project-based rental assistance have a property

interest in its continuation deriving from the U.S. Housing Act and regulations, industry custom and usage, and/or the HAP contract.[13]

The process through which HUD deprived these property interests was constitutionally deficient. HUD provided no opportunity to object to the abatement or displacement. AR Bates 194 (**NOTICE OF DISPLACEMENT** [emphasis original]); *see* prior section of this brief; Caramico, 509 F.2d at 699 et seq. HUD never notified class members (or the owner) that it *intended to terminate* the HAP contract. *See* AR Bates 112 (HAP Contract, § 2.7(b) requiring this). The foreclosure "hearing"—a telephone call with William Melvin, who participated in planning HUD's disposition (e.g. AR Bates 90) and authorized the

[13] See Holbrook v. Pitt, 643 F.2d 1261, 1270-1273 (7th Cir. 1981); Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919, 925-927 (11th Cir. 1982) *cert. denied*, 459 U.S. 971 (1982); Swann v. Gastonia Housing Authority, 675 F.2d 1342, 1346 (4th Cir. 1982); Ashton v. HUD, 716 F.2d 56, 66 (D.C. Cir. 1983); Concerned Tenants Asso. v. HUD, 685 F. Supp. 316, 323-324 (D. Conn. 1988); Bishop v. HUD, 1992 U.S. Dist. LEXIS 12597, 11-12 (N.D.IL 1992); Price v. HUD, 1983 U.S. Dist. LEXIS 11336, 8-11 (N.D.Ill. 1983); Gallman v. HUD, 639 F. Supp. 472, 482 (N.D.CA 1986); Watson v. HUD, 645 F. Supp. 345, 347-348 (S.D.OH 1986); Nichols v. HUD, 1980 U.S. Dist. LEXIS 17630, 1, n. 1 (D.D.C. 1980); Edgecomb v. Housing Auth., 824 F. Supp. 312, 314 (D. Conn. 1993); United States v. Robinson, 721 F. Supp. 1541, 1545 (D.RI 1989); *see also* Basco v. Machin, 2008 U.S. App. LEXIS 1250, 11-12, n. 7 (11th Cir. 2008) (Section 8 Voucher); Saxton v. Housing Auth. of Tacoma, 1 F.3d 881, 884 (9th Cir. 1993) (public housing); Davis v. Mansfield Metropolitan Housing Authority, 751 F.2d 180, 184 (6th Cir. 1984) (public housing); Joy v. Daniels, 479 F.2d 1236, 1241-1242 (4th Cir. 1973) (Section 221(d)(3) rent supplement); Price v. Rochester Hous. Auth., 2006 U.S. Dist. LEXIS 71092, 17-20 (W.D.NY. 2006) (shelter-plus-care program); *see generally* Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Perry v. Sindermann, 408 U.S. 593, 600-602 (1972).

foreclosure (Docket Nos. 87-2 and 101-2 (Declarations of William Melvin)), in which HUD put on no evidence—was not conducted by an impartial decision maker who resolved the facts and law based solely on the evidence introduced at the hearing. This not only violated due process (*e.g.*, Goldberg v. Kelly, 397 U.S. at 269-271); it violated the strictures of §§ 554 and 556 of the Administrative Procedure Act. Wong Yang Sung v. McGrath, 339 U.S. 33, 48-50 (1950) (hearings compelled by reason of due process must be conducted in compliance with APA, §§ 554 and 556); Clardy v. Levi, 545 F.2d 1241, 1244 (9th Cir. 1976) (same); *see* Butz v. Economou, 438 U.S. 478, 513-514 (1978).

VI. FRAP 3(c)(1)(A) and 3(c)(3)

The party-appellant in this case is the F.R.C.P. Rule 23(b)(2) class certified by order of the U.S. District Court for the Western District of Pennsylvania on October 1, 2007. Docket no. 82. HUD has not appealed this order.

When appealing a judgment denying class claims, FRAP Rules 3(c)(1)(A) requires the notice to "*specify*" the class "*by naming* [it] in the caption *or* body of the notice [emphasis added]." Rule 3(c)(3) states how to *name* a class. Even when the class has not been certified, Rule 3(c)(3) provides that "the notice of appeal is sufficient if it *names one person* [who is] qualified to bring the appeal as representative of the class [emphasis added]." Appellants complied with both FRAP 3(c)(1)(A) and 3(c)(3). The notice specified the class "in the caption…by

describing [the class] with [the] term[]…et al" (Rule 3(c)(1)(A)), and it named Jean Massie, whom the District Court certified as the lead representative member of the class, in the body of the notice (Rule 3(c)(3)).[14] HUD's argument that Rule 3(c)(3) requires the phrase "et al." to appear also in the body of the notice ignores the plain language of the rule and Rule 3(c)(1)(A). HUD Brief, p. 53, 55 ("Rule… 3(c)(3) is applicable here…. [I]n neither her notice [n]or in her attempted amended notice, did [Jean Massie] indicate *in any way* that Jean Massie, **et al.** was the appellant [emphasis added].").

HUD also ignores the express intent of Rule 3(c)(3). See Notes of Advisory Committee on 1993 Amendments, "Note to Subdivision (c)," discussed in Class Brief at pp. 35-36. This function of Rule 3(c)(3) is particularly important when the class has been certified under FRCP 23(b)(2), as the unnamed members are guaranteed neither notice of the judgment nor of the timeframe within which to appeal. Fundamentally, Rule 3(c)(3) guarantees the due process rights of the unnamed class members. As stated by this Court on September 9, 2009, "[w]e liberally construe Rule 3(c)'s requirements. Cronin v. Citifinancial Servs., 2009 U.S. App. LEXIS 20113, p. 4 (3d Cir. Sept. 9, 2009).

VII. Conclusion

[14] Because Rule 3(c)(3), pertaining to class actions, permits *naming* a class by naming only "one person" who is qualified to represent the class, the notice would have been sufficient to comply with Rule 3(c)(1)(A) even if it named Jean Massie in the caption *and* body of the notice without use of the phrase "et al."

There is no question that HUD determined this property to be feasible for repair with HAP contract rents. It is likewise indisputable that permanent displacement occurred because HUD decided to dispose of the property for demolition and redevelopment, rather than make or require repairs, and HUD provided funding for this. Therefore, HUD was legally required to preserve the HAP contract and provide URA-level relocation assistance.

HUD was within its discretion to enable this redevelopment. However, it violated its discreet duties to maintain the HAP at the property and provide URA-level relocation benefits to those displaced for the project. This Court must compel these actions unlawfully withheld by the agency.

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Certifications

I hereby certify that the word count of this Reply Brief of Appellant ***does not*** comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because there are ***8704*** words combined, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because they have been prepared using the Times New Roman style font in font size 14 of Microsoft Word 2002. The text of this brief and the hard copies of the brief are identical. A virus check was performed on the brief using a commercial antivirus software program.

I also certify that I am causing this Reply Brief of Appellants to be served to the following person via this Court's CM/ECF filing system on the date stated.

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