

Clearinghouse REVIEW

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Sargent Shriver National Center on Poverty Law

practices of the Lynn Housing Authority, which has for years now terminated participants' benefits without adequate consideration of participants' circumstances and without written decisions that reflect findings of fact and conclusions of law. This is a housing authority that had been repeatedly told by the housing court to change its practices but that, until now, refused to do so.

The *Carter* decision instructs hearing officers about their discretionary decision-making abilities and gives these hearing officers a clear delineation of their roles as independent deciders—a distinction perhaps not fully understood until this decision. Hearing decisions must contain findings of fact that will allow a reviewing court to determine what evidence was considered and what weight it was given. They must contain conclusions of law that apply those facts to the law and demonstrate that the hearing officer used independent discretion in deciding on the appropriate sanction to be imposed based on those facts and the law.

Perhaps one of the most notable aspects of *Carter* can be found in footnote 17. At all levels of this case, the plaintiff argued that, although the regulations clearly placed the burden of presenting evidence to controvert a housing authority's decision to terminate on the participant, the hearing officer was in the best place to clarify what might often be a cloudy record, in particular and most important when the participant was unrepresented and disabled. Writing for the court's majority, Chief Justice Margaret Marshall observed that "it is reasonable to expect the hearing officer to make inquiry about relevant circumstances that are obviously presented by the situation" (*Carter*, 880 N.E.2d at 787 n.17). In clarifying this role for hearing officers, Marshall suggested that a

hearing officer might ask, "Are there any other facts that I should know about, particularly those relating to the extent of the participation in the incident of the family member involved, the disability of any family member in the household, or the effects the termination of assistance might have on other family members who weren't involved in this incident?" [(*id.*).]

Marshall continued, "Such an inquiry by a hearing officer does not place an unworkable burden on him or her" (*id.*).

Although other administrative agencies—such as the Social Security Administration, agencies deciding workers' compensation, and agencies deciding unemployment benefit claims—require decision makers to help develop the record and parse out the issues, no such duty had been articulated for Section 8 terminations.

Advocates now have one additional tool to use to convince reviewing courts that Section 8 administrative hearing decisions should be reversed or remanded for complying decisions. This tool can be critical where, as here, the tenant went to the administrative hearing by herself and contacted an attorney only after the administrative hearing decision had been issued.

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Tenants Force a Policy Change at HUD and Protect Subsidized Housing Stock in Doing So

Experts estimate that in the past decade we have lost well over 100,000 public housing units throughout the country. Public housing residents in revitalizing neighborhoods, who would otherwise be the beneficiaries of this community revitalization, are increasingly being forced out of their communities as units are lost. This was the prospect facing residents of Jane Addams Village in 2006.

Jane Addams Village was an 84-unit public housing family development in Rockford, Illinois. In 2006 the Rockford Housing Authority sought and obtained the permission of the U.S. Department of Housing and Urban Development (HUD) to demolish Jane Addams Village. On July 31, 2007, two tenants of Jane Addams Village, represented by the Sargent Shriver National Center on Poverty Law and Prairie State Legal Services, filed a federal lawsuit in the Northern District of Illinois against HUD and the housing authority to stop the demolition (*Jones v. HUD*, 05-cv-50142). At the center of the litigation were the meaning and the application of Section 18 of the U.S. Housing Act of 1937 (42 U.S.C. § 1437p).

Section 18 of the U.S. Housing Act of 1937 and the Regulatory Framework

A public housing agency may eliminate portions of its public housing stock by submitting applications to HUD for full demolition or partial demolition of a development (42 U.S.C. § 1437p). HUD's Special Applications Center processes and approves applications for full or partial demolition of a public housing development. At issue in *Jones v. HUD* was a partial demolition application.

A full or partial demolition application must satisfy Section 18:

(a) Applications for demolition and disposition. Except as provided in subsection (b), upon receiving an application by a public housing agency for authorization *** to demolish or dispose of a public housing project or a portion of a public housing project (including any transfer to a resident-supported non-profit entity), the Secretary shall approve the application, if the public housing agency certifies—

(1) in the case of—

(A) an application proposing demolition of a public housing project or a portion of a public housing project, that—

(i) the project or portion of the public housing project is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and

(ii) no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life; *and*

(B) an application proposing the demolition of *only a portion of a public housing project*, that the demolition will help to ensure the viability of the remaining portion of the project;

[(42 U.S.C. § 1437p (emphasis added)).]

In sum, Section 18 outlines a two-part test for partial demolition applications: (1) Paragraph (a)(1)(A) requires that the public housing project is physically obsolete with no reasonable program of modification available to return the project to useful life (“obsolescence requirement”); and (2) Paragraph (a)(1)(B) provides that, in the case a partial demolition of a project, the demolition must help ensure the viability of the remainder of the development (“viability requirement”).

In 2006, in order to fulfill the obsolescence requirement, a public housing agency had to show that (1) a property was physically obsolete, and (2) the cost of its rehabilitation would be more than 90 percent of the “total development cost” for the location, thereby rendering any program of modification unreasonable (24 C.F.R. § 970.6 (2006)). (Total development cost is the sum of all costs for site acquisition, relocation, demolition, construction and equipment, interest, and carrying charges. HUD sets total development cost limits by jurisdiction and publishes those limits on its website. See, e.g., HUD TCD limits by jurisdiction for 2007, www.hud.gov/offices/pih/publications/notices/07/pih2007-19_tdc.pdf.) Since then, the floor for “unreasonable” programs of modification has been lowered to 57.14 percent of total development cost, making more developments subject to demolition under the obsolescence requirement (24 C.F.R. § 970.15 (2007)).

Section 18 also requires that any demolition or disposition application be developed in consultation with residents, any resident councils or advisory boards, and appropriate governmental officials (42 U.S.C. § 1437p(b)(2)). Should the public housing agency fail to fulfill its consultation requirements, HUD must disapprove the application (*id.* § 1437p(b)). Likewise, HUD and a public housing agency have an affirmative duty to further fair housing, and therefore any demolition or disposition plan and corresponding relocation plan must further fair housing (Fair Housing Act, 42 U.S.C. § 3608(e)).

Section 18 outlines specific relocation requirements in cases of demolition or disposition (the Uniform Relocation Act, 42 U.S.C. §§ 4601 *et seq.*, does not apply to demolition or disposition of public housing under Section 18). These requirements include the following: (1) tenants must receive ninety days’ notice of displacement and notice that the development will be demolished or disposed of; (2) the residents must be

informed that demolition will not commence until all residents have been relocated; (3) each family displaced by demolition or disposition must be offered comparable housing that meets housing quality standards and is in an area that is generally not less desirable than the current unit; (4) the comparable housing may include tenant-based assistance or project-based assistance; and (5) the public housing agency must pay the actual or reasonable relocation expenses of each resident displaced (42 U.S.C. § 1437p(a)(4)).

Factual Background

Dorothy Jones and Irene Brown, longtime residents of Jane Addams Village, wanted to remain in their historic community. When Jones and Brown challenged the demolition, they faced relocation to less desirable public housing or to predominately poor, minority areas of Rockford with a replacement voucher.

Jane Addams Village, a collection of eighty-four family townhomes, was part of the Jane Addams Village/Brewington Oaks public housing development located in a historic, riverfront community in Rockford, Illinois. Brewington Oaks, a pair of high-rise buildings located across the street from Jane Addams Village, primarily consists of senior housing.

Rockford Housing Authority Moves to Demolish Jane Addams Village. In July 2006 the Rockford Housing Authority submitted to HUD a “partial demolition application” seeking approval to demolish Jane Addams Village and use the vacant land as “green space.” The application was for “partial demolition” because Jane Addams Village was only a portion of the Jane Addams Village/Brewington Oaks public housing development. According to the housing authority, Jane Addams Village was an outdated “eyesore” and magnet for crime and required substantial repair. The housing authority estimated that the cost of rehabilitation of Jane Addams Village would exceed 90 percent of total demolition cost, thereby satisfying the “no reasonable program of modification” element of the Section 18 obsolescence requirement (24 C.F.R. § 970.6). HUD subsequently approved the housing authority’s application and its proposed plan to relocate the residents.

Plaintiffs Show that Jane Addams Village Was Not Physically Obsolete. In the spring of 2007 the Shriver Center and Prairie State Legal Services, on behalf of plaintiffs, engaged a structural engineer to inspect Jane Addams Village and assess its physical condition. The engineer issued a report explaining that, contrary to the housing authority’s assertions, Jane Addams Village was a typical multifamily townhome development that appeared adequately maintained and well integrated in the greater community.

The engineer’s report also showed that the housing authority’s analysis of the condition of the property and its cost of repair was grossly inaccurate. When the housing authority certified that any reasonable program of modification would exceed 90 percent of total development cost, the housing authority adopted the total development cost from a nearby community because the housing authority did not have its own total development cost. According to the report, the jurisdiction that the housing authority used to determine its total development cost, however, was inappropriate because construction costs in Rockford were significantly higher than those in the comparable jurisdiction. Had the total development cost been

properly calculated, the housing authority's estimated cost of rehabilitation would have been "reasonable" (less than 90 percent of total development cost) per federal regulation (24 C.F.R. § 970.6). Even so, the report concluded that the housing authority's estimate itself was inflated and that there were "a range of reasonable programs of modifications that would cost-effectively extend the useful life of Jane Addams Village at a fraction of the costs indicated in the application." The report made it clear that the housing authority's application for Jane Addams Village came nowhere close to satisfying the obsolescence requirement of Section 18.

Armed with the engineer's report, plaintiffs demanded that HUD rescind its approval of the housing authority's partial demolition application and that the housing authority cease all efforts to proceed with the relocation of Jane Addams Village residents. In response to plaintiff's demands, HUD conducted its own inspection, with plaintiffs' counsel and structural engineer also attending, in June 2007. HUD, too, concluded that Jane Addams Village did not meet the obsolescence requirement under Section 18.

Rockford Housing Authority Submits and HUD Approves a Revised Demolition Application. Plaintiffs' victory in stopping the demolition was very short-lived. In the same meeting where HUD explained to the Rockford Housing Authority that Jane Addams Village did not satisfy the Section 18 obsolescence requirement, HUD apparently also suggested that the housing authority submit a revised application based solely on the Section 18 viability requirement (42 U.S.C. § 1437p(a)(1)(B)).

On July 5, 2007, the housing authority submitted a revised partial demolition application relying only on the theory that the demolition of Jane Addams Village would help ensure the viability of Brewington Oaks. On July 10 HUD approved the housing authority's revised demolition application; HUD acknowledged that Jane Addams Village did not meet the obsolescence requirements under 42 U.S.C. § 1437p(a)(1)(A), but HUD found that the housing authority met what HUD characterized as the "partial demolition test" under 42 U.S.C. § 1437p(a)(1)(B) (the viability requirement).

Plaintiffs Demand that HUD Rescind Its Approval. Upon learning of HUD's decision, plaintiffs demanded in writing that HUD rescind its approval of the revised application because the application failed to meet both the obsolescence and the viability requirements of Section 18. Rejecting this argument, in a letter issued on July 19, 2007, HUD declared its decision final and not subject to any subsequent administrative appeal or review.

In light of HUD's decision, plaintiffs filed suit in the Northern District of Illinois against HUD and the Rockford Housing Authority on July 31, 2007. At the same time, plaintiffs filed motions for a temporary restraining order and preliminary injunction to stop the demolition of Jane Addams Village. (When the lawsuit was filed, plaintiffs were the only Jane Addams residents who had not been relocated. Thus plaintiffs did not seek to stop the relocation in their motions.)

Litigation and Settlement

Plaintiffs' complaint against both the Rockford Housing Authority and HUD raised several claims based on Section 18 of the U.S. Housing Act of 1937 (42 U.S.C. § 1437p) and the Fair Housing Act (42 U.S.C. §§ 3601 *et seq.*).

Legal Claims and the Application of Section 18. The fundamental issue raised by the complaint was the application of the Section 18(a) requirements for partial demolition. When HUD approved the Rockford Housing Authority's revised application, HUD adopted the position that 42 U.S.C. § 1437p(a)(1) provides two *separate* grounds on which HUD may approve a public housing agency's application for partial demolition: the obsolescence requirement *or* the viability requirement.

Plaintiffs argued that HUD's interpretation was contrary to the plain meaning of the statute's language. Paragraph (A) of 42 U.S.C. § 1437p(a)(1) outlines the two-part obsolescence requirement and concludes with the word "and." Paragraph (B) states that, in the case of partial demolition, the public housing agency must meet the viability requirement (42 U.S.C. § 1437p(a)(1)(B)). According to the plaintiffs, the only possible interpretation of this language—specifically the word "and" between paragraphs (A) and (B)—is that a public housing agency seeking to demolish only a portion of a project must satisfy the requirements prescribed in both paragraphs (A) and (B), namely, the obsolescence requirement *and* the viability requirement. (Section 18 was amended in its entirety by the Quality Housing and Work Responsibility Act of 1998 (Pub. L. No. 105-276, tit. V, § 531, 112 Stat. 2461 (Oct. 21, 1998)). Prior to 1998 and the Quality Housing and Work Responsibility Act amendments, Section 18 required a public housing agency to meet only the obsolescence requirement *or* the viability requirement in a successful partial demolition application (42 U.S.C. § 1437p(a)(1994) (amended by Quality Work and Housing Reform Act, Pub. L. No. 105-276, tit. V, § 531(a), Oct. 21, 1998); apparently the Special Applications Center and HUD were unaware that the Quality Housing and Work Responsibility Act changed the requirements for partial demolition applications to include both the obsolescence *and* the viability requirement).

Plaintiffs' Fair Housing Act claims alleged that the Rockford Housing Authority relocation program would have likely caused plaintiffs to become segregated into predominately African American communities and that both HUD and the housing authority failed to affirmatively further fair housing.

Standstill Order. Within days of filing the complaint, the parties appeared on the motion for a temporary restraining order. In lieu of argument, the parties agreed to a briefing schedule and entered a standstill order that prevented the demolition of the Jane Addams Village. Under the order, plaintiffs, the last residents still living at Jane Addams Village, agreed to be relocated and the Rockford Housing Authority agreed to secure the now-vacant development so that it did not decline in condition while the litigation was pending.

HUD's Admission of Its Mistake. Within weeks of the filing of the lawsuit, HUD realized that it had been misapplying Section 18 and that plaintiffs' interpretation of the law was correct. On August 10, 2007, HUD admitted to the court that it had misapplied the partial demolition requirements of Section 18. But HUD was concerned that formally rescinding its approval would threaten Jane Addams's former residents' relocation vouchers, so it put off formal rescission while the parties investigated the effect of formal rescission.

Given HUD's admission, however, the parties stayed all briefing and immediately began settlement negotiations. Over the next several months, the parties worked up a consent decree agreeable to all involved.

The Threat of Condemnation. Soon after plaintiffs filed suit, the City of Rockford began taking steps toward condemning and demolishing Jane Addams Village pursuant to state and local law. Plaintiffs' structural engineer, who periodically inspected the property throughout August, found that the condition of the property was not dangerous. The condition of the now-vacant Jane Addams Village, however, was declining—vandals broke into the property and began stripping the copper wiring and otherwise causing damage. Thus, during the months of settlement negotiations, the specter of condemnation loomed over the Jane Addams Village and plaintiffs found themselves preparing for a condemnation fight as well. That the City of Rockford actively pushed for and supported the demolition as a means to "revitalize" the community became evident as the plaintiffs gathered more information regarding the city's plans to demolish Jane Addams Village.

In part due to the willingness of HUD and the Rockford Housing Authority to resolve the matter amicably with the plaintiffs, the City of Rockford ultimately backed away from its effort to condemn Jane Addams Village.

Consent Decree

On January 24, 2008, the parties submitted and the court approved a consent decree. The decree allows the demolition of Jane Addams Village but ensures that the housing authority maintain its stock of low-income housing. In this way the decree is a significant victory for plaintiffs, Jane Addams Village's former residents, and Rockford's low-income families who may benefit now, or in the future, from federally subsidized housing.

The decree provides that (1) the Rockford Housing Authority, with HUD oversight, must develop seventy-seven units of low-income housing in the form of public or project-based Section 8 housing; (2) every former Jane Addams family, including the plaintiffs, will have the opportunity to return to the replacement housing; (3) the housing authority must pay the moving expenses for up to two moves of each former Jane Addams family; (4) in furtherance of fair housing principles, the housing authority, with HUD oversight, must hire a private contractor to help it establish a housing mobility program within its voucher program; and (5) in pursuing the above, the housing authority must consult and reach agreement with plaintiffs regarding the development, location, and size of the replacement housing and the implementation of the housing mobility program.

Implications and Lessons Learned

Without question, the greatest impact of *Jones v. HUD* is HUD's "new" policy for partial demolition applications. After plaintiffs filed this lawsuit, HUD "revised" its processing requirements in order to comport with the law—partial demolition applications must now satisfy both the obsolescence and the viability requirements of Section 18.

A number of lessons can be learned from the *Jones* litigation:

Get in Early. The earlier that advocates can begin challenging a public housing agency's plans for demolition, the better. In this case, plaintiffs and counsel did not get involved with Jane Addams Village until months after the initial demolition application was approved. The time delay in this case put HUD in the

position where it had to reconsider the demolition application it had already approved (making reversing more difficult), and the delay allowed the Rockford Housing Authority the time necessary to vacate the building. Advocates should monitor public housing agency five-year and annual plans and the HUD Special Applications Center website, and get involved early. Whenever a suspect demolition application is submitted to the center, advocates can and should send comments to the center, the Office of Public and Indian Housing, and the Office of Fair Housing.

Get an Expert. Engaging the structural engineer—and doing so relatively early—was vital to plaintiffs' success. To the extent that hiring an expert is not cost-prohibitive, an expert may give advocates the leverage necessary to challenge the facts alleged in a public housing agency's demolition application with HUD. (Grants for costs associated with this sort of impact litigation may be available from the Impact Fund, www.impactfund.org.) To bolster any Fair Housing Act claim, other experts may track where former public housing families relocate or will likely relocate with vouchers.

Keep Units Occupied. Plaintiffs learned firsthand that once vacant a property declines rapidly. Even though the Rockford Housing Authority, pursuant to the standstill order, boarded up and fenced in the vacant Jane Addams Village, vandals were nonetheless able to get in and cause damage. Whether a cause of action based on de facto demolition can be maintained is no longer clear, and so units in at-risk developments should be kept occupied (See, e.g., *Anderson v. Jackson*, 2007 U.S. Dist. LEXIS 9074 (E.D. La. 2007)).

HUD Must Approve a Taking by Eminent Domain. Early this year, in part due to the City of Rockford's effort to condemn Jane Addams Village without HUD approval, HUD made clear that public housing developments cannot be taken by eminent domain without HUD permission (Notice PIH 2008-02, www.hud.gov/utilities/intercept.cfm?offices/pih/publications/notices/08/pih2008-2.pdf).

The product of collaboration between non-Legal Services Corporation programs and Legal Services Corporation programs facing local opposition, *Jones v. HUD*, on the one hand, demonstrates the effectiveness of contesting the substance of demolition applications with HUD and the tangible benefits that are possible when parties work toward a settlement aimed at preserving low-income housing. On the other hand, the challenges that the plaintiffs faced not only from the housing authority but also from the city itself highlight the growing need in our communities to build support for housing preservation so that all the local stakeholders understand the value of maintaining low-income housing in their community.

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