UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil Action No. 11-cv-700 DSD/JJK

Barbara Kane, Kathleen Schlauch, Nadine Wilson, Edward Colbert, Tony Bari, and HOME Line, a Minnesota non-profit corporation, Plaintiffs, v. U.S. Department of Housing and Urban Development, Defendant.	)	**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

INTRODUCTION

This action involves Shingle Creek Tower Apartments ("the Project" or "Shingle Creek Tower"), a multifamily property in Brooklyn Center, Minnesota that is currently subject to a mortgage held by Defendant United States Department of Housing and Urban Development ("HUD" or the "Secretary"). Five individual tenants of Shingle Creek Tower and HOME Line, a Minnesota non-profit corporation (collectively "the Plaintiffs"), brought this action for injunctive and declaratory relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, seeking to enjoin HUD from foreclosing on the mortgage and selling the Project to another owner without certain post-sale conditions that Plaintiffs claim the law requires. After several attempts, the foreclosure sale has occurred and a non-profit organization has emerged as the successful bidder; however, the deal cannot close pending the resolution of this lawsuit due to the

Notice of *Lis Pendens* filed against the property. Plaintiffs advance four claims for relief: (1) HUD's foreclosure of its mortgage lien on this property violates the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. §§ 3701-3717 ("MMFA"); (2) HUD's foreclosure sale does not comply with 12 U.S.C. § 1701z-11(k)(2); (3) HUD failed to consider its own regulations at 24 C.F.R. § 27.20; and (4) HUD's foreclosure sale violates 12 U.S.C. § 1701z-11 because HUD's proposed Use Agreement does not limit rents for all very low-income households to 30% of 50% of area median income pursuant to 12 U.S.C. § 1701z-11(e)(1)(A)(iii) and (b)(5)(A)(i). The Court lacks subject matter jurisdiction because the APA does not permit judicial review of purely discretionary agency actions and the Plaintiffs have not identified any other waiver of sovereign immunity. Even were the Court to find subject matter jurisdiction, HUD did not act arbitrarily, capriciously, or illegally; rather, HUD acted properly in all respects. HUD enjoys both contractual and statutory rights to foreclose on the property and impose conditions on the new owner as HUD deems appropriate and has complied fully with all applicable requirements.

BACKGROUND

I. STATUTORY BACKGROUND.

The MMFA, enacted as part of the Housing and Community Development Amendments of 1981, Pub. L. 97-35, 95 Stat. 422, codified at 12 U.S.C. §§ 3701-17, establishes the procedures by which HUD is authorized to institute foreclosure proceedings on a defaulted, HUD-held multifamily mortgage. *See* 12 U.S.C. § 3701(b) ("The purpose of this chapter is to create a uniform Federal foreclosure remedy for

multifamily mortgages."); 12 U.S.C. § 3703; 24 C.F.R. § 27.2(b). The MMFA defines the term "multifamily mortgage" to include mortgages held by HUD under Title II of the National Housing Act ("NHA"). 12 U.S.C. § 3702(2)(A). The MMFA vests HUD with discretion to foreclose using its non-judicial foreclosure procedures, to initiate a judicial foreclosure in federal or state court, or to pursue non-judicial foreclosure under applicable state law. 12 U.S.C. § 3703.

Congress determined that, prior to the MMFA's enactment, disparate and cumbersome state foreclosure laws prevented HUD's efficient administration of multifamily mortgages. 12 U.S.C. § 3701(a)(1). Lengthy state-law foreclosure proceedings "cause[d] detriment to the residents of the affected projects and the community," led "to deterioration in the condition of the properties involved," and increased the risk of vandalism, fire loss, depreciation, damage, and waste, all necessitating "substantial Federal management and holding expenditures." 12 U.S.C. § 3701(a)(2). These complications "seriously impair[ed] the Secretary's ability to protect the Federal financial interest in the affected properties and frustrate[d] attainment of the objectives of the underlying Federal program authorities, as well as the national housing goal of a decent home and a suitable living environment for every American family." 12 U.S.C. § 3701(a)(5). Congress expressly designed the MMFA's non-judicial foreclosure process to "reduce unnecessary litigation by removing foreclosures from the courts where they contribute to overcrowded calendars." 12 U.S.C. § 3701(a)(6).

HUD may commence foreclosure under the MMFA if a mortgagor breaches any covenant or condition of the mortgage agreement for which foreclosure is authorized

under the mortgage. 12 U.S.C. § 3705. If HUD as mortgage holder determines that a mortgagor has breached the mortgage agreement, HUD is authorized to request a foreclosure commissioner to commence foreclosure. 12 U.S.C. § 3707. Upon HUD's request, the commissioner commences foreclosure by issuing a notice of default and foreclosure to the mortgagor. 12 U.S.C. § 3704.

The MMFA applies to foreclosures on defaulted multifamily mortgages held by HUD pursuant to Section 221(d)(4) of the NHA, 12 U.S.C. 1715(1)(d)(4). The Section 221(d)(4) mortgage insurance program is used to insure mortgages for new construction or substantial rehabilitation. No tenant income or rent restrictions are statutorily required, and the statute makes no provision for Federal rent subsidies. Nevertheless, some residents in Section 221(d)(4) properties receive HUD assistance through the Section 8 program.

Plaintiffs' amended complaint fails to mention the key statutory provision pursuant to which HUD is attempting to dispose of the Project mortgage. Sixteen years after enacting the MMFA, Congress freed HUD from many of the remaining restrictions relating to mortgage foreclosure sales. Section 204(a) of the HUD Appropriations Act of 1997, Pub. L. 104-24, 110 Stat. 2894, codified at 12 U.S.C. § 1715z-11a(a), entitled "Flexible Authority for Multifamily Projects," empowered HUD to "manage and dispose of … multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." *Id.* (emphasis added). This statute applies to foreclosure sales conducted under the MMFA. As is clear

from this language, HUD has broad discretion in disposing of HUD-held mortgages, and this discretion undermines each of Plaintiffs' allegations.

II. FACTUAL BACKGROUND.

The Project is a 13-story apartment building built in 1974. AR 230. For most of its first 25 years, the Project remained in satisfactory financial condition and maintained an average occupancy rate of 98%. *Id.* However, its physical condition began to decline in 1999. *Id.* The Project suffered a failing Real Estate Assessment Center ("REAC") score of 58a in 1999 and an average score of only 74c in 2000 and 2001. *Id.* These scores indicated the Project was not meeting HUD's health and safety requirements. The Project needed to be upgraded. *Id.*

Boca Limited Partnership ("Boca"), a limited dividend partnership, purchased the property on August 1, 2002. AR 1-21. To facilitate the transfer to Boca and the rehabilitation needs of the property, the existing HUD-subsidized mortgage was prepaid with funds from a new HUD-insured mortgage. The new mortgage was insured under Section 221(d)(4) of the NHA. AR 22-30. The mortgage debt on the property was significantly increased to cover costs associated with the acquisition and rehabilitation of the property. AR 230. These expenses were paid for with municipal bonds issued by the City of Brooklyn Center, low-income housing tax credit funding, and funds from the State of Minnesota and other local government entities in the amount of $3,764,594. AR 66-70, 230. Housing choice vouchers were provided to all eligible tenants. AR 230. Recipients of these tenant-based vouchers can move at any time to take their vouchers with them. The rehabilitation was completed in 2003. *Id.* After the renovation was

completed, younger tenants began to move in and seniors continued to leave the property. *Id.* By 2009, occupancy had dropped to 84% resulting in a shortfall of rental income to pay the mortgage on the property. *Id.* Boca executed a new use agreement that binds it and all future owners through September 30, 2019 to maintain the Project as affordable housing for low-income tenants and in decent, safe, sanitary, and good repair. AR 31-35. Through a separate Interest Reduction Payment ("IRP") Agreement, HUD agreed to continue making monthly interest reduction payments to the owner to preserve the availability and affordability of the housing. AR 36-65.

The Project had trouble competing with other rental properties in the area that had lower rents and amenities not offered by Shingle Creek, such as air conditioning, dishwashers, and pools. AR 230. The lack of amenities at the Project impeded the occupancy levels needed to sustain the costs of operation and debt service at the Project despite the housing voucher and IRP subsidies provided by HUD. AR 231. The Project experienced net cash deficiencies in 2007 and 2008. AR 159-160. Boca contributed a total of $298,343 through December 31, 2008 to meet its financial obligations. *Id.* When Boca decided to no longer fund deficits, its limited partner made at least two mortgage payments. *Id.* Thereafter, the limited partner discontinued funding and the Project went into default in April 2009. *Id.* On July 27, 2009, the lender Glaser Financial Group ("Glaser") assigned the mortgage to HUD as the new lender with an unpaid principal balance of $5,467,069.79. AR 161-63, 174-76.

On November 5, 2009, HUD sent a Notice of Violation to Boca notifying it of the mortgage assignment and providing it with 30 days to submit a reinstatement plan. The

notice also explained that HUD would initiate foreclosure if no acceptable reinstatement plan was provided. AR 161-63. By December 2009 occupancy was at 84%. AR 230-34. On January 5, 2010, HUD sent Boca a 21-day notice of foreclosure letter allowing it to submit reasons why foreclosure should not occur. AR 272-83. On February 5, 2010, HUD notified Boca that, because no legal reasons were presented to HUD for purposes of stopping the foreclosure, HUD would proceed with foreclosure. AR 292-93. After considering all nine factors set forth in 24 C.F.R. § 27.20, AR 159-450, on March 3, 2010, HUD's Multifamily Property Disposition Center recommended foreclosure of Shingle Creek Tower. AR 230-34.

On May 14, 2010, HUD advertised the foreclosure sale of the Project. AR 305-35. Upon receipt of correspondence from Plaintiffs' counsel challenging the terms HUD included in the foreclosure bid kit materials, HUD delayed the foreclosure sale. AR 93-94. HUD corresponded with Plaintiffs' counsel for approximately 11 months. *See* AR 98-100, 141-42, 150-53.

Plaintiffs filed their complaint in this Court on March 22, 2011. Plaintiffs also recorded a Notice of *Lis Pendens* against the property.

On April 14, 2011, HUD conducted the foreclosure sale. AR 369-98. Genghis Khan Holding, LLC ("Genghis Khan") was the high bidder at the foreclosure sale with a bid of $2,800,000. On June 28, 2011, HUD notified Genghis Khan that, after reviewing its submittal, HUD had determined Genghis Kahn did not have the requisite qualifications to own and operate the Project and, therefore, rejected its bid. AR 125-26.

On July 13, 2011, HUD notified Republic Shingle Creek, LLC ("Republic") that it was the successful bidder. AR 148. On July 28, 2011, Republic submitted an executed Acknowledgment by Bidder with a paragraph inserted above its signature requiring that HUD convey the property free and clear of the *lis pendens* Plaintiffs had filed. AR 796. *See also* AR 761-762. On August 8, 2011, HUD notified Republic that its alteration of the Acknowledgement by Bidder document was regarded as non-responsive and rejected Republic's bid. AR 148-49.

Plaintiffs filed their First Amended and Supplemental Complaint on September 30, 2011. Plaintiffs did not seek a temporary restraining order or a preliminary injunction.

HUD amended some of the requirements in preparation for another foreclosure sale. AR 826-60. HUD restricted the bidders to nonprofits and government entities. HUD also inserted an equity provision to the November 2011 foreclosure sale documents, increasing the affordability provision term from 20 to 30 years because HUD knew bids would be lower and wanted to ensure HUD received any potential equity to offset the lower sales price. AR 841, 846. HUD conducted a foreclosure sale on November 10, 2011. Aeon Nonprofit was the high bidder with a bid of $1.00. HUD's limitation of the bidders on this project to nonprofit or governmental entities and HUD's willingness to accept a one dollar purchase price demonstrate HUD's concerns for the property and the affected tenants. Money not spent to purchase the property is available to the new owner to improve the property.

This foreclosure, like the three incomplete foreclosures before it, was conducted under the authority of both the MMFA and the Flexible Authority for Multifamily

Projects provisions, 12 U.S.C. § 3701 *et seq.* and 12 U.S.C. § 1715z-11a. AR 841. *See also* AR 320, 352, 385. Until the November 2011 foreclosure sale is completed by a closing and transfer of title, Boca remains the owner of the property. Plaintiffs' *lis pendens* has impeded Aeon from receiving title insurance, effectively halting the foreclosure sale on the property.

In summary, Shingle Creek was a troubled project unable to function even with the high subsidies provided by HUD. Due to the lack of amenities at Shingle Creek, the rents could not be raised high enough to cover the mortgage debt on the property. After assuming the mortgage, HUD determined that the best way to maintain the Project as affordable housing was to sell it in a non-judicial foreclosure sale restricted to non-profits and governmental entities with long-term experience with affordable housing in Minnesota. The current Foreclosure Sale Use Agreement (which HUD requires bidders to agree to execute if they are successful) preserves the Project as affordable housing for 30 years and prohibits marketing of units for any purpose other than affordable housing without HUD's prior written approval. AR 841, 846. Moreover, it restricts rent of the units to low–income or very low-income families. The purchaser is restricted from increasing the rent above the maximum allowed under Section 402 of the Internal Revenue Code of 1986 for three years after execution of the Use Agreement. AR 846. *See also* AR 355, 388.

ARGUMENT

I. STANDARDS OF REVIEW.

HUD has moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or 12(h)(3), because there is no applicable waiver of sovereign immunity. When considering such a motion, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). "[N]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The plaintiff has the burden of proof that jurisdiction does in fact exist. *Id.* Lack of subject matter jurisdiction cannot be waived; it may be raised at any time by a party to an action, or by the court *sua sponte*. Fed. R. Civ. P. 12(h)(3). A complaint may be challenged successfully for lack of subject matter jurisdiction either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1992). A district court may consider matters outside the pleadings to determine whether it has subject matter jurisdiction. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 470 (8th Cir. 1993); *Osborn*, 918 F.2d at 728 n.4.

Plaintiffs seek judicial review under the APA. 5 U.S.C. §§ 701-706. The Court should dismiss Plaintiffs' claims as exempt from the APA as they pertain to agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). While there is a strong presumption that agency action is reviewable by courts, that presumption is not absolute. *Greer v. Chao, Secretary of U.S. Dept. of Labor*, 492 F.3d 962, 964 (8th Cir.

2007). Where agency action is "committed to agency discretion by law", federal courts lack jurisdiction. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985).

Alternatively, HUD moves for summary judgment on Plaintiffs' APA claim based on the administrative record. A district court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A fact is material only when its resolution affects the outcome of the case. *Id.* at 248. A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id.* at 252. The court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its favor. *Id.* at 250. The nonmoving party, however, cannot rest upon mere denials or allegations in the pleadings; rather, the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Should the Court proceed with review, such review shall be under a highly deferential standard that presumes the agency action to be valid. *See Bangura v. Hansen*, 434 F.3d. 487, 502 (6th Cir. 2006). The court's inquiry must be "searching and careful," but "the ultimate standard of review is a narrow one." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The Court may not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989);

Volpe, 401 U.S. at 416. Instead, the Court must only determine whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Deference to the agency is appropriate where, as here, a case calls for the agency to determine matters that are at the core of its expertise. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999).

A court may not set aside or hold unlawful agency action unless that action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U. S. C. § 706(2)(A). An agency action is arbitrary and capricious if the agency fails to examine relevant evidence or articulate a satisfactory explanation for the decision. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). An agency's decision may be said to be arbitrary or capricious only if: (1) its explanation contradicts the evidence or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise; (2) the agency entirely failed to consider an important aspect of the problem or issue; (3) the agency relied on factors which Congress did not intend the agency to consider; or (4) the decision otherwise constitutes a clear error of judgment. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43; *accord Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010).

The reviewing court may also review the agency decision for conformity with the law. 5 U.S.C. § 706(2)(A); *Bangura*, 434 F.3d at 502. The reviewing court "may not

supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 43 (citations and internal quotations omitted); *Mayo v. Schiltgen,* 921 F.2d 177, 179 (8th Cir. 1990). However, "[e]ven when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alsaka Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 497 (2004) (*quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 286 (1974)). The agency need only show "'a rational connection between the facts found and the choices made.'" *Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43 (citation omitted).

Additionally, "a court cannot reweigh evidence simply because the plaintiff disputes the agency's finding. Instead, the evidence must compel a different decision to be arbitrary and capricious." *Ghaly v. INS,* 48 F.3d 1426, 1430 (7th Cir. 1995). The possibility of drawing inconsistent conclusions from the evidence does not mean that the agency's findings are not supported by substantial evidence. *Am. Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. 490, 523 (1981); *Erickson Transp. Corp. v. Interstate Commerce Comm'n,* 728 F.2d 1057, 1963 (8th Cir. 1984). This standard of review is highly deferential to the agency: a court need not find that the agency's decision is "the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." *Am Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983).

II. NO WAIVER OF SOVEREIGN IMMUNITY APPLIES.

Plaintiffs allege sovereign immunity has been waived in two ways. Plaintiffs allege that HUD can be sued here under the "sue and be sued clause" of the NHA, 12 U.S.C. § 1702 ("NHA Section 1702"). Alternatively, Plaintiffs cite the APA, 5 U.S.C. § 702. Am. Compl. ¶ 4. However, neither provision provides the requisite waiver of sovereign immunity here. NHA Section 1702 does not apply because the NHA provisions that Plaintiffs allege HUD violated do not fall within the specific enumerated subchapters of the NHA to which the sue and be sued clause of NHA Section 1702 applies. The APA does not provide the requisite waiver of sovereign immunity because HUD's actions and decisions at issue were within HUD's unreviewable discretion and are thus not cognizable under the APA. 5 U.S.C. § 701(a)(2).

A. GENERAL PRINCIPLES OF SOVEREIGN IMMUNITY.

As courts of limited jurisdiction, the district courts have jurisdiction only where Congress specifically grants subject matter jurisdiction to adjudicate the asserted claim. *Kokkonen v. Gaurdian Life Ins. Co.*, 511 U.S. 375, 377 (1994). In an action against the United States (or an agency thereof), the plaintiff must establish a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity. *V S Ltd. Partnership v. Dept. of Housing and Urban Development*, 235 F.3d 1109, 1112 (8th Cir. 2000); *Presidential Gardens Assocs.*, 175 F.3d 132, 139 (2d Cir. 1999); *United American, Inc. v. N.B.C.-U.S.A. Housing Inc. Twenty Seven*, 400 F. Supp. 2d 59, 61 (D.D.C. 2005). The plaintiff bears the burden of establishing these three distinct requirements. *V S Ltd Partnership,* 235 F.3d at 1112. "Moreover, where the plaintiff seeks to sue the United States or an

instrumentality thereof, he may not rely on the general federal question jurisdiction of 28 U.S.C. § 1331, but must identify a specific statutory provision that waives the government's sovereign immunity from suit." *Clinton County Commissioners v. U.S.E.P.A.*, 116 F.3d 1018, 1021 (3d Cir. 1997).

Following established principles of sovereign immunity, the Supreme Court has held that "the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). *Accord*, *United States v. Dalm*, 494 U.S. 596, 608 (1990) (the United States is immune from suit unless it consents and the terms of its consent circumscribe the court's jurisdiction). The doctrine of sovereign immunity is a complete bar to suit against the United States unless Congress has waived sovereign immunity explicitly. *United States v. Testan*, 424 U.S. 392, 399 (1976). This waiver must be "unequivocally expressed in statutory text" and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Moreover, "a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id*. Since federal question jurisdiction under 28 U.S.C. § 1331 does not, by itself, operate as a waiver of sovereign immunity, Plaintiffs must identify another independent basis for bringing their claims in district court. *See Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981). Here, contrary to Plaintiffs allegations, Am. Compl. ¶ 4, neither NHA Section 1702 nor the APA provides the requisite waiver of sovereign immunity, and therefore this Court lacks subject matter jurisdiction.

B. NO WAIVER OF SOVEREIGN IMMUNITY IN THE NHA.

Plaintiffs cite NHA Section 1702, which provides in relevant part: "The Secretary [of HUD] shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter, be authorized in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1702. Under its terms, this clause waives HUD's sovereign immunity in a particular case only when the specific statutory section that the plaintiff claims HUD violated is located in the NHA subchapters specifically enumerated in the sue and be sued clause of NHA Section 1702. "To contend that a provision not expressly enumerated [in Section 1702] is still covered by this language would render the enumeration superfluous. Because it is a 'cardinal principle of statutory construction' that no parts of a statute's text should be rendered superfluous…Section 1702 cannot provide a waiver of sovereign immunity for the Secretary's actions taken pursuant to [a provision outside of the enumerated subchapters of the NHA]." *United Am., Inc.,* 400 F. Supp. 2d at 62 (citations omitted); *see VS Ltd Parnership,* 235 F.3d at 113; *Thomas v. Pierce*, 662 F. Supp. 519, 526-27 (D. Kan. 1987). Because Plaintiffs do not allege violations of the NHA that fall within any of the subchapters enumerated in the sue and be sued clause of NHA Section 1702, that clause does not provide the requisite waiver of sovereign immunity.

Plaintiffs' first cause of action asserts violations of the MMFA. The MMFA is found in the Housing and Community Development Amendments of 1981, Pub. L. 97-35, 95 Stat. 422, codified at 12 U.S.C. §§ 3701-3717, and is not within any of the NHA subchapters enumerated in the sue and be sued clause of NHA Section 1702.

Furthermore, the MMFA itself contains no provisions waiving HUD's sovereign immunity with respect to its actions pursuant to that statute. *See Checed Creek, Inc. v. Sec'y of HUD*, No 4:06cv110, 2007 WL 1238592, at *2 (E.D. Va. Apr. 27, 2007); *Massie v. HUD*, Civil No. 06-1004, 2007 WL 184827, at *3 (W.D. Pa. Jan. 19, 2007), *reconsidered on other grounds*, 2007 WL 674597 (W.D. Pa. Mar. 1, 2007).

In their second and fourth causes of action, Plaintiffs allege violations of 12 U.S.C. § 1701z-11 which addresses "[m]anagement and disposition of multifamily housing projects". *See* Am. Compl. ¶¶ 4, 8, 16-17, 32 & 34. These allegations also do not fall within the subchapters enumerated in the sue and be sued clause of NHA Section 1702. In fact, Section 1701z-1, while codified in the same United States Code chapter as the NHA, is not part of the NHA at all. *See Thomas*, 662 F. Supp. at 521-22, 527-28. Rather, it is part of the Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, § 203, 92 Stat. 2080-90 (1978). As such, Plaintiffs second and forth causes of action under Section 1701z-11 are not within the subchapters enumerated in the sue and be sued clause of NHA Section 1702.

Another statute pursuant to which HUD exercises its authority to dispose of multifamily mortgages is 12 U.S.C. § 1715z-11a(a). AR 841. This statute authorizes the Secretary to "manage and dispose of … multifamily mortgages held by [HUD] on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." *Id.* This provision is also not subject to NHA Section 1702's waiver of sovereign immunity because it is not part of the NHA. *See Jewish Ctr. For Aged v. HUD*, No. 4:07-CV-750 (JCH), 2007 WL 2121691, at *4-*5 (E.D. Mo. July 24, 2007).

Rather, Section 1715z-11a(a) is part of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, §204, 110 Stat. 2894 (1996). Nevertheless, some courts mistakenly refer to Section 1715z-11a in passing as part of the NHA, presumably due to its location in the United States Code. *See, e.g., Telesca v. Long Island Hous. P'ship, Inc.,* 443 F. Supp. 2d 397, 407-08 (E.D.N.Y. 2006); *Guity v. Martinez*, No. 03 Civ. 6266 (LAP), 2004 WL 1145832, at *3-4 (S.D.N.Y. May 20, 2004). No court, however, has ever held that this provision is subject to Section 1702's waiver of sovereign immunity.

Finally, Plaintiffs' third cause of action for arbitrary and capricious agency action in failing to abide by its own regulations does not implicate any specific section of the NHA, let alone a subchapter enumerated in NHA Section 1702. Thus, Plaintiffs' third cause of action does not fall within the NHA Section 1702 waiver of sovereign immunity.

In sum, NHA Section 1702 does not provide the requisite waiver of sovereign immunity for Plaintiffs' claims under the MMFA and NHA.

C. HUD'S ACTIONS ARE EXEMPT FROM APA REVIEW.

Plaintiffs' reliance on the APA also fails. The APA, a limited waiver of sovereign immunity, provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. If the court upon review finds agency action to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" the Court shall hold the actions unlawful and set the agency action aside. 5 U.S.C. § 706(2)(A). As relief for an alleged failure to act, the APA

provides "the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

The APA embodies a "basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). However, the APA contains two exemptions from judicial review of agency action, where "statutes preclude judicial review" and where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The latter exemption applies here to preclude Plaintiffs' lawsuit.

The APA does not apply to agency actions "committed to agency discretion by law." 5 U.S.C. 701(a)(2). *Heckler v. Chaney*, 470 U.S. at 828-29; *Greer v. Chao*, 492 F.3d 962, 964 (8th Cir. 2007); *Owner-Operator Independent Drivers Ass'n Inc. v. New Prime, Inc.*, 192 F.3d 778, 785 (8th Cir. 1999); *Dubois v. Thomas*, 820 F.2d 943, 946-952 (8th Cir. 1987); *Hill v. Group Three Housing Development Corp.*, 799 F.2d 385, 396-97 (8th Cir. 1986) . Under APA Section 701(a)(2) and *Heckler v. Chaney*, "review is not to be had if the statute [or regulation said to govern the challenged agency action] is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Greer*, 492 F.3d at 964 (quoting *Heckler v. Chaney*, 470 U.S. at 830) (emphasis in original)).

APA Section 701(a)(2) "requires careful examination of the statute on which the claim of agency illegality is based," *Webster v. Doe*, 486 U.S. 592, 600 (1988), and requires dismissal when there is "no law to apply," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Accordingly, Plaintiffs "must specify some statute or regulation that would limit [HUD's] discretion in this matter." *Lunney v. United States*,

319 F.3d 550, 558 (2d Cir. 2003). Plaintiffs failed to allege such a statute or regulation in their amended complaint.

1. Congress gave HUD broad discretion in foreclosure matters.

Congress gave HUD broad discretion in determining whether, when, and the manner in which to foreclose on property subject to HUD mortgages. The Secretary enjoys "very broad discretion … in deciding whether to foreclose when a default occurs," *United States v. Victory Highway Village*, 662 F.2d 488, 493 (8th Cir. 1981), because the decision to foreclose "is fundamentally of a business and administrative nature, requiring the exercise of HUD's business and administrative judgment." *NBC-USA Housing Inc., Twenty-Six v. Donovan*, 774 F. Supp. 2d 277, 299 (D.D.C. 2011) (quoting *United States v. Winthorp Towers*, 628 F.2d, 1028, 1036 (7th Cir. 1980)). Foreclosure decisions, therefore, "should for the most part be free from judicial review." *United States v. Golden Acres, Inc.*, 520 F. Supp. 1073, 1076 (D. Del. 1981).

In the context of foreclosures initiated by HUD, HUD cannot be found to have acted arbitrarily or capriciously in the absence of substantial evidence that the decision to foreclose was inconsistent with Congress's national housing objectives. *See Federal Prop. Mgmt. v. Harris*, 603 F.2d 1226, 1231 (6th Cir. 1979) ("the agency must be allowed broad discretion to choose between alternative methods of achieving the national housing objectives"). Once a mortgagor defaults, "[t]he federal policy to protect the treasury and promote the security of federal investment which in turn promotes the prime purpose of the [National Housing] Act to facilitate the building of homes by use of federal credit becomes predominant." *Victory Highway Village*, 662 F.2d at 494 (quoting

U.S. v. Stadium Apts., Inc., 425 F.2d 488, 494 (9th Cir. 1970)); *see also United States v. OCCI Co.*, 758 F.2d 1160, 1165 (7th Cir. 1985) (the Secretary has a statutory obligation to ensure the "prompt enforcement of the rights of the United States through HUD to minimize losses … and protect public money from unnecessary risk") (emphasis in original). "[HUD] has broad discretion to choose its remedies … and thereby achieve national housing objectives." *Id.* (*citing Victory Highway Village*, 662 F.2d at 495; *Winthrop Towers*, 628 F.2d at 1036). Thus, Congress gave HUD broad discretion in this area generally and with respect to the matters alleged in this action specifically.

2. The "Flexible Authority" statute vests in HUD broad discretion with respect to multifamily projects

Sixteen years after Congress passed the MMFA, Congress granted HUD broad "flexible authority" under 12 U.S.C. 1715z-11a ("Section 204") with respect to multifamily projects. Section 204(a), entitled "Flexible Authority for Multifamily Projects," provides:

> During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary . . . , and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.

12 U.S.C. § 1715z-11a(a) (emphasis added).

The court must determine whether this language has a plain, unambiguous meaning with regard to the particular dispute in the case. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The language of this statute is clear. The use of "may" not just once -- but twice -- clearly grants discretion. The term "dispose of" has been defined to

mean, "To determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc. of; to direct or assign for a use." *See* <http://www.websters-online-dictionary.org/definitions/dispose+of>. The power to "dispose of" a mortgage clearly includes the power to foreclose on the property encumbered by it. *See also Massie v. HUD*, 620 F.3d 340, 350 (3rd Cir. 2010).

Significantly, Congress's use of the phrase "notwithstanding any other provision of law" clearly means what it says. Construing the plain language of a "notwithstanding" clause, the Supreme Court has explained the clause "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993); *Shomberg v. United States*, 348 U.S. 540, 547-48 (1955) (when Congress uses a "notwithstanding" clause it "clearly manifest[s] its intent that certain policies should override" other statutory terms). In *Cisneros*, the Supreme Court stated, "the Courts of Appeals generally have interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that '[a] clearer statement is difficult to imagine.'" *Cisneros*, 508 U.S. at 18 (citations omitted). Here, the "notwithstanding" language of 12 U.S.C. § 1715z-11a(a) reflects Congress's intent that HUD have unfettered discretion in disposing of mortgages on such terms and conditions as HUD may determine to be appropriate for the particular situation.

Courts have followed *Cisneros* in construing the flexible authority provision. Section 1715z-11a(a) "confirms the Secretary's broad discretion in determining the manner in which HUD disposes of properties." *Guity v. Martinez*, 2004 WL 1145832, at

*4. In assessing the "wide discretion" granted in § 1715z-11a(a), and in particular, the "notwithstanding clause," "the court must assume that Congress meant what it said, and that the law governs even when it would violate other applicable statutes." *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, No. CV-05-4830, 2006 WL 297704, at *3, 8 (E.D.N.Y. Feb. 7, 2006); *Massie v. HUD*, Civil Action No. 06-1004, 2007 WL 184827, at *4 (W.D. Pa. Jan. 19, 2007), *vacated in part on other grounds*, 2007 WL 674597 (W.D. Pa. Mar 01, 2007) (this provision "must be read to override any conflicting provision of law in existence at the time that the flexible authority statute was enacted").

Section 204(a) trumps other statutes that would otherwise regulate the terms of a foreclosure. *Chicago ACORN, et al. v. HUD*, 05 Civil 3049, 2005 U.S. Dist. LEXIS 45970, *12 (N. D. IL. Oct. 5, 2005). Section 204's enactment in 1996 postdated the 1968 enactment of Section 236. "Congress is thus presumed to have known these allegedly inconsistent laws, yet chose to grant HUD unbridled discretion to dispose of multifamily properties 'notwithstanding' the requirements in these other statutes and orders." *Id.* (internal citation omitted). "By vesting the Secretary of HUD with the authority to dispose of multifamily properties 'notwithstanding any other provision of law,' Congress made it explicit that earlier statutes would not curtail HUD's discretion to manage and dispose of multifamily properties." *Id.* at 5.

Thus, Section 204(a), the flexible authority provision, endows HUD with unrestricted discretion to impose new terms and conditions to govern the foreclosure of a multifamily mortgage held by HUD, including the mortgage encumbering Shingle Creek. This "flexible authority" provision trumps the other, older statutory provisions upon

which Plaintiffs base their case. Because Congress committed the disposition of mortgages, such as the one at issue here, to HUD's discretion "on such terms and conditions as the Secretary may determine, "notwithstanding any other provision of law," this Court lacks jurisdiction to review HUD's actions in this case. The Court, therefore, should dismiss this action for lack of subject matter jurisdiction. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. at 830.

3. No jurisdiction to compel agency action.

Citing APA Section 706(1), Plaintiffs seek a permanent injunction requiring HUD to comply with the statutes and regulations cited in their amended complaint in any foreclosure sale and to impose on the buyer at the sale various conditions, including limitations on future rent increases, a prohibition against termination without cause, and compliance with tenant organizing and participation requirements in 24 C.F.R. Part 245. The Court lacks jurisdiction over this request for two reasons.

In addition to the 701(a)(2) bar, the Court also lacks jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance et al.*, 542 U.S. 55, 64 (2004). Here, Plaintiffs in their complaint do not (1) identify which actions it is seeking to compel from HUD, (2) allege such actions are discrete in any way, or (3) allege statutes or regulations that require the Defendants to take those discrete actions. Rather, Plaintiffs' attack is just the sort of broad programmatic attack rejected in *Norton* and other cases. *Id.*

Plaintiffs "cannot seek *wholesale* improvement of a program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 891 (1990)). In *Norton*, the Court gave a specific example of the type of discrete action a court may be empowered to compel. "When an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be". *Id.* at 65. The Court explained:

> The principle purpose of the APA limitations we have discussed…is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Id. at 66. Here, Plaintiffs do not seek to compel discrete actions HUD is required by law to take; rather, Plaintiffs seek to compel broad programmatic actions that HUD is not legally required to take. Under the APA, this Court cannot compel HUD to act in a manner not demanded by law. *Norton*, 542 U.S. at 65. Therefore, the APA does not provide any basis for the Court to compel HUD to act in the manner Plaintiffs seek.

III. HUD'S ACTIONS WERE NOT ARBITRARY, CAPRICIOUS, OR UNLAWFUL.

As argued above, this Court should dismiss this entire case because HUD's actions were committed to its discretion and are thus unreviewable. However, should the Court decide to conduct an APA review on the merits, it would find that HUD actions were neither arbitrary, capricious, nor unlawful. Therefore, the Court should grant summary judgment for HUD.

A. HUD DID NOT VIOLATE THE MMFA.

Even if HUD did not have the discretionary authority afforded by the flexible authority provision, 12 U.S.C. § 1715z-11a(a), HUD's actions would have been proper under the MMFA. Section 367(b)(2)(A) of the MMFA provides that in a case (such as this one) where "the majority of residential units in a property subject to … a [foreclosure] sale are occupied by residential tenants at the time of the sale, the Secretary shall require, as a condition and term of sale, any purchaser … to operate the property in accordance with such terms, as appropriate of the programs referred to in paragraph (1)." 12 U.S.C § 3707(b)(2)(A) (emphasis added). Paragraph (1) refers to the program under which the mortgage insurance or assistance was provided, or to any applicable regulatory or other agreement in effect with respect to such property immediately prior to the time of the foreclosure. 12 U.S.C. § 3706(b)(1).

Therefore, in this case, the MMFA requires HUD to require a new owner to conform either to the requirements of the Section 221(d)(4) program under which Shingle Creek is presently insured or to the requirements of the Section 236(e)(2) use agreement

under which assistance is presently being provided, as HUD shall deem those contrasting requirements to be appropriate to the present situation. It further allows HUD to combine or modify those terms "as appropriate."

HUD's proposed foreclosure sale does not violate the MMFA (12 U.S.C. §§ 3701-17) either, because the MMFA provides HUD with the authority to determine what conditions and terms of sale are appropriate. The MMFA at Section 3706(b)(1) states that the Secretary may require, as a condition and term of sale, that the purchaser at a foreclosure sale agree to continue to operate the property in accordance with the terms of the program under any applicable regulatory or other agreement in effect prior to the time of the foreclosure sale. 12 U.S.C. § 3706(b)(1) (emphasis added). Section 3706(b)(2)(A) further provides that the Secretary shall require as a condition and term of sale any purchaser to operate the property in accordance with such terms, as appropriate, of the Section 236 program. 12 U.S.C. § 3706(b)(2)(A)(emphasis added). The language in the MMFA makes it patently obvious that HUD has discretion to determine the appropriate conditions and terms that should be included in the sale. HUD determined that it was *not* feasible to continue operation of Shingle Creek Apartments as a Section 236 Project, and that it would not be appropriate to require the exact same rent levels in the bid kit.

The Section 236(e)(2) Use Agreement does not limit HUD's authority to make this determination. That agreement is a contract between HUD and the owner, Boca. AR 31-35. Moreover, the IRP (Interest Reduction Payments) Agreement is an agreement between the former lender Glaser Financial Group, Inc., the owner Boca Limited Partnership, and HUD. AR 36-65. None of the Plaintiffs is a party to either of these

contracts, nor is any Plaintiff a third-party beneficiary of either agreement. Therefore, Plaintiffs have no cause of action against HUD under either of these agreements. Because Section 204 authorizes HUD to dispose of mortgages "notwithstanding any other provision of law," there is no cause of action under Section 236(e) itself.

B. HUD COMPLIED WITH12 U.S.C. § 1701Zz-11.

1. 12 U.S.C. § 1701z-11(k)(2) does not apply.

Plaintiffs incorrectly allege that 12 U.S.C. § 1701z-11(k)(2) applies to the proposed foreclosure sale before this Court. *See* Am. Compl. ¶¶ 17-18, 38. The statute provides:

> (2) Sale of certain projects
>
> The Secretary may not approve the *sale of any subsidized project*--
>
> (A) that is subject to a mortgage held by the Secretary, or
>
> (B) if the sale transaction involves the provision of any additional subsidy funds by the Secretary or a recasting of the mortgage,
>
> unless such sale is made as part of a transaction that will ensure that the project will continue to operate, at least until the maturity date of the loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the proposed sale of the project.

12 U.S.C. § 1701z-11(k)(2) (emphasis added).

By its terms, Section 1701z-11(k)(2) applies only to the *sale of any subsidized project*, not the foreclosure of a HUD-held mortgage. In other words, Section 1701z-11(k)(2) applies to situations where the owner of a property sells it to another owner, subject to HUD's approval. Here, HUD is seeking to foreclose on a property and no

approval by HUD to HUD is required before HUD can proceed with the foreclosure. Additionally, this transaction does not involve a "recasting of the mortgage" but a foreclosure of the mortgage. Hence, Section 11701z-11(k)(2) does not apply to the foreclosure sale in this case.

2. Section 1701z-11(e)(1).

For their Fourth Cause of Action, Plaintiffs allege that HUD's foreclosure sale does not limit rents sufficiently, and therefore, violates 12 U.S.C. § 1701z-11(e)(1) and 1701z-11(b)(5). *See* Am. Compl. ¶¶ 14, 25, 26, and 40 (in which Plaintiffs argue that HUD should have required a Section 8 standard (30 per cent of net income) for tenant paid rents). However, the very language of those statutes belies Plaintiffs' allegations.

Plaintiffs claim the proposed Use Agreement violates subsection (e)(1) of Section 203, entitled "Management and Disposition of Multifamily Housing Projects", which is located in the Housing and Community Development Amendments of 1978. Pub. L. 103-233; 108 Stat. 343; 12 U.S.C. § 1701z-11. The plain language of Section 1701z-11(e)(1) proves this allegation to be untrue. It states:

> In the case of multifamily housing projects that are acquired by a purchaser other than the Secretary at foreclosure or after sale by the Secretary, the Secretary may enter into contracts under Section 8 of the United States Housing Act of 1937 (to the extent budget authority is available) with owners of the projects, subject to the following requirements: …

12 U.S.C. § 1701z-11(e)(1) (emphasis added). This section is clearly discretionary as indicated by the use of the word "may". There is no mandate whatsoever that HUD *must* provide Section 8 assistance to Shingle Creek. Thus, Plaintiffs' allegation that HUD's proposed foreclosure sale violates this section is false. Am. Compl. ¶¶ 26 and 40.

3. Section 1701z-11(b)(5).

When Congress reformed Section 1701z-11, the intent was to reform requirements for the disposition of multifamily property owned by HUD and to establish a framework governing the disposition of multifamily housing projects that does not impede the Government's ability to dispose of properties. *See* Multifamily Housing Property Disposition Reform Act of 1994, Pub. L. No. 103-233, §101,108 Stat. 342 (1994). HUD determined that it would be appropriate to continue to offer affordable units where the rent does not exceed 30% of 50% of the area median income for units occupied by very low-income families and 30% of 80% of the area median income for low-income families. AR 846-47. Plaintiffs allege the foreclosure sale violates subsection 12 U.S.C. 1701z-11(b)(5), which defines an affordable unit as follows:

> A unit shall be considered affordable if--
>
> **(A)** for units occupied--
>
> **(i)** by very low-income families, the rent does not exceed 30 percent of 50 percent of the area median income, as determined by the Secretary, with adjustments for smaller and larger families; and
>
> **(ii)** by low-income families other than very low-income families, the rent does not exceed 30 percent of 80 percent of the area median income, as determined by the Secretary, with adjustments for smaller and larger families; or
>
> **(B)** the unit, or the family residing in the unit, is receiving assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f].

HUD's Foreclosure Sale Use Agreement contains a rider entitled "Affordability of Units". *See* AR 846-47. This rider defines "affordable" for current tenants using the exact same language as 1701z-11(b)(5)(A)(i) and (ii). Contrary to Plaintiffs' allegations,

the rent limits in the proposed Use Agreement comply fully with the applicable law and regulations.

C. HUD CONSIDERED ALL THE FACTORS IN 24 C.F.R. § 27.20.

HUD considered all the factors at 24 C.F.R. § 27.20 in determining the appropriate conditions and terms for the foreclosure sale. HUD regulations at 24 C.F.R. § 27, Subpart A, implement requirements HUD must follow in the administration of the MMFA that are to be consulted in conjunction with the MMFA. 24 C.F.R. § 27.1.

Prior to commencement of a foreclosure, if a majority of the residential units in a property subject to foreclosure sale are occupied by residential tenants on the date of the sale or the date HUD designates the foreclosure commissioner, HUD shall consider nine factors in determining terms which may be appropriate to require. 24 C.F.R. § 27.20(a)-(b). The nine factors are: (1) The history of the project; (2) A financial analysis of the project; (3) A physical analysis of the project; (4) The income levels of the occupants of the project; (5) Characteristics, including rental levels, of comparable housing, and trends in the area; (6) The availability of or need for rental housing for low and moderate-income persons in the area; (7) An assessment of the number of occupants who might be displaced as a result of the manner of disposition; (8) Eligibility of the occupants of the property for rental assistance under any program administered by HUD and availability of funding; and (9) Other factors relating to the project as the Secretary considers appropriate.

The Fort Worth Multifamily Property Disposition Branch ("PD Center") processed the foreclosure recommendation for the Property in full compliance with 24

C.F.R. § 27.20 through the following research, which corresponds with the 9 factors listed above:

1. The history of the Project – The history of the Project and purpose of the program were communicated via the foreclosure recommendation package submitted by the local field office through the Multifamily Hub. AR 159. The local field office is responsible for monitoring the property being recommended for foreclosure. The foreclosure recommendation package includes a memorandum from the Hub, which provides a history of the property, the reason for default and a recommendation for restrictions to be included in the sale. AR 164-70. A list of project units complete with tenant names and addresses, copies of Notices of Violation and Default, financial reports, regulatory agreements and detailed property information accompany the Hub memorandum. *See* AR 177-194, 207-220. The HUD PD Center reviewed this package to ensure the foreclosure recommendation was justified.

2. A financial analysis of the project – A financial analysis is completed via HUD Form 9650. AR 235-42. This form, through an analysis of projected income (i.e. current rent for property units and after sale rent for property units), estimated operating and maintenance costs, estimated repair costs, debt service and projected stabilized occupancy rate provides an "as-is" price for the property and assists in determining project viability after foreclosure sale. Current rent for property units were ascertained through information provided by the local field office. AR 207-220. Market rents are established by completing a market survey for the immediate area. The property is compared to "like" properties in the immediate area to determine "market" rent. AR 243-

46. Estimated operating and maintenance costs are determined through review of the Income and Expense Analysis published by the Institute of Real Estate Management (IREM), financial documents for the property, and benchmark reports from HUD's IREMs system. AR 247-48, 412. Estimated repair costs were determined using information provided by the local field office. AR 230-34. REAC scores are considered in determining the need for a Comprehensive Repair Survey ("CRS"). If the last REAC score was 80 or above and the property is not a subsidized property, the PD Center will generally not order a CRS, but will include a $2,000 per unit cost for repairs. See AR 231. This project received a REAC score of 81 on June 15, 2009. AR 231. Stabilized occupancy is determined through Census reports for the immediate area. AR 399-408. These are factors used to determine project viability and the "as-is" sales price.

3. A physical analysis of the project – The physical condition of the property was determined through information provided by the local field office. *See* AR 230-34. National Environmental Policy Act and Section 106 of the National Historic Preservation Act (36 C.F.R. Part 800) requirements are met by completing HUD Form 4128. AR 251-71. The local field office conducted the environmental assessment and completed the form. *Id.* The PD Center coordinated with the State Historic Preservation Office to ensure deed restrictions met with their approval. AR 284-91.

4. The income levels of the occupants of the project – The Department is authorized by the Housing and Community Development Amendments Act of 1978, as amended by the Housing and Community Development Act of 1987 and the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, to collect information

relating to the income level of certain unassisted tenants in projects with assigned or foreclosed mortgages. Upon determination to initiate foreclosure, a notice, which includes the survey and a Privacy Act Statement, is prepared and sent to each unit at the property. AR 296-301. Tenants are encouraged to complete and return the survey form. (A self-addressed stamped envelope is provided with the survey.) *Id.* This survey form reports the name and birthdate of the head of household, annual income of the household, the number of occupants for the unit, and the amount of and type of subsidy, if any, received by the family. *Id.* The information is used in establishing the income classification of unassisted tenants and is used to divide respondents into categories of very low, low or moderate income. When a property is sold, the information may be used to identify specific units and unit types which should be retained as affordable, and may be used in determining what type of assistance can be provided to the project. Each survey that is returned to HUD is reviewed to determine the tenant's eligibility for protection under Section 203(g) of the Multifamily Housing Property Disposition Act of 1994. The information is provided to new owners and they are required to verify the income and include the rent protection in the lease. Moreover, the terms of the foreclosure sale require the new owner to agree that the rent of any pre-existing very low-income tenant is paying shall not be exceeded or subject to any rent increase that would require the family to pay more than 30% of its adjusted annual income. AR 848.

5. Characteristics of comparable housing, and trends in the area – Rental market information is obtained through information provided by the local field office, area real estate publications, local area rental advertising and databases, Census data and

through contacts with professional multifamily property management companies in the area. AR 302-304, 399-408. In completing the market survey, the Property was compared to other properties in the area to determine a market rent. AR 243-46. Characteristics such as property type (i.e. walk-up, elevator), year built, unit and community amenities offered by the property, and occupancy levels are considered in determining market rent. *Id.* Additionally, the PD Center provided notices to units of local government as well as affected tenants. AR 294-301. These notices informed of the initiation of foreclosure and provided information regarding the terms and conditions of sale. *Id.* The PD Centers request information and feedback from recipients and provide a contact name and number. *Id.*

6. The availability of or need for rental housing for low and moderate-income persons in the area – The availability of affordable rental housing in the area is determined through the market research and information provided by the local field office. AR 418-450. Additionally, any rent and income restrictions at the property are continued through the foreclosure sale. AR 414-17. When the Department notifies the unit of local government ("ULG"), the ULG is given the right not only to comment on the terms and conditions of sale, but to participate in the process. AR 294-95. They are also provided the opportunity to express their interest in the acquisition of the property. *Id.* However, no ULG interest was expressed in the proposed foreclosure sale of the Property here. *See* AR 168.

7. An assessment of the number of occupants who might be displaced as a result of the manner of disposition – Displacement is rarely encountered as a result of

a foreclosure action. Generally, displacement will occur prior to the foreclosure recommendation and is initiated at the field office level. No displacement was expected, nor did it transpire in this case. *See* AR 168.

8. Eligibility of the occupants of the property for rental assistance under any program administered by HUD and availability of funding – The PD Center conducts a tenant survey that reports the annual income of the households. AR 296-301. This information is reviewed to determine income levels. A rent cap is used for very low-income tenant households. This provides a two-year rent protection for pre-existing very low-income tenants as required by 203(g) of the Multifamily Housing Property Disposition Act of 1994. The new owner is required to ensure that this provision is included in the tenant's lease and certify the income of the tenant annually. AR 848. Affordability is maintained through the execution of a new use agreement containing income and rent restrictions. AR 846-47.

9. Other factors relating to the project as the Secretary considers appropriate – HUD considers income and rent restrictions that are imposed via Land Use Restriction Agreements applied by state, county and local finance agencies. During the foreclosure sale analysis, if it is found that such an Agreement exists, HUD will review to determine if it is appropriate to extend the restrictions through the foreclosure sale. A foreclosure sale which includes an affordability provision (rent and income restricted), like this project, requires that the new owner obtain prior HUD written approval for any rent increases. Additionally, when properties are sold through

foreclosure with affordability provisions, HUD must review and approve all changes in ownership and management of the property. AR at 841.

Plaintiffs allege HUD's foreclosure sale violates 42 U.S.C. § 3608 because it *may* have a disparate impact on minority housing opportunities. Am. Compl. ¶ 35. As discussed *infra*, 12 U.S.C. § 1715z-11a(a) provides the Secretary with broad discretion to determine the factors applicable to any particular foreclosure sale. Discrimination is ordinarily considered when HUD looks at the impact of displacement as a result of foreclosure, or where tenant paid rents might exceed the 30% standard. Neither has occurred here.

After considering all 9 factors listed in 24 C.F.R. § 27.20, HUD concluded that it would not be able to continue Section 236 rents. Occupancy at the property was at 95% in 2005. AR 230. However, new properties with amenities like pools and dishwashers attracted more tenants than Shingle Creek. *Id.* Beginning in 2006, occupancy rates began to fall and by December 2009 occupancy was at 84%. *See* AR 230-34.

In addition, HUD would not have the required information before or after foreclosure to determine rents using its traditional Section 236 rent computation methodology. AR 155-57. Traditionally in a Section 236 project, rents are set on a budget–based computation that includes operating expenses, debt service requirements based on a 1% interest rate and limited annual distributions for limited dividend for-profit mortgagors. *Id.* at 156. This calculation cannot be made after the foreclosure sale because the successful purchaser will not receive the benefit of the 1% interest reduction payment (IRP). *Id.* Because the purchaser at foreclosure will not have the benefit of

IRP, there is no legal basis to subject the purchaser to compliance with the Section 236 statutory and program requirements. *Id.* When Boca defaulted and its lender assigned the mortgage to HUD on July 27, 2009 in exchange for mortgage insurance benefits, the assignment terminated the IRP agreement. AR 155. Moreover, during the life of the Section 236 mortgage, HUD computed Section 236 rents based on development proposals that were reviewed and determined acceptable under the Section 236 program requirements and regulations. AR 156*; see also* 12 U.S.C. § 1715z-1(f)(1). Post-foreclosure, the property will no longer be considered a Section 236 project because the 236(e)(2) use agreement terminates at foreclosure. AR 155. Since HUD will not be processing bidders' development proposals at the foreclosure sale, HUD will not know the debt service component of the rent after the foreclosure sale. AR 156. The basis for HUD's decision about the terms to which the foreclosure sale purchaser would be subject was rational and obvious: The property would not be sustainable with the Section 236 rents because the new owner would not have the benefit of the 1% IRP, and HUD does not have sufficient information about the purchaser's development plans prior to foreclosure to calculate the rents.

In sum, HUD properly considered all the relevant factors and explained decisions in the administrative record and the bid kits. The APA requires no more.

CONCLUSION

The Court should dismiss this action for lack of subject matter jurisdiction because there has been no valid waiver of sovereign immunity. Should the Court not dismiss the action outright, it should enter summary judgment in favor of HUD for the reasons set forth above.

Dated: March 16, 2012

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