COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. **03H84CV000151**

LEYDA COLON, on behalf of herself and all others similarly situated,
Plaintiff

VS.

BOSTON HOUSING AUTHORITY,
Defendant

ORDER PERTAINING TO METHOD TO BE USED TO DETERMINE BASELINE MEASURE OF FAIR MARKET VALUE FREE OF DEFECTS

This case involves claims for damages brought on behalf of a class of public housing tenants against the Boston Housing Authority ("BHA") arising from the presence of lead paint in common areas and apartments of buildings that comprise the Charlestown Housing Development. In June 2007, the court ruled that the plaintiff class was entitled to summary judgment as to liability on the breach of implied warranty of habitability claim.[1] The court determined that the BHA was liable under an implied warranty theory to those tenant families that occupied apartments with dangerous levels of lead and to all tenant families who lived in buildings with dangerous levels of lead present only in the

[1] The procedural history of this case is set out in this court's September 27, 2007 memorandum of decision that addressed the cross motions for summary judgment. As to the other claims set forth in the complaint, the court ruled in favor of the BHA and dismissed the class plaintiffs' lead statute, negligence and emotional distress claims. The court denied the class plaintiffs' summary judgment motion pertaining to their G.L. c. 186, § 14 claim. The court ruled that the presence of lead in the common areas did not constitute a per se interference with the tenants' quiet use and enjoyment of their apartments. Further, the court ruled that disputed issues of fact existed regarding whether and the extent to which dangerous levels of lead were present in specific apartments (in addition to the presence of lead in the common areas).

common areas. The parties have stipulated with respect to the warranty of habitability and the quiet enjoyment claims that the individual plaintiff class members may recover actual damages based solely upon diminution in the fair rental value of their unit based upon the presence of lead.

This matter is before the court on the BHA's **Motion for Determination of Fair Rental Value**. The BHA submitted a memorandum together with supporting affidavits. The class plaintiff filed a reply memorandum together with supporting affidavit.

The parties agree that the measure of damages for breach of the implied warranty of habitability (and in this case for violation of G.L. c. 186, § 14, if liability is established) is the difference between the fair rental value of the premises free of defects and the fair rental value of the premises during the period that the defective conditions existed. *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 199 (1973); *Haddad v Gonzalez*, 410 Mass. 855, 872 (1991). The parties have asked the court to determine the appropriate standard to be used to set the baseline fair rental value free of defects (FRV) for the apartments at the Charlestown Housing Development apartments at issue in this case. It is from this baseline FRV that the court will then calculate diminution of value damages resulting from the presence of lead in those apartments and/or the abutting common areas.

The BHA argues that the fair rental value of a BHA apartment free of defects should be based upon the actual per unit operating cost of each similarly sized apartment at the Charlestown Development.[2] The BHA argues that I should adhere to the reasoning and methodology set forth in my 2000 order in the case of *BHA v Williams* (Nos. 97-01005, 98-02641).[3] The plaintiff class argues that the court should use as the standard for setting the fair rental value for each unit the "flat rent" schedules established by the BHA pursuant to 42 U.S.C. § 1437a(a)(2)(b)(i); 24 C.F.R. § 960.253.

When faced with this issue for the first time in *BHA v Williams* I ruled, in an order dated October 31, 2000, that "the actual per unit operating cost constitutes the most

---

[2] See, affidavit of Frederick S. Tomaino, dated May 7, 2010; second affidavit of Frederick S. Tomaino, dated July 14, 2010, Exhibit BB; 24 C.F.R. Subpart A, § 990 et seq.

[3] The *Williams* order is attached to the BHA's May 7, 2010 motion as Exhibit 5.

reliable, accurate (though admittedly imperfect) and objective basis upon which to determine the fair rental value of [a rental unit at a BHA development]."[4] I reasoned that "[t]he use of the operating cost figure avoids the arbitrariness that results if public housing tenant rent (based upon tenant income only) is used as the sole determinant of fair market value. The use of the operating cost figure also avoids the risk that the public housing authority would be assessed an unjust penalty (*unlike a Section 8 landlord, damages would be assessed against the housing authority based upon an amount that the authority never could have received as rent*) were private housing rents used as the sole determinant of fair rental value."[5] At the time I issued the *Williams* order in 2000, the BHA had not established a schedule of "flat rents" for its public housing units.

Historically, public housing rents were set using a formula based upon a percentage of the adjusted household income of the family. In 1998 Congress enacted the Quality of Housing and Work Responsibility Act of 1998 ("QHWRA"), 42 U.S.C. §

---

[4] This is an approximation of the amount the BHA actually receives for each unit. This cash amount includes the subsidized rent set forth each tenant and a percentage of the operating and utility subsidies paid to the BHA by HUD that is attributed to each tenant's apartment. The subsidy payments are divided among the apartments using a formula based upon the number of bedrooms in each apartment. See second Tomaino affidavit, Exhibit BB.

[5] In *Williams* I rejected as measures of fair rental value for a public housing unit (1) the actual rent paid by a BHA tenant, (2) Section 8 FMR rents and (3) private market rents. I reasoned that " . . . the monthly rent paid by a public housing tenant [does not bear] any rational relationship to the fair rental value of that tenant's apartment . . . The contract rent is established by means of a formula based upon a percentage of the tenant's adjusted household income (approximately 30%). The rent is adjusted annually up or down based upon changes in the income of the tenant's household. The monthly rent for a similar apartment in the same public housing development may differ by hundreds of dollars depending solely upon the income of the tenant household. I cannot discern any rational reason why the fair rental value of those similar apartments should differ based solely upon the income of the tenants. Convenience is not an acceptable reason to adopt an arbitrary standard. Simply stated, the monthly rent that a public housing tenant pays provides neither a fair nor an accurate measure of the fair rental value of the apartment. With respect to private market and Section 8 FMR rents I reasoned that " . . . the term "fair rental value" when applied to public housing does not necessarily mean the amount that a public housing unit might theoretically rent for on the free and private market. For the most part public housing authorities operate housing developments independent of private real estate market forces. Public housing authorities receive public funds (often referred to as operating subsidies) to augment the rents received from their tenants. The subsidies and rent are used to pay for the operation of the public housing developments. Section 8 FMR rents (which is a measure based upon private housing values) bare no reliable or proximate relationship to public housing per unit operating costs. The Section 8 FMRs are intended to approximate private market rents. HUD has recognized that private rents and public housing rents involve very different measures of value . . . The public housing authority (here the BHA) never receives for any of its apartments (adding together the operating subsidy and tenant rent) an amount that comes close to the Section 8 FMR for a similarly sized apartment in Boston."

1437a(a)(2)(b)(i), that directed public housing authorities ("PHAs") to provide public housing tenants with an additional rent setting option. QHWRA provided that tenants could continue to pay an income-based rent (approximately 30% of the adjusted household income) or a newly established "flat rent." The statute states that a PHA shall establish a flat rental amount for a dwelling unit based upon the rental value of the unit as determined by the public housing authority. QHWRA affords PHAs significant discretion to consider a number of economic and non-economic factors in establishing "flat rents." Significantly, the statute does not state or require that the PHA must set "flat rents" at a rate based upon prevailing private market rents or Section 8 rents. In fact, in setting the "flat rents" PHAs are subject to certain limiting requirements set forth in QHWRA. First, in establishing a "flat rent" a PHA is required to take into consideration "that the rent structures do not create a disincentive for continued residency in public housing by families who are attempting to become economically self-sufficient through employment." Therefore, a PHA in the exercise of its discretion may set "flat rates" using criteria or factors that are not related to the actual rental or market value of public housing units. Second, Congress placed an explicit operating cost-based limitation of the housing authority's discretion in the setting of the "flat rents." The statute provides that "[t]he rental amount for a dwelling unit shall be considered to comply with the requirements of this clause ***if such amount does not exceed the actual monthly costs to the public housing agency attributable to providing and operating the dwelling unit***" (emphasis added).[6] Therefore, to the extent that the actual monthly operating costs of the apartment are less than what a tenant might otherwise be willing to pay for that apartment were it offered for rent in a private unassisted market, the "flat rent" set by the PHA

---

[6] The sentence immediately after this clause states "[t]he preceding sentence may not be construed to require establishment of rental amounts equal to or based on operating costs or to prevent public housing agencies from developing flat rents required under this clause in any other manner that may comply with this clause." I construe this provision to mean that a PHA is not required to set "flat rents" at a rate equal to operating costs or to use a "flat rate" formula that is based upon operating costs. However, while a PHA may use any formula and consider all factors set forth in the statute (and in the HUD regulations to the extent they are consistent with the statute) to set the "flat rent," QHWRA mandates that "flat rents" may not exceed the "actual monthly cost to the public housing agency attributable to providing and operating the dwelling unit." While neither the statute nor the legislative history provide any further illumination on this provision, it appears that this statutory limitation prevents a PHA from setting "flat rents" at a level that would result in the PHA receiving a windfall profit at the expense of the public housing tenant.

cannot exceed the amount of those operating costs attributable to that apartment (typically based upon bedroom-size).

The Department of Housing and Urban Development ("HUD") enacted regulations to implement the statutory provisions of QHWRA regarding the public housing rent options. 24 C.F.R. § 960.253. With respect to setting "flat rents" § 960.253(b) states "the flat rent is based on the market rent charged for comparable units in the private unassisted rental market. It is equal to the estimated rent for which the PHA could promptly lease the public housing unit after preparation for occupancy." The regulation identifies a number of factors that the PHA must consider in setting the "flat rent" including the statutory directive that the PHA "avoid creating disincentives for continued residency." Surprisingly, the HUD regulation does not include any provisions that incorporate the explicit operating cost-based limitation on "flat rents" mandated by QHWRA. Specifically, the regulation does not require that "flat rents" not exceed the actual monthly costs to the public housing agency "attributable to providing and operating the dwelling unit." To the extent that the HUD regulation requires that a PHA set "flat rents" in an amount that exceeds such actual operating costs, that regulatory provision is inconsistent with the statutory provisions in QHWRA that placed ceiling limitations on the PHAs authority to set "flat rents."

The BHA first implemented "flat rents" in 2000. The BHA "flat rent" schedules were revised in 2003 and again in 2008. The BHA set one "flat rent" citywide for each category of apartments based upon the number of bedrooms. The BHA set the "flat rents" at 70% of Section 8 fair market rents for similarly sized units. Based upon the rent schedules set forth in the second Tamaino affidavit, these BHA "flat rents" are uniformly higher than the actual per unit operating costs to the BHA (rent plus utility and operating subsidy). It appears that in setting these "flat rents" the BHA followed the HUD regulations. However, where a provision of the HUD regulation conflicts with the explicit statutory language of QHWRA, a PHA must comply with the statute.

Both the "per unit operating costs" and the "flat rent" schedules are flawed and imprecise standards for determining FRV. Both rent schedules are based on general factors and criteria applied to all BHA developments across the city. The "operating costs" standard ("actual rent plus subsidy") proposed by the BHA has the benefit of

basing rental value on the total income the BHA actually receives. However, the manner in which the BHA proposes to apportion the HUD operating subsidies in calculating FRV bears only a general and imprecise relationship to what it actually costs the BHA to operate each class of apartments (based upon number of bedrooms). While the "operating cost" standard is consistent with the QHWRA limitation, it bears little relationship to actual rental value (to the extent it is even possible to apply a willing buyer/seller valuation model to a public housing apartment). On the other hand, the "flat rents" method proposed by the plaintiff class, while having the benefit of appearing to be based upon market-based rental value considerations, in actual fact is based in significant part upon policy considerations and discounted private-market §8 rental values set by HUD that have little if any relationship to "estimated rent for which the PHA could promptly lease the public housing unit after preparation for occupancy." Further, the rent set forth in the BHA "flat rent" schedules do not comply with the explicit limitation set forth in QHWRA that the "flat rents" not be set at levels higher that the "actual monthly cost to the public housing agency attributable to providing and operating the dwelling unit" (what I have referred to as the actual per unit operating costs).[7] Neither proposed standard focuses on specific valuation-related characteristics of the Charlestown community or of the apartments at the Charlestown Housing Development.

At the end of the day, the court is left to adopt one or the other of the flawed proposed standards for purposes of establishing the baseline measure of fair rental free of defects.

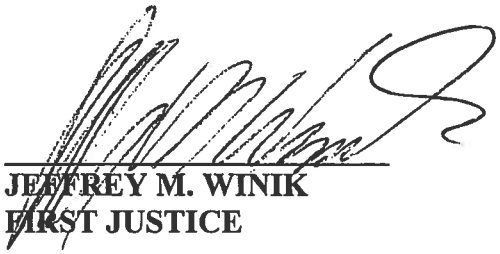
After considering the arguments set forth by the parties at oral argument and in their memoranda, I rule that for purposes of calculating damages for breach of the implied warranty of habitability (and actual damages for breach of the statutory covenant of quiet enjoyment) for the class members in this action, the actual per unit operating cost (as is set forth in the rent schedule appended to the second Tomaino affidavit, Exhibit BB) constitutes the most reasonable, fair and statutorily supportable basis upon which to

---

[7] The class plaintiffs have not suggested that any significant number of them have ever paid a monthly rent based upon the BHA "flat rent" schedules. However, see footnote 8, infra.

determine the fair rental value of the apartments occupied by members of the plaintiff class at the Charlestown Public Housing Development.[8]

SO ORDERED



JEFFREY M. WINIK
FIRST JUSTICE

February 16, 2011

cc: Zachary W. Berk, Esquire
Peter S. Brooks, Esquire
Susan Gelwick, Esquire
Christopher Robertson, Esquire
Wilbur E. Commodore, Esquire

[8] It is possible that one or more class members were paying an "income based rent" or a "flat rent" for all or a portion of the relevant time period that exceeded the "actual per unit operating cost" rents. In order to evaluate and assess damages in a fair and equitable manner, the class counsel may file a motion with respect to those identified class members requesting that the higher paid monthly rent actually paid be used as the measure of fair rental value free of defects. I will consider whether to modify this order with respect to those specific tenants if and when a motion is filed.