

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

THE COLORADO COALITION FOR THE HOMELESS, a Colorado Nonprofit Corporation

Plaintiff,

v.

GENERAL SERVICES ADMINISTRATION,

And

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant(s).

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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**INTRODUCTION**

This is a civil action for declaratory and injunction relief. The Colorado Coalition for the Homeless, a Colorado nonprofit corporation, hereby brings this complaint against the General Services Administration (“GSA”) and the United States Department of Housing and Urban Development (“HUD”) for violating its statutory and regulatory requirements pursuant to 42 U.S.C. § 11301 *et seq.*, § 11411 *et seq.*, Title V of the Stewart B. McKinney Homeless Assistance Act (“McKinney Act) requiring that HUD identify and publish lists in the Federal Register of excess or surplus buildings and properties that are suitable for use to assist the homeless, and make its determination of suitability of such properties for homeless use.

## **JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343, and pursuant to review under the Administrative Procedure Act, 5 U.S.C. § 702.
2. Venue is proper in the District of Colorado under 28 U.S.C. § 1391(b) because Plaintiff and the property subject to dispute are located within this District.

## **PARTIES**

3. Plaintiff, The Colorado Coalition for the Homeless (“CCH”), is a nonprofit corporation organized under the laws of the state of Colorado, whose mission is to work collaboratively toward the prevention of homelessness and the creation of lasting solutions for homeless individuals and families throughout Colorado. CCH provides integrated health care, supportive housing, emergency assistance, counselling and support to more than 15,000 unique homeless and at-risk families and individuals each year. CCH represents homeless families and individuals who are negatively affected by the action of Defendants failure to follow the legal and regulatory requirements of Title V of the McKinney Act.
4. Defendant General Services Administration is an agency of the United States government which owns and manages real estate assets of the United States including the Denver Federal Center in Lakewood, Colorado and a 59 acre parcel known as the Federal Center Station property it intends to sell by auction on July 25, 2017.
5. The United States Department of Housing and Urban Development is an executive department of the United States Government whose responsibilities include screening surplus

federal properties to determine their suitability for use to assist the homeless pursuant to Title V of the McKinney Act 42 U.S.C. § 11411 *et seq.*

### **NATURE OF ACTION**

6. Plaintiff brings this action pursuant to Title V of the Stewart B. McKinney Act 42 U.S.C. § 11411 *et seq.* and the Administrative Procedures Act (“APA”) 5 U.S.C. § 706 for defendants’ arbitrary and capricious action in their failure to appropriately screen and determine the suitability of surplus real estate property owned and managed by the General Services Administration in violation of Act 42 U.S.C. § 11411 *et seq.* and HUD’s regulations under 45 Part 12a *et seq.*

7. The failure of HUD and GSA to follow the requirements of Title V of the McKinney Act has deprived Plaintiff the opportunity to use the subject Property to assist and benefit thousands of homeless families and individuals by providing supportive housing, shelter, employment, services and other supports on the GSA surplus property and such failure will cause serious and irreparable harm to Plaintiff and the thousands of homeless families and individuals it serves, or could serve, but for HUD and GSA’s failure to comply with the law and regulations.

### **FACTS**

8. The Denver Federal Center is an approximately 670 acre site owned and managed by the GSA in an area near 6<sup>th</sup> Avenue and Kipling Street surrounded by the city of Lakewood, Colorado. The Denver Federal Center provides office, warehouse, and other space for the benefit of 26 different federal agencies on the site. Included within this site is an approximately 59.049 acre portion of the site known as the Federal Center Station property situated in the

northwestern corner of the Denver Federal Center (the “Surplus Property”). This site is vacant, other than road improvements.

9. In 2015 and 2016, GSA negotiated with the City of Lakewood to transfer the Surplus Property to the City of Lakewood in exchange for the City’s building of a lab at the Federal Center site. According to City documents and news accounts, Lakewood would then sell off pieces of the Surplus Property to developers with the intention that it be built out as part of a comprehensive plan complete with residential, retail and office space adjoining the Regional Transportation District rail station adjacent to the Surplus Property.

10. In 2016, the City of Lakewood decided not to move forward with the exchange of the Surplus Property, and the GSA decided to place the Surplus Property of the market through its auction process.

11. As required by Title V or the McKinney Act, GSA notified HUD sometime in mid-2016, pursuant to HUD’s required canvass of landholding agencies of unutilized, underutilized, excess or surplus properties under Section 12a.3 (a), that the Surplus Property was excess and surplus and subject to HUD’s assessment of its suitability.

12. On September 23, 2016, HUD published in the Federal Register a notice that the Surplus Property (HUD No. 5401630010) was “unsuitable” for use as facilities to assist the homeless. The Notice cited “hazardous constituents at concentrations exceeding residential/unrestricted use levels; clear threat to personal safety”. Federal Register Volume 81, Number 185, pages 65665-65667.

13. On September 29, 2016, Plaintiff “appealed” HUD’s determination of unsuitability through its process of emailing its request that HUD review its determination. Plaintiff noted

that 1) given the size of the site, 2) that only a portion of the property may have exposure to hazardous materials, and 3) that the GSA had been negotiating a transfer of the property to the City of Lakewood for redevelopment of mixed uses, including residential use, a determination by HUD that the property was unsuitable for use to assist the homeless was inaccurate and inappropriate.

14. On November 1, Ann Marie Oliva, Deputy Assistant Secretary of Special Needs responded to Plaintiff by letter upholding HUD's decision that the property was unsuitable "due to the landfill located on this property with high concentrations of polycyclic aromatic hydrocarbons, metals, dioxin/furans, pesticides, and asbestos that are a threat to physical safety".

15. On October 13, 2016, Plaintiff wrote to Mr. Flavio Peres, Office of Real Property Utilization and Disposal at GSA requesting, among other things, "1. Environmental reports and other documents describing, addressing, discussing: a. Contamination(s) in structures (if applicable), b. Contamination(s) in the soils, 2. Past and present and/or planned mitigation efforts, 3. Documents and information pertaining to the source of the contamination , 4. Site Plan showing the location of contamination(s) impacting the property, a. Location of tests with results, b. Source of contamination, c. Subsoil drainage patterns, direction and flow, and 5. Site Plan showing existing structures and/or uses of the property. The purpose of this request was for Plaintiff to assess whether there was any basis for the determination made by GSA and HUD that the property was "unsuitable" due to contaminants identified in Oliva's letter.

16. Plaintiff never received a response to its request from GSA.

17. On July 1, 2017, Plaintiff discovered a sign located on the Surplus Property indicating that the 59 acre parcel was for sale by the GSA. Upon further review, Plaintiff found the property listed

for auction scheduled for July 25, 2017 on GSA's website

<https://www.gsa.gov/portal/content/152190>.

18. The GSA Invitation for Bids on the Surplus Property (listed as IFB Number GSA-R-1849) included a number of documents, including environmental documents maintained by the Colorado Department of Public Health and Environment ("CDPHE"), a "Corrective Action Plan for Post Corrective Measures Operation and Maintenance of the Northwest Corner Landfill Cover Formerly Part of the Denver Federal Center, Lakewood Colorado" ("CAP) required to be completed by the successful bidder, and an Operations and Management Plan ("O&M Plan) dated March 2017 documenting the procedures required to be followed for the development of the Surplus Property on areas determined by CDPHE and GSA that needed to be addressed by any future prospective purchaser of the Surplus Property.

18. Among other things, the O&M plan indicated that there were only two areas on the 59 acre Surplus Property site, consisting of a total of 15 acres, that contained landfills that has been capped in compliance with CDPHE regulations and that were subject to limited use restrictions that required approval of CDPHE prior to any future development that would disturb this portion of the site. O&M Page 2.2. Alternatively, these areas could be remediated to meet "residential/unrestricted use criteria". O&M Page 2.2. Otherwise, these covered landfills would need to be inspected and monitored. O&M 3.1. The O&M plan provided additional guidance on the excavation and removal of any soil within the footprint of the Landfill Cover area.

19. The O&M plan stated that "CDPHE has determined that excavated soil and waste from within the footprint of the NW Corner Landfill Cover area may be reused within the existing footprint of the NW Corner Landfill Cover as long as the reuse activity does not adversely affect

human health or groundwater and it is properly covered after relocation. Additionally, if the soil or waste to be reused onsite contains RACS then the requirements in Section 5.5.8(B) of the Solid Waste Regulations (6 CCR 1007-2, Part 1) must be met. No waste or contaminated soil shall be used as backfill over or adjacent to structures or utilities. Relocated waste and/or contaminated soil must be covered in accordance with Section 5.3 of this O&M Plan”. O&M 5.1.

20. The O&M Plan further described the conditions upon which the Surplus Property, including the Covered Landfill areas, could be developed for any use.

21. In a letter dated February 14, 2017 from CDPHE to the City of Lakewood Planning Department, David Walker, CDPHE’s project manager for the Denver Federal Center, confirmed that GSA provided CDPHE a copy of the Restrictive Notice for the covered landfill portion of the Surplus Property. Mr. Walker stated that **“One thing to note is that there is no restriction on the type of development that may occur in the Northwest Corner Sale Area property in general, or the NW Corner Landfill Cover property in particular.** (Emphasis added).

CDPHE Letter page 2. The letter further noted that O&M Plan must be followed when “redeveloping the landfill area to ensure protection of human health during and after construction.” Id.

22. On July 21, 2017, Plaintiff requested HUD to reconsider its determination of “unsuitability” for homeless use based on the documents included in the GSA Invitation for Bids. To date, HUD has not responded to Plaintiff’s request.

## STANDING

23. The Mission of the Colorado Coalition for the Homeless is to work collaboratively toward the prevention of homelessness and the creation of lasting solutions for homeless individuals and families throughout Colorado. In furtherance of its mission, since 1996, CCH has developed 18 housing and service facilities throughout Colorado to provide integrated health care and housing to more than 15,000 persons each year.

24. Specifically, CCH has constructed 1,800 units of supportive and affordable housing for homeless families and individuals, including 220 apartments on the former Lowry Air Force Base in Denver, a former Department of Defense site disposed of around 1994 pursuant to Title V of the McKinney Act. CCH is an eligible entity under Title V of the McKinney Act and HUD regulations to request the transfer of surplus federal property for use to assist the homeless, and has the capacity to meet regulatory requirements for such use.

25. The CCH strategic plan calls for developing new housing opportunities meeting the needs of homeless and at-risk families and individuals” and “increased access to quality health care for homeless and at-risk individuals and families”.

26. The Metro Denver area is in the midst of a severe affordable housing crisis, with a shortage of 31,000 housing units for households at or below 30% of Area Median Income in Denver alone.

27. The availability and price of vacant land for development of supportive housing, shelters and supportive service facilities is a significant limitation on the ability of CCH to meet the growing needs of the homeless community in Metro Denver.



28. The most recent HUD required Point In Time count of the homeless conducted in January 2016 by the Metro Denver Homeless Initiative found that there were 5,467 homeless individual counted in the seven county Denver Metro area, including 439 in Jefferson County, where the Federal Center is located.

29. Given the significant resource that the GSA Surplus Property would provide to allow the development of supportive housing, health care, shelter and other services on the site to assist the homeless, CCH and its clients have a direct and significant interest in the proper disposition of the Surplus Property in accordance with the law and requirements of the McKinney Act. The failure of HUD and GSA to faithfully fulfill its requirements under Title V of the McKinney Act has created significant harm by preventing the use of the Surplus Property to provide needed housing, shelter and supportive services to thousands of homeless individuals in Metro Denver.

### **LEGAL BACKGROUND**

29. Title V of the McKinney Act, 42 U.S.C. § 11301 *et seq.*, § 11411 *et seq.*, requires that HUD canvass federal landholding agencies on a quarterly basis requesting information from each landholding agency regarding federal real properties that are excess, surplus, underutilized, or unutilized.

30. Within thirty days of receiving information of available excess properties from landholding agencies, HUD is required to determine whether they are suitable to assist homeless persons, and notify the public of suitable and available properties. 42 U.S.C. § 11411(a).

31. Under HUD Regulation 24 CFR § 581.4 (b) HUD is required to determine the suitability of a property for use as a facility to assist the homeless without regard to any particular use.

32. Under HUD Regulation 24 CFR § 581.4 (c) HUD is required to evaluate the environmental information contained in the property checklists forwarded to HUD by the landholding agencies for the purpose of determining suitability under the criteria in § 581.

33. Under HUD Regulation 24 CFR § 581.4 (f), a representative of the homeless may appeal an unsuitability determination, and upon a receipt of a request to review a determination of unsuitability, HUD must notify the landholding agency that such a request has been made and advise the agency that it should refrain from initiating disposal procedures until HUD has completed its reconsideration regarding unsuitability. 24 CFR § 581.4 (f) (4).

34. Under HUD Regulation 24 CFR Part 581.4, "All properties, building and land will be determined suitable **unless a property's characteristics include one of more of the following:**

**(5) Documented Deficiencies.** A property with a documented and extensive condition(s) that represents a **clear threat to personal physical safety** will be determined unsuitable. Such conditions may include, but are not limited to, contamination, structural damage or extensive deterioration, friable asbestos, PCB's, or natural hazardous substances such as radon, periodic flooding, sinkholes or earth slides.

35. The Suitability criteria under § 581.6 create a presumption of suitability of excess properties, unless one or more of the listed conditions therein are met.

36. Section 581.6 (a) (2) provides that "Underground storage, gasoline stations and tank trucks are not included in this category and their presence **will not be the basis of an unsuitability determination unless there is evidence of a threat to personal safety** as

provided in paragraph (a)(5) of this section." (emphasis added). A capped landfill, representing a portion of the subject site, is similar to an underground storage site, and should lead to a determination of unsuitable only if there is evidence of a threat to personal safety.

37. Section 581.6 (a) (4) provides that "if only an incidental portion of the property not affecting the use of the remainder of the property is in the floodway, the property will not be determined unsuitable."

### **FIRST CLAIM FOR RELIEF**

38. The preceding paragraphs are incorporated herein.

39. HUD has failed to fully fulfill its requirements under Title V of the McKinney Act and its implementing regulations under 24 CFR § 581 et. seq.

40. HUD has arbitrarily and capriciously failed to consider all of the environmental records maintained by GSA in determining that the Surplus Property was unsuitable for use to assist the homeless in violation of the Administrative Procedure Act, 5 U.S.C. § 702.

41. HUD failed to support its finding of unsuitability by providing evidence that any environmental issue reported to it by GSA constituted a "clear threat to personal physical safety" as required by 24 CFR § 581.6 (a) (5).

42. GSA failed to fully and accurately represent to HUD the actual environmental risk contained in a portion of the Surplus Property in an apparent attempt to thwart the Congressional intent of Title V of the McKinney Act and federal regulation by overstating the environmental contamination on the site while maintaining to state regulatory agencies and local planning agencies that the site was suitable for development of mixed use residential and office uses without significant environmental restriction.

43. This Court is authorized to judicially review HUD's and GSA's failure to properly assess the Surplus Property as suitable for use to assist the homeless under the Administrative Procedures Act.

44. GSA's disposition of the Surplus Property through auction to the highest bidder will make the property unavailable for use to assist the homeless and create serious and irreparable harm to Plaintiff and its homeless clients.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Enjoin GSA from selling the Surplus property until GSA and HUD has fulfilled its legal requirements to determine the suitability of the property taking into account all environmental information known by GSA, including the determination by the Colorado Department of Public Health and Environment that there is no restriction on the type of development that may occur on the property.
- B. Require HUD to re-assess the Surplus Property taking into account all relevant information regarding the suitability of the property for all development, including for use to assist the homeless.
- C. Grant Plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 25<sup>th</sup> day of July, 2017.

s/ John Parvensky

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