UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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CARRIAGE HOUSE EAST,
a limited partnership,
CARRIAGE HOUSE NORTH,
a limited partnership,
CAMBRIDGE SQUARE OF GREENWOOD,
a limited partnership,
GENE B. GLICK COMPANY, INC.
an Indiana Corporation, d/b/a
GENE GLICK MANAGEMENT CORP.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,
and SAMUEL PIERCE,
SECRETARY OF THE DEPARTMENT
OF HOUSING AND URBAN
DEVELOPMENT,

Defendants.

No. IP 81-1236-C

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
JUDGMENT

This matter comes before the Court upon the plaintiffs' 3 December 1981 amended complaint for declaratory judgment and injunctive relief. On 14 January 1982 plaintiffs filed a motion for emergency hearing on plaintiffs' request for declaratory judgment and preliminary injunctive relief. On 15 January 1982 the Court granted the request and ordered a hearing for 22 January 1982. The Court also, pursuant to Rules 40 and 65, Federal Rules of Civil Procedure, ordered the trial of the action on the merits to be advanced and consolidated with the hearing

second amended complaint.[1] Trial on the merits then proceeded.

This cause having been submitted to the Court on the pleadings, testimony of various witnesses, exhibits admitted in evidence on behalf of the parties hereto, and the several affidavits, declarations and exhibits filed by the parties as rebuttal evidence after the hearing, and the Court having fully considered the evidence as presented and the arguments of counsel as set forth in their respective briefs, does now make the following findings of fact, conclusions of law and judgment entry.

Plaintiffs Carriage House East, Carriage House North and Cambridge Square of Greenwood (Owners) are three limited partnerships organized under the laws of the State of Indiana. Each of these plaintiffs is an owner of a multi-family housing project assisted through programs sponsored by the United States Department of Housing and Urban Development (HUD). Plaintiff Gene B. Glick Company, Inc., d/b/a Gene Glick Management Corp. (Management Company) is an Indiana corporation which has a HUD-approved Management Agreement incorporating a Management Plan with each Owner to manage Owners' projects.

The defendant United States Department of Housing and Urban Development is an agency of the United States engaged in the administration of various housing programs including rent subsidies for low-income families pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. Section 1437f and the subsidizing of interest rates for low-income housing pursuant to Title II of the National Housing Act, Section 236, 12 U.S.C. Section 1715z-1, and the purchase of mortgages pursuant to said Act, Section 221 of said Act, 12 U.S.C. Section 1715 1.

Defendant Samuel Pierce is sued in his capacity as an officer of the United States.

At all times relevant to their complaint, the following multi-family housing assistance programs were in effect and applied to Owner as indicated:

(a) Mortgage Subsidies: Carriage House East receives assistance pursuant to Section 221(d)(3) of the National Housing Act, 12 U.S.C. Section 1715 l, which authorizes an agency of the United States to purchase mortgages to assist in the financing of housing for moderate-income families. In order to be eligible, a mortgage must be made by a "mortgagor approved by the Secretary and regulated or supervised under Federal *** laws *** or by the Secretary under a Regulatory Agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section ***."

Regulations under this Section of the Act are found in Section 221 of Title 24 C.F.R. Section 221.529 states:

> "The Commissioner may regulate and restrict the mortgagor as long as the Commissioner is the insurer, holder, or reinsurer of the mortgage. Such regulation or restriction may be in the form of a regulatory agreement ***."

(b) Interest Reduction Payments. Carriage House North receives assistance pursuant to Section 236 of the National Housing Act, 12 U.S.C. Section 1715z-1, which authorizes the Secretary of HUD to contract to make periodic interest reduction payments to a mortgagee on behalf of the owner of a rental housing project designed for occupancy by lower income families.

1974, 42 U.S.C. Section 1437f, which provides for HUD payments to Owners to subsidize monthly rent payments of qualified tenants. Subsection (e)(2) of that Section provides:

> "The contract between the Secretary and the owner with respect to newly constructed *** dwelling units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants *** shall be assumed by the owner (or any entity *** approved by the Secretary, with which the owner may contract for the performance of such responsibilities) ***."

HUD regulations currently in effect for Cambridge Square of Greenwood are contained in 24 C.F.R. Part 880, published in the Federal Register in 1976, and last found in 24 C.F.R. revised as of April 1, 1979. Section 880.116(a) authorizes owners to require subsidized families to pay a security deposit in an amount equal to one month's gross family contribution to monthly rental. Section 880.119 determines the responsibilities of the owner of the project. In Subsection (a)(3) the responsibilities of the owners are defined as including but not limited to "Performance of all management functions including the taking of applications, selection of Families including verification of Income and other pertinent requirements, and determination of eligibility and amount of Family contribution in accordance with HUD-established schedules and criteria ***." Section 880.608 to be found in 24 C.F.R. revised as of April 1, 1981 requires the Owner to secure a security deposit equal to one month's total family contribution or $50.00, whichever is greater, at the time the lease is signed, and states "The owner may collect the security deposit on an installment basis."

For the project owned by each Owner and managed by Management

Plans have been reviewed and approved by HUD approximately every other year. For the entire period beginning with the initial closing of Carriage House East on December 19, 1967, until July 6, 1981, the HUD Indianapolis area office has approved the following language in at least 75% of plaintiffs' Management Plans:

> <u>Question 8(d)</u>:
>
> "What are the leasing policies and procedures?"
>
> <u>Answer</u>:
>
> "A lease is required along with a security deposit *** Applicants pay $25.00 of this security deposit with application.
>
> "If the applicant is found not to be eligible, or if he cancels before the apartment is ready for occupancy, the deposit made at time of application would be refunded to him."

The Management Agreements involved, which incorporate the Management Plans, are agreements entered into between an Owner and a management group. The Management Plan is the management group's written explanation of its plan for a particular development. The Area Office is given the responsibility of approving or disapproving Management Agreements.

All of the Owners' Management Agreements contain the following language under paragraph 4 labeled HUD Requirements:

> In performing its duties under this Management Agreement, the Agent will comply with all pertinent requirements of the Regulatory Agreement, and the directives of the Secretary. In the event of any instruction from the Owner which is in contravention of such requirements, the latter will prevail.

The regulatory agreements involved contain the following provision:

> Owners shall not without the prior written approval of the Commissioner:

Application Fees, from the Acting Area Manager (Area Manager) of HUD's Indianapolis Area Office (Area Office). In the memo the Area Manager stated:

> As of October 1, 1981, this office will no longer allow any fee to be charged to an applicant for HUD-insured or HUD-held subsidized projects. Any such application fees or deposits presently on hand must be refunded by October 1, 1981. We have changed this policy due to exorbitant fees that are being charged and some inordinately long periods of time from fee collection until the availability of an apartment. We also wish to eliminate any discrimination of otherwise program-eligible applicants who are unable to pay such a fee. Many applicants for subsidized units can ill-afford such a lengthy cash outlay.

On July 15, 1981, plaintiffs responded to the Area Manager's memorandum of July 6, 1981 and objected to the instructions contained in the Area Manager's memorandum on the following grounds:

(a) The Management Company's policy for more than a decade in both subsidized and unsubsidized projects has been to obtain a partial payment of the allowable security deposit at the time an application for housing is made by a prospective tenant and as a condition precedent to becoming a part of the waiting list, and that policy has consistently been approved as submitted in Management Plans filed with the Area Office.

(b) The attempted change in policy by HUD by Area Office memorandum without a hearing or discussion with the management companies affected is a violation of due process and is contrary to the normal regulatory authority of HUD.

(c) The Area Office does not have authority to change its long-standing policy because the security deposit installment paid on application is not a part of the rent and is a payment not associated with the condition of occupancy or leasing.

In a letter dated August 27, 1981, plaintiffs wrote to HUD's Assistant Secretary for Housing-Federal Housing Commissioner (Commissioner) requesting his review and instructions concerning the July 6, 1981 letter from the Area Manager. Plaintiffs pointed out that the Area Manager improperly stated the facts and failed to address the legal issue raised concerning the authority of the Area Office to make the proposed policy change. The Commissioner responded in a letter dated October 5, 1981, concluding that the Area Office is correct in its application of the "long-standing HUD policy regarding the prohibition of application fees." He stated that the partial security deposit can only be construed as an application fee. The Commissioner also supplied the following justification for HUD's refusal to allow such a fee:

> We have been informed that in many instances the prospective tenants to your client's units must wait as long as three years. I do not understand the need for concern regarding security and requiring such a deposit, even a partial one, when the family is only on a waiting list and is not in occupancy.

On 4 November 1981 the HUD central office published a handbook to ensure that interpretations of the regulatory agreements for subsidized projects are uniform throughout the nation. The handbook, which is distributed to all owners, managing agents and HUD field office staff, states HUD policy for Section 221(d)(3), Section 236, and Section 8 projects. Chapter 4 of the handbook is titled "Leasing, Deposits and Termination of Tenancy." Section 3 of this chapter concerns charges in addition to rent. Paragraph 4-11 of Section 3 refers to charges prior to occupancy. It prohibits application fees and states:

Any finding of fact more properly designated a conclusion of law is now deemed such.

The Court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. Section 1331(a).

Administrative interpretations of their regulations must be given controlling weight unless plainly erroneous or inconsistent with the regulations.

The plaintiffs were provided sufficient notice that HUD was changing its policy in the Indianapolis Area Office in regard to "application fees."

HUD was requiring the plaintiffs to adhere to the Regulatory Agreements which take precedence over the Management Plans if there is a difference between the two.

Plaintiffs were provided an opportunity to present their views to the Commissioner of the Federal Housing Authority.

Commissioner Winn found that the $25.00 security deposit required to obtain a position on a waiting list was an application fee. This finding was not plainly erroneous or inconsistent with the regulations.

Commissioner Winn provided reasons for the agency's action and there was a rational basis for the agency's action: the plaintiffs' scheme would cause hardship on the intended beneficiaries of HUD statutes.

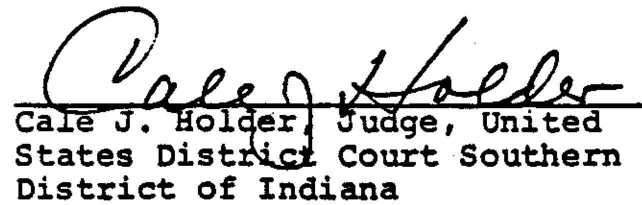
An administrative agency is not estopped by a regional office's former interpretation of a statute from correcting that which the agency presently feels to be plainly erroneous.

The law is with the defendants and against the plaintiffs.

Any conclusion of law more properly designated a finding of

take nothing by way of their complaint. Costs are assessed against the plaintiffs.

Dated this 14 day of May, 1982.



Cale J. Holder, Judge, United States District Court Southern District of Indiana