Vermont Superior Court
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Washington Unit

SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-02299

Rebecca Duprey et al v. Jenney Samuelson et al

Opinion and Order on Motion for Preliminary Injunctive Relief

Plaintiffs bring this action seeking declaratory and injunctive relief against Defendants. Plaintiffs are currently receiving housing assistance from Defendants and are residing at various Vermont motels and hotels. They maintain that the Defendants have violated the Vermont Administrative Procedures Act (VAPA), 3 V.S.A. §§ 800–848, by eliminating their housing assistance without engaging in formal rulemaking. Specifically, they claim that the expanded benefits provided during the Covid-19 pandemic cannot be undone unless through rulemaking. They also assert that Defendants violated their rights to due process under the federal and Vermont Constitutions by failing to give them adequate notice and opportunity to be heard prior to eliminating their housing benefits and by not properly administering the program. They claim irreparable harm to them is imminent as they are about to lose their housing.

Defendants make a multifaceted response. Principally, they assert that: (1) the Plaintiffs' delay in bringing this action warrants refusing the request for injunctive relief; (2) the state-law claims are barred because Plaintiffs have not exhausted their administrative remedies; (3) the VAPA claim fails because all

actions taken to expand benefits were emergency actions of temporary duration and, thereafter, the prior rules continued to exist; and (4) the due process claims fail because the changes were the product of legislative action, the Defendants have no property based entitlement to the housing benefit, and the notice provided was reasonable under the circumstances.

This case was filed on Tuesday. Given the fact that the benefits at issue are to end today, the Court requested expedited briefing and set the matter for a prompt hearing. The hearing was held this morning. Both sides were represented by able and experienced counsel. Based on the submissions of the parties and the arguments of counsel, the Court makes the following determinations.[1]

Statutory/Regulatory Background

Prior to the pandemic, Vermont made emergency housing available to qualified persons pursuant to the Department for Children and Families' (DCF) General Assistance (GA 2600 Rules) and Emergency Assistance (EA 2800 Rules) rules, including through DCF's Adverse Weather Conditions policy. That policy expanded housing benefits each year based on particularly severe and dangerous weather. In response to the Covid-19 pandemic, the Legislature authorized DCF to temporarily relax required qualifications to make emergency housing more widely available. *See* 2020, No. 91, § 1. Between then and now it has reauthorized various

[1] This case was filed only two days ago. It has been the subject of highly expedited briefing and Court action. The Court's opinion attempts to balance the compelling need to issue a prompt ruling against its typical desire to provide complete explication and citation of all relevant authorities.

forms of relaxed emergency housing assistance repeatedly. *See, e.g.,* 2020, No. 140, § 13; 2021, No. 6, § 1; 2021, No. 74, § E.321; 2022, No. 83, § 54; 2022, No. 185, § E.325. In turn, Defendants acted on those authorizations and expanded the housing benefits in various ways during the pandemic.

Earlier this year, the Legislature determined to end temporarily expanded benefits as of the end of May (the expanded Adverse Weather Conditions policy) and June 2023 (extending expanded benefits for certain described persons). 2023, No. 3, § 45.

Defendants maintain that the result of the end of the expanded benefits is a return to, what they assert, have always been the underlying and not repealed GA 2600 and EA 2800 rules governing housing eligibility. Plaintiffs claim the expanded benefits continue on until formal action has been taken to modify them or reinstate the older rules.

<u>The Plaintiffs</u>

Plaintiffs allege that they receive housing assistance from the Defendants. They assert that they will or are likely to be expelled from that housing on June 1, 2023. All assert that they suffer from some disability and that they have no place to reside if Defendants do not continue to provide housing assistance. Plaintiff Duprey has two children. One Plaintiff may become reincarcerated if her housing is lost as housing is a term of her parole. All allege extreme anxiety and concern over the threat of losing their housing. None specifically claims to have received the notice of termination of benefits set out in Exhibit 1.

Analysis

Plaintiffs' request for an injunction faces a high hurdle. "An injunction is an extraordinary remedy, the right to which must be clear." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000); *Comm. to Save the Bishop's House v. Medical Center Hosp. of Vt.,* 136 Vt. 213, 218 (1978); Vt. R. Civ. P. 65. Plaintiffs' motion for preliminary injunctive relief requires the Court to balance a number of factors to assess the impact of granting or withholding the requested relief: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596 (internal quotations omitted); *see In re J.G.*, 160 Vt. 250, 255 n.2 (1993) (noting same).

At this early juncture, Plaintiffs have failed to carry the burden of establishing a basis for a preliminary injunction under Vermont law.

I. Likelihood of Success on the Merits

Plaintiffs have failed to convince the Court that they are likely to prevail on the merits.

A. Exhaustion

An administrative remedy appears to exist whereby Plaintiffs could raise their state-law claims. If a person is denied housing benefits, she may appeal that decision to the Human Services Board. 3 V.S.A. § 3091(a). Leaving aside federal due process claims, where such an administrative remedy is available, plaintiffs typically must pursue it "before turning to the Courts for relief." *Mullinex v.*

*Menar*d, 2020 VT 33, ¶ 8; *Pratt v. Pallito*, 2017 VT 22, ¶ 14, 204 Vt. 313, 318 (discussing exhaustion); *Luck Bros. v. Agency of Transp.*, 2014 VT 59, ¶ 21, 196 Vt. 584, 595 (exhaustion required of state constitutional claims). If a plaintiff has failed to exhaust administrative remedies, the Court lacks subject-matter jurisdiction over the matter. *Mullinex*, 2020 VT 33, ¶ 8.

Plaintiffs here claim that without having been provided notice of the lack of availability of benefits, nothing triggered any obligation to appeal to the Human Services Board. They also argue that any exhaustion requirement in this case should be waived by the Court on futility grounds.

There is a clear distinction in federal cases between statutorily required exhaustion and the corresponding judge-made requirement in the absence of a statutory demand. Courts may not waive a statutory exhaustion requirement but may waive the judge-made requirement in limited circumstances, including for futility. *See Stone v. Errecart*, 165 Vt. 1, 4 (1996); *see also Town of Bridgewater v. Dep't of Taxes*, 173 Vt. 509, 510–11 (2001) (concluding that a clear statutory path of appeal to agency demonstrates legislatively mandated exhaustion).

While Defendants raised exhaustion in briefing, the matter of futility only came up at the hearing and has not been briefed. At best, it is unclear how the doctrine might apply in this case. The issue is further complicated by Plaintiffs' allegations of a lack of notice as to a particular benefits "decision." At this point in the proceeding, the Court is unable to conclude that it lacks jurisdiction because Plaintiffs failed to exhaust their administrative remedies.

B. Federal Due Process[2]

Plaintiffs allege that Defendants failed to give them adequate individualized notice, failed to provide proper notice by entrusting delivery to a third party, failed to provide individual determination of benefits, failed to include information on how to challenge the termination of benefits, and administered the programs without standards, rules, or policies. They maintain that these shortcomings violate the due process provisions of the state and federal Constitutions. Defendants argue that the due process claims do not succeed because the expirations of the programs were set by the Legislature's acts and were not adjudicative acts to which procedural due process protections attach. Additionally, Defendants maintain that Plaintiffs have no actionable property interest as the emergency housing established by the Legislature was not an entitlement. Lastly, they contend that the notice provided was reasonable given the interactions between the parties and the circumstances.

1. Legislative, Not Adjudicative Acts

"Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause." *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994) (citing *R.R. Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1204–05 (2d Cir. 1987)). Generally, "the legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). A narrow exception exists: "a due process claim is

[2] The due process analysis for the federal claims is applicable to due process claims arising under Chapter 1, Article 4 of the Vermont Constitution. *See Holton v. Dep't of Emp. & Training*, 2005 VT 42, ¶ 27, 178 Vt. 147, 159-60.

available when the legislature deprives property rights with legislation that is targeted at a particular individual or small group of individuals, or that was adopted during the course of a legislative process that was somehow defective." *Conway v. Sorrell*, 894 F. Supp. 794, 802 (D. Vt. 1995).

Here, the Legislature enacted a series of laws that set limited periods or specific expiration dates for waivers, variances, and emergency rules that Defendants were to consider. Act 91 (2020) permitted Defendants to consider waiving or modifying existing rules, or adopting emergency rules, during a specified period: "During a declared state of emergency in Vermont as a result of COVID-19." Act 91, § 1 (2020). Act 140 (2020) modified the period to a specific date, "[t]hrough March 31, 2021." Act 140 (2020), § 1. Act 6 (2021) extended the date to March 31, 2022. Act 6 (2020), § 1. Act 74 (2021) charged DCF with implementing a "sustainable housing plan on July 1, 2022" to reduce or end reliance on the GA and Emergency Assistance motel voucher program effective June 30, 2022. Act 83 (2022) ordered DCF to make emergency housing available through the GA Emergency Housing program through June 30, 2022, and declared the Adverse Weather Conditions policy to be in effect until March 31, 2022. Act 185 (2022) acknowledged that DCF had promulgated the Transitional Housing Program Emergency Rules (22-E07), effective through September 28, 2022, and authorized a second emergency rule substantially similar to it. Act 185, § E.325.1(a). Finally, Act 3 (2023) specified an end date for funds to be used for some housing benefits until May 31, 2023, and for other housing benefits until June 30, 2023. Act 3: § 45.

The termination of the programs at issue in this case followed a schedule that was determined in the legislative process in a manner that did not single out individuals or adjudicate eligibility. Under such circumstances, it is likely that no notice and opportunity to be heard was required to end those legislatively provided benefits.

2. Protected Property Interest

Nor is it clear on the present record whether an actionable property interest is at issue in this case. *See Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011). To have a property interest protected by due process rights, a person must have a legitimate claim of an ongoing entitlement to it. Here, in addition to providing expiration dates for the temporary measures enabled in the acts described above, the Legislature expressly stated, in multiple places, that emergency housing was "not an entitlement." Act 74, § E.321(b); Act 154, § E.321.1(a). That legislative directive cabins the benefits at issue and makes plain that no entitlement to ongoing benefits was intended by the General Assembly.

Plaintiffs have not convincingly shown how a participant in the programs at issue could be entitled to benefits that extend beyond the expiration dates set out by the Legislature itself in expanding housing benefits or in authorizing Defendants to consider expanding such benefits.

The Plaintiffs have not persuaded the Court as to the existence of an actionable property interest.

3. Adequate Notice

Given those determinations, the Court need not reach the issues raised as to the adequacy of the notices. Exhibit 1. If such notice were required, however, evidence may well be needed to evaluate the adequacy of the notice in this case. Plaintiffs do not contest the Defendants' proffer that participants have to apply for housing on a regular basis. During the pandemic, the reauthorization cycle was 30-days, and according to Defendants, program staff members spoke with each participant every 30 days.

Defendants argue that when participants contacted DCF to apply or extend their benefit, staff were to communicate that the benefits were "for a set, limited duration of time." Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 9. Defendants state that DCF proactively contacted participants to communicate about the programs, and that, starting in 2022, Care Coordination Housing Resources Teams ("CCHRT") visited hotels to speak with participants.

As regards to the most recent changes, Defendants aver that they sent letters on May 3 and May 23, 2023 to participants of the AWC program to advise them that their housing under that program would end on June 1, 2023. The letters clearly stated the termination date, outlined reasons for continued housing, and provided a number to call. It also set forth possible grounds for the person to seek to extend

the housing benefit. Exhibit 1. Hotel staff were directed to place the letter under the doors of participants' rooms.

Plaintiffs forcefully maintain that mail notice would have been preferable and is often the constitutional standard. They argue that relying on third parties is unreliable; and their declarations support the view that some Plaintiffs, at least, did not receive the notices.

Defendants respond that prior mailings to participants had resulted in a high incidence of returned mail. The decision to have notice delivered by the hotels was designed *to improve* the quality of the notice. Further, as there is an ongoing interaction between Defendants and participants nearly each month as to ongoing housing assistance, information is most often transmitted in that way as well.

Were it required, the Court has ongoing doubts about the quality of the notice; however, the countervailing evidence offered by the Defendants makes the matter one that requires further factual development and could not be determined on this record. *See Hogaboom v. Jenkins*, 2014 VT 11, ¶ 15, 196 Vt. 18, 23 ("Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections." (internal quotation omitted)).

Plaintiffs have not established that they are likely to succeed on their due process claims.[3]

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[3] Plaintiffs also make a claim that the Defendants' administration of the housing program and the lack of clear standards violate due process. This argument has not been fully developed on the existing record. In any event, in light of the Court's

C. Alleged Violations of the VPA

Plaintiffs argue that under *In re Diel,* 158 Vt. 549 (1992), they somehow should remain entitled to emergency housing until such time as DCF re-adopts its pre-pandemic General Assistance (GA 2600 Rules) and Emergency Assistance (EA 2800 Rules) by formal rulemaking. The Court is not persuaded.

The parties have extensively cataloged the legislation that has authorized DCF to expand emergency housing assistance beyond its pre-pandemic GA 2600 Rules and EA 2800 Rules. The Court sees in that history no intention at all to do away with those pre-pandemic rules. Rather, each enactment clearly intended temporary deviations from those rules, in response to the public emergency, whether by separate emergency rulemakings by DCF or policy changes. The most recent iteration is 2023's Act No. 3, § 45, which brings expanded benefits under DCF's expanded Weather Conditions policy to a close on May 31, 2023, and brings other expanded benefits for certain individuals as specifically described in Act 3 to a close on June 30, 2023.

Nowhere in Act 3 or any of the related legislation leading up to it that in any way addresses the housing assistance program does the Court see any intent that, upon the cessation of temporary expanded benefits, there would be no GA or EA

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other rulings, the Court cannot find that the Plaintiffs have established a likelihood that they would be successful on that claim.

benefits available at all. Nor has DCF done anything on its own to indicate its intent to eliminate the pre-pandemic GA and EA rules.

Plaintiffs counter that the above authorizations should not be seen as providing sunset dates for waivers or modifications. Instead, they should be seen as setting the time period in which the Defendants could "consider" modifications. The Court disagrees. A straightforward reading of the laws indicates an intention to allow time-limited waivers/modifications of the rules. No legislative history or other interpretive tools have been proffered that would arrive at a contrary reading. That view also accords with 3 V.S.A. § 848, which generally provides that the ending of legislative authorizations can terminate administrative rules.

Plaintiffs cite *In re Diel*, 158 Vt. 549 (1992), as support for their argument that DCF has somehow entirely superseded its GA and EA rules. *Diel* never addressed an analogous issue, however. In *Diel*, the Department of Social Welfare unilaterally rescinded a policy that it had unilaterally adopted reducing benefits to petitioners under the Aid to Needy Families with Children program. Though the policy changes were within its discretion generally, the Court explained that the rescission of the policy change expanding benefits was void because it qualified as a rule under the APA, the Department was not exempt from the APA rulemaking requirement, and it had failed to promulgate the policy change as a rule. *See Diel*, 158 Vt. at 554–55. Nothing in *Diel* invalidated the Department's underlying rules. *Diel* merely held that, until the Department implemented its policy change by rule, there would be no modification (*i.e.,* the petitioners would get expanded benefits).

Plaintiffs in this case essentially are challenging Act 3 and the Legislature's decision to end temporary expanded benefits that it had been authorizing over the last few years. Legislative acts by the Legislature are not subject to the APA. A rule subject to the APA is an "*agency* statement of general applicability that implements, interprets, or prescribes law or policy and that has been adopted in the manner provided by sections 836–844 of this title." 3 V.S.A. § 801(9) (emphasis added). The policy change to which Plaintiffs object—when expanded emergency housing benefits would end—was made by the Legislature, not DCF. Neither *Diel* nor the APA applies as Plaintiffs contend.

To the extent Plaintiffs seek somehow to bind Defendants to any of the various waivers done by Defendants during the Covid-19 emergency, *Diel* also provides no support. There, the agency action was not in any way time limited. By contrast, whether viewed through the lens of the legislative authorizations or the waivers themselves, it is apparent that the expansion of benefits was intended to be of temporary and emergency duration, which has now expired.

At this stage, the Court cannot find it likely that Plaintiffs have established a violation of the VAPA.

* * *

In sum, the Court concludes that Plaintiffs have not established a likelihood of success on any of their claims.

II. Irreparable Harm

The Court agrees that removing persons from their rightful homes and subjecting them to homelessness is an irreparable harm. *Sinisgallo v. Town of Islip Housing Auth.*, 865 F. Supp. 2d 307, 328 (E.D.N.Y. 2012). Most of the named Plaintiffs have provided proof that there is a likelihood that they will be without shelter after today. They have also eloquently described the emotional and physiological toll the ongoing process has had and is having on them. Those harms are plainly imminent, palpable, and cannot be repaired through later relief.

Weighed against that conclusion, are the Court's determinations, on the existing record, that the Plaintiffs have no ongoing guarantee or claim to housing under the standards that are to sunset on June 1 (or July 1), and that the Defendants' conduct did not violate the VAPA or due process.

Nonetheless, given the impact on Plaintiffs, the Court concludes that this factor has been established and weighs in favor of Plaintiffs.

III. Harm to Defendants/Public Interest

A Court is often at its peril in determining the "public interest." No doubt, forcing many unhoused persons into communities without providing resources for that influx will have an impact on the individuals and the communities. Here, however, the Legislature has passed laws that included provisions to sunset funding for the housing programs Plaintiffs seek to extend through this lawsuit. Typically, absent constitutional infirmity, the public interest favors allowing Defendants to follow the statutory framework that has been created by the elected

branches of government. *See Texaco, Inc. v. Hughes*, 572 F. Supp. 1, 9 (D. Md. 1982); *see also Able v. United States*, 44 F.3d 128, 131 (2d Cir.1995) ("[G]overnmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly."); Charles Wright, Arthur Miller, Mary Kane, *Federal Practice and Procedure* § 2948.4. The same is true here.

Additionally, the Defendants have set out persuasive arguments that issuing an injunction at this late stage would create even more housing confusion than is alleged to exist by Plaintiffs, would result in significant unfunded costs to taxpayers beyond that authorized by their elected representatives, and would threaten to lessen the housing stock available for the most vulnerable Vermonters who will retain housing eligibility after July 1.

The public interest and the potential adverse effects on Defendants and third parties, weighs against a preliminary injunction.[4]

Conclusion

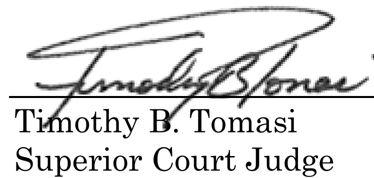
In light of the foregoing, the Court concludes that Plaintiffs have not established the "clear" right to relief that is necessary for the Court to issue preliminary injunctive relief. The Plaintiffs have plainly alleged potential harm of

[4] The Defendants also ask that the Court consider the Plaintiffs' alleged delay in bringing this action either as a basis to deny relief outright or in the context of balancing. *See Nat'l Council of Arab Americans v. City of New York*, 331 F. Supp. 2d 258, 265 (S.D.N.Y. 2004). While the action was filed just days prior to the end of the benefits at issue, the Court accepts counsel for Plaintiffs' justifications for filing on the date they did. The Court does not weigh any possible delay in filing against Plaintiffs.

high order. The legislative determination to end the housing benefits at issue controls, however; and Plaintiffs have not convinced the Court, at this juncture, that the Defendants' actions have violated the VAPA or due process. Further, the remaining injunctive factors also weigh in favor of the Defendants.

The Defendants shall respond to the Complaint by July 1.

Electronically signed on Thursday, June 1, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge