

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Arlington Housing Partners, Inc.,	:	
Plaintiff-Appellant,	:	
v.	:	
Ohio Housing Finance Agency,	:	No. 10AP-764 (C.P.C. No. 09CVH-07-9859)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 30, 2012

Richard A. Green Co., L.P.A; and Richard A. Green; McMahon DeGulis LLP; and Andrea M. Salimbene; Coan & Lyons, and Carl A.S. Coan, III, for appellant.

Michael DeWine, Attorney General, William J. Cole and Keith A. McCarthy, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Arlington Housing Partners, Inc., appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, Ohio Housing Finance Agency ("OHFA") in a rent dispute involving federally subsidized housing.

{¶ 2} Arlington Housing Partners is an Ohio for-profit corporation that functions as the general partner of Wilbeth-Arlington Housing, L.P. The limited partnership is itself the owner of a complex known as Wilbeth-Arlington Homes, a 328-unit multi-family

rental housing facility in Akron, Ohio. As this case is now postured, we may, for the sake of convenience, refer to the general partner, the limited partnership, and the housing complex itself collectively and without distinction as "Arlington Housing" or "the owner."

{¶ 3} Appellee OHFA is a public housing agency that receives and distributes rent subsidies from the federal Department of Housing and Urban Development ("HUD") for private low- and middle-income housing in Ohio through what is commonly known as the "Section 8" housing program. At one time a division of the Ohio Department of Development, OHFA became an independent state agency in 2005 pursuant to Am.Sub.H.B. No. 431, codified at R.C. 175.01 et seq. As an independent state agency, OHFA may "[s]ue and be sued in its own name with respect to its contracts, obligations, and covenants * * * in a court of competent jurisdiction located in Franklin county." R.C. 175.05(B)(10).

{¶ 4} Arlington Housing and OHFA are parties to a HUD-approved housing assistance payments ("HAP") contract under which Section 8 subsidies are applied to tenant rents in the Arlington Housing complex. Arlington Housing sued OHFA for breach of contract, alleging that OHFA failed to pay a series of "automatic" annual rent increases due under the HAP contract. OHFA defended by asserting that changes to federal law and applicable HUD regulations precluded or excused payment of the rent increases contemplated under the HAP contract.

{¶ 5} The trial court granted summary judgment in favor of OHFA. The trial court concluded that HUD, rather than OHFA, established the scheduled criteria referred to in the HAP contract for increases in housing assistance payments, and that any nonpayment by OHFA was either excused by the HUD-imposed changes or resulted from

a breach by HUD for which OHFA would not be liable. Arlington Housing has timely appealed and brings the following two assignments of error:

1. The trial court erred in granting Defendant-Appellee's motion for summary judgment.
2. The trial court erred in denying Plaintiff-Appellant's motion for summary judgment.

{¶ 6} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶ 7} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 8} This case, as currently postured, involves few factual disputes as the matter has been argued to this point on questions of statutory law and contractual language. We will accordingly conduct a review de novo of these aspects.

{¶ 9} The Section 8 housing program was established by Congress in 1974 and establishes a federal program for subsidizing low-income housing. Under the Section 8 program, HUD enters into contracts that provide rent subsidies for low-income tenants occupying privately-owned dwellings. HUD effectuates the subsidies either by contracting directly with the private landlords or by acting through the intermediary of a local public housing agency. *See generally*, 42 U.S.C. 1437a and f. The tenants pay a proportion of the rent themselves and HUD, either directly or through the public housing agency, pays the balance. The agreed rent is based on fair-market value of the dwelling unit with some variation to allow for supplemental expenses associated with the landlord's compliance with administrative and regulatory burdens of the Section 8 program. 42 U.S.C. 1437f(c)(1).

{¶ 10} As originally enacted in 1974, the Section 8 program requires HUD to adjust monthly rents on an annual basis pursuant to published guidelines. 42 U.S.C. 1437f(c)(2)(A) (1974 text); 24 C.F.R. 880.609(a) (1980 text). HUD must give notice of these "annual adjustment factors" through publication in the Federal Register. 24 C.F.R. 888.202 (2008 text). The scheduled annual adjustments to contract rents are subject to an overall limitation providing that "adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by [HUD]." 43 U.S.C. 1437f(c)(2)(C), (1974 text).

{¶ 11} In the context of this federal program, OHFA's predecessor in interest, the Ohio Housing Development Board, in 1978 entered into an "annual contributions contract" with HUD under which OHFA, pursuant to further HAP contracts with private landlords, receives from HUD and transmits to such contracting landlords the monthly housing assistance payments under Section 8 HAP contracts. Pursuant to this arrangement, in 1979, OHFA's predecessor entered into a HAP contract with Arlington Housing's predecessor-in-interest, the Akron Metropolitan Housing Authority. This HAP contract carries an approval signature by a HUD representative.

{¶ 12} The HAP contract, under the heading "Automatic Annual Adjustments," provides under section 1.9 for annual rent adjustments:

(b.)(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

* * *

(d.) Overall Limitation. Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government.

{¶ 13} The language of section 1.9(b) closely tracks the applicable statutory and regulatory language in effect in 1979 and discussed above. The contract thus reflects the

expectation that HUD would publish annually a notice of annual adjustment factors and that, if HUD deemed it necessary, HUD itself would further conduct a rent comparability study and cap the rents so that the scheduled annual increases would not unduly exceed market rents for comparable unassisted housing. Otherwise, the rent adjustments would be implemented as a matter of course, *i.e.*, "automatically" as described in the contract section heading.

{¶ 14} Section 8 governing law has been revised several times during the life of the Arlington Homes HAP contract. *See generally, Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). At issue in this case are a pair of significant changes enacted in 1994 by Congress in an effort to limit the rising costs of the Section 8 program. This legislation addresses some aspects of the annual rent adjustments and the "material difference" cap on rent. *Haddon Hous. Assoc., LLC v. United States*, 92 Fed.Cl. 8, 11 (2010) ("*Haddon I*"). We will refer to these changes collectively as the "1994 amendments."

{¶ 15} The first of these shifted the burden from HUD to the landlord to demonstrate that the rent for assisted units did not exceed that for comparable unassisted units:

[W]here the maximum monthly rent, for a unit in a * * * substantial rehabilitation * * * project to be adjusted using an annual adjustment factor *exceeds the fair market rental for an existing dwelling unit in the market area*, the [HUD] Secretary shall adjust the rent *only to the extent that the owner demonstrates that the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type, and age the same market area*, as determined by the [HUD] Secretary.

(Emphasis added.) Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub.L. No. 103-327, 108

Stat. 2298, 2315 (1994), codified at 42 U.S.C. 1437f(c)(2)(A). Of some significance in the present case is the fact that although the amended statutory language places a new burden upon the landlord to provide comparability studies before benefiting from annual rent adjustments, the first italicized passage above specifies that a landlord is required to do so only for units for which the rent exceeds ab initio the prevailing market rate. The source for the determination of fair-market rates in a given area is not fully developed in this case, but we glean from other cases that this springs from yet another published index furnished by HUD.

{¶ 16} The 1994 amendments also provided for a reduced annual adjustment for units occupied by tenants holding over from the prior year, reflecting the presumed financial advantage accruing to landlords from stable, long-term rentals:

[F]or any unit occupied by the same family at the time of the last annual rental adjustment, where the [HAP] contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for the unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0.

Id., codified at 42 U.S.C. 1437f(c)(2)(A).

{¶ 17} Pursuant to these statutory changes, HUD issued a notice ("Notice 95-12") reflecting the statutory language and requiring landlords to submit a rent comparability study at least 60 days before the HAP contract anniversary date in order to receive an annual increase. As with the statute, this notice required such a submission only for units whose rent exceeds fair-market rental for existing dwellings in the area. Notice 95-12 has been periodically replaced over the intervening years by comparable provisions

continuing HUD's requirements in this respect, culminating in the current HUD Notice H 2002-10 containing identical terms. *See generally, Haddon I* at 13, fn. 4.

{¶ 18} The complaint in this case states that, prior to the 1994 amendments, Arlington Housing duly received automatic annual HAP contract rent increases. After the 1994 amendments, Arlington Housing did not receive adjustments every year, and when it did receive increases, these were less than what was called for under the contract.

{¶ 19} As the trial court saw it, the threshold issue here is solely a question of whether OHFA as a contracting party with the plaintiff private landlord can be held liable for the foregone rent increases when OHFA claims that all times it acted in strict compliance with applicable statutes and HUD regulations as they evolved over the term of the HAP contract. Based on the above law and the record before us, we find that this oversimplifies the problem because not all classes of the housing units at issue are identically affected by the 1994 amendments. We will therefore independently address four separable issues in this appeal and apply the results to various aspects of Arlington Housing's claims. In the order in which we shall address them, these issues comprise, first, whether units renting below "fair market rental" are impacted at all by the 1994 amendments' provisions regarding comparability studies; second, whether the burden-shifting for comparability studies violates the terms of the original HAP contract; third, whether the reduced adjustment factor for holdover rentals conflicts with the terms of the original HAP contract; and fourth, whether OHFA can be held liable for any breach that occurred.

{¶ 20} With respect to the first enumerated issue, the 1994 amendments require a landlord to supply a comparability study only in cases "where the maximum monthly rent

* * * for a unit * * * to be adjusted using an annual adjustment factor exceeds the fair market rental for an existing dwelling unit in the market area." 42 U.S.C. 1437f(c)(2)(A). Arlington Housing asserts, and OHFA does not dispute for summary judgment purposes, that a certain number of the rental units here rented below fair-market rental, and would thus not trigger the need for a landlord to submit a comparability study even under the 1994 amendments and resulting HUD regulatory notices. OHFA does not articulate any further statutory or regulatory basis upon which to bar an automatic annual increase for these units pursuant to the HAP contract and HUD's published adjustment factors.

{¶ 21} The 1994 amendments, at least with respect to comparability studies as a prerequisite to scheduled increases, do not conflict with the terms of the HAP contract or otherwise impede OHFA's performance thereunder for such below-market units. Nor does Arlington Housing's failure to affirmatively request annual adjustments preclude a breach by OHFA, because where a pre-1994 HAP contract calls for truly automatic annual adjustments there is no duty upon the landlord to request such adjustments as a condition precedent to receiving them. *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed.Cl. 751, 759 (2003) ("*Cuyahoga I*") ("The 'automatic' references in these provisions, as well as the annual periodicity established therein, plainly reveal an intent that the adjustments would occur without [the owner] having to take any significant action."); *cf. Haddon I*, 92 Fed.Cl. at 19 (addressing different form of HAP contract with additional language stating that annual adjustments would be granted "upon request of the owner.") Summary judgment on the grounds cited by the trial court was therefore incorrect with respect to those units that would qualify as renting below fair-market rental, because

automatic annual adjustments were due for these units without any condition precedent under the HAP contract and either pre- or post-1994 amendment law.

{¶ 22} Turning to the question of whether the burden-shifting for comparability studies impairs Arlington Housing's rights under the HAP contract, we are guided by precedent to find that it does. The 1994 amendments to Section 8's governing law gave rise to much litigation addressing the impact of the changes upon existing HAP contracts. Because the federal government was, in effect, curtailing its own contractual obligations through these additional conditions precedent for annual adjustments and the shifted burden for providing comparability studies, landlords who contracted directly with HUD undertook a series of lawsuits to recover their annual increases under the pre-1994 amendment version of the applicable statutes and regulations. These actions generally sought to enforce landlords' rights embodied in HAP contracts entered into prior to the 1994 amendments. Public housing agencies have also sued HUD in an attempt to recoup from HUD the lost subsidies due to the new annual increase restrictions, *see, e.g., Cuyahoga I*, or sought to implead HUD as a necessary party and potential third-party defendant, *One and Ken Valley Hous. Group v. Maine State Hous. Auth.*, D.Me. No. 1:09-cv-00642-DBH (June 24, 2011) and *Village West Assoc. v. Rhode Island Hous. and Mortgage Finance Corp.*, 618 F.Supp.2d 134 (D.R.I.2009).

{¶ 23} Without developing the nuances of these cases beyond that which is necessary for decision of the present appeal, the United States Court of Federal Claims, which has jurisdiction over monetary lawsuits against the federal government, has on the whole held that the 1994 amendments and accompanying HUD notices amounted to a repudiation by the federal government of its contractual obligations under existing HAP

contracts, at least with respect to the newly-imposed requirement that landlords affirmatively demonstrate an entitlement to annual adjustments that previously were granted by default. By making annual rent adjustments less than automatic (as called for in the typical HAP contract), and by shifting the burden to landlords to demonstrate entitlement to such rent increases, the federal government had imposed "a condition extraneous to the boundaries of the contractual instrument" by which the government was bound. *Statesman II Apts., Inc. v. United States*, 66 Fed.Cl. 608, 618 (2005); see also, *Park Properties Assocs., L.P. v. United States*, 82 Fed.Cl. 162, 167 (2008) ("*Park II*"). HUD, as a contracting party, was liable for the omitted adjustments. The Court of Federal Claims reached this conclusion after analyzing the Section 8 contracts and statutes and applying a body of doctrine that balances the extent to which a sovereign government must remain free to legislate and govern against the need to abrogate the sovereign's power to abusively curtail its own contractual obligations by enactment, *i.e.*, limitations on the sovereign's power to "claim the benefit of its own breach." See, *e.g.*, *Cuyahoga I*, 57 Fed.Cl. at 764-76.

{¶ 24} We therefore find a clear conflict between the terms of the present HAP contract and the new conditions under which HUD allows annual rent adjustments under current law, and there would be a breach or repudiation of the HAP contract in this respect if HUD were the contracting party. Because HUD is not the defendant party in the present case, we do not yet dispose of the question of whether OHFA is liable for such a breach and address that issue separately after resolving another preliminary point.

{¶ 25} We now turn to the question of whether the reduced annual adjustment factor for holdover units under the 1994 amendments conflicts with the terms of the HAP

contract. This reduced adjustment factor, if upheld, would reduce any recovery by Arlington Housing for holdover units if foregone annual adjustments are awarded as damages in this case.

{¶ 26} On this issue, the Court of Federal Claims has split, holding in *Statesman*, 66 Fed.Cl. at 625, that the reduction for holdover units was a breach, and in *Park Properties Assocs., L.P. v. United States*, 74 Fed.Cl. 264, 275 (2006) ("*Park I*"), *Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed.Cl. 534, 542 (2005) ("*Cuyahoga II*"), and *Haddon Hous. Assocs., LLC v. United States*, 99 Fed.Cl. 311, 336 (2011) ("*Haddon II*") that the reduction was not a breach. All these cases involved HAP contracts to which HUD was a party. In *Statesman*, the court held that HUD had not published findings that correlated the reduction in rent adjustments for turnover units with lower landlord expenses for such units. *Statesman* at 625. The Court of Federal Claims' later decision in *Park I* disagreed on this point, finding that *Statesman* had "overread" language in the HAP contract that required HUD to give a basis for its determination of the annual adjustment factors in a given year, and that in any case there was legislative history to support the objectives of the amendments in setting a rate differential for holdover units. *Park I* at 275.

{¶ 27} If a lack of published rationale were to be the sole basis for rejection of the rate differential, we find the reasoning in *Park I* more persuasive. The language relied upon by *Statesman* is found at section 1.9b(1) of the HAP contract in our case: "Automatic Annual Adjustment Factors will be determined by [HUD] at least annually * * *. Such Factors and the basis for their determination will be published in the Federal Register." *Park I*, however, concluded that "neither this clause nor any other part of the contract

requires or even suggests that the published 'basis' must be described in factual terms, requiring a demonstration that costs are lower for holdover tenants." *Id.* at 275. It was sufficient to publish the annual adjustment factors with reference to the "legislation that effected a modification of the adjustment factors." *Id.* Additional rationalizations furnished by HUD would be unnecessary, as these would merely restate the declared intent of the legislature as expressed in the legislative history. *Id.* at 276. Pursuant to *Park I*, we are convinced that the concerns expressed in *Statesman* do not warrant a finding of breach on this issue in the present case.

{¶ 28} Beyond the question of any lack of *published* rationale, however, we note that even *Statesman* does not suggest that a rate differential for holdover units, of itself, violates the original terms of the HAP contract. "[T]he old-form HAP contract did not require 'a single, monolithic [adjustment] factor for all units at a given property.' " *Haddon II* at 336, quoting *Cuyahoga II* at 542 (bracketed alterations added). The HAP contract clearly contemplates that the amount of annual adjustments will be determined by HUD and applied by the parties, and that both parties accept that this term will vary at the discretion of HUD. Nothing in the contract precludes a differential in adjustment factors to reflect cost variations consistent with commercial practices in the housing industry, such as the desirability of retaining tenants beyond a single lease term and the common practice of offering more attractive rents in order to keep such holdovers.

{¶ 29} For both these reasons, we accordingly find that the rate differential for holdover units does not conflict with the terms of the HAP contract before us with respect to any class of rental unit.

{¶ 30} Lastly, we address the question of whether OHFA may be liable for any purported breach of contract caused by the 1994 amendments. In contrast to the cases discussed above, the present action involves a private landlord seeking to recover directly from a public housing authority, OHFA, which failed to pay annual rent increases. While this is not a case of national first impression, as cases discussed below will establish, rights and liabilities under housing assistance contracts in this context are at best unsettled.

{¶ 31} Arlington Housing has stated its claim as a breach of contract action, which other courts have found appropriate for recovery in comparable cases. *See, e.g., Haddon I* at 15. Complicating our disposition of this case, however, is the fact that despite a fair number of cases addressing Section 8 law, no court has definitively and comprehensively passed upon the interlaced contractual relationships between the three classes of parties at interest here (private landlords, public housing authorities, and HUD), and described the rights and responsibilities among them pursuant to the various combinations of HAP contracts and annual contributions contracts between the parties.

{¶ 32} Leaving aside cases in which HUD contracted directly with private landlords, we find two cases in which courts found a public housing authority directly liable for breach of its HAP contract with a private landlord based upon a denial of annual adjustments pursuant to the 1994 amendments: *Cathedral Square Partners Ltd. Partnership v. South Dakota Hous. Dev. Auth.*, D.S.D. No. CIV 07-4001, 2011 WL 43019 (Jan. 5, 2011), and *Greenleaf Ltd. Partnership v. Illinois Hous. Dev. Auth.*, N.D.Ill. No. 08 C 2480, 2010 WL 3894126 (Sept. 30, 2010). Unfortunately, neither *Cathedral Square* nor *Greenleaf* articulates a rationale for seamlessly shifting recourse from HUD to the

subsidized public housing authority. Both cases seem to simply assume that if the federal government (HUD) were liable for breach if it unfairly changed through subsequent legislation the rules under which its own contracts were to be performed, then any similarly situated public housing authority must also be in breach if it complied with the 1994 amendments and failed to grant automatic annual adjustments.

{¶ 33} We are unable to adopt this view because we find that it ignores the essential logic of the cases upon which it relies. *Cuyahoga, Haddon, Statesman, and Park* are all predicated upon the fact that the federal government was both a party to the HAP contract and, through exercise of its lawmaking function, the agent of changes that denied the other parties to the contract, private landlords, the full benefit of the agreed bargain. In other words, the courts applied existing rules that place a check upon the government's ability to " 'make its own performance impossible through its manner of regulation,' " and make any contractual promise by the government an " 'illusory bargain.' " *Cuyahoga I* at 771, quoting *United States v. Winstar Corp.*, 518 U.S. 839, 921, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (Scalia, J., concurring). Thus, in a situation in which the standard HAP contract between a private landlord and HUD expressly assigned to "the government" the determination of whether there existed material difference between rent for assisted and comparable unassisted units, HUD, as a contracting party, was not free to manipulate that material difference determination in derogation of its pre-existing contractual obligations. *Statesman*, 66 Fed.Cl. at 612.

{¶ 34} Under these conditions, the contracting landlord was allowed to claim the benefit of the original contract even if this contravened the effect of subsequent legislation. No such remedy should be available here because OHFA, in a word, is not the

federal government and had no hand in the 1994 amendments. OHFA is merely a contracting party like any other, entirely subject in the performance of its contractual duties to the constraints of legality and regulation.

{¶ 35} We accordingly find that OHFA for two reasons may not be held liable for any nonpayment of annual increases for units affected by the 1994 amendments. First, we find that, for these units, there was no breach because the language of the contract expressly incorporated HUD's regulatory framework, and contemplated that changes in HUD's annual adjustment factors and the manner of their determination would constitute a variable term in the contract. In the alternative, we find that OHFA's performance under the contract was excused by the doctrine of impossibility.

{¶ 36} Variable terms that will fluctuate with an independently-set index are a common and enforceable component of many types of contract, as the current turmoil tied to variable-rate mortgages in the housing market can illustrate. Such terms can allow for fluctuations in commodities prices, *ConocoPhillips v. United States*, 501 F.3d 1374 (Fed.Cir.2007), labor and raw materials, *Bethlehem Steel Corp. v. Litton Industries, Inc.*, 507 Pa. 88 (1985), and, most apropos here, to rent: *Capital Equity Ltd. v. Metromedia Steakhouses, Inc.*, 10th Dist. No. 92AP-1498 (Mar. 30, 1993.)

{¶ 37} The HAP contract in question between OHFA and Arlington Housing essentially included such a variable term to be set by HUD. The contract does not allocate responsibility to OHFA to provide annual rent adjustments other than those set pursuant to HUD's directives. OHFA was in fact in full compliance with the contract when it complied with HUD's new scheme governing annual increases. Section 1.9(d) of the HAP contract specifies that "the government," *i.e.* HUD, governs adjustments. Under Section

1.3a(1) of the HAP contract, OHFA is bound only to provide assistance payments that "equal the difference between the contract rents for units leased by families and the portion of such rents payable by families as determined by the owner in accordance with schedules and criteria established by [HUD]." When HUD changed the rules for allowing rent adjustments, it caused the subsidy term in the contract between OHFA and Arlington Housing to vary in a manner that was beyond the control of either party. OHFA then performed (at least with respect to units not renting below market ab initio) according to its contractual obligation to grant annual adjustments "in accordance with the schedules and criteria established by HUD." Under this analysis, there is no breach by OHFA in declining to apply rent adjustments for those units that were affected by the 1994 amendments and required a rent comparability study furnished by Arlington Housing as a precondition to any increase.

{¶ 38} We therefore conclude that OHFA did not breach its HAP contract with Arlington Housing when it failed to furnish automatic annual rent increases for units that required a comparability study under the 1994 amendments as prerequisite to annual adjustment. Such rent adjustments were, pursuant to the HAP contract, subject both to HUD's determination of the amount of annual increase and HUD's determination of whether the "material difference" cap applied. By extension, the parties to the HAP contract defer to HUD's regulatory structures addressing the manner of determining which "material differences" exist, and the procedure by which such differences in rent between subsidized and unsubsidized units will be established.

{¶ 39} In the alternative, we find that OHFA's contractual duty to furnish automatic annual adjustments for such units was excused under the impossibility

doctrine. "Impossibility of performance occurs when, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *J.J.O. Constr., Inc. v. Baljak*, 10th Dist. No. 06AP-1300, 2007-Ohio-4126, ¶ 13. Application of this doctrine can allow any party to void the contract when government activity renders performance impossible or illegal. *London & Lancashire Indemn. Co. of Am. v. Bd. of Commissioner of Columbiana Cty.*, 107 Ohio St. 51, 64 (1923). ("[L]egal impossibility of performance is a defense to the performance of a contract[.]")

{¶ 40} While the doctrine of impossibility will not allow a party to voluntarily place itself in a position of inability to perform, then plead impossibility, *id.* at 65, that exception will not apply here. There is no role for OHFA in determining material difference under the overall limitation clause, or in setting the annual adjustment factors. OHFA is entirely tributary of HUD in this respect, and OHFA's contractual obligations do not supersede its duty to comply with federal law. After enactment of the 1994 amendments, OHFA was subject to these legal requirements governing the subject of the contract, and had no privilege to ignore the federal mandates. Performance of the HAP contract as written for units affected by the 1994 amendments became impossible, and any failure to pay annual adjustments for those units is excused.

{¶ 41} We will summarize our conclusions by applying them to the various classes of housing units created by our analysis. The terms of the HAP contract, the wording of the Section 8 program as it stood at the time of execution of that contract, and the effect of the subsequent amendments upon that contract, make it convenient to separate the affected housing units into four classes: (1) turnover units (units with new tenants for the year in which a rent increase may be due) renting above market; (2) holdover units

renting above market; (3) turnover units renting below market; and (4) holdover units renting below market.

{¶ 42} For both turnover units and holdover units renting above market rates, we find that OHFA either did not breach the contract or was excused from performance under the contract with respect to automatic annual adjustments. The trial court properly granted summary judgment in favor of OHFA in respect to this class of rental.

{¶ 43} Turnover units renting below market would be subject to neither the burden-shifting for comparability studies nor the rate reduction imposed under the 1994 amendments upon holdover units. The 1994 amendments, therefore, do not of themselves preclude OHFA's performance under the HAP contract for this class of unit in any respect, and the trial court erred in granting summary in favor of OHFA for this class of rental.

{¶ 44} Holdover units renting for below-market rates present a mixed outcome. Pursuant to the preceding discussion, these would not implicate the requirement of a comparability study before receiving an annual adjustment, but would receive only a reduced adjustment under the 1994 amendments. The trial court erred in granting summary judgment to OHFA with respect to these units, but we reject the assertion that recovery would be at the full published annual adjustment rate.

{¶ 45} Finally, we turn to Arlington Housing's second assignment of error, which asserts that it was itself entitled to summary judgment. We overrule this assignment of error in its entirety. The trial court's judgment passes only upon the contractual and legal issues addressed above. While our conclusions with respect to some parts of the contract claim do establish the bare foundation for recovery of damages with respect to some

categories of rental units, OHFA has raised a number of independent affirmative defenses that may preclude liability or recovery. These have yet to be addressed by the trial court and present numerous subsisting issues of material fact. Summary judgment of any nature in favor of Arlington Housing is inappropriate at this juncture.

{¶ 46} In accordance with the foregoing, the first assignment of error of appellant Arlington Housing Partners, Inc. is sustained in part and overruled in part. The second assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas granting summary judgment to appellee Ohio Housing Finance Agency is reversed in part and affirmed in part, and the matter is remanded for further proceedings in accordance with law and this decision.

*Judgment affirmed in part
and reversed in part;
cause remanded.*

KLATT and FRENCH, JJ., concur.
