No.09-1087

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JEAN MASSIE,

Appellant

v.

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

Appellees

Appeal from the Final Order of the U.S. District Court for the the Western District of Pennsylvania (Ambrose, J.) at Civil No.06-1004 Entered on October 31, 2008

BRIEF FOR THE APPELLEES

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JURISDICTION

This is a direct appeal stemming from the granting of the Motion for Summary Judgment filed by appellees United States Department of Housing and Urban Development (HUD) and its Secretary and dismissal of appellant Massie's complaint filed in the Western District of Pennsylvania. The district court had jurisdiction over the action by virtue of 28 U.S.C. § 1331.

The judgment order of the district court was entered on the docket on September 26, 2008 (A 53a, Docket No. 131).[1] Appellant Massie filed a

[1] All record citations preceded with the letter "A" refer to the Appendix filed by the appellant. Additional citations preceded by the letters "AR" refer to pages of the

Motion for Reconsideration in the district court on October 6, 2008 (A 53a, Docket No. 132). The Motion for Reconsideration was denied by an Order entered on October 31, 2008 (A 53a, Docket No. 137). Appellant Massie filed a timely notice of appeal on December 30, 2008 (A 54a, Docket No. 141).

This Court has jurisdiction to decide the appeal pursuant to 28 U.S.C. § 1291, because it is an appeal from a final judgment that disposes of all claims with respect to all parties.

Administrative Record which are included within Volume III of the Appendix (A 608a-1055a). The Administrative Record and Supplemental Administrative Record were filed in the District Court (A 49a, Docket No. 87; A 50a, Docket No. 101).

ISSUES PRESENTED and STANDARDS OF REVIEW

1. Whether the district court erred in granting summary judgment in favor of the Defendant/Appellees on the basis that there was no violation of 109 P.L. 115, § 311, that the Defendant/Appellees did not violate any management or disposition regulations and that Plaintiffs waived any claim of a due process violation.

(a) Appellant Jean Massie filed a civil complaint raising the claims that were then placed in issue before the District Court by cross-motions for summary judgment (A 50a, Docket Nos. 103 and 106).

(b) The district court's summary judgment decision is subject to the plenary standard of review, and this Court applies the same test as the district court. Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993). In "all cases summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Id. As this Court has noted, and as Federal Rule of Civil Procedure 56(e) requires, "[w]here the movant has produced evidence in support of its motion for summary judgment, the nonmovant cannot rest on the allegations of the pleadings and must do more than create some metaphysical doubt." Id. Thus, a party resisting summary judgment may not "'rely merely upon bare assertions, conclusory allegations or suspicions.'" Gans v. Mundy, 762 F.2d 338, 340 (3d Cir. 1985).

A court may not, at the summary judgment stage, act as a fact-finder, weighing evidence and making credibility determinations. Big Apple v.

BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). However, summary judgment may be granted "'where the facts are undisputed and only one conclusion may reasonably be drawn from them.'" Gans, 762 F.2d at 341 (emphasis added, quoting Flying Diamond Corp. v. Pennaluna Co., 586 F.2d 707, 713 (9th Cir. 1978)).

The standard of review over statutory interpretation is plenary. United States v. Knox, 977 F.2d 815 (3d Cir. 1992).

Additionally, this Court must affirm an agency decision that is supported by substantial evidence. Title 5 U.S.C. § 706(2)(E). The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In determining whether substantial evidence supports the decision, this Court does not, however, make credibility determinations or reweigh evidence. See NLRB v. Walton Mfg. Co., 369 U.S. 404, 405 (1962). Thus, as this Court has held, "when an agency is given discretion to make a decision, it can only be overturned if it is arbitrary, capricious or an abuse of discretion." National Small Shipments Traffic Conference v. United States, 887 F.2d 443 (3d Cir. 1989).

Thus, agency decision making is subject to limited review. An action will not be found to be arbitrary and capricious if the action is rational, based on relevant factors, and within the agency's statutory authority. Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 42 (1983); Frisby v. United States Housing and Urban Development, 755 F.2d 1052, 1055 (3d Cir. 1985).

2. Whether individual Plaintiff Jean Massie is the sole Appellant in this appeal.

(a) Jean Massie filed the only Notice of Appeal that is before this Court (A 1a).

(b) The Court exercises plenary review over the question whether it has jurisdiction to consider the appeal. In re Blatstein, 192 F.3d 88, 94 (3d Cir. 1999). See In re Meyertech Corp., 831 F.2d 410, 413-14 (3d Cir.1987). See also Am. Motorists Ins. Co. v. Levolor Lorentzen, Inc., 879 F.2d 1165, 1169 (3d Cir. 1989) (noting "we have the responsibility to satisfy ourselves of our jurisdiction"); Thermice Corp. v. Vistron Corp., 832 F.2d 248, 251 (3d Cir. 1987).

STATEMENT OF RELATED PROCEEDINGS

This case has not been before this Court previously.

A notice of appeal captioned as an "Amended Notice of Appeal" was filed in the District Court on February 24, 2009 (A 54a, Docket No. 143). Based upon that filing in the District Court, an appeal was thereafter docket in this Court at No. 09-1544. On July 14, 2009, this Court dismissed the appeal at No. 09-1544 as untimely and the Court directed the parties to address who are properly appellants in appeal No. 09-1087 in their briefs on the merits in No. 09-1087 (This issue is addressed in Argument II.).

Counsel is not aware of any other related case or proceeding -- completed, pending, or anticipated -- before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

This case began with the filing of a complaint and a request for a temporary restraining order ("TRO") by Plaintiffs Jean Massie, et al. on July 26, 2006 (A 40a, Docket Nos. 1 and 2). Plaintiffs were residents of Third East Hills Park which, at one time, operated as a resident-owned housing cooperative.[2] Each resident, upon entry to Third East Hills Park, had the opportunity to purchase an ownership interest in the property by becoming a shareholder in Third East Hills Park, Inc. ("TEHP"). In the complaint, the Plaintiffs claimed they had been divested of their interests in TEHP.

The district court granted a TRO on July 27, 2006, received written submissions on the matter, held an injunction hearing on August 4, 2006 where live testimony and documentary evidence was submitted by all parties, and on August 9, 2006, the district court denied the preliminary injunction (Docket entry nos. 3-5 and 12). Plaintiffs' request for a preliminary injunction suggested that HUD had determined that TEHP's Board was dysfunctional and had been since 2002 (Docket entry no. 11). Plaintiffs noted that HUD claimed TEHP failed to comply with maintenance requirements which TEHP was contractually obligated to do (Id.). Plaintiffs admitted that although HUD attempted to provide technical assistance to TEHP, HUD ultimately concluded that TEHP's Board lacked the capacity to adequately meet its ownership responsibilities (Id.). Plaintiffs suggested that, as a result, HUD assumed mortgagee-in-possession status as of 2004 (Id.).

[2] On October 1, 2007, the District Court granted Plaintiffs' motion for class certification, noting that the class consisted of residents with fully-paid memberships as of the date of the notice of foreclosure (November 10, 2004) (A 48a, Docket No. 82).

The Defendants moved to dismiss the Plaintiffs' Complaint, on January 19, 2007. The district court granted the Defendants' motion under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on all but one count -- Count IV -- wherein Plaintiffs asserted a violation of 109 P.L. 115, § 311. The court dismissed Count IV under Fed. R. Civ. P. 12(b)(6) for failing to state a claim, thereby disposing of this matter and closing the case. (Docket entry nos. 13 and 33).

On January 29, 2007, Plaintiffs filed a motion for reconsideration. On March 1, 2007, the district court granted Plaintiffs' request for reconsideration and ordered the Clerk of Courts to reopen the case (Docket entry no. 40). On March 21, 2007, upon Defendants' motion, the court clarified the March 1, 2007 order, specifically identifying the only three surviving claims. They were: (1) HUD's alleged violation of 109 P.L. 115, § 311; (2) HUD's alleged violation of Plaintiffs' procedural due process rights as third party beneficiaries if HUD failed to provide Plaintiffs with the opportunity at the foreclosure hearing to provide factual objections to the foreclosure; and (3) HUD's alleged failure to comply with its own regulations involving the management and disposition of the HUD-held mortgages on Third East Hills Park Property (Docket entry no. 53).

Defendants filed the administrative record pertaining to this case on November 2, 2007 and filed a supplement to it on December 12, 2007 (Docket entry nos. 87 and 96). Defendants filed their motion for summary judgment, brief in support and concise statement of material facts on December 26, 2007, while Plaintiffs filed their motion, brief and concise statement on December 27, 2006 (Docket entry nos. 103-105 and 106-108, respectively). Responses were filed by both sides to the other's Motions and reply briefs followed (See,

docket entry nos. 113, 115, 121 and 122). The National Housing Law Project and Housing Preservation Project (NHLP/HP) sought and received permission to file an amicus curiae brief on behalf of Plaintiffs, to which Defendants responded (Docket entry nos. 120 and 129).

On September 26,2008, the district court granted the Defendants' Motion for Summary Judgment against the Plaintiffs and denied the Plaintiff's Motion for Summary Judgment (A 7a-37a). Massie, et al. v. U.S. Department of Housing and Urban Development, et al., 2008 WL 4443830 (W.D.Pa. Sept. 26, 2008). Appellant Massie filed a Motion for Reconsideration in the district court on October 6, 2008 (A 53a, Docket No. 132). The Motion for Reconsideration was denied by an Order entered on October 31, 2008 (A 53a, Docket No. 137). Appellant Massie filed a timely notice of appeal on December 30, 2008 (A 54a, Docket No. 141; A 1a).

STATEMENT OF FACTS

A. Introduction.[3]

This appeal by Appellant Jean Massie is based upon assertions that the District Court erred in granting summary judgment in favor of the Defendant/Appellees.[4] In order to place the issues that were the subject of the motions for summary judgment in context, as it did in the District Court, the Appellees will set forth much of the factual information that they presented to the District Court, even though not all of that information might be material to the District Court's decision on the motions. To the extent that the Appellees have not reviewed herein any factual information, the Appellees would note that the District Court engaged in a very thorough review of the background and factual material in its Opinion and Order and Appellees cite and rely upon that thorough review and analysis (A 7a-27a).

At issue in the District Court was §311 of 109 P.L. 115. This statute,109 P.L. 115, was essentially a legislative funding bill for FY 2006. §311 of that legislation provided:

> Notwithstanding any other provision of law, in fiscal year 2006, in managing and disposing of any multifamily property that is owned or held by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payments under section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property. To the extent the Secretary determines that such a multifamily

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[3] The Defendant/Appellees will submit that the only appellant properly before this Court is "Jean Massie." In Argument II, it is asserted, in response to this Court's direction, that this Court is without jurisdiction to consider the claims of anyone other than appellant Jean Massie. Never-the-less, the Appellees will review the factual background of the case as presented in the District Court and respond to the arguments of the appellant challenging the District Court's grant of summary judgment in favor of the Appellees and against the group of Plaintiffs in the court below.

[4] Defendant/Appellees will be referred to later in this brief generally as "HUD."

> 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.

It is this provision, contained in the FY 2006 funding legislation, that was asserted by the Plaintiffs as the basis for the claims that were presented in the District Court. Defendant/Appellees submit that the Plaintiffs' misinterpretation and flawed construction of §311 is the cornerstone of their claims, which were properly found by the District Court to be without merit.

B. The Factual Background Regarding HUD'S Discontinuation of Project-Based Payments Under the HAP Contract.

1. The Provisions of HUD's HAP Contract With The Co-Op.

Third East Hills Park, Inc. ("the Co-op") entered into a Section 8 Housing Assistance Payments ("HAP") contract with HUD on September 13, 1976 and, on May 24, 2001, the parties entered into a contract that renewed the prior HAP contract for an additional twenty (20) years (AR 95-130). The HAP contract provided that the Co-op would lease the units in Third East Hills Park housing development ("TEHP" or "the Property") to eligible low-income families and that HUD would pay a portion of each eligible tenant's monthly rent (AR 95-96, 121-23). The HAP contract required the Co-op to, among other things, "maintain and operate the Contract Units and related facilities so as to provide Decent, Safe, and Sanitary housing." (AR 100).

The HAP contract provided that if, in HUD's determination, the Co-op failed to maintain the Property as required, HUD must notify the Co-op of the nature of the noncompliance, the actions required to cure the noncompliance, and the time by which the noncompliance must be cured (AR 112).

The HAP contract further provided that, if the Co-op failed to cure its noncompliance to HUD's satisfaction within the time prescribed in the notice, HUD had the right to abate the housing assistance payments in whole or in part (AR 100), terminate the contract in whole or in part, or take other corrective action (AR 112).

2. Background Regarding REAC Inspections.

HUD maintains a Real Estate Assessment Center ("REAC") to perform inspections of properties subject to HAP contracts; such inspections are performed pursuant to uniform standards set forth in 24 C.F.R. § 5.705. REAC inspects a property and uses the results, generated by a uniform inspection process, to develop a score for the property's physical condition. See 24 C.F.R. § 200.857(a).

As an alternative to inspecting every unit, REAC often inspects a statistically valid sample of units and derives the property's score from that sample. See, e.g., 24 C.F.R. § 902.20. REAC computes the physical inspection score based on a 100-point scale, with 100 indicating the highest score possible, and with a score of less than 60 indicating that a property is not being maintained in a decent, safe and sanitary condition. See 24 C.F.R. § 200.857(b). In addition to and regardless of the overall score, REAC notes exigent health and safety ("H&S") deficiencies that the owner must remediate immediately. See 24 C.F.R. § 200.857(c)(2).

3. REAC Inspections Of The Property.

REAC inspected the Property several times, including inspections on October 9, 2002; December 5, 2003; and September 22, 2004 (AR 180-87, 157-67, 168-79). For the October 9, 2002 inspection, the Property received a score of 53c*, with the “c” indicating that REAC found one or more exigent

health and safety deficiencies calling for immediate attention or remedy, and with the asterisk indicating that REAC found health and safety deficiencies with respect to smoke detectors (AR 180).

The October 9, 2002 REAC inspection report details deficiencies including the following: broken and missing hand railing; damaged door frames and locks; damaged, falling, and leaning fences; eroded grounds and overgrown vegetation; graffiti; damaged sinks, tubs, cabinets and floor coverings; missing drains and manhole covers; missing hot water pressure relief valves; blocked emergency exits; common area routes inaccessible to disabled users; mold; and infestation (AR 180-187).

In response to the failing REAC report, on May 7, 2003, HUD sent the Co-op a notice stating that it was not fulfilling its obligation to maintain the Property in decent, safe, and sanitary condition; the notice also identified the deficiencies, and specified that the Co-op had 60 days to cure those deficiencies (AR 837-838).

REAC inspected the Property again on December 5, 2003, and awarded a score of 55c* (AR 157-167). The December 5, 2003 REAC inspection report again includes deficiencies in the Property, including the following: broken and missing hand railing; missing, damaged, or inoperable refrigerators; holes in walls and spalling; damaged, falling, and leaning fences; eroded grounds and overgrown vegetation; graffiti; pot holes; damaged sinks, tubs, cabinets and floor coverings; damaged and inoperable electrical and ventilation systems; exposed wires near light switches; damaged door frames and locks; water damage; inaccessibility for disabled users; and mold (AR 157-167).

HUD's Departmental Enforcement Center ("DEC") conducted a site visit of the Property on June 22-23, 2004 to determine if, one year after HUD had

notified the Co-op of the Property's physical deficiencies and six months after a failed follow-up inspection, the Co-op had brought the Property into compliance (AR 49-73). During the site visit on June 22-23, 2004, the DEC inspected all units of the Property noted in the December 5, 2003 REAC inspection report, as well as additional units it selected randomly (AR 49).

During the site visit on June 22-23, 2004, the DEC observed physical deficiencies in the interior of these units that it selected randomly, including the following: mold; holes in walls, doors, and ceilings; fire hazards; missing and damaged outlet covers; damaged ranges/ovens; ant infestation; missing and defective smoke detectors; corroded faucets; and damaged sinks (AR 49-50). During the site visit on June 22-23, 2004, the DEC also observed deficiencies on the exterior of the Property, including the following: graffiti; damaged door and window frames; damaged exterior lighting; eroded grounds; pooling of water outside the front doors of units; and damaged, missing, and leaning fences (AR 50).

The DEC site visit report noted that "[t]he majority of the above findings are recurring issues from previous inspections, including the REAC inspection of December 5, 2003," and it advised members of the Co-op board that "the numerous, recurring deficiencies and health and safety violations at the property made the [P]roject unsuitable for residency and that HUD was being left with no alternative but to take action to protect the tenants." (AR 50, 72).

On July 12, 2004, HUD again sent a notice to the Co-op regarding its failure to maintain the project in a decent, safe, and sanitary condition; such notice identified several of the observed deficiencies, and instructed that the Co-op had 30 days to (1) conduct a survey identifying the physical deficiencies of the project; (2) correct the physical deficiencies at the project, including, but

not limited to, those deficiencies identified in the REAC inspection and the notice; and (3) certify to HUD compliance with these requirements (AR 76-77). The notice dated July 12, 2004 reiterated that, if the Co-op failed to take these actions, HUD may, without further notice, pursue any and all available remedies, including, but not limited to, abatement/suspension of the HAP contract and foreclosure (AR 76-77).

On September 22, 2004, after the Co-op's 30-day cure period had run, REAC inspected the Property and awarded a score of 43c* (AR 168). The REAC report again found deficiencies in the Property, including the following: broken and missing handrails; missing, damaged, and inoperable refrigerators; holes in walls, spalling; damaged, falling, and leaning fences; missing doors; eroded grounds and overgrown vegetation; graffiti; pot holes; damaged sinks, tubs, cabinets and floor coverings; inoperable electrical and ventilation systems; damaged door frames and locks; water damage; mold; damaged gutters; and common area routes inaccessible to disabled users (AR 168-179).

4. HUD's Election To Abate The Co-Op's HAP Contract.

Because the Co-op failed to cure the Property's physical deficiencies within the 30-day period prescribed in the July 12, 2004 notice, HUD elected to exercise its right pursuant to the HAP contract and 24 C.F.R. § 886.123 to abate the contract (AR 133-134). On November 10, 2004 HUD abated the contract and, as the HAP contract required (AR 101), HUD provided written notification of the abatement to the Co-op (AR 133-134).

In a memorandum dated February 1, 2005, the director of HUD's Atlanta Multifamily Property Disposition Center requested a series of documents pertaining to the project's fiscal condition, in connection with its referral of the project for foreclosure (AR 246-247). On February 9, 2005, Wallace and

Associates Architects, who were retained by HUD for this purpose, issued a Comprehensive Repair Survey Report and cost estimate for the project, which estimated the total costs for repairs as $2,497,098.00 (AR 260, 519-526). In a Peer Analysis dated April 11, 2005, HUD determined that repair costs and operating expenses for the project far exceeded potential property income and "as-is" value (AR 264-266).

HUD terminated the HAP contract on March 10, 2006 (AR 809).

5. Provisions Of HUD'S Multifamily Housing Memo.

On May 31, 2006, HUD's Office of Housing issued an internal memorandum with the subject line "Fiscal Year 2006 Property Disposition Program," the stated purpose of which was "to provide instructions . . . regarding property disposition requirements for the FY 2006." (Multifamily Housing Memo at p. 1) (Docket No. 35, Exhibit 1). Section V of the Multifamily Housing Memo, titled "Project-Based Section 8 Assistance," described HUD's interpretation of the applicability of 109 P.L. 115, § 311 to HUD dispositions (Multifamily Housing Memo at p. 4) (Docket No. 35, Exhibit 1). Section V of the Multifamily Housing Memo stipulated a HUD disposition policy that was "[i]n accordance with Section 311 [of 109 P.L. 115]," stating:

> [T]he 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.

(Multifamily Housing Memo at p. 4) (Docket No. 35, Exhibit 1).

The Multifamily Housing Memo further stated as follows:

> To the extent the Secretary determines that it is not feasible to continue such assistance for the property, based on cost of maintaining such assistance or other factors, the Secretary, in consultation with the residents, may provide project-based

> Section 8 rental assistance at another existing property (or properties) or provide "other rental assistance." (See below, under the Feasibility Analysis Section, if it is recommended that the Section 8 HAP contract should be terminated after the foreclosure sale.)

(Multifamily Housing Memo at p. 4) (Docket No. 35, Exhibit 1) (emphasis added).

In the Multifamily Housing Memo, HUD noted exceptional cases where section 311 did not require maintenance of a HAP contract:

> Note: For properties where assistance under the project-based section 8 HAP contract has been abated and the HAP contract has been or will be terminated upon completion of the relocation of all the residents, **the Department will not offer the property with a HAP contract at the foreclosure sale**.

(Multifamily Housing Memo at 4) (Docket No. 35, Exhibit 1) (emphasis added).

In a section of the Multifamily Housing Memo titled "Feasibility Analysis," HUD described the process for fulfilling both the requirements in §311 of 109 P.L. 115 for a feasibility determination and subsequent tenant consultation regarding other rental assistance to be provided (Multifamily Housing Memo at pp. 6-8) (Docket No. 35, Exhibit 1).

The Multifamily Housing Memo further requires the Property Disposition Center to make a recommendation regarding the feasibility of maintaining assistance under the Property's project based Section 8 HAP contract, based upon the Comprehensive Repair Survey and financial Peer Analysis (Multifamily Housing Memo at pp. 6-7) (Docket No. 35, Exhibit 1).

The Multifamily Housing Memo also states that the determination of feasibility may also be accomplished by "considering other factors"; however, in either case, HUD stated that the Director of HUD's Office of Asset

Management would be authorized to make the final determination (Multifamily Housing Memo at pp. 6-7) (Docket No. 35, Exhibit 1).

The Multifamily Housing Memo also provides as follows regarding HUD's policy for compliance with the tenant consultation required by section 311 should the Secretary determine that a property is not feasible for preservation of a HAP contract:

> Section 311 also requires the Department to consult with the residents if the project-based Section 8 HAP contract will not be maintained. . . . The foreclosure notification will include the Department's requirements for disposing of the property. Whether the property will be sold with or without continuation of the project-based Section 8 HAP contract, the residents will be given 30 days to respond and comment on the foreclosure notification and the Department's disposition requirements.

(Multifamily Housing Memo at pp. 7-8) (Docket No. 35, Exhibit 1).

C. Factual Background Regarding Relocation Assistance.

1. Relocation Assistance Offered Upon Abatement Of The HAP Contract.

On November 17, 2004, HUD sent a notice of displacement to each of the residents of TEHP, indicating that "for health, safety and security reasons, [HUD] has made a determination to relocate the remaining tenants at [the Property]." (AR 194).[5] The notice of displacement dated November 17, 2004 further stated that HUD had contracted with Lord and Dominion Investments Management ("L&D") to provide assistance in locating replacement housing for each tenant, and that a meeting regarding relocation and relocation benefits would be held on December 2, 2004 (AR 194).

The notice of displacement dated November 17, 2004 also stated that residents with executed leases would be reimbursed for the reasonable amount

[5] The District Court incorrectly notes the date of this notice of displacement as November 14, 2004 (See A 16a, District Court Opinion at p. 10).

of moving expenses and that income-eligible tenants would receive a voucher for tenant-based Section 8 rental assistance, which can be used anywhere in the United States and its territories (AR 194). Additionally, the notice of displacement dated November 17, 2004 stated that residents should "[p]lease note that you will be required to continue paying rent at [the Project] as long as you continue to live there. Receipt of a voucher does not relieve you of this responsibility." (AR 194).

On or about December 8, 2004, L&D notified the residents of TEHP that board president Yevorn Gaskins had requested that L&D no longer use the board room, located on the premises of the project, to conduct its relocation services for the residents; accordingly, L&D informed the tenants that it would be moving to an off-site location by December 13, 2004 (AR 228).

On February 10, 2005, HUD notified the residents of TEHP that HUD intended to foreclose on the Property and indicated that the buyer at the foreclosure sale would be subject to various terms and conditions related to the operation of the Property (AR 252). The notice dated February 10, 2005 further stated that, according to those terms and conditions, the buyer of the Property would be required to provide relocation assistance in the form of advisory services, relocation expense payment and other assistance, in the event residents are displaced due to redevelopment of the project (AR 252).

Additionally, the notice dated February 10, 2005 stated that, "Tenants currently receiving project based rental assistance will receive assistance under the Section 8 Housing Voucher program, if the assistance is available and the tenant is eligible for the program to be utilized." (AR 252).

2. HUD's Acquisition Of The Property After The Relocation Was To Be Completed, And Conveyance To URAP.

In a letter dated March 4, 2005, the Urban Redevelopment Authority of Pittsburgh ("URAP") informed HUD that it may be interested in purchasing the property (AR 255-256). In a letter dated April 20, 2005, from HUD to URAP, HUD stated that it would be willing to consider a sale of the property to URAP if certain conditions were met, but informed URAP that because the project-based HAP contract had been abated due to the poor physical condition of the project, and HUD was relocating the residents, the project-based HAP contract could not be continued (AR 298-300).

On June 20, 2005, HUD notified the residents of TEHP that the relocation assistance efforts would end on July 31, 2005, and that each resident must move out of the project prior to that date in order to receive full relocation benefits (AR 605). HUD's notice dated June 20, 2005 further stated that residents deciding to relocate after July 31, 2005, would still be eligible to receive a voucher, but would no longer be able to obtain additional relocation assistance (AR 605).

HUD paid approximately $330,000 to L&D to cover relocation expenses for residents of TEHP (AR 608-617), $280,000 of which came from funds redirected under the Property's HAP contract (AR 609). The majority of the residents of TEHP accepted HUD's offer of relocation expenses and successfully relocated (Complaint ¶ 15).

As of November 30, 2007, approximately 14 residents remained at the Property (Plaintiffs' Brief In Support of Approval of Stipulation) (Docket No. 94). On June 9, 2006, HUD authorized payment of an "Up Front Grant" to

URAP of $3,400,000 should HUD acquire the Property at foreclosure (AR 544).

On June 22, 2006, HUD notified the residents of TEHP that HUD would attempt to acquire title to the Property at the foreclosure auction, and that HUD planned to execute a contract of sale with URAP providing for the immediate sale of the Property to URAP should HUD succeed in acquiring the Property at auction (AR 550). Attached to the notice dated June 22, 2006 was a copy of HUD's initial disposition plan detailing the planned foreclosure acquisition and transfer of title, as well as URAP's plans for redevelopment of the Property (AR 551-553).

In the initial disposition plan attached to the notice dated June 22, 2006, HUD stated that, "the Property had project-based Section 8 assistance for all of the units. The Section 8 assistance was terminated because of the poor physical condition of the Property and HUD provided funding to the Pittsburgh Housing Authority for Housing Choice Vouchers for all eligible residents." (AR 551).

The initial disposition plan attached to the notice dated June 22, 2006 provides:

> [URAP] must relocate the remaining residents within twelve (12) months of taking title to facilitate the redevelopment of the Property. [URAP] has the option to relocate the remaining residents either on or off site. HUD has provided sufficient funding to the Housing Authority of Pittsburgh for Housing Choice Vouchers for all eligible residents to assist in the relocation effort. [URAP] will be required to provide advance written notice of the expected displacement. The notice shall be provided as soon as feasible, describe the assistance and procedures for obtaining the assistance and the procedures for obtaining the assistance, and contain the name, address and phone number of an official responsible for providing the assistance.

(AR 552).

The initial disposition plan attached to the notice dated June 22, 2006 further provided that residents of TEHP will be reimbursed for reasonable moving expenses and that URAP will make an effort to allow tenants to apply for readmission to the project upon the completion of its redevelopment (AR 552).

HUD provided the residents of TEHP with an opportunity to submit comments regarding the initial disposition plan, and requested the residents comment or respond to the proposed plan by July 22, 2006 (AR 550). HUD did not receive any comments to the initial disposition plan; accordingly, on July 25, 2006, HUD finalized and approved the plan (AR 600-604).

HUD issued its final disposition plan, which included identical provisions concerning relocation to those included in the initial plan, on July 25, 2006 (AR 600-604).

3. The Contract Of Sale Between HUD and URAP.

On July 5, 2006, HUD and URAP entered into a contract of sale, pursuant to which URAP agreed to take title to the Property, upon HUD's acquisition of title at the foreclosure sale, in exchange for a sales price of $1.00 and an agreement to continue to offer the units at an affordable level for a minimum of 25 years, among other restrictions (AR 555-562). The contract of sale between HUD and URAP also included an Up Front Grant Agreement, pursuant to which HUD agreed to provide URAP with a grant covering a percentage of the redevelopment costs (AR 585).

Rider 6 to the contract of sale between HUD and URAP required URAP to relocate all current residents to alternative decent, safe and sanitary housing within twelve months of the date of the contract, and to comply with the relevant statutes and regulations, including The Housing and Community

Development Amendments of 1978, 12 U.S.C. § 1701z-11(j), 24 C.F.R. § 290.17, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, et seq., and 24 C.F.R. Part 249 in its relocation of the residents (AR 576-577).

Rider 6 to the contract of sale between HUD and URAP additionally provided that URAP was required to reimburse residents for reasonable moving expenses, including expenses incurred in returning to the redeveloped Property, and provide advance written notice of any expected displacement, describing the assistance and procedures for obtaining the assistance and containing the name, address, and phone number of an official responsible for providing the assistance, as soon as feasible (AR 576-77).

On October 26, 2006, the Property was offered for sale at foreclosure; HUD was the high bidder, and title to the Property was transferred to HUD via deed. AR 741-47, 753-58. Also on October 26, 2006, HUD transferred title to the Property to URAP by special warranty deed, pursuant to the contract of sale (AR 751-52, 764-66, 798). The special warranty deed included all of the riders attached to the contract of sale, including rider 6, requiring URAP to provide relocation assistance for the residents of TEHP (AR 777-778).

4. The MOU's Provisions For Relocation Assistance.

On November 9, 2007, URAP entered into a Memorandum of Understanding ("MOU") with 3rd East Hills Limited Partnership ("TEHLP"), which is supplemental to and intended to facilitate the intentions of the contract of sale between URAP and TEHLP (Docket No. 94-2, ¶ 1.1). The MOU states that URAP has conveyed title to the Property to TEHLP and that TEHLP will demolish existing units in order to renovate the Property (Docket No. 94-2, ¶¶ 1.1-1.3). The MOU states that TEHLP intends to develop 10

three-bedroom single-family detached new for-sale units and 20 three-bedroom duplex attached new for-sale units (Docket No. 94-2, ¶¶. 3.4, 3.7).

Although the total development costs of the new for-sale units will exceed $250,000 per unit, the 10 three-bedroom single family detached new for-sale units will have a list sales price of $120,000 but an effective sales price of $75,000 in the form of a first mortgage with a subsidy available from city, county and state sources to serve as soft second mortgage in the amount of $45,000 (Docket No. 94-2, ¶¶ 3.4, 3.7). The 20 three-bedroom duplex attached new for-sale units will have a list sales price of $112,000 but an effective sales price of $67,500 in the form of a first mortgage with a subsidy to serve as soft second mortgage in the amount of $45,000 (Docket No. 94-2, ¶¶. 3.4, 3.7).

In the MOU, URAP and TEHLP anticipate that purchasers of new for-sale units will be required to make a three percent down payment and secure approximately 97 percent of the effective sales price through a first mortgage; they further anticipate that most tenants, former and present cooperative members, and former residents who would qualify under the requirements of the lenders to purchase a new for-sale unit would qualify for down-payment assistance through URAP (Docket No. 94-2, ¶¶ 3.5, 3.6). The MOU provides that tenants and former tenants of the Property, who resided in the Property on or after October 26, 2006, shall have the first priority for both new rental units and new for-sale units at the new development (Docket No. 94-2, ¶¶ 9.1, 9.2, 9.3).

The MOU further provides that cooperative members who resided at the Property on or after November 10, 2004 shall have a second priority for both new rental units and new for-sale units, provided they meet TEHLP's objective and reasonable suitability requirements or have the ability to purchase a

for-sale home (Docket No. 94-2, ¶¶ 9.1, 9.2, 9.3). Under the MOU, all other persons who lawfully resided at the Property on or after November 10, 2004, shall have a third priority for both new rental units and new for-sale units (Docket No. 94-2, ¶¶ 9.1, 9.2, 9.3).

The MOU provides that, because the new rental units will be financed under the Low Income Housing Tax Credit ("LIHTC") Program administered by the Pennsylvania Housing Finance Agency ("PHFA"), all tenants and others who apply for the new rental units will have to meet the eligibility requirements of the LIHTC Program (Docket No. 94-2, ¶ 9.6). Any tenants of TEHP who elect to remain on site pursuant to Article IV of the MOU and do not at the time of applications for a new rental unit either meet the eligibility requirements of the LIHTC Program or purchase a new for-sale home will be given at least 90 days written notice that they must relocate, and will receive the relocation assistance and benefits required to be provided a Displaced Person under the Uniform Relocation Act (Docket No. 94-2, ¶ 9.6).

In order to qualify for assistance under the Uniform Relocation Act, the MOU provides that the tenant must remain on site until the Notice of Relocation Eligibility is issued (Docket No. 94-2, ¶ 9.6). The MOU provides that tenants electing to move into temporary on-site units shall receive moving and relocation assistance, including all out-of pocket expenses necessary for the move to and from the temporary unit and a moving contractor to move tenants' belongings at no cost to the tenant (Docket No. 94-2, ¶4.4, Ex. 3, Ex.4).

Pursuant to the MOU, TEHLP is also offering tenants incentives to move off-site, including a one time payment of $5,000.00, a fixed moving allowance, based on the tenants' present room count ($1,280 for three-bedroom

units, $1,450 for four-bedroom units), a one time payment of tenant's security deposit not to exceed one month's rent, utility deposit payments in an amount not to exceed $300, and first priority on the waiting list (along with residents remaining in temporary on-site units) for the new units when the new units are ready for occupancy (Docket No. 94-2, ¶¶ 5.1, 5.2, Ex. 3, Ex. 4).

Pursuant to the MOU, to further assist tenants in moving off-site, TEHLP will make available to all tenants an up-to-date listing of available units in Pittsburgh and Allegheny County, in both non-racially impacted and other neighborhoods and meet with each Tenant to determine their personal needs and preferences (Docket No. 94-2, ¶¶ 7.1, 7.2, 7.3 and Ex. 4).

Pursuant to the MOU, TEHLP will also provide transportation for tenants to look at available units and assistance necessary to enable the tenant to complete any application required by the unit's owner, as well as request the appropriate housing authority to inspect any available unit the tenant desires to rent (Docket No. 94-2, ¶¶ 8.1, 8.2, 8.4).

Pursuant to the MOU, TEHLP will also permit the tenants to form a representative entity during the planning and decision making process to provide input on policies and decisions affecting the new development (Docket No. 94-2, ¶10.1).

D. Plaintiffs' Stipulation of Non-Interference.

On November 30, 2007, plaintiffs filed a Motion for Approval of Stipulations, Docket No. 93, and sought the district court's approval of Plaintiffs' Stipulation of Non-Interference (Docket No. 93-2). On December 4, 2007, the district court granted the motion and docketed the Plaintiffs' Stipulation of Non-Interference (Docket No. 95). In the Stipulation of Non-Interference, plaintiffs acknowledged that, on October 26, 2006, the

property which is the subject of this litigation was conveyed three times — by deed from the HUD Foreclosure Commissioner to HUD, then by deed from HUD to URAP, and finally by deed from URA to TEHLP (Docket No. 93-2).

Plaintiffs further stipulated that no member of the plaintiff class will seek to reverse the foreclosure sale of the property, ask for equitable relief that jeopardizes the right or ability of TEHLP to redevelop the property, or challenge or call into question the validity of TEHLP's legal and equitable title to and ownership of the property (Docket No. 93-2).

SUMMARY OF ARGUMENT

HUD did not unlawfully withhold rental subsidies from Appellant Jean Massie, or from any of the Plaintiffs. No unlawful action occurred and Appellant Massie is wrong in asserting that HUD misinterpreted 109 P.L. 115, Section 311. That statutory provision does not apply to this case. Section 311 is explicitly limited to actions taken by HUD "in fiscal year 2006." Because the government's fiscal year begins on October 1st and ends the following year on September 30th, fiscal year 2006 ended on September 30, 2006. HUD's action that purportedly triggered section 311 was its foreclosure of the Property on October 26, 2006. Because the foreclosure occurred during fiscal year 2007 and section 311 applies only to actions taken by HUD in fiscal year 2006, section 311 is facially inapplicable to this action.

Moreover, section 311 explicitly requires the preservation of Section 8 rental assistance payments "that are ***attached*** to any dwelling units in the property." 109 P.L. 115, § 311 (emphasis added). HUD ceased all rental assistance payments to the Property no later than March 10, 2006, when it terminated the HAP contract. HUD submits that it ceased rental assistance payments on November 10, 2004, when it abated the HAP contract. The Property was receiving no rental assistance payments for almost two years -- and had no HAP contract -- more than seven months before HUD foreclosed on the Property. Because the Property received no Section 8 assistance in any form that could have been preserved on the date of foreclosure, such payments were not "attached to any dwelling units in the property" and therefore §311 is not applicable to this case. The issue in this case was whether the HAP contract was "attached" to the Property at foreclosure. Because Section 311 does not directly address that question, HUD was authorized to interpret the

statute in order to resolve this question. HUD's interpretation of Section 311is entirely consistent with the intent of the statute. While Section 311 compels preservation of Section 8 payments attached to dwelling units at foreclosure, it is implicit in the overall statutory scheme that Congress did not intend HUD to continue payments at projects that are not decent, safe and sanitary. Where HUD has determined that the physical condition of a project is so sub-standard that the Section 8 contract must be abated and ultimately terminated, section 311 cannot be reasonably construed to require that the assistance payments should continue under the existing project based-contract. HUD's interpretation is reasonable, permitting the discontinuation of project-based payments when the HAP contract has been abated, and has been or will be terminated, due to poor conditions at the subject property. After an appropriate Chevron analysis, the District Court could and did properly defer to HUD's interpretation of the statute.

HUD fulfilled its obligations regarding relocation assistance. The Relocation Act was not triggered by HUD's November 17, 2004 notice of displacement or abatement of the HAP contract because HUD did not act to further a federal project. Rather, HUD issued the notice of displacement because of its concerns over the health, safety, and security of the residents, and not because of a purchase, demolition or rehabilitation by a third-party. Because the displacement here is not the "direct result of programs or projects undertaken by a Federal Agency or with Federal financial assistance", the Relocation Act does not apply. Because Massie and the other plaintiffs did not meet the statutory or regulatory definitions of "displaced person[s]," the Relocation Act did not apply to the abatement of the HAP contract. HUD has additional regulatory obligations under 24 C.F.R. § 290.17(d) with regard to

those residents that declined to exercise their right to relocate as a result of HUD's abatement of the HAP contract. HUD fully satisfied those obligations.

Appellant Jean Massie and the other Plaintiffs also failed to exhaust their administrative remedies, therefore their claims seeking relocation assistance pursuant to the URA and its regulations should have been dismissed on that basis. Finally, by stipulation, Plaintiffs waived their right to contest any and all aspects of HUD's foreclosure of the Property. They therefore no longer could sustain a claim that HUD violated the Plaintiffs' procedural due process rights.

This Court should recognize that the only appellant validly before this court is Jean Massie. There is no jurisdiction in this Court to consider the claims of the class. Jean Massie's argument that Fed. R. App. P. 3(c)(1)(A) and Fed. R. App. P. 3(c)(3) were both satisfied should be rejected.. She argues that the "caption" "Jean Massie, et al." in her notice of appeal was sufficient. However, in neither her notice or in her attempted amended notice, did she indicate in any way that Jean Massie, **et al.** was the appellant. Further, Jean Massie has not identified any claims that are unique as to her. As such the Court should affirm the District Court's summary judgment order in favor of the Defendant/Appellees and against individual appellant Jean Massie.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT APPELLEES ON THE BASIS THAT THERE WAS NO VIOLATION OF 109 P.L. 115, § 311, THAT THE DEFENDANT APPELLEES DID NOT VIOLATE ANY MANAGEMENT OR DISPOSITION REGULATIONS AND THAT PLAINTIFFS WAIVED ANY CLAIM OF A DUE PROCESS VIOLATION.

A. Applicable Standards of Review.

1. Motion for Summary Judgment.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 and exercises plenary review over the District Court's decision to grant summary judgment. McGreevy v. Stroup, 413 F.3d 359, 363 (3d Cir.2005). Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court reviewing a summary judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 330 (3d Cir.1995). However, a party opposing summary judgment "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." Podobnik v. U.S. Postal Serv., 409 F.3d 584, 594 (3d Cir. 2005) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ. P. 56(c). That is, Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence

of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. The plaintiff cannot merely rest on allegations in his complaint. Id. at 324. To defeat a motion for summary judgment, "the nonmoving party must adduce more than a mere scintilla of evidence in his favor." Williams v. Borough of Chester, 891 F.2d 458, 460 (3d Cir. 1989).

2. Review Under the Administrative Procedure Act.

The District Court found that the Plaintiffs' claims were brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. (see Docket No. 90). The scope of review in APA cases, whether the agency's action was arbitrary and capricious, is "narrow, and a court is not to substitute its judgment for that of the agency." Prometheus Radio Project v. FCC, 373 F.3d 372, 389 (3d Cir. 2004) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Rather, a reviewing court examines agency action in order to "ensure that, in reaching its decision, the agency examined the relevant data and articulated a satisfactory explanation for its action, including 'a rational connection between the facts found and the choice made.'" Prometheus Radio Project, 373 F.3d at 389-90 (quoting Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). In other words, a court may reverse an agency's decision only where it "is not supported by substantial evidence, or the agency has made a clear error in judgment." Prometheus Radio Project, 373 F.3d at 390. Moreover, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974).

B. HUD Did Not Violate Section 311 of 109 Public Law 115.

The District Court found that "[b]ased upon my analysis of the evidence presented and the legal statutory interpretation requirements, [ ] Defendants did not violate 109 P.L. 115, § 311." (A 26a). The District Court was correct in its analysis and in its conclusion.

Congress has repeatedly stated that one of the primary goals and purposes of national housing policy affected through federal assistance is to provide housing that is "decent," and that living conditions be suitable, decent, safe, and sanitary. See, e.g., 42 U.S.C. § 1441 ("Declaration of national housing policy" includes "the goal of a decent home and a suitable living environment"); 42 U.S.C. § 1437(a)(4) ("declaration of policy" for Section 8 housing assistance states that "our Nation should promote the goal of providing decent and affordable housing for all citizens"); 42 U.S.C. § 1437(b)(1) (defining "low-income housing" supported by Section 8 to mean "decent, safe and sanitary dwellings assisted under this chapter."); 42 U.S.C. § 1437f(a) (explaining that Section 8 provided authorization for assistance payments "[f]or the purpose of aiding low-income families in obtaining a decent place to live . . . .").

Consistent with this goal of decent, safe, and sanitary housing, HUD regulations explicitly authorize HUD to abate – i.e., stop – payments obligated pursuant to a Housing Assistance Payments ("HAP ") contract when a property owner "fail[s] to maintain a dwelling in Decent, Safe, and Sanitary condition." See 24 C.F.R. § 886.123(d). Moreover, HAP contracts typically provide that, when an owner fails to maintain the property in decent, safe, and sanitary condition, HUD is authorized to withdraw payments to the property owner and

redirect the dedicated contract funds to tenant relocation.[6] For example, the HAP contract in this case states:

> Housing assistance payments shall only be paid to the owner for contract units . . . leasing ***decent, safe and sanitary*** units from the Owner in accordance with statutory requirements, and with all HUD regulations and other requirements. If the Contract Administrator determines that the Owner has failed to maintain one or more contract units in decent, safe and sanitary condition, and has abated housing assistance payments to the owner for such units, the Contract Administrator may use amounts otherwise payable to the Owner pursuant to the Renewal Contract for the purpose of relocating or rehousing assisted residents in other housing.

(AR 122) (emphasis added).

Section 311 of 109 Public Law 115 consists of two clauses applying to the management and disposition of any multifamily property that is owned or held by the Secretary of HUD. The first clause mandates maintenance of rental assistance payments:

> Notwithstanding any other provision of law, ***in fiscal year 2006***, in managing and disposing of any multifamily property that is owned or held by the Secretary of [HUD], 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. . . .

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[6] Before the District Court, Plaintiffs misinterpreted the HAP contract to provide that HUD only had authority to abate payments for inspected units. Pursuant to the HAP contract, the owner must maintain the "Contract Units and related facilities so as to provide Decent, Safe, and Sanitary housing[.]" (AR 100, ¶ 1.7(a)). If the owner fails to properly maintain even one Contract Unit, it has failed to comply (Id.) Here, HUD found multiple substandard units (AR 157, 168, 180). After receiving notice and opportunities to cure, the owner still failed to comply (AR 133-34). At that point, HUD had "the right to terminate this Contract in whole or in part or to take other corrective action to achieve compliance." (AR 112, ¶ 2.7(b)) (emphasis added). Accordingly, the contract cannot reasonably be read to restrict HUD to abatement -- a lesser remedy than termination -- on a unit-by-unit basis (AR 112, ¶¶ 2.7(b) and (c)); see, e.g., Faltin Motor Transp., Inc. v. Eazor Exp., Inc., 273 F.2d 444, 445 (3d Cir. 1960).

109 P.L. 115, § 311 (emphasis added).[7] The second clause of section 311, however, provides a discretionary override of this mandate. It states:

> 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***.

Id. (emphasis added).

1. Section 311 Is Inapplicable To This Case.

It is axiomatic that the plain language of a statute is controlling. "We start, as we must, with the language of the statute." Bailey v. U.S., 516 U.S. 137, 144 (1995). As detailed below, the plain language of section 311 demonstrates that it does not apply to this case.

As a preliminary matter, section 311 is explicitly limited to actions taken by HUD "in fiscal year 2006." 109 P.L. 115, § 311. The government's fiscal year begins on October 1st and ends the following year on September 30th. See 31 U.S.C. § 1102. Accordingly, fiscal year 2006 ended on September 30, 2006. HUD's action that purportedly triggered section 311 was its foreclosure of the Property on October 26, 2006 (AR 741). Because the foreclosure occurred during fiscal year 2007 and section 311 applies only to actions taken by HUD in fiscal year 2006, section 311 is facially inapplicable to this action.[8]

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[7] The phrase "attached to any dwelling units" is not defined in section 8 of the United States Housing Act. See generally, 42 U.S.C. § 1437f. Rather, section 8 uses the terms "project-based assistance" and "tenant-based assistance." See 42 U.S.C. § 1437f(f)(6) and (f)(7).

[8] Appellant's attempted interpretation of the effect of the continuing resolution would render meaningless the express limitation of §311 to FY 2006. The continuing resolution was not passed until February 15, 2007, after FY 2006 had ended and after the foreclosure had occurred. See 101 P.L. 5 § 101(c)(9).

Moreover, section 311 explicitly requires the preservation of Section 8 rental assistance payments "that are ***attached*** to any dwelling units in the property." 109 P.L. 115, § 311 (emphasis added). In this case, however, HUD ceased all rental assistance payments to the Property no later than March 10, 2006, when it terminated the HAP contract (AR 809). Indeed, HUD asserts that it ceased rental assistance payments on November 10, 2004, when it abated the HAP contract (AR 133). HUD foreclosed on the Property on October 26, 2006 (AR 741). Thus, the Property was receiving no rental assistance payments for almost two years -- and had no HAP contract -- more than seven months before HUD foreclosed on the Property. Because the Property received no Section 8 assistance in any form that could have been preserved on the date of foreclosure, such payments were not "attached to any dwelling units in the property." 109 P.L. 115, § 311. Accordingly, section 311 is not applicable to this case.

The District Court initially inferred that HUD continued to provide rental assistance payments even after the November 10, 2004 notice of abatement, and that payments were thus "suspended, as opposed to completely abated, such that they were still 'attached' to some dwelling units." (See Docket No. 40, at p. 5). The District Court's inference was based on a February 10, 2005 notification to tenants that referred to tenants as "currently receiving rental assistance." (AR 252). In its decision denying Plaintiffs' motion for reconsideration, the District Court acknowledged this inference had proved to be incorrect because "the evidence of the record clearly and unequivocally shows that **all** rental assistance payments were abated as of November 10, 2004." (See Docket No. 137, at p. 3 (emphasis in original) (AR 133-34)). As of that date, HUD redirected the funds allocated to this project

under the HAP contract from rental assistance for units at the project, to tenants' relocation to units at different properties.[9] Thus, the Section 8 subsidy originally allocated for rental assistance was being used to fund relocation of the tenants to units that were decent, safe, and sanitary as of that date.

Because HUD ceased all rental assistance payments after November 10, 2004 and terminated the HAP contract on March 10, 2006, rental assistance payments were no longer "attached" to the Property on October 26, 2006, the date of foreclosure. As such, section 311 does not apply to this action.

The district court was therefore correct that "the plain meaning of §311 clearly does not require HUD" to continue to make rental assistance payments for dwelling units which once received rental assistance payments. (A. 23a).

2. The District Court Correctly Determined that, Even if Section 311 Applies, the Court Would Defer To HUD's Interpretation which Permits the Discontinuation Of Project-Based Payments When the HAP Contract Has Been Abated, and Has Been Or Will Be Terminated.

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court established a two-step standard for courts to review the interpretations of statutes promulgated by executive agencies. "First, always, is the question whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 843. If Congress has not directly addressed the issue, the agency is authorized to interpret the statute. Under this second step, the agency's interpretation is reviewed using a high degree of deference. "We have long recognized that considerable weight

[9]As previously noted, the HAP contract specifically provides that housing assistance payments shall be paid only for units that are maintained in decent, safe, and sanitary condition, and that HUD will abate any payments for a unit that does not meet these requirements, and utilize those funds for relocating the residents of the unit (AR 122).

should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." Id. at 844. So long as "the agency's answer is based on a permissible construction of the statute" (see id., a reviewing court will defer to the agency's interpretation.).

The issue in this case was whether the HAP payments were "attached" to the Property at foreclosure, thereby requiring HUD to preserve the HAP contract. Section 311 does not directly address that question. Accordingly, HUD was authorized to interpret the statute in order to resolve this question. HUD did so on May 31, 2006, when it issued a Multifamily Housing Memo, in which HUD determined that, "[f]or properties where assistance under the project-based Section 8 HAP contract has been abated and the HAP contract has been or will be terminated . . . , [HUD] will not offer the property with a HAP contract at the foreclosure sale." (See Multifamily Housing Memo at 4) (attached as Exhibit 1 to Docket No. 35). HUD's interpretation is entitled to Chevron deference, because it is a permissible interpretation of the statute.

HUD's interpretation is entirely consistent with the intent of section 311. While that provision compels preservation of Section 8 payments attached to dwelling units at foreclosure, it is implicit in the overall statutory scheme that Congress did not intend HUD to continue payments at projects that are not decent, safe and sanitary. See, e.g., 42 U.S.C. §§ 1441, 1437(a)(4), 1437(b)(1), 1437f(a). Where HUD has determined that the physical condition of a project is so sub-standard that the Section 8 contract must be abated and ultimately terminated, section 311 cannot be reasonably construed to require that the assistance payments should continue under the existing project based-contract. Accordingly, HUD's interpretation is reasonable, because it permits the

discontinuation of project-based payments when the HAP contract has been abated, and has been or will be terminated, due to poor conditions at the subject property. Therefore, the District Court could and did properly defer to HUD's interpretation of the statute. (A. 26a).

3. HUD Complied With Section 311 By Properly Deciding That The Continuation Of Section 8 Payments Was Not Feasible.

While the first sentence of section 311 discusses "any rental assistance payments under section 8," the second sentence states that, where HUD determines that it is not feasible to continue rental assistance payments for a particular property, to protect the interests of the tenants, HUD may "contract for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance." 109 P.L. 115, § 311. However, section 311 does not specify what form a feasibility determination must take, or how HUD must consult with tenants. Accordingly, these determinations are left to the Secretary's discretion. See, e.g., Chevron, 467 U.S. at 843.

In the Multifamily Housing Memo, HUD implemented standards for the feasibility determination. Specifically, the Memo states that HUD's Property Disposition Center must make a recommendation regarding the feasibility of maintaining assistance under the property's project-based Section 8 HAP contract based upon a variety of economic factors, including a Comprehensive Repair Survey (See Multifamily Housing Memo, Docket No. 35, Ex. 1, at 6-7). It further provides that, to meet the tenant consultation requirement, HUD must provide tenants 30 days to respond to the foreclosure notice and disposition requirements (Id. at 7-8).

HUD fully complied with the standards in the Multifamily Housing Memo in this case. First, HUD performed the requisite feasibility determination because the Property Disposition Center commissioned a comprehensive repair survey, which demonstrated that needed repairs would cost almost twice the amount of the current mortgage on the Property (AR 519-526). HUD also performed a peer analysis demonstrating that repair costs and operating expenses for the project far exceeded potential property income and "as-is" value (AR 264-266). HUD further satisfied the consultation requirement by giving the tenants notification of the foreclosure, along with a copy of the initial disposition plan for the Property, and providing 30 days for tenants to respond with comments (AR 550). Moreover, HUD did not finalize its disposition plan until after the close of the 30 day comment period (AR 600-604). By satisfying the standards in the Multifamily Housing Memo, HUD fully complied with section 311 of 109 Public Law 115.

C. HUD Fulfilled Its Obligations To Provide Relocation Assistance To Plaintiffs.

In 24 C.F.R. § 290.17, HUD implemented regulations regarding relocation assistance that apply to "all HUD-owned multifamily housing projects and all multifamily housing projects subject to HUD-held mortgages." 24 C.F.R. § 290.17(a) ("Scope of section."). Subsection (c) of that section sets forth the requirements for relocation assistance that apply in cases where displacement does not fall within purview of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Relocation Act" or "URA"), 42 U.S.C. § 4601 et seq. See 24 C.F.R. § 290.17(c) ("Relocation assistance at non-URA levels."). In contrast, subsection (d) contains regulations applying to HUD's implementation of the Relocation Act

for multifamily projects. See 24 C.F.R. § 290.17(d) ("Relocation assistance at URA levels--").

1. The URA Does Not Apply to the Abatement of the HAP Contract and HUD Provided the Relocation Assistance Required for Non-URA Cases.

a. The URA Does Not Apply to the Abatement of the HAP Contract.

The URA is designed to "establish a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance." 42 U.S.C. § 4621(b). In addition to the HUD regulations set forth in 24 C.F.R. § 290.17(d), the Department of Transportation ("DOT") promulgated rules, pursuant to 42 U.S.C. § 4633, to implement the URA for all federal agencies. These DOT regulations are set forth in 49 C.F.R. Part 24.

The Relocation Act defines a "displaced person" as:

> any person who moves from real property . . . ***as a direct result of*** a written notice of intent to acquire . . . such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance; or . . . ***as a direct result of*** rehabilitation, [or] demolition . . . under a program or project undertaken by a Federal agency or with Federal financial assistance in any case in which the head of the displacing agency determines that such displacement is permanent.

42 U.S.C. § 4601(6)(A)(I) (emphasis added); see also 24 C.F.R. § 290.17(d)(3) (defining displaced person as "any person . . . that moves from the real property . . . permanently, ***as a direct result*** of acquisition, rehabilitation or demolition ***for*** a federally assisted project.") (emphasis added); 29 C.F.R. § 290.17(d)(3)(iv) (excluded from definition of "displaced person" if "HUD determines the person was not displaced as a direct result of acquisition, rehabilitation, or demolition for an assisted project."); 24 C.F.R. § 290.17(c) (describing situations in which non-URA assistance is required, including, for

example, that which occurs "as a direct result of the foreclosure of a HUD-held mortgage on a multifamily housing project.").

Accordingly, the Supreme Court has found that the definition of displaced person "encompasses only those persons ordered to vacate in connection with the actual or proposed acquisition of property for a federal program." Alexander v. HUD, 441 U.S. 39, 62 (1979). Where the purpose of HUD's acquisition is not "'for,' or intended to further, a federal program or project," the Relocation Act does not apply. Id. at 63; Robzen's, Inc. v. HUD, 515 F.Supp. 228, 232 (M.D. Pa. 1981) ("The overriding purpose of the [Relocation Act] is standardization of the benefits available to individuals displaced by federal projects.").

The Relocation Act was not triggered by HUD's November 17, 2004 notice of displacement or abatement of the HAP contract because HUD did not act to further a federal project. Rather, HUD issued the notice of displacement because of its concerns over the health, safety, and security of the residents (AR 194), and not because of a purchase, demolition or rehabilitation by a third-party. Because the displacement here is not the "direct result of programs or projects undertaken by a Federal Agency or with Federal financial assistance" see 42 U.S.C. § 4621(b), the Relocation Act does not apply. See also Caramico v. HUD, 509 F.2d 694, 699 (2d Cir. 1974) ("random acquisitions by the FHA of defaulted property" are not covered under the URA).

Thus, because plaintiffs do not meet the statutory or regulatory definitions of "displaced person[s]," the Relocation Act does not apply to the abatement of the HAP contract.

b. HUD Fully Complied With The Requirements for Relocation Assistance Set Forth In Section 290.17(c).

Even though the URA does not apply to the abatement of the HAP contract, the applicable regulations require HUD to provide displaced tenants with the opportunity to obtain the following relocation assistance:

> (1) Advance written notice of the expected displacement shall be provided at least 60 days before displacement, describe the assistance and the procedures for obtaining the assistance, and contain the name, address and phone number of an official responsible for providing the assistance;
>
> (2) Other advisory services, as appropriate, including counseling, referrals to suitable (and where appropriate, accessible), decent, safe, and sanitary replacement housing, and fair housing-related advisory services;
>
> (3) Payment for actual reasonable moving expenses, as determined by HUD; and
>
> (4) Such other federal, State or local assistance as may be available.

24 C.F.R. § 290.17(c)(1)-(4).[10] As explained below, HUD fully complied with each of these requirements.

In its November 17, 2004 notice of displacement, HUD provided the following information to residents of TEHP: HUD had retained the services

[10] Subsection (b) of this section also applies to non-URA cases. Specifically, section 290.17(b) requires HUD to take "all reasonable steps . . . to minimize the displacement of persons . . . from a project covered by this part." 24 C.F.R. § 290.17(b). Applied here, HUD complied with section 290.17(b). Indeed, this requirement must be read "[c]onsistent with the other goals and objectives of [part 290]," id., and "the goals and objectives of [Part 290] are the same as the goals and objectives of 12 U.S.C. § 1701z-11." 24 C.F.R. § 290.17. Moreover, "minimizing the involuntary displacement of tenants" is only one of several "'competing goals' that are relevant to determining the course of action to be taken by the Secretary with regard to [the management and disposition of multifamily housing projects]." Frisby, 755 F.2d at 1056. Several other statutorily-mandated provisions strongly weigh in favor of displacement in this case, including "preserving and revitalizing residential neighborhoods [and] maintaining the existing housing stock in a decent, safe, and sanitary condition." 12 U.S.C. § 1701z-11(a)(3)(A) and (B). Accordingly, HUD's actions in this case are fully consistent with the intent of the applicable regulations, including 24 C.F.R. § 290.17(b).

of a contractor to provide assistance in locating replacement housing for each tenant; a meeting regarding relocation benefits would be held on December 2, 2004; residents with executed leases would be reimbursed for the reasonable amount of moving expenses; and income eligible tenants would receive a voucher (AR 194). This notice complies with each of the four requirements set forth in 24 C.F.R. § 290.17(c)(1)-(4). HUD satisfied the first requirement because it issued the notice of displacement more than 60 days before the displacement occurred, and the notice described the assistance and the procedures for obtaining the assistance, and contained the name, address and phone number of the official responsible for providing the assistance. See id. at § 290.17(c)(1). The notice complied with subsection (c)(2) because it informed residents of a meeting to discuss relocation benefits, and stated that a professional relocation coordination company would provide residents specific assistance in locating replacement housing. See id., § 290.17(c)(2). HUD met the third requirement because the notice informed residents that they are entitled to be reimbursed for the reasonable amount of moving expenses. See id., § 290.17(c)(3). Finally, HUD satisfied the requirement in subsection (c)(4) because the notice stated that income eligible residents would receive rental assistance vouchers. See id., § 290.17(c)(4). Accordingly, HUD fully complied with its regulatory obligations for providing relocation assistance. The District Court correctly found that the Plaintiffs were not displaced persons under the facts of this case and the applicable definition (A. 30a-31a).

2. To The Extent That The URA Applies, Plaintiffs' Claims Fail Because They Failed To Exhaust Administratively, And HUD Fully Complied With Regulations Requiring Relocation Assistance Under The URA.

a. Plaintiffs Failed to Exhaust Their Available Administrative Remedies.

Both the DOT and HUD regulations implementing the Relocation Act provide for an administrative appeal of an adverse agency and adverse purchaser's determination, respectively, of a person's eligibility for or amount of relocation assistance. See 49 C.F.R. § 24.10 (DOT regulation entitled "Appeals"); 24 C.F.R. § 290.17(f) (HUD regulation entitled "Appeals").

It is well-settled that claimants must exhaust their administrative remedies to seek judicial review of an agency decision. "Exhaustion of [administrative remedies] allows top-level officials of an agency to correct possible mistakes made at lower levels and thereby obviate unnecessary judicial review." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990). In addition to allowing the agency to correct mistakes before being "haled into federal court," the exhaustion requirement discourages "disregard of [the agency's] procedures." Woodford v. Ngo, 548 U.S. 81, 89, 126 S. Ct. 2378, 2385 (2006). Exhaustion of remedies also promotes efficiency:

> In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. . . . And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.

Id. (citations and quotations omitted).

Plaintiffs cannot contend that they availed themselves of the DOT and HUD appeal procedures and the opportunity to seek administrative review of HUD's actions regarding relocation assistance. Because plaintiffs failed to

exhaust their administrative remedies, their claims seeking relocation assistance pursuant to the URA and its regulations were properly dismissed.

b. HUD Fully Complied With The Requirements for Relocation Assistance Set Forth In The URA And Section 290.17(d).

HUD has additional regulatory obligations under 24 C.F.R. § 290.17(d) with regard to those residents that declined to exercise their right to relocate as a result of HUD's abatement of the HAP contract. However, as explained below, HUD fully satisfied those obligations.

Section 290.17(d) requires that displaced persons be provided with relocation assistance at the levels described in, and in accordance with the requirements of, the Relocation Act and its implementing regulations. See 24 C.F.R. § 290.17(d)(1). Under the Relocation Act, HUD is permitted to delegate its obligations to a "displacing agency" if HUD receives satisfactory assurances from the displacing agency that it will provide the following relocation assistance: (a) fair and reasonable relocation payments and assistance; (b) relocation assistance programs offering the services described in 42 U.S.C. § 4625; and (c) providing access to comparable replacement dwellings to displaced persons within a reasonable period of time prior to displacement, in accordance with 42 U.S.C. § 4625(c)(3).[11] See 42 U.S.C. §§

[11] Section 4625 of the URA requires the head of any "displacing agency" to ensure that relocation advisory services described in subsection (c) are made available to all displaced persons. Subsection (c) provides that each relocation assistance advisory program shall include such measures, facilities, or services as may be necessary or appropriate in order to:

> (1) determine, and make timely recommendations on, the needs and preferences, if any, of displaced persons for relocation assistance;
>
> (2) provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses

4630(1)-(3). A "displacing agency" is defined as "any Federal agency carrying out a program or project, and any State, State agency, or person carrying out a program or project with Federal financial assistance, which causes a person to be a displaced person." See 42 U.S.C. § 4601(11).

HUD fully complied with these requirements because, after receiving the requisite assurances, HUD delegated its relocation assistance authority to the URAP (AR, 576-77, 777-78). Specifically, URAP agreed to the following: to relocate all current residents within twelve months of the date of the contract of sale and to comply with the relevant statutes and regulations in its relocation of tenants (including the Housing and Community Development Amendments of 1978, 12 U.S.C. § 1701z-11(j), 24 C.F.R. § 290.17, the URA, 42 U.S.C. § 4601, et seq., and 49 C.F.R. Part 24); to reimburse tenants for reasonable moving expenses, including expenses incurred in returning to the redeveloped project; and to provide advance written notice of any expected displacement,

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and farm operations;

(3) assure that a person shall not be required to move from a dwelling unless the person has had a reasonable opportunity to relocate to a comparable replacement dwelling, except in the case of—[listing exceptions]

* * * * * * * * * *

(4) assist a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location;

(5) supply (A) information concerning other Federal and State programs which may be of assistance to displaced persons, and (B) technical assistance to such persons in applying for assistance under such programs; and

(6) provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation.

42 U.S.C. § 4625(c).

describing the assistance and procedures for obtaining the assistance and containing the name, address and phone number of an official responsible for providing the assistance, as soon as feasible (AR 576-77, 777-78).

Moreover, in HUD's initial disposition plan, HUD notified the residents that URAP would be obligated to provide extensive relocation services (AR 550-553). HUD provided the residents with an opportunity to submit comments regarding the disposition plan and, although HUD did not receive any comments, it did not finalize its disposition plan until after the expiration of the 30 day comment period. (AR 550, 600-04). Accordingly, HUD complied with 24 C.F.R. § 290.17(d) by delegating any residual relocation assistance requirements to URAP, receiving assurances from URAP that the required services would be provided, and notifying the residents that URAP would provide those services.[12]

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[12] Indeed, URAP has made good on its agreement to provide relocation services. On November 9, 2007, URAP entered into a MOU with TEHLP which was supplemental and intended to facilitate the intentions of the contract of sale for Third East Hills between URAP and TEHLP. (See Docket No. 94-2, ¶ 1.1). Under the MOU, URAP agreed, among other things, to provide TEHP tenants with the following generous benefits:

First priority for new rental units and new for-sale units at the new development it intended to build (id., ¶¶ 9.1, 9.2, 9.3);

Temporary on-site units if they elected to stay during demolition and construction, as well as moving and relocation assistance (all out-of pocket expenses necessary for the move to and from the temporary unit and a moving contractor to move tenants' belongings at no cost) (id., ¶ 4.4, Ex. 3-4);

Incentives, for those tenants that elect to move off the site, including a one-time payment of $5,000.00, a moving allowance of $1,280 or $1,450 based on their unit size and payment of tenant's security and utility deposit payments (id., ¶¶ 5.1, 5.2, Ex. 3-4);

An up-to-date listing of available units for those that chose to move off-site, transportation to look at the available units, and assistance in completing any applications for new rental units (id., ¶¶ 7.1, 7.2, 7.3, 8.1, 8.2, 8.4 and Ex. 4).

C. Plaintiffs Waived Their Due Process Claims.

The District Court also correctly found that the plaintiffs had waived "any right they may have had to claim a violation of due process." (A. 32a). The first and third claims that remained in the District court – HUD's purported violation of 109 P.L. 115, § 311 and alleged failure to comply with its own relocation regulations – fail for the reasons discussed above. The District Court described the Plaintiff's remaining claim as a "violation of Plaintiffs' procedural due process right, as third party beneficiaries, by HUD in failing to provide Plaintiffs with the opportunity at the foreclosure hearing to provide factual objections to the foreclosure." (See Docket No. 53). This claim also fails.

On November 30, 2007, Plaintiffs filed a motion seeking the District Court's approval of Plaintiffs' Stipulation of Non-Interference, which the Court granted on December 4, 2007 (See Docket Nos. 93 and 95). In their stipulation, Plaintiffs acknowledge that the Property was conveyed three times on October 26, 2006 -- by deed from the HUD Foreclosure Commissioner to HUD, by deed from HUD to URAP, and by deed from URAP to TEHLP (See Docket No. 93-2); (AR 741-808). Plaintiffs further stipulate that no class member will seek to reverse the foreclosure sale of the Property, ask for equitable relief that jeopardizes the right or ability of TEHLP to redevelop the Property, or challenge or call into question the validity of TEHLP's legal and equitable title to and ownership of the Property (See Docket No. 93-2) (stipulating "that they will no longer seek to regain title to the property through this action or otherwise seek relief which would jeopardize [TEHLP's] title.").

By signing the stipulation, Plaintiffs waived their right to contest any and all aspects of HUD's foreclosure of the Property; accordingly, they no

longer could sustain a claim that HUD violated Plaintiffs' procedural due process rights. Even if Plaintiffs could have proved that HUD failed to provide them with the opportunity at the foreclosure hearing to provide factual objections to the foreclosure – as Plaintiffs alleged in their due process claim – the lack of any such opportunity is of no consequence now that Plaintiffs have waived their right to attempt to reverse the foreclosure sale. Plaintiffs' due process claim alleged that they should have had the opportunity to object to the foreclosure but, when they explicitly waived their right to seek relief based upon the foreclosure, they also waived their due process claim.

Thus, the District Court correctly determined that summary judgment in favor of the Defendant/Appellees on all three issues before it was appropriate on the basis of the facts and the law. The Order granting the Defendant/Appellees' motion and the judgment in their favor should be affirmed.

II. THIS COURT SHOULD RECOGNIZE THAT THE SOLE APPELLANT BEFORE THIS COURT IN THIS APPEAL IS JEAN MASSIE.

Plaintiff "Jean Massie" filed a Notice of Appeal from the Order of "10/31/2008" on December 30, 2008 (Docket No. 141). The appeal was docked in this Court at No. 09-1087. Appellant Massie then asked this Court to correct what she characterized as a "labeling error" by allowing her to add additional parties, who, contrary to Fed. R. App. P. 3(c)(A), were not listed in the December 30, 2008 Notice of Appeal as appellants in that appeal.[13] The appeal that was docketed in this Court at No. 09-1544 was subsequently dismissed as untimely.[14]

The Supreme Court has made it clear that the requirements of Rules 3 and 4 of the Rules of Appellate Procedure create a jurisdictional threshold that may not be waived, even for "good cause." Torres v. Oakland Scavenger Company et al., 487 U.S. 312, 317(1988). See also, Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551, 553 (3d Cir. 1989) ("Compliance with Fed. R. App. P. 3(c) is a jurisdictional prerequisite.").

While Fed. R.App. P. 3(c) was itself amended after Torres, the notice of appeal filed in the District Court on December 30, 2008 in this case fails to

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[13]On February 24, 2009, an "Amended" Notice of Appeal was filed in the District Court from the Order of October 31, 2008, with added names of alleged appellants (A 54a, Docket No. 143). The names were added on a second page through a reference of "see attached sheet."

[14] This Court's Order read: "The notice of appeal was not filed within the time prescribed by Fed. R. App. P. 4(a). Accordingly, appeal No.09-1544 is dismissed. The parties are directed to address who are properly appellants in appeal No. 09-1087 in their briefs on the merits in No. 09-1087. The parties are asked to particularly address whether Fed. R. App. P.3(c)((1)(A) or 3(c)(3) is the operative rule under the circumstances of this case, and, if Rule 3(c)(3) is the operative rule, how it should be interpreted in this case, in light of Marrs v. Motorola, Inc., 547 F.3d 839 (7th Cir. 2008)."

meet the requirements of the amended rule. See, e.g., Adams v. United States, 471 F.3d 1321, 1324 (Fed. Cir. 2006). It should also be noted that Fed. R. App. P. 26(b) expressly prohibits this Court from enlarging the time to file a notice of appeal. Dura Systems, 886 F.2d at 554, n.1. In recognition of the jurisdictional nature of the Appellant's error, this Court should specifically reject Massie's request to add parties to the Notice of Appeal filed at No. 09-1087.

The parties were asked by the Court to particularly address whether Fed. R. App. P. 3(c)(1)(A) or 3(c)(3) is the operative rule under the circumstances of this case, and, if Rule 3(c)(3) is the operative rule, how it should be interpreted in this case, in light of Marrs v. Motorola, Inc., 547 F.3d 839 (7th Cir. 2008) (July 14, 2009 Order). Federal Rule of Appellate Procedure 3(c)(1)(A) states:

> The notice of appeal must specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"

Fed. R. App. P. 3(c)(1)(A). Federal Rule of Appellate Procedure 3(c)(3) further states that "[i]n a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal **as representative of the class**." Fed. R. App. P. 3(c)(3).(emphasis added). The comment to the 1993 amendments to Rule 3(c) provide, *inter alia*,

> The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the

> amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.
>
> In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal **as a representative of the class**.

Fed. R. App. P. 3, 1993 Amendments, Note to subdivision (c)(emphasis added). Federal Rule of Appellate Procedure 3(c)(3) is applicable here because the District Court granted class action status (A. 48a, Docket No. 82).[15]

In Marrs, 547 F.3d 839, Michael Marrs served as a class representative. When the district court granted the defendants' motion for summary judgment, Marrs appealed. Marrs' notice of appeal named himself as the appellant but did not mention the class–neither that he was appealing on behalf of the class nor that he was the class representative. The Marrs court relied on its prior decision in Murphy v. Keystone Steel & Wire Co., 61 F.3d 560 (7th Cir. 1995).

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[15] The members of the class numbered either 36 or 52, but in any event the numbers were not unusually large so as to be burdensome, particularly where the number of named plaintiffs was only five. See A. 48a, Docket No. 82, at footnote 2 ("[E]ven if I were to find that the class numbered thirty-six, as Defendants assert, that would not necessarily bar certification. Classes of thirty-six have been certified, as that number 'hovers near the number which most generally agree will satisfy the numerosity requirement.' Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 40 (S.D.N.Y. 1990)).

The court held in Murphy that "the notice of appeal must indicate that the class representative is appealing in his representative capacity." Marrs, 547 F.3d at 840 (citing Murphy, 61 F.3d at 571 n.7); see also Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1572 (10th Cir. 1994); Ford v. Elsbury, 32 F.3d 931, 933-34 (5th Cir. 1994). In Marrs, the appellant's notice of appeal did not indicate that he was a class representative and that he was appealing in his representative capacity. Marrs, 547 F.3d at 840.

The court then compared Marrs to Clay v. Fort Wayne Community Schools, 76 F.3d 873 (7th Cir. 1996), which involved a class of parents and a class of students–each with its own class representative. Marrs, 547 F.3d at 840 In the notice of appeal, only the parent class was listed. Id. The court held in Clay that it lacked jurisdiction to hear the merits of the students' appeal and stated that "notice by the adult plaintiffs is simply not the functional equivalent of notice by the student plaintiffs." Id. at 840-41 (quoting Clay, 76 F.3d at 876). The Marrs court pointed out that the Marrs case only had one class but believed nonetheless that "these differences between [Marrs] and Murphy and Clay are too slight to warrant a different result." Id. at 841.

Massie argues that Fed. R. App. P. 3(c)(1)(A) and Fed. R. App. P. 3(c)(3) were both satisfied and that this case is distinguishable from Marrs. She argues that the "caption" "Jean Massie, et al." in her notice was sufficient. However, in neither her notice or in her attempted amended notice,[16] did she

[16] Interestingly, the caption in the attempted Amended Notice of Appeal was the same as the caption in the original unamended Notice of Appeal. Neither caption contains any indication therein as to whom the appellant is. Even more interestingly, the Amended Notice of Appeal indicates that the reader must "see attached sheet" to identify the appealing party or parties. The attached sheet lists "Yugonda Akrie, Louise Brandon, Jean Massie, Aline Reid and Shirley Sowell, on behalf of themselves and all others similarly situated (certified class)." (Third East Hills Park, Inc. ("the Co-op") was not listed.) Thus, the Amended Notice of Appeal more than casually

indicate in any way that Jean Massie, **et al.** was the appellant (Compare A. 1a and A. 2a).[17]

In light of Marrs and its predecessors, this Court should recognize that the only appellant validly before this court is Jean Massie and that there is no jurisdiction in this Court to consider the claims of the class. Massie has not identified any claims unique as to her. As such the Court should affirm the District Court's summary judgment order in favor of the Defendant/Appellees and against individual appellant Jean Massie.

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suggests that it was clear to the author of the Notice of Appeal that that Notice did **not** name a class representative as the appellant.

[17] The fact that the "et al." indicator in a caption can be misleading, and not in any way a sufficient indicator of who is **intended** to be included by that appellation, can be seen from an earlier action in this very case. Through an unopposed motion, Plaintiffs requested that three previously-named plaintiffs names be withdrawn from the list of plaintiffs included in the "et al." of the caption and that the caption be amended "accordingly" (A 48a, Docket No. 73)(motion requesting deletion of three plaintiffs, two of whom were determined to not to be members of the alleged class of residents with fully-paid memberships). Thus, the term "et al." remained in the ensuing pleadings in the District Court, even though the party plaintiffs had changed. Plaintiff/Appellant Jean Massie's reliance on this misleading aspect of the caption should be rejected as a basis for a justification for expanding the scope of her personal appeal.

CONCLUSION

For the foregoing reasons, the Order of the District Court granting summary judgment in favor of the Defendant Appellees should be affirmed.

Respectfully submitted,

MARY BETH BUCHANAN
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/s/Robert L. Eberhardt
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CERTIFICATE OF COMPLIANCE

1. This brief ***does not*** comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is ***56*** pages in length and contains ***15,514*** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Accordingly, a Motion for Leave to File Response Brief in Excess of Length Limitation is being filed simultaneously with this brief.

2. This brief 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 this brief has been prepared in a proportional typeface using WordPerfect 12 in Times New Roman 14 point font.

3. The text of this e-brief and hard copies of the brief are identical.

4. A virus check was performed on this e-brief with Trend Micro OfficeScan Version 6.5.

/s/Robert L. Eberhardt
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CERTIFICATE OF SERVICE

I hereby certify that the following are filing users and will be served electronically by the Notice of Docketing Activity. A hard copy of this brief was also mailed to:

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