

United States Files Fair Housing Suit Against Joliet to Preserve Affordable Housing

On August 4, 2011, the United States filed a civil action against Joliet, Illinois, alleging that it has violated federal housing laws by its efforts to condemn and take through eminent domain a federally subsidized development known as Evergreen Terrace.¹ The suit alleges that Joliet's eminent domain action threatens displacement of about 764 low-income residents, most of whom are African American, requiring most to leave Joliet because of the lack of sufficient affordable housing elsewhere in the city. The United States claims that such actions would violate the Fair Housing Act² due to their disparate impact and perpetuation of segregation, as well as the Housing and Community Development Act governing the Community Development Block Grant (CDBG) program.³ The United States is seeking a court order prohibiting the alleged housing discrimination, monetary damages and a civil penalty.

The government's suit opens another chapter in a long-running controversy during the past decade involving the city, the property owners, the tenants and the Department of Housing and Urban Development (HUD). For many years, some city officials have sought to demolish the development, expressing various degrees of hostility to the property and its residents. As later described, these efforts have spawned numerous lawsuits and administrative actions. The most recent action filed by the United States alleges that the effect of the city's actions and proposed actions is "to limit or reduce the number of Black or African American residents residing within the City of Joliet."⁴ According to the government, such actions "would have a disproportionate adverse impact on African-Americans and operate to perpetuate segregation in Joliet."⁵

Background

Evergreen Terrace is a 356-unit apartment complex consisting of eight buildings on the west side of the Des Plaines River. Approximately 731 of 764 residents, or 95.6%, are African American, while approximately 16% of Joliet's 147,433 residents identified themselves as black or African American in the 2010 census. Evergreen Terrace, formerly known as River West and Bluff Plaza, was originally developed in 1968 by private owners as affordable housing under one of HUD's mortgage interest

subsidy programs. HUD currently provides rental assistance for all of the units at Evergreen Terrace under the project-based Section 8 program, following a recent renewal of the housing assistance payments (HAP) contract and restructuring of the mortgage.

The city has long attempted to eliminate this affordable housing. In 1978, the city proposed redevelopment of River West property to change the "tenant class," but HUD never approved the plan because of concerns about insufficient replacement housing for displaced families.⁶ In 1982 and 1983, the owners of the two properties executed 20-year Section 8 HAP contracts, under which some of the units were demolished and the rest rehabilitated.

Approaching the expiration of the Section 8 contract terms in 2001, the owners of both portions of the project, then known as Evergreen Terrace I and II, sought HUD approval to restructure the financing and rental assistance under the Mark to Market Program authorized by the Multifamily Assisted Housing Reform and Affordability Act (MAHRA).⁷ Under this preservation program, these benefits are conditioned upon the owner's commitment to continue providing affordable housing for at least 30 more years. HUD's administrative contractors for the Mark to Market Program in Illinois, the Illinois Housing Development Authority (IHDA) and a private consulting firm, conducted an independent assessment of Evergreen Terrace, including both the physical needs and the availability of replacement housing for tenants in the event the property was not preserved.

IHDA determined that the property's physical deficiencies were indeed remediable.⁸ IHDA also conducted a Mark to Market rental assistance assessment plan, which examines the impact of converting the project-based Section 8 subsidy to vouchers, specifically whether tenants with vouchers can find adequate and available decent housing in the local market.⁹ IHDA found that there was a strong demand for affordable housing and not enough units in Joliet where landlords would be willing to accept vouchers to absorb the displaced residents.¹⁰ Thus, IHDA concluded that there was a critical need for the affordable housing provided by a restructured and rehabilitated Evergreen Terrace.

The city, whose views were solicited during the restructuring assessment process, had requested that HUD disapprove any renewal of HUD rental assistance at the property, which the mayor characterized as blighted.¹¹ The mayor sought to have the property eliminated and the tenants relocated.¹² A councilman referred to the tenants as "rats" and "rats from Robert Taylor Homes [in

¹United States v. City of Joliet, No. 11cv5305 (N.D. Ill. filed Aug. 4, 2011) [hereinafter Compl.].

²42 U.S.C.A. §§ 3601 *et seq.* (Westlaw Aug. 11, 2011).

³42 U.S.C.A. § 5301 *et seq.* (Westlaw Aug. 11, 2011).

⁴Compl. ¶ 54.

⁵*Id.*

⁶*Id.* ¶ 21.

⁷42 U.S.C. § 1437f note (Multifamily Housing Assistance).

⁸Compl. ¶ 27.

⁹24 C.F.R. § 410.421 (2010); Compl. ¶ 29.

¹⁰Compl. ¶ 29.

¹¹*Id.* ¶ 28.

¹²*Id.*

Chicago].¹³ HUD determined that the city's objections that the property was blighted lacked merit, and approved the restructuring plan in May 2003.

The city then requested and was granted a meeting to discuss the situation, at which the city requested that HUD delay the restructuring and consider its alternative plan to relocate the tenants. Joliet then submitted a "Program of Choice" relocation plan, which proposed a mix of Section 8 vouchers, relocation to public housing units and homeownership programs.¹⁴ After HUD rejected this plan as deficient, Joliet then submitted a revised plan relying primarily on vouchers for relocation.¹⁵ Around the same time, in late 2003, IHDA submitted a supplemental report to HUD, which cited recent tremendous difficulties experienced by the city in finding landlords willing to accept voucher holders, and found the city's assertions of Evergreen as "crime-ridden" to be factually unfounded.¹⁶

HUD then designated a new entity to serve as Market administrator and perform another full assessment of the physical needs and relocation impacts. That entity found that the property had rehabilitation needs of about \$1 million. It also performed a survey and found only 39 units within a 15-mile radius (out of a total of 790 vacant units) whose owners were willing to accept vouchers.¹⁷ In the summer of 2005, HUD then approved the refinancing necessary to preserve Evergreen under the restructuring plan. In 2006, HUD provided Section 8 renewal contracts and new financing to the owners, in exchange for new regulatory and 30-year use agreements, as well as rehabilitation commitments.¹⁸ HUD's findings concerning the Evergreen restructuring were later reviewed and found accurate by the HUD Inspector General.¹⁹

Shortly after HUD's 2005 approval, the city passed a resolution declaring the property a public nuisance and blighted, relying on code enforcement violations found by its inspection department. This began a flurry of litigation and administrative action, including the following:

- The owners of the property filed suit against the city.
- The city filed a condemnation action.
- The tenants filed a civil suit based on the Fair Housing Act (FHA).
- An individual tenant filed a fair housing complaint with HUD.
- HUD undertook enforcement action to withhold CDBG funding.

¹³*Id.* The same councilmember referred to Evergreen as a "tumor that is a cancer on the city." *Id.* ¶ 43.

¹⁴*Id.* ¶ 31.

¹⁵*Id.*

¹⁶*Id.* ¶ 32.

¹⁷*Id.* ¶ 35.

¹⁸*Id.* ¶ 42.

¹⁹*Id.* ¶ 41.

The Various Actions

The owners of Evergreen Terrace were the first to file suit against Joliet, raising claims under the Supremacy Clause, civil rights laws and fair housing statutes.²⁰ The trial court dismissed the owner's complaint, finding no jurisdiction under Article III for lack of a "case or controversy." On appeal, the Seventh Circuit reversed, finding that the owner's preemption claim against the city could be litigated under Section 1983, that the partnership could sue under Section 1982,²¹ and that the owner had Article III standing under the FHA, having alleged both direct injury to its proprietary interests and derivative injury to itself from harm to tenants.²² The Seventh Circuit directed that, on remand, the trial court first address the condemnation proceeding, which had been filed shortly after the owner's suit, surmising that would resolve the validity of many of the owner's claims.²³

The city's condemnation proceeding, filed in state court, had named the owners and mortgagee Government National Mortgage Association (GNMA), a federal government agency administered by HUD, as defendants. Because the action was against a federal agency and involved property with a federal lien, HUD then removed the condemnation action to federal court.²⁴ The city then moved to dismiss GNMA because it was no longer the mortgage holder and to remand the case to state court. The federal government opposed that motion, arguing that Evergreen was subject to HUD regulatory agreements that accompany the mortgages and that give HUD a substantial interest in the action.

The trial court dismissed GNMA as a defendant in the condemnation, but denied the city's motion to remand and subsequently joined HUD as a defendant. The court also permitted the tenants, represented by the Sargent Shriver National Center on Poverty Law in Chicago, to intervene. HUD and the owners asserted several defenses to the condemnation, including federal preemption and violations of the Constitution's property and contract clauses, as well as the doctrine of intergovernmental immunity.²⁵

²⁰New West L.P. v. City of Joliet, No. 05cv1743, 2006 WL 2632752 (N.D. Ill. Sept. 8, 2006), *reversed and remanded*, 491 F.3d 717 (7th Cir. 2007).

²¹42 U.S.C. § 1982 (providing that all citizens enjoy the same real property rights as white citizens).

²²New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) (reinstating owner's Supremacy Clause, civil rights and fair housing claims against city).

²³The Seventh Circuit also suggested that the owner's remaining claims might be barred under the *Noerr-Pennington* doctrine, which could insulate the city from liability for some of its lobbying and litigation activities that allegedly violate other federal laws. 491 F.3d at 721-22.

²⁴City of Joliet v. Mid-City Nat'l Bank of Chicago, No. 05cv6746 (N.D. Ill. filed Nov. 29, 2005).

²⁵U.S. Const. art. VI, cl. 2 (Supremacy Clause), art. I, § 10, cl. 1 (Contracts Clause), art. IV, § 3, cl. 2 (Property Clause).

In response to the city's motion for judgment on the pleadings regarding the preemption defenses in the condemnation action, HUD argued that the condemnation was preempted because of federal interests in the property reflected in federal statutes.²⁶ The district court rejected HUD's preemption argument,²⁷ relying primarily upon dictum in the Seventh Circuit's opinion²⁸ on the prior appeal in the related case brought by the owners. The court then issued a similar ruling on motions for summary judgment, and certified the preemption issue for interlocutory appeal.

The Seventh Circuit affirmed the finding of no federal preemption, and suggested that the district court should bring the condemnation action to a speedy conclusion.²⁹ Relying on cases under which the Supreme Court has narrowed the scope of conflict preemption, and perhaps some misunderstandings of the effect of HUD's 30-year Mark to Market use agreement, the Seventh Circuit indicated that nothing short of an express federal statute or regulation would suffice to preempt the city's eminent domain power. Even so, the court recognized that a city's discriminatory use of eminent domain might still present a legal barrier to the condemnation action.³⁰

Apart from the owner's suit, fair housing claims have been concurrently filed in other proceedings. While seeking intervention in the condemnation, the tenants had filed a separate FHA case against the city,³¹ claiming that the city's action to remove Evergreen and displace the residents constituted intentional discrimination and had a disparate impact upon African Americans. In late 2009, an Evergreen Terrace tenant also filed a complaint with HUD, alleging that Joliet's actions violated the FHA. HUD referred the complaint to the Justice Department, pursuant to the FHA authorization of DOJ enforcement when a complaint alleges discriminatory zoning or land use practices by a local government.

In December 2009, the Justice Department amended its answer in the condemnation suit to assert additional defenses under the FHA and the Equal Protection Clause. During these proceedings, HUD has also pursued administrative enforcement action. HUD has raised serious questions regarding whether the city has complied with its obligation to affirmatively further fair housing. HUD rejected the city's Analysis of Impediments (AI) to Fair

Housing Choice and Consolidated Plan for 2010 and its AI for 2011, primarily because of the city's proposed actions to displace Evergreen Terrace residents without adequate and affordable replacement housing.³²

The Government's Most Recent Action

The United States' recent suit asserts that the city violated the FHA and the Housing and Community Development Act. The FHA claim alleges that Joliet's condemnation action will make dwellings unavailable because of race or color in violation of 42 U.S.C. § 3604(a), thus also interfering with protected rights under § 3617, as well as constituting discriminatory practices under § 3614. It further alleges injuries to the residents, the owners and persons seeking affordable housing in Joliet. The Housing and Community Development Act claim alleges that a group of persons will be excluded from participation, denied benefits or discriminated against on grounds of race or color by CDBG-funded activities in violation of 42 U.S.C. § 5309(a). In addition to money damages and civil penalties, the suit seeks to enjoin the city from proceeding with the condemnation without ensuring that there will be sufficient and adequate affordable housing for Evergreen Terrace residents and to require the city to take steps to prevent the recurrence of any similar discriminatory conduct.³³

On August 18, the district court granted the United States' motion to consolidate its suit with the three other pending suits—the city's condemnation proceeding, the owner's civil rights suit, and the tenants' fair housing action. The United States' action provides important support for years of efforts to preserve and improve Evergreen Terrace, waged by the tenants, advocates, the owners and HUD. The Justice Department has raised serious questions about the city's actions that will test the protections promised by the FHA, which the court must now evaluate. The Department's efforts in this case to protect the tenants of Evergreen Terrace certainly echo its highest traditions. ■

²⁶HUD relied upon Section 221 of the National Housing Act, providing the mortgage insurance for Evergreen Terrace, and MAHRA, 42 U.S.C. §1437f note (Multifamily Housing Assistance).

²⁷*City of Joliet v. Mid-City Nat'l Bank*, No. 05cv6746, 2007 WL 2298403 (N.D. Ill. Aug. 3, 2007).

²⁸*New West L.P. v. City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007).

²⁹*City of Joliet v. New West L.P.*, 562 F.3d 830 (7th Cir. 2009) (finding federal jurisdiction due to HUD's presence as a party with security interest, but rejecting claim that eminent domain action was preempted).

³⁰*Id.* at 837–38. The parties' subsequent petition for rehearing en banc was denied, as were the tenants' and owner's petitions for certiorari to the U.S. Supreme Court.

³¹*Davis v. City of Joliet*, No. 07cv7214 (N.D. Ill. filed Dec. 21, 2007).

³²*See, e.g.*, Letter from Maurice J. McGough, Director, HUD Office of Fair Housing and Equal Opportunity, Region V, to Honorable Arthur Schultz, Mayor of Joliet (May 25, 2011).

³³The United States' press release is available at http://www.justice.gov/usao/iln/pr/chicago/2011/pr0804_02.pdf.