2004 WL 5046101 (Conn.) (Appellate Brief)
Supreme Court of Connecticut.

ASYLUM HILL PROBLEM SOLVING REVITALIZATION ASSOCIATION and Adrienne Brown, Plaintiffs-Appellants,

v.

Gary E. KING, Defendant-Appellee.

No. 17313.
October 21, 2004.

Brief of Plaintiffs-Appellants

Annette M. Lamoreaux, Connecticut Civil Liberties, Union Foundation, 32 Grand Street, Hartford, CT 06106, Tel: (860) 247-9823, Fax: (860) 728-0287, Email: annettel@cclu.org.

Jonathan B. Orleans, Sarah W. Poston, Zeldes, Needle & Cooper, P.C., 1000 Lafayette Boulevard, Bridgeport, CT 06604, Tel: (203) 333-9441, Fax: (203) 333-1489, Email: jorleans@znclaw.com, Attorneys for Plaintiffs-Appellants.

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***1** *STATEMENT OF FACTS*

I. The Nature of the Proceedings Below

Plaintiffs, Asylum Hill Problem Solving Revitalization Association (hereinafter "Asylum Hill NRZ") and Adrienne Brown, a low-income African-American resident of the Asylum Hill neighborhood in Hartford, brought this action against Gary King, the executive director and president of the Connecticut Housing Finance Authority ("CHFA"), seeking to enforce statutory and regulatory commands that the Authority take affirmative steps to prevent racial segregation and high concentrations of poverty in its administration of the Low Income Housing Tax Credit ("LIHTC") Program.

Defendant moved to dismiss the Amended Complaint on the grounds that no private cause of action exists under the statutes relied upon by plaintiffs, and the Superior Court therefore lacked subject matter jurisdiction. Plaintiffs opposed defendant's Motion to Dismiss, contending that the Superior Court did have subject matter jurisdiction over their claims.

At the December 18, 2003 oral argument on defendants' motion, the court determined that a Motion to Dismiss was not the appropriate challenge to the complaint, as the question of whether plaintiff has a private right of action is property raised on a Motion to Strike. *Asylum Hill Problem Solving Revitalization Association et al. v. Gary E. King, Case No. (X02) CV 03-01-0179515-S,* Slip. Op., January 5, 2004 ("Ruling") at 4. The Court sought, and obtained, the parties' agreement that defendant's Motion to Dismiss could be construed as a Motion to Strike. Tr. Oral Argument at 5-13. On January 5, 2004, the Superior Court, without expressly ***2** stating that it had in fact converted defendant's Motion to Dismiss to a Motion to Strike, issued its ruling granting defendant's motion, and striking all three counts of the Amended Complaint. Ruling at 3, 20.

Plaintiffs appealed this ruling. Defendants, pursuant to Practice Book § 66-8, moved to dismiss the appeal for lack of subject matter jurisdiction. They argued that plaintiffs had failed to move for entry of judgment pursuant to Practice Book § 10-44, that no final judgment had been entered by the Superior Court, and that this Court therefore did not have jurisdiction over the appeal. Plaintiffs filed in this Court a Memorandum in Opposition to Motion to Dismiss, and simultaneously filed in the Superior Court the requisite Motion for Judgment, which was granted on March 1, 2004. On March 10, 2004, the Appellate Court granted defendants' Motion to Dismiss plaintiffs' appeal. Plaintiffs then filed the instant appeal from the judgment entered on March 1, 2004. Plaintiffs respectfully submit that the Superior Court erred in striking the three counts of their Amended Complaint.

II. Factual Background

Plaintiff Asylum Hill NRZ is an unincorporated association representing the interests of residents and institutions concerned with the quality of life and the future of the Asylum Hill neighborhood in Hartford. The Asylum Hill NRZ is the official neighborhood organization created pursuant to Con. Gen. Stat. § 7-601 to "develop a strategic plan to revitalize the neighborhood." (Compl. ¶ 2). Plaintiff Adrienne Brown is a low-income African-American resident of the Asylum Hill neighborhood. (Compl. ¶ 3).

***3** The Low Income Tax Housing Credit (LIHTC) Program is a federally funded low income housing production program authorized by 28 U.S.C. § 42 and administered by state housing finance agencies. The LIHTC program is currently the federal government's largest low-income housing production program. (Compl. ¶ 5-6). Plaintiffs' Amended Complaint alleges that: although CHFA is subject to federal and state Fair Housing laws, it does not follow federal regulations restricting siting of low-income family developments in segregated neighborhoods, nor has the CHFA developed its own regulations to prevent increased segregation. (Compl. ¶ 7).

CHFA has sited numerous LIHTC properties in Asylum Hill and other high-poverty Hartford neighborhoods. CHFA has failed to devise a system to assess and review its tax credit allocation system to avoid placement in poverty-ridden and racially saturated areas, has failed to collect or analyze racial data of occupants and LIHTC applicants, and has failed to adopt rules restricting siting of low-income family developments in racially concentrated, high poverty areas. (Compl. ¶ 14-17). Plaintiffs' Amended Complaint also alleges that CHFA's "Qualified Allocation Plan," which governs selection of proposals to receive LIHTC subsidies, permits and encourages low-income rental housing to be developed in poor, racially isolated neighborhoods. (Compl. ¶ 18).

Central to plaintiffs' Amended Complaint is CHFA's failure to develop site selection standards which would assess and seek to avoid or ameliorate segregation resulting from the placement of additional low income family housing in urban areas ***4** already racially saturated and suffering from poverty. Plaintiffs claim that the CHFA's practices violate:

1. C.G.S. § 8-37cc(b), in that CHFA fails to "affirmatively promote fair housing choice and racial and economic integration in all programs administered";

2. The federal Fair Housing Act, 42 U.S.C. § 3601 et seq., in that CHFA's housing policies have a racially discriminatory and segregative effect and deliberatively or foreseeably contribute to increased racial segregation; [1] and

3. 42 U.S.C. § 3608(d), in that CHFA's failure to develop a system to assess and prevent racial segregation in the administration of the LIHTC program violates the CHFA's duty "affirmatively to further fair housing."

ARGUMENT

I. Standard of Review

The Superior Court's decision to grant defendant's Motion to Dismiss, treated as a Motion to Strike, is a purely legal decision. The standard of review in an appeal from the granting of a Motion to Strike is well-established:

> Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [plaintiff's motion] is plenary ... We take the facts to be those alleged in the complaint ***5** that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency.

Commissioner of Labor v. C.J.M. Services, Inc., 268 Conn. 283, 292 (Conn. 2004) *quoting Bohan v. Last,* 236 Conn. 670, 674 (1996) (internal citations omitted).

II. The Superior Court Erred in Dismissing Plaintiffs' First Count Under C.G.S. § 8-37cc

In 1991, the Connecticut legislature passed a comprehensive state fair housing law, Public Act 91-362, as one in a series of legislative developments seeking to remedy the segregation of low-income minority families in the urban areas of this state. See Section II.C. below. C.G.S. § 8-37cc(b) was part of Public Act 91-362. It states that "[e]ach housing agency shall affirmatively promote fair housing choice and racial and economic integration in all programs administered or supervised by such housing agency." [2] The first issue in this appeal is whether plaintiffs -- a low-income African American individual living in a segregated urban ***6** area, and a community organization working to improve conditions in the same urban area - may bring a claim pursuant to C.G.S. § 8-37cc(b).

The Connecticut Supreme Court has articulated a multi-pronged standard for determining whether a statute contains an implied right of action. As set forth in *Napoletano v. CIGNA Healthcare of Connecticut, Inc.,* 238 Conn. 216 (1996), cert. denied, 520 U.S. 1103 (1997), this standard requires consideration of several factors:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose ... benefit the statute was enacted ...? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Id. at 249, 250, *citing Cort v. Ash,* 422 U.S. 66, 78 (1975). In determining whether there is a private right of action under a statute that enforces a civil right such as fair housing, this standard must be applied in keeping with the general rule requiring broad construction of remedial statutes. *See Thames Talent. Ltd. v. Commission on Human Rights and Opportunities,* 365 Conn. 127, 666 (2003)(applying rule to Fair Employment Practices Act, which appears in same part, chapter and title of Connecticut General Statutes as fair housing requirements).

In *Pane v. City of Danbury,* 267 Conn. 669 (2004), decided quite recently, the three-factor test was re-affirmed and applied by our Supreme Court. *Id.* 679-681 (2004). In the instant case, however, the Superior Court erroneously concluded that none of the three parts of the *Napoletano* standard is satisfied by C.G.S. § 8-37cc(b), and that no private right of action exists under the statute.

***7 A. Plaintiffs are Within the Class for Whose Benefit Section 8-37cc(b) was Enacted.**

The first step in determining whether a right of action is implied in this statute is a broad evaluation of whether "the plaintiff [is] one of the class for whose... benefit th[is] statute was enacted." *Napoletano,* 238 Conn. at 250. In *Napoletano,* the Court considered the provisions of Connecticut Public Act 94-235, which requires that each network of preferred health care providers regularly file with the state a list of its participants and the criteria for joining the network. The Court observed that two groups of plaintiffs benefited from the statute: physician providers who could determine whether they met the criteria for participation in the network, and patients who could learn the credentials of the providers in a given health care plan. *Id.* at 250.

Here, it is plain that § 8-37cc(b) benefits those individuals and communities eligible for the housing administered by the housing agencies to which it applies. The statute requires the promotion of "fair housing choice" and "economic integration," goals that would have little meaning if they were not intended for these individuals and communities. The achievement of "housing choice" benefits any and all of those who could choose the housing at issue, and "economic

integration" benefits the entire community. Consistent with this interpretation, § 8-37cc(a) expressly refers to low-income households, such as plaintiff Brown's. It is evident That the purpose of the statute is to protect residents of urban neighborhoods and metropolitan areas from increased racial segregation and poverty concentration. The Superior Court, however, focused its analysis of the first *Napoletano* factor almost exclusively on whether the statute contains an *"explicit* designation of who ***8** *[sic]* it seeks to benefit." Ruling at 13 (emphasis added). The court's unwillingness to look beyond the language of the statute in its analysis was clear in its explication: "It is difficult to imagine that a majority of legislators intended to create something so significant as a private right of action but *chose not to express it in the statute."* Ruling at 20 (emphasis added). But a court undertaking the *Napoletano* analysis *must* be open to finding such a cause of action in the absence of such legislative expression: that is the very essence of an implied cause of action.

The Superior Court failed to complete the analysis of this factor. Finding that § 8-37cc(b) contains no "explicit designation," it made only one further observation -- that as neither plaintiff Adrienne Brown nor the Asylum Hill NRZ were people participating in, or seeking to participate in, the tax credit program at issue, only "a potentially limitless and therefore meaningless" definition of the class of intended beneficiaries would include them. Ruling at 14. The court ignored plaintiffs' allegations that Asylum Hill is a poor and racially segregated neighborhood, and that as the entity charged with "develop [ing] a strategic plan to revitalize the neighborhood," and an individual resident of the neighborhood, Asylum Hill NRZ and Adrienne Brown will benefit from the defendant's promotion of "fair housing choice" and "economic integration." Inclusion of these plaintiffs in the class of intended beneficiaries of the statute requires no broader a definition of the class than was made by the *Napoletano* and *Pane* courts. *Napoletano,* 238 Conn. at 250 (class of beneficiaries of statute included any and all patients who might consider being part of a health care plan about which the statute required information to be filed); *Pane,* 267 Conn. at 680 (class for whose benefit the Connecticut Freedom of Information ***9** Act was enacted "consists of members of the general public who desire information about the conduct of their government.") Just as these classes of plaintiffs were broad, but hardly "limitless and ... meaningless," so a class of plaintiffs comprised of those individuals eligible to receive housing agency services, and whose communities will be affected by the location of such services, was plainly intended to benefit from the provisions of section 8-37cc(b).

To the extent any doubt remains on this point, the legislative policy driving § 8-37cc at the time it was passed clearly compels inclusion of the plaintiffs in the class of persons for whose benefit the statute was enacted. *See Pane,* 267 Conn. at 679-80 (considering "overarching legislative policy" of Connecticut's Freedom of Information Act in defining the Act's beneficiaries). The problems of increasing racial and economical segregation in urban areas were unquestionably part of the discussion in the passage of C.G.S. § 8-37cc(b); indeed, the legislative history is replete with examples of testimony addressing segregation. *See, e.g., Hearing on H.B. 5523, P.A. 91-362 before Select Comm. on Housing,* 1991 Leg. 266-68 (1991) (Department of Education testimony addressing the plight of minority children isolated in segregated areas); *Id.* at 270-272 (expressing the Department's concern that a failure to take action on housing desegregation would mean a perpetually segregated system of education); and *Id.* at 271 (Senator Barrows discussing the notion that desegregation of schools is a two-way street with students from the city going to the suburbs and suburban students coming into the city). These are not isolated examples. The general theme of the hearings appears to be deep concern ***10** for the plight of minorities in economically disadvantaged areas. *See id.* at 293, 301, 317, 324, 325, and 392.

It is difficult to believe that in light of such testimony, the legislature intended to prevent a neighborhood group representing a low-income racially segregated neighborhood and a low-income African American individual residing in that neighborhood from bringing an action to enforce C.G.S. § 8-37cc(b) in order to challenge government action that increases segregation there. Plaintiffs exemplify the very class of people the legislature was concerned about in enacting this legislation.

B. The Legislative History of C.G.S. § B-37cc(b) Should be Read to Permit a Private Cause of Action

The legislative history of C.G.S. § 8-37cc, which must be considered pursuant to the second prong of the *Napoletano* test, does not undermine the conclusion that a private right of action is implicit in the statute. In *Napoletano,* the Court

found a private cause of action implied in Public Act 94-235 for physicians and patients seeking to redress a health care plan's failure to file the information required by the statute, even in the absence of any mention "explicit or implicit" of a private cause of action in the legislative history. *Napoletano,* 238 Conn. at 250. Similarly, the Appellate Court in *Skakel v. Benedict,* 54 Conn.App. 663 (1999), found a private right of action in C.G.S. § 17a-688(c), although there was no "indication, explicit or implicit, in the legislative history that the legislature intended either to deny or to create a private right of action for injunctive relief." *Id.* at 687. Indeed, many courts applying the *Napoletano* standard have found private causes of action in the absence of any explicit indication in the legislative history of an intent to create one. ***11** *See Spencer, White & Prentis Foundation Corp. v. Cardi Corp.,* 2001 WL 128914, 28 Conn. L. Rptr. 627 (Conn. Super. 2001)(App. 1) (finding private right of action, noting that although "[s]ection 49-41 b(2) does not explicitly provide for a private cause of action ... this does not preclude a finding that such a remedy is implicit in the statutory scheme"); *Doe v. Voluntown Bd. of Educ.,* 1999 WL 1001112, 25 Conn. L. Rptr. 629 at *3 (Conn. Super. 1999)(App. 3) (finding private right of action under C.G.S. § 10-214(c), despite no " ... indication, explicit or implicit, in the legislative history that the legislature intended to create or to deny a private cause of action."). *See also Spears v. Garcia,* 263 Conn. 22, 29 (2003) (finding a private right of action under Conn. Gen. Stat. §52-557n(a) which outlines the liability for political subdivisions and its officers, stating that "because the pertinent legislative history ... is silent as to the legislature's intent... *the defendants cannot rely on if to support a contrary interpretation."*)(emphasis added).

Although the legislative history of C.G.S. § 8-37cc(b) is replete with evidence of the legislators' intent to improve conditions for individuals such as plaintiff Brown and communities such as Asylum Hill, see section II.C below, it includes no specific indication of an intent to create a private cause of action. This silence, however, as demonstrated above, is by no means dispositive. Notwithstanding the Superior Court's dismissal of this silence as "unilluminating," it is more consistent with prior cases to interpret legislative silence as permitting an implied cause of action in this instance.

***12 C. A Private Right of Action to Enforce the Duty to Affirmatively Further Fair Housing Is Consistent with the Underlying Purpose of the Overall Legislative Scheme.**

The third *Napoletano* factor requires consideration of whether a private cause of action to enforce section 8-37cc(b) is consistent with the legislative scheme. *Napoletano,* 238 Conn. at 250. In *Napoletano,* the Court considered the legislative history of Public Act 94-235 to ascertain its purposes. In view of the legislature's intent to assist health care providers and consumers in making informed decisions, the Court concluded that a private right of action exists permitting such individuals to enforce the statute. *Id.* at 251.

In this case as in *Napoletano,* the legislative history of the statute at issue clearly demonstrates that the primary purposes behind the Act were to benefit the very people now seeking to enforce it, by increasing housing choice for low-income individuals and racial integration in the community. As noted above, C.G.S. § 8-37cc(b) was part of Public Act 91-362, a comprehensive state fair housing law passed in 1991. In March 1988, not long before the passage of C.G.S. § 8-37cc(b), the State of Connecticut Blue Ribbon Commission on Housing issued its Report to the Governor and the General Assembly, finding that, *inter alia,* "The state's 169 municipalities should be encouraged to continue or to begin to forge locally appropriate solutions to regional housing problems." *Report of the Blue Ribbon Commission on Housing,* pg. 3 (March 1, 1988). In the same year, the Connecticut Supreme Court issued its first major ruling on exclusionary zoning in *Builders Service Corp., Inc. v. Planning & Zoning Com'n of Town of East Hampton,* 208 Conn. 267 (1988), and the *Sheff v. O'Neill* school desegregation case was filed in ***13** early 1989. The Affordable Housing Land Use Appeals Act, C.G.S. § 8-30g et seq., which encourages the development of affordable housing outside of urban areas, was also passed in 1989 and became effective in 1990. Each of these developments reflects Connecticut's search for regional solutions to the segregation of low-income minority families in blighted, disinvested urban areas.

The legislative history of C.G.S. § 8-37cc(b) shows that legislators and advocates viewed Public Act 91-362 as part of this comprehensive movement to combat segregation in Connecticut. In the hearing on P.A. 91-362, the *Sheff* litigation or the link between housing and school segregation is mentioned at least eight times. *See* Hearings on H.B. 5523 (P.A.

91-362) before the Select Comm. on Housing, 1991 Leg. at 267, 270, 271-272, 274, 300, 312, 372, and 457 (1991)(App. 10) (hereinafter, "Hearings"). The need for low-income persons to have choice in the location of their housing is discussed at least nine times. *See, Hearings* at 278, 287, 288, 293, 299, 305, 309, and 315. Likewise, concerns about the concentration of impoverished persons of color in urban areas and attendant problems with education, employment, etc., are discussed at least eleven times. *See Hearings* at 267, 276, 293, 296, 301, 317, and 391-392 (1991). Furthermore, implicit throughout the legislative history is the perceived need for a regional solution to the problem of housing segregation. *See, e.g., Hearings* at 268, 294, 297, 312, 315, 333, 354, 357, 363, 366, and 372. The testimony before the legislators who passed C.G.S. § 8-37cc(b) was sophisticated and comprehensive, revealing a deep understanding of the problems of urban segregation and the concentration of poor persons of color in urban areas, as well as the necessity of a strong public policy response.

***14** The other components of Public Act 91-362 also provide important context for understanding C.G.S. §8-37cc(b). The bills which eventually became P.A. 91-362 addressed a range of housing segregation issues including the administration of housing subsidies, regional housing obligations, and housing choice and mobility. The overall package was designed to address the racial and economic segregation of affordable housing in Connecticut.

The sponsors of P.A. 91-362 were very familiar with 42 U.S.C. § 3608 (the section of the Fair Housing Act upon which § 8-37cc(b) is based, *see Commission on Human Rights and Opportunities v. Sullivan Associates,* 250 Conn. 763, 799-800 (2003)(recognizing Connecticut legislature's desire to conform Connecticut fair housing legislation to federal fair housing laws), and it is thus also important to understand the manner in which § 3608 had been construed by the courts at the time C.G.S. § 8-37cc was passed. At that time, the most well known Second Circuit case, *Otero v. New York City Hous. Auth.,* 484 F.2d 1122 (2nd Cir. 1973), stood for the proposition that a private right of action to enforce the government obligation to affirmatively further fair housing was implicit in § 3608 and available to a range of potential plaintiffs. At the same time, the Fair Housing Act was being vigorously enforced in high profile cases on Long Island (*Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926 (2nd Cir. 1988)) and in Yonkers, N.Y. (*U.S. v. Yonkers Bd. of Educ.,* 837 F.2d 1181 (2nd Cir. 1987)). In view of this broad contextual backdrop for the statute's passage, it is fair to assume that the Legislature expected its anti-segregation mandates to be enforceable.

***15** The Superior Court acknowledged that this legislative scheme is fully consistent with plaintiffs' attempt to enforce the defendant's duty to promote fair housing. Ruling at 15. Allowing a low-income minority resident and an organization representing a poor, segregated neighborhood to claim that a government agency is perpetuating segregation in housing is plainly consistent with the overall goals of Public Act 91-362 and the specific admonition of C.G.S. § 8-37cc(b) that state housing agencies "affirmatively promote fair housing choice and racial and economic integration in all programs administered or supervised by such housing agency."

The Superior Court erred, however, in its conclusion that certain other aspects of the legislative scheme weigh against construing § 8-37cc(b) to include a private cause of action. First, the court viewed the absence of an express cause of action in other portions of the chapter in which § 8-37cc is located, along with the presence of provisions for administrative and legislative review of CHFA reports analyzing each housing agency's "efforts, and the results of such efforts, ... in promoting fair housing choice and racial and economic integration," Ruling at 16, *quoting* Public Acts 1991, No. 1-362 § 1, codified at C.G.S. § 8-37bb, [3] as weighing ***16** against the recognition of a private right of action in the statute. This reasoning flies directly in the face of the Supreme Court's express statement in *Napoletano* that "where the legislature wishes to limit enforcement of a statute to an administrative body, it has expressly done so," *Napoletano,* 238 Conn. at 251, and with the Court's conclusion in *Napoletano* that the absence of an express limitation in P.A. 94-235 to enforcement by the state *"supports* our conclusion that the act permits a private cause of action." *Id.* at 252 (emphasis added).

Significantly, in analyzing this issue courts have consistently focused on the *adequacy* of existing administrative remedies to redress individual grievances concerning statutory violations, not the mere *existence* of such remedies. *Napoletano,* 238 Conn. at 252 (because Unfair Insurance Practices Act "does not provide a mechanism enabling private individuals to file grievances, private persons would be denied all access to the administrative enforcement process in the absence of

a private cause of action"); *Doe v. Voluntown Board of Education,* 1999 WL 1001112 at *4 (Conn. Super 1999)(finding private cause of action against Board of Education where no administrative remedy was provided in the statutory scheme); *Stabile v. Southern Connecticut Hospital Systems, Inc.,* 1996 WL 651633, 18 Conn. L. Rptr. 157 at *10 (Conn. Super. 1996) (App. 49)(denying private action where ***17** administrative option to challenge decisions already exists as part of the workers' compensation statutory scheme).

In this case, as in *Napoletano* and *Doe,* individuals such as plaintiff Brown and those represented by Asylum Hill NRZ would be entirely without access to the administrative enforcement process in the absence of a private cause of action. The Superior Court's decision that the existence of CHFA's reporting requirement weighs against implying a private right of action is particularly inapt in light of the allegation in the Amended Complaint that CHFA "has failed to collect or analyze data on the race of occupants of or applicants to LIHTC developments in Connecticut." Comp. ¶ 16. Thus, for the affirmatively furthering obligation contained in C.G.S § 8-37cc(b) to have any meaning, it must be read to contain a private right of action.

The Superior Court's limitation of the scope of *Napoletano* to claims by individuals against private entities, rather than state governmental entities, is also erroneous. In applying the *Napoletano* standard to an individual's claim against the City of Danbury, the Supreme Court made no mention of any such limitation, addressing the City's governmental status only in its separate consideration of the defendant's common law immunity. *Pane v. City of Danbury,* 267 Conn. at 680-81. No such immunity is at issue in this case. In addition, lower courts have repeatedly applied *Napoletano* and implied private causes of action against governmental entities. *See, e.g., Doe v. Voluntown Board of Education,* 1999 WL 1001112 at *4 ("... to effectuate fully the [statutory] purposes of providing annual postural screenings to children ..., private interests would not be amply served without private causes of action") (internal citations omitted); ***18** *Ramos v. Town of Branford,* 1998 WL 469797, *3 (Conn. Super. July 30, 1998) (App. 63)(estate of firefighter killed in commercial building fire has private cause of action against fire marshal pursuant to statute requiring periodic inspections of such buildings).

The Superior Court's remaining points concerning the third *Napoletano* factor are similarly uncompelling. While the court was correct that the *Napoletano* Court "relied on a version of the *Cort [v. Ash]* test that the United States Supreme Court no longer uses," Ruling at 18. this does not make a difference here. While the degree to which *Gonzaga University v. Doe.* 546 U.S. 273 (2002) has changed the *Cort v. Ash* test for implying private causes of action in the federal courts is not yet entirely clear, the Connecticut Supreme Court has not changed the *Napoletano* standard in response to the *Gonzaga* decision. *See Pane v. City of Waterbury,* 267 Conn. 669. *See also Stangle v. Mark and Dennis Sullivan Trust,* 2002 WL 31170894 at *2 (Conn.Super. Aug. 18. 2002)(App. 65); *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC,* 2003 WL 22205977 at *3 (Conn.Super. Sept. 10, 2003) (App. 70).

Finally, the Superior Court's suggestion that the *Napoletano* Court itself erred in failing to consider the concept that "[w]hen the legislature has authorized supplementary private causes of action, it has generally done so expressly," Ruling at 1, seems entirely inapposite: in *Napoletano,* as in this case, the question before the Court was whether a private cause of action may be *implied.* There is no dispute that the statute contains no express cause of action. The Superior Court's related reference to "the general rule... that "[i]f the language of a statute is plain and unambiguous," there is no need to search beyond the words themselves for the ***19** meaning of the statute, Ruling at 19, is similarly misguided. This rule simply cannot fairly be applied in a case in which the very issue in dispute is whether -- in the absence of an *express* private cause of action -- such a cause of action may be implied under the statute. As the Supreme Court has already articulated, and continues to use, the specific and distinct *Napoletano* standard for the resolution of such a dispute, this general rule does not apply in this case. [4]

As demonstrated above, C.G.S § 8-37cc(b) clearly satisfies Connecticut's *Napoletano* test for the existence of an implied private right of action, and the Superior Court erred in dismissing plaintiffs' first count.

III. The Superior Court Erred In Failing to Determine That § 3608(d) of the Fair Housing Act is Enforceable Through Section 1983.

The Fair Housing Act. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (the "Act"), was passed within a week after the assassination of Martin ***20** Luther King, Jr. One of the Act's principal goals was to eradicate segregated housing patterns and segregation in government housing programs. The Act was substantially amended in 1988 to strengthen fair housing enforcement and to encompass handicap discrimination.

At issue on this appeal is the Act's requirement that defendant (acting in his official capacity as head of CHFA) "affirmatively further" fair housing, a mandate that has been interpreted by the courts to require governmental entities to pursue policies "that avoid racial segregation and actively promote integration." *Shannon v. U.S. Dept. of Housing and Urban Dev.,* 436 F.2d 809, 820 (3rd Cir. 1970); *Otero v. New York City Hous. Auth.,* 484 F.2d 1122, 1132-34 (2d Cir. 1974); *N.A.A.C.P. v. Sec?y of Housing and Urban Dev.,* 817 F.2d 149, 154 (1st Cir. 1987).

Section 3608(d) of the Fair Housing Act provides:

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further* the purposes of this subchapter..."

§ 42 U.S.C. 3608(d) (emphasis added). This section obligates the Department of the Treasury, which is responsible for the LIHTC program, to consider the racial concentration effects of its programs and promote less segregative alternatives. This duty is delegated to local housing agencies, including CHFA, which administer the LIHTC program. Plaintiffs contend that § 3608 (d), and its implementing IRS Regulation, 26 CFR § 1.42-9, which incorporates HUD fair housing regulations by ***21** reference, can be enforced through 42 U.S.C. § 1983. [5]

A. § 3608 Creates Enforceable Rights.

In order to decide whether § 1983 provides a remedy for violation of a federal statute, a court must first "determine whether Congress intended to create a federal right." *Gonzaga University v.* Doe, 536 U.S. 273, 283 (2002). Plaintiffs submit that the legislative and enforcement history of § 3608 clearly demonstrate that Congress aid so intend, and that §3608 satisfies the three-step test established by the Supreme Court in *Blessing v. Freestone,* 520 U.S. 329 (1997), for making this determination. Plaintiffs first discuss §3608's enforcement history; next, the legislative history; and finally, the *Blessing* factors.

1. Courts Have Consistently Enforced 42 U.S.C. § 3608 Over the Last 30 Years.

In assessing whether Congress intended a statute to create an enforceable right, the Supreme Court has emphasized the importance of reviewing the statute's enforcement history. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 380 (1983) (private right of action?? § 10(b) of the Securities Act "has been consistently recognized for mo?? than 35 years"). Section 3608 of the Fair Housing Act has an equally long and consistent history of enforcement in the federal courts, ***22** against both HUD and local housing agencies. [6] In 1987, the Court of Appeals for the First Circuit observed that "every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating." *N.A.A.C.P v. Sec'y of Housing and Urban Dev.,* 817 F.2d at 155. The enforcement of § 3608 has continued even after the ??reme Court's decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002). *See Langlois v. Abington Housing Authority,* 234 F. Supp. 2d 33, 55-6 (D. Mass. 2002); ***23** *Darst-Webbe Tenant*

Ass'n Bd. v. St. Louis Housing Authority, 339 F.3d 702, 712-713 (8th Cir. 2003); *Thompson v. Dept. of Housing and Urban Devel.,* No. MJG-95-309, slip op. at 10-12 (D. Md., Nov. 26, 2003) (App. 72). (Plaintiffs address the *Gonzaga* decision in more detail in Subsection 4 below.)

Decisions by the Second Circuit Court of Appeals, which are given particular consideration by this Court, *Schnabel v. Tyler,* 230 Conn. 735, 743 n.4 (1994), have consistently held § 3608 to be enforceable against the federal, state and local governments, both directly and through § 1983 or the APA. *See Otero,* 484 F.2d at 1130. *See also United States v. Yonkers Bd. of Educ.,* 837 F.2d 1181, 1219 (2d Cir. 1987) ("an authority may not... select sites for projects which will be occupied by non-whites only in areas already heavily concentrated with a high proportion of non-whites") (citing *Otero* and *Shannon v. HUD,* 436 F.2d 809 (3d Cir. 1970)); *Davis v. New York City Housing Authority,* 278 F.3d 64, 81 (2d Cir. 2002) ("the FHA... authorizes courts to order 'affirmative action to erase the effects of past segregation and desegregate housing patterns' ") (citing *Otero); Comer v. Cisneros,* 37 F.3d 775 (2d Cir. 1994) (permitting claims based in part on 42 U.S.C. § 3608).

2. The Act's Legislative History Further Confirms the Statute's Enforceability.

The legislative history of the Fair Housing Act shows that racial integration was a central goal of Congress, coequal in importance to the mere prohibition of discrimination in housing. *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972). Senator Mondale, one of the bill's sponsors, argued that "America's goal must be of an integrated society, a stable society .... If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation." ***24** 114 Cong. Rec. 3422 (1968). Other supporters of the bill concurred:

> [t]he assassination of Martin Luther King, Jr., has given us a tragic reminder of the urgency for Federal protection of the exercise of civil rights ....A national fair housing act ... is required unless the explosive concentration of Negroes in the urban ghettos is to continue. The hour is late If Congress delays, it may be writing the death warrant of racial reconciliation.

114 Cong. Rec. H9589 (1968) (statement of Rep. Ryan). *See generally* Robert Schwemm, *Housing Discrimination Law and Litigation* § 7.3 (2003). Professor Schwemm concludes that "[t]he legislative history does show...that § 3608 was seen as a way of buttressing existing legal resources in order to mount a stronger attack on the widespread problem of segregation in public housing". *Id.* at § 21.2.[7] The Fair Housing Act was primarily designed to protect minority citizens from discrimination and segregation in housing, and § 3608 is the provision of the Act that speaks directly to government on behalf of this class of citizens.[8]

Moreover, when Congress undertakes a comprehensive amendment and revision of a statute, and does not disturb its established judicial enforcement mechanisms, Congress effectively ratifies prior judicial enforcement actions. The 1988 Fair Housing Amendments Act was an historic, comprehensive revision of the Fair Housing Act of 1968. Although much was added and changed, § 3608's ***25** mandate "affirmatively to further..." fair housing was left intact. As the Supreme Court has instructed in a comparable case assessing rights-creating language in the securities laws, this type of Congressional ratification is strongly indicative of legislative intent:

In 1975 Congress enacted the 'most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934.' When Congress acted, federal courts had consistently and routinely permitted a plaintiff to proceed under Section 10(b) even where express remedies under Section 11 or other provisions were available. In light of this well-established judicial interpretation. Congress' decision to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action.

Herman & MacLean, 456 U.S. at 384-386 (citations omitted). Similarly, when Congress adopted the 1988 Amendment to the Fair Housing Act, the tradition of judicial enforcement of § 3608 was well-established, and was left undisturbed. [9]

Finally, to the extent that there is any ambiguity in § 3608's mandate, this mandate must be construed in favor of plaintiffs. As the Supreme Court instructed in *Trafficante,* 409 U.S. at 212, a "generous construction" of the Fair Housing Act is required to effectuate its purposes. *See also Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982) (referring to the "broad remedial intent of Congress embodied in the [Fair Housing] Act"); *City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725, 731 (1995) (noting precedent "recognizing the FHA's broad and inclusive compass").

The Superior Court opined in this case that the presence of an express private cause of action in § 3613, for enforcement of the anti-discrimination ***26** provisions in § 3604, militates against a finding that § 3608(d) creates a private right of action. Ruling at 6-7. This reasoning was expressly rejected by the Supreme Court in the context of the federal securities laws in *Herman & MacLean,* 459 U.S. at 386, stating that "[t]he effectiveness of the broad proscription against fraud in Section 10(b) would be undermined if its scope were restricted by the existence of an express remedy under Section 11." In fact, the case for enforcement of § 3608 through § 1983 is substantially strengthened by the absence of an alternative enforcement mechanism in the statute itself. As in the case of the securities laws, the purposes of § 3604 and § 3608 are separate and distinct, making separate enforcement approaches appropriate. As the Third Circuit pointed out in *Shannon,* the enforcement sections of the 1968 Fair Housing Act:

> establish a complaint and enforcement procedure for the redress of discriminatory housing practices prohibited by §§ 804, 805 and 806 of the Act, 42 U.S.C. §§ 3604, 3605, 3606. The complaint and enforcement procedures do not pertain to the Secretary's affirmative duties under § 808(d)(5) of the 1968 Act, 42 U.S.C. § 3608 (d)(5), or under the 1964 Civil Rights Act, or under the Housing Act of 1949. As to these affirmative duties, judicial review of his actions is available.

Shannon, 436 F.2d at 820. In this regard, the United States Supreme Court has *twice* cited *Shannon* with approval, in opinions addressing the scope of the Act's private enforcement provisions. *Trafficante,* 409 U.S. at 211; *Gladstone Realtors v. Bellwood,* 441 U.S. 91, 114 n.28 (1979). Thus, the presence of express rights-enforcement provisions in other parts of the Fair Housing Act, contrary to the Superior Court's suggestion, actually supports the conclusion that the statute confers enforceable rights. *See Wallace v. Chicago Housing Authority,* 298 F.Supp.2d 710, 719 (N.D.III. 2003) (explaining that "the fact that private enforcement ***27** is available under [§§ 3605 and 3606 of] the Act supports our conclusion that Congress intended to confer rights upon a class of individuals").

3. Analysis of the *Blessing* Factors Further Confirms that §3608 is Enforceable Through §1983.

The Supreme Court in *Blessing v. Freestone* set forth three factors for determining whether a statute creates a federal right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-341 (internal citations omitted). That a federally conferred right is essential to a cause of action under 42 U.S.C. § 1983 was reiterated by the Court in *Gonzaga University v. Doe,* 536 U.S. 273 (2002). While the *Gonzaga* Court strongly emphasized this point, it did not disturb the *Blessing* factors. Thus, since *Gonzaga* was decided, federal courts have continued to apply the *Blessing* factors to § 3608 of the Fair Housing Act, finding that the statute creates enforceable rights. *See, e.g., Langlois v. Abington Housing Authority,* 234 F. Supp. 2d 33 (D. Mass. 2002). *See also Darst-*

Webbe Tenant Ass'n. Bd. v. St. Louis Housing Authority, 339 F. 3d 702, 712-13 (8th Cir. 2003) (assuming without citing *Gonzaga* or *Blessing* that 42 U.S.C. 3608(e)(5) creates enforceable rights). Courts have continued to apply the *Blessing* factors since *Gonzaga* to find enforceable rights in other federal statutes as well. *E.g., Sabree v. Richman,* 367 F.3d 180 (3d Cir. 2004)(applying *Blessing*/*Gonzaga* test to find rights enforceable by Medicaid recipients); ***28** *Rabin v. Wilson-Coker,* 266 F. Supp. 2d 332, 341 (D. Conn. 2003) (Chatigny, J) (applying *Gonzaga*/*Blessing* analysis to the Medicaid Act).

a. Plaintiffs Are Intended Beneficiaries of the Statute.

The plaintiffs in the present case are clearly among those intended to benefit from the "affirmatively to further" provisions of the Fair Housing Act. As the U.S. District Court in Massachusetts recently concluded: "[i]t could not be clearer from the statute, the legislative history, and the case law construing it that this provision was intended to benefit the plaintiffs here: people in desperate need of access to fair housing, minorities and the poor." *Langlois,* 234 F. Supp. 2d at 72.

Consistent with the Act's legislative history, numerous fair housing cases have been brought by persons living in communities *affected* by discrimination and segregation, without being residents of, or even applicants for, regulated housing. *See, e.g., Trafficante* (white and black residents of apartment complex affected by exclusion of minorities); *Gladstone Realtors* (neighborhood residents affected by racial steering practices that threaten to lead to increased segregation of community). Likewise, the plaintiffs in many of the cases that have challenged the segregated location of low-income housing under 42 U.S.C. § 3608 have included local residents and community organizations. *See, e.g., Garrett v. City of Hamtramck,* 503 F.2d 1236, 1240 (6th Cir. 1974) (plaintiffs included community association of minority residents of area scheduled for housing project); *King v. Harris,* 464 F. Supp. 827 (E.D.N.Y. 1979) (plaintiffs included minority neighborhood residents and community organizations), *aff'd King v. Faymore Dev. Co.,* 614 F.2nd 1288 (2d Cir. 1979), *vacated on other grounds* 446 U.S. 905 (1980), *aff'd without* ***29** *opinion* 636 F.2d 1202 (2d Cir. 1980); *Pleune v. Pierce,* 697 F.Supp 113, 117 (E.D.N.Y. 1988) (residents of proposed project area claiming injury associated with segregation of a presently integrated neighborhood). [10]

In light of the abundant case law broadly construing the class of persons protected under the Fair Housing Act generally -- and § 3608 specifically -- over more than 30 years, the Superior Court's statement that the statute "focus [es] ... on 'the person regulated rather than the individuals protected' " Ruling at 6, is insufficient grounds for its conclusion that § 3608(d) does not create rights in favor of plaintiffs. *See Langlois,* 234 F. Supp. 2d at 72 (applying *Blessing*/*Gonzaga* test to conclude that low-income and minority residents of community, and organization representing them, were clear intended beneficiaries of "affirmatively furthering" requirement); *Wallace,* 298 F.Supp.2d at 719 (reaching same conclusion through *Blessing*/*Gonzaga* analysis of claims by residents and former residents of public housing); *Thompson,* slip op. at 10-12 (same for suit by African-American public housing residents) [11] .

***30 b. The "Affirmatively to Further" obligation is not so "vague and amorphous" as to strain judicial competence.**

Since the passage of the Fair Housing Act, courts have had little difficulty in defining the rights and obligations created by § 3608. In *Otero v. New York City Housing Authority,* the Second Circuit said § 3608 establishes an obligation to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." 484 F.2d at 1134. The First Circuit has held that this duty means "at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *N.A.A.C.P. v. Secretary,* 817 F.2d at 156; *see also Project B.A.S.I.C. v. Kemp,* 776 F.Supp. 637, 642 (D.R.I. 1991).

More recently, courts using the *Blessing* analysis to assess § 3608 have not found it to be so "vague and amorphous" as to be beyond the competence of the judiciary to enforce. *See Reese v. Miami-Dade County,* 210 F. Supp. 2d at 1329;

Langlois, 234 F. Supp. 2d at 72. As the U.S. District Court also observed in *Langlois,* while the statutory command of § 3608 is clear enough on its face, it has been given additional content by the regulations HUD has developed to enforce it. *Id.* The pertinent regulations in the present case include, but are not limited to, HUD's site selection guidelines, at 24 CFR § 941.202 (c) and 24 CFR § 983.6. In these regulations, originally developed in response to the *Shannon* case, HUD has set out detailed interpretations of the meaning of the "affirmatively furthering" ***31** obligation applied to the specific problem of site selection. [12]

c. Section 3608 of the Fair Housing Act imposes binding obligations upon the State.

Likewise, the language of § 3608 is mandatory, stating expressly that agencies administering housing programs *"shall"* administer them "in a manner affirmatively to further" fair housing. This provision has been held to be binding on state and local governments in the Second Circuit. *See Otero.* Furthermore, the Second Circuit clearly explained in *Otero* that this mandatory obligation creates an "affirmative duty to consider the impact of publicly assisted housing programs on racial concentration," 484 F.2d at 1134, and requires "[a]ction ... to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Id.*

4. The *Gonzaga* clarification of the *Blessing* test is limited to enforcement of statutes enacted under the Spending Clause.

Although the foregoing discussion assumes that the *Blessing*/*Gonzaga* analysis would apply to § 3608 of the Fair Housing Act, there are significant indications in the *Gonzaga* opinion and in its antecedents that the holding is limited to statutes adopted pursuant to the Constitution's Spending Clause, Article I, § 8, ***32** c1.1. The Fair Housing Act arises directly out of the Thirteenth Amendment, and therefore should not be subject to the type of inquiry set out in *Gonzaga.*

The imposition of enforceable requirements on states under the spending power raises separation of powers concerns that are not present where Congress relies on direct constitutional authority such as the Commerce Clause or the 13th and 14th Amendments. Statutes passed under the Spending Clause merely condition receipt of funds on compliance with federal requirements. While the Court has not prevented Congress from imposing such requirements, it has adopted a strict test to ensure that Congress clearly intended its pronouncements in spending clause statutes to convey enforceable rights.

Gonzaga's focus on restricting over-enforcement of Spending Clause statutes is apparent throughout the opinion. At the outset, the Court announces: "[W]e have never before held, and decline to do so here, that *spending legislation* drafted in terms resembling those of FERPA [the Family Educational Rights and Privacy Act] can confer enforceable rights." 536 U.S. at 279 (emphasis added). Similarly, the court's discussion of the cases leading up to *Gonzaga* is focused on the enforceability of Spending Clause provisions. Indeed, at the heart of its explication of the holding in *Gonzaga,* the Court pointedly limits its reasoning to "legislation enacted pursuant to the spending power," and federal funding provisions." *Gonzaga,* 536 U.S. at 280, *quoting Pennhurst,* 451 U.S. at 28.

Unlike FERPA, § 3608 of the Fair Housing Act directly requires the government to act to protect the rights of victims of segregation. It requires this not as a condition of funding but as a mandate. As the federal district court in ***33** Massachusetts explained in distinguishing a claim under § 3608 from the claim at issue in *Gonzaga:*

> Title VIII, however, is different. It is a civil rights statute focused on ensuring individual rights to fair housing. Its obligations are not ancillary to a federal-state spending contract. Rather, its provisions operate directly on local PHAs, spelling out their obligations with precision.

Langlois v. Abington Housing Authority, 234 F.Supp. 2d at 74 (citing *Gonzaga*) (emphasis omitted). The *Wallace* court similarly refused to apply *Gonzaga* to a Fair Housing Act case under § 3608:

... the statute at issue in *Gonzaga* was enacted pursuant to Congress's spending power, whereas the Fair Housing Act is a civil rights statute concerned with remedying past housing discrimination. This is significant, according to the Supreme Court, because there is 'far less reason to infer a private remedy in favor of individual persons if Congress ... had written [the statute] simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.'

Wallace, 298 F.Supp.2d at 718-19, quoting *Gonzaga,* 536 U.S. at 287 (internal quotation omitted).

B. Section 3608 Is Enforceable Through 42 U.S.C. 1983.

Under *Gonzaga* and *Blessing,* once it is established that § 3608 contains "rights creating language" there is no further obstacle to its enforcement under Section 1983. The Supreme Court confirmed this point in *Gonzaga:*

> Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.

536 U.S. at 284 (citation omitted). "Congress is presumed to legislate against the background of § 1983 and thus to contemplate private enforcement of the relevant ***34** statute against state and municipal actors absent fairly discernible congressional intent to the contrary." *Langlois,* 234 F.Supp. 2d at 48.

The only exception to this presumption of enforceability occurs where Congress has "specifically foreclosed a remedy under § 1983." *Gonzaga,* 536 U.S. at 285 n. 4. The burden is on the state to show that Congress intended to foreclose § 1983 enforcement, either through evidence in the statute itself or by a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* In this case, not only is there no evidence of an intention to foreclose enforcement, but the legislative evidence to the contrary. And there is certainly no comprehensive enforcement scheme for § 3608 -- indeed, the APA and § 1983 are the primary enforcement alternatives available for this section.

C. I.R.S. Regulation 26 CFR § 1.42-9 Creates Enforceable Rights That Are Derivative of the Rights Created by 42 U.S.C. § 3608.

Plaintiffs also rely on 26 CFR § 1.42-9, an I.R.S. regulation that incorporates HUD's fair housing rules, as a separate basis for their § 1983 claim. Plaintiffs recognize that *Alexander v. Sandoval,* 532 U.S. 286 (2001), would likely preclude enforcement of 26 CFR § 1.42-9 unless that regulation is based on § 3608, a statute that creates enforceable rights. But if the court finds that § 3608 creates enforceable rights, and further finds that the IRS regulation is based on § 3608, then *Sandoval* and *Gonzaga* require that the IRS regulation (and the HUD regulations it incorporates) are enforceable through § 1983.

D. The Presence or Absence of an Implied Private Right of Action in Section 3608 is Immaterial in This Case.

As long as § 1983 is available to enforce the Fair Housing Act's ***35** "affirmatively furthering" requirement, this Court does not need to reach the more complicated analysis of whether Congress intended § 3608 to create an "implied right of action". The existence of an implied private right of action is an issue only when there is no alternative method of vindicating plaintiffs' rights through 42 U.S.C. § 1983 or the APA. *See N.A.A.C.P. v. Sec'y,* 817 F.2d at 152-54, 157-60

(finding no "private right of action" against HUD to enforce § 3608, but nevertheless holding that plaintiffs could obtain relief under the APA.)

The Superior Court, inexplicably overlooking this point, concluded that § 3608 does not permit a private right of action without fully analyzing whether the section includes personal, enforceable rights. Ruling at 8. While plaintiffs disagree with the Superior Court's analysis, they recognize that the existence of a remedy under §1983 makes it unnecessary for them to pursue their appeal of the Superior Court's ruling that §3608 does not contain an implied private right of action.

*36 *CONCLUSION*

For all of the foregoing reasons, the Superior Court's decision striking the First and Third Counts of the Amended Complaint should be reversed.

Footnotes

1 Plaintiffs contend that Count II of the Amended Complaint presents a claim that defendant's policies have a discriminatory and segregative effect in violation of 42 U.S.C. § 3604. While this claim was not a subject of the defendant's Motion to Dismiss, the Superior Court dismissed the claim on the ground that it did not comply with the requirement of Practice Book § 10-3 that a claim based on a statute set forth the statute's number specifically. Ruling at 8-9. Plaintiffs do not seek to appeal this portion of the Superior Court's ruling, but reserve the right to replead Count II, insofar as it is based on § 3604, in the event the Superior Court's ruling is reversed in whole or in part.

2 Connecticut General Statute § 8-37cc, in full, provides:

§ 8-37cc. Housing agencies to serve households with incomes less than fifty percent of area median income and to promote fair housing choice and racial and economic integration

(a) Each housing agency, as defined in section 8-37aa, shall, within available resources and to the extent practicable, serve households with incomes less than fifty per cent of the area median income, including households with incomes less than twenty-five per cent of the area median income. In administering its programs each housing agency shall attempt to serve households in the lower range of the income group for which the housing program was developed.

(b) Each housing agency shall affirmatively promote fair housing choice and racial and economic integration in all programs administered or supervised by such housing agency.

3 C.G.S. § 8-37bb provides in pertinent part:

(a) On or before December 31, 1991, and annually thereafter, each housing agency shall submit to the General Assembly a report, for the year ending the preceding September thirtieth, which analyzes by income group, households served by its housing construction, substantial rehabilitation, purchase and rental assistance programs. Each report submitted after December 31, 1991, shall analyze the households served under each program by race.... Each report submitted under this section shall also analyze the efforts, and the results of such efforts, of each agency in promoting fair housing choice and racial and economic integration.

(b) Each report submitted under this section shall also document the efforts of the agency in promoting fair housing choice and racial and economic integration and shall include data on the racial composition of the occupants and persons on the waiting list of each housing project which is assisted under any housing program established by the general statutes or special act or which is supervised by the agency.

4 The legislature's passage of Public Act 03-154 in 2003 does not change this analysis. P.A. 03-154 provides:

The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

There can be no dispute that C.G.S. § 8-37cc(b) does not reveal a meaning that is "plain and unambiguous" with respect to enforcement of the "affirmatively to further fair housing" requirement in the text. Thus, even if P.A. 03-154 were a valid exercise of legislative authority and governed this Court's interpretation of C.G.S. §8-37cc(b), which plaintiffs do not concede, consideration of the "extratextual evidence" of the statute's meaning, as set forth above, would demonstrate that a private cause of action should be implied in the statute.

5 42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

6 Circuit Court of Appeals cases finding § 3608 enforceable include: *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Authority,* 339 F. 3d 702 (8th Cir. 2003); *Latinos Unidos de Chelsea en Accion v. Sec'y of Housing and Urban Dev.,* 799 F.2d 774, 791-93 (1st Cir. 1986) (Breyer, J.); *N.A.A.C.P. v. Sec'y of Housing and Urban Dev.,* 817 F.2d 149 (1st Cir. 1987); *Munoz-Mendoza v. Pierce,* 711 F.2d 421, 429 (1st Cir. 1983) (Breyer, J.); *Alschuler v. Dep't of Housing & Urban Dev.,* 686 F.2d 472, 477-78 (7th Cir. 1982); *Business Ass'n. of University City v. Landrieu,* 660 F.2d 867, 870-71 (3d Cir. 1981); *Garrett v. City of Hamtramck,* 503 F.2d 1236, 1247 (6th Cir. 1974); *Otero v. NYCHA,* 484 F.2d 1122, 1134 (2d Cir. 1974); *Shannon v. United States Dep't of Hous. & Urban Dev.,* 436 F.2d 809, 818-19 (3rd Cir. 1970).
District Court cases finding § 3608 enforceable include: *Langlois v. Abington Housing Authority,* 234 F. Supp. 2d 33 (D. Mass. 2002); *Reese v. Miami-Dade County,* 210 F. Supp. 2d 1324 (S.D. Fla. 2002) (subsequent history omitted); *Puerto Rico Pub. Hous. Admin. v. United States Dep't of Hous. & Urban Dev.,* 59 F. Supp. 2d 310, 322-24 (D.P.R. 1999); *Liddy v. Cisneros,* 823 F. Supp. 164, 171 (S.D.N.Y. 1993); *Pleune v. Pierce,* 697 F. Supp. 113, 119-20 (E.D.N.Y. 1988); *Lee v. Pierce,* 698 F. Supp. 332, 342 (D.D.C. 1988) (no private right of action; APA review only), *summary judgment granted in part by Lee v. Kemp,* 731 F. Supp. 1101 (D.D.C. 1989); *Givens v. Chaires,* Civil Action No. 3-83-0131-H, 1984 U.S. Dist. LEXIS 20195, at *11-12 (N.D. Tex. Jan. 23, 1984); *Young v. Pierce,* 544 F. Supp. 1010, 1017-19 (E.D. Tex. 1982); *Clients' Council v. Pierce,* 532 F. Supp. 563, 575-76 (W.D. Ark. 1982), *rev'd on other grounds,* 711 F.2d 1406 (8th Cir. 1983); *King v. Harris,* 464 F. Supp. 827, 836-37 (E.D.N.Y. 1979, *aff'd without op. sub nom King v. Faymor Dev. Co.,* 614 F.2d 1288 (2d Cir. 1979), *vacated on other grounds by* 446 U.S. 905 (1980); *Jaimes v. Toledo Metro Housing Authority,* 432 F. Supp. 25 (N.D. Ohio 1977); *Jones v. Tully,* 378 F. Supp 286 (E.D.N.Y. 1974), aff'd, 510 F.2d 961 (2d Cir. 1975) (per curiam).

7 Citing *Clients' Council v. Pierce,* 711 F.2d 1406, 1425 (8th Cir. 1983); *Young v. Pierce,* 628 F. Supp. 1037, 1056 (E.D. Tex. 1985); and extensive comments of supporters of the bill.

8 These concerns are also reflected in the HUD site and neighborhood standards, see, e.g., 24 C.F.R. §§ 941.202 and 983.6, adopted pursuant to 24 U.S.C. § 3608, which restrict development of low-income housing in "area(s) of minority concentration" and in "racially mixed area(s) if the project will cause a significant increase in the proportion of minority to non-minority residents in the area." 24 C.F.R. § 941.202 (c)(ii).

9 The case for congressional ratification is strengthened considerably by the addition of numerous additional obligations on HUD and other federal agencies while leaving intact the essential language of § 3608 as interpreted by the courts.

10 To the extent that low-income families actually *eligible* for LIHTC housing are deemed to be necessary or important parties by this court, the plaintiff Asylum Hill NRZ's membership includes such families, and the Association is competent to pursue this case on their behalf. *See Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell,* 199 Conn. 609, 616 (1986).

11 While these cases interpret the "affirmatively furthering" requirement of § 3608(e)(5) rather than § 3608(d), the two sections simply impose the same requirements on public housing agencies (§ 3608(d)) and the Secretary of HUD (§ 3608(e)(5)), and as such, as acknowledged by the Superior Court, "deserve similar treatment." Ruling at 7 n.4.

12 Plaintiffs do not argue that these regulations create rights beyond those established in the fair housing statute itself. Plaintiffs' argument from the fair housing regulations is twofold: First, plaintiffs point to the regulations as an authoritative additional source of content for the rights enunciated in § 3608. Second, plaintiffs argue that the I.R.S. regulation that is based on 42 U.S.C. § 3608, 26 C.F.R. § 1.42-9 and the fair housing regulations it incorporates, are enforceable under § 1983 to the same extent that § 3608 is enforceable.