

APA Abuse of Discretion -- List of Cases Involving National Housing Goals or HUD Directives

From GB 4th ed. 2012, as updated through 2016 Supplement:

The following sections briefly discuss the utility of the National Housing Goals and HUD directives in supporting an argument that HUD's actions are arbitrary and capricious or otherwise contrary to applicable law. For more information on the National Housing Goals, *see* § 13.8.1.2, *supra* and for more on HUD Directives, *see* § 13.8.1.3, *supra*.

Use of the National Housing Goals. The national housing policies can be helpful in supporting a claim that HUD deviated from its statutorily-required duties, or abused its discretion by ignoring some non-discretionary factor in its decision-making. Courts have set aside HUD decisions that either ignored factors made relevant under the national housing policies, or did not reflect consideration of the interests or values declared important by Congress.¹ In some cases, the courts have cited the housing goals to imply specific duties of HUD,² or non-federal defendants, such as FHA-subsidized landlords and PHAs.³

¹*E.g.*, *Winthrop Towers*, 628 F.2d 1028 (HUD decision to foreclose a federally insured Section 221(d)(3) mortgage was reviewable under the APA, to determine whether decision was abuse of discretion in light of national housing policies established in 42 U.S.C. § 1441); *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980) (under the APA, HUD sale of Section 236 subsidized property reviewable as abuse of discretion for possible violation of National Housing Act policies and objectives); *Shannon*, 436 F.2d 809; *Lee v. Kemp*, 731 F. Supp. 1101 (D.D.C. 1989); *Walker*, 665 F. Supp. 831; *Kent Farm Co.*, 417 F. Supp. 297; *Silva*, 565 F.2d 1217; *Tenants for Justice*, 413 F. Supp. 389; *Cole*, 389 F. Supp. 99.

²*E.g.*, *Brown v. Lynn*, 385. 986 (N.D. Ill. 1974) (relying heavily on the national housing policies in concluding that HUD had a duty to create a foreclosure-prevention process to protect low-income homebuyers); *City of Phila. v. Page*, 363 F. Supp. 148, 154 (E.D. Pa. 1973) (relying in part on the housing goals to imply a warranty of habitability into the contracts under which HUD sold foreclosed single-family homes to low-income buyers); *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973) (the national housing policies to establish procedural rights for tenants facing rent increases in public housing).

³*McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971) (Section 221(d)(3) BMIR tenants had an implied statutory right not to be evicted without good cause, relying in part on general housing goals of providing decent housing to low-income families in a suitable living environment); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973) (relying on housing goals in deciding that Rent Supplement landlord could not evict tenant without good cause); *Thomas v. Hous. Auth. of Little Rock* 282 F. Supp. 575 (E.D. Ark.1967) (relying on underlying housing policy in determining PHA's policy of denying admission to unwed mothers was invalid and must be set aside); *Fletcher v. Hous. Auth. of Louisville*, 525 F.2d 532 (6th Cir. 1975) (relying extensively on the national housing policies declared in the 1937 and 1949 acts to invalidate PHA's economic mix admissions policies, which made it difficult for low-income people to secure admission). *But compare* *Techer v. Roberts-Harris*, 83 F.R.D. 124 (D. Conn. 1979) (implied warranty of habitability in properties acquired by HUD after foreclosure might arise out of the national housing goals) *and* *Winthrop Towers*, 628 F.2d 1028 (HUD foreclosure decision reviewable for consistency with national housing goals) *with* *Alexander v. HUD*, 555 F.2d 166 (7th Cir. 1977), *aff'd on other grounds*, 441 U.S. 39 (1979) (national housing goal was not a warranty that HUD program housing would be decent, safe and sanitary; national policies were generalities but not enforceable duties) *and* *Crochet v. Hous. Auth. of Tampa*, 37 F.3d 607 (11th Cir. 1994) (in denying preliminary injunction where tenants sought to enjoin conversion from utility check metering to individual retail metering on the basis that such conversion was inconsistent with goals of the USHA, relying on the general goal of devolution of authority to local PHAs and regulatory discretion to choose between systems).

Use of HUD Directives. Advocates challenging a HUD decision under the APA can also use agency directives to show that HUD unreasonably deviated from its own policies interpreting the relevant law.⁴

HUD may be bound to follow directives that are written in mandatory language. For instance, in *Brown v. Lynn*,⁵ Judge Will eloquently concluded HUD was obliged to follow its own directives, and HUD had a duty, evidenced in the directives and the national housing goals, to establish a foreclosure avoidance procedure:

HUD may not hide behind its own alleged subversion of the national housing policy. For HUD to argue its guidelines for servicing these programs are only suggestions which it need not and will not enforce, regardless of the apparent impact upon the supposed beneficiaries of these programs, only exposes the likelihood that HUD has failed to act in furtherance of the congressionally mandated housing policy.⁶

Subsequently, in *Estrada v. Hills*,⁷ another court reaffirmed *Brown's* principle that handbooks can be binding upon HUD officials even if they would not bind private parties. In that case, the court held that HUD officials were obligated to follow the provisions of a HUD Property Disposition Handbook, because it contained mandatory language that the plaintiffs sought to enforce against HUD and not private parties, the officials never contended that the handbook was merely a policy statement, and “[f]inally, failure to follow its own regulations is evidence of HUD's subversion of its statutory obligation to produce housing of sound standards of livability.”⁸

In some cases, advocates can reference HUD directives as HUD's official interpretations of relevant statutes and regulations, to overcome HUD's claimed defense that a rule of law does not apply. For instance, in *Massie v. HUD*,⁹ an APA claim for violation of statutory duty, the Third Circuit relied on HUD directives interpreting its statutory duties in holding that HUD must maintain a HAP contract at a project-based Section 8 property after foreclosure and sale to a new owner. The statute required HUD to maintain rental assistance payments for foreclosures during fiscal year 2006.¹⁰ HUD argued that the statute did not apply because the foreclosure date was after fiscal year 2006, and because HUD had already abated assistance payments. The court rejected these arguments because HUD was in the “process” of foreclosure during the relevant time period, and a HUD memorandum stated that the

⁴By themselves, directives are usually not a source of a cause of action against HUD. *See, e.g.,* United States v. Thomas, 627 F. Supp. 129 (N.D. Ill. 1985) (mortgagor in default counterclaimed against HUD for damages on grounds that HUD violated its handbook by failing to monitor, supervise or inspect a rehabilitation project financed under HUD's Section 312 program; in dismissing counterclaim, the court reasoned that the handbook was internal policy, the handbook's duty to inspect was designed to protect HUD, not the borrower, and thus could not support cause of action for damages).

⁵385 F. Supp. 986 (E.D. Ill. 1974).

⁶*Brown*, 385 F. Supp. at 998.

⁷401 F. Supp. 429, 437 (N.D. Ill. 1975).

⁸*Id.* at 437-38.

⁹*Massie v. HUD*, 620 F.3d 340 (3d Cir. 2010).

¹⁰*Id.* at 350 (citing Pub. L. No. 109-115 § 311, 199 Stat. 2396 (2005) (FY 2006 Schumer Amendment)).

statute applied to properties in the process of disposition at foreclosure,¹¹ and that HUD was therefore required to maintain the HAP contract.¹² Moreover, HUD's handbook also stated that HUD's official practice was not to cancel the HAP contract.¹³

In other cases, advocates may argue that HUD acted unreasonably by deviating from its directives,¹⁴ or that HUD's decision was arbitrary and capricious because the agency ignored a factor that its own directive required it to consider.¹⁵ For example, in *Marceau v. Blackfeet Housing Authority*,¹⁶ tribal members sued HUD for approving construction of housing with wood foundations treated with harmful chemicals. Citing a Minimum Property Standards Handbook, the Ninth Circuit reversed and remanded for determination of whether HUD had in fact departed from its regulations and guidance in violation of the APA.¹⁷ In *Price v. Pierce*, the court held that the HUD's approval of reduction in Section 8 assisted units was an abuse of discretion "clearly not based on considerations of all relevant factors," including a handbook addressing the extent of permissible underutilization of Section 8 housing subsidies.¹⁸

In *Glendale Neighborhood Association v. Greensboro Housing Authority*,¹⁹ the plaintiff association used directives to challenge HUD's approval of a public housing construction site under the APA's abuse of discretion standard.²⁰ The association argued that HUD's site approval based solely on census data contravened a HUD notice, which stated that HUD should exercise reasonable judgment, not apply criteria mechanically, and "need not rely solely on census tract data if those data are clearly out of date

¹¹*Id.* at 350-51.

¹²*Id.* at 351-53.

¹³*Id.* at 352.

¹⁴*See, e.g.,* *Silva v. E. Providence Hous. Auth.*, 565 F.2d 1217, 1223-24 (1st Cir. 1977) (holding that HUD failed to consider all relevant factors when terminating a contract for the development of a public housing project because of the PHA's unreasonable delay, and citing a HUD handbook providing that termination should be used only as a last resort); *Tenants & Owners in Opposition to Redev. (TOOR) v. HUD*, 406 F. Supp. 1024 (N.D. Cal. 1970) (court relied upon a HUD regional "circular" in concluding that HUD's approval of a relocation plan was irrational). *See also* *United States v. Coal. For Buzzards Bay*, 644 F.3d 26, 33-34 (1st Cir. 2011) (Coast Guard was bound by its express reliance on a Department of Transportation order which it had incorporated by reference into its own regulations to guide the Coast Guard in complying with the National Environmental Policy Act).

¹⁵*Shannon v. HUD*, 436 F.2d 809, 817 (3d Cir. 1970) (rent supplement program and the public housing programs were sufficiently analogous to permit reliance upon a public housing handbook as evidence that racial factors were also relevant in HUD's decisions concerning rent supplement projects); *Cronkhite v. Kemp*, 741 F. Supp. 828 (E.D. Wash. 1990) (relying on HUD handbook criteria to hold that HUD Secretary abused his discretion in denying assignment of mortgage); *Brown v. Kemp*, 714 F. Supp. 445 (W.D. Wash. 1989) (decision of HUD Secretary to deny assignment of mortgage was arbitrary and capricious in light of HUD handbook requiring individual consideration of circumstances beyond mortgagor's control); *Tenants for Justice v. Hills*, 413 F. Supp. 389 (E.D. Pa. 1977) (relying on provisions in HUD's property disposition handbook in issuing a preliminary injunction when tenants challenged HUD's property disposition decision on the ground that HUD had improperly ignored the relevant factors).

¹⁶540 F.3d 916, 924 (9th Cir. 2008).

¹⁷*Id.* at 928. The court also referenced the Minimum Property Standards Handbook and an Interim Indian Housing Handbook in finding that HUD did not as a rule require treated foundations and the IHA was not "rigidly bound" to HUD's property standards. *Id.*

¹⁸615 F. Supp. 173, 185 n.4 (N.D. Ill. 1985). Regarding the handbook, the court stated, "The Court does not rely upon this document for its holding, although it arguably provides yet another articulation of agency enforcement policy which is inconsistent with the Secretary's challenged actions." *Id.*

¹⁹956 F. Supp. 1270 (M.D.N.C. 1996).

²⁰*Id.* at 1277 (referencing 5 U.S.C. § 706 (2)(A)).

and do not accurately reflect the neighborhood racial composition.”²¹ Concluding that HUD’s decision was arbitrary and capricious because HUD had no reason to rely only on census data, and did not consider evidence of increasing minority concentration in the area of the proposed housing site, even though guidance expressly directed HUD to consider such evidence,²² the court vacated HUD’s approval and remanded for further proceedings.²³

However, even if HUD has deviated from its directives, advocates claiming abuse of discretion must also convince the court that the directives were mandatory *and* that HUD acted improperly. For instance, in *Pozzie v. HUD*,²⁴ a Home Mortgage Assignment Program participant who defaulted on her mortgage after losing her job sought review of HUD’s refusal to assign her mortgage, claiming the refusal was arbitrary, capricious and an abuse of discretion.²⁵ Federal regulations, as well as a handbook, required the Secretary to accept assignment of mortgages when participants met six criteria, and the handbook required HUD to apply all criteria “individually” to each applicant.²⁶ Relying on other cases,²⁷ the participant claimed HUD categorically denied her application because she lost her job, rather than considering her individual circumstances.²⁸ Rejecting that characterization, the court held that HUD had fully investigated the circumstances and reasonably concluded the default was within her control.²⁹

²¹*Id.* at 1278-79.

²²*Id.* at 1279-80. The court also found that HUD offered insufficient evidence for its determination that “sufficient” and “comparable” opportunities for housing existed outside the area of minority concentration, as defined and required by the notice. *Id.* at 1281-83.

²³*Id.* at 1283.

²⁴No. 93 C 1085, 1994 WL 96687 (N.D. Ill. March 22, 1994).

²⁵*Id.* at *1.

²⁶*Id.* at *2-3 (citing 24 C.F.R. § 203.650(a)).

²⁷*Brown v. Kemp*, 714 F. Supp. 445 (W.D. Wash. 1989) (citing HUD handbook stating that curtailment of income was a circumstance beyond a mortgagor’s control, and holding HUD had no reasonable basis for denying mortgage assignment simply because mortgagor was self-employed); *Cronkhite v. Kemp*, 741 F. Supp. 828 (E.D. Wash. 1990) (court extensively cited HUD handbook in holding that HUD abused its discretion by refusing to assign a mortgage without fully considering individual circumstances beyond mortgagor’s control).

²⁸*Pozzie*, 1994 WL 96687, at *4.

²⁹*Id.* at *6-7. *See also Willowood Care Center of Brunswick, Inc. v. Donovan*, No. 1:09 CV 2782, 2011 WL 2149354 (N.D. Ohio May 31, 2011) (owner of skilled nursing facility with a HUD Regulatory Agreement sued for breach of implied covenant of good faith and fair dealing after HUD required repairs but denied reimbursement because it would reduce reserves below a minimum required by HUD; although minimum balance was not required by the agreement or the handbook recommendation, court found insufficient evidence of bad faith).