IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO ACORN, WYVONIA PICKETT, CALLIE DAVIS, FLORIDA WASHINGTON, and JOAN BANKS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD"), and ALPHONSO JACKSON, in his official capacity as Secretary of HUD,

Defendants.

No. 05 C 3049

MEMORANDUM AND ORDER

This suit concerns the future of a large complex of multifamily government-subsidized housing on Chicago's west side. This area, called the Lawndale Restoration, is comprised of 1,240 housing units that span approximately 25 city blocks. The plaintiffs here are four Lawndale Restoration residents and ACORN (the Association of Community Organizations for Reform Now), a nonprofit community organization dedicated in part to maintaining affordable housing for low-income families in Chicago.[1] The plaintiffs brought a nine-count complaint against the United States Department of Housing and Urban Development and its Secretary, Alphonso Jackson, (collectively "HUD"), contending that HUD's plan to foreclose on the Lawndale Restoration property violates multiple statutes governing how HUD disposes of subsidized multifamily housing and seeking a preliminary injunction to halt the foreclosure. The

---

[1]The plaintiffs have also moved to certify a class made up of all current and former residents of the Lawndale Restoration, but the court's disposition of this motion makes it unnecessary to reach the class certification issue.

court has before it HUD's motion to dismiss the plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(1) (subject matter jurisdiction) and 12(b)(6) (failure to state a claim for which relief may be granted). For the reasons set forth in the following order, the court grants HUD's motion to dismiss pursuant to Rule 12(b)(1).

I. Background

The Lawndale Restoration is the largest privately owned subsidized apartment project in Chicago. Since 1984, residents of the Lawndale Restoration have received rent subsidies in the form of project-based Section 8 assistance. Project-based Section 8 subsidies are provided through a contract between the property owner and HUD (or local public housing agencies). *See* 42 U.S.C. § 1437f(b). Tenants generally pay 30% of their income towards rent and the federal government makes up the difference. Thus, with project-based Section 8 assistance, when a tenant vacates a unit, the subsidy remains available for the next tenant who occupies it. This is in contrast to the other primary form of Section 8 assistance, which is tenant-based. Tenant-based Section 8 assistance utilizes so-called "Housing Choice Vouchers," which are given to a specific family or individual to use at any qualifying property. If the landlord or owner accepts the Section 8 voucher, the tenant pays a portion of the rent and a subsidy covers the rest. *See* 42 U.S.C. § 1437f(o) (detailing voucher program).

On account of anticipated foreclosure proceedings on the Lawndale Restoration, the future of the property's project-based Section 8 contract is in jeopardy. Since 1974, HUD has insured the mortgage on the Lawndale Restoration. When the owner fell approximately $900,000 behind on the $51 million mortgage, HUD paid the mortgage insurance claim. In exchange, HUD received the interest in the mortgage. The plaintiffs allege that HUD now

intends to foreclose on the mortgage and sell the property to the City of Chicago or private owners (with some restrictions intended to maintain affordable housing). Instead of continuing the project-based Section 8 subsidy on the Lawndale property, HUD plans to issue Section 8 vouchers to the Lawndale tenants. The plaintiffs maintain that Section 8 vouchers are a less stable form of assistance than the project-based subsidies because they depend on the availability of landlords willing to accept them as well as sufficient housing that meets the federal criteria for the vouchers. Additionally, the plaintiffs assert that because approximately 99% of Lawndale residents are African-American and 80% are single mothers with minor children, HUD's plans have "an adverse discriminatory impact on African-Americans, females, and families with children."

The plaintiffs claim that eliminating the contract for project-based Section 8 subsidies on the Lawndale Restoration violates a number of statutes regulating HUD's management and disposition of defaulted HUD-insured multifamily projects. Specifically, the plaintiffs claim HUD's action runs afoul of a number of provisions of the Multi-Family Housing Property Disposition Reform Act of 1994 ("Disposition Reform Act"), 12 U.S.C. § 1701z-11, which sets forth requirements for HUD's management and disposition of its multifamily housing projects. According to the plaintiffs, the requirements laid out in the Disposition Reform Act work to further the broader affordable housing goals outlined in the National Housing Act, 12 U.S.C. §§ 1701-1749aaa-5, and the Fair Housing Act, 42 U.S.C. §§ 3601-3619.

In particular, the plaintiffs contend HUD's decision to replace the project-based Section 8 contract with Section 8 vouchers violates the following sections of the Disposition Reform Act: section 1701z-11(e)(2)(A), which requires HUD to determine that there is an adequate supply of

affordable housing for tenants using Section 8 vouchers, section 1701z-11(e)(2)(B) which limits the replacement of project-based assistance with vouchers to 10% of the aggregate number of units in a multifamily project, and section 1701z-11(c)(3)(B), which requires HUD to sell properties only to a purchaser capable of "implementing a sound financial and physical management program."[2] The plaintiffs further contend that HUD's actions violate section 1701z-11(a)(1) of the Disposition Reform Act, which requires HUD to dispose of multifamily housing projects in conformity with the stated goals of the National Housing Act, 12 U.S.C. § 1701t (affirming goal of "decent home and suitable living environment" for American families). The plaintiffs also claim that HUD's plans are inconsistent with provisions of the National Housing Act forbidding discriminating or making housing unavailable on the basis of race, 42 U.S.C. § 3604(a)-(b), and requiring HUD to administer housing programs in a manner that furthers the policies of the Fair Housing Act, *id.* at 3608(e)(5). Finally, the plaintiffs claim that HUD's actions violate Executive Orders 12892, 59 Fed. Reg. 2939 (1994), and 11063, 27 Fed. Reg. 11527 (1962), which both require HUD to affirmatively further fair housing.

The plaintiffs seek relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, which authorizes a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law," *id.*

---

[2]In their complaint, the plaintiffs also point to 12 U.S.C. § 1715z-11a(b)(1), which requires HUD to transfer certain substandard housing to the local government. However, HUD points out without contradiction that this provision does not apply here because HUD has not owned the Lawndale Restoration for six months or more.

§ 706(2)(D). They request a preliminary injunction to prevent HUD from foreclosing on the Lawndale Restoration mortgage or terminating the project-based Section 8 contract on the property and issuing Section 8 vouchers to Lawndale tenants. HUD, however, has moved to dismiss the plaintiffs' complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and failure to state a claim for relief, Fed. R. Civ. P. 12(b)(6), contending that its actions are not subject to review under the APA on account of 12 U.S.C. § 1715z-11a(a), which grants HUD broad discretion to manage and dispose of multifamily properties like the Lawndale Restoration.

II. Standard of Review

The court begins with HUD's Rule 12(b)(1) motion. Because HUD is not challenging the facts alleged in the complaint, the standard of review for its motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) mirrors the familiar standard employed on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Orange v. Burge*, No. 04 C 0168, 2005 WL 742641, at *4 (N.D. Ill. March 30, 2005) (slip opinion); *Royal Towing, Inc. v. City of Harvey*, 350 F. Supp.2d 750, 752 (N.D. Ill. 2004). Under that rule, the facts in the plaintiff's complaint are accepted as true, and dismissal is proper only when it appears beyond doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Cody v. Harris*, 409 F.3d 853, 857 (7th Cir. 2005); *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004) (reviewing dismissal under Rule 12(b)(1)). However, in reviewing a motion under Rule 12(b)(1) the court is not limited to the four corners of the complaint when determining if it has subject matter jurisdiction. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003).

III. Analysis

A. Flexible Authority Provision

HUD argues that section 204 of the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1997, entitled "Disposition of HUD-owned properties," relieves HUD of its obligation to comply with the Disposition Reform Act and the other statutes on which the plaintiffs rely. Section 204 reads as follows:

> (a) Flexible authority for multifamily projects.
>
> During fiscal year 1997 and fiscal years thereafter, *the Secretary may manage and dispose of multifamily properties owned by the Secretary*, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter, the provision of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), *and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law*.

12 U.S.C. § 1715z-11a(a) (emphasis supplied). This so-called "flexible authority provision" was first passed two years after the Disposition Reform Act, and HUD claims that it supersedes the requirements found in that Act. Specifically, HUD contends that by giving the Secretary discretion to determine the terms and conditions for disposition of multifamily mortgages "notwithstanding any other provision of law," Congress signaled its intent that HUD not be bound by the requirements in the Disposition Reform Act or other statutes limiting its ability to decide the terms on which it will dispose of the Lawndale Restoration. HUD further contends that because section 204 gives HUD total discretion over the disposal of multifamily projects, its actions are not subject to review under the APA. HUD's argument thus presents the court with two interrelated questions—whether section 204 displaces the requirements in the Disposition Reform Act and other statutes, and if so, whether it grants HUD discretion such that its actions are not subject to review under the APA.

To determine the meaning of section 204, the court "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *see also United States v. Day*, 418 F.3d 746, 756 (7th Cir. 2005) (reiterating "basic principle[] of statutory interpretation" that court look "primarily to the language of the statute"). The court's task is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the language is clear, the court's inquiry begins and ends there, for when "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *see also United States v. Henderson*, 376 F.3d 730, 732 (7th Cir. 2004) (if terms of statute are unambiguous, judicial inquiry is complete).

HUD argues that here the statutory language is plain, and the court need go no further. The pertinent portion of section 204 states that "the Secretary [of HUD] may manage and dispose of multifamily properties owned by the Secretary . . . and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." 12 U.S.C. § 1715z-11a(a). As HUD points out, the statutory language is very broad, and explicitly grants HUD the authority to set the terms and conditions for disposing of multifamily properties "notwithstanding any other provision of law." Section 204's enactment postdates the Disposition Reform Act, the National Housing Act, the Fair Housing Act, and the executive orders which the plaintiffs maintain that HUD must follow. Congress is thus presumed to have known of these allegedly inconsistent laws, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979), yet chose to grant HUD unbridled discretion to dispose of multifamily properties "notwithstanding" the requirements in these other statutes and orders.

Thus, to the extent those provisions control how HUD disposes of multifamily properties, the court is hard-pressed to see how they would apply in light of the express terms of section 204. *See Crowley v. Carribean Transport, Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989) (holding that statute's use of "notwithstanding any other provision of law" overrode previously-enacted statute and noting that a "'clearer statement is difficult to imagine'"). Presumably, "any other provision of law" includes the Disposition Reform Act, as well as the other statutes and executive orders on which the plaintiffs rely. *See City & County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1276-77 (9th Cir. 1997) (per curiam) ("[S]ection 632's provisions have force '[n]otwithstanding any other provision of law.' '[A]ny other provision of law' includes the Tax Injunction Act."); *see also Ferrell v. HUD*, 186 F.3d 805, 809 n.3 (7th Cir. 1999) (use of "[n]otwithstanding any other provision of law" evidenced "Congress' intent that HUD cease operating mortgage assignment program previously required"); *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1271 (7th Cir. 1994) (characterizing the use of "notwithstanding any other provision or rule of law" as "clear and unambiguous language"); *Roloff v. Sullivan*, 975 F.2d 333, 336 (7th Cir. 1992) ("'Notwithstanding any other provision of this subchapter' serves as an exception" to provision that would "otherwise be applicable law"); *see also HUD v. Rucker*, 535 U.S. 125, 130 (2002) ("[T]he word 'any' has expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Because the language is clear, the court need not turn to additional tools of statutory interpretation.

The plaintiffs, however, contend that such an interpretation of section 204 cannot withstand scrutiny for several reasons. First, the plaintiffs maintain that HUD's reading of the statute results in a repeal by implication, and HUD cannot sustain its burden of demonstrating

that Congress intended such a repeal. To support their position, the plaintiffs rely on the "cardinal principle of statutory construction that repeals by implication are not favored." *United States v. Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). The plaintiffs argue that an implied repeal would be particularly inappropriate here because the flexible authority provision is found in an appropriations bill, *see Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (doctrine disfavoring repeals by implication applies with more force when subsequent legislation in an appropriations measure), and is a more general provision than the specific Disposition Reform Act, *see Cont'l Tuna*, 425 U.S. at 169 (principle against implied repeals carries "special weight" when party argues that general statute has repealed more specific statute).

Although it is true that repeal by implication is disfavored, that principle is not particularly helpful here. This is because the court need not resort to implication in order to find that the flexible authority provision overrides earlier provisions such as the Disposition Reform Act. By vesting the Secretary of HUD with the authority to dispose of multifamily properties "notwithstanding any other provision of law," Congress made it *explicit* that earlier statutes would not curtail HUD's discretion to manage and dispose of multifamily properties. *See Nat'l Coalition to Save our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) ("On its face" use of phrase "[n]otwithstanding any other provision of law" demonstrates Congress's "clear intent" that agency is free to disregard pre-existing legislation). As the D.C. Circuit pointed out in *National Coalition to Save our Mall*, the "classical but sometimes forgotten" purpose of a clause such as 'notwithstanding any other provision of law' is "to prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal." *Id.*; *see also Assessment Appeals Bd.*, 122 F.3d at 1276 (invoking presumption against implied repeals because statute did *not* "have language indicating its effectiveness notwithstanding any

other provision of law"). In short, because there is no need to resort to implication, the court need not grapple with the question of whether section 204 worked an implied repeal of earlier statutes limiting HUD's discretion to dispose of multifamily properties.

Moreover, even if the presumption against implied repeals were triggered here, section 204 is clear enough that it would repeal earlier statutes by implication. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (presumption against implied repeal overcome only when legislative intent is "'clear and manifest'"). The Supreme Court has explained that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l., Inc.*, 534 U.S. 124, 141-42 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Because of its broad language, section 204 is indeed irreconcilable with earlier enactments such as the Disposition Reform Act. By its terms, section 204 wipes out "any law" that would interfere with HUD's discretion to manage and dispose of multifamily properties such as the Lawndale Restoration. Thus, HUD cannot simultaneously comply with the detailed requirements in the Disposition Reform Act and utilize the power granted in section 204 to dispose of multifamily properties "on such terms and conditions as the Secretary may determine." 12 U.S.C. § 1715z-11a(a).

For similar reasons, the court rejects the plaintiffs' contention that section 204 can be harmonized with earlier statutes limiting HUD's discretion. The plaintiffs suggest that HUD should be allowed to "invoke the Flexible Authority provision only once it establishes, by building an adequate administrative record, that (1) doing so results in a more efficient use of federal funds while (2) also maximizing preservation of affordable housing." Although this may be a desirable procedure, it is not the one Congress chose. The plaintiffs' argument reads two entirely new, and noticeably absent, requirements into section 204. Their suggested reading

would effect a significant change on the statute in its current form, which grants HUD otherwise unrestricted authority to set the terms and condition for disposal of its multifamily properties. *See Crowley*, 865 F.2d at 1283 (concluding that plaintiff's proposed interpretation of statute containing "notwithstanding" clause would "palpably amend the legislation to add a qualifying clause" and pointing out that court was "not authorized to edit Congress's work").

The plaintiffs next contend that reading the flexible authority provision as HUD suggests would lead to absurd results. They point out that, taken to its extreme, the flexible authority provision could be used by HUD to insulate itself from "*all* other applicable legislation, including . . . statutory prohibitions in electoral politics, and statutory requirements regarding the proper accounting for funds, and every other federal statute." To support their claim, the plaintiffs cite two cases for the general proposition that courts should not interpret a statute broadly when doing so leads to absurd results or results in a meaning "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). While this may be true, the court's task is to deal with the situation presented by this case, and it thus declines to entertain the plaintiffs' conjecture about the worst-case scenario. *See Ricci v. Arlington Heights, Ill.*, 116 F.3d 288, 292 (7th Cir. 1997) (noting that "list of horribles" should not detract court from determining how criminal statute "could be properly applied" in case before it); *cf. Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1545 (7th Cir. 1996) ("Constitutional jurisprudence should not be driven by the absurd possibility[.]"). The court agrees that section 204 grants HUD wide latitude, but it is not the court's place to second-guess Congressional intent. The court must instead apply the plain language of the statute, which appears to give HUD the authority to dispose of multifamily properties on terms of its own choosing.

The court also rejects the plaintiffs' claim that section 204 amounts to an unconstitutional delegation of legislative power. The plaintiffs argue that HUD's interpretation of the flexible authority provision is untenable because its broad reading would vest HUD with legislative authority. The argument, based on Article I, Section 1 of the Constitution, relies on the principle that when giving an agency decisionmaking authority, Congress must provide the agency with some "intelligible principle" to which it must conform. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (citation and internal quotations omitted). This is not a difficult standard to satisfy. The Court pointed out in *Whitman* that in the Court's history it had "found the requisite 'intelligible principle' lacking in only two statutes." *Id.* 531 U.S. at 474. The Court further noted that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-45 (citation and internal quotations omitted). Just so here. Congress has given HUD wide latitude to determine how to dispose of multifamily properties, and regardless of whether this court agrees, it is not authorized to second-guess Congress's choice. The flexible authority provision confers a large degree of "policy judgment" to HUD, but the court does not think it amounts to a grant of legislative power. Giving HUD authority to set its own terms and conditions in one small area of its overall authority does not strike the court as the type of very rare situation in which Congress has unconstitutionally delegated legislative power to an administrative agency. *See Whitman*, 531 U.S. at 472.

Finally, the court is unpersuaded by the plaintiffs' supplemental authority, which is a proposed rule that HUD recently published in the Federal Register. *See* 70 Fed. Reg. 45,492 (Aug. 5, 1005). HUD's proposed rule (the substance of which is not relevant here) refers to the "requirements" of the Disposition Reform Act. The plaintiffs point out that because HUD

referred to the "requirements" of the Disposition Reform Act, that Act must still bind HUD, notwithstanding section 204. The plaintiffs' argument has some logical appeal. Nevertheless, ultimately the court is unconvinced that use of the term "requirements" in a *proposed* rule is sufficient to overcome the plain language of section 204. In sum, the court concludes that section 204, by its clear terms, overrides earlier statutes and regulations dictating the means by which HUD may dispose of multifamily properties. The only remaining question, then, is whether the court may review HUD's decision under the APA.

B. Review Under the Administrative Procedure Act

HUD maintains that in light of the broad discretion granted it by section 204, the court cannot review its decision to dispose of the Lawndale Restoration under the APA. HUD faces an uphill battle with this argument, because the APA embodies a basic presumption in favor of judicial review over final agency actions. *See*, *e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); *Schneider Nat'l Inc. v. I.C.C.*, 948 F.2d 338, 342 (7th Cir. 1991); *see also* 5 U.S.C. § 702 (authorizing judicial review for a person adversely affected by agency action). There are, however, limitations on such review. Section 701 of the APA provides that agency action is not reviewable "to the extent that" the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Section 701(a)(2) "is a very narrow exception" to the presumption of judicial review, and applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also Home Builders Ass'n v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 615 (7th Cir. 2003). Subsection (a)(2) precludes judicial review when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v.*

Chaney, 470 U.S. 821, 830 (1985). In those circumstances, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.*

HUD argues that, given the broad language of section 204, there is "no meaningful standard" against which the court could evaluate its decision to replace Lawndale's project-based Section 8 subsidy with tenant-based Section 8 vouchers. Although no federal appellate court has considered this precise argument, at least one other district court has interpreted section 204 and concluded that it is so broadly drawn that subsection (a)(2) of the APA precludes judicial review. In *Mays v. Cuomo*, a district court in the Southern District of Ohio concluded that section 204 prevented the court from considering the claims of three tenants who resided in one of three multifamily housing projects in Cincinnati, Ohio. *See Mays v. Cuomo*, No. C-1-96-929, at 11 (S.D. Ohio May 21, 1998) (unpublished order). The tenants there, like the plaintiffs here, sought to prevent HUD from eliminating project-based Section 8 subsidies for the housing projects. There, as in this case, HUD was foreclosing on the multifamily properties, and decided to sell the units without maintaining the project-based Section 8 contract on the properties. *Id.* at 3-4. Just as HUD proposes doing with the Lawndale Restoration, in *Cuomo* HUD planned to convert the project-based Section 8 subsidies into tenant-based Section 8 vouchers. *Id.* The district court in *Cuomo* dismissed the plaintiffs' suit for lack of subject matter jurisdiction after concluding that the broad grant of discretion in section 204 foreclosed judicial review under the APA. *Id.* at 11.

HUD urges the court to adopt the rationale in *Cuomo*. Although not binding, the reasoning in *Cuomo* is persuasive. The court in *Cuomo* described section 204's relationship to HUD's decision about project-based or tenant-based Section 8 assistance as follows: "[p]reempting other provisions of law, § 204 authorizes [the Secretary of HUD], in making these decisions, to use his discretion, unencumbered by any statutory or regulatory guidelines." *Id.* at

10. The court then analogized the language in section 204 to other language that various courts have concluded committed decisionmaking "to agency discretion" under subsection (a)(2). *Id.* at 10-11. Using those cases as a guide, the court in *Cuomo* concluded that section 204 granted HUD discretion to dispose of multifamily properties such that judicial review of its decision was precluded under section 701(a)(2) of the APA. *See id.*

Although the exception to judicial review in subsection (a)(2) is very narrow, the court concludes, like the court in *Cuomo*, that it applies here. Section 204 grants the Secretary of HUD authority to dispose of multifamily properties like the Lawndale Restoration "on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." 12 U.S.C. § 1715z-11a(a). As discussed above, section 204 overrides other provisions of law. Yet section 204 itself offers the court no criteria against which to judge the exercise of HUD's discretion. *See Lalani v. Perryman*, 105 F.3d 334, 337-38 (7th Cir. 1997) (concluding that subsection (a)(2) precluded judicial review of decision to extend voluntary departure where regulation gave "no guidance" as to how decision was to be made); *Singh v. Moyer*, 867 F.2d 1035, 1039 (7th Cir. 1989) (no review under the APA of discretionary waiver of a foreign residency requirement where "statutory language is void of criteria" to assess official's decisionmaking process). Thus, the court is left with "no meaningful standard," *Heckler*, 470 U.S. at 830, against which it can review the particulars of HUD's decision to dispose of the Lawndale Restoration.

In *Webster v. Doe*, the Supreme Court concluded that it could not review the director of the CIA's decision to terminate an employee under the APA because the director's decision was "committed to agency discretion." The statute in question in *Doe* allowed the director to terminate a CIA employee whenever he "shall deem such termination necessary or advisable in

the interests of the United States." *Webster v. Doe*, 486 U.S. 592, 600 (1988). The Court concluded that such language "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful standard of review." *Id.* Likewise, section 204 gives deference to the Secretary of HUD, and it does so "notwithstanding any other provision of law"—thus foreclosing any "meaningful standard" against which the court could review HUD's decision to replace Lawndale's project-based Section 8 subsidy with Section 8 vouchers. This conclusion is supported by the fact that, as the court noted in *Cuomo*, the language of the flexible authority provision is similar to language other courts have found to preclude judicial review. *See Madison-Hughes v. Shalala*, 80 F.3d 1121, 1128 (6th Cir. 1996) (collecting cases).

In an attempt to avoid this conclusion, the plaintiffs point to several cases which they contend stand for the proposition that there is sufficient law to review HUD's actions despite the "notwithstanding any other law" portion of section 204. At best, these cases suggest that the court retains the authority to review HUD's actions for compliance with the very broad policy statements found in the National Housing Act and the Fair Housing Act. These cases, however, are distinguishable because none deal with the statute at issue in this case—instead, they deal with "nothwithstanding" provisions that included limiting language not present in section 204. *See United States v. Winthrop Towers*, 628 F.2d 1028, 1034-36 (7th Cir. 1980) (concluding that HUD's decision to foreclose on federally insured mortgage under 12 U.S.C. § 1713(l) could be reviewed for consistency with policies in National Housing Act when § 1713(l) gave HUD power to foreclose "notwithstanding any other provisions of law *relating to the acquisition, handling, or disposal of real and other property by the United States*) (emphasis added); *Russell v. Landrieu*, 621 F.2d 1037, 1040-41 (9th Cir. 1980) (same); *Lee v. Kemp*, 731 F. Supp. 1101, 1108-10 (D.D.C. 1989) (interpreting similar language in 12 U.S.C. § 1710(g) to allow review of

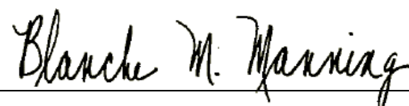
HUD's actions for consistency with policies in National Housing Act); *Lee v. Pierce*, 698 F. Supp. 332, 338-39 (D.D.C. 1988) (same).

Moreover, as HUD points out, the rationale in the only binding authority plaintiffs cite, *Winthrop Towers*, has been cast in doubt by the reasoning of a concurring opinion in the more recent *United States v. OCCI Co.*, 758 F.2d 1160 (7th Cir. 1985). In *OCCI*, Judge Posner expressed his opinion that *Winthrop Towers* was wrongly decided. Specifically, Judge Posner opined that the statement of policy objectives in the National Housing Act, 42 U.S.C. § 1441, was too broad to provide any meaningful standard for review under the APA. *OCCI, Co.*, 758 F.2d at 1167 ("I do not know what constructive contribution this or any other court can make to the achievement of the nation's housing goals by reviewing HUD's decision to foreclose for conformity with the generalities of section 1441. . . . If ever there was a case where 'agency action is committed to agency discretion by law,' 5 U.S.C.§ 701(a)(2) . . . this is the case."). Given Judge Posner's concurrence in *OCCI*, the court declines to extend the rationale of *Winthrop Towers* in this case, especially in light of the broad language of section 204. In sum, the language of section 204 leads the court to the conclusion that HUD's choice of disposing of multifamily properties like the Lawndale Restoration has been "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and is thus not subject to review under the APA.

III. Conclusion

For the foregoing reasons, the court thus GRANTS the defendant's motion to dismiss [21] for lack of subject matter jurisdiction. All other motions [4],[18] are stricken as MOOT.

ENTER:



Blanche M. Manning
United States District Court Judge

DATE: October 5, 2005