UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 22-35539

COMMUNITY ACTION RESOURCE ENTERPRISES, INC.

Plaintiff-Appellant

vs.

THOMAS J. VILSACK, Secretary of the Department of Agriculture, et al.

Defendants-Appellees

---O

On Appeal From an Order of the
United States District Court
For the District of Oregon, Portland (Hon. Michael H. Simon)
Dist. Ct. No. 3:16-DV-2116-SI

BRIEF OF THE APPELLANT

Gideon Anders
NATIONAL HOUSING LAW PROJECT
1663Mission Street, Suite 460
San Francisco, CA 94103

Michael Pijanowski
Richard Peel
OREGON LAW CENTER
230 NE 2nd Avenue, Suite F
Hillsboro, OR 97124

Edward Johnson
OREGON LAW CENTER
522 SW Fifth Street, # 812
Portland, OR 97204

Attorneys for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Community Action Resources Enterprise, Inc. is an independent private nonprofit corporation formed under Oregon state law. It does not have any stock and is not owned or controlled by a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT OF JURISDICTION

The District Court had jurisdiction to hear the case, which was brought under the Administrative Procedures Act, under 28 U.S.C. §§ 1331, 1337, 1343(a)(3), (a) (4), and 1361. The court also had jurisdiction to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to hear cases from all final decisions of the district courts of the United States. The decision being appealed in this case is a final decision to dismiss a case as moot made by the District Court for the District of Oregon on May 11, 2022. Appellants filed a timely notice of appeal on July 8, 2022, under Rule 4 of the Federal Rules of Appellate Procedure. This Court set the deadline for filing the opening brief on appeal as November 16, 2022.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

CARE raises two main issues and one secondary issue in this case. They are:

1. Did the district court correctly conclude, under the ordinary mootness standard, that the sale and preservation of GE mooted CARE's case even though CARE did not, and could not, force the sale and preservation of GE through litigation and, none of the claims for relief that CARE did seek were ever addressed or remediated?
2. Did the district court properly conclude that the voluntary cessation exception to mootness, which the court previously applied to the case, did not continue to apply because GE was sold and preserved even though RD never met the heavy burden imposed by the exception?
    a. Did the district court abuse its discretion by failing to follow the case of the law doctrine when it concluded, notwithstanding its failure to modify its regulations or practices, that the sale and preservation of GE was sufficient evidence to show that RD had modified its preservation practices sufficiently to justify its abandonment of its previous holding that the voluntary cessation exception to mootness applied to the case?

STATMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

Plaintiff, Community Action Resource Enterprises (CARE), is a nonprofit organization that provides housing assistance, including financial aid, to low income persons living or wanting to live in Tillamook County, Oregon. In November of 2017, CARE joined four very low income residents of Golden Eagle II (GE) apartments, a 32 unit complex financed and subsidized by Rural Development (RD) under Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, in bringing a lawsuit challenging RD's approval of the GE owner's request to prepay the loan. Prepayment of the loan would have removed GE from the RD affordable rental housing stock and from the affordable rental housing inventory in Tillamook City and County, and threatened the displacement of its residents. The lawsuit also challenged RD's operation of its voucher program, which is designed to provide housing assistance to persons displaced by prepayments, and a regulation authorizing RD to lift use restrictions placed on some developments as a condition of prepayment.

Just prior to the hearing on Plaintiffs' request for a preliminary injunction to stop the GE prepayment, the district court provided the parties with a tentative

opinion granting the injunction. *See* ECF 67 at 4.[1] However, after receiving the tentative opinion, RD changed its position and advised the district court that it would not allow prepayment pending completion of a review of its prepayment approval decision. Several months later, RD withdrew its prepayment approval and advised the GE owner that, in accordance with the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), the owner must first offer GE for sale to a nonprofit or public entity. If no potential purchaser made an offer, the owner could then prepay the loan without restrictions.

The prepayment of Section 515 loans is governed by ELIHPA, which was passed in 1988 to limit the loss of RD rental housing and the displacement of its residents. ELIHPA sets out the process that RD must follow when an owner seeks to prepay a Section 515 loan. One of the ways ELIHPA protects RD housing is by requiring owners to offer their developments to nonprofit and public entities for purchase and preservation as RD housing whenever the prepayment has a material impact on minority housing opportunities. In this case, after RD revised its prepayment approval, the process resulted in Northwest Coastal purchasing GE by assuming the owner's outstanding RD loan and securing a second loan to pay off the owner's equity in the property. However, the process does not always work as it did with GE and ELIHPA does not guarantee the preservation of a Section 515

[1] The tentative opinion was never entered into the case record.

development. If RD properly analyzes a prepayment application, various steps in the ELIHPA prepayment process allow RD to approve a prepayment and, thereby, take the development out of the Section 515 program.

After RD withdrew the GE prepayment approval, Plaintiffs filed an amended complaint. RD responded with a motion to dismiss, contending that CARE and the other plaintiffs lacked standing and that the case was moot because RD had rescinded its original decision approving the prepayment. The district court denied RD's motion, finding that all the plaintiffs had standing and that the case was not moot because RD's reversal of the prepayment approval and new requirement that the owner offer GE for sale brought the case within the voluntary cessation exception to mootness. In so doing, the district court assumed, but did not decide, that the plaintiffs' claims were moot. ER-63.

The voluntary cessation exception places a heavy burden on defendants to show that it is absolutely clear that the illegal conduct is not likely to recur. The district court held that RD did not meet this burden as the Plaintiffs had not secured the relief originally sought because none of the challenged regulations or agency practices had been modified since the case was filed. ER64.

Plaintiff never sought to force the sale or preservation of GE through this litigation because there is simply no way to bring such a claim under ELIHPA. Instead, Plaintiffs sought declaratory relief that the manner by which RD approved

prepayments, operated the voucher program and maintained some of its regulations were contrary to law and otherwise arbitrary and capricious. Plaintiffs also sought an injunction to prohibit RD from approving other prepayments in Tillamook and surrounding counties unless and until the agency regulations and practices were made consistent with applicable laws.

This case is now on appeal by plaintiff CARE because the district court held that the sale and preservation of GE mooted all of Plaintiffs' claims. In so holding, the district court also rejected CARE's argument that the voluntary cessation exception, which the district court previously applied to this case, continues to apply by virtue of the fact that RD never met the burden that the exception placed on it. Moreover, the district court abused its discretion by not applying the law of the case doctrine, which required that it continue to follow its earlier decision that the voluntary cessation exception applied to the case. In reaching these conclusions the district court did not address the fact that RD has not made any changes to its prepayment decision making process or anything else related to Plaintiff's claims. Other than RD's reversal of its GE prepayment approval in response to Plaintiff's litigation, no extraordinary events have occurred that would justify the district court's abandonment of the voluntary cessation exception. Accordingly, CARE believes that the district court's decision is wrong.

2. Statement of Facts

Community Action Resource Enterprises (CARE) and four very low income residents of Golden Eagle II (GE) apartments, a 32-unit federally financed and subsidized affordable housing development financed by a direct loan from Rural Development (RD), a mission area within the U.S. Department of Agriculture, filed this lawsuit on November 4, 2016, after RD illegally approved the prepayment of the GE loan in September of 2016. ER-95. The prepayment approval would have allowed the GE owner to convert the housing from a deeply subsidized federal affordable housing development to a market rent development and threatened its low and very low residents with displacement. *Id*. 95-96.

CARE is a Tillamook County based nonprofit organization that provides a wide variety of housing services, including financial assistance, such as the payment of rent or utilities, to low income persons and families living in or wanting to live in Tillamook County who are in crisis or struggle to make ends meet. CARE relies on subsidized housing in Tillamook County as a resource for housing clients with multiple barriers to entering a very tight housing market. It has previously experienced the transition of other subsidized apartments to market rate rentals and has had to expend significant financial and staffing resources to help residents locate other affordable housing. It is concerned about RD section 515 prepayments because there are six RD financed Section 515 properties, with a

total of 147 units, in Tillamook County and an additional nine developments with over 300 units in neighboring counties. At least one property in Tillamook County and four in neighboring counties are eligible to prepay their loans at any time. ECF 4 at 9 and 130 at 1.[2]

Threatened with the displacement and potential homelessness and the loss of indispensable affordable rental housing in Tillamook City and County, communities with a very tight rental housing market particularly for low and very low income households, the complaint[3], as amended, had four claims all brought under the Administrative Procedure Act. 5 U.S.C. § 702. It alleged that (1) the regulation that RD followed to approve the prepayment of the GE loan violated the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) by establishing a different standard for determining the impact of the prepayment on minority housing opportunities; (2) RD was making prepayment decisions in an inconsistent, arbitrary and capricious manner because it had no guidance for determining the impact of a prepayment on minority housing opportunities; (3) RD was operating its voucher program in a manner that violated the program's authorizing statute as well as ELIHPA by encouraging prepayments; and, (4) an RD regulation, which authorizes it to lift use restrictions imposed on developments

[2] All ECF citations are to source of undisputed factual background information.
[3] Hereinafter, all reference will be made to Second Amended Complaint, ECF 49, which is the operative pleading.

with prepaid loans, also violated ELIHPA which did not authorize use restrictions to be lifted. ER-88-91.

Rural Development (RD) is a mission area of the U.S. Department of Agriculture. The Rural Housing Service (RHS), which operates within this mission area, is the agency within the department responsible for administering all of the department's rural housing programs, which are authorized by Title V of the Housing Act of 1949. Pub. L. 81–171, Codified at 42 U.S.C. §§ 1471-1490t.[4] ER-79-80. The Defendants are all USDA employees responsible for administering the Section 515 housing loan program both nationally and in Oregon.[5] All the defendants were sued in their official capacities.

Golden Eagle II (GE) was constructed in 1976 with a 50-year Section 515 RD direct loan. Rents at the development are made affordable to low and very low income households by RD rent subsidies extended to the owner on behalf of the residents. ER-80-81.

Section 515 loans are authorized by Section 515 of the Housing Act of 1949. 42 U.S.C. § 1485. The GE loan did not have any prepayment restrictions when it

[4] RHS housing programs are operated in the field by Rural Development staff. All references in this brief will, therefore, be made to RD and not RHS.

[5] Since this case has been filed, responsibility for the management of the section 515 program has been reorganized. RD state employees, such as defendant Hoffman, are no longer responsible for managing the program in the various states. Instead, RD staff, working under the direction of RHS National Office staff are managing and supervising the operation of the Section 515 program.

was made. However, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 (Pub. L. 100-242), which placed restrictions on Section 515 owners' right to prepay their loans. ELIHPA is codified at 42 U.S.C. § 1472(c).[6]

The loss of RD subsidies due to prepayments without use restriction typically results in the owners increasing rents to prevailing market rents, causing resident displacement. To limit displacement and homelessness, Congress authorized and funded an RD voucher program in the 2006 Agriculture Appropriations Act. Pub. L. 109-97 (November 10, 2005). The program has been operating for sixteen years without regulations. It operates in accordance with a periodic Federal Register Notice, most recently published on May 11, 2017. (82 Fed. Reg. 21972), and a Rural Development Voucher Program Guidebook, published in 2010. *Available at https://www.rd.usda.gov/files/MO-Voucher%20Program%20Guidebook.pdf*.

The owner of GE requested RD's approval to prepay the GE loan in May of 2015. In response, RD undertook a Civil Rights Impact Assessment (CRIA) to assess the impact of the prepayment on minority housing opportunities and on availability of alternative affordable housing in Tillamook. Relying on a regulation

[6] ELIHPA and RD regulations implementing the program are described below in greater detail. *See* Pg. 13 *infra*.

that defines material impact as a disproportional impact, (7 C.F.R. § 3560.658(b)), RD concluded that the GE prepayment would not have a disproportional impact on minority housing opportunities but that there was insufficient alternative housing in the area to which residents could relocate on the date of prepayment. Accordingly, it advised the owner and the residents that the owner's request was approved subject to use restrictions intended to protect the current residents for as long as they chose to remain in their homes. The notice also advised the residents that they may be eligible for RD vouchers that would allow them to remain at GE or move to other housing. ER-81-82.

Threatened with displacement and the loss of federally assisted affordable housing the plaintiffs filed for a preliminary injunction on November 23, 2016, in order to stop the GE loan prepayment. *Id.* The court set a hearing on the plaintiffs' motion for January 4, 2017. Several days before the hearing, the court sent the parties a tentative opinion and order that would have granted the plaintiffs' motion. ER-59.

At the hearing, the defendants advised the court that there was no need for a preliminary injunction as they decided to voluntarily withdraw the prepayment approval because they believed that the CRIA, which assessed the prepayment's impact on minority housing opportunities, may have errors in it. They advised the court that they would review the CRIA and not allow a prepayment until after it is

completed. The Court agreed and dismissed plaintiffs' motion without prejudice. *Id.*

Four months later, on May 4, 2017, RD advised the court that it had completed a new CRIA that concluded that the GE prepayment would have a material and disproportionate effect on minority housing opportunities. Accordingly, it advised the owner that if it sought to prepay the loan it was first required to offer the development for sale to a nonprofit or public agency for a term of 180 days. On or about May 11, 2017, the GE owner advised RD that it would comply with the RD decision and offer GE for sale. *Id.* and ECF 42 and 44.

In response to the revised RD decision, Plaintiffs filed an unopposed second amended complaint, the operative complaint. ER-75-93. Shortly thereafter, the defendants filed a motion to dismiss the case for lack of standing and mootness. ER-46. The Plaintiffs opposed the motion arguing that RD's choosing to rescind the first CRIA after litigation was commenced and issuing a second revised CRIA, brought the case under the voluntary cessation exception to mootness. *See* ER-63.

After a hearing on the motion, the court rejected RD's motion to dismiss and issued a 31 page opinion and order finding that the Plaintiffs had standing and that the case was not moot under the voluntary cessation exception. ER-44-74. In making the mootness decision the court assumed, but did not decide, that the case was moot and made several findings to support the conclusion that the RD did not

meet the heavy burden, imposed by the voluntary cessation exception, of showing that the challenged practices will not recur. ER-63.

The GE owner offered GE for sale and Northwest Coastal, a local nonprofit organization offered to purchase the development, which the GE owner accepted. The parties had 24 months to close the deal. ECF 109 at 5-6.

In December of 2021, GE was transferred to Northwest Coastal, which agreed, as a condition of RD allowing it to assume the outstanding 515 loan and making it a second 515 loan, to pay for the owner's equity and to maintain GE as affordable housing until 2051. ECF 124 at 2.

With GE preserved, the RD filed a motion to dismiss, ECF 128. The motion was granted by the court, ER-3-11. That decision is the subject of this appeal.

Since this case was filed, none of the regulations or practices that the Plaintiffs have challenged have been modified. ECF 130 at 10-12.

3. Statutory Framework—ELIHPA

The Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. 100-242, was enacted to preserve federally financed affordable housing and limit tenant displacement due to prepayments. ER-89. It requires owners of Section 515 developments who want to prepay their loans to submit a prepayment request to RD. 42 U.S.C. § 1472(c)((3). In response, the agency is authorized to offer the owner incentives to remain in the 515 program. *Id.* § 1472(c)(4).

If an owner rejects incentives and continues to seek a prepayment, ELIHPA requires RD to make two determinations: First, whether the proposed prepayment will have a ***material*** impact on minority housing opportunities. *Id.* § 1472(c)(5)(G)(ii). If RD makes such a finding, the owner must offer the development for sale, for a term of 180 days, at its market value, to a nonprofit or public agency. *Id.* § 1472(c)(5)(A)(ii). If a purchase offer is made and accepted, the sale of the development must be completed within 24 months. 7 C.F.R. § 3560.662(f) (2022). If no purchase offer is received, or a purchase offer is not closed, the owner is free to prepay the loan without any use restrictions. Second, if RD determines that there is no impact on minority housing opportunities, it must determine whether there is sufficient alternative affordable housing in the community to which the residents of the prepaid development can move to as of the date of prepayment. *42 U.S.C.*§ 1472(c)(5)(G)(ii). If RD determines that sufficient alternative housing is not available, an owner can only prepay the loan subject to use restrictions that protect the residents at the development against displacement. *Id.* If RD determines that there is sufficient alternative housing in the market area, an owner is free to prepay the loan. ER-85.

The ELIHPA implementing regulations vary from the statutory requirements in two significant respects. First, the regulation directing staff to determine whether the prepayment will have an impact on minority housing opportunities directs that

such a finding be made if there is a ***disproportionate*** impact on minority housing opportunities. Second, when a loan is prepaid subject to use restrictions, ELIHPA requires that the owner become obligated to ensure that any residents of the development remaining after prepayment will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment. 42 U.S.C. § 1472 (c)(5)(G)(ii)(I). Notwithstanding the fact that the ELIHPA does not authorize the use restrictions to be lifted, a RD regulation authorizes it to lift the use restrictions when financial assistance provided to the residents of the housing will no longer be provided due to no fault, action, or lack of action on the part of the borrower. 7 C.F.R. § 3650.662(f). This authorization is contrary to ELIHPA. ER-91.

SUMMARY OF THE ARGUMENT

The district court's decision to dismiss the case as moot was wrong for two reasons:

1. The sale of GE to Northwest Coastal has not mooted CARE's challenge to RD regulations and practices that violate laws authorizing the prepayment of RD loans and the operation of its voucher program.

2. The facts and law of the case do not justify the district court's abandonment of its earlier decision that the voluntary cessation exception to mootness applies to this case.

STANDARD OF REVIEW

District court dismissals based on mootness are reviewed *de novo* on appeal, *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (citing *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003)), *Wade v. Kirkland,* 118 F.3d 667, 669 (9th Cir.1997), as are motions to dismiss. *Ralston v. Cty. of San Mateo*, No. 21-16489, 2022 U.S. App. LEXIS 30289, at *2 (9th Cir Nov. 1, 2022) (citing *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004); *Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir. 1995)). Decisions on the law of the case are reviewed under the abuse of discretion standard. *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

ARGUMENT

A. The District Court's Decision That The Case Is Moot Is Contrary To Law And fact.

1. This Case Is Not Moot Under the Ordinary Mootness Standard.

CARE joined this action because RD's illegal approval of the GE prepayment threatened the displacement of its residents who would have relied upon CARE's financial and other housing services to avoid displacement or to find alternative housing. RD's approval of the prepayment relied on a regulation that was contrary to ELIHPA, raised other issues related to the agency's failure to establish coherent guidance for making decisions on the impact of prepayments on minority housing opportunities, illegal regulatory provision allowing RD to lift use restrictions imposed by ELIHPA on some prepaid developments, as well as its illegal management of the voucher program, for which the residents would have become eligible if the prepayment was approved.

There are multiple other Section 515 developments in Tillamook and surrounding counties whose owners are eligible to apply to prepay their loans. CARE's interest in this action was to avoid injury from the prepayment of GE as well as the injury that would be caused if the illegal regulations and practices were allowed to affect future prepayment applications filed by other owners of developments in Tillamook and surrounding counties.

Importantly, no claim or relief requested in the complaint sought to force the sale or preservation of GE. Such a claim could not be brought under existing laws.

In response to this litigation and to the district court's tentative preliminary injunction opinion enjoining prepayment of the GE loan, RD only revised its analysis of the underlying GE prepayment decision and concluded that the GE loan could not be prepaid without the property first being offered for sale to a nonprofit or public agency. RD did not, however, change any of the underlying regulations or practices that CARE challenged and that allowed the initial illegal prepayment decision. Accordingly, the district court denied RD's first motion to dismiss by applying the voluntary cessation exception to mootness.

After GE was sold to Northwest Coastal, which agreed to restrict its use of GE as affordable housing until 2051, the district court granted RD's second motion to dismiss on the basis that there was no longer a live controversy. ER-9. The district court did so notwithstanding the fact that CARE continued to have an interest in preventing RD from approving prepayments, in Tillamook and surrounding counties, in reliance on a regulation that violated ELIHPA, operating the voucher program in a manner that violated both its authorizing statute and ELIHPA, and maintaining a regulation that breached ELIHPA's goal of protecting remaining residents against displacement. CARE has an ongoing interest in

avoiding these injuries by securing the relief that it sought when this case was filed. Thus, contrary to the district court's latest decision, this case is not moot.

Under Article III of the Constitution, federal courts' jurisdiction is limited to live controversies and courts cannot consider moot claims. *Church of Scientology v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992). A claim is moot if "... changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.,* 398 F.3d 1125, 1129 (9th Cir.2005) (*en banc*). If any remedy could help alleviate the adverse effects of the injury suffered by a plaintiff, the claim is not moot. *Tyler v. Cuomo,* 236 F.3d 1124, 1137 (9th Cir.2000). Thus, the focus of a mootness inquiry is whether there can be any effective relief to remedy the alleged violations. *NW Envtl. Defense Ctr. v. Gordon,* 849 F.2d 1241, 1244–45 (9th Cir.1988). *Tyler v. Cuomo,* at 1137, *Forest Guardians v. Johannes*, 450 F.3d 455, 462-63 (9th Cir. 2006). Critically, this question must be asked separately for each cause of action. *Chew v. Gates*, 27 F.3d 1432, 1437 (9th Cir. 1994); *see also Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) ("[A]n individual claim...becomes moot when a plaintiff actually receives all of the relief he or she could receive on the claim through further litigation.") (emphasis deleted). In other words, a cause of action is not considered moot because the "primary and principal relief sought" is no longer available. *Powell v. McCormack*, 395 U.S. 486, 499

(1969) (internal quotation marks omitted); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017). Rather, the question is "whether there can be any effective relief." *Id*. "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

In the second amended complaint, the operative pleading on this appeal, CARE alleged four Administrative Procedure Act (APA) violations. It sought declaratory and injunctive relief to prevent the agency from continuing to violate the law by (1) following a regulation that violates ELIHPA when determining whether a prepayment will have a material impact on minority housing opportunities; (2) failing to adopt regulations or other guidance that define how to measure and determine the impact of a prepayment on minority housing opportunities and thus making prepayment decisions in an arbitrary and capricious manner; (3) operating the RD Voucher program in a manner that violates the program's purposes and ELIHPA; and, (4) maintaining a regulation that violates ELIHPA by allowing the agency to lift use restrictions imposed on a development as a condition of prepayment. ER-88-91.

CARE asked for declaratory relief that these regulations and practices were contrary to law and injunctive relief to stop RD from continuing to follow these

regulations and practices when future prepayments were approved in Tillamook or surrounding counties. ER-92-93.

In granting RD's motion to dismiss, the district court failed to review CARE's claims to assess whether there could be any effective relief to remedy the alleged violations. *See, NW Envtl. Defense Ctr. v. Gordon,* at 1244–45 (9th Cir.1988). Instead, it summarily dismissed the need to undertake such a review by asserting that "[o]nly Golden Eagle . . . is at issue in this case" (ER-10-11) and that "[a[fter the sale of Golden Eagle to Northwest Coastal, Plaintiffs' claims became moot." *Id*. at 9-10. The district court justified this conclusion by an earlier statement that

> [e]ach of Plaintiffs' claims challenge Rural Development's actions and policies related to prepayment applications. . . . There [currently] is no pending application for prepayment of the Golden Eagle loan, and Northwest Coastal has not indicated that it plans to file one.

Id. 9.

The district court stated that "[CARE] does not assert any claims against Defendants with respect to any action related to any other housing development or other Section 515 borrowers in Tillamook County" and rejected CARE's claim that it has an interest in avoiding their prepayment even if the owners of those properties did not currently have prepayment applications pending. *Id*. at 10.

The district court's statements and conclusions mischaracterize the nature of CARE's complaint and the relief sought and arbitrarily limits the scope of relief.

The central error is the belief that the goal of the litigation was the preservation of GE and that once Northwest Coastal purchased the property CARE received all the relief to which it was entitled and it no longer had a cognizable interest in the outcome of the litigation.

As noted earlier, ELIHPA sets out a process that must be followed when an owner seeks to prepay a Section 515 loan. *See* Pg. 13, *supra*. That process may result in a development being preserved. It may also result in the owner being allowed to prepay a loan with or without use restrictions. Whether a development is sold and preserved or the owner is allowed to prepay the loan depends on decisions and factors that are unique to each owner and development for which a prepayment request is filed. Again, there is no way that CARE could have forced the preservation of GE through litigation.

Given that the preservation of GE was not a form of relief that CARE sought, the district court's statement that only GE is at issue in this case and that after its sale to Northwest Coastal, Plaintiff's claims became moot is simply wrong. It has no basis in law or fact.

Similarly, the district court's statement that all the Plaintiffs' claims are related to prepayment applications and that there is no prepayment application pending, or contemplated, for the prepayment of GE is wrong because it is also rooted in the district court's belief that the preservation of GE, or of another

particular development, was the object of this litigation. Since that is not the case, the fact that the claims stem from prepayments and there is no GE prepayment application pending is irrelevant in considering and determining CARE's ongoing interests or the form of relief to which it is entitled.

The district court's conclusion that CARE is unable to seek relief against future prepayments in Tillamook County because it did not file a claim against RD with respect to a specific future prepayment is also in error. On the contrary, by bringing this case, CARE sought to force RD to modify its prepayment practices so that it is not injured by future prepayments approved under regulations that violate ELIHPA. That is why CARE sought injunctive relief to stop RD's continuing violation of governing statutes. Notably, CARE sought injunctive relief in its Second Amended Complaint after RD revised its GE prepayment decision. ER-92-93. As a result, the relief that it sought could no longer be directed at the GE prepayment. It was directed at future prepayments in Tillamook and surrounding counties.

CARE has a clear and continuing interest in preventing future prepayments that are approved under regulations that violate ELIHPA. Currently, there are six rural development section 515 subsidized developments with a total of 147 units in Tillamook County and an additional nine developments with over 300 units in adjacent counties. At least several of these projects are eligible to apply to prepay

their loans at any time and the prepayment of any of them will severely impact CARE's resources in relocating the residents in Tillamook or neighboring counties because the rental markets in these counties are very tight. ECF 130-1 at 3-4.

Critically, there is no way of predicting if and when the owners of these developments may prepay. Prepayment decisions are made by owners primarily based on their individual financial and other circumstances. Nationally, prepayments are being made at a much higher rate than expected and during the period this case has been pending, owners of at least four 515 developments in Oregon have prepaid their loans. ECF 130 at 11.

CARE is entitled to seek protection against further injury by enjoining RD from approving any prepayment in Tillamook and surrounding counties based upon its reliance on a regulation that is contrary to law. *See Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 293, 99 S.Ct. 230 160 L.Ed.2d 895 (1979). It is also entitled to be protected from RD operating its voucher program, which is intended to protect residents facing displacement caused by prepayments, in violation of applicable law. Lastly, if any prepaying developments are prepaid subject to use restrictions, as was the case in RD's original approval of the GE prepayment, CARE is entitled to be protected against RD lifting those use restrictions when its authority to lift the restrictions conflicts with ELIHPA.

Plaintiff welcomed the sale and preservation of GE. However, it is not an event that has forestalled CARE's right to secure the relief that it sought at the beginning of this litigation. In addressing whether the circumstances that prevailed at the beginning of litigation have been forestalled by subsequent events, courts consistently look at "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc*., at 1129. This basic question is asked separately for each cause of action. *Chew v. Gates*, at 1437; *see also Chen v. Allstate Ins. Co.*, at 1144 ("[A]n individual claim...becomes moot when a plaintiff actually receives all of the relief he or she could receive on the claim through further litigation.") (emphasis deleted). To determine whether changed circumstances have forestalled the relief that can be granted, courts look at the relief that was sought by the plaintiff at the beginning of the case and whether that relief, or some other form of relief, can still be granted.

Effective relief can be granted in this case, thus, it is not moot. *See, NW Envtl. Defense Ctr. v. Gordon,* at 1244–45. The district court can still hold that CARE is entitled to relief that it originally sought. It can declare that the challenged regulations and practices violate the law and enjoin their enforcement when it causes an injury to CARE's interests.

RD filed is first motion to dismiss after RD changed its decision to allow the prepayment of GE. It argued that plaintiff did not have standing and that the case was moot. In denying that motion, the district court held that the case did not become moot merely because RD had changed its decision allowing the prepayment of GE. It found that the

> Defendants did not cease much of the alleged wrongful conduct—retaining allegedly improper regulations, failing to have standards that result in allegedly arbitrary and capricious analyses, and operating an allegedly arbitrary and capricious voucher program. For example, RD has not changed its regulations more closely to mirror the statutory text with respect to CRIAs, as Plaintiffs allege it should with respect to evaluating the effect on minority housing. Instead, when faced with the Court's tentative decision on Plaintiff's motion for preliminary injunction, RD decided to withdraw its particular CRIA relating to a single property, reissue that CRIA, and then rescind the prepayment approval on that one property. Changing that single decision, however, does not change the underlying wrongful conduct that Plaintiffs' allege resulted in that allegedly wrongful decision, which Defendants appear to have conceded was a wrongful decision when they rescinded that action.

ER-64.

The only factual change between denial of RD's earlier motion and granting of the current one, was Northwest Coastal's purchase of GE and its preservation until 2051. As the purchase and preservation of GE is not a remedy sought by CARE and is not an event that forestalled the granting of further relief to CARE, there is no reason for the district court to have deviated from its earlier findings.

Instead, it should have evaluated whether CARE is still entitled to any of the relief sought in its complaint.

The district court cites to *Doe v. Reed,* 697 F.3d 1235 (9th Cir. 2012) and *Ctr for Biological Diversity v. Lohn,* 511 F.3d. 960, (9th Cir. 2007) for the proposition that a moot case cannot be revived by alleged future harm that is remote and speculative. ER-9. The facts in both cases are fundamentally different from this case and do not support the conclusion for which they are cited. In *Doe No. 1 v. Reed*, the plaintiff sought to enjoin the state of Washington and two private organizations from releasing information that was otherwise readily available on several public websites that are not controlled by the state or the private organizations. *Doe No. 1* at 1238-1239. The court denied the requested relief on the ground that "once a fact is widely available to the public, a court cannot grant any 'effective relief' to a person seeking to keep that fact secret." *Id*. at 1240. The statement for which the case is cited was made by the court in response to the plaintiff's efforts to limit further harm by enjoining the state's disclosure of the already publicly available information. The court denied the relief because it was "not clear why anyone would bother filing an additional public records request. And if someone did file such a request the State would realistically not be contributing to the 'further disclosure' of the petitions by responding to the request." *Id.* at 1239. In short, the court denied the requested relief because it could

not undo what has already been done and further future disclosures by the state would not harm the plaintiff if they were ever made. Here, unlike *Doe*, CARE did not get any of the relief that it originally sought, which included a declaration that the regulations on which RD relied were contrary to law and an injunction preventing RD from furthering CARE's injury by approving other prepayments in Tillamook and surrounding counties while relying on illegal regulations.

Similarly, in *Ctr. for Biological Diversity* the court refused to grant plaintiff's declaratory relief request, preventing the National Marines Fisheries Service from relying on a challenged agency policy when promulgating final regulations regarding the status of the Southern Killer whale as an endangered species, when the service declared the whale an endangered species in a final rule published during the pendency of the appeal. The court held that the agency met its burden of showing that the case was moot and that "declaring the [agency's p]olicy unlawful would serve no purpose in this case because the [agency] has listed the Southern Resident as an endangered species, the [plaintiff's] ultimate objective." 511 F.3d. 964. The court rejected plaintiff's request, to nonetheless declare the agency policy illegal because it might affect future determinations with respect to other whales, as too remote and too speculative to save the case from mootness. *Id.* This is not the case here. CARE has not sought to require the sale or preservation of GE. It sought declaratory relief that RD's regulations and practices in approving

prepayments are illegal and an injunction preventing RD from relying on those regulations when considering future prepayment requests that would affect CARE's services. RD has never shown that it will change its regulations or practices and, accordingly, has not met its burden of showing that this case was moot.

Since none of the RD regulations or practices have changed since this case was filed, the district court should have denied RD's motion to dismiss and allowed the case to proceed on the merits. For these reasons, the district court's decision that the case is moot must be reversed and the case remanded for further proceedings.

2. The Voluntary Cessation Exception to Mootness Continues to Apply To This Case Notwithstanding the Sale and Preservation of Golden Eagle.

Even if this case is moot under the ordinary standard for determining mootness, it is not moot under the voluntary cessation exception to mootness. The district court's decision to dismiss the case must be reversed because RD has not met and cannot meet the burden of showing that it is absolutely clear that its allegedly wrongful behavior could not reasonably be expected to recur. Its regulations and practices have not changed since this case was filed. Moreover, contrary to the district court's conclusion, the sale of GE to Northwest Coastal does not relieve the agency of its burden under the exception.

The voluntary cessation exception to mootness was adopted by the courts to prevent a party from voluntarily ceasing an illegal practice after a case challenging that practice is filed, thereby leaving that party free to return to its old ways after the case is dismissed for mootness. *Knox v. Serv. Emps. Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.") (internal quotation omitted). The exception holds that a court is not deprived of its power to determine the legality of the practice even if the case is otherwise considered to be moot. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 189 (2000) (citing *City of Mesquite v. Aladdin's Castle, Inc.* 455 U.S., 283, 289 (1982)).

When the exception is applied, a case may only be mooted if the party asserting mootness shows that subsequent events make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia v. Environmental Protection Agency*, ___ U.S. ___, 142 S.Ct. 2587, 2607 (2021) (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation marks omitted). *See Johnson v City*

of Grants Pass, ___ F.4th ___, 2022 WL 4492090 *8 (9th Cir., Sept. 28, 2022). Here, RD is unable to meet this burden.

In response to RD's first motion to dismiss, the district court held that the voluntary cessation exception to mootness applied to this case.

> RD voluntarily agreed to reconsider its [Civil Rights Impact Analysis (CRIA)] and prepayment approval relating to GE. RD did not, however, change any policy or make any procedural changes to the regulations and procedures challenged by Plaintiffs. The Ninth Circuit has found that "an executive action that is not governed by any clear or codified procedures cannot moot a claim" and falls within the voluntary cessation exception. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). Even if RD's reconsideration of GE's CRIA indicates some intention of changing its policy going forward, without a more rigorous policy statement or change to its regulations, the Ninth Circuit advises courts to be "less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (finding that this type of conduct falls within the voluntary cessation exception).

ER-65.

In support of its decision, the district court affirmed CARE's argument that its injury will continue if the case is not allowed to proceed under the voluntary cessation exception.

> Plaintiffs argue in their response that if RD does not change its allegedly improper regulations or start using proper prepayment standards of review, RD will continue to violate ELIHPA, which " will continue to frustrate CARE's mission and increase CARE's financial and personnel burdens in Tillamook County. . . . CARE will have to spend more time assisting its clients in finding affordable housing, *challenging RD's illegal acceptance of prepayment requests*, and providing additional financial assistance." ECF 57 at 9 (emphasis

> added). Additionally, at oral argument counsel for CARE confirmed that CARE would continue to file lawsuits in the future if additional properties receive prepayment approval. This is a sufficient stated intention to resume activities by Plaintiff to satisfy the requirements set by the Ninth Circuit. *Rosemere*, 581 F.3d at 1174; *S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1134 (9th Cir. 2004).

Id. at 67. Accordingly, the district court rejected the defendants' first motion to dismiss.

The facts have not changed since 2018. RD's voluntary rescission of its decision approving the GE prepayment continues to bring the case within the voluntary cessation exception and none of the challenged activities identified by the district court when it denied RD's earlier motion to dismiss have been remedied. RD has made no showing that it is absolutely clear that the alleged wrongful behavior is not reasonably likely to recur. Indeed, the contrary is true. By law, RD must continue to follow the challenged regulations and guidance, *Morton v. Ruiz*, 415 U.S. 199, 233-35 (1974) (federal agency must follow its own procedures), thereby assuring that it will continue to violate the law.

CARE has previously made it clear that it plans to file new cases against RD if it continues to illegally approve prepayment applications in Tillamook and surrounding counties. *Id.* Given that stated intent, the burden is on RD to show that it will not continue to rely on the challenged regulations and practices or that CARE "faces an insurmountable hurdle to filing another complaint." *Rosemere Neighborhood Assoc. v. U.S. Env. Protection Agency*, 581 F.3d 1169, 1174-1175

(9th Cir. 2009). Here RD has done neither. Accordingly, the voluntary cessation to mootness continues to apply to this case and the court's decision must be reversed.

In its recent opinion granting RD's motion to dismiss the case, the district court rejected CARE's contention that the voluntary cessation exception continues to also apply to the case under the law of the case doctrine, which generally precludes a court from reconsidering an issue that has already been decided by the same court, or a higher court in the same case. *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

While a court has discretion to depart from the law of the case where: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result, *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997), its failure to justify the departure constitutes an abuse of discretion.

In response to CARE's argument that the voluntary cessation exception to mootness continues to apply, the district court summarily dismissed its law of the case argument.

> The fact that the Court previously ruled that Rural Development's rescission of the prepayment approval constituted voluntary cessation does not mean that any subsequent factual development that moots Plaintiffs' claims also constitutes voluntary cessation. In the Court's prior Opinion and Order, the Court concluded that the voluntary exception to mootness applied because Rural Development ceased the

> challenged conduct—its approval of the prepayment application for Golden Eagle. Here, Defendants have not merely ceased the challenged conduct. Instead, the reason Plaintiffs' claims are moot is because a non-party has purchased Golden Eagle and assumed the Section 515 loan.

ER-10.

The district court's statement is factually and legally wrong and inconsistent with the district court's 2018 decision that the case is not moot. RD has not ceased the challenged conduct. The RD prepayment regulations have not changed, RD has not published any guidelines for determining how to evaluate the impact of a prepayment, the Federal Register Notice setting out how RD manages the voucher program and the RD Voucher Program Guide have not changed, and the regulation authorizing RD to lift use restrictions remains the same. In other words, all of CARE's claims remain live and unresolved and RD has made no statement or taken other action that it intends to modify its regulations or practices.

As the district court previously stated, by changing the GE prepayment decision RD has simply relieved part of the imminent harm but has not changed any of the challenged regulations and practices. ER-65. It has not eliminated the fundamental problem addressed by this litigation. RD will continue to violate ELIHPA when assessing prepayment requests from owners of Section 515 developments located in Tillamook or surrounding counties. It will continue to operate the voucher program as it has before this case was filed and has not

changed the regulation authorizing RD staff to lift use restrictions imposed on prepaying developments. CARE is thus forced to file new cases when a prepayment request is filed. In its 2018 decision, the district court specifically held that CARE should not have to use its resources to relitigate this case. Yet its recent order prescribes the very opposite. The plaintiffs are correct that "CARE will have to file a new lawsuit if Rural Development approves prepayment for some other development in Tillamook County." ER-10.

CARE does not dispute that subsequent factual developments can moot a claim. However, the sale and preservation of GE is not such a development. It was never the object of this litigation and was never included among Plaintiffs' claims. Thus, the fact that GE was transferred and preserved does not address any of the changes that Plaintiffs sought to achieve by filing this lawsuit. Accordingly, the district court's statement that it was justified in not following the law of the case lacks credence and is an abuse of discretion.

Given that none of the regulations or agency practices have changed since 2018 and given that RD staff must follow final regulation and other existing agency guidance, it is not only likely that the unlawful conduct will continue, it is assured. Accordingly, the district court's holding that the voluntary cessation exception is no longer applicable to the case and that the case is moot must be rejected. *See Johnson v. City of Grants Pass*, ____ F.4th ____, 2022 WL 4492090

*8 (9th Cir., Sept. 28, 2022) (Voluntary cessation of challenged practices rarely suffices to moot a case).

CONCLUSION

CARE has shown that the district court's decision that this case is moot is not supported by the facts or the applicable law. It asks that the decision be reversed and that the district court be directed to proceed to the merits of the case.

Dated this 16th Day of November 2022.

Respectfully submitted,
NATIONAL HOUSING LAW PROJECT
/s/ Gideon Anders
Gideon Anders, CA Bar #86872
ganders@nhlp.org
1663 Mission St., Suite 460
San Francisco, CA 94103
(415) 546-7000

Michael Pijanowski, OSB #004426
mpijanowski@oregonlawcenter.org
Richard Peel, OSB #201833
rpeel@oregonlawcenter.org
OREGON LAW CENTER
230 NE 2nd Avenue, Suite F
Hillsboro, OR 97124
Phone: (503) 676-5416

Edward Johnson, OSB #965737
ejohnson@oregonlawcenter.org
OREGON LAW CENTER
522 SW Fifth Street, # 812
Portland, OR 97204
Phone: (503) 640-4115