IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 19-008041 CA 21

FXE FUTBOL LLC, a Florida limited liability company,

Plaintiff,

vs.

CITY OF FORT LAUDERDALE, a Florida municipal corporation,

and

MIAMI BECKHAM UNITED LLC, a Florida limited liability company,

Defendants.

_____/

DEFENDANT MIAMI BECKHAM UNITED LLC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY INJUNCTION

Defendant Miami Beckham United LLC ("Inter Miami" or "Defendant"), by and through undersigned counsel, responds in opposition to Plaintiff FXE Futbol LLC ("FXE" or "Plaintiff")'s Emergency Motion for Temporary Injunction filed with the Court on April 24, 2019 (the "Motion"), asserts its right to an evidentiary hearing in relation to Plaintiff's Motion, and, further, states as follows:[1]

[1] Inter Miami adopts and incorporates Defendant, City of Fort Lauderdale's Response in Opposition to Plaintiff's Emergency Motion for Temporary Injunction filed on April 29, 2019.

OVERVIEW

The City of Fort Lauderdale ("City")'s decision to demolish Lockhart Stadium – property owned solely by the City – is entirely within the discretionary functions of the legislative and/or executive branches of local government and, in the absence of facts not present in this case, unreviewable by the courts. Plaintiff does not allege possession of any property right or contractual relationship related to the continued maintenance of the existing stadium, but nonetheless seeks to halt its demolition. In lieu of a legally recognized interest that endows the Plaintiff with the right to override municipal action, Plaintiff attempts to base its Motion (and its Complaint) exclusively on Section 255.065, Florida Statutes, which implements a process for encouraging and facilitating public-private partnerships ("P3 Statute"). The P3 Statute, however, does not endow (unsuccessful) participants with the right to sue and challenge the process which it creates or, as in this specific request for injunctive relief, challenge discretionary governmental decisions which might arise out of the process.

Against this factual backdrop, several cases illustrate why this Motion has no merit. First, *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) and *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013) confirm that the doctrine of separation of powers bars Plaintiff from using the judicial system to interfere with the City's discretionary decision to demolish the stadium. Second, *Herbits v. City of Miami*, 207 So. 3d 274 (Fla. 3d DCA 2016), is clearly dispositive because, without a legally cognizable injury, Plaintiff lacks standing. Finally, *Ford v. City of St. Petersburg, FL., Inc.*, Case No. 522012 CA 010312, 2013 WL 9668711 (Fla. 6th Cir. Ct., April 5, 2013), and *Reese v. Miami-Dade County*, 242 F.

Supp. 2d 1292, 1309 (S.D. Fla. 2002), both illustrate the high burden for injunctive relief when a citizen seeks to interfere with government's decision to demolish a building that it owns.[2]

Finally, and importantly, Plaintiff's Motion fails to satisfy any of the four requisite elements for a temporary injunction, much less all of them as the law requires. By advancing self-interest over community interest, Plaintiff's Motion seeks to deprive the City and its residents of the benefits of bringing a world-class soccer organization to the City. Injunctive relief is thus neither necessary nor justified, and Plaintiff's Motion should be denied.

RELEVANT FACTS

A. The City-Owned Property

The City owns Parcels 19B, 25, 26 and 27 at Fort Lauderdale Executive Airport (the "Property"). The Property is the site of Lockhart Stadium, a stadium that is currently in a state of disuse and disrepair ("Stadium").

B. Inter Miami Submitted an Unsolicited Proposal Relating to the Property

David Beckham and his partners (including Inter Miami) are in the process of bringing Major League Soccer to South Florida. On January 28, 2019, Inter Miami submitted to the City an unsolicited proposal pursuant to the P3 Statute to design, construct, occupy, manage, and maintain a state-of-the-art soccer training facility; a multi-purpose 18,000-seat stadium; and a sport centric community destination and public park on the Property ("Inter Miami's Proposal"). Inter Miami's Proposal involved bringing both Major League Soccer and United League Soccer to the City. On February 5, 2019, the City Commission adopted Resolution No. 19-25 and subsequently issued notice advising that the City would accept other proposals for the same project.

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[2] For the Court's convenience, copies of *Ford v. City of St. Petersburg, FL., Inc.* and *Reese v. Miami-Dade County* are attached hereto as **Composite Exhibit A**.

C. Plaintiff Submitted an Alternative Proposal

Subsequent to the City's receipt of Inter Miami's Proposal, Plaintiff submitted its own alternative proposal that contemplated a restoration of the Stadium. On March 19, 2019, at a Commission Conference Meeting, the City heard presentations from the Plaintiff and Inter Miami on their proposals. At no time during the meeting did anyone discuss the presence of asbestos on the Property or object to the selection process. The City decided not to accept Plaintiff's unsolicited proposal.

D. City Approved Interim Agreement with Inter Miami

On April 2, 2019, the City Commission approved an Interim Agreement between the City and Inter Miami by a unanimous 5-0 vote, authorizing Inter Miami to, *inter alia*, test soil, assess environmental damage, and tear down the Stadium ("Interim Agreement"). Importantly, the Interim Agreement does not authorize or involve the transfer or other disposition of City property.

E. The P3 Statute Affords Significant Discretion to the City

The P3 Statute expressly provides for "timely and cost-effective acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of projects serving a public purpose" and that "a public-private partnership has demonstrated that it can meet the needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public." § 255.065(2)(a), Fla. Stat. The P3 Statute further states that it "shall be construed as cumulative and supplemental to any other authority or power vested in or exercised by the governing body of a county, [or] municipality… including those contained in acts of the Legislature." § 255.065(14), Fla. Stat.

The P3 Statute expressly allows governmental entities to enter into "interim agreements" with the private entity prior to entering into a "comprehensive agreement," as defined therein. The provision relating to interim agreements reads as follows:

> Before or in connection with the negotiation of a comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development or operation of the qualifying project. An interim agreement does not obligate the responsible public entity to enter into a comprehensive agreement. **The interim agreement is discretionary** with the parties….

§ 255.065(6), Fla. Stat. (emphasis added).

The P3 Statute allows provisions to be included in an interim agreement that accomplish, *inter alia*, the following:

> Authorize the private entity to commence activities for which it may be compensated related to the proposed qualifying project, including, but not limited to, project planning and development, design, environmental analysis and mitigation, survey, **other activities concerning any part of the proposed qualifying project**, and ascertaining the availability of financing for the proposed facility or facilities.

§ 255.065(6)(a), Fla. Stat. (emphasis added).

The P3 Statute also contains a catch-all provision stating that the interim agreements may "[c]ontain **such other provisions** related to an aspect of the development or operation of a qualifying project **that the responsible public entity and the private entity deem appropriate**." § 255.065(6)(c), Fla. Stat. (emphasis added).

Lastly, the P3 Statute expressly permits the public entity to "rank the proposals received in the order of **preference"** and to freely reject a proposal at any point until a contract with the proposer is executed. *See* § 255.065(5)(c), Fla. Stat. Nothing in the P3 Statute requires the City to accept any proposals received under the P3 Statute. *See id.* ([T]he responsible public entity may reject all proposals at any point in the process until a contract with the proposer is executed.").

ARGUMENT

I. CITY'S DECISION IS UNREVIEWABLE BY THE COURTS

Plaintiff cites to zero authority, and Inter Miami is aware of none, that supports the proposition that a third-party without a legally recognized contractual or property interest in

specific municipally-owned property, such as Plaintiff, may enjoin that municipality from demolishing its own property. As the Florida Supreme Court has recognized, "certain discretionary functions of government are inherent in the act of governing and are immune from suit." *Trianon Park Condo. Ass'n,* 468 So. 2d at 918; *see also id.* at 920 (collecting authorities holding that a governmental entity's decision whether or not to build or modernize a building is a discretionary function with which the judicial branch shall not interfere). As confirmed in *Detournay v. City of Coral Gables*, the doctrine of separation of powers:

> [A]ppl[ies] equally well to injunctions and declaratory actions. Separation of powers is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action. It would be a hollow idea if it applied only to some procedures and not others.

Detournay, 127 So. 3d at 874.

Absent a violation of constitutional or statutory rights, the judicial branch must not interfere with "the discretionary functions of the legislative or executive branches." *Id.*; *see* Art. II, § 3, Fla. Const. (requiring the strict separation of powers among three branches of government); Art. VIII, § 2, Fla. Const. (granting municipalities broad governmental, corporate and proprietary powers to govern "except as otherwise provided by law").

Here, Plaintiff has not asserted that the City violated any constitutional or statutory right (or City Charter provision) related to the City's discretionary decision to demolish the Stadium on its own property, or that Plaintiff has any right to renovate the existing stadium under the P3 process. Nor can it. The City's approval of an unsolicited P3 proposal is purely discretionary. [3]

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[3] While this case does not arise from the traditional procurement context, caselaw addressing the strong judicial deference in the context of municipal selection of competitive bids is instructive here. *See, e.g., Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982) ("In Florida . . . a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.").

See, e.g., § 255.065(5)(c), Fla. Stat. ("[T]he responsible public entity may reject all proposals at any point in the process until a contract with the proposer is executed."). As such, the City's decision to proceed with a proposal under the P3 Statute is a decision that falls within the "discretionary functions of the legislative or executive branches of government." *See id.*; *Detournay*, 127 So. 3d at 873-74.

Moreover, under Section 255.065, Fla. Stat., the City is not required to engage in any negotiations with Plaintiff if the City does not enter into a comprehensive agreement with Inter Miami. The City has decided to demolish Lockhart Stadium, the City's own property, based upon the unanimous passage of the Interim Agreement, which not only permits, but anticipates demolition. [4] In sum, Plaintiff fails to assert that it possesses a legally recognizable statutory or constitutional right as authority for bringing this action and, accordingly, the Court must not disturb the City's discretionary decision relating to its own property and the P3 process.

II. PLAINTIFF LACKS STANDING TO ASSERT THIS CHALLENGE

Standing is a threshold question that this Court must resolve before reaching the merits of the case. *See Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) ("An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the [municipal] authority in question.") (quoting *Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972)). In *Herbits v. City of Miami*, the Third District Court of Appeal relied on *Solares v. City of Miami* and affirmed the dismissal of a complaint alleging the city violated its own charter on the basis that the plaintiff lacked

[4] To the extent that Plaintiff argues otherwise, demolition does not constitute a disposition of an interest in real property. *See, e.g.*, *Ford*, 2013 WL 9668711, at *1 (rejecting citizens efforts to enjoin the city from demolishing a municipal pier building, and holding that demolition was not subject to the city charter because demolition does not constitute a disposition of an interest in real property).

standing. 207 So. 3d 274. While Plaintiff contends an injunction is justified by the legal maxim that "for every wrong, the law provides a remedy," (*see* Mot., 2) the *Herbits* court discussed this principle and concluded that, absent a legally recognizable interest sufficient to establish standing, the plaintiffs' remedy "should be at the polls and not in the courts." *Id.* at 284 (quoting *Paul v. Blake,* 376 So. 2d 256, 259 (Fla. 3d DCA 1979)).

Like in *Herbits*, the Plaintiff here possesses no legally recognized interest sufficient to establish its standing to maintain this action. Most critically, Plaintiff does not allege that it has any ownership and/or possessory right in or to the Property, nor does Plaintiff allege that it is in privity with the City relating to the Property. *See id.*; *Smith v. City of Fort Myers*, 944 So. 2d 1092, 1094 (Fla. 2d DCA 2006) (holding that plaintiff lacked standing to challenge the legality of city's transfer of park (used as the spring training grounds for the Boston Red Sox) to county, where plaintiff alleged no special injury from the city's alleged violation of a Florida statute).

Plaintiff alleges that it submitted an alternative proposal under the P3 Statute. However, the act of submitting an unsolicited alternative proposal to the City under the P3 Statute cannot, and does not, confer upon Plaintiff some legally recognized interest or right. Unlike a traditional competitive bid contest, where a city may be required to issue a contract to the lowest qualified and responsive bidder, as set forth in the P3 Statute, the City maintains absolute discretion to reject or accept all proposals submitted under the Statute. *Compare* § 255.065(5)(c), Fla. Stat. ("[T]he responsible public entity shall rank the proposals received in order of **preference**. . . . [T]he responsible public entity **may reject all proposals at any point** in the process until a contract with the proposer is executed.") (emphasis added), *with* § 255.20(1)(d)(1), Fla. Stat. (2019) ("If the project: [i]s to be awarded based on price, the contract must be awarded to the lowest qualified and responsive bidder in accordance with the applicable county or municipal ordinance or district

resolution and in accordance with the applicable contract documents."); *see City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d 798, 802–03 (Fla. 3d DCA 2002) (holding that bid award violated Florida law because the city was required to "accept the bidder of the lowest responsible bidder who will perform the contract in a manner most beneficial to the City").[5] Because Plaintiff has no right to have its alternative proposal selected by the City, Plaintiff has no right to challenge the City's decision. *See* § 255.065(5)(c), Fla. Stat.

Plaintiff's mere desire to have its alternative proposal selected by the City does not confer upon Plaintiff a legally recognizable interest. *See Fla. Home Builders Ass'n, Inc. v. City of Tallahassee*, 15 So. 3d 612, 613 (Fla. 1st DCA 2009) ("[S]uch speculative possibilities, based on factual assumptions pertaining to events that only might occur at some uncertain time in the future, do not create the necessary standing for declaratory or injunctive relief."); *see also Heath v. Bear Island Homeowners Ass'n, Inc.*, 76 So. 3d 39, 40 (Fla. 4th DCA 2011) ("Quite simply, because this plain language explicitly makes enforcement of the Declaration a purely discretionary decision on the part of the Association, Heath had no clear legal right to an injunction to compel the Association to enforce the terms of the Declaration."). Moreover, the P3 Statute does not create a mechanism for private enforcement. *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003) ("Absent such expression of intent, a private right of action is not implied."); *City of Sarasota v. Windom*, 736 So. 2d 741, 742 (Fla. 2d DCA 1999) ("In the absence of legislative intent to create a private cause of action on behalf of citizens seeking to challenge an allegedly improper traffic control device, we decline to create such a cause of action. Therefore,

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[5] Even where a second lowest bidder does have standing to file a bid protest lawsuit (again, under facts neither present or alleged in this case) "strong judicial deference" is accorded to an "agency's decisions with respect to competitively bid contracts." *See Miami-Dade County v. Church & Tower, Inc.*, 715 So. 2d 1084, 1089-90 (Fla. 3d DCA 1998) (finding that a disappointed bidder was not entitled to a temporary injunction because it could not show "arbitrary or capricious action, much less illegality, fraud, oppression, or misconduct").

the plaintiffs possess no private cause of action and, accordingly, lack standing to institute such a claim."); *compare* § 255.20, Fla. Stat. (2019) ("Any qualified contractor or vendor who could have been awarded the project had the project been competitively bid has standing to challenge a local government's actions to determine if the local government has complied with this section."), and § 163.3215, Fla. Stat. (2019) ("Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on[] a development order…").

Simply put, Plaintiff has no right, no injury, and no standing. The failure to satisfy this threshold question requires denial of Plaintiff's Motion. *See, e.g., Herbits*, 207 So. 3d at 284-287 ("Because these Plaintiffs and other members of the general public are neither parties to these Agreements nor third party beneficiaries thereunder, they have no right to challenge the Agreements, or to seek a declaration from the Court that the Agreements should be terminated.").

III. PLAINTIFF DOES NOT AND CANNOT SATISFY THE LEGAL REQUIREMENTS FOR INJUNCTIVE RELIEF

A. The Legal Standard

A temporary injunction is a drastic and extraordinary remedy which should be granted with extreme caution. *Mercado Oriental, Inc. v. Marin*, 725 So. 2d 468, 469 (Fla. 3d DCA 1999); *see North Dade Water Co. v. Adken Land Co.*, 114 So. 2d 347, 348 (Fla. 3d DCA 1959) ("The nature of a temporary injunction is such that it is granted sparingly and cautiously, taking into consideration the beneficial results on one hand and the probable detriment on the other.").

A party seeking a temporary injunction must both plead *and* prove:

(1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law;

(2) the substantial likelihood of success on the merits;

(3) that the threatened injury to the plaintiff outweighs any possible harm to the defendant; ***and***

(4) that the granting of a temporary injunction will not disserve the public interest.

Cordis Corp. v. Prooslin, 482 So. 2d 489-90 (Fla. 3d DCA 1986); *see Hiles v. Auto Bahn Federation, Inc.*, 498 So. 2d 997, 998 (Fla. 4th DCA 1986) (stating that a temporary injunction should be granted only after the moving party has ***alleged and proved*** facts entitling him to relief).

Before a Court can enter an injunction, all four criteria must be met by "[c]lear, definite, and unequivocally sufficient factual findings." *Wade v. Brown*, 928 So. 2d 1260, 1261 (Fla. 4th DCA 2006); *Bellach v. Huggs of Naples, Inc.*, 704 So. 2d 679, 680 (Fla. 2d DCA 1997) (remanding with instructions to the trial court to either make specific findings on each criteria or deny the injunction); *see Santos v. Tampa Med. Supply*, 857 So. 2d 315, 316 (Fla. 2d DCA 2003) ("The findings must do more than parrot each tine of the four-prong test.") (citation omitted). Where a trial court enters an injunction without proof of the essential elements listed above, the injunction order amounts to an abuse of discretion and will be reversed on appeal. *Florida E. Coast Ry. Co. v. City of Miami*, 299 So. 2d 152, 154 (Fla. 3d DCA 1974).

In the context of enjoining government from demolishing their own property, courts have rejected injunctive relief absent the violation of some constitutional right or irreparable harm. For example, in *Ford v. City of St. Petersburg, FL., Inc.*, the circuit court rejected, and the Second District confirmed, citizens efforts to enjoin the city from demolishing a municipal pier building, holding that demolition was not subject to the city charter because demolition does not constitute a disposition of an interest in real property. 2013 WL 9668711, at *1. And, reinforcing the high bar to injunctive relief, in *Reese v. Miami-Dade County*, the Southern District denied injunctive relief to plaintiffs that sought to prevent demolition of public housing where *they lived*. 242 F.

Supp. 2d at 1309. The court found that the plaintiffs failed to show irreparable harm because they could relocate from public housing or could return to the new development. *Id.*

B. Plaintiff Fails to Satisfy all Four Criteria for Injunctive Relief

Injunction cases are all or nothing. Either the injunction-seeker demonstrates **all** four of the requisite elements to a temporary injunction, or (s)he loses. Here, Plaintiff fails to satisfy any of the requisite elements much less all of them. Therefore, Plaintiff is not entitled to a temporary injunction. In sum:

- **No Substantial Likelihood of Success**: Plaintiff cannot demonstrate a clear legal right entitling it to mandamus, declaratory relief, tortious interference, injurious falsehood, or an injunction. As set forth above, Plaintiff's claims are barred by the doctrine of separation of powers and failure to demonstrate standing. To be sure, mandamus will not lie to compel a discretionary act. *See Detournay*, 127 So. 3d at 873.

  Plaintiff's Motion alleges that the City failed to comply with the P3 Statute by entering into the Interim Agreement. First, the City's process was entirely correct, and the plain text of the P3 Statute confirms that the Interim Agreement was approved in compliance with the statute and that demolition is not a prohibited activity. *See* § 255.065(6), Fla. Stat. ("[Interim Agreement can] [c]ontain such other provisions related to an aspect of the development or operation of a qualifying project that the responsible public entity and the private entity deem appropriate."). Plaintiff's attempt to shoehorn "demolish" into the definition of "develop" and "modify" improperly conflicts with the plain language of the Statute. *See, e.g., Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992). Moreover, the Statute does not require an independent analysis prior to ranking competing proposals. *See* § 255.065(3)(a)(5), Fla. Stat. ("Such review shall be performed by an architect, a landscape architect, or an engineer licensed in this state qualified to perform the review, and such professional shall advise the responsible public entity **through completion of the design and construction of the project**." (emphasis added)). Finally, Plaintiff's asbestos arguments are unsupported. The decision to demolish was made before any asbestos statements were made and there is, in fact, asbestos on the property.

  Plaintiff cites no provision of decisional law to support the unprecedented relief it seeks here. For this reason, Plaintiff's likelihood of success falls far short of the "substantially likely to succeed" benchmark. *Anderson v. Upper Keys Business Group, Inc.*, 61 So. 3d 1162, 1170 (Fla. 3d DCA 2011) (recognizing that a party requesting injunctive relief "must convince the Court, not that [they] *might* succeed, or *could possibly* succeed [on the merits]; rather, the movant[s] must clearly

convince the Court that they are *substantially likely* to succeed.") (citation omitted). Therefore, Plaintiff's Motion must be denied.

- **No Irreparable Harm, But Rather Adequate Remedies**: Plaintiff cannot demonstrate "irreparable harm." Plaintiff alleges, in purely speculative fashion, that but for Inter Miami's conduct the City would have accepted Plaintiff's alternative proposal. Because this injury is entirely speculative and based on factual assumptions pertaining to uncertain events that might have occurred, Plaintiff does not possess a legally recognizable interest subject to being irreparably harmed. Indeed, the City already rejected Plaintiff's proposal and has no obligation under the P3 Statute to consider it anew.

  Moreover, Plaintiff has already pursued alternative legal remedies to redress any alleged harm to Plaintiff. Significantly, Plaintiff has pending claims for damages for tortious interference and injurious falsehood that are based on the same alleged (but false) statements regarding asbestos that are now support for Plaintiff's Motion. Accordingly, and although Inter Miami maintains that Plaintiff has zero likelihood of success on its pending claims, Plaintiff cannot demonstrate the absence of a remedy.

- **Equitable Considerations**: Even if Plaintiff could establish a clear legal right to an injunction and the absence of adequate remedies at law (and it cannot), the Court should nevertheless refuse to enter an injunction to avoid an inequitable result, especially where, as here, an injunction would cause substantial damages to the City and Inter Miami. If granted, the injunction would prevent the Inter Miami Major League Soccer expansion team from having a place to play its first season in 2020.

- **Public Interest**: Plaintiff cannot demonstrate how allowing the City to demolish the Stadium (which has sat unused and in an unsafe condition for years) would disserve the public interest. To the contrary, allowing a city to take action to return the Property to productive use (approved by the municipal authority) serves the public interest. Indeed, the City's legislative and executive branches have determined that proceeding with the demolition of the Stadium serves the public interest. Additionally, if granted, an injunction would deprive the City and its residents of watching world class soccer in their City.

  Therefore, Plaintiff's Motion must be denied.

CONCLUSION

Defendant Miami Beckham United LLC respectfully requests that the Court enter an Order denying Plaintiff's Emergency Motion for Temporary Injunction, and all such further relief as this Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2019, a true and correct copy of the foregoing was furnished via electronic delivery to:

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COMPOSITE EXHIBIT A

2013 WL 9668711 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Sixth Judicial Circuit
Civil Division
Pinellas County

Kathleen FORD, Fred Debardelaben, Gregory J. Cahanin,
Frank Carter Karins, Joseph Reed, and Burton Kline, Plaintiffs,
v.
CITY OF ST. PETERSBURG, FL., INC., a Florida municipal corporation, Defendant.

No. 522012CA010312.
April 5, 2013.

Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment

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Joseph Patner, Esq., City of St. Petersburg, PO Box 2842, St. Petersburg, FL 33731

Jack Day, Judge.

***1 THIS CASE** is a dispute between Plaintiffs, who are citizens and registered voters of the City of St. Petersburg, and the City. Plaintiffs, with many others, signed a petition calling for a referendum on the question of whether to "preserve and refurbish" the City's municipal pier building. The City declined to provide for the referendum. In this action Plaintiffs seek, in Count I, to require the City to do so, pursuant to the petition. In Count II, Plaintiff Ford seeks to require the City to conduct a referendum pursuant to Article One of the City Charter, and in Count III she seeks a temporary injunction against demolition of the pier building, pending resolution of the issues raised by Counts 1 and II. [1]

The case came before the court on March 27, 2013, to be heard on the Plaintiffs' Motion for Summary Judgment as to Count I only-and Defendant's Motion for Summary Judgment as to all counts. The court has considered the legal arguments of counsel, all the affidavits and documents submitted by the parties, and the applicable Florida Statutes and appellate precedents.

UNDISPUTED FACTS

The court finds there are no genuine issues of material fact, and that the following facts, among others, are undisputed:

1. The form and content of the petition are as shown by the attachment to this order.

2. The petition received authentic signatures from over ten percent of the electors of the City of St. Petersburg.

3. Approximately 85 percent of the signers of the petition also checked off a preference on the petition ("yes") or ("no"), as though the petition were a public opinion poll.

4. Despite the statements of some supporters suggesting amenability to a straw poll, the purpose of the petition was to amend the City Charter, as was emphatically asserted by counsel for Plaintiffs.

DISCUSSION

1. *Count One*

As a matter of law it is obvious, but as a matter of public interest it bears repeating, that it does not fall to this court to decide the future of the pier or pier building. The issues before the court boil down to whether the City has violated a legal obligation to provide for a referendum.

It is generally known that the specific wording of petitions and ballot initiatives is of critical importance. Any person who even casually follows current events in the State of Florida must be aware of the frequency with which the proponents of ballot initiatives, including the Legislature,[2] are thwarted by problems with their wording. In fairness, it should be acknowledged that these are not "mere" technicalities but requirements of clarity to preclude unforeseen consequences.

***2** The City Council undoubtedly has the authority, on its own initiative, to place a referendum or straw poll on the ballot. In order to *compel* city government to do so, however, legal standards must be met. Clearly, thousands of concerned citizens wanted some kind of vote about the future of the pier. It is most unfortunate more attention was not paid to the requirements of law at the beginning stages of their effort.

The defendant City has pointed out a number of issues about the language of the petition. Among other arguments, the City contends, with some justification, that the terms, "preserve" and "refurbish" are vague and even somewhat contradictory, and that the phrase "iconic landmark" is technically inaccurate, and the sort of political rhetoric proscribed by the Florida Supreme Court. *Florida Department of State v. Mangat,* 43 So.3d 642 (Fla. 2010). Moreover, the City points out that the petition is susceptible to being misread as a public opinion poll. At least two citizens, by affidavit, stated that they signed the petition believing it to be a public opinion poll on whether to have a referendum. Indeed, the fact the great majority of signers gratuitously checked "yes" or "no" when they signed the petition supports the conclusion that there was some confusion as to whether they were casting a vote, or petitioning for an election.

Consistent with this confusion, the City's motion and legal argument were all cast in terms of its purported belief that Plaintiffs were seeking a City-wide ballot vote that would serve as a *straw poll*, as opposed to a binding election. In its motion and supporting exhibits, the City points to several communications in which both proponents of the petition and representatives of the City seem to have characterized the petition as seeking a non-binding vote. However, as noted above, it is the express position of the Plaintiffs that such was not the intent of the petition, but rather that its purpose was to amend the City Charter.

Although the City Council could choose to provide for a non-binding "straw poll" referendum, it cannot legally be compelled to do so. The only legal tool for citizens to compel a municipal referendum is that provided by Section 166.031, Florida Statutes. That section, entitled "Charter Amendments," provides that

> the electors of the municipality may, by petition signed by ten percent of the registered electors … submit … a proposed amendment to its charter .... The governing body of the municipality shall place the proposed amendment contained in the … petition to a vote of the electors at the next general election .... 166.031(1), Florida Statutes

Plaintiffs' petition does not mention a charter amendment. Although it does cite Section 166.031, among other statutes (i.e. §§ 104.486, 775.082, and 775.083), it does not quote it or accord it any particular significance. The petition offers no

reference to the City Charter or any portion of it, no proposed language to be added, no language proposed to be deleted and, indeed, no suggestion of how the charter should be amended in order to "preserve and refurbish" the pier building.[3] This lack of connection to the charter is the most serious problem with the form of the petition. It is a fatal defect.

For a citizen initiative to amend a municipal charter, Section 166.031 works in conjunction with Section 101.161(1), Florida Statutes, entitled "Referenda; Ballots," which provides:

> *3 (1) Whenever a ... public measure is submitted to the vote of the people, a ballot summary of such ... measure shall be printed in clear and unambiguous language on the ballot...followed by the word "yes" and also by the word "no".... The ballot summary of the ... measure and the ballot title to appear on the ballot shall be embodied in [an] enabling resolution or ordinance. The ballot summary ... shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. *Id.; see also*, Division of Elections Opinion 80-34, October 21, 1980.

The statutory scheme gives little guidance about the process whereby the verbiage of a petition is recast as appropriate ballot language. The City of St. Petersburg contends that this process is entirely the obligation of the petitioners. The court disagrees. The case of *Shulmister v. City of Pompano Beach*, 798 So.2d 799 (Fla. 4th DCA 2001) is binding on this court in holding that the City, which is statutorily obligated to "embody" the ballot title and ballot summary in an enabling resolution or ordinance, is ultimately responsible for the wording of the ballot title and ballot summary. *Shulmister*, however, is to be distinguished from the present case. In that case the defendant city was presented with clear, precise, legally coherent petition language that delineated the proposed charter amendment. In contrast, the petition in this case is fatally lacking any connection to the City Charter. The imprecision of the petition's scope and impact distinguishes this case from *Shulmister*.[4]

The petition does not provide the basis to compel a charter amendment referendum. Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Count I.

2. *Count Two*

Plaintiffs contend that demolition of the pier building requires a referendum pursuant to Article I of the City of St. Petersburg Charter, which provides in pertinent part:

> (a) *Purpose.* The purpose of this section is to protect City-owned park and waterfront property. Except as provided herein, no waterfront or park property owned by the City may be sold, donated, or leased without specific authorization by a majority vote in a City-wide referendum.

The Article goes on to define "sale" to include any "permanent disposition of an interest in real property other than a utility easement."

The clear purpose of these provisions is to protect the People's park and waterfront resources from being alienated to third parties without the assent of the electorate. In this case, however, there is no prospect of conveying an interest in

real property to a third party. Although a structure such as the pier is in some respects (such as taxation) treated as real property, it is better understood as an *improvement* to real property. Black's Law Dictionary defines "improvement" as a

> valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes....

Here, the "real property" is the surface of the earth upon which the building rests, not the building itself. Alteration or demolition of the building will not constitute "disposition of an interest in real property." Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Count II.

3. *Count Three*

***4** Based upon the foregoing analysis, Count III of Plaintiffs' Complaint is moot. Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Count III.

4. *Plaintiffs' Motion for Summary Judgment*

In accordance with the discussion above, Plaintiffs' Motion for Summary Judgment is DENIED.

DONE and ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this 5th day of April, 2013.

<<signature>>

JACK DAY, Circuit Court Judge

cc:

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Footnotes

1 The Plaintiffs originally disputed the validity of the procedure by which the City Council moved from pursuing restoration of the pier to its present position (specifically, the transition from Ordinance 715-G to Resolution 2010-435). However, this argument was made moot by the City's adoption of Ordinance 1018-G in 2011.

2 *Cf, e.g., Roberts v. Doyle,* 43 So. 3d 654 (Fla. 2010) and *Department of State v. Mangat, infra.*

3 For contrast, compare the clear and specific charter amendment language of the petition in *Shulmister v. City of Pompano Beach, infra*, at 800.

4 There are other significant distinctions. *Shulmister* involves a city's repeated deliberate attempts to sabotage an impeccably worded citizen ballot initiative by refusing to delete eight superfluous words in the ballot summary. Further, the case was decided under a prior version of Section 101.161 which used the term "substance" rather than "ballot summary." Laws 2011, c. 2011 -40, Section 29.

End of Document

242 F.Supp.2d 1292
United States District Court,
S.D. Florida.

Mary REESE, et al., Plaintiffs,
v.
MIAMI–DADE COUNTY, et al., Defendants.

No. 01–3766–CIV.
|
Dec. 5, 2002.

Synopsis
Occupants and prospective occupants of public housing project sued county, claiming that plan calling for demolition of existing units and their replacement by mix of public housing, rent to own and market priced housing violated their rights under federal statutes and Establishment Clause. The District Court, 210 F.Supp.2d 1324, granted county's motion to dismiss in part. Thereafter, occupants moved for preliminary injunction barring implementation of plan. The District Court, Highsmith, J., adopting the Report and Recommendation of Turnoff, United States Magistrate Judge, held that: (1) occupants failed to satisfy likelihood of prevailing on merits requirement for preliminary injunction with any of their claims under Fair Housing Act, Title VI of Civil Rights Act, or Establishment Clause; (2) occupants failed to satisfy likelihood of success requirement with respect to Quality Housing and Work Responsibility Act and Community Development Act; and (3) occupants failed to satisfy requirement that they show irreparable harm in absence of injunction.

Motion denied.

West Headnotes (5)

[1] Civil Rights
Property and housing

Occupants of public housing project failed to satisfy likelihood of succeeding on merits requirement, for issuance of preliminary injunction halting demolition of their buildings and relocation of tenants, when they claimed that plan violated Fair Housing Act, Title VI of Civil Rights Act, and equal protection clause; necessary evidence of intent to discriminate was not provided. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Civil Rights Act of 1968, § 804, as amended, 42 U.S.C.A. § 3604.

2 Cases that cite this headnote

[2] Civil Rights
Property and housing

Occupants of public housing project failed to satisfy likelihood of succeeding on merits requirement, for issuance of preliminary injunction halting demolition of their buildings and relocation of tenants, when they claimed that plan violated Fair Housing Act, Title VI of Civil Rights Act, and equal protection clause due to its disparate impact on black residents; discriminatory effect was minimal, as virtually all residents were black, there was no evidence of discriminatory intent, there were no less discriminatory steps that could remedy problems with overly dense, obsolete housing, and county could not be compelled to undertake affirmative action program. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Civil Rights Act of 1968, § 804, as amended, 42 U.S.C.A. § 3604.

7 Cases that cite this headnote

[3] Injunction
Public housing

Occupants of public housing project failed to satisfy likelihood of succeeding on merits requirement, for issuance of preliminary injunction halting demolition of their buildings and relocation of tenants, when they claimed that county's plan violated Quality Housing and Work Responsibility Act, due to absence of adequate racial and socioeconomic study of consequences. Veterans Affairs and HUD Appropriations Act, § 501 et seq., 112 Stat. 2461.

Cases that cite this headnote

[4] Injunction

⌲ Public housing

Occupants of public housing project failed to satisfy likelihood of succeeding on merits requirement, for issuance of preliminary injunction halting demolition of their buildings and relocation of tenants, when they claimed that plan violated Housing and Community Development Act (HCDA) requirement that comparable replacement dwelling be provided for each demolished unit; Congress had subsequently removed "one for one" requirement for program involved in present case. Housing and Community Development Act of 1974, § 104(d)(2)(A)(i), 42 U.S.C.A. § 5304(d)(2)(A)(i).

3 Cases that cite this headnote

[5] Injunction

⌲ Public housing

Occupants of public housing project failed to satisfy irreparable harm requirement, for issuance of preliminary injunction halting demolition of their buildings and relocation of tenants; occupants made no showing that they would be prohibited in relocating from project or would be denied right to return to new development that would replace present homes.

1 Cases that cite this headnote

Attorneys and Law Firms

***1294** Charles F. Elsesser, Jr., Florida Legal Services Inc., Miami, FL, Benjamine Reid, Miami, FL, Todd Isaac Espinosa, Nationalo Housing Law Project, Oakland, CA, for Plaintiffs.

John Darrell McInnis, Terrence Andrew Smith, David Stephen Hope, Cynji Lee, Dade County Attorney's Office, Miami, FL, Laura W. Bonn, Miami, FL, for Defendants.

ORDER

HIGHSMITH, District Judge.

THIS CAUSE is before the Court upon Plaintiffs' Motion for a Preliminary Injunction Against Miami–Dade County and Rene Rodriguez (**DE 13**). This Court referred the motion to United States Magistrate Judge William C. Turnoff for issuance of a Report & Recommendation ("R & R"). Before the Court is Magistrate Judge Turnoff's R & R, issued on September 11, 2002. Also before the Court are Plaintiffs' Objections to the R & R and the County Defendants' Response to Plaintiffs' objections. The R & R advises this Court to deny the motion on the grounds that Plaintiffs (1) are not likely to succeed on the merits and (2) did not make a sufficient showing of irreparable harm.

After a careful *de novo* review of the R & R, Plaintiffs' objections, Defendants' response, the case file, and the pertinent authorities, the Court concurs with Magistrate Judge Turnoff's findings and analysis and hereby ADOPTS the R & R in its entirety. [1]

Accordingly, it is ORDERED AND ADJUDGED that Plaintiffs' motion for a preliminary injunction against Miami–Dade County and Rene Rodriguez is DENIED.

REPORT AND RECOMMENDATION

TURNOFF, United States Magistrate Judge.

This Cause comes before the undersigned for a Report and Recommendation on Plaintiffs' Motion for a Preliminary Injunction Against Miami–Dade County and Rene Rodriguez (D.E.13). A hearing on the matter was held on May 22, 2002. Through the Motion for Preliminary Injunction, Plaintiffs seek to enjoin Defendants from relocating the residents of the James E. Scott Homes Public Housing Project or further demolishing the James E. Scott Homes. For the reasons stated below, this Court should deny Plaintiffs' Motion in its entirety.

I. FINDINGS OF FACT

A. THE PARTIES

1. Plaintiff, Mary Reese ("Reese"), is a public housing resident presently residing in James E. Scott Homes ("Scott Homes"), a public housing development, with her two (2) children ages fifteen (15) and twenty-five (25). (D.E. 1; D.E. 53, Ex. B at 7).

2. Plaintiff, Velma Bailey ("Bailey"), a former public housing resident, resided in ***1295** Scott Homes with her ten (10) minor children. Bailey and her family have relocated to the residential community of Country Walk with the use of one of the County's Section 8 vouchers. (D.E. 1; Tr. at 91–93).

3. Defendant, Miami–Dade County (the "County") is a political subdivision of the State of Florida. The County is the designated public housing authority in this jurisdiction. The County's Miami–Dade Housing Agency ("MDHA") presently administers public housing and other federally subsidized housing programs in the County. (D.E.1).

4. Defendant, Rene Rodriguez ("Rodriguez"), in his official capacity, is presently and at all times material hereto has been the Director of MDHA. (D.E.1).

B. FACTUAL BACKGROUND

5. In 1992, the Congressional Commission on Severely Distressed Public Housing was established to identify severely distressed or obsolete public housing developments and offer solutions for their revitalization. The result of the Commission's inquiry was the Homeownership and Opportunities for People Everywhere ("HOPE VI") program, which targets, for purposes of revitalization, distressed public housing developments that: (1) are uninhabitable because of poor siting or design; (ii) have heavy concentrations of poverty; (iii) have high rates of vandalism or criminal activity; or (iv) contribute significantly to disinvestment in the surrounding communities. (D.E. 53, Ex. A, Ozdinec Decl. ¶ 4).

6. Scott Homes and Carver Homes (collectively "Scott–Carver Homes") are two public housing developments, located within the County's jurisdiction and operated by MDHA. Scott Homes and Carver Homes were built in 1954 and 1964, respectively. Currently, the total number of units between Scott Homes and Carver Homes is 850. (D.E. 127; Pls.' Ex. 8). [1]

7. Ninety-nine (99%) percent of the Scott–Carver Homes' residents are African–American. Many of these residents include families with children under the age of eighteen (18). (D.E.1).

8. Scott–Carver Homes currently meets the definition of "severely distressed" for purposes of the HOPE VI program. According to the County's 1999 HOPE VI grant application to the United States Department of Housing and Urban Development ("HUD"), both developments are antiquated, the units too small, and the density too high. Additionally, there are serious structural, site and infrastructure defects, which render Scott–Carver Homes overdue for demolition and redevelopment through the HOPE VI program. (D.E. 127; Pls.' Ex. 5).

9. The County lacked the necessary financial resources to rehabilitate Scott–Carver Homes because of past expenditures used to rehabilitate other public housing developments destroyed during Hurricane Andrew in 1992. (D.E. 118 at 11).

10. The County initially determined that Scott Homes would be a good candidate for a HOPE VI Revitalization Grant because it was severely distressed. (D.E. 116 at 14–16).

11. In 1996, HUD published a Notice of Funding Availability ("NOFA") seeking ***1296** HOPE VI grant applications from public housing authorities around the country.

12. In response to the NOFA, the County Defendants submitted a grant application for Scott Homes in which it sought to demolish approximately 149 of the existing public housing units and revitalize the remaining 605 units, which would remain as public housing units. (Pls.' Ex. 8). However, HUD did not fund the grant application. (D.E. 1; D.E. 116 at 9).

13. In 1997, the County once again submitted an application in response to HUD's NOFA for HOPE VI funding. The 1997 application proposed to demolish 340 of the existing 754 units located within Scott Homes, to build 140 new replacement units, and to revitalize the remaining units. The County's Revitalization Plan

proposed to leave 554 on-site units. Of the number of on-site units, the County proposed to keep 292 public housing units and 262 affordable rental units to be built by private developers. Again, HUD did not fund this application. (D.E. 1; D.E. 116 at 10).

14. In 1998, the County submitted another HOPE VI application. This proposal was the first time the County included Carver Homes as part of its revitalization efforts. According to the application, the County proposed to demolish all of the existing public housing units located within Scott–Carver Homes, and replace them with 401 units comprised of 246 public housing units, 72 rent-to-own units, 63 low-income tax credit units and 20 market rate units. Again HUD did not fund this application. (Pls.' Ex. 7; D.E. 1; D.E. 116 at 10–12).

15. On February 26, 1999, HUD issued a Super Notice of Funding Availability ("Super NOFA") announcing the availability of approximately $523 million in HOPE VI revitalization funds. The Super NOFA included a number of qualifications, which each applicant would have to satisfy in order to be awarded revitalization funds. (Defs.' Exs. 3 and 4).

16. The Super NOFA required that each applicant's proposal must be designed to lessen the concentration of low-income households, create opportunities for desegregation, and offer viable housing choices in the design of the new development. (D.E. 53, Exhibit A, Ozdinec Decl. ¶ 5; Defs.' Exs. 3 and 4).

17. The Super NOFA required that each proposal affirmatively further fair housing and encourage diversity via the following: (1) physical design of the revitalized units; (2) location of the new units; and (3) marketing of housing types. The Super NOFA also stated that diversity can be accomplished if the applicants' marketing and outreach activities "target all segments of the population on a nondiscriminatory basis, promote housing choice, and opportunity throughout [the applicant's] jurisdiction, and contribute to the deconcentration of minority and low-income neighborhoods." (Defs.' Exs. 3 and 4).

18. The Super NOFA required all applicants to certify that they had matching funds, which could be combined with the HUD funds to carry out the revitalization activities. (Defs.' Exs. 3 and 4).

19. The Super NOFA required all applicants to comply with the requirements set forth in the Uniform Relocation and Real Property Acquisition Act. (Defs.' Exs. 3 and 4).

20. The Super NOFA did not require successful applicants to comply with the Housing and Community Development Act. (Defs.' Exs. 3 and 4).

***1297** 21. The Super NOFA did not require that applicants' revitalization plans provide a one-for-one replacement of each public housing unit demolished. (Defs.' Exs. 3 and 4).

22. The County submitted to HUD its fourth HOPE VI application for Scott–Carver Homes in response to the 1999 Super NOFA. (Pls.' Ex. 8).

23. The County's application required all of the present public housing units be demolished and subsequently replaced with 371 on-site units, plus an additional 91 affordable homeownership off-site units. With regard to the on-site units, the County proposed to build 80 public housing units, 135 public housing rent-to-own units and 156 affordable homeownership units. (Pls.' Ex. 8).

24. The County's HOPE VI Revitalization Plan ("Revitalization Plan") proposed to lessen concentration of low-income families and offer desegregation opportunities via the following: reduction of on-site density by 56%, construction of new homes, and rent-to-own and traditional public housing units. (Pls.' Ex. 8, Revitalization Plan, Ex. E at 3 and Attach. 6).

25. The Revitalization Plan also stated, "WE CAN'T CONTROL: HOPE VI requisites mandated by HUD: Lessen the concentration of poverty; discourage concentrations of minorities in undesirable neighborhoods." (Pls.' Ex. 8, Revitalization Plan, Attach. 6).

26. The Revitalization Plan also stated "WE CAN'T CONTROL: Adker Decree, which refers to this Court's Consent Decree entered on October 28, 1998 in the matter of *Adker v. United States Dept. of Housing and Urban Dev.,* Case No. 87–0874 CIV–PAINE (October 28, 1998)." Pursuant to that Decree, the County is required to desegregate its Section 8 and public housing programs along with other housing opportunities

programs which come within the County's control. (Pls.' Ex. 8, Revitalization Plan, Attach. 6; Defs.' Ex. 7 and 8).

27. The Adker Decree governs the County's present HOPE VI plans for Scott–Carver Homes. (Defs.' Ex. 7).

28. The Revitalization Plan neither denoted nor connoted that the reason the County selected Scott–Carver Homes for revitalization, was due to the race of the current residents.

29. The Revitalization Plan stated that Scott–Carver Homes were selected because they are severely distressed. (Pls.' Ex. 8; Revitalization Plan, Ex. A at 1–3).

30. The reference to desegregation or discouraging minorities in neighborhoods relates only to the requirements set forth in the Super NOFA and only as it relates to the newly constructed development. (Defs.' Exs. 3 and 4).

31. In addition to the requested HUD award, the Revitalization Plan also included a commitment of approximately $65 million in additional resources to complete the proposed revitalization activities. Of this funding, the County's Office of Community and Economic Development ("OCED") committed $2 million in Community Development Block Grant ("CDBG") to this project. (Pls.' Ex. 8, Revitalization Plan Attach. 26).

32. The Revitalization Plan included a socioeconomic study, dated May 20, 1999, prepared by Goodkin Consulting. (Pls.' Ex. 8, Revitalization Plan Attach. 15).

33. The Revitalization Plan also proposed to relocate all of the present residents of Scott–Carver Homes to other ***1298** replacement housing through MDHA's Section 8 vouchers, public housing, homeownership and rent-to-own programs. (Pls.' Ex. 8).

34. Scott Homes is divided into four sectors, i.e. I, II, III, and IV, for purposes of relocation, demolition and revitalization. The Carver Homes units are not included in any of the sectors, but these residents will be relocated at the same time as the Scott Homes residents residing in Sector IV. (Pls.' Ex. 8).

35. The relocation of the Scott–Carver Homes residents will be completed over a four-year period. (Pls.' Ex. 8).

36. The total number of residents to be relocated under the Revitalization Plan is 826. (Pls.' Ex. 8).

37. In 1999, HUD approved the County's HOPE VI application due to its Revitalization Plan. As a result, HUD awarded the County $35 million. (D.E.1).

38. HUD, through its Acting Deputy Assistant Secretary for Public Housing Investment, Milan Ozdinec, stated that "MDHA's 1999 application would not have been funded if it included replacing all or most of the 850 public housing units currently located at Scott and Carver," of which 754 units are located within Scott. The Deputy Secretary further stated that the application was approved because "it significantly reduced the number of public housing units that would be put back on site of Scott and Carver." (D.E. 53, Exhibit A, Ozdinec Decl. ¶ 5).

39. Following the award of the County's HOPE VI grant application, sixty-four (64) of the units located in Scott Homes were flooded due to the "No Name Storm" of the Fall of 2000. As a result, the residents in these units were relocated. (D.E. 37, Ex. A, Brewster Decl. ¶ 19).

40. On April 10, 2001, the Miami–Dade Board of County Commissioners ("Commission"), adopted Resolution Number 376–01 authorizing the transfer of $6 million to Miami–Dade Housing Finance Authority to construct one hundred and fifty (150) single-family homes to be purchased by public housing residents. Current residents of Scott–Carver Homes will be given the right of first refusal to purchase these homes. (Defs.' Ex. 1).

41. On April 20, 2001, the County executed a contract with the National Housing Group to serve as a Relocation Service Provider for the Scott–Carver Homes HOPE VI revitalization project. The total price for this contract is $1,998,586. (Defs.' Ex. 9).

42. The Relocation Service Provider's responsibilities include, but are not limited to, providing the required relocation counseling to Scott–Carver Homes residents, providing financial and technical relocation assistance, recruiting prospective landlords to participate in the County's Section 8 program, and creating and maintaining relocation and landlord databases. (D.E. 121 at 37–39; Defs.' Ex. 9).

43. On May 8, 2001, the Commission adopted Resolution Number 495–01 requiring the County to construct an additional one hundred and seventy-five (175) Section 8 project-based affordable housing units to accommodate those Scott–Carver Homes residents displaced as a result of the HOPE VI project. (Defs.' Ex. 2).

44. On August 16, 2001, the County entered into a contract with H.J. Russell & Company to serve as Program Manager for the Scott–Carver Homes HOPE VI revitalization project. The total price of this contract is $2,550,530.00. (Defs.' Ex. 10).

***1299** 45. On September 6, 2001, Plaintiffs, Reese and Bailey, along with Plaintiffs, Herbert Jones and Patricia Sanders, who were public housing waiting list applicants, and organizational Plaintiff Low Income Families Fighting Together ("L.I.F.F.T.") filed this class action lawsuit against County Defendants, HUD and Mel Martinez, Secretary of HUD ("Federal Defendants"). (D.E.1).[2] Plaintiffs alleged violations of (A) the Fair Housing Act (counts 1–6); (B) Title VI of the civil Rights Act (count 7); (C) Equal Protection (counts 8 and 9); (D) the Quality Housing and Work Responsibility Act of 1998 (count 10); (E) the Housing and Community Development Act (counts 11–13); (F) the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (count 14); and (G) the National Environmental Policy Act (count 15). In an Order dated July 2, 2002, the Court found that this Court did not have subject matter jurisdiction with respect to count 14 of Plaintiffs' Complaint.

46. On September 6, 2001, the Plaintiffs filed the present Motion for Preliminary Injunction and a Motion for Class Certification. (D.E. 13 and 14). Through this motion for preliminary injunction, Plaintiffs seek to prevent the "forced or voluntary" relocation of the residents of Scott Homes and to prohibit the County from demolishing any of the existing units located within Scott Homes. Plaintiffs move for an injunction on all remaining counts of their Complaint, except under count 15 which pertains to violations of the National Environmental Policy Act. The motion for preliminary injunction also does not seek to enjoin the County from relocating the residents of Carver Homes or from demolishing any of the buildings located within it.[3]

47. On September 19, 2001, the County's Building Department's Unsafe Structures Board ("Board") held a hearing concerning the seventy-eight units flooded during the "No Name Storm." (D.E. 37, Ex. A, Brewster Decl. ¶ 20, Ex. 1).

48. On September 25, 2001, the Board issued an order to MDHA requiring it to demolish the buildings within ninety-days from the date of the order. (D.E. 37, Ex. A, Brewster Decl. ¶ 20, Ex. 1).

49. On October 18, 2001, the Court entered an Order requiring County Defendants to cease and desist from any demolition of any buildings located in Scott Homes until such time as the Court issued an order on Plaintiffs' Motion for Preliminary Injunction. (D.E.24).

50. On April 12, 2002, Plaintiffs filed a Motion for Temporary Restraining Order to enjoin County Defendants from evicted residents remaining in Sector I pursuant to a ninety (90) day notice to vacate. (D.E.91).

51. On April 24, 2002, the Court denied Plaintiffs' Motion for Temporary Restraining ***1300** Order because the parties were able to reach an agreement. (D.E.108).

52. As of May 20, 2002, of the 187 families living in Sector I, 113 were relocated through the use of Section 8 vouchers, sixty-two (62) were relocated to other public housing, two (2) were relocated to homeownership and thirteen (13) were relocated to other housing. As of the date of the hearing on Plaintiffs' Motion for Preliminary Injunction there remained only twenty (22) families located in Sector I. (Defs.Ex. 6).

53. There are twenty-one (21) buildings in Sector I. Six (6) of the buildings are occupied by no more than one family. (Def's Ex. 6).

54. There are families within Scott Homes who wish to relocate through the County's Revitalization Plans, and object to the present lawsuit against the County Defendants. (D.E.119).

55. There are various former residents of Scott Homes who have already relocated with the use of Section 8 vouchers; voluntarily selected the neighborhood in which they presently reside; support the County's Revitalization Plan; and object to the present lawsuit. (D.E.119).

56. At the hearing on the Motion for Preliminary Injunction, Plaintiffs' expert Andrew Beveridge testified extensively on the high minority concentrations of the neighborhoods where the relocated Scott Homes residents with Section 8 vouchers currently reside. Mr. Beveridge, however, conceded that he had no knowledge of the County's relocation plans for Scott Homes nor the choice component included in the relocation process. Mr. Beveridge was unable to determine that there were any residents who relocated to areas where they did not wish to reside. Moreover, Mr. Beveridge also conceded that his analysis did not consider the countywide housing opportunities provided by the County Defendants. He also admitted to having no knowledge regarding the concentrations of African–Americans nor the income mix of the neighborhoods in which they reside in the County. (Tr. 47, 51, 56 and 57).

II. CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

To succeed on a motion for a preliminary injunction, Plaintiffs must show: (1) they have a likelihood of success on the merits; (2) there exists, absent the injunction, a significant risk of irreparable harm; (3) the balance of hardships tilts in their favor; and (4) granting the injunction will not adversely affect the public interest. *See Siegel v. Lepore,* 234 F.3d 1163, 1176 (11th Cir.2000); *CBS, Inc. v. Smith,* 681 F.Supp. 794, 802 (S.D.Fla.1988). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly [establishes] the 'burden of persuasion' as to each of the four prerequisites." *Siegel,* 234 F.3d at 1176; *United States v. Jefferson County,* 720 F.2d 1511, 1519 (11th Cir.1983), *quoting Canal Auth. v. Callaway,* 489 F.2d 567 (5th Cir.1983); *see also Shatel Corp. v. Mao Ta Lumber and Yacht Corp.,* 697 F.2d 1352, 1354 (11th Cir.1983). If the movant fails to carry its burden of proving any of the prerequisites, the preliminary injunction should be denied regardless of whether the movant meets the other requirements. *Id.* Here, Plaintiffs have not met their burden to warrant the issuance of a preliminary injunction. The evidence and testimony presented at the hearing on Plaintiffs' Motion for Preliminary Injunction and contained in the record demonstrate Plaintiffs are not entitled to such an ***1301** extraordinary form of relief. Plaintiffs' claim for injunctive relief therefore must fail.

B. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

1. Fair Housing, Civil Rights Act of 1964 and Equal Protection Claims

Plaintiffs assert that County Defendants have violated the Fair Housing Act[4] ("FHA"), the Civil Rights Act of 1964[5] and the Equal Protection Clause through the Fourteenth Amendment. Plaintiffs assert two different types of claims, discriminatory intent claims and disparate impact claims.

Courts across the country have consistently held that there is no constitutional right to housing. *See generally Jaimes v. Toledo Metropolitan Housing Auth.,* 758 F.2d 1086, 1096 (6th Cir.1985) (no constitutional right to be furnished safe sanitary and decent housing by housing authority); *Smith v. Town of Clarkton,* 682 F.2d 1055 (4th Cir.1982) (no constitutional right of individuals to have housing meet a particular standard); *Acevedo v. Nassau County,* 500 F.2d 1078 (2nd Cir.1974) (no constitutional guarantee of access to a dwelling of a particular quality); *Schmidt v. Boston Housing Auth.,* 505 F.Supp. 988 (D.Mass.1981) (no federal right to low-income public housing). If plaintiffs qualify for housing within the new Scott–Carver Homes, they are entitled to apply like everyone else. *See Darst–Webbe Tenant Ass. v. Saint Louis Housing Auth.,* 202 F.Supp.2d 938 (E.D.Mo.2001) (Plaintiffs' claims to enjoin a public housing authority's HOPE VI plans were rejected). However, "if plaintiffs are arguing that they are denied the opportunity to occupy the [new] units because they cannot qualify, the Court has no authority to force defendants to give them the opportunity." *Id.*

a. Discriminatory Intent Claims

[1] Generally, under the FHA it is unnecessary to establish discriminatory intent in order to prove there has been a violation. *Elliott v. City of Athens,* 960 F.2d 975, 984 (11th Cir.1992) (*citing Metropolitan Housing Dev. Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir.1977)). However, if discriminatory intent is claimed, a plaintiff has the burden of showing that the defendants actually intended or were improperly motivated in their decision to discriminate against persons protected by the FHA.

***1302** In the instant case, Plaintiffs claim that the County's HOPE VI Revitalization Plan serves as direct evidence of the County's intent to violate not only the FHA, but also the Civil Rights Act of 1964 and the Equal Protection Clause. Specifically, Plaintiffs direct the Court to that part of the County Defendants' application which reads in part, "We cannot control HOPE VI requisites mandated by HUD", which require, in part that, the County "[l]essen the concentration of poverty; [discourage] concentrations of minorities in undesirable neighborhoods." (Pls.' Ex. 8, Revitalization Plan Attach. 6). This language is not discriminatory on its face because it does not "indicate any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). *Cf. Ragin v. The New York Times Co.,* 923 F.2d 995 (2nd Cir.1991) (FHA prohibits use of human models as a medium for expression of a racial preference in a newspaper advertisement thus conveying an illegal message); *United States v. Hunter,* 459 F.2d 205 (4th Cir.1974) (statement that apartments are in "white home" indicates to the ordinary reader a racial preference in acceptance of tenants).[6] Unlike the facts of the cases relied upon by Plaintiffs to demonstrate racial motivation, the County is not giving any preferential treatment to one group over another nor have any racial classifications been created.[7]

Moreover, present in the 1999 application are references to language similar in nature to the requirements of the Super NOFA but worded differently. In a Fact Sheet, entitled "1999 HOPE 6, What are the characteristics of a winning application", the phrase reads the "lessening of the concentration of low income residents and the creation of desegregation opportunities." *Id; see also* Pls' Ex. 8, Revitalization Plan, Attach. E. The language as it presently appears in the County's HOPE VI application mirrors, albeit not exactly, the language found in the February 26, 1999 HUD Super NOFA, which states "the activities you propose must lessen concentration of low-income households, create opportunities for desegregation, and offer viable housing choices." 64 Fed Reg. 9725, 9735 (1999). The Super NOFA further states that in order to achieve diversity ***1303** "your marketing and outreach activities should be targeted to all segments of the population on a nondiscriminatory basis, promote housing choice and opportunity throughout your jurisdiction, and contribute to the deconcentration of minority and low-income neighborhoods." *Id.* at 9737.

Additionally, the County's language is consistent with that which appears in the Quality Housing Work Responsibility Act ("QHWRA") of 1998. The QHWRA requires public housing authorities to affirmatively further fair housing. The QHWRA states the PHA's "policies that govern eligibility, selection and admissions under its PHA Plan should be designed to reduce racial and national origin concentrations." 24 C.F.R. § 903.2.

In addition to the requirements set forth in the Super NOFA and QHWRA, County Defendants are subject to this Court's mandate to create opportunities for desegregation in its housing programs, including public housing, Section 8 and other housing opportunities programs that come under County control similar to the present HOPE VI revitalization project. *See Adker v. United States Dept. of Housing and Urban Dev.,* Case No. 87–0874–CIV–PAINE (October 28, 1998). It is clear that the County's HOPE VI Plans are consistent with the tenets of the *Adker* Consent Decree.[8]

Plaintiffs, as the movants, have the burden to establish a substantial likelihood of success on the merits on these claims. Without this requisite evidence of discriminatory intent, the Court cannot conclude that Plaintiffs have established a likelihood of success on these claims.

b. Disparate Impact Claims

[2] In the instant case, Plaintiffs further argue that disparate impact occurs in three forms: (1) the forced displacement of the current residents from Scott–Carver Homes; (2) the reduction in the supply of family public housing in the County; and (3) the exclusion of households of certain sizes and income from the new development. (D.E. 14 at 9). Plaintiffs contend that each of these actions have the effect of making housing unavailable or otherwise denying housing opportunities for ***1304** current residents of Scott Homes. (D.E. 14 at 9).

In a FHA disparate impact case brought against a public defendant, a plaintiff has the initial burden of presenting a prima facie case of discriminatory effect of the challenged law. *United States v. City of Black Jack,* 508 F.2d 1179, 1184 (8th Cir.1974). There are four (4) factors courts generally utilize when evaluating a discriminatory impact

claim. First, the court must determine the strength of a plaintiff's showing of discriminatory effect. Second, the court must determine what, if any, evidence there is of discriminatory intent. Third, the court must examine what the defendant's interest is in taking the action that is the subject of the complaint. Last, the court must decide whether the plaintiff seeks to compel the defendant to affirmatively provide housing for minorities or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *See Metropolitan Housing Dev. Corp. v. Village of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir.1977).[9] Each of these factors is examined below.

Strength of Plaintiffs' Showing of Discriminatory Effect

Under the first factor the Court in *Metropolitan Housing Dev.* found that there are two types of discriminatory effect which "a facially neutral decision about housing can produce." *Id.*

> The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act.

Id. at 1290.

Plaintiffs, based upon the evidence presented, cannot establish that either the forced or voluntary relocation of current residents, the reduction in the supply of public housing, or the exclusion of households of certain sizes and incomes from the new community, will produce any of the discriminatory effects described above. It cannot be disputed that residents will be relocated whether under the present plan or some other plan. However, it is difficult to ascertain from any of the Plaintiffs' pleadings what form this relocation plan should take. In one instance, Plaintiffs appear to argue that the current relocation plan forces residents to move from their present community to other communities. (D.E. 14 at 9). Plaintiffs then argue elsewhere that the County should relocate residents in areas where their minority group does not predominate. (D.E.92).

Moreover, Plaintiffs attempt to support their claims by reference to the "affordable housing crisis" in Miami–Dade County. (D.E. 1; D.E. 14). County Defendants, however, have put forth factual evidence demonstrating that new affordable housing opportunities will be provided specifically for Scott Homes residents, including Section 8 vouchers, newly revitalized on-site public housing units, and affordable homeownership and rental opportunities both onsite and off-site. (Pls.' Ex. 8). Furthermore, Plaintiffs have not shown how the present plan, as it relates to Scott Homes, ***1305** will have a greater adverse impact on one racial group over another since, as Plaintiff's have demonstrated, African–Americans make up ninety-nine percent (99%) of the residents within Scott Homes. (D.E. 1; D.E. 14).

Evidence of Discriminatory Intent

With respect to the second factor, Plaintiffs have presented insufficient evidence to establish the County's "discriminatory intent" as to the disparate impact claims asserted. As explained above in more detail, relying on the single statement in the County's HOPE VI Revitalization Plan does not substantiate the claim of discriminatory intent, especially since the statement refers to requirements set forth by HUD in its Super NOFA and the QHWRA, which are federally issued and over which the County Defendants have no control.

Defendants' Interest in Taking Its Action

The third factor also weighs in favor of County Defendants as Defendants have articulated reasons that are bona fide and legitimate for their actions, and because there do not appear to be less discriminatory alternatives available that can serve those ends. *See Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 939 (2nd Cir.1988). It remains undisputed that Scott Homes meets the definition of "severely distressed," for purposes of qualifying for HOPE VI funding. The evidence demonstrates that the County selected Scott–Carver Homes not because of the racial composition of the development, but because of its poor physical design and structure. According to the County's 1999 HOPE VI Revitalization Plan:

> [a]lthough both of these public housing developments were constructed to meet the rising demand of affordable housing at the time, by modern standards, the developments are antiquated, the units too small and the density simply too high. Added to these undesirable design features are serious structural, site and infrastructure defects, which render Scott Homes and Carver Homes overdue for demolition and redevelopment through the HOPE VI program.

(Pls.' Ex. 8, Revitalization Plan, Ex. A at 1).

Further, Plaintiffs have failed to establish that but for the HOPE VI funds, the County would have the financial means to independently revitalize Scott Homes in the manner in which Plaintiffs seek. (D.E. 118 at 11). As Plaintiffs correctly assert, the County Defendants made three (3) separate attempts to apply for funding to revitalize Scott Homes. (D.E. 1; Pls. Ex. 6 and 7). The County, in its first application in 1996, proposed to demolish 150 of the Scott Homes public housing units, and proposed to rehabilitate the remaining units and maintain them as public housing. Plaintiffs concede that the County's prior HOPE VI application was "far less harmful" to Scott Homes' residents and shows that less discriminatory alternatives are available. (Pls.Ex. 6). As the evidence shows, however, it was not the County, but HUD that declined to fund this project. According to HUD's Acting Deputy Assistant Secretary, one of the reasons the County's 1999 HOPE VI application was funded was because it proposed to demolish all of the public housing units and "it significantly reduced the number of public housing units that would be put back on site of Scott and Carver." (D.E. 53, Exhibit A, Ozdinec Decl. ¶ 5).

The County Defendants have taken steps to address some of Plaintiffs' concerns. ***1306** Subsequent to HUD's approval of the HOPE VI Revitalization Plan, the County Commission adopted two resolutions to increase the number of affordable housing units to be built off-site within the Scott–Carver HOPE VI target area. (Defs.' Exs. 1 and 2). Pursuant to these resolutions, Scott–Carver Homes' residents will be provided with the right of first refusal for these newly constructed units. Thus, the County Defendants have articulated there are no less discriminatory alternatives available.

Determination of Plaintiffs' Intended Relief

Finally, with regard to the fourth factor, Plaintiffs are essentially seeking to compel the County to take affirmative action with respect to their housing opportunities. As stated by the Seventh Circuit:

> The Courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction.

Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir.1977). Accordingly, as Plaintiffs are seeking affirmative action from the County, this factor weighs against the relief Plaintiffs seek.

In sum, Plaintiffs have failed to establish a likelihood of success on the merits on either their discriminatory intent or disparate impact arguments with respect to their Fair Housing Act, Civil Rights Act of 1964 or Equal Protection claims.

2. Quality Housing and Work Responsibility Act Claim

[3] Plaintiffs also fail to show a substantial likelihood of success on their Quality Housing and Work Responsibility Act claim. Plaintiffs argue, *inter alia,* that the County has failed to meet the requirements of the QHWRA insofar as it failed to consider the racial and socioeconomic effects of the plan's proposed demolition of the public housing units, and that the County's HOPE VI application includes

no analysis of the racial and socioeconomic effects of the HOPE VI plan. Plaintiffs, however, have failed to show any discriminatory intent or disparate impact as a result of the Revitalization Plan. Their claim that the Revitalization Plan fails to include a socioeconomic study is without merit since the Revitalization Plan approved by HUD includes a study completed on May 20, 1999 by Goodkin Consulting, which measured the economic feasibility in the redevelopment area. Furthermore, even if Plaintiffs dispute the study's validity or compliance with the requirements of QHWRA, HUD approved the Revitalization Plan with the study. Moreover, even if Plaintiffs were correct in their arguments, it does not appear that the issuance of an injunction would be an appropriate remedy.

3. Housing and Community Development Act Claims

[4] Pursuant to the Housing and Community Development Act ("HCDA"):

> governmental agencies or private developers shall provide within the same community comparable replacement dwellings for the same number of occupants as could have been housed in the occupied and vacant occupiable low and moderate income dwelling units demolished or converted to a use other than for housing for low and moderate income persons, and provide that such replacement housing may include existing housing ***1307** assisted with project based assistance provided under section 1437f of this title.

42 U.S.C. § 5304(d)(2)(A)(i). Plaintiffs assert that pursuant to 42 U.S.C. § 5304(d), any "project assisted with Community Development Block Grant ("CDBG") funds, must provide within the same community comparable replacement dwellings for the same number of occupants." [10] (D.E.1). In this case, the County committed as part of its matching funds $2 million in CDBG funds. By making this claim, however, Plaintiffs, in essence, ignore the history of and eventual elimination by Congress of the one-for-one replacement requirements for the HOPE VI Program.

Prior to the existence of HOPE VI, HUD administered the now defunct Urban Revitalization Demonstration ("URD") Program. Under the URD Program, in HUD's appropriations act in the early 1990s, Congress earmarked significant grant funds for award to "troubled" public housing agency's ("PHA") and PHAs in cities with more than a certain population threshold to prompt those PHAs to develop and implement innovative, comprehensive strategies for the revitalization of those PHAs' most troubled public housing projects and their surrounding neighborhoods. *See* Title II of Pub.L. 102–389, 106 Stat. 1579–1581 (1992). After several years of funding the original large-city URD PHAs, Congress enacted and eventually codified permanent legislation that authorized the HOPE VI program. The HOPE VI program is a competitive grant program open to a far wider range of PHAs that serves precisely the same purposes as the URD Program and has largely similar programmatic requirements. *See* 42 U.S.C. § 1437v.

At the time of Public Law 102–389's enactment in 1992, Section 18 of the U.S. Housing Act, 42 U.S.C. § 1437p, required PHAs to include as part of their applications to demolish public housing units both a plan for relocation of each tenant displaced by such demolition and a plan for replacement within six years of each public housing unit demolished or sold. [11] Compliance with Section 18's "one-for-one" replacement requirement—the resources for which were usually provided by HUD upon its approval of a demolition/disposition application—could be achieved either via the creation of a new "hard" unit of low-income housing or, to a limited extent, via the provision of Section 8 rent subsidies to an expanded number of families. In July 1995, however, Congress enacted Section 1002 of Pub.L. 104–19, 109 Stat.1994, 235 ***1308** (1995), a HUD supplemental appropriations and rescissions act [12], which eliminated [13] retroactively the requirement that PHAs replace units of public housing that HUD has certified as obsolete, and in every appropriations act enacted thereafter, Congress continued to suspend the replacement requirement for newly approved demolitions and dispositions, until Congress ultimately eliminated the requirement permanently in 1998. [14]

Section 18 of the U.S. Housing Act, the only Act previously requiring one-for-one replacement for HOPE VI-type projects, no longer affords Plaintiffs grounds to argue that the County's HOPE VI Revitalization Plan is deficient because it fails to provide for creation of one public housing unit for each public housing unit demolished. In fact, a similar argument was made by the plaintiffs and rejected by the District Court in *Darst–Webbe Tenant Ass. v. Saint Louis Housing Auth.*, 202 F.Supp.2d 938 (E.D.Mo.2001). In that case, the housing authority sought to demolish through its HOPE VI grant the existing public housing development and to replace it with a newly constructed mixed income housing project. As part of their claims for relief, plaintiffs sought to

> [enjoin] the federal defendants to withhold or withdraw from the City of St. Louis any commitment of Section 108 loan guarantee assistance until such time as the City has an antidisplacement and relocation plan that provides for all occupied and vacant occupiable low-income dwelling units demolished in connection with a CDBG-assisted activity to be replaced in the same community with comparable replacement dwellings for the same number of occupants and until the HOPE VI plan is revised to provide for replacing in the same neighborhood and in the required numbers and sizes of all the occupied and vacant occupiable low-income dwelling units slated for demolition.

Id. at 945. The Court, however, in a prior ruling, held that the one-for-one replacement of the demolished units was not a remedy available to plaintiffs. *Id.*

Similarly, in the instant case, Plaintiffs have failed to demonstrate that a one-for-one replacement of the Scott Homes units is a remedy that is available to them. Congress specifically eliminated the one-for-one replacement requirements for HOPE VI funded projects. Therefore, a preliminary injunction requiring the County ***1309** Defendants to develop a revitalization plan that complies with the requirements of HCDA simply because there has been a commitment of $2 million—which amounts to only 1.89% of the present $106 million dollar project—would violate the tenets of HOPE VI and the Congressional intent described herein.

On a practical level, even if the Court could compel the County Defendants to replace each of the units on a one-to-one basis, the Court could not fashion such a remedy for the Plaintiffs because the evidence presented makes it apparent that the County Defendants have insufficient financial resources to independently build such a project, and that HUD would probably not fund such a project. [15]

More importantly, Plaintiffs have not made a facial or as-applied constitutional challenge to the legislation that enacted HOPE VI and eliminated the one-for-one replacement requirement. Plaintiffs cannot request one-for one type replacement relief where the legislation does not require the same. Thus, the undersigned cannot recommend such relief where Plaintiffs have not challenged the constitutionality of the HOPE VI legislation.

C. PLAINTIFFS HAVE NOT MADE A SUFFICIENT SHOWING OF IRREPARABLE HARM

[5] Plaintiffs have failed to provide sufficient compelling evidence that they would suffer irreparable injury. No evidence was presented during the evidentiary hearing that any of the witnesses or the persons whom they represent would be prohibited from relocating from Scott Homes or that they were denied the right to return to the new development. In contrast, the County Defendants have demonstrated a legitimate interest in pursuing its HOPE VI Revitalization Plan as approved and would suffer provable damages in the event the project is halted or delayed by a preliminary injunction.

As Plaintiffs have not shown a substantial likelihood of success on the merits or that they will suffer irreparable harm, the undersigned need not address the remaining factors required for the issuance of an injunction. Accordingly, the undersigned recommends that Plaintiffs' Motion for Preliminary Injunction (D.E.13) be denied in its entirety.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections with the Honorable Shelby Highsmith, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *RTC v. Hallmark Builders, Inc.,* 996 F.2d 1144, 1149 (11th Cir.1993); *LoConte v. Dugger,* 847 F.2d 745 (11th Cir.1988).

Sept. 11, 2002.

ORDER

This Cause comes before the Court on Defendants' Motion to Strike (D.E.132). The Court having reviewed the record, and ***1310** being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Strike (D.E.132) is GRANTED. Paragraphs 46 and 101 of Plaintiffs' Proposed Findings of Fact and Conclusions of Law are hereby STRICKEN.

All Citations

242 F.Supp.2d 1292, 16 Fla. L. Weekly Fed. D 72

Footnotes

1 Paragraph 36 of Magistrate Judge Turnoff's R & R is hereby modified to replace the word "residents" with the word "households."

1 "Pls.' ex. # or "Defs.' ex. # " refer to either Plaintiffs or Defendants' exhibits which are listed in the Joint Stipulation Concerning Evidence for Hearing on Motion for Preliminary Injunction (D.E.127).

2 Plaintiffs moved on December 31, 2001 to drop Jones and further moved to join or intervene Shanlavie Jenkins as a party Plaintiff. (D.E.41). This Court on January 2, 2002 granted said motion. (D.E.42). On May 23, 2002, the Court entered a preliminary Order (D.E.123), after consideration of Federal Defendants Rule 12(h)(3) Suggestion the Court Lacks Jurisdiction Over the Subject Matter (D.E.71) and County Defendants' Motion to Dismiss (D.E.38), in which it granted and denied in part both motions. Pursuant to that Order, the Court determined that Plaintiffs, Jenkins and L.I.F.F.T. lacked standing to bring this action. In a subsequent Order (D.E.125), the Court further ruled that the claims of Plaintiff Sanders were moot.

3 In an Order dated July 3, 2002, the Court certified a class composed of all African–American individuals residing in Scott Homes as of September 17, 1999.

4 Pursuant to 42 U.S.C. § 3604 it shall be unlawful-

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

5 According to 42 U.S.C. § 2000d, "[n]o person in the United States shall, on grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

6 HUD's promulgated rules provided some guidance as to the types of advertisement that are prohibited under the FHA. Pursuant to 24 C.F.R. § 100.75:

Discriminatory notices, statements and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

7 Plaintiffs' reliance on cases such as *Johnson v. Board of Regents,* 263 F.3d 1234 (11th Cir.2001); *U.S. v. Starrett City Associates,* 840 F.2d 1096 (2nd Cir.1988); and *U.S. v. Charlottesville Redevelopment and Housing Auth.,* 718 F.Supp. 461 (W.D.Va.1989), for the proposition of racial motivation is misplaced.

8 Even if the Court were to find the evidence relied upon by Plaintiffs is circumstantial evidence of discrimination, Plaintiffs cannot meet the burden set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Under *McDonnell Douglas* (1) a plaintiff has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence; (2) if a plaintiff sufficiently establishes a *prima facie* case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action; and (3) if the defendant meets this requirement the burden reverts back to the plaintiff to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext. *Id.* at 802–03, 93 S.Ct. 1817; *see also Secretary, United States Dept. of Housing and Urban Dev. v. Blackwell,* 908 F.2d 864, 870 (11th Cir.1990). For the purposes of this preliminary injunction, Plaintiffs cannot demonstrate that they are able to make a prima facie case. Plaintiffs are required to establish that they are a member of a protected class; that they applied for and were qualified for housing and that in spite of their qualification the County denied them housing on the basis of race and familial status. *Id.*

Although Plaintiffs are able to show that they meet the first criteria, *i.e.,* they are African–Americans, they cannot demonstrate they applied and were qualified for housing and were denied by County Defendants because of their race and/or familial status. Even if the Court finds that Plaintiffs have established a prima facie case, the County Defendants have set forth a legitimate nondiscriminatory reason for their actions. Plaintiffs have not demonstrated that these reasons are pretextual.

9 Many courts are in dispute as to whether the factors listed herein should be advanced as part of a plaintiff's prima facie case or whether they are part of the burden shifting analysis to be considered in a final determination on the merits. *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 935 (2nd Cir.1988).

10 CDBG funds are federal funds allocated to the County by HUD. The evidence shows that part of the HOPE VI Grant Application included a budget, which referenced the commitment of $2 million in CDBG funds towards this project. The proposed use of these funds is for infrastructure construction of the new planned community. (Pls.' Ex. 8, Revitalization Plan, Attach.s 17, 18, and 26.) The undersigned finds that a less than 2% infusion into a project for infrastructure construction does not dictate the rules in which a project is implemented and arguments to the contrary are meritless. Accordingly, the Court cannot compel the County Defendants to construct the new units on a one-for-one basis because of a commitment of $2 million in CDBG funds.

11 Under Section 18, tenants who were displaced by a project's demolition were entitled merely to be relocated to other housing; a PHA had no obligation to consider the displaced tenants for residence in the new replacement units created, often years later. The URD statute provided that families displaced by URD demolition must at least be considered "eligible for residence in any low-income replacement units." Pub.L. 102–389, 106 Stat. 1579, 1580.

12 The title of the Act is the "Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti–Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred in Oklahoma City, and Rescissions Act, 1995."

13 *See* Section 1002(a)(3), striking the language of Section 18(b)(3) as it then existed.

14 *See* Section 531 of the Quality Housing and Work Responsibility Act of 1998, as enacted by Title V of the Department of Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1999. In addition, an analysis of the legislative history indicates that Congress intended to eliminate the one-for-one replacement requirement under the Housing Act of 1937 for the following reasons:

The one-for one replacement requirement has been one of the major impediments to eliminating the most distressed public housing and revitalizing public housing communities. Because there typically have been no funds to fulfill the requirement, as well as an insufficient number of suitable sites for replacement housing, the one-for-one replacement requirement has simply prevented the demolition of obsolete and dangerous projects.

S. Rep. No. 21, 105th Cong., 1st Sess. at 25 (1997).

15 *Cf. Smith v. Town of Clarkton,* 682 F.2d 1055 (4th Cir.1982) where the Court found defendants violated FHA and Fourteenth Amendment when it withdrew "multimunicipality low-income housing authority," thereby blocking construction of low-income units with federal funds. The Court found that it was proper to require defendants to reinstitute the procedures, but found it improper to compel the defendant to construct the units using locally generated funds where construction had not begun. *Id.* at 1069.

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