

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-1087

JEAN MASSIE, et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, et al.,

Appellees.

APPEAL FROM THE FINAL ORDER OF THE U.S. DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA AT C.A. 06-1004 ENTERED
ON OCTOBER 31, 2008

**AMICI CURIAE BRIEF OF NATIONAL HOUSING LAW PROJECT AND
HOUSING PRESERVATION PROJECT IN SUPPORT OF APPELLANTS**

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ARGUMENT

This appeal concerns the application of Section 311 of 109 P.L. 115 to the disposition by the United States Department of Housing and Urban Development (HUD) of the Third East Hills Park (“the project”) Section 8 project. At the time of its adoption, Section 311 was simply the latest in a long line of efforts by Congress to assure that project-based Section 8 Housing Assistance Payment (“HAP”) contracts, like that at the project, would be preserved for the long term if at all feasible. Not only did HUD ignore its obligations in this case, it issued a May 31, 2006 Notice directing HUD staff to ignore the statute in similar cases. The District Court’s endorsement of HUD’s actions is grounded in a serious misreading of the relevant legislative history.

I. Congressional efforts to assure preservation of Section 8 contracts.

Section 311 is part of a consistent pattern of Congressional actions to require HUD to preserve project-based assistance whenever possible, rather than replacing it with tenant-based assistance. Section 311 must be understood in that context. With the Preserving Affordable Housing for Senior Citizens and Families into the 21st Century Act, Pub. L. No. 106-74, Title V (October 20, 1999) (“21st Century Act”), Congress first introduced the possibility of replacing terminated project-based Section 8 assistance with tenant-based vouchers. In doing so, Congress made clear that vouchers were only to be viewed as a last resort—HUD’s first duty

is to preserve project-based subsidies wherever possible. In approving S. 1596, the Senate's version of the 21st Century Act, the Senate Committee on Appropriations emphasized:

This bill includes legal authority to allow HUD to provide section 8 rental assistance up to the market rent of a unit for low-income families where owners of projects assisted with section 8 project-based assistance choose to not renew their expiring section 8 contracts... The Committee believes that HUD must first make *every effort* to renew the expiring section 8 contracts which are attached to this assisted housing, especially those projects located in low vacancy areas, including those in high cost urban areas...

Senate Committee on Appropriations Report No. 106-161 on S.1596, "Housing Certificate Fund (Including Transfer of Funds) Committee Recommendation" (September 16, 1999) (emphasis supplied) (available on the Library of Congress website at <http://thomas.loc.gov>).

Beginning in 2001 Congress included in each HUD Appropriations Act a provision nearly identical to Section 311, but applying only to elderly or disabled tenants. See P.L. 106-377, § 233 (2001 HUD Appropriations Act).¹

The Senate Committee drafting the 2006 HUD Appropriations Act, 109 P.L. 115, of which Section 311 was a part, said the following about tenant protection vouchers, made available to local Public Housing Authorities (PHAs) in order to

¹ See also, P.L. 107-73, title II, § 212 (2002); P.L. 108-7, Div. K, Title II § 213 (2003); P.L. 108-199, Div. G, Title II, § 212 (2004); P.L. 108-447, Div. I, title II, § 211 (2005). All available through <http://thomas.loc.gov/home/approp/app08.html>.

provide tenant-based assistance to residents of HUD subsidized projects where it was not possible to preserve project-based assistance:

The committee also remains concerned that HUD is not committed to maintaining section 8 project-based housing and may be encouraging owners to opt out of the program. This would be a tremendous mistake since affordable housing needs are growing while the stock of affordable low-income housing is shrinking...The Committee also directs GAO to assess HUD's efforts and success in preserving HUD-assisted low-income housing, especially section 8 project-based housing...

109 Senate Report 109.² This consistent pattern demonstrates Congressional intent to permit the replacement of project-based assistance with tenant-based vouchers, as happened in this case, only as a last resort. This case, unfortunately, demonstrates that Congress' concern about HUD's lack of commitment to maintaining Section 8 project-based housing was well founded.

II. Section 311 applies despite HUD's abatement and purported termination of the Section 8 HAP contract.

Section 311 of 109 P.L. 115 provides:

Notwithstanding any other provision of law, in fiscal year 2006,³ in managing and disposing of any multifamily property that is owned or held by the Secretary of Housing and Urban Development, the Secretary shall maintain any rental assistance payments under section 8 of the United States Housing Act of 1937 that are attached to any dwelling units in the property. To the extent the Secretary determines that such a multifamily property owned or held by the Secretary is not

² Senate Report 109-109, Title III, Tenant-Based Rental Assistance, Committee Recommendation, available at: <http://thomas.loc.gov/cgi-bin/cpquery/R?cp109:FLD010:@1%28sr109%29>

³ This language has been included in subsequent HUD appropriations enactments.

feasible for continued rental assistance payments under such section 8, based on consideration of the costs of maintaining such payments for that property or other factors, the Secretary may, in consultation with the tenants of that property, contract for project-based rental assistance payments with an owner or owners of other existing housing properties, or provide other rental assistance.

HUD's argument that Section 311 does not apply here is that the statute requires only that rental assistance "payments that are attached to any dwelling units" be maintained.

However, the May 31, 2006 Notice regarding the 2006 property disposition program upon which HUD relies is quite clear that what Section 311 requires HUD to maintain during the disposition process is "the project based Section 8 HAP *contract*." May 31, 2006 Notice, Fiscal Year 2006 Property Disposition Program, p. 4.

As described above, Congress' intent with Section 311 and its predecessors was to maintain project based assistance where feasible by continuing the HAP contracts. Both the Senate Report and the House Conference Report characterize the obligation created by Section 311 as maintenance of or continued "project-based *assistance*."⁴ The Section 8 statute defines "project-based assistance" as that provided through contracts to make assistance payments to owners and tenant-based as assistance provided through the voucher program. 42 U.S.C. §§

⁴ House Conference Report 109-307, pg. 276; Senate Report 109-109, p 189. Both available through <http://thomas.loc.gov/home/approp/app08.html>.

1437f(f)(6) and (7), (d)(2), and (o). In focusing on the use of the term “payment,” apparently for purposes of this litigation only, HUD ignores the obvious intent of Congress as well as its own policy set out in the May 31 Notice.

A final problem with this position is that, when HUD takes ownership of a property, all project-based Section 8 payments are immediately abated. HUD does not make Section 8 payments to itself. See, HUD Handbook 4315.1, “Multifamily Property Dispositions – Management,” Section 5-21 and Appendix 5-4.⁵ Thus, if the statute had the meaning asserted by HUD in this case, Section 311 would never apply to disposition of HUD owned property. This abatement has been standard HUD practice for years (the Handbook is dated 11/93) and Congress certainly did not intend Section 311 to have the absurd result that the statute could never apply to precisely those situations to which it was intended to apply.

HUD also argues that Section 311 could not apply to the foreclosure sale because the HAP was terminated in March of 2006, seven months prior to the foreclosure sale. But Section 311 applies to HUD’s actions “in...disposing of multi-family property.” HUD’s activities “in disposing of multi-family property” begin far before the foreclosure sale and necessarily include HUD’s decisions on what to do with project-based Section 8 contracts. The May 31, 2006 Memorandum on which HUD relies states that Section 311 requires HUD to

⁵ Available on the HUD website at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4315.1/index.cfm>.

maintain the HAP contract on properties for which HUD holds the mortgage “and is in the process of disposing the property at foreclosure.” May 31 Notice at p. 4. The language of the Act and the Memorandum clearly refer to more than the moment in time at which the property changes hands; the language refers instead to HUD’s disposition process. The HUD Memorandum describes this extended disposition process which begins with a recommendation to foreclose, and includes notifications, hearings, right to cure, ongoing administration of the mortgage and HAP contract, and analysis whether to retain the HAP contract.⁶ May 31 Notice, ps. 2-8. During this process, the owner has a right to cure the defaults “prior to and up to the actual foreclosure sale.” May 31 Notice, p. 3. This cure may include making all required repairs. *Id.* Section 311’s reference to “in...disposing of multi-family property” applies to HUD decision making regarding retention of the HAP contract during this process and requires HUD to retain the contract if feasible and to conduct a feasibility analysis in order to determine that the HAP will not be retained. HUD’s Statement of Material Facts submitted with its summary judgment motion below indicates that the disposition process was underway as early as February, 2005 when “the director of HUD’s...Multifamily Property Disposition Center requested a series of documents...in connection with

⁶ See also, 12 U.S.C. Section 1701z-11(c) laying out extensive procedural steps defining “disposition of property” which culminate with the foreclosure sale but involve substantial steps prior to the sale.

its referral of the project for foreclosure.” HUD Statement of Material Facts, pg. 6, Paragraph 27. Thus the disposition process was underway well before the termination of the HAP project. After the passage of Section 311, an analysis of the feasibility of maintaining the HAP and consultation with the tenants should have been part of this disposition process. However, it appears that HUD, acting on the policy set out in the May 31, 2006 Notice, terminated the contract without following the process for compliance with Section 311 set out in the Notice because it had abated the contract earlier.

HUD’s argument that it was not required to comply with Section 311 is pure bootstrapping. In effect, HUD in its position in this litigation, as well as its assertion in the May 31 Notice that a Section 8 contract which has been abated and will be terminated will not be maintained, amounts to the absurd assertion that: “HUD need not comply with a statute that limits HUD’s ability to terminate a section 8 contract in disposing of this property in any situation in which HUD has terminated that section 8 contract in the process of disposing of this property.” The statute was obviously passed to curb HUD’s predilection for terminating project-based assistance during this disposition process. To accept HUD’s argument that it can avoid Section 311 by terminating a HAP anytime prior to sale is to render the statute meaningless.

III. HUD's position is not entitled to Chevron deference.

HUD asserts that its position, set out in the May 31, 2006 Notice, that it need not apply Section 311 to Section 8 contracts with respect to which the agency had already decided that abatement and termination was proper, is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). The District Court agreed with this position, and adopted HUD's position set out above, based on a serious misreading of the legislative history of 109 P.L. 115.

The District Court focused on discussions in both the House and Senate Committee Reports of a switch from funding a "unit based" system back to funding a "budget based" system. However, these discussions involved two different methods for funding for the tenant-based housing choice voucher program run by PHAs. The "unit based" funding simply meant funding based on the cost per unit for the units administered in the previous year; while the "budget based" method focuses on the total cost of the program in the previous year, regardless of the number of units assisted. Both funding mechanisms apply only to the tenant-based voucher program and have nothing to do with project-based Section 8 HAP contracts at issue here.

The Court apparently mistook the term "unit based," as applied to the voucher program to mean "project-based" as applied to those HAP contracts directly between HUD and the owners of multi-family housing. The programs are

completely separate and the funding discussions regarding the voucher program have nothing to do with the project-based program. In fact, as cited above, in discussing tenant protection vouchers, the Senate Committee made quite clear its preference for project-based contracts over tenant protections vouchers, which HUD issued to displaced tenants in this case.

HUD and the District Court suggest that HUD's refusal to consider maintaining through the disposition process a Section 8 contract which has been abated is justified because HUD should not reward owners who let their properties fall into disrepair. But that is not at all what is meant by complying with Section 311, even in cases where a Section 8 contract has been abated for failing to make repairs. Section 311 applies to the disposition of HUD held properties. Properties don't become HUD held, and aren't foreclosed upon, unless there are serious problems. So Congress certainly intended Section 311 to apply to such properties. As the May 31 Notice makes clear, after a disposition "the purchaser will ensure that all units under the Section 8 HAP contract meet the Department's Uniform Physical Inspection Standards before Section 8 assistance is provided after a foreclosure or HUD-owned sale." The point of the disposition process is to assure that physical deficiencies are corrected. The point of Section 311 is to assure that Section 8 contracts are maintained in post-foreclosure/disposition rehabilitated properties.

HUD's position is not entitled to *Chevron* deference, because the agency position set out in the May 31, 2006 Notice is not based on a permissible construction of the statute. *Chevron*, 104 S.Ct. at 2782. Indeed, the May 31, Notice clearly indicates that the agency will decline to follow the clear Congressional directive if, as was the case here, it had already decided to abate the Section 8 contract.

Respectfully submitted August 31, 2009

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