IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00 N 1454

PARK HILL TENANTS COUNCIL,
LOW INCOME TENANTS ASSOCIATION,
GERTRUDE MYERS, AND ANGELIQUE WOODS,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ANDREW M. CUOMO, Secretary of the U.S. Department of Housing and Urban Development, in his official capacity, COLORADO HOUSING AND FINANCE AUTHORITY, DAVID HERLINGER, Executive Director of the Colorado Housing and Finance Authority, in his official capacity, HORN CREEK DEVELOPMENT CO., LLLP, formerly known as Horn Creek Development Co, Ltd. and PHG ACQUISITIONS, CORP., general partner of Horn Creek Development Co., Ltd.

Defendants.

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT COLORADO HOUSING AND FINANCE AUTHORITY'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs hereby submit their response to Defendant Colorado Housing and Finance Authority's Motion to Dismiss Plaintiffs Amended Complaint.

I. INTRODUCTION

Although this case concerns the plight of only one federally-subsidized housing complex in Denver, Park Hill Gardens West, the potential loss of this one low-income housing complex is part of a major affordable housing crisis facing tenants and communities across the country. Thousands of units of privately-owned affordable housing constructed or rehabilitated as far back as the late 1960's are at risk of loss in Denver and nationwide as a result of expiring use restrictions or expiring long-term

subsidy contracts. The Center for Affordable Housing and Educational Quality for the City of Denver, "Housing in Denver: Problems, Needs and Opportunities," (December 1999) (_____). Congress has provided HUD with clear mandates and the authority necessary to enable it to prevent the loss of these affordable housing units. As early as 1983 Congress recognized the need to preserve affordable rental units by enacting Section 250 of the National Housing Act, 12 U.S.C. § 1715z-15. This law gives clear direction to HUD to not accept the proposal by the owner of Park Hill Gardens West to prepay the mortgage because of the critical need for such housing in the Denver area. The Fair Housing Act, 42 U.S.C. § 3604 et seq. provides additional justification for HUD's refusal to permit the prepayment of the mortgage that will result in the loss of these affordable housing units for lower income minorities. More recently, in order to address the twin goals of "[preserving] low income housing affordability and availability while reducing the long term costs of project based assistance," Congress enacted two major legislative initiatives giving HUD clear guidance on the treatment of subsidy contracts renewals, as well as explicit direction on the goals to be fulfilled by HUD. *See* Multifamily Assisted Housing Reform and Affordability Act of 1997, Title V of Pub. L. No. 105-65, 111 Stat. 1385 (October 27, 1997) ("MAHRAA") and Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act, Pub. L. No. 106-74, Title V (October 20, 1999) ("21st Century Act").

The first of these initiatives, the MAHRAA, set up a mechanism to reduce debt service and operating costs for assisted multifamily developments in order to permit reduction of subsidy contract rent levels where the existing levels are higher than rents for comparable market-rate units. This program, known as HUD's "mark-to-market" program, allows HUD to restructure mortgage debt for

HUD-insured mortgages so that the portion of the rent subsidies required for mortgage payments can be reduced or eliminated. In order to promote efficiency in debt restructuring, MAHRAA required HUD to contract with independent entities, called "Participating Administrative Entities" or "PAEs," to administer the mark-to-market program in each state. MAHRAA, Section 513. Defendant Colorado Housing Finance Authority ("CHFA") is the PAE under contract with HUD to administer the mark-to-market program in Colorado.

The second initiative, the 21st Century Act, gave HUD more explicit guidance on rent levels for contract renewals, including a mandate to increase rent levels where necessary to preserve developments; made corrections in the mark-to-market program; and authorized special "enhanced" vouchers to reduce the harm to tenants in the event of non-renewal of a subsidy contract. While authorizing enhanced vouchers in the 21st Century Act, Congress made clear that vouchers were only to be viewed as a last resort—HUD's first duty is to preserve project-based subsidies wherever possible. In approving S. 1596, the Senate's version of the 21st Century Act, the Senate Committee on Appropriations emphasized:

> This bill includes legal authority to allow HUD to provide section 8 rental assistance up to the market rent of a unit for low-income families where owners of projects assisted with section 8 project-based assistance choose to not renew their expiring section 8 contracts... The Committee believes that HUD must first make *every effort* to renew the expiring section 8 contracts which are attached to this assisted housing, especially those projects located in low vacancy areas, including those in high cost urban areas...

Senate Committee on Appropriations Report No. 106-161 on S.1596, "Housing Certificate Fund (Including Transfer of Funds) Committee Recommendation" (September 16, 1999) (emphasis supplied) (available on the Library of Congress website at http://thomas.loc.gov).

In this case, HUD not only failed to pursue alternatives to preserve the property as subsidized housing[1], but HUD also failed to follow the law regarding those steps to be taken to prevent the Owner from opting out. Particularly because the harsh consequences of HUD's actions fall almost entirely upon African-American households in Park Hill Gardens West, HUD's conduct not only contradicts Congressional directives regarding preservation of low-income housing, but also violates HUD's obligations under the Fair Housing Act.

II. RELEVANT FACTS

The facts relevant on a Motion to Dismiss are those facts set out in Plaintiffs' Amended Complaint.

III. ARGUMENT

A. Standard of Review

A court faced with a 12(b)(6) motion must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Because "granting defendant's motion to dismiss is a harsh remedy which must be cautiously studied . . . to protect the interests of justice," *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986), a court should grant such motion "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th Cir. 1989).

[1]Plaintiffs are filing with this Response a Motion to Amend Complaint and Third Amended Complaint. The Third Amended Complaint sets forth Plaintiffs' claim regarding the alternatives open to HUD and CHFA to preserve Park Hill Gardens West as viable, affordable housing under MAHRAA and the 21st Century Act.

Further, the federal rules require in a complaint only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Rule 8 standard contains "a powerful presumption against rejecting pleadings for failure to state a claim." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985); *see also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) ("It is axiomatic that 'the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'") (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* vol. 5 § 1357, at 598 (1969)).

B. CHFA Has Violated the Fair Housing Act By Causing a Disparate Adverse Impact Upon African-Americans and by Failing to Comply with Its Obligation to Affirmatively Further Fair Housing

CHFA misreads the Fair Housing Act, and attempts to evade its Fair Housing duties, when it argues that it has no obligation to affirmatively further fair housing and that it has not made housing unavailable because of race in violation of the Fair Housing Act.[2] CHFA's argument seems to be that, if anyone discriminated, it was the property owner, not CHFA. This argument ignores the fact that CHFA was in a position to let the owner proceed as it did or to stop the owner from proceeding as it did by refusing to allow the prepayment and enforcing the CHFA Regulatory Agreement. Being in this position, CHFA was obligated to ensure that its actions did not cause a disparate impact upon any protected class, as well as to see that its actions were consistent with its obligation to affirmatively further fair housing.

1. CHFA's Actions Are Covered By the Fair Housing Act

[2] Plaintiffs base their discrimination claims for relief against CHFA only on the provisions of the Fair Housing Act. To the extent that claims for relief were also alleged in Plaintiffs' Amended Complaint for violations of Executive Order 11063 and 24 C.F.R. § 107, such claims for relief are withdrawn.

a. The Fair Housing Act Requires CHFA to Ensure That Its Actions Do Not Cause A Disparate Impact Upon Protected Classes

As a preliminary matter, the Fair Housing Act prohibits both purposeful discrimination on the basis of race and prohibits those policies and practices that have a disparate impact on the basis of race regardless of any discriminatory motive on the part of the defendant. *See Bangarter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). No showing of discriminatory intent is necessary to establish a disparate impact claim. *See Mountain Side Mobile Estates Partnership v. Sec'y of HUD*, 56 F.3d 1243, 1252 (10th Cir. 1995). Nothing in the Complaint alleges purposeful discrimination by CHFA; rather, the Complaint alleges that CHFA's actions or inactions have caused a disparate impact upon African-Americans. *See* Amended Complaint at ¶ 59.

CHFA portrays the Owner's conversion of apartments from federally-subsidized rental units to for-sale townhomes as a racially neutral conversion from one form of occupancy to another which does not cause unlawful discrimination under the Fair Housing Act because it is not denying housing to African-Americans *on the basis of their race* within the meaning of section 3604(a). However, "the necessary premise of a disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Mountain Side,* 56 F.3d at 1250-51 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (other citations omitted). An early disparate impact case, *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights ("Arlington II")*, 558 F.2d 1283 (7th Cir. 1977), noted that the difficulty in reading section 3604(a) of the Fair Housing Act to support a disparate impact claim is that the language of that provision prohibits discrimination "because of race." *Id.* at 1288. However, that court held that "[i]n light

of the declaration of congressional intent provided by section 3601 and the need to construe the act expansively in order to implement that goal, we decline to take a narrow view of the phrase "because of race" contained in section 3604(a)." *Id.* at 1289. The Court continued: "We therefore hold that . . . a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Id.* As noted above, the Tenth Circuit has likewise endorsed a discriminatory effect standard under 3601(a). *See Mountain Side*, 56 F.3d at 1252.

b. CHFA Is Obligated to Affirmatively Further Fair Housing

In addition to its duty not to discriminate, CHFA is also obligated to affirmatively further fair housing. The fact that the language of the statute, 42 U.S.C. § 3608(e)(5), applies on its face only to HUD does not relieve CHFA of this duty. With respect to Park Hill Gardens West, CHFA has acted as HUD's agent, grantee, and contractor. *See* Amended Complaint, ¶¶ 12, 21, 24. In such circumstances, courts have held that agencies such as CHFA have the same obligation as HUD to affirmatively further fair housing. *See Otero v. N.Y. Hous. Auth.*, 484 F.2d 1122, 1133-34 (2nd Cir. 1973) (affirmative duty to further fair housing goals applies to local agencies receiving federal housing and urban development funds); *followed by U.S. v. Charlottesville Redevel. & Hous. Auth.*, 718 F. Supp. 461, 464-65 (W.D. Va. 1989).[3]

While CHFA refers to the obligation to affirmatively further fair housing as a vague imperative, its meaning has been well fleshed-out in cases. This duty has been interpreted to mean that an agency has "at

[3] In addition to the obligation imposed by the Fair Housing Act, CHFA is also obliged to prevent discriminatory practices pursuant to Executive Order 11063 and 24 C.F.R. § 107. 24 C.F.R. § 107.15(f) defines "discriminatory practices" broadly to include "use of a policy or practice, or any arrangement, criterion or other method which has the effect of denying equal housing opportunity."

a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *NAACP v. HUD*, 817 F.2d 149, 156 (1st Cir. 1987).

Thus, it is the obligation "to evaluate alternative courses of action in light of their effect upon open housing." *Id.* at 157. *See also Shannon v. U.S. Dept. of Hous. and Urban Devel.*, 436 F.2d 809 (3d Cir. 1970), (HUD required to conduct study of effect of new development on racial composition of surrounding area); *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991) (HUD's failure to consider impact of mixed-use development on racial composition of surrounding neighborhoods arbitrary and capricious).

The duty to affirmatively further fair housing is the duty to examine agency actions so as to avoid causing a disparate impact upon protected classes. This means keeping necessary statistics and conducting studies at significant decision-making junctures, such as deciding to allow a subsidized housing project to prepay its mortgage and opt out of the subsidy program. As the court noted in *Shannon*, an agency charged with affirmatively furthering fair housing "must utilize some institutionalized method whereby . . . it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under . . . [the Fair Housing Act.]" 436 F.2d at 821.

2. CHFA Is Liable for Causing Discriminatory Impact

a. CHFA Was In the Position of Decision-Maker, and Made Decisions Which Caused a Disparate Impact Upon African-Americans

The U.S. Supreme Court has found that the clear intent of Congress is for the Fair Housing Act to be construed broadly. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the

Court commented that the language of the Act is "broad and inclusive," *id.* at 209, that the Act carries out a "policy that Congress considered to be of the highest priority," *id.* at 211, and that vitality can be given to this policy "only by a generous construction" of the statute. *Id.* at 212. Ten years after *Trafficante*, the Supreme Court again referred to "the broad remedial intent of Congress embodied in the [Fair Housing] Act" in another unanimous Title VIII opinion. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

Liability under the Act is thus not limited to certain types of actors. Instead the reach of the Act extends to anyone who commits one of the acts proscribed by the Act, with certain narrow exceptions not at issue in this case.[4] Governmental--or quasi-governmental--defendants are not exempt. As the 6th Circuit Court of Appeals has stated, "Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class. . . . When Congress amended § 3604(f) in 1988, it intended the section to reach not only actors who were directly involved in the real estate business, but also actors who directly affect the availability of housing, such as state or local governments."[5] *Michigan Protection and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) (citing H.R. Rep. No. 711, 100th Cong., 2d Sess. 22 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2183 (other citations omitted).

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[4] Section 3603(b) (1)exempts "any single-family house sold or rented by an owner under certain limited circumstances, and 3603(b)(2) exempts units in buildings that are occupied or intended to be occupied by no more than four families if the owner maintains a residence in the building. Section 3607 exempts "housing for older persons" from its prohibitions against familial status discrimination.

[5] Section 3604(f) contains language comparable to 3604(a), but applies to discrimination on the basis of handicap, as opposed to other protected classes. This section was added by the 1988 Fair Housing Amendments Act.

Nor is CHFA relieved from liability as one "merely . . . responsible for putting the violator in the position in which he can act improperly," as asserted in CHFA's motion, citing *Hollins v. Kraas*, 369 F. Supp. 1355, 1358 (N.D. Ill. 1973).[6] CHFA's position is nothing like the position of the Defendants in the *Hollins* case, in which the motions to dismiss of an owner and bank were granted because the court found them not liable for the actions of a rental agent where the owner and bank had not authorized the rental agent to act as their agents. *Id.*

Plaintiffs allege that CHFA was itself in the position of declining or accepting prepayment of the mortgage by the property owner in this case. *See* Amended Complaint, ¶ 28. It approved the prepayment and released the CHFA Regulatory Agreement. Amended Complaint, ¶ 38, 42. CHFA thus made the affirmative decision to "waive" the requirements of the CHFA Regulatory Agreement with respect to the property owner. CHFA Motion to Dismiss, p.24. This action was a prerequisite to the owner's attempted election to opt out of the HAP contract. CHFA's approval of prepayment was apparently taken in spite of Congressional goals regarding efforts to keep existing low-income housing subsidized, and in the absence of using the tools that Congress had provided to prevent property owners from opting out. As HUD's designated PAE, CHFA was charged with making every effort to preseve Park Hill Gardens West as viable affordable housing, including pursuing alternatives such as mortgage restructuring under MAHRAA.[7]

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[6] CHFA's other cited case, *Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996), is not relevant to the issue of whether CHFA was in a position to take action which violated the Fair Housing Act. In that case, the Court affirmed the lower court's motion to dismiss Fair Housing Act and other claims against two city officials sued in their individual capacities, finding that the officials were entitled to qualified immunity. *Id.* at 529-32. CHFA also cites *Kennedy Park Home Ass'n v. City of Lackawanna*, 318 F. Supp. 669, 694 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Plaintiffs find nothing in the case to support Defendant's argument.

[7] Plaintiffs' proposed Third Amended Complaint articulates the manner in which CHFA, as HUD's PAE, failed to pursue alternatives to preserve Park Hill Gardens West in violation of Congressional intent.

Due to the extreme adverse disparate impact upon African-Americans that resulted, there can be no doubt that CHFA violated its duties not to discriminate and to affirmatively further fair housing.

b. Conversion From One Form of Occupancy To Another May Constitute A Discriminatory Act If There Is No Adequate Business Necessity That Justifies the Disparate Impact of the Change

CHFA argues that the practice that has caused the displacement of a disparate number of African-Americans is not actionable under the Fair Housing Act because it is a neutral conversion from one form of occupancy to another. However, courts have not hesitated to hold that otherwise neutral actions of rental property owners and others resulting in displacement of tenants which have a disparate impact on racial minorities can violate the Fair Housing Act. *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (plaintiffs made out prima facie case of disparate impact discrimination where apartment complex's conversion to "all-adult" had the effect of displacing greater percentages of persons of color than whites); *Hispanics United of DuPage County v. Village of Addison*, 988 F. Supp. 1130 (N.D. Ill. 1997) (in ruling on fairness of proposed settlement, court found that redevelopment of tax increment financing area, which displaced large number of Hispanics, constituted disparate impact); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153-54 (S.D.N.Y. 1989) (defendant's refusal to accept section 8 vouchers and imposition of income tests had unlawful disparate impact upon African Americans and Latinos where "policies would have the effect of disqualifying from tenancies 6.06% of the minority households in the applicant pool, but only 0.25% of nonminority households in the pool").[8]

[8] The unpublished decision cited by CHFA, *Williams v. 5300 Columbia Pike Corporation*, 1996 U.S. App. LEXIS 31004 (4th Cir. 1996), simply decides, without analysis, that the disparate effects test does not apply where the issue is price. This decision is in contrast to the decisions cited above and is not well-reasoned. Further, it can be distinguished from the case at hand based upon the fact that, first, unlike CHFA, the private *Williams* defendants were not subject to affirmative duties to prevent discrimination, and second, that their actions did not

2. Plaintiffs Have Adequately Alleged Disparate Impact

a. Disparate Impact Upon African-Americans

To survive a motion to dismiss in a disparate impact case, all that a plaintiff must do is plead that a facially neutral practice's adverse affects fall disproportionately upon a protected group. *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir.) *cert. denied,* 120 S. Ct. 579 (1999) (Title VI case). The court "must presume that the general allegations in the complaint encompass the specific facts necessary to support the allegations." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990)). Furthermore, as the Supreme Court has stated, "when a federal court reviews the sufficiency of a complaint . . . the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *accord Lake v. Arnold*, 112 F.3d 682, 688 (3d Cir. 1997).

In this case, plaintiffs have pled that the adverse effect of the Defendants CHFA's otherwise neutral practice will fall disproportionately upon persons who are members of protected classes. *See* Amended Complaint, ¶ 59. Plaintiffs are entitled, therefore, to offer evidence at trial to support this allegation and should not have their claims dismissed.

In addition, Plaintiffs have pled facts which support their allegation that the defendants' action have a disparate impact upon African-Americans. A prima facie case of disparate impact "is generally shown by statistical evidence." *Mountain Side Mobile Estates Partnership v. Sec'y of HUD,* 56 F.3d 1243, 1251 (10th Cir. 1995). In making a determination of whether there is a disparate impact, courts have

involve federal or state subsidies.

focused on the percentages of protected class members versus non-protected class members affected by the defendant's policy or practice. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 929 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Arlington II*, 558 F.2d at 1289-90; *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987, 1018 (E.D. Pa. 1976), *modified on other grnds*, 564 F.2d 126 (3d Cir. 1977).

Plaintiffs have alleged that the population affected, Park Hill Gardens West residents, are over 90% African-American, while the population of African-Americans in Denver is 12.5%. Amended Complaint, ¶ 17. This type of analysis of disparate impact is the same as that used by the court in *Hispanics United*, 988 F. Supp. at 1155-57. That case involved demolition of a number of buildings in a tax increment financing district. The court, in approving a settlement agreement, endorsed the notion that the reference population may be the general population of the town. *Id.* at 1155.

Plaintiffs have further pled facts which indicate that the black population of Denver has a disproportionate need for subsidized housing. Plaintiffs have cited a HUD report which shows 43% of Denver blacks, versus 28% of all Denver residents, have housing affordability problems. Amended Complaint, ¶ 18. Those households with affordability problems would be households in need of subsidized housing such as that at Park Hill Gardens West. This type of analysis follows the reasoning of *Arlington II*, 558 F.2d at 1289-90 (40% of eligible persons in the Chicago area were black compared to 18% of the entire population); *Huntington Branch NAACP*, 844 F.2d at 929 (28% of blacks v. 11% whites income-eligible; 7% of white households v. 24% of black households "need" subsidized housing); and

Smith v. Town of Clarkton, 682 F.2d 1055, 1064-66 (4th Cir. 1982) (black population of the county was far more in need of subsidized housing than the white population).[9]

When considered in light of the standard that a motion to dismiss is only appropriate when "it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief," *Ash Creek Mining v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992), it is clear that Plaintiffs have adequately set forth their disparate impact claims so that such claims should not be dismissed.

b. Perpetuation of Segregation Claim

Plaintiffs withdraw their perpetuation of segregation claim.[10]

B. Plaintiffs Properly Assert a Claim Against CHFA Under 42 U.S.C. Section 1983 for CHFA's Violation of 42 U.S.C. § 1437f(c)(8)(A)

By accepting the Owner's deficient one-year notice, CHFA has denied Plaintiff residents the right to receive proper notice of the Owner's intent to opt out of the Section 8 program, in violation of the federal statutory notification requirement under 42 U.S.C. § 1437f(c)(8)(A) as it read in July of 1999. CHFA claims that this statutory provision creates "no duties of a public housing authority such as CHFA" and that they had no authority to approve or disapprove the termination of the HAP Contract that was scheduled to occur at the expiration of the notice.

CHFA is simply incorrect in its assertion that it has no obligations to implement the provisions of 42 U.S.C. §1437f and that it had no authority to approve or disapprove the notice under 42 U.S.C.

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[9] Plaintiffs have further alleged, in their proposed Third Amended Complaint, that tenants of color in the development who are displaced, and applicants of color on the development's waiting list, will be disproportionately harmed—as compared to white tenants and applicants—because they will face discrimination in the private market and will have more difficulty in locating other housing.

[10] This change is reflected in Plaintiffs' proposed Third Amended Complaint.

§1437f. 42 U.S.C. § 1437f (b) authorizes the Secretary of HUD to enter into annual contributions contracts with public housing agencies pursuant to which agencies enter into contracts to make assistance payments to owners in accordance with 42 U.S.C. § 1437f. This same subsection also requires public housing agencies to implement the provisions of §1437f and only where it is found that there is no "public housing agency to implement the provisions of Section 1437f, " is the Secretary authorized to enter into contracts to make assistance payments to owners and to perform the other functions assigned to a public agency by Section 1437f. *See* 42 U.S.C. § 1437f(b). Courts have held that agencies, such as CHFA, have agreed to function according to the terms of the United States Housing Act of 1937, as amended, in contracting with HUD for annual contributions to administer subsidies. *See Wright v. City of Roanoke Redevelopment and Housing Authority (City of Roanoke)*, 479 U.S. 418, 423 (1987).

As stated in paragraph 51 of the Amended Complaint, CHFA has entered into an Annual Contributions Contract with HUD and was therefore deemed by HUD under the ACC and 42 U.S.C. § 1437f(b) to be the public housing agency. Section 1.11(a) of the Annual Contributions Contract (ACC) between CHFA and HUD provides that the "HA must comply, and must require owners to comply, with the requirements of the U.S. Housing Act of 1937 and all HUD regulations and other requirements, including any amendments or changes in the law or HUD requirements." *See* Attachment I to HUD's Motion to Dismiss, ACC. It thus cannot be denied that CHFA is required to implement the provisions of Section 1437f, including the one-year notice requirement under Section 1437f(c)(8)(A), as it read in July of 1999.

In addition, HUD issued PIH Notice 98-62, "Fiscal Year 1999 Renewal of Expiring Section 8 Moderate Rehabilitation (Mod Rehab) Housing Assistance Payments (HAP) Contracts" on December 15,

1998, and PIH Notice 99-22, "Clarification of PIH Notice 98-62 Governing FY 99 Renewal of Expiring Section 8 Moderate Rehabilitation Housing Assistance Payments Contracts," on May 20, 1999, both of which, among other things, discussed the one-year statutory notification requirement in Section 8(c)(8)(A) of the United States Housing Act of 1937, codified as 42 U.S.C. 1437f(c)(8)(A). In its discussion of this section, HUD states that "[t]he law also requires that the owner submit the notice to HUD; however, since local PHAs administer the Mod Rehab program, the owner shall submit the notice to the appropriate PHA *instead of HUD* [emphasis added]."[11] This additional requirement established by HUD is authorized under 42 U.S.C. 1437f(c)(8)(C) which explicitly required, at the pertinent time in July 1999, that all notices "under this paragraph shall also comply with any additional requirements established by the Secretary." CHFA, as the public housing agency administering the Mod Rehab program, was explicitly required, by HUD, to act on behalf of HUD in receiving the Owner's notice and ensuring compliance with the applicable statutory notification requirement at the time.[12]

It is explicitly clear that CHFA was *required* to make sure the Owner provided sufficient notice of its intent to opt out of the Section 8 program one year prior to the expiration of the HAP contract to the tenants and by failing to do so, CHFA denied Plaintiff residents of their rights under 42 U.S.C.

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[11] PIH Notice 99-22 was issued by HUD to supplement, clarify and modify the procedures outlined in Notice PIH 98-62. Notice PIH 98-62, dated December 15, 1998, provided instructions for implementing Section 524 (a)(1) and (2) of the Multifamily Assisted Housing Reform Act of 1997, as amended by the FY '99 Appropriations Act, which governed the renewal of HAP contracts under the Section 8 Mod Rehab program.

[12] Plaintiffs do not contend that HUD was released of its obligations under the statute because of its assignment of review of the notice to CHFA under Notices PIH 98-62 and 99-22. Regardless of HUD's assignment of review of the notice to public housing agencies (PHA) under these notices, HUD is also bound by the statutory notice requirements as it maintains the obligation of overseeing operations of the PHAs under the ACC, its continued duties of affirmatively furthering fair housing goals under 42 U.S.C. § 3608, and its duty to offer restructuring incentives to the owner under MAHRAA and the 21st Century Act.

1437f(c)(8)(A). Therefore, Plaintiffs have a proper claim of a federal statutory violation against CHFA arising under 42 U.S.C. § 1983 and CHFA's motion to dismiss this claim should be denied.[13]

C. Plaintiffs Have Properly Alleged a Claim Against CHFA for Breach of the Regulatory Agreement

1. Plaintiffs are Third Party Beneficiaries of the CHFA Regulatory Agreement and are Entitled to Sue to Seek its Enforcement

Although the Plaintiffs do not dispute CHFA's analysis that only intended third party beneficiaries of a contract may sue to enforce its terms, CHFA's conclusion that the Plaintiffs are not the intended beneficiaries of the disputed contract provisions is misplaced. Without any analysis, CHFA concludes that the purpose of the CHFA Regulatory Agreement was solely to protect CHFA as lender and to protect the tax-exempt status of the bonds. To come to this conclusion, CHFA apparently has chosen to ignore those portions of the Regulatory Agreement that clearly express an intent to protect low- and moderate-income persons.

In order to determine whether the tenants are the intended beneficiaries, one need only to look to the first lines of the Regulatory Agreement which state, "the Mortgagor has applied to the Authority for a housing facility loan (the "Loan") for the construction and permanent financing of a housing facility for

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[13] 42 U.S.C.§ 1983 may be used to enforce 42 U.S.C. §1437f. *See Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342 (4th Cir. 1982) (§ 1983 action where housing authority failed to give proper notice of eviction under 42 U.S.C. §1437f). *See also Hill v. Richardson*, 7 F.3d 656, 658 (7th Cir. 1993) (in action seeking attorneys fees, court found that § 42 U.S.C. § 1437f claim colorable under §1983 claim). In the unlikely event that the Court determines that Plaintiffs do not have a proper right of action under 42 U.S.C. § 1983, Plaintiffs have an implied right of action under the United States Housing Act of 1937, as amended, as there are direct, enforceable rights contained in the Act. *See City of Roanoke*, 479 U.S. at 423*; Hurt v. Philadelphia Hous. Auth.*, 806 F. Supp. 515, 526 (E.D. Pa. 1992); and *Orrego v. HUD*, 701 F. Supp. 1384 (N.D. Ill. 1988), *rev'd on other grds sub nom. Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir. 1991).

persons of low- and moderate-income . . . " *See* CHFA Regulatory Agreement, attached to Defendant CHFA's Motion to Dismiss as Exhibit A. Paragraph 3 of the Regulatory Agreement restricts the owner to operate the premises solely as a rental property and specifically prohibits conversions to condominiums or other use for the designated time period. *Id.* Paragraph 4(a) of the Regulatory Agreement requires the owner of the premises to maintain at least 75% of the units for low- or moderate-income tenants and at least 20% of the units for low-income tenants. *Id.* Paragraph 4(b) of the Regulatory Agreement requires the owner to enter into contracts that will enable the premises to remain subsidized for low- and moderate-income tenants for 20 years and to seek to extend the housing subsidies for an additional 20 years. *Id.* All of these specific provisions are clearly intended to protect low- and moderate-income tenants and prospective tenants of the Park Hill Gardens West complex.

Although the cases cited by CHFA hold that tenants are not intended third-party beneficiaries of the particular regulatory agreements between *HUD* and the owners, they are not—as alleged—the only cases in which courts have considered these claims. In fact, numerous courts have found that tenants are entitled to sue as intended third-party beneficiaries of a HUD regulatory agreement. *See, e.g., Gonzalez v. St. Margaret's House Hous. Devel. Fund Corp.*, 620 F. Supp. 806, 810 (S.D. N.Y. 1985) *aff'd*, 848 F.2d 391 (2d Cir. 1988); *Concerned Tenants Assoc. of Indian Trails Apts. v. Indian Trails Apts.*, 496 F. Supp. 522, 528 (N.D.Ill. 1980); *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 835, 174 Cal. Rptr. 806, 810 (1st Dist. 1981); *Guthartz v. Lewis*, 408 So.2d 600, 601 (Fla. 3d DCA 1981) *aff'd on other grnds*, 428 So.2d 222 (1983); *Mount Sinai Hosp. v. Loutsch*, 119 Misc.2d 427, 431, 462 N.Y.S. 2d 1004 (N.Y. Civ. Ct. 1983).

Of course, the cases cited for both sides on the issue of whether tenants can sue as intended third party beneficiaries of a HUD regulatory agreement are of limited relevance since the Plaintiffs are not seeking to enforce a *HUD* regulatory agreement. In other significant ways, the cases cited by CHFA are distinguishable from the Plaintiffs' claims. Specifically, *Reiner v.West Vill. Assocs.,* 768 F.2d 31, 32 (2d Cir. 1985), *Falzarano v.U.S.,* 607 F.2d 506, 511 (1st Cir. 1979) and *Harlib v. Lynn,* 511 F.2d 51, 56 (7th Cir. 1975), concerned tenants who sought to utilize their status as third-party beneficiaries to challenge the setting of rents at their complexes. The tenants in *Little v.Union Trust Co. of Md.*, 412 A.2d 1251, 1253-54 (Md. App. 1980), were attempting to enforce those provisions of the HUD regulatory agreement that mandated that the owner maintain the premises in good repair. As addressed by the New York Courts in *Reiner,* 768 F.2d at 33, *Mount Sinai Hospital,* 119 Misc.2d at 431, and *Caramico v. HUD*, 509 F.2d 694, 701 (2d Cir. 1974), there is a significant difference between tenants complaining about the setting of rent levels and those who are challenging outright evictions. The Plaintiffs in this action are not only challenging an eviction, but are seeking to maintain the premises as subsidized housing for themselves and others in need of such housing. This case is clearly not an instance in which the tenants are micro-managing the operations of the complex such that public policy flags might be raised to prevent the assertion of their rights. These are tenants who are seeking to enforce the most fundamental obligations of the CHFA Regulatory Agreement and the requirements of the federal housing acts. Unlike the tenants in *Angleton v. Pierce,* 574 F. Supp. 719, 735-36 (D .N.J. 1983), and *Carson v. Pierce,* 546 F. Supp. 80, 87 (E.D. Mo. 1982), who apparently did not even reside in subsidized housing, the tenants at Park Hill Gardens West are low-income families and elderly persons fighting to maintain housing of last resort and to attempt to make both the Owner and CHFA comply with their contractual obligations.

A much clearer interpretation of the third party beneficiary issue for low- and moderate-income tenants residing in subsidized housing can be found by examining *Holbrook v. Pitt,* 643 F.2d 1261, 1270-77 (7th Cir. 1981) and its progeny. The Court in *Holbrook* analyzed the provisions of the contractual documents seeking to be enforced, as well as the statutory scheme surrounding the housing at issue, to come to the conclusion that "[i]f the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt." *Id.* at 1271*; see also Ashton*

v. Pierce, 716 F.2d 56, 66 (D.C. Cir. 1983), *modified*, 723 F.2d 70 (D.C. Cir. 1983); *Gomez v. City of El Paso*, 805 F. Supp. 1363, 1368 (W.D. Tex. 1992), *aff'd*, 20 F.3d 1169 (5th Cir. 1984); *Hurt v. Philadelphia Hous. Auth.*, 806 F. Supp. 515, 527 (E.D. Pa. 1992); *Henry Horner Mothers Guild v. The Chicago Hous. Auth.*, 780 F. Supp. 511, 516 (N.D. Ill. 1991); *Tinsley v. Kemp,* 750 F. Supp. 1001, 1009 (W.D. Mo. 1990).

Similarly, the state and federal statutory mandates of both CHFA and the federal Mod Rehab Section 8 Program are clear. The first paragraph of the legislative declaration establishing CHFA and explaining its purpose states that "[t]he general assembly finds and declares that there is a shortage in Colorado of decent, safe, and sanitary housing which is within the financial capabilities of low- and moderate-income families." C.R.S. § 29-4-702(1). Likewise, Congress authorized Section 8 payments "[f]or the purpose of aiding lower-income families in obtaining a decent place to live." 42 U.S.C. § 1437f(a). The National Housing Act's Multifamily Mortgage Insurance Programs, including insurance

under Section 221(d)(4) of the Act, were intended "to assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. § 1715l(a). Even CHFA should admit that the bonds at issue were only tax exempt because the premises was being used as rental housing for low- and moderate-income families. *See* §§ 103 and 142(d) of the Internal Revenue Code, 26 U.S.C. § 103, 142(d). Based upon the foregoing, the Plaintiffs are clearly the intended third-party beneficiaries of the CHFA Regulatory Agreement and CHFA's Motion to Dismiss on these grounds must be denied.

2. CHFA's Obligations Under the Regulatory Agreement

Paragraph 18 of the CHFA Regulatory Agreement clearly intended that the parties needed prior written approval of HUD in order to amend the terms of the agreement in any way. CHFA does not even allege in its motion that permission to take these actions was sought or received from HUD.

CHFA's consent to prepayment of the mortgage and release of the CHFA Regulatory Agreement was an express violation of the terms of the agreement requiring the parties to maintain a HAP contract in place at the subject premises for an initial 20-year term.

Further, according to the express language of the agreement, both the Owner and CHFA are meant to be bound to the use restrictions contained in paragraph 3 of the CHFA Regulatory Agreement. The relevant provisions state as follows:

> NOW, THEREFORE, it is hereby agreed by and between the parties hereto, their successors and assigns, as follows:
>
> 3. Maintenance as Rental Project. Once available for occupancy, each residential unit in the Development...will be rented or held available for rental to the public on

> a continuous, nontransient basis...and may not be converted to condominium or other use.

CHFA Regulatory Agreement, ¶ 3. Therefore, to the extent that CHFA bound itself to this provision and has the power to take actions to enforce same, it was and is obligated to do so.

Even if this Court finds that there is only an enforceable obligation against the Owner based upon the CHFA Regulatory Agreement, CHFA should not be dismissed from the action as they are a necessary party in order to effectuate the relief sought herein. See Fed. R. Civ. P. 19; *Davis for Davis v. Dosar-Barkus Band of the Seminole Nation of Oklahoma*, 192 F.3d 951, 957-59 (10th Cir. 1999); *Associated Dry Goods Corp. v. Towers Financial Corp.*, 920 F.2d 1121, 1123-25 (2d Cir. 1990)

3. CHFA's Argument That Defendants Had Waived Any Requirement That the HAP Contract Be Extended Is Not Properly Before The Court On A Motion to Dismiss Because It Is An Affirmative Defense And Requires Development Of Factual Issues

As its third argument in support of the dismissal of Plaintiffs' claim for breach of the CHFA Regulatory Agreement, Defendant CHFA argues that any obligation to renew the contract was "waived by the parties before any rights vested in Plaintiffs." CHFA Motion to Dismiss, p. 21. CHFA's Motion goes on to claim that the Defendants' waiver of the prepayment preclusion is permissible because it occurred prior to any detrimental reliance or acceptance of the contract by the third-party beneficiary. CHFA Motion to Dismiss, p. 24.

By characterizing its breach of the Regulatory Agreement as a "waiver," CHFA attempts to introduce an affirmative defense which is more properly made in an answer. Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, vol. 5 §1277, at 461-62. Since waiver involves material factual disputes outside the complaint, it is an inappropriate basis for a Rule 12 Motion. *Manecke v. School*

Board of Pinellas County, 553 F. Supp. 787, 788, *(M.D. Fla. 1982), aff'd in part, rev'd in part*, 762 F.2d 912 (11th Cir. 1985). Plaintiffs are entitled to present at trial their evidence as to whether and if the defendants are permitted to waive the prepayment preclusion provision, as well as whether the tenants detrimentally relied upon the contract's provisions. CHFA's waiver claim in support of its Motion to Dismiss should be disregarded by the court.

Even if the court were to consider CHFA's affirmative defense in ruling on the Motion to Dismiss, it must be kept in mind that CHFA and the property owner could only "waive" their contract obligations if the rights of the third party beneficiary had not vested. As Judge Arraj has written:

> It is also well established that there is a certain point after which the named parties to the contract may not modify or destroy the rights of the third-party beneficiary under the contract by executing a subsequent agreement. The language generally used is that this may not be done if the rights of the beneficiary "vest" before it learns of the second agreement. J. Calamari & J. Perillo, The Law of Contracts § 17-11 (3d ed. 1987). The general rule is that the rights of a beneficiary vest when the beneficiary "materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." Restatement (Second) of Contracts § 311(3).

Williston Basin Interstate Pipeline Co. v. Western Gas Processors, Ltd., 1988 U.S. Dist. LEXIS 17543 at 11 (D. Colo. 1988). In this case, the very fact that tenants are still living at Park Hill Gardens West pursuant to subsidies administered under a HAP contract indicates that there are third party beneficiaries who continue to rely on the continuing existence of a regulatory agreement between the property owner and CHFA. The many ways in which the tenants have relied are issues of proof for the plaintiffs to demonstrate at trial.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that Defendant CHFA's Motion to Dismiss be denied.

Dated this 23rd day of October, 2000.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on the 23rd day of October 2000, I served a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT COLORADO HOUSING AND FINANCE AUTHORITY'S MOTION TO DISMISS AMENDED COMPLAINT by placing it in the U.S. mail, with sufficient postage attached thereto and properly addressed to:

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