U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 19, 2008

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: Linares, et al. v. Secretary of Housing and Urban Development, *et al.*, No. CV-06-876 (E.D.N.Y.)

Dear Madam Speaker:

In accordance with 28 U.S.C. 530D, we want to advise you that the Solicitor General has decided not to appeal the final judgment entered by the United States District Court for the Eastern District of New York in this case, which declares that a "no cause" eviction procedure authorized by 24 C.F.R. 247.10, issued by the Department of Housing and Urban Development (HUD) pursuant to its authority under 12 U.S.C. 1710(g), violates due process. See 28 U.S.C. 530D(a)(1)(B)(ii) (requiring congressional notification when, *inter alia*, the Department of Justice determines "not to appeal * * * any judicial * * * determination adversely affecting the constitutionality of any" regulation).

Under Section 203(k) of the National Housing Act, 12 U.S.C. 1709(k), HUD insures mortgages extended by banks to finance the purchase and rehabilitation of one-to-four-family properties. While Section 203(k) is predominantly a home-ownership program under which borrowers are required to reside in the insured properties, certain public and private non-profit entities intending to sell or lease the mortgaged properties to low- or moderate-income persons may also qualify for mortgages.

During 1998 and 1999, 721 properties in and around New York City were purchased by non-profit organizations using Section 203(k) mortgages. Those non-profit entities acquired properties at inflated prices and with inflated repair escrow accounts, and then they failed to rehabilitate them and to fulfill their financial obligations. As a consequence, there were widespread defaults and foreclosures, and HUD took title to over 500 properties, both vacant and occupied. Under HUD regulations governing single family mortgage insurance programs, in the event of foreclosure, single family properties are to be conveyed vacant to HUD — unless the

Secretary consents to accept the property occupied — in order to facilitate resale to others seeking home ownership. In this case, because of certain exigencies, HUD accepted conveyance of the properties, whether occupied or not, so that it could, together with the City, quickly develop a plan for their rehabilitation and resale.

In January 2002, pursuant to the rehabilitation and resale plan, HUD entered into a Memorandum of Understanding ("MOU") with New York City's Department of Housing Preservation and Development in which the Section 203(k) properties (also referred to as the "MOU Properties") were bundled together in packages of properties containing five housing units or more for the purpose of resale to developers under grants made available through HUD's Upfront Grant program. In February 2006, HUD served various occupants of the MOU properties, including plaintiffs in this case, with a notice to vacate at the end of the lease term or a notice to quit for failing to enter into a lease, or risk state eviction proceedings. Notices of this type are not required to state the reason why the evictions are sought. In response to the notices, plaintiffs filed this suit, seeking to enjoin HUD from proceeding with "no cause" evictions. The district court found that 24 C.F.R. 247.10 violates due process and declared the regulatory provision unconstitutional on its face. Although the court enjoined enforcement of the regulation in an order dated May 5, 2008, the court's final judgment, dated July 17, 2008, only declares the regulation unconstitutional and dismisses the case. Copies of the relevant district court opinions and orders are enclosed.

The Solicitor General has decided against appealing the district court's judgment in this case, but he has not made any decision to forgo a defense of the regulation in other circumstances. This case was not a class action, and it is not clear that the district court's final judgment, which declares the regulation invalid, could properly have binding effect beyond the four named plaintiffs. Further, there is a question of mootness, since at the time of the decision either the plaintiffs had voluntarily vacated their units or the property had been sold by HUD pursuant to the MOU. The status and scope of the district court's injunction also are unclear, but, even assuming that it has some continuing effect, HUD would not interpret it as extending beyond the controversy in this case. We also note that affirmance would create adverse circuit precedent on this issue.

In addition, HUD has informed the Office of the Solicitor General that the impact of the decision is minimal or nonexistent for several interrelated reasons. Specifically, the regulation at issue is rarely used. With respect to New York City, only an extremely small number of MOU properties remain in HUD's possession. Finally, HUD has assured the Office of the Solicitor General that any concerns about 24 C.F.R. 247.10 can be addressed through agency rulemaking.

The government filed a protective notice of appeal on September 15, 2008, and the government's brief as appellant is currently due on December 17, 2008. The government intends to dismiss the appeal before the due date for the brief.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures