



Owners have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup>

The principal issue presented is whether the Owners' alleged failure to give sufficient advance notice of their intention to "terminate" their contract with HUD requires HUD to continue providing project-based assistance for the complex.

Because this Court answers that question in the negative, HUD's motion to dismiss is GRANTED, and the Owners' motion to dismiss is GRANTED, in part, and DENIED, in part.

#### **Standard of Review**

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must regard all well-pleaded facts as true, and must treat the allegations in the complaint in the light most favorable to the plaintiff. See Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988). The motion should be granted "only if, when viewed in this manner, the pleading shows no set of facts which could entitle [the] plaintiff to relief." Id.

#### **The Complaint**

The allegations contained in the amended complaint are as

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<sup>1</sup> Secretary Martinez and HUD, initially, moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), on the ground that PEH lacked standing. The complaint, later, was amended to add the Tenants Association as a plaintiff. The motion presently before the court is more appropriately treated as a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

follows. Some time ago, the Owners entered into housing assistance payment contracts ("HAP contracts") with HUD pursuant to which HUD provided rental subsidies for the complex in exchange for the Owners' agreement to rent the apartments in the complex to low-income families subject to HUD regulations. Those contracts had specified expiration dates but, periodically, were extended or renewed by mutual agreement.

The most recent extension expired on May 31, 2001. Because the parties were unable to agree on the rent to be paid for the apartments, the Owners were unwilling to extend the contracts any further and HUD decided to adopt a rent subsidy program that provided assistance to individual tenants wherever they reside instead of the project-based assistance program that provided assistance for tenants residing in a designated complex of apartments.

Section 1437f(c)(8) of the U.S. Housing Act and R.I. Gen. Laws § 34-45-5, which is incorporated by HUD regulations, require an owner who wishes to "terminate" a HAP contract to give affected tenants at least one or two years' advance notice, respectively. Here, the plaintiffs allege that the notice purportedly provided by the Owners was either not timely or failed to satisfy the prescribed requirements.<sup>2</sup> In their memorandum, the plaintiffs

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<sup>2</sup> The Owners' decision not to renew was prompted by a dispute with HUD regarding the amount of rent to which the Owners were entitled for the various apartment units.

assert that HUD's conversion to a tenant-based assistance program will reduce the supply of subsidized low-income housing units in Woonsocket and that some of their members may not qualify because, apparently, the Woonsocket Housing Authority (the "WHA"), which administers the tenant-based assistance program, enforces the eligibility standards more stringently than the Owners do under the project-based assistance program.

More specifically, in their seven-count amended complaint, the plaintiffs claim that: (1) the Owners violated the U.S. Housing Act, 42 U.S.C. § 1437f(c)(8), by not providing sufficient notice of their intent to terminate their project-based assistance contract with HUD; (2) the Owners and the WHA violated the Housing and Community Development Amendments of 1978, 12 U.S.C. § 1715z-1b(b)(2), by interfering with the tenants' efforts to obtain rent subsidies in the form of project-based assistance; (3) the Owners violated R.I. Gen. Laws § 34-45-1, by not providing sufficient notice of their intent to terminate the project-based assistance contracts with HUD; (4) HUD violated the Administrative Procedures Act, 5 U.S.C. § 701 et seq.,<sup>3</sup> by arbitrarily and capriciously allowing the contracts to expire; (5) HUD and the WHA violated their duty to further fair housing under 42 U.S.C. § 3608(e)(5) by

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<sup>3</sup> The plaintiffs refer to "28 U.S.C. § 701 et seq." No such code section exists. Because it is clear that the plaintiffs are alleging a violation of the Administrative Procedures Act, this Court assumes the plaintiffs mean to refer to 5 U.S.C. § 701 et seq.

terminating project-based assistance for the complex and, instead, subsidizing tenants' rent through a program of tenant-based assistance; (6) the defendants violated the 5th and 14th Amendments to the U.S. Constitution by depriving plaintiffs of property without due process of law; and (7) the plaintiffs are entitled to declaratory relief under 28 U.S.C. §§ 2201, 2202.

### **Discussion**

#### **I. The Statute**

Section 1437f(c)(8)(A) requires an owner receiving payments under a project-based assistance contract to provide written notice of any proposed termination of the contract to HUD and the affected tenants "not less than one year before termination . . . ." The apparent purpose of the notice requirement is to afford the tenants an opportunity to find alternative subsidized housing.

Subsection (B) states that: "In the event the owner does not provide the notice required, the owner may not evict the tenants or increase tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed." 42 U.S.C. § 1437f(c)(8)(B). Subsection (B) also authorizes, but does not require, HUD to "allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice . . . ." Id.

In this case, the tenants assert that they were unaware of the Owners' intent not to renew their contract with HUD until April 16,

2001, when they were notified by the WHA that because the project-based assistance contract was set to expire on May 31, 2001, the tenants may be eligible to receive tenant-based assistance after that date.

In order to preserve the status quo and prevent any tenants from being displaced or being required to pay more for occupancy of their apartments, this Court, on June 28, 2001, entered a temporary restraining order enjoining the Owners from evicting any tenant participating in the project-based assistance program as of May 31, 2001, provided that the tenant continued to meet the eligibility requirements of the project-based assistance program and the provisions of their lease, and made an effort to seek tenant-based assistance. Because the Owners desired to retain the tenants and the WHA was prepared to continue subsidizing their rents under a tenant-based assistance program, the defendants readily agreed to abide by those terms for a period of one year.

The principal issues to be decided are:

1. Whether the plaintiffs can compel HUD to resume project-based assistance to the complex.
2. If so, whether the plaintiffs can compel the Owners to renew their contract with HUD.

## II. The Claims Against HUD

The plaintiffs are unable to identify any statutory provision requiring HUD to continue project-based assistance to a housing

complex if the owner fails to provide proper notice that it is "terminating" its contract to participate in the program. On the contrary, as already noted, § 1437f(c)(8)(B) states that, if the owner fails to give the required notice, "[t]he Secretary may allow the owner to renew the terminating contract." 42 U.S.C. § 1437f(c)(8)(B) (emphasis added).

Nor does the statute purport to prevent a HAP contract from expiring if the required notice is not provided. Rather, "[i]t merely prevents the owner from evicting tenants or increasing rental payments until such time as the owner has provided the notice and one year has elapsed." Hines v. Charlestown Housing Authority, No. 1:01CV70-CDP, slip. op. at 19 (E.D. Mo. Jan. 15, 2002).

Absent an express statutory provision automatically renewing HAP contracts after their expiration dates, it is difficult to see how an owner can continue to be bound to such a contract against its will. Evidence that Congress harbored no such intent may be gleaned from § 524 of the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA") which provides that, upon "termination or expiration" of a project-based assistance contract, HUD "shall at the request of the owner," renew the contract. MAHRA, Pub. L. No. 105-65, 111 Stat. 1384, § 524(a)(1) (emphasis added).

The plaintiffs rely on a HUD Loan Management Set Aside program handbook that, apparently, was published on HUD's internet web site

in 1993 and suggests that HUD must require owners who fail to comply with the notice requirements to agree to a unilateral extension of HAP contracts. However, it appears that the provisions in that handbook are no longer in effect and, in any event, there is no statutory authorization for imposing such a requirement.

Since HUD is neither required nor authorized to unilaterally extend HAP contracts against the will of owners, its failure to attempt to do so did not violate the Housing Act or constitute action that was arbitrary or capricious within the meaning of the Administrative Procedures Act. Nor can its exercise of discretion in switching from project-based assistance to tenant-based assistance be viewed as depriving the plaintiffs of any property rights without due process.

### III. The Claims Against the Owners

To the extent that the plaintiffs' claims against the Owners rest on the premise that the Owners can be compelled to renew their HAP contracts with HUD, those claims fail for many of the reasons previously stated. There is no statutory authorization for requiring owners to continue participating in such contracts after their expiration date. The sole remedy for failing to provide the requisite notice is that an owner is prohibited from evicting tenants or increasing their rent payments until such notice has been provided and the prescribed notice period has elapsed.

In addition, since HUD, itself, has chosen to provide subsidies under a tenant-based assistance program instead of a project-based assistance program, it would be impossible for the Owners to renew a contract to which they would be the only party.

In short, the plaintiffs' only viable claim against the Owners is that the Owners should be barred from evicting or increasing the rent of tenants who occupied the complex under the project-based assistance program unless and until the Owners provide the notice of termination required by law and the prescribed period following such notice has elapsed.

**Conclusion**

For all of the foregoing reasons, the motion to dismiss by HUD and Secretary Martinez is GRANTED. In addition, the Owners' motion to dismiss is GRANTED with respect to Counts II and VI, and DENIED with respect to Counts I, III, and VII.

By order,

\_\_\_\_\_  
Deputy Clerk

ENTER:

\_\_\_\_\_  
Ernest C. Torres,  
Chief United States District Judge  
Date: \_\_\_\_\_