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U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ILLENE BIRKLAND, ELMER STUBBLEFIELD, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 ROTARY PLAZA, INC., a California )  
 Non-Profit Corporation, dba )  
 ROTARY PLAZA, and EUGENE BURGER )  
 MANAGEMENT CORPORATION, a California )  
 Corporation, THE UNITED STATES )  
 DEPARTMENT OF HOUSING AND URBAN )  
 DEVELOPMENT, SAMUEL R. PIERCE, JR., )  
 SECRETARY, U.S. Department of )  
 Housing and Urban Development, )  
 )  
 Defendants. )

No. C 84-2026 SW  
MEMORANDUM

Plaintiffs seek to have the court declare as unlawful and enjoin the maintenance of a mandatory meal plan at the Rotary Plaza, which is a housing complex that is subsidized pursuant to the National Housing Act. The matter is before the court on defendants' motion for judgment on the pleadings and on the parties' cross-motions for partial summary judgment.

FACTS

According to the complaint, plaintiffs are residents of Rotary Plaza, an apartment project for the elderly located in South San Francisco. The non-federal

1 or private defendants are the owners and managers of the housing complex. The  
2 federal defendants are responsible for reviewing, auditing and overseeing the  
3 management of the housing complex and for fixing and enforcing policies regarding  
4 housing complexes such as Rotary Plaza. Under §236 of the National Housing Act,  
5 12 U.S.C. §1715z-1, the federal defendants provide a subsidy to the owners of the  
6 Rotary Plaza, which reduces the mortgage payments that the owners pay with  
7 respect to the housing complex.

8 Pursuant to leases entered into by the plaintiffs at the commencement of their  
9 tenancies, the plaintiffs are participants in the Section 236 program, which is  
10 administered by the United States Department of Housing and Urban Development  
11 ("HUD"). HUD and the owner of Rotary Plaza have entered into a Regulatory  
12 Agreement which governs the manner in which Rotary Plaza is run.

13 HUD maintains a policy which permits owners of housing projects subsidized  
14 under the Section 236 program to impose a requirement that tenants residing in such  
15 a facility purchase up to one meal per day from the housing project. That policy,  
16 which is found in HUD Handbook 4350.3, §4-13, p. 4-6 (1981) provides that:

17 In elderly projects, the Owner may require participation in a meal program as  
18 a condition of admission. The required participation may not exceed one meal  
per day at a modest cost approved by HUD.

19 As a condition of admission and continued tenancy, Rotary Plaza requires  
20 tenants to sign an agreement to pay a monthly food service charge of \$70 per month  
21 to cover the cost of five evening meals per week at the project's dining facilities.  
22 Plaintiffs object to this requirement.

23 This action has been related to Aujero v. CDA Todco, Inc., 756 F. 2d 1374  
24 (9th Cir. 1985), in which mandatory meal charges at another facility were challenged.  
25 In Aujero, the Ninth Circuit affirmed this court's granting of summary in favor of  
26 defendants. Both courts concluded that mandatory meal payments did not constitute

1 defendants' motion for judgment on the pleadings as to the third cause of action is  
2 granted. See Aujero, 756 F. 2d at 1377, Mayoral v. Jeffco American Baptist  
3 Residences, 726 F. 2d 1361 (10th Cir.), cert. denied, 105 S. Ct. 255 (1984).

4 b. Fourth Cause of Action - Plaintiffs allege that the collection of charges  
5 for mandatory meals is unlawful because there has not been full compliance with the  
6 requirement set forth in Handbook 4350.3 that HUD approve the cost of the meals.  
7 This claim apparently arises under the APA.

8 Assuming arguendo that HUD has not approved the cost of meals, defendants  
9 argue that this claim must fail because HUD's decision not to enforce this section of  
10 the Handbook against the private defendants is committed to its discretion and  
11 therefore is not subject to review under §701(a)(2) of the APA which excepts from  
12 judicial review "agency action...committed to agency discretion by law."

13 Alternatively, defendants argue that plaintiffs have demonstrated that the mandatory  
14 meals program at Rotary Plaza was tacitly approved by HUD. In connection with  
15 another portion of the motions before the court, plaintiffs have submitted a letter  
16 from one HUD official to another which indicates that tacit, implicit approval of the  
17 meal charges of Rotary Plaza may have been given.

18 The court has considered this evidence as well as the Handbook itself. Thus,  
19 the motion for judgment on the pleadings is converted to one for summary judgment.  
20 In light of the recent Supreme Court decision in Heckler v. Chaney, - - U.S.- -, 105  
21 S. Ct. 1649, 1657-68 (1985), the court finds that HUD's actions, either in failing to  
22 approve or implicitly approving the mandatory meal charges, are unreviewable under  
23 §701(a)(2). Therefore, summary judgment in defendants' favor is granted as to this  
24 cause of action.

25 c. Fifth and Sixth Causes of Action - In these causes of action, plaintiffs  
26 allege that the mandatory meal charges defeat the intent of the Section 236 Program  
27 in that they deprive the plaintiffs of affordable and decent housing and constitute  
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1 charges for rent in excess of the rent limitations set forth in 12 U.S.C. §1715z-1.  
2 Defendants' motion for judgment on the pleadings is granted because these claims  
3 were litigated and rejected in Aujero.

4 d. Seventh Cause of Action - In this cause of action, plaintiffs allege that  
5 Rotary Plaza's mandatory meals program violates plaintiffs' constitutional rights to  
6 privacy and free association. Because the court of appeals rejected a similar claim  
7 in Aujero, the court hereby grants defendants' motion for judgment on the pleadings  
8 as to the seventh cause of action.

9 e. Eighth Cause of Action - Plaintiffs allege here that the non-federal  
10 defendants have forced the plaintiffs to enter into food service agreements which  
11 are illegal, unlawful and unconscionable under California law. The non-federal  
12 defendants argue that there is no federal jurisdiction over them and therefore this  
13 state law cause of action cannot be maintained against them in view of this circuit's  
14 rules on pendent party jurisdiction.

15 It appears that federal jurisdiction over the private defendants exists. In  
16 Aujero, the court of appeals declined to address the issue whether an implied right  
17 of action exists under the United States Housing Act of 1937, 42 U.S.C. §1437f  
18 (1982), because it found that it had jurisdiction over the federal appellee under the  
19 APA. The court went on to state that "jurisdiction is sufficiently broad to  
20 encompass each of the substantive claims in this action." Aujero, 756 F. 2d at 1375.  
21 As some of those claims were made by private appellees, the court implicitly held  
22 that the APA confers federal jurisdiction over private parties such as those before  
23 the court. But see City of Rohnert Park v. Harris, 601 F. 2d 1040, 1048 (9th Cir.  
24 1979). Because the APA provides a basis for federal jurisdiction over the non-  
25 federal defendants, this state law cause of action, which arises out of the same  
26 facts, may be maintained.

1 Relying on IMO Development Corp. v. Dow Corning Corp., 135 Cal. App. 3d,  
2 451, 4610, 185 Cal. Rptr. 341 (1982), the private defendants argue further that even  
3 assuming arguendo that plaintiffs have asserted claims over which federal jurisdiction  
4 lies, there is no unconscionability under California law since plaintiffs allege that  
5 they had no alternative to signing the food service agreements. Defendants argue  
6 that IMO Development demonstrates that an allegation that a contract has been  
7 obtained by economic duress does not amount to a showing of unconscionability.  
8 IMO Development is distinguishable because plaintiff there failed to allege that the  
9 contract was unconscionable. Since plaintiffs have included that allegation in their  
10 complaint in this matter, the court finds that this claim is sufficient to withstand  
11 the motion for judgment on the pleadings. Thus, this portion of the motion is  
12 denied.

13 II. CLAIMS SUBJECT TO MOTION FOR JUDGMENT ON THE PLEADINGS AND  
14 CROSS-MOTIONS FOR SUMMARY JUDGMENT

15 a. First Cause of Action - Plaintiffs allege that the mandatory meal policy is  
16 illegal in that it was not published in the Federal Register as required by the FOIA,  
17 5 U.S.C. §552.

18 5 U.S.C. §552(a)(1)(D) requires that federal agencies publish in the Federal  
19 Register "substantive rules of general applicability adopted as authorized by law, and  
20 statements of general policy or interpretations of general applicability formulated and  
21 adopted by the agency."

22 In Anderson v. Butz, 550 F. 2d 459 (9th Cir. 1977), the court adopted the  
23 "significant impact" rule to determine when publication in the Federal Register is  
24 required by the FOIA. Pursuant to that standard, an administrative interpretation is  
25 not deemed to be of "general applicability" if (1) it is only a clarification or  
26 explanation of existing laws or regulations and (2) it has no significant impact upon  
27 any segment of the public. In Butz, the court concluded that an instruction which  
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1 "affect(ed) more than the internal operations" of the government entity, Id. at 463,  
2 and had a significant impact on the plaintiffs should have been published.

3 In their motions, defendants contend that the mandatory meals policy does not  
4 constitute a substantive rule of general applicability or a statement of general policy  
5 within the meaning of this section and Butz. First, they argue that the policy  
6 allowing mandatory meals was originated in 1963 by HUD's predecessor, the Housing  
7 and Home Finance Agency ("HHFA"). They contend that the HUD policy is nothing  
8 more than a restatement of existing law, which need not be published in the Federal  
9 Register but need only be made available for public inspection and copying pursuant  
10 to §552(a)(2)(B).

11 The court rejects this argument. Unlike the HHFA policy, the HUD mandatory  
12 meals policy permits owners to waive mandatory meal requirements for certain  
13 reasons. It also provides that HUD must approve mandatory meal charges. Because  
14 the HUD policy differs from the HHFA policy in these and other significant aspects,  
15 it is clear that the HUD policy is more than a clarification or explanation of existing  
16 policy.<sup>1</sup>

17 The court holds that the HUD mandatory meals policy is more than a  
18 clarification of existing policy and does more than affect the internal operations of  
19 HUD and the Section 236 program. The court also finds that the policy has a

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21 1. In addition, it appears that the previous policy may also have been subject to  
22 publication under the statutory provisions then in effect. See 5 U.S.C. §§1001 et  
23 seq. If this is the case, then the government cannot "have its proverbial cake and  
24 eat it too": it cannot claim that its new policy is exempt from publication because it  
25 does nothing more than clarify an old policy, unless that policy was previously  
26 adopted in accordance with the controlling statutory dictates. See U.S. v. Garner,  
27 No. C 83-4531, slip op. at 38 (5th Cir., July 19, 1985).

1 significant impact on a segment of the public, which include persons such as  
2 plaintiffs. It therefore is the court's finding that the regulation is subject to  
3 publication under §552(a)(1)(D). See also Herron v. Heckler, 576 F. Supp. 218 (N.D.  
4 Cal. 1983); Lewis v. Weinberger, 415 F. Supp. 652 (D.N.M. 1976).

5 Defendants argue, however, that even assuming arguendo that HUD's mandatory  
6 meal policy is "statement of general policy" or a "substantive rule of general  
7 applicability" within the meaning of §552(a)(1)(D), plaintiffs' claim must fail.  
8 Defendant's first argument is that plaintiff may not maintain this cause of action  
9 because plaintiffs have not been adversely affected by HUD's failure to publish the  
10 policy and there is no alternative course of action that plaintiffs would have taken  
11 in this case had HUD's mandatory meal policy been published in the Federal Register.  
12 Donovan v. Wollaston Alloys, Inc., 695 F. 2d 1, 9 (1st Cir. 1982); Hogg v. U.S., 428  
13 F. 2d 274, 280 (6th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

14 Both of these cases are distinguishable. The court in Donovan found that the  
15 OSHA inspection program which plaintiffs challenged "was an internal procedure.. and  
16 was typical of the type of information provided in agency staff manuals" and "did  
17 not have a significant impact on the substantive rights", Id., of the plaintiff. The  
18 Butz case was distinguished on the ground that it involved plaintiffs who faced  
19 increased costs as a result of the challenged policy, whereas the plaintiff in Donovan  
20 the company would have been selected for the challenged inspection in any event.  
21 Similarly, the Hogg court ascertained that publication was not required because  
22 nonpublication of a Department of Justice internal instruction pertaining to the  
23 functions of United States attorneys in the conduct of litigation did not affect the  
24 complainant.

25 In the instant case, plaintiffs have been directly and adversely affected by the  
26 mandatory meals policy; in this respect, their claim is substantially similar to the  
27 claim made in Butz. Further, even if the situation were analogous to the authorities  
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1 on which defendants rely, defendants' argument that plaintiffs would not have had an  
2 alternative course open to them is mere speculation. At a minimum, had publication  
3 occurred, plaintiffs or other concerned parties might have taken recourse to the  
4 political process to effect a change in the policy. Thus, this argument is rejected.

5 Defendants' second argument, that publication is not required because plaintiff  
6 had actual and timely notice of the policy, presents a closer question. Section  
7 552(a)(1) provides that "except to the extent that a person has actual and timely  
8 notice of the terms thereof, a person may not in any manner be required to resort  
9 to, or be adversely affected by, a matter required to be published in the Federal  
10 Register and not so published."

11 In Butz, the court held that notification which occurred when an instruction  
12 resulting in reduced food stamp benefits to plaintiffs was implemented was "not the  
13 timely notice contemplated by Congress when it enacted the exemption to the  
14 standard FOIA procedures." Id., 550 F. 2d at 463. In contrast, notice is timely if  
15 it is received "well in advance" of the time it affects the recipient. Yassini v.  
16 Crosland, 618 F. 2d 1356, 1362 (9th Cir. 1980). Because plaintiffs received notice  
17 of the mandatory meals policy before they agreed to reside in Rotary Plaza, "well in  
18 advance" of the time the policy affected them, the notice was timely within the  
19 meaning of Section 552(a)(1).

20 Nonetheless, the notice was inadequate. According to the evidence before the  
21 court, plaintiffs were not then notified about HUD's policies concerning the  
22 availability of exemptions from mandatory meal programs. This is not the complete  
23 and particular notice which the FOIA contemplates. See Northern California Power  
24 Agency v. Morton, 396 F. Supp. 1187, 1191-92 (D.D.C. 1975), aff'd., 539 F. 2d 293  
25 (D. C. Cir. 1976). The court therefore rejects defendants' argument that publication  
26 of the mandatory meals policy was not required because plaintiffs received actual  
27 and timely notice of that policy. Defendants' motions for judgment on the pleadings  
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1 and summary judgment are denied, and plaintiffs' motion for summary judgment on  
2 this cause of action is granted.

3 b. Second Cause of Action - Plaintiffs allege that the HUD's mandatory  
4 meals policy was adopted in violation of the notice and comment requirements of the  
5 APA, 5 U.S.C. §553, and 24 C.F.R., Part 10.

6 The Ninth Circuit has stated that substantive rules which are subject to the  
7 notice and comment procedures of §553 are those which "effect a change in existing  
8 law or policy." Powderly v. Schweiker, 704 F. 2d 1092, 1098 (9th Cir. 1983).

9 Defendants contend that the HUD mandatory meals policy does not come within this  
10 definition because it merely is a continuation and restatement of the prior policy.

11 This argument has already been rejected by the court.

12 Next, defendants argue that publication of the mandatory meals policy is not  
13 required because 5 U.S.C. §553(a)(2) exempts from the rulemaking requirements  
14 matters "relating to public..benefits, or contracts." Even if this is true, however,  
15 HUD waived that exception and elected to be bound by the APA's notice and  
16 comment requirements by adopting 24 C.F.R., Part 10. In pertinent part, that  
17 regulation provides:

18 It is the policy of the Department of Housing and Urban Development to  
19 provide for public participation in rulemaking with respect to all HUD programs  
20 and functions, including matters that relate to public property, loans, grants,  
benefits or contracts, even though such matters would not otherwise be  
subject to rulemaking by law or executive policy.

21 24 C.F.R. §10.1.

22 The court finds that the mandatory meals policy should have been promulgated  
23 in accordance with the APA's notice and comment procedure. Accordingly, as to the  
24 second cause of action, defendants' motions for judgment on the pleadings and  
25 summary judgment are denied, and plaintiffs' motion for summary judgment is granted.

26 c. Ninth Cause of Action - In their complaint, plaintiffs allege that they are  
27 third party beneficiaries of the Regulatory Agreement entered into between the  
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defendants. Plaintiffs have moved for an adjudication that they are third party beneficiaries of the Agreement. The defendants have filed a motion for judgment on the pleadings and a motion for summary judgment, arguing that plaintiffs are not third party beneficiaries of this Agreement.

The Regulatory Agreement, which plaintiffs believe was breached, provides that Rotary Plaza may charge tenants for facilities and/or services "upon written approval of (HUD)." Defendants contend that plaintiffs are merely incidental beneficiaries, rather than intended beneficiaries of the agreement, so they may not sue to enforce it. See Falzarano v. U.S., 607 F. 2d 506 (1st Cir. 1979); Restatement of Contracts §145; 4 Corbin on Contracts §§774 et seq.

With one exception, federal courts consistently have held that tenants are not third-party beneficiaries of Regulatory Agreements between HUD and project owners. Falzarano, supra; Reiner v. West Village Associates, 600 F. Supp. 233 (S.D.N.Y. 1985); Ellis v. U.S. Department of Housing and Urban Development, 551 F. 2d 13 (5th Cir. 1977). But see Gonzales v. St. Margaret's Housing Housing Development Fund Corporation, No. 84 CIV 1697, slip op. (S.D.N.Y., July 12, 1985 ); Zigas v. Superior Court of the State of California, 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (1981). While tenants may be considered third-party beneficiaries of contracts to provide rental assistance payments by HUD to landlords, Falzarano; Holbrook v. Pitt, 643 F. 2d 1262 (7th Cir. 1981), and therefore may sue to enforce such contracts, they do not have third-party beneficiary status as regards Regulatory Agreements. Accordingly, defendants' motion for judgment on the pleadings as to the Ninth Cause of Action is granted.

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CONCLUSION

In accordance with the foregoing, it is hereby ordered that:

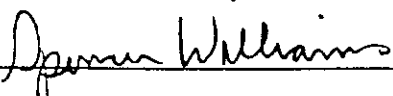
1. Defendants' motion for judgment on the pleadings is GRANTED as to the third, fifth and sixth causes of action. Defendants' motion for judgment on the pleadings on the fourth cause of action is considered one for summary judgment and is GRANTED.

2. Defendants' motion for judgment on the pleadings is DENIED as to the eighth cause of action.

3. Defendants' motions for judgment on the pleadings and summary judgment on the first and second causes of action are DENIED, and plaintiffs' motion for summary judgment on these causes of action is GRANTED. The court has determined that further proceedings are necessary to determine the appropriate remedy on these causes of action. Plaintiffs are directed to address this issue in a memorandum filed on or before September 18, 1985. Defendants shall file a responsive memorandum on or before October 2, 1985. Plaintiffs' reply, if any, shall be filed on or before October 9, 1985. A hearing on this motion shall be held on October 16, 1985 at 10:00 a.m.

4. Defendants' motion for judgment on the pleadings on the ninth cause of action is GRANTED, and the other motions directed to this cause of action are DENIED.

IT IS SO ORDERED.

  
UNITED STATES DISTRICT COURT

Dated: AUG 7 5 1985