

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc.,	*	
Plaintiff,	*	Civil Action No.
v.	*	07-CV-945-O
The United States Department of	*	ECF
Housing and Urban Development,	*	
Defendant.	*	

PLAINTIFF'S BRIEF IN OPPOSITION TO HUD OBJECTIONS AND MOTION TO STAY

Plaintiff opposes HUD's objections to and motion to stay the U.S. Magistrate's July 20, 2009 order requiring HUD to provide plaintiff with the administrative record in the case. HUD cites some unspecified burden as the reason for the objections and the stay. There is no such burden. HUD's attorney has admitted that the administrative record is already compiled. HUD cites numerous cases in support of its motion. Not one of the cases involves a decision on a motion to stay the filing of an administrative record by a federal agency. HUD has not met its burden for overturning or staying the order to provide the administrative record. Since HUD has already used the administrative record - as set out in self-serving affidavits by HUD employees - in its favor on the motion to dismiss and since HUD is clearly going to continue its efforts to dismiss the case, plaintiff will be prejudiced by an order staying the order to produce. HUD can continue to dip into the record at its convenience while plaintiff will have no access to the record for the continuing dispute on the motion to dismiss.

HUD could not specify a burden because there is none.

HUD's argument that an unspecified "burden" on it justifies its objections to and its request for a stay of the order requiring it to provide plaintiff with the administrative record upon which HUD relied by August 19, 2009. Defendant's Objections, page 2. HUD does not state

what this burden might be. If HUD was seeking to prevent discovery by asserting such an undue burden, it would have to provide more than such a “mere statement.” *S.E.C. v. Brady*, 238 F.R.D. 429, 437 - 438 (N.D. Tex. 2006). HUD did not do so but rather rests its motion on the non-specific objection that provides no basis for either a detailed response or for an order granting relief based on the general objection.

HUD cannot show that the order will impose any burden much less an undue burden. When HUD’s attorney first called plaintiff’s attorney after the U.S. Magistrate’s recommendation and accompanying orders were filed, the HUD attorney confirmed that the HUD administrative record had been compiled. Placing postage on a package or emailing electronic records is not an undue burden that would justify the exceptional relief of a stay of an order that HUD must admit is clearly within the discretion of the Court.

HUD’s cases provide no basis for the stay other than the discretion of the Court.

The order to provide the plaintiff with the administrative record violates no statute, regulation, or court made principle. HUD’s objections and motion provide no such authority. The cases HUD cites do not involve the question of whether the provision of the administrative record should be stayed pending the final decision on a motion to dismiss. The Court of Claims routinely decides motions to dismiss along with decisions based on the administrative record. *Flowers v. U.S.*, 80 Fed.Cl. 201, 202, 227 (Fed. Cl. 2008); *Barnick v. U.S.*, 80 Fed.Cl. 545, 546-547 (Fed.Cl. 2008). There is no legal requirement for the requested stay.

In addition to HUD not meeting its burden to show a stay is justified, such an order would prejudice plaintiff by continuing HUD’s unilateral access to the administrative record.

If the analogy to discovery is followed, then the onus is on HUD to show that it is entitled

to the requested stay. HUD has shown neither legal authority nor factual grounds for the stay. An additional ground for denial of the motion is the prejudice to plaintiff caused by allowing HUD to continue to enjoy unilateral access to the administrative record even on the motion to dismiss.

HUD's objections to providing the Court and the plaintiff with the administrative record have not kept HUD from using the administrative record on its own behalf. Although the documents in the record have not been filed or served, HUD has already filed two affidavits discussing the contents of the administrative record. HUD used the affidavits to support its motion to dismiss.

The first affidavit citing to and relying upon the administrative record was the Declaration of Kurt G. Usowski in Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Document 9 filed 10/02/2007 (Usowski). Mr. Usowski was the Assistant Deputy Assistant Secretary for Economic Affairs responsible for supervising the development of the Section 8 voucher program fair market rents. Usowski, page 1. His declaration described HUD's process for establishing fair market rent areas in general and in the Dallas area. Usowski pages 2 - 4. Mr. Usowski discussed HUD's findings, HUD's phone survey, HUD's use of Census data, HUD's use of the Consumer Price Index data, the basis for some changes to the fair market rent areas, HUD's use of American Community Survey data, and HUD's record for implementation of the market area for the determination of fair market rents in the Dallas area. Usowski, throughout. HUD cited Usowski on HUD's record for establishing fair market rent areas and fair market rents 21 times in its brief in support of its motion to dismiss. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction; Accompanying Brief; Certificate of Interested Persons, 4 cites on each of pages 9, 11, 12; 2 cites on each of pages 10 and 27, one cite on each

of pages 16, 18, 21, 25, and 28. Plaintiff had no access to the same administrative record used by HUD and Mr. Usowski.

The second affidavit citing to and relying upon the administrative record was the Declaration of Donald L. Darling In Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Document 17 filed 11/13/2007 (Darling). Mr. Darling was the HUD Regional Economist and had a role in setting Section 8 Fair Market Rents. Darling, page 1. Mr. Darling's affidavit discussed meetings with Dallas Housing Authority, data submitted by the Dallas Housing Authority, a HUD spreadsheet identifying racial composition and median rents for census tracts in Dallas, Collin, Denton, and Tarrant Counties, and his records concerning contacts with the Dallas Housing Authority. Darling pages 1 - 3. None of the records were produced. HUD used the Darling declaration to deny that it was responsible for setting rents that did not provide access to predominantly White areas. Defendant's Reply In Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction, page 9 n.8.

HUD asked for and received an extension of time to file its objections to the U.S. Magistrate's Recommendation on the HUD motion to dismiss. The District Judge's decision on those objections will be de novo. Fed. R. Civ. P. 72(b)(3). Even if HUD does not submit additional material concerning the administrative record to the District Judge, it will be using its previous record and arguments. Plaintiff will still have no access to the underlying administrative record upon which HUD relies for its motion to dismiss if the Court grants the stay.

Conclusion

HUD has not shown that it is entitled to the stay on either the law or the facts. There is no law requiring the stay and HUD will suffer no burden in complying with the order. Without such

a showing, there is no basis to prejudice plaintiff by supporting HUD's unilateral access to the administrative record. Plaintiff asks the Court to exercise its discretion and deny the motion for a stay of the order requiring HUD to provide plaintiff with a copy of the administrative order by August 19, 2009 as ordered.

Respectfully Submitted,

s/ Michael M. Daniel

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Certificate of Service

I hereby certify that on August 10, 2009 I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individual who has consented in writing to accept this Notice as service of this document by electronic means: James D. Todd Jr.

s/ Michael M. Daniel