

Standing and Litigation to Preserve Federally Subsidized Housing

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I. Introduction

Standing doctrine has many critics. It is criticized for being inconsistent, unpredictable, and an inadequate tool for deciding what parties may bring claims before the federal courts.¹ It is also criticized for its tendency to promote majoritarian interests over the interests of the underdogs of our society.² However, standing doctrine remains a reality that must be overcome by litigants attempting to pursue a claim before courts of law. Recently, the Minnesota District Court denied standing to a housing advocacy organization that attempted to challenge the sale and demolition of federally subsidized affordable housing units. The District Court held that this organization could not prove that it was injured in fact.³

This paper will attempt to analyze standing doctrine in light of the important struggle to preserve federally subsidized affordable housing units. Section I will explore the need for affordable housing and the extent of the problem in Minnesota. Section II will examine the statutes underlying the authority of the Department of Housing and Urban Development (HUD) to allow the prepayment of mortgages. Section III will first discuss standing considerations in general and then explicitly discuss four types of standing advocacy organizations can attempt to gain standing to bring suit in these situations.

A. The Problem

Everyone seems to agree that each person deserves to live in a safe, stable, affordable home. Maslow's famed hierarchy reminds us that when basic needs such as shelter are not adequately provided for, other important elements of self-actualization are extremely difficult to achieve. Stable housing is an important component to social, economic, psychological and physical

¹ Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. Rev. 301, 304 (2002).

² *See generally Id.* at 322-329.

³ *Community Stabilization Project v. Cuomo*, 199 F.R.D. 327 (D. Minn. 2001).

health. The absence of affordable housing leads to a number of social ills: increased homelessness, economic instability, and a lack of livable and workable communities.

A number of recent studies have documented the great importance of affordable housing to the health of our communities. The Hennepin County City/County Task Force on Homeless Families concluded that, “the single most important cause of homelessness in our area is the inadequate supply of affordable housing to low-income families.”⁴ Homelessness is a significant problem in Minnesota: The Wilder Research Center estimated that in the year 2000, 21,329 people were homeless or precariously housed in Minnesota on any given night. This is 2.5 times the estimate made in 1991.⁵ One quarter of the homeless families in the Twin Cities receive their income through employment. However, 68 percent of these families earn less than \$10 an hour, and to afford an average one-bedroom apartment, a family must make \$12.70 an hour.⁶

The cost of homelessness is significant. Employment, education, and health suffer as families are caught in a cycle of homelessness and instability. The lack of a permanent address makes it difficult to find and keep work. A child may have to change schools a number of times within a school year because of moving from home to home or from shelter to shelter. This disrupts the child’s education, placing a strain on the children and also on their teachers who continually have to play catch-up with each new child. Studies have also found that children staying in inadequate shelter suffer from numerous health problems.⁷

Many families are caught in a cycle of instability as they are forced to pay a significant portion of their income towards housing costs. A 1999 study revealed that, “approximately one

⁴ City/County Task Force on Homeless Families, *Report and Recommendations of the Task Force*, 1 (May 2001).

⁵ Wilder Research Center Summary, *Minnesota statewide survey of people without permanent shelter*, 2 (August 2001).

⁶ *Id.* at 1.

out of every seven American households either paid more than half its income for housing and/or lived in substandard conditions.”⁸ Housing that is affordable should cost a family no more than 30 percent of its monthly income.⁹ When families’ incomes are tied to excessive housing costs, they are left vulnerable to the consequences of unexpected emergencies, which could, in turn, jeopardize their housing. Lack of affordable housing, lack of employment, and lack of education are ultimately linked, entrapping members of our society in a Catch 22 that leaves them struggling to provide for their families.

Federal and state governments have long recognized the need for affordable housing, and in the past have aggressively created programs and provided funds for developing affordable housing. These efforts were scaled back dramatically in the 1980s, and the federally subsidized housing that is currently in place is at great risk of conversion to market rate, further depleting the valuable supply of affordable housing. “According to the Family Housing Fund, the federal government subsidizes more than 12,000 units of privately owned rental housing for low-income families, people with disabilities and senior citizens in the Minneapolis-St. Paul area. Almost two-thirds of these units are located in the suburbs. Over the next four years, more than 9,000 of these units will be at risk of conversion to higher rents, placing thousands of low-income tenants in danger of losing their homes.”¹⁰

The Second Mayors’ Regional Housing Task Force recently concluded that “[t]he most efficient way to provide affordable housing is to preserve what we have.”¹¹ The cost of preserving a two-bedroom apartment is far less than the cost of producing a brand new

⁷ Family Housing Fund Public Education Initiative, *Children Pay the Price for Homelessness*, 1 (December 1999).

⁸ National Housing Conference, *Four Windows: A Metropolitan Perspective on Affordable Housing Policy in America*, 1 (2001).

⁹ Mayors’ Regional Housing Task Force, *Affordable Housing Making it a Reality*, 9 (October 2002).

¹⁰ *Id.* at 24.

¹¹ *Id.* at 25.

apartment. It is estimated that \$1.5 billion of “gap financing” will be necessary “just to fill the demand for workforce housing needed over the next five years.”¹² Preservation efforts also face fewer barriers than efforts to create new affordable housing, which often face zoning and “Not In My Backyard” challenges.

The tenants of the units converted to market rate are provided for with vouchers that allow them to continue living in the unit or to find a new unit and to continue paying 30 percent of their income. Therefore, in the law’s eyes, these tenants are being placed in the position they would have been had the development remained subsidized, and do not have an injury for which they may pursue a remedy in court.

However, the unit, previously set-aside for low-income renters, goes market rate as soon as the tenant leaves that apartment. Thus the overall supply of affordable rental units is diminished for future renters, injuring the interests of low-income tenants who are currently seeking housing or who will need to seek housing in the future.

B. Efforts to Preserve Federally Subsidized Privately Owned Rental Housing

Minnesota is one of the most active states in preserving federally subsidized, privately owned rental housing. Various efforts are being made at preserving this affordable housing stock. Such efforts include a number of government-sponsored incentives to keep owners involved in the Section 8 program. As a result of such incentives, the Minnesota Housing Finance Agency has preserved about 5,000 units in 62 developments.¹³

A number of non-profit agencies are also active in the fight to preserve federally subsidized affordable housing. These agencies educate tenants about their rights, help tenants organize to protect their rights, and attempt to persuade the owners to prevent their units from converting to

¹² *Id.* at 12.

¹³ Interview with Julie Lasota, Minnesota Housing Finance Agency Housing Preservation Specialist (Oct. 31, 2002).

market rate.¹⁴ Occasionally, when negotiations fail some of these organizations will attempt to bring the owner and HUD to court in order to enforce provisions of statutes requiring that HUD follow procedural safeguards and discretionary guidelines before allowing an owner to prepay a mortgage.¹⁵ A brief explanation of the statutory history is helpful for understanding the basis of these suits.

II. Statutory History

A basic understanding of the statutes allowing apartment owners to convert their properties to market rate is necessary to appreciate the general problem. When an owner chooses to discontinue offering low-income housing, she must either prepay her HUD-insured mortgage or opt-out of other affordable housing programs to relieve her property from the obligations connected with receiving federal subsidies. As this occurs, HUD is statutorily mandated to follow specific procedures and fulfill various duties. If HUD fails to follow these statutory mandates, it is liable to the affected tenants and to future tenants. Although it is nearly impossible, far beyond the scope of this paper, and unnecessary to understand the standing issues surrounding the lawsuits to analyze every HUD statute, a brief overview is provided.

In 1937, Congress passed the “National Housing Act” in an effort to provide affordable housing options for all citizens of the United States.¹⁶ Originally, the mechanisms implemented by the federal government were exclusively geared toward financially assisting state and local authorities to provide affordable housing. However, toward the end of the 1960’s, Congress authorized HUD to assist and encourage private developers to provide affordable housing.¹⁷ To encourage private development, HUD insured mortgages and offered below market interest rates

¹⁴ Interview with Charlie Warner, Executive Director of Homeline (October 4, 2002).

¹⁵ See 42 U.S.C. § 1427f (2002).

¹⁶ Primarily codified as 12 U.S.C. §§ 1701-49 (1937).

¹⁷ See e.g. 12 U.S.C. § 1715l(d)(3), z-1 (2001).

to developers who guaranteed to abide by certain conditions and to offer affordable housing to low-income residents.¹⁸

Such a mortgage agreement required a private owner to agree to stay in the program for a minimum number of years and to maintain the condition of the housing to standards HUD determined adequate. Now, nearly 35 years after HUD began insuring these mortgages, a rapidly increasing number of private owners are choosing¹⁹ to opt-out of their mortgage agreements and to prepay their loans. Since HUD no longer offers project-based assistance, this means that the number of affordable dwellings in the country is drastically dropping.

Depending on when and under what conditions the agreement was made, HUD has certain discretion and certain duties toward the public to ensure that not all private owners are allowed to prepay their mortgages and no longer offer affordable housing to low-income citizens. First, HUD is responsible for ensuring that all owners hoping to prepay their mortgages and hoping to cease their involvement in affordable housing follow all of the statutory procedures²⁰ necessary to leave the program.²¹ For example, the applicable statutes demand that owners give current tenants at least one year's notice before moving out. HUD is responsible for ensuring that all of the tenants receive such notice.²²

¹⁸ See e.g. Pub. L. No. 106-74, §531, 113 Stat. 1055, 1070 (1999) where congress still demands that HUD offer incentives to private owners to stay in the privately-owned, government-subsidized affordable housing projects.

¹⁹ It is difficult and unnecessary for purposes of this paper to understand the reasons why landlords may choose to relieve themselves of the government subsidies and leave the affordable housing market. However, after discussing the issue with one landlord in the Twin Cities, he explained that although it was still possible to make money while offering affordable housing, with the tight rental market in the Twin Cities, there is more money to be made in the private market. He explained the choice to remain in the affordable housing market to simply be one of "social justice."

²⁰ See e.g. Minn. Stat. 471.9997 (1998). There are also state statutes which owners must follow in prepaying and eventually dismissing current residents from their homes. This statute for example, requires a year notice be given to the local governing body of the municipality.

²¹ See generally 12 U.S.C. §§ 4102-37 (2002).

²² See generally *215 Alliance v. Cuomo*, 61 F. Supp. 2d 879 (D. Minn. 1999).

Secondly, HUD also has duties through an advanced voucher program²³ that ensures that the current low-income residents maintain adequate housing by allowing these residents to live affordably elsewhere.²⁴ After receiving these vouchers, misplaced tenants can either remain in the same apartment complex or seek compatible housing with a voucher that allows these tenants to spend 30% of their income on housing, while the remaining rent is subsidized by the federal government.²⁵

Another duty required of HUD, most pertinent to the present analysis, provides that HUD attempt to prevent this country's stock of affordable housing from decreasing before the full maturity of the mortgages.

The Secretary may not approve the sale of any loan or mortgage held by the Secretary (including any loan or mortgage owned by the Government National Mortgage Association) on any subsidized project or formerly subsidized project, unless such sale is made as part of a transaction that will ensure that such project will continue to operate at least until the maturity date of such loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the assignment of the loan or mortgage on such project to the Secretary.²⁶

Under this statute, HUD cannot sell the insured-mortgage to another private entity unless the new agreement dictates that the property will remain affordable for the length of the original term provided in the agreement between HUD and the original owner.²⁷ The statute indicates that Congress intended a private right of action for both tenants and prospective tenants in order to ensure that HUD acts in the public's best interest and attempts to preserve the current stock of affordable housing.²⁸ In certain situations, HUD lacks statutory discretion and must allow an

²³ See 42 U.S.C. § 1437f(t) which states that the prepayment of HUD-insured mortgages triggers vouchers for the displaced residents.

²⁴ See Pub. L. No. 104-24, 110 Stat. 2875, 2884-85 (1997).

²⁵ *Id.*

²⁶ 12 U.S.C. § 1701z-11(k) (2002).

²⁷ See *generally supra* n. 20.

²⁸ 1987 U.S.C.C.A.N. 3317, 3355.

owner to prepay the mortgage. However, HUD is then required to offer the owner incentives, aimed at convincing her to continue providing low-income housing.²⁹

Finally, the last way HUD helps to maintain the availability of affordable housing is through Housing Assistance Program Contracts (HAP).³⁰ Through HAP contracts, the government agrees to subsidize the rent in a certain number of apartments of a particular apartment complex so long as the owner rents the property to low-income tenants and properly maintains the apartments, similar to the restrictions placed upon owners of HUD-insured mortgages. These contracts are restricted to a maximum period of five years and are usually for no less than one year.³¹

The full legislative history behind affordable housing preservation is far beyond the scope of this paper and is unnecessary for determining whether a party has standing to sue HUD for violating one of the statutes. For present purposes, it is important to realize that there are two ways to legally challenge HUD's decision to allow an owner to prepay a mortgage and remove her property from the affordable housing stock. First, a challenger can claim that the owner, and consequently HUD, did not follow the procedural safeguards mandated by statute.³² Second, challengers can allege that HUD has not followed the discretionary guidelines in determining whether it should allow the owner to prepay the mortgage.³³ The question of *who* can challenge HUD's decisions and bring these suits remains to be answered.

III. Standing Doctrine

As mentioned earlier, the doctrine of standing is somewhat elusive and has caused much skepticism among legal scholars. "Several years ago, Justice Douglas observed that

²⁹ See generally 12 U.S.C. § 1701z-11(a) (2002).

³⁰ See generally 42 U.S.C. § 1437f (2002).

³¹ *Id.* at (b)(2).

³² See generally *Community Stabilization Project*, 199 F.R.D. 327.

‘(g)eneralizations about standing to sue are largely worthless as such.’ Many exasperated courts and commentators have echoed the thought, often adding that standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits.”³⁴ Yet standing must be dealt with.

Standing doctrine is based on the constitutional requirement that there be an actual case or controversy.³⁵ The essence of standing doctrine is that the right party be before the court to pursue the claim.³⁶ Standing serves as a “rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.”³⁷ A special interest in a particular issue is not sufficient to entitle a party to pursue litigation in that particular matter.³⁸ This requirement ensures that the claim is pursued passionately and to its full extent, and it also limits the number of claims heard by the court systems.³⁹

Over the last several decades, the standing doctrine has evolved to include three specific constitutional requirements: (1) Injury in Fact - the plaintiff must show that it has suffered an injury that is “concrete and particularized,” “actual or imminent,” and not “conjectural or hypothetical;” (2) Causation - the plaintiff must show that this injury is “fairly traceable to the challenged action of the defendant;” and (3) Redressability - the plaintiff must also show that the injury may be redressed through the court’s action.⁴⁰

³³ See generally *215 Alliance*, 61 F. Supp. 2d 879.

³⁴ Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* vol. 13, § 3531, 347-348, (2d ed., West 1984) quoting *Assoc. of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970).

³⁵ U.S. Const. art. III, § 2, cl. 1.

³⁶ *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) (“[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.”)

³⁷ *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

³⁸ *Id.* at 739-40.

³⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 191 (2000) (“Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.”)

⁴⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Even when a plaintiff meets this constitutional minimum, there are prudential requirements that must also be met. Generally these prudential rules require (1) that a plaintiff “assert his own legal rights and interests,” not resting “his claim to relief on the legal rights or interests of third parties;”⁴¹ (2) that courts “refrain from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances;’” and (3) that the litigant’s interests are “within the zone of interests intended to be protected by the statute, rule, or constitutional provision on which the claim is based.”⁴² These prudential rules may be waived by an act of Congress. The Fair Housing Act, for example, allows the courts to waive the prudential standing requirements in cases alleging discriminatory housing practices. This means that organizations that are defending the rights of third parties may have standing to pursue such a claim under the Fair Housing Act.⁴³

A housing advocacy organization attempting to bring a claim under the National Housing Act, or some other provision that would allow it to challenge the destruction or conversion of federally subsidized affordable housing, does not necessarily have the benefit of the Fair Housing Act to bypass these prudential requirements. However, the discussions of *jus tertii* standing and administrative standing reveal that these prudential requirements should not prove fatal to the organization’s pursuit of these claims.

This paper will examine some of the theories under which an organization may attempt to establish standing: organizational standing, representational standing (associational standing), *jus tertii* or third-party standing, and administrative standing. These theories will then be analyzed in light of housing advocacy organizations that are attempting to preserve affordable housing for current and unknown, unnamed low-income tenants.

⁴¹ *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

⁴² *Defenders of Wildlife, Friends of Animals and Their Env. v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988).

A. Organizational Standing

An organization has a right to pursue a claim in the federal courts on its own behalf when it can establish that it meets the minimum constitutional requirements of standing: injury in fact, causation, and redressability.

1. Injury in Fact

The most serious challenge faced by an advocacy organization attempting to prove standing to bring a suit on its own behalf is showing that it has suffered an injury in fact caused by the challenged action. The injury must be personal to the organization.⁴⁴ An injury in fact to an organization's activities drains the organization's resources and is "more than simply a setback to its abstract social interests."⁴⁵ A special interest in a particular matter is insufficient to establish standing concerning that matter.⁴⁶ The Supreme Court has clearly stated that, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."⁴⁷ The psychological discomfort of watching an action that is against one's personal convictions is not sufficient to establish injury in fact.⁴⁸ The organization's injury must be real, distinct, and imminent.

An advocacy organization opposing the diminishment of the affordable housing supply does not have a right to bring litigation to stop such action based on its belief in the rightness or importance of its cause. Anger, frustration, and empathy for the plight of those who will be harmed by the lack of affordable housing in the future will not confer standing on this advocacy organization. A belief that the government has violated some statute, rule, or constitutional

⁴³ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

⁴⁴ *See Associated General Contractors of North Dakota v. Otter Tail Power Co.*, 611 F.2d 684, 687 (8th Cir. 1979).

⁴⁵ *Natl. Fedn. of the Blind of Missouri v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999).

⁴⁶ *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

⁴⁷ *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982).

⁴⁸ *Id.* at 485.

principle does not “provide a special license to roam the country in search of governmental wrongdoing and to reveal [these] discoveries in federal court. The federal courts were simply not constituted as ombudsman of the general welfare.”⁴⁹

a. Impairment of Organization’s Activities

Instead, such an advocacy organization must show that it has suffered a “concrete and demonstrable injury” to its activities, a drain on its resources, or frustration of its mission as a result of the wrongful termination of affordable housing units.⁵⁰ When alleging an impairment of its activities, the organization must show *how* its activities are hampered by the defendant’s conduct and *how* the disputed policy affects its operations.⁵¹

For example, in discrimination cases, a complaint should detail the organization’s efforts expended to identify the defendant’s discriminatory acts.⁵² What were the daily activities of the organization prior to actions of the defendant? How have the daily activities of the organization changed? How are the daily activities of the organization hindered by the defendant’s action? Specify this information in hours, money, credibility, and staff resources. The plaintiff organization must also show that these changes were motivated by the defendant’s illegal activity.⁵³

Two cases worth comparing are *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers* and *Spann v. Colonial Village, Inc.* The claims in both of these cases arose under the Fair Housing Act because of discriminatory advertisements. Both of the plaintiffs in these cases were non-profit organizations whose purposes were to promote equality in housing, and combat segregation in housing through educational efforts. The Fair Housing

⁴⁹ *Id.* at 487.

⁵⁰ *Havens*, 455 U.S. at 379.

⁵¹ See generally *Natl. Fedn. of the Blind of Missouri*, 184 F.3d at 980.

⁵² See generally *Moeske v. Miller and Smith, Inc.*, 202 F. Supp. 2d 492, 499 (E.D.Va. 2002).

Council’s (FHC) mission was to “educate and promote fair housing and to oppose segregation based on the protected classes found in the Fair Housing Act of 1968.”⁵⁴ The plaintiffs in *Spann* were “organizational plaintiffs dedicated to ensuring equality of housing opportunity through education and other efforts.”⁵⁵

The plaintiffs in these cases were similar in purpose, and the defendants in these cases committed similar actions. However the most important similarity in *FHC* and *Spann* is that both courts held that injury in fact requires more than a diversion of resources into litigation.⁵⁶ The plaintiffs in *Spann* were granted standing, while the plaintiffs in *FHC* were denied standing. What specific facts were alleged in *Spann* that were missing from *Fair Housing Council*?⁵⁷

These cases affirm the necessity for plaintiff organizations to quantify their injuries. The plaintiffs in *FHC* claimed that they suffered setbacks to their organization’s outreach efforts and purpose and that they had to increase their efforts to ‘undo the damage’ resulting from the discriminatory advertisements which drained the organization’s resources.⁵⁸ However, the FHC failed to provide evidence that they had to modify their services, that their educational efforts were needed or that they even implemented any educational efforts.⁵⁹ They also failed to provide evidence showing that they had offered any counseling in efforts to “reverse the damage caused by the advertisements.”⁶⁰

⁵³ See *Arkansas ACORN Fair Housing, Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998).

⁵⁴ *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 72 (3rd Cir. 1998).

⁵⁵ *Spann v. Colonial Village, Inc.*, 899 F.2d 25, 26 (D.C. Cir. 1990).

⁵⁶ *Id.* at 27; *Fair Housing Council*, 141 F.3d at 78-79 (“something more than litigation is required to establish injury.”) The significance of this distinction will be addressed *infra* p. 17-21.

⁵⁷ An important consideration is that *FHC* was in the summary judgment phase, requiring “more than mere allegations.” 141 F.3d at 76. The plaintiffs in *Spann* were appealing a dismissal of their case and were seeking to pursue their claims. 899 F.2d at 25-26. The burden of pleading requirements are not as stringent as the burden at the summary judgment phase.

⁵⁸ *Fair Housing Council*, 141 F.3d at 76 n.2.

⁵⁹ *Id.* at 77-78.

⁶⁰ *Id.* at 77.

The court in *Spann* held that “Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants’ use of print media, are sufficiently tangible to satisfy Article III’s injury in fact requirement.”⁶¹ The plaintiffs in *Spann* were held to have standing to pursue their claims, but they still had the burden of proving “concrete drains on their time and resources.”⁶² They would need to detail the time, effort and money spent to educate the D.C. real estate industry and the public that racial preference is illegal.⁶³ *Spann* would need to provide evidence that the ads interfered with their “efforts and programs intended to bring about equality of opportunity for minorities and others in housing” and that the ads also decreased the effectiveness of their efforts to educate the real estate industry.⁶⁴

An advocacy organization whose purpose is to “foster and preserve affordable housing for its clients and its members” should allege and be prepared to prove that its ordinary activities were hampered by the threat of the discontinuance of the federally subsidized housing units. It should allege what actions were necessary to deal with this particular issue. How many staff members were involved in these efforts? How many hours were spent on these efforts? What other activities suffered as a result? An organization whose ordinary activities include helping low-income people find housing would find this task more difficult with the disappearance of affordable housing units from the market. In *Havens*, the Supreme Court found that a perceptible impairment on an organization’s ability to provide counseling and referral services

⁶¹ 899 F.2d at 29.

⁶² *Id.* at 27.

⁶³ *Id.*

⁶⁴ *Id.* at 28.

for low- and moderate-income home seekers was “far more than simply a setback to the organization’s abstract social interests” and was sufficient to establish injury in fact.⁶⁵

b. Drain on Organization’s Resources

Showing economic injury resulting from the allegedly illegal action is another way to establish that an organization has suffered an injury in fact. How does an organization show that it has suffered a drain on its resources because of the defendant’s actions? One of the most important things to remember is that general allegations of injury or a drain on resources is inadequate to establish a specific, concrete injury.⁶⁶ In order to establish that the plaintiff organization has suffered an injury in fact, it must allege specific facts that quantify the resources used to counteract the defendants’ allegedly illegal actions.⁶⁷ How were resources spent before? How are resources allocated now because of the defendant’s actions?

An organization alleging expenditures counteracting discriminatory activity must present evidence that if not for the activity of the defendant, the expenditures would not have been necessary and could have been used for other agency priorities.⁶⁸ An organization should specify the steps taken to counteract the defendant’s actions. Detailing the hours spent counseling, the investigation involved, and the cost involved in providing these resources should be sufficient to establish standing in most circumstances when those expenses are the result of the defendant’s action.⁶⁹ Itemizing the resources that were required to counteract the defendant’s actions should help an organization prove injury in fact from a drain on the organization’s resources.⁷⁰

⁶⁵ 455 U.S. at 379.

⁶⁶ See *Warth*, 422 U.S. at 503.

⁶⁷ See generally *Arkansas ACORN*, 160 F.3d at 434.

⁶⁸ See *Assoc. of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 361 (5th Cir. 1999).

⁶⁹ See *Moeske*, 202 F.Supp. at 499; *Williams v. Portesky Mgt., Inc.*, 955 F. Supp. 490 (D. Md. 1996).

⁷⁰ See *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (holding that itemized list of expenses demonstrated drain of resources and injury in fact).

Most often these efforts and resources can be shown to not be solely for the pursuit of litigation. For example, in a case where an organization counseled and investigated a claim of discrimination based on handicap accessibility, the court concluded that the organization's efforts would not have led to litigation had the complexes made accommodations as a result of the plaintiff's efforts.⁷¹ An organization cannot help but bolster its standing argument if it can show that its efforts would have combated the illegal activity without necessarily leading to court. For example, if an advocacy organization can prove that its actions would have ideally lead to an agreement with HUD or with the apartment owner that would have preserved the federal subsidies and prevented the diminishment of affordable housing stock without necessarily leading to litigation, it should be easier to prove standing based on a drain of resources caused by the defendant's actions.

This distinction could prove to make or break the plaintiff's case depending on the relevant jurisdiction. (Although the discussion below focuses on claims arising under the Fair Housing Act, the *Havens* analysis of organizational injury should still apply to advocacy organizations pursuing preservation claims because this analysis has not been limited to Fair Housing claims.)⁷² The circuits are split over whether *Havens* can be interpreted as allowing standing based on the mere diversion of resources towards litigation arising from violations of the Fair Housing Act.⁷³ A number of circuits interpret *Havens* narrowly and conclude that the injury conferring drain on an organization's resources must occur separately from the organization's

⁷¹ *Moeske*, 202 F. Supp. at 500.

⁷² *Fair Empl. Council of Greater Washington*, 28 F.3d at 1277 (Discussing fair employment claims); *Granville House, Inc. v. Dept. of Health and Human Services*, 715 F.2d 1292, 1298 (8th Cir. 1983) (challenging classification of alcoholism as mental disease); *Natl. Fedn. of the Blind of Missouri*, 184 F.3d at 979 (challenging state vocational rehabilitation policy).

⁷³ See *Spann*, 899 F.2d at 27 ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit"); Compare with *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) ("That some of the OHC staff's time was spent exclusively on litigating this action does not deprive the organization of standing to sue in federal court").

pursuit of this suit.⁷⁴ However, other circuits interpret *Havens* more broadly and have concluded that resources and time diverted from agency activities toward ‘legal efforts aimed at combating discrimination’ are sufficient to establish standing.⁷⁵

The circuits that interpret *Havens* narrowly argue that allowing organizations to assert standing based on the diversion of resources towards litigation would render Article III standing meaningless.⁷⁶ Such an injury is voluntary or self-inflicted – arising from an organization’s choice to involve itself in the suit.⁷⁷ The D.C. Circuit concluded that such injury is “not really a harm at all.”⁷⁸ The Fifth Circuit has argued that advocacy organizations do not have a legally protected interest in not expending resources “on behalf of individuals for whom they are advocates, at least where the only resources ‘lost’ are the legal costs of the particular advocacy lawsuit.”⁷⁹ To allow injury from such a diversion of resources would allow “any sincere plaintiff [to] bootstrap standing by expending its resources in response to actions of another.”⁸⁰

To satisfy the injury requirement set by these circuits an organization must establish an injury separate from the expenses and resources diverted towards the particular litigation.⁸¹ By showing that the defendant’s conduct has increased the number of people in need of counseling or has “reduced the effectiveness of any given level of outreach efforts,” the organization would

⁷⁴ *Spann*, 899 F.2d at 27; *Fair Housing Council*, 141 F.3d at 78-79.

⁷⁵ *Arkansas ACORN*, 160 F.3d at 434; *Ragin*, 6 F.3d at 905; *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

⁷⁶ *Spann*, 899 F.2d at 27.

⁷⁷ *Fair Empl. Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *Assoc. of Community Organizations for Reform Now v. Fowler*, 178 F.3d at 358-359.; *Lee Ray Bergman Real Estate Rentals v. North Carolina Fair Housing Center*, 568 S.E.2d 883, 866 (N.C. App. 2002).

⁷⁸ *Fair Empl. Council of Greater Washington*, 28 F.3d at 1277 (“One can hardly say that BMC has injured the Council merely because the Council has decided that its money would be better spent by testing BMC than by counseling or researching.”)

⁷⁹ *Assoc. for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994).

⁸⁰ *Id.*

⁸¹ See *Fair Empl. Council of Greater Washington*, 28 F.3d at 1276-1277.

be able to establish that it has suffered an injury in fact.⁸² As mentioned earlier, the plaintiffs in *Spann* were able to establish standing by detailing the expenditures that were necessary to counteract the defendant's discrimination.⁸³ To establish that an organization has suffered injury because of expenditures to counteract illegal activity, it should present evidence that if not for the action of the defendant, the expenditures would not have been necessary and could have been used toward other agency priorities.⁸⁴

Justice Scalia has asserted that, "Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."⁸⁵ The circuits that interpret *Havens* broadly have concluded that although mere litigation costs are not sufficient to establish standing, resources and time diverted from agency activities toward "legal efforts aimed at combating discrimination" are sufficient to establish standing.⁸⁶ When an organization must pursue litigation to counteract another's discrimination, it is prevented from spending time and money on other efforts to end discrimination.⁸⁷

A number of courts have concluded that the circuits can be reconciled with a "litigation plus" approach.⁸⁸ According to these courts standing may be established under the Fair Housing Act when an organization "(1) Devoted significant resources to identifying and counteracting the defendants' discriminatory practice; and (2) such practices have frustrated the organization's efforts against discrimination."⁸⁹ According to these courts, the fact that these investigations and

⁸² *Id.* at 1276.

⁸³ *Spann*, 899 F.2d at 27.

⁸⁴ *Assoc. of Community Organizations for Reform Now v. Fowler*, 178 F.3d at 361.

⁸⁵ *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 107 (1998).

⁸⁶ *Arkansas ACORN*, 160 F.3d at 434; *Ragin*, 6 F.3d at 905; *Village of Bellwood*, 895 F.2d at 1526.

⁸⁷ *See Williams*, 955 F.Supp. at 494.

⁸⁸ *Moeske*, 202 F. Supp. 2d at 499 n.8; *Williams*, 955 F. Supp. at 494.

⁸⁹ *Williams*, 955 F. Supp. at 495.

efforts lead to litigation does not destroy the organization’s standing.⁹⁰ Standing in these cases was established by providing documentation of the efforts and time the organization spent identifying the discriminatory acts, the time spent counseling and investigating the case, the cost related to those activities, and the effect that these activities had on other agency efforts.⁹¹

The Eighth Circuit appears to adopt the broad reading of *Havens* evidenced in *Ragin* when it states, “[T]he deflection of an organization’s monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute an actual injury. . . .”⁹² Therefore, it makes sense to argue that an advocacy organization in Minnesota should be able to establish federal standing by demonstrating a concrete drain on its resources and diversion of its efforts from ordinary programs aimed at helping low-income people maintain and find housing to legal efforts aimed at combating the unlawful disappearance of affordable housing units from the market.

c. Frustration of Purpose

While injury in fact is generally accepted by demonstrating economic injury, as discussed above, injury in fact may also be established through non-economic interests. For example, a setback to the agency’s mission may help to establish an injury in fact. A District Court Judge in Minnesota interpreted *Havens* as providing that “an organization may sue seeking declaratory judgment if the allegedly illegal practice impairs the organization’s ability to fulfill its purpose.”⁹³ In *Granville House, Inc. v. Department of Health and Human Services*, the Eighth Circuit concluded that an organization had standing to challenge the Department of Health and Human Services’ definition of alcoholism as a mental disease because it lost significant funding

⁹⁰ *Id.*; *Moeske*, 202 F. Supp. 2d at 500.

⁹¹ See generally *Moeske*, 202 F. Supp. 2d at 499; *Williams*, 955 F. Supp. at 494.

⁹² *Arkansas ACORN*, 160 F.3d at 434.

⁹³ *215 Alliance*, 61 F. Supp. 2d at 884.

and its mission of providing treatment to indigent persons was frustrated by the new classification.⁹⁴ Proving frustration of purpose was easy in that case. Granville House could no longer afford to provide treatment for indigent persons. Its purpose was no longer viable. However, not every court requires the complete frustration of an organization's mission. The Ninth Circuit has found that an organization's actions in designing, printing, and distributing literature "aimed at redressing the impact [defendant's] discrimination had on the Marin housing market" were sufficient evidence that the organization's mission was frustrated by the defendant's discrimination.⁹⁵

An advocacy organization that can show that the actions of the defendants served to frustrate its purpose of fostering and preserving affordable housing, either by making it impossible for the organization to continue its programs or by significantly interfering with the organization's ability to fulfill its purpose should be able to establish a concrete injury in fact sufficient to establish Constitutional standing.

2. Causation

Although injury in fact poses the most significant barrier to advocacy organizations attempting to establish standing, causation and redressability can also pose a significant threat to standing. The Constitutional requirement of causation mandates that the injury be "fairly traceable to the defendants' actions."⁹⁶ In *Warth v. Seldin*, the Supreme Court refused to grant the plaintiffs standing because the plaintiffs were unable to provide facts supporting the conclusion that the Town's zoning ordinances rather than the plaintiff's personal economic situations were

⁹⁴ 715 F.2d at 1299. Because Granville House lost significant federal funding due to this classification, it had to provide services for patients who could pay. Thus, its purpose to provide services for indigent people was frustrated. The court found that this frustration and the ensuing economic injury established standing.

⁹⁵ *Fair Housing of Marin*, 285 F.3d at 905.

⁹⁶ *Lujan*, 504 U.S. at 560-61.

to blame for their inability to live in Penfield.⁹⁷ The Court asserted that “Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents’ restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield.”⁹⁸

An organization must be able to provide specific facts that establish the connection between its suffered injury and the action of the defendant. In *Arkansas ACORN v. Greystone Development, Ltd.*, the plaintiff organization failed to allege that the defendant’s actions were the cause of its injuries. ACORN had failed to quantify the resources used to counteract any discriminatory advertisements. ACORN failed to show “what resources were used in identifying Greystone in particular as an alleged violator of the FHA, in monitoring or otherwise investigating Greystone once identified, in determining the discriminatory effects specifically attributable to Greystone’s advertisements, or in counteracting those discriminatory effects.”⁹⁹ The Court went on to hold that “Absent specific facts establishing distinct and palpable injuries fairly traceable to Greystone’s advertisements, ACORN cannot satisfy its burden at the summary judgment stage to establish the injury in fact requirement for standing under the FHA.”¹⁰⁰

An advocacy organization alleging an injury because of the defendant’s decision to convert federally subsidized units to market rate must prove that its injury is a result of the particular defendant and of the particular action at issue. If the injury would occur apart from the actions of the defendant, the organization cannot claim that the defendant’s actions were its cause.

⁹⁷ *Warth*, 422 U.S. at 506.

⁹⁸ *Id.* at 504.

⁹⁹ 160 F.3d at 434.

¹⁰⁰ *Id.* at 435. *See also Fair Housing Council of Suburban Philadelphia*, 141 F.3d at 78 (Plaintiffs failed to prove that the investigation of discriminatory advertisements was motivated by the particular defendant.)

3. Redressability

Redressability is the third prong of the Constitutional limits to standing. Redressability requires that the relief sought by the plaintiff remedy the harm caused by the defendant's actions. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court. That is the very essence of the redressability requirement."¹⁰¹ For example, the plaintiffs in *Steel Company v. Citizens for a Better Environment* sought a number of remedies for the reporting violations committed by Steel Company. One such remedy was a declaratory judgment stating that Steel Company had failed to file its reports. However, because this fact was not disputed the court declined to issue a declaratory judgment, as it would be "worthless to all the world."¹⁰² The Court also refused to issue injunctive relief because the violation was not continuing or imminent in the near future.¹⁰³ The Court also declined to impose civil penalties on behalf of the advocacy organization. These fines were paid to the United States Treasury and would not benefit the plaintiff in any way, nor would they prevent future violations. Justice Scalia explained, "although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."¹⁰⁴ A plaintiff organization must be prepared to show how each remedy sought would help to put the organization back into the same position it was in before the defendant's illegal action.

Unless a plaintiff organization can prove that the court can provide relief from the harm suffered because of the defendant's actions, the organization will not be able to pursue the suit in

¹⁰¹ *Steel Co.*, 523 U.S. at 107.

¹⁰² *Id.* at 106.

¹⁰³ *Id.* at 108.

¹⁰⁴ *Id.* at 107.

a federal court. For example in *Warth*, the Court maintained that “a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court’s intervention.”¹⁰⁵

An advocacy organization challenging the conversion or demolition of affordable housing units must prove that requiring HUD to follow the procedures required in the statute would help to remedy the injury. It must be able to prove that preventing the owner from converting the units to market rate would put the organization back in the position it was in prior to the threatened harm.

4. Organizational Standing in Minnesota

Minnesota’s standing requirements are simpler than those required by the federal courts. Standing is acquired either when the plaintiff has suffered an “injury in fact” or when the plaintiff “is the beneficiary of some legislative enactment granting standing.”¹⁰⁶ Similarly to the federal requirement, an injury in fact must be more than an “abstract concern with a subject which may be affected by an adjudication,” and more than speculative.¹⁰⁷ Sincere interest in a particular subject and enthusiasm for pursuing a claim will not suffice for standing.¹⁰⁸

Again, a plaintiff organization must be prepared to quantify its injury. It must be prepared to demonstrate *how* the allegedly illegal activity has caused its own activities harm, or has decreased its effectiveness.¹⁰⁹ If an organization cannot provide evidence that its situation would

¹⁰⁵ 422 U.S. at 508.

¹⁰⁶ *State v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996).

¹⁰⁷ *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 490, 493 (Minn. 1996); *State v. Knutson*, 523 N.W.2d 909, 911 (Minn. App. 1995).

¹⁰⁸ *Phillip Morris, Inc.*, 551 N.W.2d at 495.

¹⁰⁹ *Minnesota Educ. Assn. v. Indep. Sch. Dist. No. 404*, 287 N.W.2d 666, 669 (Minn. 1980).

have been different except for the actions of the defendant, its injury is merely speculative and does not satisfy the injury in fact requirement.¹¹⁰

B. Representational (Associational) Standing

Representational standing is another theory that organizations can attempt to use to obtain standing as an organization. The ability to pool resources and utilize organizational skills often places advocacy organizations in the best position to represent the interests and rights shared by individual members.¹¹¹ To prove representational standing, an organization must meet three different requirements. First, one of the organization's members must have standing to sue in his own right.¹¹² Second, the interest the organization seeks to protect must be germane to the organization's purpose.¹¹³ Third, the lawsuit must not require the individual participation of organization members in order to assert the claim or to obtain relief.¹¹⁴

To establish representational standing, an advocacy organization pursuing litigation to preserve federally subsidized housing must show that one of its members either lives in or is seeking to live in the federally subsidized apartment complex that is at risk of conversion to market rent. The organization must prove that this member would have standing on her own to pursue this lawsuit. The organization must also be able to show that preserving affordable housing is germane to the purpose of the housing organization, and that the member's participation is not necessary to seek a judgment to stop the conversion of the units to market-rate housing. In undergoing this analysis, the court will take all prudential considerations discussed in the previous section into consideration.

¹¹⁰ *Byrd*, 495 N.W.2d at 231.

¹¹¹ *United Auto Workers v. Brock*, 477 U.S. 274 (1986).

¹¹² *Hunt v. Washington State Apple Advert. Commn.*, 432 U.S. 333 (1977).

¹¹³ *Id.*

¹¹⁴ *Id.*

1. An Organization's Member Must Have Standing To Sue on Her Own Right

As mentioned, an organization seeking representational standing must first show that at least one of its members would have standing to sue on her own behalf.¹¹⁵ The organization must prove that the individual member has suffered an injury in fact, that the injury is caused by the allegedly illegal action, and that it is likely that the court could redress the injury through the requested remedy.¹¹⁶ A housing advocacy organization may have two types of members that might be able to prove standing to sue an apartment owner or HUD for wrongfully converting the apartment's subsidized units to market rate: members who live in the units at risk of conversion or members who are homeless and seeking to live in those subsidized units. Although the facts differ for both groups of individuals, each could make claims that they as individuals meet these three requirements.

For individual members who live in the apartment complex, the easiest way to show that they have met the three conditions of standing is through an alleged procedural violation.¹¹⁷ For example, in *215 Alliance v. Cuomo*, the District Court of Minnesota found that representational standing did exist for the housing organization because its members failed to receive adequate notice when the landlord decided to no longer offer affordable housing.¹¹⁸ However, even when the notice is sufficient, current residents may claim injury from vouchers that inadequately replace their housing, from unstable living conditions, and from the emotional hardship faced by the tenants as they are forced to move away from friends, family, school, work, and other

¹¹⁵ *Natl. Taxpayers' Union, Inc. v. United States*, 68 F. 3d 1428, 1435 (D.C. Cir. 1995). These are the same standing rules laid out in the Organizational Section of this paper and the same rules apply here, only in this instance, the facts alleged to confer standing are not to the organization as a whole but instead to the individual members.

¹¹⁶ *Friends of the Earth*, 528 U.S. 167.

¹¹⁷ See generally *215 Alliance*, 61 F.Supp.2d 879 where a claim that the requisite notice deemed necessary by statute was not provided to the current tenants, so the current tenants, as members, met the requirements of individual standing.

¹¹⁸ *Id.*

obligations.¹¹⁹ Finally, the relief sought must repair the alleged injury to these members.

Therefore, an injunction preventing the apartments from converting to market-rate before the end of the contract's term would be sufficient to repair the tenants' injury.¹²⁰

For the organization's individual members who are seeking affordable housing and who are not currently living in the disputed apartment complex, the claim of individual standing is straightforward. Simply, the number of low-income apartments in the area has declined because of an alleged violation of statute by HUD officials, and it has become more difficult for them to find housing. However, it is impossible to determine which exact member would have been able to live in the subsidized units had it remained an affordable option.

Because of the difficulty discerning which member would have lived in any specific apartment, it may be challenging to show that the member suffered a direct injury in fact. However, the legislative history of the relevant statute indicates that Congress intended this statute to protect and to be enforced by current and future tenants.¹²¹ Therefore, prospective tenants should be able to prove injury in fact solely because of HUD's alleged statutory violations, allowing the mortgage's prepayment and decreasing the market's supply of affordable dwellings. Courts have allowed organizations to pursue claims under statutes granting private causes of action, recognizing the important role of private suits in enforcing the statute.¹²²

Other courts have also recognized that future tenants can allege an injury-in-fact solely by virtue of seeking housing when housing opportunities have been destroyed. Again, in *215 Alliance*, the District Court of Minnesota found that because the housing organization, who was

¹¹⁹ See e.g. *Hispanics United of Dupage County v. Village of Addison, Illinois*, 958 F. Supp. 1320, 1323 (N.D. Ill. 1997) where similar considerations were sufficient for the plaintiffs to establish standing in their own right.

¹²⁰ See generally *Natl. Commn. to Preserve Soc. Sec. v. Bowen*, 750 F. Supp. 1069, 1084 (D.D.C. 1990).

¹²¹ 1987 U.S.C.C.A.N. 3317, 3355.

¹²² See *Spann*, 899 F.2d 22-23. There, the court conferred standing for a housing organization challenging discrimination in real estate advertising in part because the statute authorizing the challenge imparted the power to

bringing a similar claim to those discussed here, represented potential tenants, the organization's representational interest survives even though the current residents may receive vouchers.¹²³ However, this reasoning was not accepted by the District Court of Minnesota in *Community Stabilization Project v. Cuomo*, where the court denied representational standing to the housing organization bringing a similar claim without even discussing the interests of group members who were also potential tenants.¹²⁴ The court failed to recognize and analyze whether the organization's members seeking housing could establish standing as individuals.

By proving that an advocacy organization's members - tenants of the disputed apartment complex or prospective tenants - have suffered an injury in fact, the organization will meet the first prong of the representational standing requirement. As discussed above, both groups of members may be able to provide facts establishing such an injury and satisfy this requirement.

2. The Interests The Organization Seeks To Protect Must Be Germane To The Organization's Purpose

An organization wishing to represent its members in litigation must show that the protection it seeks for its members is consistent with and fundamental to the organization's purposes. Therefore, while the organization's litigation focuses on the claims of the individual members, it is also representing its own interests.¹²⁵ For example, a housing advocacy organization, attempting to gain representational standing for purposes of challenging the conversion of federally subsidized apartment units to market rate, must show that stabilizing and preserving the current stock of affordable housing in Minnesota and protecting the statutory rights of low-income tenants is a fundamental component of the organization's mission.

private plaintiffs, and to have the statute enforced, it needed private suits. However, this suit was also brought under the Fair Housing Act, so these relevant and established ideals need to be taken into consideration. *See supra* n. 40.
¹²³ *See* 61 F. Supp. at 884.

¹²⁴ 199 F.R.D. 327, *aff'd on other grounds*, *Community Stabilization Project v. Martinez*, 31 Fed. Appx. 340 (8th Cir. 2002).

Although the analysis of such cases is primarily case specific, determined by the specified purpose of the housing organization and the types of injuries claimed, housing organizations should not have trouble meeting this prong of representational standing.¹²⁶ The legal rights of low-income tenants and the number of available affordable-housing units are directly related to the purposes of these housing advocacy organizations. Therefore, organizations hoping to protect such interests should incorporate these purposes into mission statements and goals because courts will take them into consideration.

3. The Claims Asserted and the Relief Sought Must Not Necessitate the Involvement of Individual Members

For an organization to obtain representational standing, the individual participation of the individual members must be unnecessary. In most circumstances, it is well settled that when injunctive or declaratory relief is requested, individual participation is not needed.¹²⁷ A housing organization seeking to preserve federally subsidized apartment units will almost certainly seek injunctive relief. If procedural violations are alleged, the organization will seek to postpone the termination of the affordable housing until the procedural violations are remedied. If the organization seeks to prevent the loss of the affordable housing by preventing the owner from prepaying the mortgage, then again, the primary relief sought is injunctive and individual proof is not needed.

When the requested relief or the nature of the litigation requires the involvement of individual members, an organization cannot obtain representational standing.¹²⁸ For example, if

¹²⁵ *United Food and Commercial Workers Union Loc. 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996).

¹²⁶ See generally *215 Alliance*, 61 F. Supp. 2d 879 and *Community Stabilization Project*, 199 F.R.D. 327 (both courts found that the housing organization met this prong of the representational standing test).

¹²⁷ See e.g. *Natl. Comm. to Preserve Soc. Sec.*, 750 F. Supp. at 1084.

¹²⁸ *Terre Du Lac Assoc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 471 (8th Cir. 1985).

instead of seeking injunctive relief,¹²⁹ the organization seeks improved vouchers or increased monetary expenses for moving, it will be more difficult for the organization to show that it will not need individual involvement to pursue its claims and attain the remedy. In *Community Stabilization Project*, the court held that CSP could not bring the claim on behalf of its members because the relief sought, vouchers for the displaced residents, required individual proof that each individual was eligible to receive a Section 8 voucher.¹³⁰ However, courts in other jurisdictions have granted remedies that would later require individual proof for validation.¹³¹

Because injunctive relief is the primary relief sought by housing organizations attempting to preserve federally subsidized apartments through litigation, and because individual participation from the organization's members is unnecessary to such litigation, these housing organizations may satisfy the third prong of the representational standing analysis. Therefore, such organizations should have a viable claim to standing under the representational standing analysis.

4. Minnesota State Law Regarding Representational Standing

State law regarding standing is controlling, and state standing and federal standing can differ.¹³² However, in cases of representational standing, Minnesota courts have consistently followed the *Hunt* test described *infra*, and the case law regarding representational standing relies on federal representational standing law.¹³³ Because of this, the analysis surrounding representational standing in each jurisdiction is similar to that described above.

¹²⁹ See *Middlewest Motor Freight Bureau v. United States*, 525 F.2d 681 (8th Cir. 1975) where the court indicated that when the relief requested is more than injunctive relief, it is more likely that representational standing will not exist for an organization.

¹³⁰ See 199 F.R.D. at 333.

¹³¹ *Holbrook v. Pitt*, 632 F.2d 1261 (7th Cir. 1981); *Bloom v. Niagara Falls Housing Auth.*, 430 F. Supp. 1183 (W.D.N.Y. 1977).

¹³² See e.g. *Group Health Plan, Inc. v. Philip Morris Inc.*, 68 F. Supp. 2d 1064, 1068 (D. Minn. 1999); *McKee v. Likins*, 261 N.W. 2d 566, 570-71 (Minn. 1977).

¹³³ See e.g. *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. App. 1985) where representational standing was denied because the organization did not pass the second prong of the *Hunt* test.

C. *Jus Tertii* Standing

Jus tertii standing is another standing theory housing organizations may use to gain standing to pursue litigation attempting to prevent the conversion of federally subsidized units to market rate. *Jus tertii* standing is best understood as a combination of representational and organizational standing. Like organizational standing,¹³⁴ to successfully attain *jus tertii* standing, the organization must show that it has suffered an injury in fact.¹³⁵ However, unlike organizational standing and contrary to a well-settled prudential restriction, *jus tertii* standing¹³⁶ allows a claimant to rest her “claim to relief on the legal rights or interests of third parties.”¹³⁷ Stated simply, *jus tertii* standing allows an organization to base its claim for relief not on its own injuries but instead on the injuries, rights, and interests of third parties not involved in the suit.¹³⁸ Therefore, *jus tertii* standing may be granted in instances where organizational standing was not because it is unnecessary that the relief requested be directed toward the plaintiff.

There are three requirements that must be satisfied before a plaintiff can seek relief based on the rights and interests of a party not involved in the lawsuit. First, the organization must demonstrate that it was injured in fact.¹³⁹ Second, the party on whose behalf the relief is requested must face practical obstacles preventing it from bringing suit on its own behalf.¹⁴⁰

¹³⁴ See *Assoc. General Contractors of North Dakota*, 611 F.2d 684.

¹³⁵ *Warth*, 422 U.S. 490.

¹³⁶ See e.g. *Sec. of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). The court discusses *jus tertii* standing and the situations in which it is recognized.

¹³⁷ See e.g. *Valley Forge Christian College*, 454 U.S. at 486.

¹³⁸ The fourth and unmentioned prong of *jus tertii* standing is simply that the unnamed parties to the suit must have also suffered an injury-in-fact. This has not been litigated and the analysis is encompassed in the section of this paper discussing the first prong of the representational standing test, that the organization’s members must have standing to sue in their own right.

¹³⁹ Since the injury-in-fact analysis is provided in the Organizational Standing Section of this paper, only the latter two prongs of the *jus tertii* analysis are discussed below.

¹⁴⁰ See *Joseph H. Munson Co.*, 467 U.S. at 956.

Third, the party bringing the suit must be in a position where it can reasonably be expected to zealously pursue the issues on behalf of the third party's interests.¹⁴¹

If all of these requirements are met, the plaintiff has standing to sue even though the requested relief is directed toward third parties. Therefore, to prove *jus tertii* standing, an advocacy organization seeking to preserve federally subsidized apartments through litigation must first show injury-in-fact to itself. If the organization can show injury-in-fact, it must then meet the two additional requirements of *jus tertii* standing. First, it must show that the parties whose rights it is trying to protect, namely low-income tenants and homeless people, are unable to bring suit on their own behalf. Secondly, the organization must show that it is in a position to adequately bring claims on behalf of these vulnerable parties.

1. The Party Whose Rights The Relief Is Predicated Upon Must Be Unable To Represent Its Own Rights

When analyzing a third party's ability to bring suit on its own behalf and whether a plaintiff should be allowed to seek relief based on the third party's rights, courts have consistently granted the plaintiff standing so long as the other two *jus tertii* requirements are met. When a plaintiff can demonstrate injury-in-fact and adequate representation, courts have rarely let this first requirement prevent *jus tertii* standing.¹⁴²

In *Craig v. Boren*, the United States Supreme Court granted *jus tertii* standing to an alcohol vendor representing the equal protection rights of underage males in Oklahoma who were unable to purchase alcoholic beverages at the same rates and amounts as were females the same age.¹⁴³ Even though the plaintiff was not a male subject to the increased regulations, it was still able to

¹⁴¹ *Craig v. Boren*, 429 U.S. 190, 193-94 (1976).

¹⁴² See e.g. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Courts still deny plaintiffs' attempts at *jus tertii* standing but not on the basis that the third party could actually have served its own interests. Here, the court denied *jus tertii* standing and standing all together because there was no injury-in-fact to any of the organization plaintiffs.

seek judgment vindicating the rights of underage males. The Court concluded that it was simply impractical to require the claimants retain a male in the applicable age range as party to the suit throughout the entire suit.¹⁴⁴

In *United States Department of Labor v. Triplett*, the Supreme Court allowed an attorney to bring suit on behalf of prospective, unknown clients because he alleged that a statute capping the contingency percentage available to attorneys in asbestos cases violated the Due Process Rights of these unknown, future clients.¹⁴⁵ Similarly, the Supreme Court allowed the plaintiff in *Secretary of State of Maryland v. Joseph H. Munson, Inc.* to bring suit on behalf of charitable foundations, challenging the constitutionality of a statute regulating the percentage of income the foundation could expend on fund-raising purposes, despite the fact that the plaintiff was not itself a charitable organization.¹⁴⁶ In all of these cases, the court, without lengthy comment, found that practical obstacles existed which kept the third parties, for whom relief was sought, from bringing suit on their own behalf.

It follows that housing advocacy organizations should be allowed to assert the rights of low-income and homeless persons in need of affordable housing. These organizations have a strong argument that such persons are unable to bring claims to assert their own rights and interests. Like the plaintiffs in *Triplett*, *Joseph H. Munson, Inc.*, and *Craig*, a housing organization is not seeking relief for only itself but is instead seeking relief for an unnamed third party. In *Triplett*,¹⁴⁷ the unnamed party was an ambiguous number of clients, allegedly being deprived of the right to find counsel. Since it was impossible to name exactly which client would eventually find which attorney and if the decision to find the attorney might change absent the statute,

¹⁴³ See 429 U.S. at 194.

¹⁴⁴ *Id.*

¹⁴⁵ See generally 494 U.S. 715 (1990).

¹⁴⁶ 467 U.S. at 957.

practical obstacles existed which kept the future clients from bringing suit themselves. In *Joseph H. Munson, Inc.*,¹⁴⁸ there were no specific barriers preventing charitable organizations from bringing suit on their own behalf, but the plaintiff was allowed to bring the suit because it could adequately advocate for the charitable organizations.¹⁴⁹ In all of these examples, the court never required the third party to be present to represent its own interests so long as the other two facets of *jus tertii* standing were met: the party representing the third party's interests suffered an injury-in-fact and it could adequately represent the third party's interests.

The prospective tenants who will suffer from the decrease of the supply of safe, affordable, federally subsidized housing caused by the conversion of these units to market rate are unascertainable. It is impossible to know exactly which residents would have eventually occupied those dwellings. However, even though the names of these individuals are unascertainable, housing advocacy organizations meeting the other criterion of *jus tertii* standing should be able to bring suit on the behalf of those unnamed, future residents.

It is possible that the people whose rights the claim seeks to protect are members of the housing organization bringing suit. Representational standing and *jus tertii* standing are two different methods of gaining standing, and courts may blur this distinction when a plaintiff seeking *jus tertii* standing is advocating for the rights of its own members. However, this should not differentiate these cases from the *jus tertii* cases discussed above. An Eighth Circuit decision that denied standing because of a lack of injury did not declare *jus tertii* standing impossible

¹⁴⁷ See generally 494 U.S. 715.

¹⁴⁸ See generally 467 U.S. 947.

¹⁴⁹ See generally *id.* The court based a substantial portion of its analysis on the peculiar circumstance of that case and it being a First Amendment challenge and is not entirely applicable to the present situation. However, the finding is still predicated on a notion that enough obstacles existed to possibly prevent an injured unnamed party from bringing suit to vindicate its own interests.

merely because the third party not able to bring suit may be a member of the litigating organization.¹⁵⁰

Therefore, if housing organizations can show an injury-in-fact and can show that they will adequately represent the needs of the unnamed low-income tenants and homeless people injured by the deprivation of federally subsidized housing, these organizations should be able to prove *jus tertii* standing.

2. The Party Bringing Suit Must Be In A Position To Adequately Represent The Unnamed Third Party

Jus tertii standing requires that the party bringing suit show that it “can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.”¹⁵¹ This last prong of *jus tertii* standing is similar to the well-settled notion that standing analysis “focuses on the party seeking to put his or her complaint before the court and not upon the issues the party wishes to have adjudicated.”¹⁵² However, in *jus tertii* standing the rights asserted are not those of the party asserting the rights. Therefore, the focus is on the relationship between the claimant and the third party.

To show that a proper relationship exists between the party bringing suit and the third party, the plaintiff must demonstrate that it is pursuing results equally desired by itself and the third party. For example, in *Joseph H. Munson Company, Inc.*, the Supreme Court found that the plaintiff, an organizer of charitable fund drives, had the requisite relationship with the charitable organizations because “the activity sought to be protected [was] at the heart of the business relationship between Munson and its clients.”¹⁵³ Similarly, in *Eisenstadt v. Baird*, the Court allowed a physician to assert the rights of unmarried people seeking contraceptives, challenging

¹⁵⁰ *Natl. Fedn. of the Blind of Missouri*, 184 F.3d at 981.

¹⁵¹ *Joseph H. Munson*, 467 U.S. at 956.

¹⁵² *Flast*, 392 U.S. at 99.

a statute that did not allow the distribution of contraceptives to unmarried people, because the plaintiff had an “adequate incentive” to assert the rights of unmarried people to contraceptives.¹⁵⁴ Finally, in *Triplett*, the Supreme Court found that the attorney was the proper party to bring suit on behalf of the possible future litigants subject to the statute limiting attorney fees because the enforcement of the restriction prevented a relationship between the two parties, and the remedy sought enabled the relationship to form.¹⁵⁵

Because housing organizations attempting to preserve federally subsidized housing and low-income, prospective tenants have similar interests in maintaining the amount of affordable housing stock available to low-income people, housing organizations are in the proper position to bring suit on behalf of the rights of these low-income and homeless people. In *Triplett*, the Court found that the relationship between the two claimant and the third parties was affected by the alleged infringement of the third parties’ rights. Therefore, the claimant was able to assert the rights of the unnamed third party.¹⁵⁶ The relationship between these housing organizations and the low-income and homeless persons is negatively affected by the decreasing supply of available, affordable rental dwellings. The resources of these housing organizations are strained; their ability to help low-income persons find and maintain housing is diminished, and these low-income people risk homelessness and uncertainty. The desire to prevent the diminishment of affordable housing is at the heart of the relationship between these parties.¹⁵⁷ Because the desired outcome of such a suit is to prevent the diminishment of the number of affordable apartments in

¹⁵³ 467 U.S. at 958.

¹⁵⁴ *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972). As well, the court intimates that it is not the relationship between the two parties that is important but the impact of the litigation on the third party in determining whether a party has the ability to assert the rights of parties not involved in the lawsuit.

¹⁵⁵ See 494 U.S. at 720.

¹⁵⁶ *Id.*

¹⁵⁷ *Joseph H. Munson*, 467 U.S. at 956 (allowing the party to pursue the interests of the unnamed third party because the matter of controversy was at the heart of the relationship between the parties).

that area, housing organizations should be allowed *jus tertii* standing if they satisfy the other two requirements.

A housing advocacy organization may be able to satisfy the three requirements of *jus tertii* standing. The organization would need to demonstrate that it has been injured in fact by the decision to allow the particular complex to convert to market rate. The organization would also need to demonstrate that the third party for whom relief is sought cannot bring suit on its own behalf. The difficulty of determining which prospective tenants have actually been denied or will be denied the opportunity of living in the particular complex makes it difficult for these parties to bring suit to prevent the conversion. These people are harmed by the loss of opportunity and the rising competition for available subsidized units. Therefore housing organizations, having the same interests in preserving subsidized housing, are in a position to zealously represent the interests of these third parties. Therefore, *jus tertii* standing appears to be a perfect fit for housing organizations attempting to advocate for the benefit of these vulnerable, low-income persons.

D. Administrative Standing

Administrative standing is yet another theory that advocacy organizations may attempt to use to pursue litigation challenging HUD's decision to allow the prepayment of a HUD mortgage and the conversion of a federally subsidized complex to market rate. "Elementary justice requires that one who is hurt by illegal action should have a remedy. The central principal that grows out of [this] is very simple: *One who is adversely affected in fact by governmental action has standing to challenge its legality, and one who is not adversely affected in fact lacks standing.*"¹⁵⁸ The Administrative Procedure Act (APA)¹⁵⁹ "grants standing to a person

¹⁵⁸ *Greer v. Illinois Housing Dev. Auth.*, 523 N.E.2d 561, 573 (Ill. 1988)(italics in original) (quoting 4 K. Davis, *Administrative Law Treatise* § 24:2, at 212 (2d. ed. 1983)).

‘aggrieved by agency action within the meaning of a relevant statute.’¹⁶⁰ Plaintiffs sue under the APA when a government agency acts in a way that results in harm to the plaintiff. To attain standing under the APA the plaintiff must show that the governmental action has resulted in an injury in fact to the plaintiff and that the injury is “to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated.”¹⁶¹

1. Injury in Fact

An injury in fact must be personal to the organization asserting the injury and must meet the specified criteria mentioned previously. “Judicial review does not extend under the APA to those who seek to do no more than vindicate their own value preferences through the judicial process.”¹⁶² However, a few unique aspects of injury in fact are found in cases arising under the APA. For example, the Supreme Court has allowed plaintiffs to establish injury in fact by proving that that they were threatened with injury by the government’s action.¹⁶³ This would allow a plaintiff standing when it asserts that the government action will be taken against the plaintiff as a result of the agency action or when the “government acts directly against a third party whose expected response in turn will injure the plaintiff.”¹⁶⁴ If the plaintiff’s interests and activities will likely be harmed by a third party’s conduct resulting from a government action, the plaintiff can establish injury in fact sufficient to confer standing under the APA.¹⁶⁵ “If the third party’s conduct is sufficiently dependant upon the incentives provided by the defendant’s action,

¹⁵⁹ 5 U.S.C. § 702 (1996).

¹⁶⁰ *Assoc. of Data Processing Serv. Organizations*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1964 ed. Supp. IV)).

¹⁶¹ *Wilderness Soc. v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987) quoting *Sierra Club v. Morton*, 405 U.S. at 733.

¹⁶² *Coalition for Env. v. Volpe*, 504 F.2d 156, 165 (8th Cir. 1974).

¹⁶³ See *Wilderness Soc.*, 824 F.2d at 11(analyzing Supreme Court cases that discussed threatened injury).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 12.

then the resultant injury will be fairly traceable to that action and a court order binding the defendant will likely cure the plaintiff's harm."¹⁶⁶

When HUD, a government agency, issues regulations that allow owners of federally subsidized apartment units to opt-out and prepay their mortgages, these owners are likely to take this action and convert their units to market rate. When such action is allowed without assuring that the supply of affordable housing units maintains stability, the local housing market will be deprived of necessary affordable housing units. This deprivation will make it more difficult for future tenants to find decent, safe housing. This deprivation will also make it more difficult for housing organizations to help tenants find such decent, safe housing. The increased difficulty for these housing organizations could place a strain on resources and time and could help frustrate the organization's mission. One could see that this agency action has caused a third party to act in such a way that injured the housing organization and low-income tenants in search of housing. This could satisfy the injury in fact requirement caused by threatened harm.

Some courts have also held that an agency's violation of procedural rights constitutes injury in fact.¹⁶⁷ For example, in *Defenders of Wildlife, Friends of Animals and their Environment v. Hodel*, the Eighth Circuit allowed an environmental advocacy organization standing to pursue a claim holding that the Secretary's refusal to carry out a statutorily mandated procedure constitutes sufficient injury in fact.¹⁶⁸

The National Housing Act specifies certain procedures that HUD must take when allowing owners of federally subsidized units to prepay or opt-out of their mortgages. When HUD fails to follow these procedures, the injury in fact requirement should be satisfied.

¹⁶⁶ *Id.* at 17.

¹⁶⁷ See e.g. *Defenders of Wildlife*, 851 F.2d at 1040.

2. Zone of Interests

Recently the Eighth Circuit explained that while procedural standing may “establish the elements of constitutional standing,” a plaintiff must still satisfy prudential standing and show that its injury falls ‘within the zone of interests sought to be protected by the statutory provision.’¹⁶⁹ The Supreme Court in *Clark v. Securities Indus. Assn.*, described the zone of interests test as follows:

In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding . . .¹⁷⁰

Some courts have criticized the zone of interests test, asserting that it is inconsistently applied, leads to confusion between standing and the merits of the suit, and is not self-explanatory.¹⁷¹ However, the Eighth Circuit has applied this test to plaintiff’s asserting claims under the APA. For example, in *Rosebud Sioux Tribe v. McDivitt*, the plaintiff attempted to assert standing based on a statute that was enacted to protect Native American interests. The plaintiff was neither a Native American nor a government party and was asserting interests that conflicted with the tribe’s interest. The court found that the plaintiff was clearly outside of the zone of interests created by the statute it was attempting to enforce.¹⁷² The plaintiff also attempted to bring a claim under the National Environmental Policy Act (NEPA). However the plaintiff’s injuries were economic and were not related to the environment. Because the plaintiff

¹⁶⁸ *Id.*

¹⁶⁹ *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir. 2002).

¹⁷⁰ 479 U.S. 388, 399 (1987), quoted by *Wilderness Soc.*, 824 F.2d at 18 n.11.

¹⁷¹ *Greer*, 524 N.E.2d at 492; see also *Coalition for Env.*, 504 F.2d 156 (Acknowledged that the plaintiffs sought standing under the APA, but did not apply the zone of interests test.)

¹⁷² 286 F.3d at 1037.

did not have an environmental interest, it did not fall within the zone of interests created by the NEPA.¹⁷³

A housing advocacy organization has a clear interest in the supply of affordable housing in its area. It advocates for the welfare of the people for whom the National Housing Act was created, mainly “low-income families who require housing.”¹⁷⁴ Because the zone of interests test is supposed to be interpreted broadly, a housing organization should be able to prove that its interests fall within the zone of interests created by the National Housing Act. Therefore, assuming that it can meet the injury in fact requirement, a housing organization should be able to challenge HUD actions under the APA.

IV. Conclusion

A lack of affordable housing is a significant problem in our society. The irresponsible diminishment of the scarce supply of federally subsidized housing contributes towards the many ills caused by the nation’s housing crisis. The private, non-profit, and government sectors need to work together to attempt to solve this problem.

Housing advocacy organizations play an important role in keeping HUD accountable to its responsibilities to maintain an adequate supply of affordable housing for our nation’s low-income tenants. Housing advocacy organizations also offer vital support to low-income tenants facing the loss of their housing. These organizations are in an ideal position to pursue claims preventing the unlawful diminishment of federally subsidized housing units. Therefore, it is important that these organizations are able to bring suit when necessary to help enforce these statutory responsibilities.

¹⁷³ *Id.* at 1039.

¹⁷⁴ *Bayvue Apartments Joint Venture v. Ocwen Fed. Bank FSB*, 971 F.Supp. 129, 133 n.6 (D.D.C. 1997).

As demonstrated, depending on the facts, a housing organization should be able to prove standing to bring such suits through a variety of standing theories: organizational standing, representational standing, *jus tertii* standing, and administrative standing. Proving that an organization has been injured by the unlawful conversion and sale of these federally subsidized units is entirely possible. Proving the other elements of each standing theory is also possible. Therefore, housing advocacy organizations should be prepared to detail their efforts, losses, strains, and drains related to the disputed conduct. Their efforts before, during, and after litigation are an important component of this nation's struggle to end homelessness and poverty.