IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-21259-CIV-GRAHAM/O'SULLIVAN

MIAMI-DADE COUNTY,

Plaintiff,

vs.

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

Defendants.
_______________________________________/

**MEMORANDUM IN SUPPORT OF MIAMI-DADE COUNTY'S MOTION TO STAY AGENCY ACTION OR FOR PRELIMINARY INJUNCTION**

Miami-Dade County ("County") respectfully asks the Court to maintain the status quo by enjoining any federal takeover of the County's housing department pending this lawsuit and appeal. The Court possesses such authority under the express terms of 5 U.S.C. § 705, which authorizes a stay to prevent "irreparable harm." Here, the County would be irreparably harmed without a stay because the Defendants ("HUD") intend to seize an entire County department, along with all of its assets and property, for an indefinite period of time. The adverse ramifications of such action to the County, to public housing residents, to Section 8 voucher recipients, to County taxpayers, and to County employees, are significant and irreparable.

The County is also likely to prevail on its claim that HUD acted arbitrarily and capriciously and failed to follow its own regulations and procedures. For example, HUD acted arbitrarily and capriciously by failing to provide the County with the procedures and remedies that have been provided to other public housing authorities prior to any takeover. This is not a mere inconsistent treatment argument. **HUD is actually required to provide these remedies**

**and procedures under HUD's own regulations and guidelines.** Likewise, HUD has simply ignored that the County has cured most and is presently curing the remaining alleged violations. *See* Affidavit ("Aff.") of Kris Warren, Ex. A. HUD cannot ignore this fact, however, as a reasonable opportunity to cure is mandated by contract as well as HUD's regulations and guidelines. Finally, and perhaps most importantly, HUD provides no nexus whatsoever between its alleged violations (mostly past accounting errors that have been cured) and its chosen remedy (a full-fledged takeover). The failure to provide such a nexus requires automatic reversal under binding Supreme Court precedent. In the end, the County will demonstrate all of the elements necessary for a stay pursuant to 5 U.S.C. § 705 or a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

## Statement of Facts

### A. Historical Background

The County, which is a political subdivision of the State of Florida, is the public housing authority ("PHA") in this jurisdiction.[1] It operates as a PHA pursuant to the Public Housing and Section 8 Annual Contributions Contracts (collectively "ACCs"), which it entered in with HUD. The current Public Housing and Section 8 ACCs were executed on February 2, 1996 and September 11, 1998, respectively. *See* Second Verified Complaint ("Cpl."), Exs. C and D. The County is organized pursuant to the Home Rule Amendment to the Florida Constitution and the Miami-Dade County Home Rule Charter. The Board of County Commissioners (the "Board") serves as the governing body of the County and the board of commissioners of the PHA. The designated department within the County that administers the

[1] The Housing Act and HUD's regulations state that a PHA is "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing." 42 U.S.C. § 1437a(b)(6); 24 C.F.R. § 5.100. In order to participate in the public housing program, HUD must designate the PHA eligible, which HUD has done in the County's case, as evidenced by the ACCs.

Public Housing and Section 8 programs ("Housing Programs") is the Miami-Dade Housing Agency ("MDHA" or the "Housing Department"). The Housing Department is not *sui juris*, but is an integral part of County government. Currently, the County, which is one of the largest PHAs in the country, provides housing assistance to approximately 16,314 public housing residents and approximately 34,261 residents. *See* Aff. of Kris Warren, Ex. A.

In accordance with the Act, Regulations, and ACCs, HUD conducts annual and periodic compliance reviews of the Housing Programs. This review, in part, includes an evaluation of the County's Public Housing program through the Public Housing Annual Assessment System ("PHAS"), which involves a review of four (4) indicators of public housing, including financial management and recordkeeping. *See* 24 C.F.R. part 902. In addition, the County's Section 8 program is evaluated under the Section Eight Management Assessment Program ("SEMAP"), which involves review of fourteen (14) indicators of Section 8 programs, including annual recertifications. *See* 24 C.F.R. part 985.[2]

Based on past reviews, the County received a PHAS "high performer" designation in 2001; PHAS and SEMAP "standard performer" and "troubled performer" designations, respectively, in 2002; and PHAS and SEMAP "standard performer" designations between 2003 and 2005. Since 2005, the County has not been certified under either PHAS or SEMAP because it was granted hurricane waivers by HUD, which exempted the County from complying with certain Section 8 and Public Housing requirements, including 24 C.F.R. parts 902 and 985. *See* Ex. B, attached hereto. They do not waive the rights and remedies afforded to PHAs under these

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[2] The PHAS and SEMAP indicators were designed in part, to serve as an evaluation tool of each PHA's housing programs as well as a tool to assist PHAs to improve the delivery of services to low income families. As part of this evaluation process PHAs receive a designation of high performer, standard performer, or troubled performer depending on their performance in each of the indicators as well as their overall performance. If a PHA receives a designation lower than a high performer, HUD shall require the PHA to initiate corrective actions to address any deficiencies related to Public Housing and/or Section 8 program(s) identified by HUD. *See generally* 24 C.F.R. §§ 902.73; 902.75; 902.77; 985.104; 985.103 985.106; 985.107.

regulations, including the right to take corrective action when required or to appeal HUD's adverse decisions.

**B. Statement of the Case**

Prior to July 2006, County officials discovered that the Housing Department's administration of the County's non-federally funded affordable housing programs was inconsistent with County policy. As a result, the County commenced an independent review of the Housing Department. Due to the seriousness of the issues raised concerning the non-federally funded County programs, eleven (11) top Housing Department officials, including the Housing Department's director, were removed, terminated, demoted or they resigned.

Recognizing the need to address these issues, the County engaged in the following. First, Senior Advisor to the County Manager Cynthia W. Curry was appointed to serve as the interim director of the Housing Department. Second, a Management Assistance Team ("MAT") was assigned to the Housing Department to review, assess, and correct past and current issues in the County's housing programs.[3] Third, the County sought and received technical assistance from HUD.[4] Fourth, the County assigned the County's Office of Inspector General to the Housing Department to investigate any allegations of fraud and/or criminality. Fifth, the County hired a new senior management team, which included the current director Kris Warren.

In July and September 2006, the County's MAT issued two reports, respectively, and five (5) interim reports. *See* Cpl. Exs. E, F, and G. These reports identified key areas of the County's

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[3] The County's MAT, under the leadership of Mrs. Curry, gathered support from County employees who were experts in management services, finances and other disciplines and procured professional housing consulting personnel through a memorandum of agreement between the Tampa Housing Authority (hereinafter "THA") and the Housing Department.

[4] In response to the MAT's request, HUD provided two (2) employees who reported to the County department for approximately two (2) days per week for approximately three (3) months. No additional technical assistance was provided by HUD.

Housing Programs, which were deficient and required corrective action. Once identified, the County's MAT and the Housing Department's staff commenced corrective action.

Also, in July 2006, HUD's Assistant Secretary Orlando Cabrera began contacting and eventually meeting with County officials to discuss the state of the local and federal affordable housing programs. During these meetings, he made clear that HUD desired to take over these housing programs either voluntarily or involuntarily, if necessary. *See* Aff. of George Burgess, Ex. C.

Thereafter, HUD, through Deloitte & Touche LLP ("Deloitte"), commenced an audit of the Housing Department, and issued its Final Report on January 29, 2007. *See* Cpl., Ex. H. On February 26, 2007, HUD's Office of Public and Indian Housing was sent to the County to review tenant files in the Housing Programs, perform physical inspections at six (6) public housing properties, review all back-up data on the 2005-2006 Financial Data Schedule ("FDS"), and review the 2004-2005 audit. Following this review, Deloitte returned on March 27, 2007 to further review its initial findings. However, Deloitte did not issue an additional report of its findings. *See* Aff. of Kris Warren, Ex. A.

Prior to Deloitte's second visit, on March 5, 2007, HUD delivered a proposed "Cooperative Endeavor Agreement" ("CEA") to the County. *See* Cpl., Ex. I. The CEA did not reference any technical, fiscal or management matters that were required to be addressed. Rather, the CEA would have required: (i) the County to acknowledge that it was in substantial default of the ACC and federal regulations relating to the Housing Programs; (ii) the Board of County Commissioners be removed as the governing body of the County's public Housing Programs and required a new housing authority to be established; (iii) a general counsel

approved by HUD be hired for this newly created independent authority; and (iv) the services of a major accounting firm approved by HUD be retained. *Id.*

In an effort to address HUD's concerns, the County made good faith attempts to resolve all outstanding issues pertaining to the County's Housing Programs. Alternative proposals, none of which included a complete takeover of the Housing Department, were presented to HUD at three (3) well publicized meetings between HUD and County officials. *See* Aff. of George Burgess, Ex. C. HUD rejected these proposals because they insisted that a complete takeover was the only alternative. As a result of HUD's unwillingness to compromise, the County refused to execute the CEA because it was not in its best interest.

Based in part of the County's refusal to execute the CEA, on April 24, 2007, HUD delivered to the County undated Declarations of Substantial Default of the Public Housing ACC (the "Public Housing Notice"), and of Default of the Section 8 ACC (the "Section 8 Notice") (collectively referred to as the "Notices"). *See* Cpl, Exs. J and K. The Notices raised allegations against the County concerning financial and operational mismanagement of the Public Housing and Section 8 programs. The Notices did not raise any issues of apparent fraud or criminality, and/or emergency conditions that would pose an imminent threat to the life, health, or safety of residents. Further, the Notices required the County to correct all identified deficiencies within fifteen (15) calendar days and/or to provide a response to HUD demonstrating that HUD's determination of default was not substantively accurate within the fifteen (15) day period. *See* Cpl., Exs. J at 3; K at 3-4.[5]

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[5] Subsequent to the delivery of the Notices and prior to the County's response, HUD Deputy Secretary Bernardi made it perfectly clear in a public statement to the media that any cure period was merely pro forma and not legitimate by stating that HUD intended to forcibly take over the County Housing Programs and that HUD's "decision has been made." *See* Cpl, Ex. L. Obviously, if HUD made its decision before the extremely limited cure period was complete, there was no intention to afford the County the right to cure.

On or about May 15, 2007, the County timely submitted its response to HUD, and requested an administrative appeal of the Notices. *See* Cpl., Ex. M. In its response, the County demonstrated that HUD's facts were incorrect, and the events and conditions HUD cited did not constitute noncompliance. The County adequately responded to the Notices and demonstrated why it should not be held in substantial default or default. HUD rejected the County's response and delivered first to The Miami Herald, then to the County, Default of the Section 8 ACC and Declarations of Substantial Default of the Public Housing ACC, both dated August 7, 2007 (collectively referred to as "Final Decisions"). *See* Cpl., Exs. A and B.

In the Final Decisions, HUD expressly recognized that the County corrected the accounting issues referenced in the Notices. Nevertheless, without any supporting facts or analysis, HUD asserted that the County's financials could not be trusted. HUD also indicated the County had not corrected the Section 8 recertification backlog and had not kept the anticipated pace in making the corrections. Then, without providing any nexus whatsoever between these limited findings and its ultimate decision, HUD ordered a takeover of the County's entire Housing Department and Programs to take place ten (10) business days from the date of the Final Decisions. *See* Cpl., Ex. A at 4; Ex. B at 5. The Final Decisions conclude that the letters constitute "final agency action and there is no further right to administrative review by HUD." *See* Cpl., Exs. A at 5; B at 6.

**ARGUMENT**

The APA provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court… may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705; *see also Avon Dairy Co.*

*v. Eisamen,* 69 F.Supp. 500, 502 (N.D. Ohio 1946); *Covington v. J.W. Schwartz,* 230 F. Supp. 249 (N.D. Cal. 1964).[6]

The test for a stay of agency action and that of a preliminary injunction are essentially the same. *See Corning Sav. and Loan*, 562 F. Supp. 279, 281 (E.D. Ark. 1983). A Stay or Preliminary Injunction should be granted where the movant shows: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to non-movant; and (4) if issued, the injunction would not be adverse to the public interest. *Charles H. Wesley Educ. Foundation, Inc. v. Cox,* 408 F. 3d 1349, 1354 (11th Cir. 2005); *MacGinnitie v. Hobbs Group, LLC,* 420 F.3d 1234, 1240 (11th Cir. 2005); *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir. 1998).

Of the factors the Court considers, irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 359 (4th Cir. 1991); *Glendale Neighborhood Ass'n v. Greensboro Housing Authority,* 901 F. Supp. 996 (M.D. N.C. 1995). The County will clearly suffer irreparable harm without a stay, while HUD will suffer no harm if the stay is granted. Indeed, all four factors weigh in favor of the Court granting a Stay or Preliminary Injunction.

## I. THE COUNTY WILL LIKELY SUCCEED ON THE MERITS.

### A. The Final Decisions Are Arbitrary and Capricious Under the APA

This Court should set aside HUD's Final Decisions because HUD has acted arbitrarily and capriciously, failed to support its decision with the requisite evidence, failed to follow its own procedures, failed to work cooperatively with the County, singled out the County for

[6] Both cases cited here refer to 5 U.S.C. § 1009 which has been renumbered 5 U.S.C. § 705.

particularly harsh and unfair treatment, and failed to provide the County with required due process. *See* 5 U.S.C. § 706(2)(A).

The APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Such review is limited to "to the extent that ... (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); 5 U.S.C. § 702. With respect to the first exemption, there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner,* 387 U.S. 136, 141 (1967) (quoting *Rusk v. Cort,* 369 U.S. 367, 380 (1962)), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 105 (1977). The second exemption "is applicable 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 Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971).[7]

Here, the Act and the implementing regulations do not preclude judicial review of the Final Decisions. *See Bowen,* 476 U.S. at 670 (1986) (APA allows judicial review "except to the extent that ... (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,"). The Act and regulations were designed to provide protection to PHAs from premature takeovers. For example, the Public Housing regulations require a cure period and provide other remedies and procedures to protect PHAs:

> Before taking further action, except in cases of apparent fraud or criminality, and/or in cases where emergency conditions exist posing an imminent threat to

[7] Further, Courts may properly force agencies to follow even internal agency regulations issued without APA rulemaking where failure to enforce such regulations would adversely affect "[substantive] rights of individuals." *Morton v. Ruiz,* 415 U.S. 199, 232 (1974); *Sierra Club v. Martin,* 168 F.3d 1, 4 (11th Cir. 1999).

> the life, health, or safety of residents, ***HUD shall afford the PHA a timely opportunity to initiate corrective action, including the remedies and procedures available to PHAs designated as troubled PHAs,*** or to demonstrate that the information is incorrect.

24 C.F.R. § 902.79(b) (emphasis added).[8]

Here, the Public Housing Notice and the Final Decision do not find any existence of apparent fraud or criminality, and/or emergency conditions posing an imminent threat to the life, health, or safety of residents, that would permit it to refuse, as it has done here, the County a timely opportunity to initiate corrective action including the remedies and procedures available to PHAs designated as troubled PHAs. Instead, HUD's Notice provided a fifteen (15) day cure period, which again demonstrates HUD's disregard for its regulations. At a minimum, if HUD had followed its regulations and afforded the County "the remedies and procedures available to PHAs designated as troubled PHAs," including the cure periods relevant to such PHAs, HUD would have been required to provide over one (1) year for the County to conduct a cure. *See* 24 C.F. R. §§ 902.75(d)(1)and (d)(2).[9] HUD failed to do so, which alone justifies reversal.

There is also a second obvious basis for reversal. HUD's Final Decisions do not provide any nexus between the alleged violations (mostly accounting errors and the Section 8 backlogs)

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[8] Similarly, under the Section 8 regulations, HUD must give PHAs an opportunity to take corrective action. The regulations state that HUD must first notice the PHA of any know deficiencies no later than 120 calendar days after the end of the PHA's fiscal year of its SEMAP scores and of its overall SEMAP performance rating, e.g. high performer, standard performer or troubled performer. The notice must require the PHA to correct the identified deficiencies within forty-five (45) days. 24 C.F.R. § 985.105(b). If the PHA fails to correct a SEMAP deficiency within this period, HUD may require the PHA to submit a corrective action plan, which is subject to HUD's approval. 24 C.F.R. § 985.105(f); 24 C.F.R. § 985.106(c). In the event the PHA fails to correct the identified deficiencies or fails to prepare and implement the corrective plan, HUD may determine that such inaction constitutes a default under the Section 8 ACC. 24 C.F.R. § 985.109.

[9] For instance, under PHAS, if it is determined that based on the identified deficiencies, a PHA is a troubled performer, HUD's Real Estate Assessment Center ("REAC") "shall" refer the PHA to HUD's Troubled Agency Recovery Center for remedial action, which may include a referral to the local HUD office for oversight and monitoring. *See* 24 C.F.R. § 902.75(a). In addition, within thirty (30) days of the troubled performer notification, HUD is required to prepare a Memorandum of Agreement ("MOA"), which is a binding two (2) year contractual agreement between HUD and the PHA. During the first year of the PHA the PHA shall improve its performance under PHAS and achieve a PHAS score of at least fifty percent (50%). *See* 24 C.F.R. § 902.75(d)(1). Upon the close of the second year, the PHA shall improve its performance and achieve an overall PHAS score of at least sixty percent (60%). *See* 24 C.F.R. § 902.75(d)(2).

and the chosen remedy, which is as extreme as possible (a full-fledged takeover). In particular, HUD does not explain why these alleged violations could not be corrected with the County maintaining control. The lack of any nexus or explanation alone justified reversal. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) ("Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate <u>any rational connection</u> between the facts found and the choice made.") (emphasis added); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Alabama Tombigbee Rivers Coalition v. Kempthorne* 2007 WL 414327 (11th Cir. 2007). Likewise, HUD's decision to choose the most extreme remedy, without providing any rational or factual support, is arbitrary and capricious and must be reversed.

Finally, HUD also acted in a manner that was a clear abuse of discretion. Indeed, there is no indication that HUD exercised discretion here whatsoever. Notwithstanding the fact that the County has been aggressively addressing all of the issues identified by HUD for more than a year, statements made by HUD officials indicate that HUD intended from the outset to take over the Housing Programs. In fact, prior to receiving the County's response, Deputy Secretary Bernardi is quoted as saying, "the decision [to take over] has been made." Cpl., Ex. L; *see also* Aff. of George Burgess, Ex. C. Additionally, HUD's attempt to force the County to execute the CEA underscores its predetermined goal to take over the Housing Department and the Housing Programs without affording the County its rights. In fact the proposed CEA would have waived the County's procedural rights and required the County to agree to the removal of the Board, elimination of the County Attorney Office as general counsel, to turn over the Housing

Department and the Housing Programs to HUD and its administrator, and to establish an independent PHA. *See* Cpl., Ex. I. [10]

Where an agency has promulgated regulations and procedures for implementing a statutory scheme, the agency must "scrupulously follow" those regulations and procedures. *Sierra Club v. Martin,* 168 F.3d 1, 4 (11 Cir.1999). An agency decision issued without adherence to its own regulations must be overturned as arbitrary and capricious. *Id.* HUD has not scrupulously followed its regulations and procedures, and therefore the County is entitled to a stay of HUD's actions or in the alternative a preliminary injunction.

**B. HUD's Determination that the County is in Substantial Default Under the ACCs is Arbitrary, Capricious and Contrary to Law.**

HUD's determination that the County is in "substantial default" is arbitrary, capricious, and contrary to law. "Substantial default" is defined in Section 17 (B) of the Public Housing ACC, as "a serious and material violation of any one or more of the covenants in this ACC." *See* Cpl., Ex. C at 12; *see also* 42 U.S.C. § 1437d(g)(1) (stating that substantial default shall be defined in the ACC).

The following are examples of substantial default events or occurrences, according to Section 17(B) of the Public Housing ACC:

> (1) failure to maintain and operate the project(s) under this ACC in a decent, safe and sanitary manner; (2) the disposition or encumbrance of any project or portion thereof without HUD approval; (3) failure of the HA to comply with any civil rights requirements applicable to the HA and the project(s); (4) abandonment of any project by the HA, or if the powers of the HA to operate the project(s) in

[10] Ironically, the very agreement that HUD proposed that the County enter into is not sanctioned by the Act or the regulations. In fact, the only agreement that is authorized under the regulations is a MOA, which does not require the removal of the Board, the County Attorney's Office as general counsel, or a takeover of the Housing Department. *See* 24 C.F.R. § 902.75. Moreover, the regulations provide for two instances when HUD can effectively take over a PHA. First, if a PHA refuses to execute a MOA or does not meet the MOA requirements, HUD can initiate the judicial or administrative appointment of a receiver. *See* 24 C.F.R. § 902.77. Second, HUD can initiate an intervention pursuant to 24 C.F.R. §§ 902.79(4) and 902.83, but only after HUD has demonstrated that intervention is required. HUD is not entitled to place the County in receivership or to intervene since the requirements of the regulations have not been met.

> accordance with the provisions of this ACC are curtailed or limited to an extent that will prevent the accomplishment of the objectives of this ACC; (5)failure to carry out modernization or development in a timely, efficient and effective manner; and (6) termination of tax exemption (either real or personal property) on behalf of a project covered under this ACC.

None of HUD's allegations against the County resemble any of these examples. *See* Cpl., Exs. A and B. The Public Housing Final Decision is based upon three alleged violations which HUD claims constitute a default of the Public Housing ACC. The three violations HUD cites are: 1) Material Accounting Errors in Annual Financial Statements from 2003 to 2006; 2) Allocation of Program Costs in Violation of 24 C.F.R. § 85.22 and OMB Circular A-87; and 3) Failure to Account for HOPE VI Expenditures in Violation of 24 C.F.R. § 5.801. None of these violations constitute a default and cannot be the basis of HUD's hostile takeover of the County because ***all three violations have already been cured.*** *See* Aff. of Kris Warren, Ex. A.

The Section 8 Final Decision is based upon two alleged violations that HUD claims constitute a default of the Section 8 ACC. The two violations HUD cites are: 1) Systemic Failure to Annually Reexamine Section 8 Tenants, in Violation of Sections 3(a), 8(c)(3), and 8(o)(5) of the United States Housing Act of 1937 and 24 C.F.R. § 982.516(a); and 2) MDHA's Financial Statements Have Violated Section 8 ACC, Sections 10(a) and 14(a), and 24 C.F.R. § 982.158(a). The second allegation cannot be grounds for finding the County in default because this alleged violation has already been cured. *See* Aff. of Kris Warren, Ex. A.[11]

In the Notices, HUD directed the County to cure its violations. *See* Cpl., Exs. J and K. The County *did* cure them, and now HUD claims the cure itself constitutes a substantial default

[11] Indeed, all but one of HUD's allegations involves the County's financial statements. HUD attacks the County's *adjustments* to its financial statements, and attempts to take over the Housing Department based on past errors that HUD argues leaves the County's financial accounting unreliable. HUD's conclusion that the County's financial records are unreliable due to the County's prior period adjustments to correct past reporting errors directly contradicts HUD's own Real Estate Assessment Center Financial Data Schedule Line Definitions and Cross Walk Guide (http://www.hud.gov/offices/reac/products/fass/fass_pdf/fds_ln_def_gd_2006.pdf), which clearly asserts that prior period adjustments are acceptable ways to correct mistakes in financial statements.

of the Public Housing ACC and default of the Section 8 ACC. This is an improper determination and is arbitrary and capricious. To consider the cure a cause for treatment — as grounds for taking possession — is illogical and makes a mockery of the federal regulations requiring HUD to allow the County to cure. As demonstrated herein, the right to cure is a fundamental requirement of the regulations. *See* 24 C.F.R. §§ 902.79(b); 985.105; 985.106; and 985.107; *see also* Public Housing ACC § 17(C). Therefore, the alleged violations the County already cured cannot constitute a substantial default or default.

This point is further emphasized by the Housing Act, 42 U.S.C. § 1437d(g)(2)(i), which requires HUD, if it does take possession, **to return possession to the housing agency after the agency has cured**. If HUD can take possession based upon violations already cured, then HUD would have no duty — ever — to return possession to the agency. Such an illogical interpretation by HUD of the Housing Act is clearly arbitrary, capricious and an abuse of HUD's discretion.

Furthermore, Section 17(C) of the Public Housing ACC requires HUD to "provide a specific timeframe for the [housing authority] to cure the substantial default, ***considering the nature of the default***." HUD claims to have provided the County an opportunity to cure. *See* Cpl., Exs. A at 1; B at 1. HUD states that it allowed the County fifteen (15) days to cure. *Id.* This stated cure period inconsistent with the regulations. *See* 24 C.F.R. part 902 and 985. The County did cure all but one violation. But even those *cured* violations were considered by HUD as grounds for declaring the County in substantial default. *See* Cpl., Exs. A at 1; B at 1. According to this reasoning, HUD can command the County to cure and then take the County

over for curing. This renders *the stated cure period meaningless.*[12]

The unreasonableness of HUD's cure period is underscored by comparing it to another case where HUD gave a reasonable cure period. In *Velez v. Kemp,* 1993 WL 45989, at 1 (E.D. Pa. 1993), HUD provided the housing authority ***seven (7) months to cure*** serious violations as failing to maintain safe and sanitary housing, engaging in discriminatory practices, and failing to perform routine inspections. Indeed, HUD is required to provide the County the same remedies, rights and processes availed to agencies designated "troubled." 24 C.F.R. § 902.79(b). A "troubled" agency has ***two years to cure.*** 24 C.F.R. § 902.75(g)(2).[13]

With regard to HUD's allegation concerning the County's backlog of reexaminations of Section 8 tenants, all PHAs "must conduct a recertification of family income and composition at least annually." 24 C.F.R. § 982.516(a). HUD alleges in the undated Section 8 Notice that the County was eighty-five percent (85%) behind on its recertifications. *See* Cpl., Ex. K at 2. The County acknowledged that it was behind on recertifications, but challenged the accuracy of HUD's statement that the Housing Department was eighty-five percent (85%) behind. In fact, the actual number was actually approximately forty percent (40%). *See* Cpl., Ex. M at 7.

Since submitting its response to the Notices, the County has aggressively tackled this issue by providing additional training to its employees, hiring a consulting firm to assist in the recertification process and establishing a quality control process to ensure the accuracy of each recertification. *See* Affidavit of Kris Warren, Ex. A. As a result of these efforts, the backlog has

[12]Additionally, for the one violation the County has not completely cured — the backlog of Section 8 reexaminations — fifteen (15) days to cure is inconsistent with the regulations. The regulation requires HUD to provide the County a minimum of forty-five (45) days to cure and authorizes HUD to permit a PHA to prepare a corrective action plan that must be implemented by the PHA. 24 C.F.R. § 985.106(c).

[13] In the State of Florida, the implied covenant of good faith and fair dealing is a part of every contract, even where there was no explicit right to cure or correct a contract. *Sibran v. B.P. Products, North America, Inc.*, 375 F. Supp. 2d 1355, 1359 (S.D. Fla. 2005). One party cannot capriciously exercise discretion accorded it under a contract so as to thwart the contracting party's reasonable expectations. *Id.* at 1360. Courts have recognized that this doctrine of implied covenant of good faith would accord a party a reasonable right to cure, prior to a determination of breach. *E.g., Mercury Marine v. Clear River Construction Co., Inc.,* 839 So. 2d 508 (Miss. 2003).

considerably decreased. Thus, on its own, the County has taken steps towards bringing the annual recertifications current, while also ensuring that an additional backlog is not created as annual recertifications come due.

More importantly, HUD's Section 8 Final Decision is based on outdated data and does not account for the recertifications that have been completed since May 2007, leaving over two months of progress unrecognized. Indeed, the County has committed to reducing the backlog by September 30, 2007 to a level that is acceptable under the federal regulations, which is five percent (5%) or less. *See* 24 C.F.R. § 985.3(j). The steps taken by the County are consistent with a corrective action plan under 24 C.F.R. §§ 985.105, 985.106 or 985.107.

**C. HUD Failed to Follow Its Procedures**

HUD's directives require HUD to ensure that its "cooperative problem-solving" procedures are carried out by both HUD and the PHA. The cooperative problem solving process underscores the importance of assisting the PHA in remedying problems in its operations. In this regard, **HUD is supposed to be a partner** with the PHA in bringing about improvements in performance and/or compliance. *See* Cpl, Ex. N, Ch. 2. HUD's directives further recognize that even a PHA with serious and longstanding operational difficulties can turn around if it has the capacity, intent and necessary local community and resident support to proceed with corrective actions necessary to address identified problems. *Id.* at Ch. 6.

As with the Act and regulations, HUD's directives[14] provide it with options short of a takeover, including but not limited to requiring the County to enter into a Memorandum of Agreement pursuant to 24 C.F.R. § 902.75, which would set forth reasonable milestones to address issues related to public housing. These include requiring an Operational Improvement

[14] HUD has published directives, including the HUD Handbook, which clarifies or elaborates on established policy, and are used to issue procedures and guidance. *Id.* at Ch. 1. These directives must be consistent with the regulations. *Id.*

Plan; providing the required technical assistance to the County; selecting or participating in the selection of an Alternate Management Entity to provide technical assistance or other services; or requiring a Corrective Action Plan for any identified deficiencies in the Section 8 program.

Further, HUD Handbook 7460.7 states:

> [T]he declaration of substantial default or breach of contract is a drastic measure and should only be considered when: (1) PHA [Public Housing Authority] performance problems are severe, pervasive, and systemic; (2) the PHA and/or the locality consistently and vigorously resists problem-solving efforts; and (3) other remedies have been exhausted or determined inappropriate because of the urgent need to take immediate action.[15]

None of these factors exist here. The County has not resisted problem-solving efforts, other remedies have not been exhausted, and other remedies would be more appropriate.

In fact, HUD's treatment of other PHAs are considerably different than its present treatment of the County. For instance, HUD did not take over the Newark Housing Authority even though that agency misspent nearly $20 million in federal funds, including $3.9 million used to buy property downtown for construction of a New Jersey Devils hockey arena.[16] Newark had also failed to assess eligibility of residents, which is similar or the same as HUD's allegation against the County for the backlog of Section 8 reexaminations. Misusing federal funds is an egregious charge, yet HUD did not take possession. The County has not been accused of misspending any federal funds.

[15] Receiverships or takeovers at a PHA have generally resulted from longstanding, severe management problems that persisted despite repeated interventions by HUD and have led to the deterioration of the PHAs housing stock. Because receiverships or takeovers generally involve the complete takeover of the PHA's management and operations, HUD views them as a last resort and has imposed them only when interventions such as technical assistance or sanctions have failed. The actions taken by HUD against the County are drastic measures that are not customarily employed even against PHAs with a pervasive history of disregarding the health, safety and welfare of the residents that these housing programs are designed to assist. See Ex. D.

[16] Damien Cave, *Pact Will Change Newark Housing Agency*, NEW YORK TIMES, May 13, 2006.

Additionally, where the Gary Housing Authority failed entirely to submit financial statements, HUD did not institute a takeover.[17] Instead, HUD designated them "troubled" and instructed the housing authority on four areas where they were expected to improve. *Id.* The actions taken by this PHA are much more egregious than the County's violation: submitting financial statements and then correcting them.[18]

In the end, HUD has failed to work cooperatively with the County and failed to follow its own directive of employing the option of a takeover as a last resort. *See* HUD's Handbook 7460.7; 24 C.F.R. § 902.79(b); 24 C.F.R. § 902.75. Such egregious failures make HUD's Final Decisions arbitrary and capricious and an abuse of discretion. *See* 5 U.S.C.A. § 706. Thus, HUD's Final Decisions should be reversed. *Id.* Therefore, the County is entitled to a stay of HUD's action or in the alternative a preliminary injunction.

## II. THE COUNTY WILL SUFFER IRREPARABLE INJURY IF HUD IMPLEMENTS ITS FINAL DECISION.

The loss of control over a significant County department, by itself, constitutes irreparable harm that cannot possibly be repaired by money damages. This is particularly true where the County has recently spent tremendous time, money, and other resources in creating an expert management team to run and revitalize its Housing Department.

Moreover, approximately 545 employees work in the Housing Department. If HUD is allowed to implement its final decisions, HUD will be able to abrogate the collective bargaining

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[17] Jon Seidel, *Gary Housing Authority gets recovery plan from U.S. Agency*, POST-TRIBUNE, Mar. 23, 2007, *available at* http://www.post-trib.com/news/309904,ghud.articleprint.

[18] "In 1996, similar to the Housing Department, THA was both considered a standard performer and investigated by the HUD Office of Inspector General ("OIG") which had issued findings of various problems including: reported financials; allocation and accounting of federal dollars to non-profits; actual control of non-profits; is management of development funds; and the appearance of conflicts of interest. THA was provided an opportunity to respond to the findings. HUD created a corrective action plan based upon the OIG findings, worked with THA to resolve the problems, and tracked THA's progress. The majority of the findings were closed within two (2) years. However unlike HUD's interaction with the Housing Department, there was never any discussion or threat of takeover, or receivership. See Aff. of Kris Warren, Ex. A.

agreement that these employees have with the County. [19] 42 U.S.C. § 1437d(j)(3)(D)(i)(V). HUD has given the County no assurances as to how these employees would be treated. In fact, Assistant Secretary Cabrera stated publicly that if HUD did fire these employees, this would be the County's problem, not HUD's.[20] *See* Orlando Cabrera Interview, The Jim DeFede Show, AM 940, Aug. 9, 2006. Putting 545 County employees at risk of being fired or losing their health and retirement benefits and disregarding their collective bargaining agreements constitutes irreparable harm to the County and its employees.

Furthermore, if HUD does take possession of any of the County's assets, HUD could sell these assets, including valuable riverfront property where public housing projects sit. 42 U.S.C. § 1437d(j)(3)(D)(i)(II). HUD could build market-rate housing, and could privatize the public housing stock and/or programs. Thus, HUD would seize County assets, control them, privatize them, and the County would *never regain possession or control.* Clearly, this represents irreparable harm to the County and the public.[21]

## III. IRREPARABLE HARM TO THE COUNTY FAR OUTWEIGHS ANY HARM TO HUD IF A STAY IS GRANTED.

HUD can claim no injury by being forced to adhere to federal statutes, federal regulations and HUD's own guidelines and contractual obligations, nor would the public be disserved by such a result. HUD, as an administrative agency, "is bound by its own regulations" and the

[19] After HUD took over New Orleans, HUD disregarded collective bargaining agreements. Regardless of the emergency situation that existed in New Orleans, this fact is relevant for it represents the *power* of HUD and the irreparable injury that will result from this use of power.

[20] *See* http://www.am940southflorida.com/pages/jimdefede.html?page=4. Scroll to August 9, 2007, click on "HUD Assistant Secretary Orlando Cabrera."

[21] Finally, the County's liability exposure is increased since it would have no control over the actions of HUD or the funds required to settle disputes. Pursuant to 42 U.S.C. §1437d(j)(3)(H), if the Secretary takes possession of a public housing agency, the Secretary shall be deemed to be acting not in its official capacity, but in the capacity of the County, and any liability incurred, regardless of whether the incident giving rise to that liability occurred while the Secretary was in possession, shall be the liability of the County. This harm is particularly acute where HUD has the power to ignore or abrogate all contracts entered into between the County and third parties. 42 U.S.C.A. § 1347d(j)(3)(D)(i)(I).

failure by HUD "to act in compliance with its own regulations" is "fatal" to HUD's administrative action. *Frisby v. U.S. Dept. of Housing and Urban Dev*., 755 F.2d 1052, 1055-56 (3d Cir. 1985). Indeed, these regulations and guidelines were enacted to provide procedural safeguards to housing authorities and to ensure that a federal government takeover occurs only as a last resort. *Id.* No harm will result if a stay is granted.

## IV. A STAY WILL NOT BE ADVERSE TO THE PUBLIC INTEREST.

Granting a stay to allow this Court to review the County's Second Verified Complaint will not be adverse to the public. In fact, the public is better served by granting the stay. Members of the public, including residents assisted through the County Housing Programs, have much to lose by a HUD takeover. Presently, the people of Miami-Dade County, through their right to vote, have an impact on the housing department by determining who is elected to the Board of County Commissioners, the body that governs the housing department, and who is elected the Mayor, the individual who controls the employees of the housing department. Miami-Dade County Home Rule Charter, Art. 1, §1.01 & Art. 5 §5.01 (2006). HUD is an agency that is headquartered in Washington D.C. and insulated from the vote of the people of Miami-Dade County. The residents, therefore, lose a substantial amount of control over the housing department and its programs should HUD take over.

For the foregoing reason, Miami-Dade County respectfully requests that its Motion to Stay Agency Action or a Preliminary Injunction be granted.

RESPECTFULLY SUBMITTED,

ABIGAIL PRICE-WILLIAMS
ACTING MIAMI-DADE COUNTY ATTORNEY

BY: s/Cynthia Johnson-Stacks
Cynthia Johnson-Stacks, Terrence A. Smith,
Craig E. Leen, and David Stephen Hope
Assistant County Attorneys
Florida Bar Nos. 372234, 847471,
701696, and 87718
Stephen P. Clark Center
111 N.W. First Street, Suite 2810
Miami, FL 33128-1993
Tel. No. (305) 375-5151
Fax No. (305) 375-5611
Email: CJS2@miamidade.gov
ASMITH2@miamidade.gov
CEL1@miamidade.gov
DHOPE@miamidade.gov

## CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2007 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Cynthia Johnson-Stacks
Assistant County Attorney

## SERVICE LIST

**Case No. 07-21259-CIV-GRAHAM/O'SULLIVAN**
**United States District Court, Southern District of Florida**

**Counsel for Miami-Dade County**

Cynthia Johnson-Stacks, Terrence Smith
Craig E. Leen, and David Stephen Hope
Assistant County Attorneys
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: (305) 375-5151
Facsimile: (305) 375-5611
Email: CJS2@miamidade.gov
ASMITH2@miamidade.gov
CEL1@miamidade.gov
DHOPE@miamidade.gov
By Notice of Electronic Filing

**Counsel for Defendants**

Tamara Ulrich
United States Department of Justice
20 Massachusetts Avenue NW
Washington, DC 20530
Telephone: (202) 305-1432
Facsimile: (202) 616-8470
Email: tamara.ulrich@usdoj.gov
By Notice of Electronic Filing