UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1999

MARK T. GRANT,

Plaintiff - Appellant,

v.

THE CITY OF ROANOKE, VIRGINIA,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Michael F. Urbanski, District Judge. (7:16-cv-00007-MFU)

Submitted: June 22, 2020 Decided: June 29, 2020

Before MOTZ and KEENAN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Mark T. Grant, Appellant Pro Se. David L. Collins, OFFICE OF THE CITY ATTORNEY FOR THE CITY OF ROANOKE, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mark T. Grant appeals the district court's orders denying relief on his 42 U.S.C. § 1983 (2018) complaint.* We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Grant v. City of Roanoke*, No. 7:16-cv-00007-MFU (W.D. Va. July 18, 2017; Nov. 7, 2017; and Mar. 19, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* The district court determined that Grant was entitled to reopening of his time to file an appeal under Fed. R. App. P. 4(a)(6). The City does not challenge this finding on appeal. Accordingly, we deny the City's motion to dismiss the appeal as untimely.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 7:16-CV-00007**
v.	)	
	)	
	)	**By: Hon. Michael F. Urbanski**
CITY OF ROANOKE,	)	**Chief United States District Judge**
	)	
Defendant.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the court **GRANTS** judgment to the defendant on the plaintiff's procedural due process claim.

It is **SO ORDERED.**

Entered: 03-18-2019

/s/ Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 7:16-CV-00007**
v.	)	
	)	
	)	**By: Hon. Michael F. Urbanski**
CITY OF ROANOKE,	)	**Chief United States District Judge**
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff Mark T. Grant, proceeding pro se, filed this action under 42 U.S.C. § 1983 against the City of Roanoke (the "City"), alleging that the City improperly retained $26,257.30 from the sale of certain real property. The property at issue was previously rehabilitated for occupancy using funds awarded to the City through the federal HOME Investment Partnerships Program. Grant claimed that the City violated regulations implementing the HOME Investment Partnerships Act ("HOME Act") and his right to due process.

The case was initially assigned to Senior United States District Judge Glen E. Conrad. On July 18, 2017, Judge Conrad ruled that Grant had no viable claim for damages under the HOME Act itself or § 1983 for alleged violations of the Act and its implementing regulations. Accordingly, Judge Conrad granted the City's motion for summary judgment with respect to those claims. The City then filed a supplemental motion for summary judgment on the plaintiff's claim that he was denied due process. On November 7, 2017, that motion was granted in part and denied in part. Finding issues of fact as to whether Grant received adequate notice and an opportunity to be heard, Judge Conrad denied the City's motion for summary

judgment on the issue of procedural due process. However, to the extent that the complaint could be read to assert a violation of substantive due process, Judge Conrad concluded that the City was entitled to summary judgment on such claim.

Following an unsuccessful attempt at mediation, the case was transferred to the undersigned for the conduct of all further proceedings. On December 17, 2018, the parties appeared before the court for a bench trial on the procedural due process claim. Having considered all of the evidence together with the applicable law, the court issues this memorandum opinion, which sets forth its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). For the reasons stated herein, the court will enter judgment in favor of the City on the remaining claim.

FINDINGS OF FACT

1. The City participates in the HOME Investment Partnerships Program ("HOME Program"), a federal grant program that provides funding to states and localities to be used to increase the supply of affordable housing available for low and moderate income residents. The HOME Program is administered at the federal level by the Department of Housing and Urban Development ("HUD").

2. In 2002, the City partnered with Blue Ridge Housing Development Corporation ("BRHDC") to develop and rehabilitate housing for sale to purchasers meeting HUD's income criteria. Pursuant to the partnership agreement, the City gave BRHDC approximately $101,119.05 in HOME funds to acquire and develop property located in the City at 607 Bullitt Avenue ("the Property").

3. In late 2004 or early 2005, the plaintiff and his wife, Lori M. Grant, began looking for a house to buy in Roanoke. They planned to move to the area from New York after the plaintiff completed his service in the United States Army. While driving around Roanoke with a real estate agent, the Grants saw a "for sale" sign in front of the Property, which was new and in their price range. After touring the Property with their agent, the Grants expressed an interest in purchasing it.

4. The Grants met with representatives of BRHDC and were found to satisfy the eligibility requirements of the HOME Program. On May 20, 2005, the Grants bought the Property from BRHDC for $85,000.00. The funds used to pay the purchase price and additional closing costs were derived from the following sources: (1) an $80,000.00 mortgage loan; (2) a $2,200 HOME grant from the Virginia Department of Housing and Community Development; (3) a community development block grant ("CDBG grant") in the amount of $6,400.00; and (4) $100.00 in cash, paid out-of-pocket by the buyers.

5. The Property was subject to certain use and resale restrictions for a period of 15 years, based on the amount of HOME funds used to develop the Property. The restrictions were imposed by a Declaration of Restrictive Covenants ("Restrictive Covenants") that was signed by the City, BRHDC, and the Grants. The Grants executed the Restrictive Covenants in the presence of a notary public on May 20, 2005. The Restrictive Covenants were recorded in the Roanoke City Circuit Court Clerk's Office that same day.

6. The Restrictive Covenants provided that "[t]he terms and conditions herein shall apply for a period of 15 years from the date this document is recorded ('the period of affordability')." Restrictive Covenants 1, ECF No. 16-1. In accordance with regulations

promulgated by HUD, the Restrictive Covenants specified that the Property could only be conveyed to "a family having a gross family income not exceeding 80% of the area median," and that the family "shall use the Property as its principal residence." Id.; see also 24 C.F.R. § 92.254(a)(3) ("The housing must be acquired by a homebuyer whose family qualifies as a low-income family, and the housing must be the principal residence of the family throughout the [affordability period].").

7. The Restrictive Covenants also provided that the City "shall be notified of any . . . impending resale" within the period of affordability. Restrictive Covenants 1. The Restrictive Covenants further provided, in relevant part, as follows:

> Any such sale or conveyance of the Property shall allow the owner a fair return on investment. By this is meant that the owner, after satisfying any outstanding loans on the Property (including loans made with HOME funds), may recover the amount of the owner's down payment and closing costs and any capital improvement investment. Thereafter, the City and the homeowner shall share any remaining (net) proceeds from the sale or conveyance. The remaining proceeds shall be divided proportionally as set forth in the following mathematical formulas:
>
> HOME investment ___ x Net proceeds=Amount to City
> HOME investment +
> homeowner investment
>
> homeowner investment x Net proceeds=Amount to homeowner
> HOME investment +
> homeowner investment

Id.

8. City officials were not present for the closing on the sale of the Property. The plaintiff had no discussions with City officials regarding the Property or the Restrictive Covenants at that time.

9. The Grants moved into the Property in May of 2006, after the plaintiff completed his military service. They continued to use the Property as their principal residence until 2010, when they purchased a home in Hardy, Virginia. That same year, the Grants moved to Hardy. They subsequently rented the Property to at least two individuals. The amount of rent charged by the Grants was higher than their monthly mortgage payment on the Property.

10. At some point in 2013, the Grants decided to sell the Property. The plaintiff met with a listing agent, who advised him that the Property was still subject to the Restrictive Covenants.

11. The plaintiff obtained a copy of the Restrictive Covenants and then contacted several attorneys. The attorneys indicated that it would be difficult to avoid the terms of the Restrictive Covenants. After researching the matter on his own, the plaintiff came to believe that certain provisions of the Restrictive Covenants were invalid.

12. In late 2013, the plaintiff went to the City's Department of Planning, Building & Development to speak with someone about the Restrictive Covenants. He eventually met with Crystal Hypes, who held the position of HUD Community Resources Program Specialist II. Hypes was responsible for administering the grant funds obtained through the HOME Program.

13. During his meeting with Hypes, the plaintiff indicated that he and his wife had listed the Property for sale and that a prospective buyer, Devin Brown, had made an offer to purchase the Property. The plaintiff also indicated that he and his family were no longer living there. The plaintiff presented Hypes with a copy of the Restrictive Covenants and inquired as to how the provisions would affect the potential sale. Hypes advised the plaintiff that the

Property was still subject to the terms of the Restrictive Covenants since the 15-year affordability period had not expired, and that the proceeds from any sale within that period would be shared in accordance with the formulas set forth in the Restrictive Covenants.

14. The plaintiff and Hypes discussed the fact that the resale provisions allowed for owners of the Property to recover "any capital improvement investment." The plaintiff told Hypes that he had installed interior cabinets and was planning to build a shed on the Property. Hypes advised the plaintiff that such additions would not qualify as capital improvements for purposes of the Restrictive Covenants. Consequently, the plaintiff did not provide the City with receipts for the cabinets or other improvements made to the Property.

15. The plaintiff also learned that the City did not consider mortgage payments to be part of the "homeowner investment" for purposes of the resale formulas. As a result, the Grants would not recover any equity accumulated from making such payments if they sold the Property prior to the expiration of the 15-year affordability period.

16. Hypes emphasized to the plaintiff that the resale restrictions only applied for a period of 15 years. Hypes recommended that the Grants move back into the Property and wait until the affordability period expired before selling it, so that they would not have to share the sales proceeds with the City.

17. The plaintiff also met with Keith Holland, the Community Resources Program Administrator and Hypes' supervisor. The plaintiff disputed what Hypes had told him about the disbursement of the sales proceeds under the Restrictive Covenants. He and Holland reviewed the terms of the Restrictive Covenants and went over how the sale proceeds would be divided using the resale formulas. The plaintiff presented Holland with information from

HUD and suggested that the Restrictive Covenants did not comply with the applicable regulations. Holland advised the plaintiff that he would get back to him after having the opportunity to review the matter. Holland ultimately determined that the resale provisions in the Restrictive Covenants comported with the applicable regulatory requirements. Accordingly, Holland affirmed the representations made by Hypes, and he communicated his decision to the plaintiff.

18. The plaintiff had no further communications with Hypes, Holland, or any other City official regarding the Property. He did not ask to speak to Holland's supervisor or the City Manager. Instead, the plaintiff contacted HUD, and he was put in communication with Ronnie Legette, the Director of the Richmond Field Office.

19. Based on his conversations with Hypes and Holland regarding the resale provisions in the Restrictive Covenants, the plaintiff knew that the City would recover nearly all of the net proceeds from the sale of the Property if he and his wife accepted the pending offer. The plaintiff also understood that the City would not be entitled to any of the sale proceeds if he and his wife waited until after the 15-year affordability period expired to sell the Property. However, by that point, the Grants had already moved to Hardy with their two children, and they did not want to be required to use the Property as their principal residence. The Grants briefly considered what the plaintiff referred to as a "nuclear" option, under which they would lower the price of the Property to the point that there were no remaining sales proceeds to share with the City. The Grants ultimately declined to pursue that option, however, since they believed that it would unfairly advantage the potential buyer. Instead, they decided to accept the pending offer and proceed with sale of the Property.

20. In January of 2014, the Grants sold the Property to Devin Brown for $106,000.00. Prior to the closing date, Hypes met with Brown and confirmed that he met the eligibility requirements for participation in the HOME Program. Hypes advised Brown that the terms of the Restrictive Covenants would continue to apply until the 15-year affordability period expired. Hypes also spoke to the closing agent and explained how the sale proceeds would be divided under the Restrictive Covenants.

21. On the day of closing, Grant called Legette and asked if the net proceeds from the sale of the Property could be placed in an escrow account until HUD had the opportunity to review the Restrictive Covenants. Legette advised the plaintiff that he did not have authority to grant such request.

22. The sale was finalized on January 10, 2014. The sale proceeds were first used to satisfy the balance of the Grants' mortgage loan, to pay the closing costs for the sale of the Property, and to reimburse the Grants for the portion of the initial down payment that they personally made, which was believed at the time to be $669.20. The remaining proceeds in the amount of $26,430.95 were divided with the City using the mathematical formulas in the Restrictive Covenants. Application of the formulas resulted in the City receiving over 99% of the remaining sale proceeds, specifically, $26,257.30, and the Grants receiving an additional $173.65.

23. The Grants initiated a complaint with HUD regarding the manner in which the proceeds from the sale of the Property were divided. The Grants asserted that they did not receive a fair return on their investment. On July 15, 2014, HUD sent Holland a letter in response to the Grants' complaint. Upon review of the matter, HUD "determined that the

city's resale policy for [the Grants'] purchase and subsequent resale of 607 Bullitt Avenue was not in compliance with the HOME regulations in effect in 2005," since the policy "did not define and provide a fair return of the homeowner's initial investment and any capital improvements." July 15, 2014 Letter 2, ECF No. 19-1. HUD also determined that the City had "improperly recaptured the state's downpayment assistance of $2,200." Id. HUD explained that the $2,200 in HOME funds provided by the state should have been "considered to be a portion of the [Grants'] investment because the corresponding period of affordability had been satisfied." Id. HUD ultimately concluded that the "effect" of the problem was that "the Grant[s] did not receive a fair return on their investment pursuant to a regulatory compliant resale policy" and "were not given consideration for the $2,200 in HOME funds provided by the state of Virginia." Id. 3. HUD directed the City to take several corrective actions, including adopting a revised resale policy and recalculating the Grants' resale transaction.

24. The City objected to some of the corrective actions proposed by HUD, but confirmed that the City would treat the $2,200.00 HOME grant from the state as part of the homeowners' investment and return that amount to the Grants. By letter dated June 9, 2015, HUD maintained its finding against the City and rejected the City's assertion that it had "resolved" the matter "with the return of the $2,200 to the Grants." June 9, 2015 Letter 2, ECF No. 42-5. HUD noted that although the resale price of the Property was significantly above the original purchase price, "the City recaptured equity the Grants earned by making monthly payments on their first mortgage." Id. HUD ultimately required the City to either repay $68,530.00 to its HOME account from non-federal funds or enter into a negotiated

settlement with the Grants for an amount to be approved by HUD. The City chose the former course and transferred $68,530.00 from the City's general fund to its HOME account.

25. During the course of the litigation, the City conceded that the $2,200.00 HOME grant from the state should have been credited to the Grants under the resale provisions of the Restrictive Covenants. At trial, Holland confirmed that this error would be corrected. Holland also acknowledged that the Grants should have received credit for the CDBG grant in the amount of $6,400.00, and that the CDBG funds would be placed on the Grants' side of the ledger. With respect to capital improvements, Holland admitted that the Grants were entitled to reimbursement for any capital improvements made to the Property. However, the City never received any receipts or other documentation from the Grants. As for HUD's concern that the City recaptured equity that the Grants earned by making their monthly mortgage payments, Holland testified that the City did not ordinarily consider mortgage payments in applying the resale formulas. To the extent that the Grants are entitled to additional credit for their mortgage payments, Holland suggested that the amount of such additional credit should be offset by the income that the Grants received from renting the Property in violation of the Restrictive Covenants.

26. The plaintiff did not submit any evidence at trial documenting improvements made to the Property. Three days after the bench trial, the plaintiff filed copies of receipts from Home Depot, Lowe's, Comfort Zone, and Woods Family Heating & Air Conditioning.

CONCLUSIONS OF LAW

The Fourteenth Amendment prohibits states and municipalities from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. "Due

process contains both substantive and procedural components." Snider Int'l Corp. v. Town of Forest Heights, 739 F.3d 140, 146 (4th Cir. 2014). The sole remaining claim is asserted under the procedural component of the Due Process Clause.

To establish a violation of procedural due process, the plaintiff "must show that (1) [he] had property or a property interest (2) of which the defendant deprived [him] (3) without due process of law." Sunrise Corp. v. City of Myrtle Beach, 420 F.3d 322, 328 (4th Cir. 2005) (citing Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 826 (4th Cir. 1995)). After carefully considering the evidence adduced at trial, the court concludes that the plaintiff has not met his burden of proving by a preponderance of the evidence that he was deprived of a property interest without due process.

"At bottom, procedural due process requires fair notice of impending state action and an opportunity to be heard." Snider Int'l Corp., 739 F.3d at 146. The notice and hearing requirements are "distinct features of due process," and thus governed by different standards. Id. "Notice must be 'reasonably calculated to convey information concerning a deprivation,' while the hearing requirement is flexible, taking into account a 'balancing of the private interest and the public interest, along with the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards.'" Applegate, LP v. City of Frederick, 179 F. Supp. 3d 522, 529 (D. Md. 2016) (quoting Snider Int'l Corp., 739 F.3d at 146); see also Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). The Supreme Court "consistently has held that some kind of hearing is required at some time before a person is finally deprived of his property interest." Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 16 (1978) (internal quotation marks omitted). However,

"the 'hearing' required by the Due Process Clause need not be an adversarial hearing, a full evidentiary hearing, or a formal hearing." D.B. v. Cardall, 826 F.3d 721, 743 (4th Cir. 2016) (internal quotation marks omitted). Instead, "the opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." Craft, 436 U.S. at 16 n.17 (1978); see also id. ("[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.") (internal quotation marks omitted).

Applying these principles, the court concludes that the evidence fails to establish that the plaintiff was deprived of a property interest without adequate notice or an opportunity to be heard. Turning first to the issue of notice, it is undisputed that the Grants executed the Restrictive Covenants in the presence of a notary public on May 20, 2005. Although the Restrictive Covenants may not be free from all ambiguities, the provisions clearly put the Grants on notice that the proceeds from any subsequent sale of the Property within the 15-year affordability period would be shared with the City. Moreover, prior to reselling the Property, the plaintiff discussed the terms of the Restrictive Covenants with Hypes and Holland, and received confirmation that the resale provisions would apply if he and his wife chose to sell the Property at that time. In reviewing the resale provisions with Hypes and Holland, the plaintiff was advised that expenditures for new cabinets and a storage shed would not qualify as a "capital improvement investment" under the standard employed by the City, and that the City did not consider mortgage payments to be part of the "homeowner investment" for purposes of the resale provisions. Thus, the plaintiff knew from his

discussions with the City employees that he and his wife would not recover any equity under the City's application of the resale formulas, if they proceeded with the proposed sale of the Property. The plaintiff also knew that he and his wife would no longer be required to share any of the sale proceeds with the City if they waited until after the 15-year period expired to sell the Property. Despite having knowledge of the resale provisions, the City's interpretation of those provisions, and the manner in which the resale formulas would be applied, the Grants elected to proceed with the sale of the Property to Brown. Based on the evidence presented, the plaintiff is unable to prove that he was deprived of an interest in the Property without adequate notice.

The court likewise concludes that the evidence fails to establish that the plaintiff did not receive an adequate opportunity to be heard. Prior to selling the Property, the plaintiff personally met with Hypes regarding the Restrictive Covenants and expressed his concerns regarding the resale provisions. The plaintiff also received the opportunity to meet with Holland and voice his objections to the Restrictive Covenants. After reviewing the matter, Holland affirmed the representations made by Hypes. The plaintiff did not ask to speak to Holland's supervisor or the City Manager before selling the Property. See Code of the City of Roanoke Ch. 2, Art. V, § 2-120 ("Except as otherwise specifically provided the city manager shall exercise supervision and control over all city departments and divisions."). Instead, the plaintiff and his wife elected to proceed with the sale, despite knowing that they would only receive a small share of the proceeds. Based on the evidence presented, the plaintiff is unable to prove that he was deprived of an adequate opportunity to be heard under the circumstances of this case.

In arguing to the contrary at trial, the plaintiff repeatedly emphasized that the City was not a "neutral" party to the discussions regarding the Restrictive Covenants and that its application of the resale formulas was later found to be in error by HUD. As indicated above, however, due process does not require a pre-deprivation hearing before a neutral party in every case. See Craft, 436 U.S. at 16, n. 17 (noting that the opportunity for informal consultation with designated personnel satisfies the hearing requirement in appropriate circumstances); see also Garraghty v. Jordan, 830 F.2d 1295, 1302 (4th Cir. 1987) (holding in the public employment context that "[a] pre-deprivation proceeding need not be a full evidentiary hearing with witnesses and a neutral decision maker so long as the employee is given an opportunity to answer the charges"). Nor does the Fourteenth Amendment entitle a complaining party to "perfect" process. See Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations."). Instead, "'procedural due process is simply a guarantee' that there is notice and an opportunity to be heard." Snider Int'l Corp., 739 F.3d at 149 (quoting Mora v. City of Gaithersburg, 519 F.3d 216, 230 (4th Cir. 2008)). Based on the evidence presented, the court concludes that the pre-deprivation process afforded by the City met these minimal requirements.

Additionally, the plaintiff had post-deprivation procedures available to remedy any perceived error in the application of the Restrictive Covenants. As the United States Court of Appeals for the Fourth Circuit recently explained, "[a]nalyzing the adequacy of process a state affords usually requires courts to 'consult the entire panoply of predeprivation and postdeprivation process provided by the state.'" Rockville Cars, LLC v. City of Rockville, 891

F.3d 141, 149. (4th Cir. 2018) (quoting Tri-Cty. Paving, Inc. v. Ashe Cty., 281 F.3d 430, 436 (4th Cir. 2002)). "This is so because a due process violation 'is not complete' when the deprivation occurs; rather it is only complete when the government 'fails to provide due process.'" Ashley v. NLRB, 255 F. App'x 708, 710 (4th Cir. 2007) (quoting Zinermon v. Burch, 494 U.S. 113, 126 (1990)). In this case, the City agreed to return a portion of the sale proceeds to the Grants after they complained to HUD. If the Grants believed that the proposed adjustment would still not provide a fair return on their investment as required by the Restrictive Covenants, they could have pursued an action for breach of contract in state court. See, e.g., Riordan v. Hale, 212 S.E.2d 65, 67 (Va. 1975) (describing restrictive covenants as "contractual devices" that "must be strictly construed"). The plaintiff has provided no basis upon which the court could conclude that such remedy would have been constitutionally inadequate. See Rockville Cars, LLC, 891 F.3d at 149 (concluding that the plaintiff's failure to pursue available state court remedies was fatal to its procedural due process claim); Martinez v. City of Cleveland, 700 F. App'x 521, 523 (6th Cir. 2017) (finding no due process violation where the plaintiff had "numerous state-law remedies available to him," including "a breach of contract suit").

In sum, the court concludes that the plaintiff has not met his burden of proving by a preponderance of the evidence that he was deprived of a property interest without due process. Accordingly, the court will grant judgment in favor of the City on the procedural due process claim.*

* Because the plaintiff failed to establish a procedural due process violation, the court need not further address the City's argument that the evidence was insufficient to support a finding of municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

Notwithstanding the court's conclusion that the plaintiff has no viable claim for relief under the Fourteenth Amendment, it is clear from the evidence that errors were made by the City in applying the resale provisions of the Restrictive Covenants. Based on the City's representations at trial, it is the court's understanding that the resale formulas will be recalculated, and that the Grants will receive credit for the $2,200.00 HOME grant from the state and the CDBG grant in the amount of $6,400.00. To the extent that the plaintiff believes that he is also entitled to reimbursement for capital improvements made to the Property, the plaintiff must submit the necessary documentation directly to the City for its review and consideration. Finally, in light of the concern raised by HUD, the City should give appropriate consideration in its revised calculations to crediting the Grants with their equity investment resulting from their mortgage payments, offset by the rental income that the Grants earned in violation of the Restrictive Covenants and the applicable federal regulations.

An appropriate Order will be entered.

Entered: 03-18-2019

/s/ Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	Civil Action No. 7:16CV00007
	)	
v.	)	**ORDER**
	)	
CITY OF ROANOKE,	)	Hon. Glen E. Conrad
	)	United States District Judge
Defendant.	)	

For the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED

that the City's supplemental motion for summary judgment on the plaintiff's due process claim is **GRANTED IN PART AND DENIED IN PART.**

The Clerk is directed to send copies of this order and the accompanying memorandum opinion to the plaintiff and all counsel of record.

DATED: This 7th day of November, 2017.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	Civil Action No. 7:16CV00007
	)	
v.	)	**MEMORANDUM OPINION**
	)	
CITY OF ROANOKE,	)	Hon. Glen E. Conrad
	)	United States District Judge
Defendant.	)	

Mark T. Grant, proceeding pro se, filed this action against the City of Roanoke, alleging that the City improperly retained $26,257.30 from the sale of certain real property. The City has filed a supplemental motion for summary judgment on the plaintiff's due process claim. For the reasons that follow, the motion will be granted in part and denied in part.

Background

The facts of this case are outlined in detail in the court's July 18, 2017 memorandum opinion. They are not repeated here except as necessary for resolution of the pending motion. Where appropriate, this summary also includes additional facts cited in the parties' supplemental briefs.

The City participates in the HOME Investment Partnerships Program ("HOME"), a federal grant program created pursuant to the Cranston-Gonzalez National Affordable Housing Act of 1990, as amended, 42 U.S.C. § 12701 et seq. The HOME Program provides funding to states and localities to be used to increase the supply of affordable housing available for low-income households. The program is administered by the United States Department of Housing and Urban Development ("HUD").

In 2002, the City partnered with Blue Ridge Housing Development Corporation ("BRHDC") to develop and rehabilitate housing for sale to purchasers meeting HUD's low-income criteria. As is relevant in the instant case, BRHDC received HOME funds to purchase and rehabilitate property located at 607 Bullitt Avenue in Roanoke, Virginia ("the Property").

The plaintiff and his wife, Lori M. Grant, were found to qualify for the HOME Program. On May 20, 2005, they purchased the Property from BRHDC for the price of $85,000.00, plus additional closing costs totaling $3,969.20. The funds used to purchase the Property were derived from the following sources: (1) an $80,000.00 loan, secured by a first deed of trust on the Property, from a private bank; (2) a $2,200.00 HOME grant, secured by a second deed of trust on the property, from the Virginia Department of Housing and Community Development; (3) a Community Development Block Grant in the amount of $6,400.00; and (4) $100.00 in cash, paid out-of-pocket by the buyers.

Pursuant to the statutory and regulatory provisions governing the HOME Program, the City was required to ensure the affordability of the Property for a period of fifteen years. It was also required to impose resale or recapture provisions on the Property. Because BRHDC received HOME funds to improve the Property and the plaintiff and Ms. Grant did not directly obtain any HOME funds from the City, the City utilized the resale option.

The resale requirements were imposed on the Property pursuant to a Declaration of Restrictive Covenants, dated April 29, 2005, which was signed by the City, BRHDC, the plaintiff, and Ms. Grant. See Declaration of Restrictive Covenants ("Restrictive Covenants"), Docket No. 16-4. The Restrictive Covenants contained terms and conditions that applied against the Property

for a period of fifteen years, based on the amount of HOME funds invested in the Property. The Restrictive Covenants provided that, within the fifteen-year affordability period, "any sale or conveyance of the Property shall be only to a family having a gross family income not exceeding 80% of the area median, as established by HUD at the time of the transfer of the Property, and which shall use the Property as its principal residence." Restrictive Covenants 1. As is relevant here, the Restrictive Covenants further provided as follows:

> Any such sale or conveyance of the Property shall allow the owner a fair return on investment. By this is meant that the owner, after satisfying any outstanding loans on the Property (including loans made with HOME funds), may recover the amount of the owner's down payment and closing costs and any capital improvement investment. Thereafter, the City and the homeowner shall share any remaining (net) proceeds from the sale or conveyance. The remaining proceeds shall be divided proportionally as set forth in the following mathematical formulas:
>
> $$\frac{\text{HOME investment}}{\text{HOME investment + homeowner investment}} \times \text{Net Proceeds} = \text{Amount to City}$$
>
> $$\frac{\text{homeowner investment}}{\text{HOME investment + homeowner investment}} \times \text{Net Proceeds} = \text{Amount to homeowner}$$

Id.

The plaintiff notified the City in late 2013 that he would be selling the Property, and he inquired about the existence of the Restrictive Covenants. The City informed the plaintiff that the sale would be governed by the terms of the Restrictive Covenants and that the sales proceeds would be shared pursuant to the resale formulas set forth therein.

In January of 2014, the plaintiff and Ms. Grant sold the Property to another individual for the amount of $106,000.00. The sale triggered the resale provisions of the Restrictive Covenants. According to the City, "[t]he sales proceeds were first applied to the outstanding loans against the

Property, repayment of the [p]laintiff's initial down payment, believed at the time to be $669.20, and closing costs, leaving remaining net sales proceeds in the amount of $26,430.95." 1st Aff. of Crystal H. Hypes ("1st Hypes Aff.") ¶ 20, Docket No. 16-1 at 4. The manner in which the City applied the resale formulas in the Restrictive Covenants resulted in the City receiving nearly all of the remaining sales proceeds, specifically, $26,257.30, and the plaintiff and Ms. Grant receiving an additional $173.65. Id. ¶ 21.

The plaintiff and Ms. Grant disputed the manner in which the remaining sales proceeds were divided by the City. Although the timing of the conversation is unclear from the record, the plaintiff initially spoke with Crystal Hypes, the City employee responsible for administering HOME funds. According to the City, the plaintiff informed Hypes that the only investments he had made in the Property were the purchase and installation of an outdoor storage shed and new kitchen cabinets.[1] Hypes allegedly advised the plaintiff that such expenditures are not considered "eligible capital expenditures for purposes of . . . the calculation of the formula contained in the Restrictive Covenants." Hypes 2d Aff. ¶ 10, Docket No. 40-1. When the plaintiff "appeared disappointed with that information," Hypes purportedly told him that he could "appeal" to her direct supervisor, Keith Holland.[2] Id. ¶ 11.

At some point thereafter, the plaintiff and Ms. Grant complained to HUD. HUD investigated the complaint and determined that "[t]he city's resale policy for [the Grants']

[1] The plaintiff's opposition briefs disputes this assertion and attaches exhibits which support his contention.

[2] The second affidavit signed by Hypes refers to conversations that she allegedly had with Holland and Carmen Bucci, a HUD representative, regarding the types of home expenses that are typically considered in calculating a homeowner's "fair return on investment." Hypes 2d Aff. ¶¶ 11-12. The court agrees with the plaintiff that Hypes' accounts of the other individuals' statements during the conversations are arguably hearsay. In any event, the challenged statements are not probative of the primary issue at hand, namely whether the plaintiff received constitutionally adequate notice and an opportunity to be heard prior to the deprivation of a protected property interest.

purchase and subsequent resale of 607 Bullitt Avenue was not in compliance with the HOME regulations in effect in 2005," since the policy "did not define and provide a fair return of the homeowner's initial investment and any capital improvements." July 15, 2014 HUD Letter 2, Docket No. 19-1. HUD emphasized that "[w]hile fair return on investment is defined by the participating jurisdiction, the HOME regulations require that the City ensure that the definition is both clear and objective, so the original HOME-assisted homebuyer understands how his or her investment and any return on that investment would be determined at the time of resale." June 9, 2015 HUD Letter 1-2, Docket No. 42-5. HUD also noted that although the resale price of the Property was significantly above the original purchase price, "the City recaptured equity the Grants earned by making monthly payments on their first mortgage." Id. HUD ultimately concluded that the "effect" of the City's actions was that "the Grant[s] did not receive a fair return on their investment pursuant to a regulatory compliant resale policy[.]" July 15, 2014 HUD Letter 3. HUD required the City to either return $68,530.00 in HOME funds or settle with the Grants for an amount to be approved by HUD. The City chose the former course and transferred $65,530.00 from the City's general fund to its HOME Investment Trust Fund.

On January 11, 2016, the plaintiff filed the instant action against the City, seeking to recover the funds retained by the City from the sale of the Property. In his original complaint, the plaintiff asserted that the City's actions violated the federal regulations governing the HOME Program and his right to due process under the Fourteenth Amendment. See Compl. ¶¶ 10, 12, Docket No. 1.

On November 4, 2016, the City moved for summary judgment. The City argued that its HOME resale policy complied with the HOME regulations in existence at the time the plaintiff and

Ms. Grant purchased the property. The City did not specifically address the plaintiff's due process claim.

On July 18, 2017, following a hearing on the motion for summary judgment, the motion was granted in part and denied in part. The court concluded that the plaintiff did not have a viable claim for damages under the HOME statute itself, or 42 U.S.C. § 1983, for alleged violations of the statute and its implementing regulations. Accordingly, to the extent the City moved for summary judgment on such claims, the motion was granted. However, the plaintiff also claimed that he was denied due process as required by the Fourteenth Amendment. Because the City did not specifically address that claim in its motion for summary judgment, the court declined to consider the arguments made by the City for the first time during oral argument. Instead, the court permitted the City to file a supplemental motion for summary judgment on the due process claim.

On August 8, 2017, the City filed a supplemental motion for summary judgment, along with a second affidavit from Crystal Hypes. In the second affidavit, Hypes maintains that "[l]ocalities have the flexibility to determine what types of capital improvements [they] will include in the basis for calculating an owner's fair return on [his] investment." Hypes 2d Aff. ¶ 5. Hypes indicates and that "it is the City's policy that only expenditures for improvements that increase the fair market value of HUD HOME assisted real estate are considered capital expenditures that may be included in the basis for calculating an owner's fair return on [his] investment, if any real estate purchased or improved with the HUD HOME assistance funds is sold prior to the expiration of the Affordability Period." Id. ¶ 6. Hypes also indicates that it is "the City's position" that mortgage payments made by a homeowner "are not considered as investments in calculating his fair return on investment." Id. ¶ 13. According to Hypes, the City

believes that "such an approach ignores market realities, and would improperly shift the burden of any loss of equity by the owner onto the City." Id.

The plaintiff has filed a brief in opposition to the supplemental motion for summary judgment, along with additional exhibits. The motion is now ripe for review.

Standard of Review

An award of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if a reasonable finder of fact could return a verdict for the nonmoving party. Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013). "A fact is material if it might affect the outcome of the suit under the governing law." Id. (internal citations and quotation marks omitted). In deciding whether to grant a summary judgment motion, the court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court "cannot weigh the evidence or make credibility determinations." Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 568 (4th Cir. 2015).

Discussion

The Fourteenth Amendment to the United States Constitution protects citizens from being deprived of property without due process. U.S. Const. amend. XIV, § 1. Due process contains both procedural and substantive components. Snider Int'l Corp. v. Town of Forest Heights, 739 F.3d 140, 145 (4th Cir. 2014). "Procedural due process prevents mistaken or unjust deprivation, while substantive due process prohibits certain actions regardless of procedural fairness." Id. (citations omitted). The City has construed the plaintiff's complaint as asserting violations of

both procedural and substantive due process. Accordingly, the court will examine each component in turn.

I. Procedural Due Process

To establish a violation of procedural due process, the plaintiff "must show that (1) [he] had property or a property interest (2) of which the defendant deprived [him] (3) without due process of law." Sunrise Corp. v. City of Myrtle Beach, 420 F.3d 322, 328 (4th Cir. 2005) (citing Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 826 (4th Cir. 1995)). In moving for summary judgment, the City acknowledges that the plaintiff had a constitutionally protected interest in the Property entitling him to due process. See Def.'s 2d Supp'l Br. 6, Docket No. 40 ("[I]t is undisputed that Plaintiff had an interest in the Property, and that the City retained a portion of the sales proceeds from the sale of the Property[.]"). The City instead argues that it is clear from the record that the plaintiff received all of the process he was due.[3] For the following reasons, however, the court is unable to agree.

"At bottom, procedural due process requires fair notice of impending state action and an opportunity to be heard." Snider Int'l Corp., 739 F.3d at 146 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)); see also United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) ("Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."). The notice and hearing requirements are "distinct features of due process, and are thus governed by different standards." Id. (citation omitted). Proper notice, in particular, is an "'elementary and fundamental requirement of due process,' and must be reasonably calculated to convey information concerning a deprivation." Id. (quoting

[3] The City does not otherwise challenge whether the plaintiff is able to satisfy the requirements for municipal liability under 42 U.S.C. § 1983.

Mullane, 339 U.S. at 314). More specifically, "[d]ue process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (quoting Mullane, 339 U.S. at 314). "Adequate notice is integral to the due process right to a fair hearing, for the 'right to be heard has little reality or worth unless one is informed.'" Bliek v. Palmer, 102 F.3d 1472, 1475 (8th Cir. 1997) (quoting Mullane, 339 U.S. at 314); see also Cosby v. Ward, 843 F.2d 967 (7th Cir. 1988) ("It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose . . . .") (internal citation and quotation marks omitted).

Applying these principles, the court concludes that the City is not entitled to summary judgment on the plaintiff's procedural due process claim. The evidence in the record, when viewed in the plaintiff's favor, raises genuine issues of material fact as to whether the plaintiff was deprived of an interest in the Property without adequate notice and a meaningful opportunity to be heard.

For its part, the City seems to suggest that the Restrictive Covenants signed by the plaintiff provided adequate notice of how the sales proceeds would be disbursed if he sold the Property prior to the expiration of the affordability period. See Def.'s 2d Supp'l Br. 6 (emphasizing that "the portion of the sales proceeds from Plaintiff's sale of the Property retained by the City was in accordance with the terms of the Resale Formula contained in the Restrictive Covenants"). The problem with this argument is that the Restrictive Covenants did not reference or explain either of the resale policies described in Hypes' second affidavit. For instance, Hypes indicates that it is the City's policy to only consider certain types of capital improvements made by a homeowner in

calculating a fair return on the homeowner's investment, namely those that the City determines add value to property. However, this policy was not expressly stated in the Restrictive Covenants. The Restrictive Covenants did not limit or delineate the types of improvements that would be considered eligible capital improvements, or explain how capital improvements would be valued by the City. Instead, the Restrictive Covenants indicated that the owner "may recover . . . any capital improvement investment." Restrictive Covenants 1 (emphasis added). Accordingly, a reasonable factfinder could conclude that the Restrictive Covenants did not provide adequate notice of the City's policy on capital improvements.

Along the same lines, a reasonable factfinder could conclude that the Restrictive Covenants did not provide adequate notice of the effect that the resale provisions would have on the plaintiff's ability to build equity in the Property by making monthly mortgage payments. Hypes' second affidavit indicates that the City takes the position that mortgage payments toward the principal balance on a loan are not considered part of the "homeowner investment," for purposes of the resale formula set forth in the Restrictive Covenants. Once again, however, this particular policy was not mentioned in the Restrictive Covenants, and there is no evidence that it was relayed to the plaintiff at any other time. Consequently, a reasonable factfinder could conclude that the plaintiff was not provided sufficient notice of the potential deprivation of an equity interest in the Property.

To the extent the City alternatively argues that the plaintiff's verbal communications with Hypes provided sufficient notice to satisfy due process, the court is unable to agree. Viewing the record in the light most favorable to the plaintiff, a reasonable factfinder could conclude that their conversation did not provide adequate notice of the City's resale policies or the effect that such policies would have on the plaintiff's interest in the Property. Additionally, while Hypes

purportedly told the plaintiff that he could "appeal" to her direct supervisor, the record is devoid of any evidence regarding the nature or extent of the City's appeal process. Accordingly, the court is unable to determine whether the plaintiff was adequately informed of the procedures available for protesting the actions at issue, or whether such procedures were sufficient to protect the plaintiff's procedural due process rights.

In sum, genuine issues of material fact remain as to whether the plaintiff received adequate notice and a meaningful opportunity to be heard. Accordingly, the City is not entitled to summary judgment on the procedural due process claim.

II. Substantive Due Process

The City also construed the plaintiff's complaint as asserting a substantive due process claim. The government violates substantive due process only when its actions shock the conscience. Cty. of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998); Young v. City of Mount Ranier, 238 F.3d 567, 574 (4th Cir. 2001). The United States Court of Appeals for the Fourth Circuit has emphasized that the protections of substantive due process extend only to "state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." Rucker v. Hartford Cty., 946 F.2d 278, 281 (4th Cir. 1991) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)). To shock the conscience, the government's conduct "must be 'intended to injure in some way unjustifiable by any government interest.'" Hawkins v. Freeman, 195 F.3d 732, 742 (4th Cir. 1999) (quoting Lewis, 523 U.S. at 849) (emphasis omitted).

To the extent the plaintiff's complaint could be construed to assert a violation of his substantive due process rights, the court concludes that the City is entitled to summary judgment.

In short, the record does not contain any evidence from which a reasonable factfinder could conclude that the City engaged in conscience-shocking conduct. The manner in which the City retained the proceeds from the sale of the Property was simply not so egregious and unjust that no amount of fair procedure could rectify it. Accordingly, the City's motion for summary judgment on any alleged violation of substantive due process will be granted.

Conclusion

For the reasons stated, the supplemental motion for summary judgment filed by the City will be granted in part and denied in part. The Clerk is directed to send copies of this memorandum opinion and the accompanying order to the plaintiff and all counsel of record.

DATED: This 7th day of November, 2017.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	Civil Action No. 7:16CV00007
	)	
v.	)	**ORDER**
	)	
CITY OF ROANOKE,	)	Hon. Glen E. Conrad
	)	United States District Judge
Defendant.	)	

For the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED

as follows:

1. The plaintiff's motions to supplement his complaint (Docket Nos. 24 & 30) are **GRANTED**;

2. The defendant's motions for summary judgment (Docket Nos. 15 & 31) are **GRANTED IN PART AND DENIED IN PART**; and

3. The City is directed to file any supplemental motion for summary judgment on the plaintiff's due process claim within twenty-one (21) days of the date of entry of this order and the accompanying memorandum opinion. The plaintiff shall have twenty-one (21) days thereafter in which to file a response.

The Clerk is directed to send copies of this order and the accompanying memorandum opinion to the plaintiff and all counsel of record.

DATED: This 18th day of July, 2017.

Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARK T. GRANT,	)	
	)	
Plaintiff,	)	Civil Action No. 7:16CV00007
	)	
v.	)	**MEMORANDUM OPINION**
	)	
CITY OF ROANOKE,	)	Hon. Glen E. Conrad
	)	United States District Judge
Defendant.	)	

Mark T. Grant, proceeding pro se, filed this action against the City of Roanoke (the "City"), alleging that the City improperly retained $26,257.30 from the sale of certain real property, which was previously rehabilitated for occupancy, using funds made available to the City through the federal HOME Investment Partnerships Program ("HOME Program"). Grant claims that the City violated regulations implementing the HOME Investment Partnerships Act and his constitutional right to due process, and that he is entitled to relief under 42 U.S.C. § 1983. The case is presently before the court on the City's motions for summary judgment. For the reasons that follow, the motions will be granted in part and denied in part.

Statutory and Regulatory Background

Before delving into the factual background of this dispute, the court will summarize the statutory and regulatory context in which the facts developed.

The HOME Program is a federal block grant program created pursuant to the Cranston-Gonzalez National Affordable Housing Act of 1990 ("NAHA"), as amended, 42 U.S.C. § 12701 et seq. One of the stated purposes of the NAHA is "to extend and strengthen partnerships among all levels of government and the private sector, including for-profit and nonprofit

organizations, in the production and operation of housing affordable to low-income and moderate-income families." Id. § 12703(3).

Subtitle A of Title II of the NAHA, also known as the HOME Investment Partnerships Act ("HOME Act"), authorizes the Secretary of the United States Department of Housing and Urban Development ("HUD") "to make funds available to participating jurisdictions for investment to increase the number of families served with decent, safe, sanitary, and affordable housing and expand the long-term supply of affordable housing in accordance with provisions of this part." Id. § 12741. The HOME Act directs the Secretary to establish by regulation certain procedures with which states and municipalities must comply in order to be designated as participating jurisdictions and receive their own allocations of HOME funds. See id. § 12746. The Secretary is further directed to establish a HOME Investment Trust Fund for each participating jurisdiction, along with a line of credit that includes the participating jurisdiction's allocated HOME funds. See id. § 12748.

The HOME Act invokes Congress's authority under the Spending Clause to place conditions on the receipt of federal funds allocated by the Secretary.[1] Section 212 of the HOME Act, titled "Eligible uses of investment," describes the types of activities for which HOME funds may be used by participating jurisdictions, each of which relates to increasing the supply of affordable housing.[2] See id. § 12742(a)-(c). The statute provides in relevant part as follows:

---

[1] The Spending Clause of the Constitution of the United States empowers Congress "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. "The Clause provides Congress broad discretion to tax and spend for the 'general Welfare,' including by funding particular state or private programs or activities." Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. ___, ___, 133 S. Ct. 2321, 2327-28 (2013). Incident to this power, Congress may "impose limits on the use of such funds to ensure they are used in the manner Congress intends." Id. at ___, 133 S. Ct. at 2328.

[2] Section 212 also lists a number of activities for which the use of HOME funds is expressly prohibited, none of which are at issue in this action. See 42 U.S.C. § 12742(d).

> Funds made available under this part may be used by participating jurisdictions to provide incentives to develop and support affordable rental housing and homeownership affordability through the acquisition, new construction, reconstruction, or moderate or substantial rehabilitation of affordable housing, including real property acquisition, site improvement, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations, to provide for the payment of reasonable administrative and planning costs, to provide for the payment of operating expenses of community housing development organizations, and to provide tenant-based rental assistance.

Id. § 12742(a)(1). The statute further provides that a participating jurisdiction "shall give preference to rehabilitation of substandard housing," unless it determines that "such rehabilitation is not the most cost effective way to meet the jurisdiction's need to expand the supply of affordable housing" and "the jurisdiction's housing needs cannot be met through rehabilitation of the available stock." Id. § 12742(a)(2).

The HOME Act requires participating jurisdictions to match a certain percentage of the HOME funds that they spend in a fiscal year with their own contributions to housing that qualifies as affordable housing under the Act. See id. § 12750(a). The Act further provides that "[e]ach participating jurisdiction shall make all reasonable efforts . . . to maximize participation by the private sector, including nonprofit organizations and for-profit entities, in the implementation of the jurisdiction's housing strategy, including participation in the financing, development, rehabilitation and management of affordable housing." Id. § 12751.

Section 215 of the HOME Act establishes specific requirements that housing for homeownership must meet in order to qualify as "affordable housing" for purposes of the Act. See id. § 12745(b). The statutory requirements are as follows:

> Housing that is for homeownership shall qualify as affordable housing under this subchapter only if the housing—
>
> (1) has an initial purchase price that does not exceed 95 percent of the median purchase price for the area, as determined by the Secretary with such adjustments for differences in structure, including whether the housing is single-family or multifamily, and for new and old housing as the Secretary determines to be appropriate;
>
> (2) is the principal residence of an owner whose family qualifies as a low-income family—
>
> (A) in the case of a contract to purchase existing housing, at the time of purchase;
>
> (B) in the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the agreement is signed; or
>
> (C) in the case of a contract to purchase housing to be constructed, at the time the contract is signed;
>
> (3) is subject to resale restrictions that are established by the participating jurisdiction and determined by the Secretary to be appropriate to—
>
> (A) allow for subsequent purchase of the property only by persons who meet the qualifications specified under paragraph (2), at a price which will—
>
> (i) provide the owner with a fair return on investment, including any improvements, and
>
> (ii) ensure that the housing will remain affordable to a reasonable range of low-income homebuyers; or
>
> (B) recapture the investment provided under this subchapter in order to assist other persons in accordance with the requirements of this subchapter, except where there are no net proceeds or where the net proceeds are insufficient to repay the full amount of the assistance; and
>
> (4) if newly constructed, meets the energy efficiency standards promulgated by the Secretary in accordance with section 12709 of this title.

Id.

If a participating jurisdiction is found to have "failed to comply substantially with any provision" of the HOME Act, the Secretary of HUD is directed to take certain corrective measures. See id. § 12753. Specifically, the Secretary "shall reduce the line of credit in the participating jurisdiction's HOME Investment Trust Fund by the amount of any expenditures that were not in

accordance with the requirements of [the Act]." Id. The Secretary may also prevent withdrawals from the participating jurisdiction's HOME Investment Trust Fund, restrict the participating jurisdiction's activities under the HOME Act, or preclude the participating jurisdiction from receiving allocations of funds made available under the Act. Id.

HUD has promulgated regulations implementing the HOME Program. See 24 C.F.R. § 92.254. Pursuant to the regulations, housing that is for acquisition by a family must meet certain "affordability requirements." Id. § 92.254(a). In particular, the housing must be single-family, modest housing; it must be acquired by a low-income family and used as the family's principal residence; and it must meet the affordability requirements for a specific period as determined by the amount of assistance provided. See id. § 92.254(a)(1)-(4). For example, HOME assistance over the amount of $40,000 triggers a minimum affordability period of fifteen years. See id. § 92.254(a)(4).

Additionally, to ensure affordability, a participating jurisdiction is required to establish either "resale" or "recapture" requirements that comply with the regulatory standards established by HUD. Id. § 92.254(a)(5). The resale or recapture requirements must be included in the consolidated plan that the participating jurisdiction submits to HUD for approval, and HUD must determine that they are appropriate. Id. During the relevant time period, the regulation included the following provisions applicable to resale and recapture requirements:

> (i) *Resale.* Resale requirements must ensure, if the housing does not continue to be principal residence of the family for the duration of the period of affordability, that the housing is made available for subsequent purchase only to a buyer whose family qualifies as a low-income family and will use the property as its principal residence. The resale requirements must also ensure that the price at resale provides the original HOME-assisted owner a fair return on investment (including the homeowner's investment and any capital improvement) and ensure that the housing will remain affordable to a reasonable range of low-income homebuyers. The

> period of affordability is based on the total amount of HOME funds invested in the housing.
>
> (A) Except as provided . . . , deed restrictions, covenants running with the land, or other similar mechanisms must be used as the mechanism to impose the resale requirements. . . .
>
> (ii) *Recapture.* Recapture provisions must ensure that the participating jurisdiction recoups all or a portion of the HOME assistance to the homebuyers, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability.
>
> (A) The following options for recapture requirements are acceptable to HUD. . . .
>
> (3) *Shared net proceeds.* If the net proceeds are not sufficient to recapture the full HOME investment . . . plus enable the homeowner to recover the amount of the homeowner's downpayment and any capital improvement investment made by the owner since purchase, the participating jurisdiction may share the net proceeds. The net proceeds are the sales price minus loan repayment (other than HOME funds) and closing costs. The net proceeds may be divided proportionally as set forth in the following mathematical formulas:
>
> HOME investment / HOME investment + homeowner investment x Net proceeds = HOME amount to to be recaptured
>
> homeowner investment / HOME investment + homeowner investment x Net proceeds = amount to homeowner

Id. § 92.254(a)(5)(i)-(ii) (2005).

The HOME Act's implementing regulations also provide for performance reviews and sanctions by HUD. See 24 C.F.R. §§ 92.550-92.552. Pursuant to § 92.550, HUD must review the performance of each participating jurisdiction in carrying out its statutory and regulatory responsibilities "whenever determined necessary by HUD, but at least annually." Id. § 92-550(a). In conducting performance reviews, HUD may consider relevant information gained from a number of sources, including citizen comments and complaints. Id. Section 92.551 sets forth the procedures HUD must use in conducting performance reviews and in taking corrective and

remedial actions. The regulation provides that "[c]orrective or remedial actions for a performance deficiency (failure to meet a provision of this part) will be designed to prevent a continuation of the deficiency; mitigate, to the extent possible, its adverse effects or consequences; and prevent its recurrence." Id. § 92.551(c). The types of corrective and remedial actions that HUD may take against participating jurisdictions are set forth in sections 92.551 and 92.552. They include requiring a participating jurisdiction to "[r]eimburs[e] its HOME Investment Trust Fund in any amount not used in accordance with the requirements of this part." Id. § 92.551(c).

Factual Background and Procedural History

The City has administered and implemented its HOME Investment Partnership Program since 1994. Aff. of Crystal H. Hypes ("Hypes Aff.") ¶ 4, Docket No. 16-1 at 1. In or around 2000, "the City was awarded certain HOME funds . . . by HUD for the purpose of . . . partner[ing] with a private entity . . . [to] mak[e] affordable housing available to low income families." Id. ¶ 5. The City ultimately partnered with Blue Ridge Housing Development Corporation ("BRHDC"), a nonprofit housing agency.[3] Id. ¶ 6. By agreement dated July 1, 2002, the City made available to BRHDC certain HOME funds to develop and rehabilitate housing for sale to low income purchasers meeting HUD's low-income criteria. Id. As is relevant in the instant case, BRHDC received $101,119.05 to purchase and rehabilitate certain real property located at 607 Bullitt Avenue in Roanoke, Virginia ("the Property"). Id. ¶ 8.

The plaintiff and his wife, Lori M. Grant, were found to qualify for the City's HOME Program. Id. ¶ 9. On May 20, 2005, they purchased the Property from BRHDC for the price of $85,000.00, plus additional closing costs totaling $3,969.20. See HUD-1 Settlement Statement,

[3] BRHDC ceased operations sometime prior to 2013. See Hypes Aff. ¶ 7.

Docket No. 16-1 at 7. The funds used to purchase the Property were derived from the following sources: (1) an $80,000.00 loan, secured by a first deed of trust on the Property, from a private bank; (2) a $2,200.00 HOME grant, secured by a second deed of trust on the property, from the Virginia Department of Housing and Community Development ("VDHCD"); (3) a Community Development Block ("CDBG") grant in the amount of $6,400.00; and (4) $100.00 in cash, paid out-of-pocket by the buyers. See id.; see also Hypes Aff. ¶ 10.

Pursuant to the statutory and regulatory scheme discussed above, the City was required to ensure the affordability of the Property for a period of fifteen years. See Hypes Aff. ¶ 17. It was also required to impose resale or recapture requirements on the Property. See id. ¶ 12. Because BRHDC received the HOME assistance to improve the Property and the plaintiff and Ms. Grant did not directly obtain any HOME funds from the City, the City utilized the resale option. See Id. ¶ 15.

The resale requirements were imposed on the Property pursuant to a Declaration of Restrictive Covenants, dated April 29, 2005, which was signed by the City, BHRDC, the plaintiff, and Ms. Grant. See Declaration of Restrictive Covenants ("Restrictive Covenants"), Docket No. 16-4 at 1. The Restrictive Covenants contained terms and conditions that applied against the Property for a period of fifteen years, based on the amount of HOME funds invested in the Property. The Restrictive Covenants provided that, within the fifteen-year affordability period, "any sale or conveyance of the Property shall be only to a family having a gross family income not exceeding 80% of the area median, as established by HUD at the time of the transfer of the Property, and which shall use the Property as its principal residence." Id. The Restrictive Covenants further provided that "[a]ny such sale or conveyance of the Property shall allow the owner a fair return on investment," which was defined as follows:

> By this is meant that the owner, after satisfying any outstanding loans on the Property (including loans made with HOME funds), may recover the amount of the owner's down payment and closing costs and any capital improvement investment. Thereafter, the City and the homeowner shall share any remaining (net) proceeds from the sale or conveyance. The remaining proceeds shall be divided proportionally as set forth in the following mathematical formulas:
>
> HOME investment / HOME investment + homeowner investment x Net proceeds = Amount to City
>
> homeowner investment / HOME investment + homeowner investment x Net proceeds = Amount to homeowner

Id.

The plaintiff informed the City in late 2013 that he would be selling the Property prior to the end of the fifteen-year affordability period, and he inquired about the existence of the Restrictive Covenants. See Hypes Aff. ¶ 19. The City informed the plaintiff that the proposed sale would be subject to the terms of the Restrictive Covenants and that any remaining proceeds from the sale would be shared between the City and the plaintiff pursuant to the resale formula set forth therein. Id.

In January of 2014, the plaintiff and Ms. Grant sold the Property to Devin Brown for the amount of $106,000.00. Id. ¶ 20. This sale triggered the resale provisions of the Restrictive Covenants. "The sales proceeds were first applied to the outstanding loans against the Property, repayment of [p]laintiff's initial down payment, believed at the time to be $669.20 [rather than $100.00], and closing costs, leaving remaining net sales proceeds in the amount of $26,430.95." Id. Application of the resale formula in the Restrictive Covenants resulted in the City receiving $26,257.30, and the plaintiff and Ms. Grant receiving an additional $173.65. Id. ¶ 21.

The plaintiff and Ms. Grant disputed the manner in which the remaining sales proceeds were divided and ultimately complained to HUD. Id. ¶ 22. On July 15, 2014, HUD sent the City a letter in response to the Grants' complaint. Id. According to the letter, the "Grant[s'] complaint asserted that they did not receive a fair return of their investment pursuant to the sale of their property." Letter from HUD ("HUD Letter") 1, July 15, 2014, Docket No. 19-1. Upon review of the matter, HUD "determined that the city's resale policy for Mark T. and Lori M. Grant's purchase and subsequent resale of 607 Bullitt Avenue was not in compliance with the HOME regulations in effect in 2005." Id. at 2. The letter included the specific "finding" that "[t]he city's HOME resale policy was not in compliance with the regulation at 24 CFR [§] 92.254," since the policy "did not define and provide a fair return of the homeowner's initial investment and any capital improvements" and "relied on the recapture formula as its resale formula." Id. HUD explained that the recapture formula was "unique to the recapture option" and that "[t]he resale requirements require a different methodology." Id. HUD also indicated that the City had "improperly recaptured the state's downpayment assistance of $2,200." Id. HUD explained that the $2,200 in HOME funds provided by the state should have been "considered to be a portion of the [Grants'] investment because the corresponding period of affordability had been satisfied." Id. HUD ultimately concluded that the "effect" of the problem was that "the Grant[s] did not receive a fair return on their investment pursuant to a regulatory compliant resale policy" and "were not given consideration for the $2,200 in HOME funds provided by the state of Virginia." Id. at 3.

In the letter, HUD proposed the following corrective actions:

> Within 45 days from the date of this letter the city must retroactively adopt a revised resale policy that determines the original homebuyer's fair return on investment based on an objective standard or index that is publicly accessible and can be easily

> measured at the time of original purchase and at resale. The resale policy must also outline how it will value capital improvements, and include a comprehensive description of what will constitute a capital improvement for purposes of determining [a] fair return. The value of a capital improvement cannot be based on an appraisal. The resale provisions must be recorded and the provisions must be in the HOME agreement. The policy must outline how the city will control and determine the sale price for subsequent buyers.
>
> The proposed policy must be submitted to this office for review and final approval. Once approved, this policy will be applied to all homebuyer cases under the old policy upon resale unless the controlling period of affordability has expired.
>
> The city must also recalculate the Grant[s'] resale transaction and in so doing the city must take into consideration the $100 earnest money and the $2,200 of HOME funds provided by the state of Virginia. The city must also give consideration for any capital improvements that were made. Once this has been accomplished the city must give credit for the $669.20 that was returned to the Grant[s] in order to determine the revised return on investment. The resultant calculation must also be submitted to this office for review and approval.

Id. at 3-4. The letter noted that "[t]hese corrective and remedial actions are consistent with 24 C.F.R. [§] 92.551 and are intended to prevent a continuation of the deficiency and to mitigate, to the extent possible, the adverse impact to the involved homebuyers." Id. at 4.

In an effort to resolve the matter, the City advised HUD that it would be willing to consider the $2,200.00 HOME grant from the state, along with the $100.00 paid out-of-pocket by the Grants at the time of closing, as the Grants' homeowner investment, and reapply the resale formula in the Restrictive Covenants to determine the amount to which the Grants' were entitled. See Hypes Aff. ¶ 26. This would have resulted in the Grants receiving an additional $2,012.67 from the net proceeds of the sale of the Property. Id. ¶ 27. However, HUD rejected the City's proposal, "maintained its finding against the City," and required the City to either return $68,530.00 in

HOME funds or settle with the Grants for an amount to be approved by HUD.[4] Id. ¶ 28. The City chose the former course and transferred $68,530.00 from the City's general fund to its HOME Investment Trust Fund. Id. ¶ 29.

On January 11, 2016, the plaintiff filed the instant action against the City, seeking to recover the $26,257.30 retained by the City from the sale of the Property. In his original complaint, the plaintiff asserted that the City's actions violated the federal regulations codified at 24 C.F.R. § 92.254(a)(5) and his right to due process under the Fourteenth Amendment. See Compl. ¶¶ 10, 12, Docket No. 1.

On November 4, 2016, the City moved for summary judgment. The City argued that its HOME resale policy complied with the HOME regulations in existence at the time the plaintiff and Ms. Grant purchased the property. The City indicated, however, that it remained willing to pay the plaintiff an additional $2,012.67. See Br. in Supp. of Mot. for Summ. J. 9, Docket No. 16; see also Hypes Aff. ¶ 30. The City did not specifically address the plaintiff's due process claim.

On December 5, 2016, the parties appeared before the court for a hearing on the City's motion for summary judgment. During the hearing, the court raised the issue of whether the plaintiff has a private right of action under the statutory and regulatory provisions at issue. The court also inquired as to whether the parties would be interested in participating in mediation. The parties agreed to mediate their dispute and the matter was referred to a United States Magistrate Judge for the conduct of mediation proceedings. During the mediation proceedings, the City agreed to settle the matter for an amount that was higher than it had initially offered to pay the plaintiff. However, the plaintiff ultimately refused to sign the proposed settlement agreement.

[4] According to the City's evidence, HUD determined that $68,530.00 in federal HOME funds had been invested in the Property. See Hypes Aff. ¶ 29.

On February 24, 2017, the court entered an order directing the parties to file supplemental briefs on the issue of whether the plaintiff has a private right of action under the HOME provisions in question. Both sides submitted supplemental pleadings on that issue,[5] and the court heard additional oral argument on May 19, 2017. The matter is now ripe for review.

Standard of Review

Rule 56 of the Federal Rules of Civil Procedure permits a party to move for summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether to grant a summary judgment motion, the court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Discussion

I. Statutory and regulatory claims

The plaintiff claims that the resale formula set forth in the Restrictive Covenants is "illegal" under 24 C.F.R. § 92.254(a)(5), and that he should be awarded all of the sales proceeds retained by the City. See Compl. ¶ 8 ("This action of seizure or recapture by the City . . . is illegal under 24 CFR [§] 92.254(a)(5)."); id. ¶ 13 (seeking "damages of $26,257.30").

As discussed above, the regulation at issue is part of a series of regulations implementing the HOME Act. It is undisputed that the HOME Act does not expressly provide a private right of action for damages for alleged violations of the statutory and regulatory provisions governing the distribution and use of HOME funds. Grant argues, however, that a private right of action for

[5] Grant moved to supplement his complaint, and the City filed a supplemental motion for summary judgment. Grant's motions will be granted.

damages can be implied from the HOME Act, and, alternatively, that he may pursue a claim for damages under 42 U.S.C. § 1983. The court will address these arguments in turn.

A. Implied right of action under the HOME Act

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979). Private rights of action to enforce federal laws, whether explicit or implicit, must be created by Congress. See Alexander v. Sandoval, 532 U.S. 275, 286 (2001). When legislation is enacted pursuant to Congress' spending power, the "typical remedy for . . . noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State [or municipality]." Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981)). If Congress chooses to confer individual rights subject to private enforcement, the statute must "speak[] with a clear voice, and manifest[] an unambiguous intent to confer individual rights." Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (citation and internal quotation marks omitted).

Thus, "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Transamerica Mortg. Advisors v. Lewis, 444 U.S. 11, 15 (1979). The "central inquiry" is whether Congress intended to create a private cause of action. Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979). "'[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" Thompson v. Thompson, 484 U.S. 174, 179 (1988) (quoting Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 94 (1981)); see also Stoneridge Inv. Partners, LLC v.

Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008) (observing that "it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one") (citations omitted).

In Gonzaga, the Supreme Court discussed the test for determining whether a statute provides an implied right of action. See 536 U.S. at 290. The Court emphasized that "for Congress to create new rights enforceable under an implied right of action," it must do so in "clear and unambiguous terms."[6] Id. The Court explained that "'the question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute by its terms grants no private rights to any identifiable class.'" Id. at 283-84 (quoting Touche Ross & Co., 442 U.S. at 576) (omission and alteration in original). "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" Id. at 284 (quoting Cannon, 441 U.S. at 692 n.13). The Court noted that it had "recognized, for example, that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972 create individual rights because those statutes are phrased 'with an unmistakable focus on the benefited class.'"[7] Id. (quoting Cannon, 441 U.S. at 691) (emphasis in original). Conversely, the Court has observed that "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of

[6] Although the precise issue in Gonzaga was whether a statute created rights enforceable in an action under 42 U.S.C. § 1983, the Supreme Court noted that "[a] court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context." 536 U.S. at 285. "Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." Id. (citations omitted).

[7] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

persons.'" Alexander, 532 U.S. at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

Applying these principles, the Gonzaga Court held that the statutory provisions under consideration failed to confer enforceable rights. The plaintiff in Gonzaga attempted to bring a civil action to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which was enacted pursuant to Congress' spending power. See Gonzaga, 536 U.S. at 276. FERPA provides, in pertinent part, that "[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents." 20 U.S.C. § 1232g(b)(1). Under § 1234c(a) of Title 20, the Secretary of Education may terminate funding only if the educational agency or institution fails to "comply substantially" with FERPA's requirements. See 20 U.S.C. § 1234c(a).

In holding that the FERPA's nondisclosure provisions do not create enforceable rights, the Supreme Court first determined that FERPA's nondisclosure provisions "lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." Gonzaga, 536 U.S. at 287 (citing Alexander, 532 U.S. at 288-89). The Court contrasted the wording of the nondisclosure provisions with the individually focused terminology of Title VI and Title IX. See id. The Court emphasized that unlike those statutes, the FERPA provisions at issue "speak only to the Secretary of Education, directing that 'no funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.'" Id. (quoting 20 U.S.C. § 1232g(b)(1)).

The Supreme Court further determined that the nondisclosure provisions have an "'aggregate' focus . . . [and] are not concerned with 'whether the needs of any particular person

have been satisfied.'" Id. at 288 (quoting Blessing v. Freestone, 520 U.S. 329, 343-44 (1997)). The Court explained that the nondisclosure provisions "speak only in terms of institutional policy and practice, not individual instances of disclosure." Id. The Court also found significant the fact that "[r]ecipient institutions can further avoid termination of funding so long as they 'comply substantially' with the Act's requirements." Id. (quoting 20 U.S.C. § 1234c(a)). The Court observed that its finding on this issue was "not unlike Blessing, which found that Title IV-D [of the Social Security Act] failed to support a § 1983 suit in part because it only required 'substantial compliance' with federal regulations." Id. (quoting Blessing, 520 U.S. at 335, 343).

Finally, the Gonzaga Court noted that its "conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions." Id. at 289. Specifically, "Congress expressly authorized the Secretary of Education to 'deal with violations' of the Act, [20 U.S.C.] § 1232g(f), and required the Secretary to 'establish or designate [a] review board' for investing and adjudicating such violations, § 1232g(g)." Id. (emphasis and alteration in original). Additionally, the statute's implementing regulations "permit[] students and parents who suspect a violation of the Act to file individual written complaints," and set forth the procedures by which such complaints will be investigated. See id. (citation omitted). The Supreme Court determined that such procedures "further counsel against . . . finding a congressional intent to create individually enforceable rights." Id. at 290.

Thus, Gonzaga makes clear that the court must examine the text and structure of a statute in order to determine whether it clearly and unambiguously creates a private right of action. If the statute's text and structure "provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." Id. at 286. Likewise, "[i]f they provide some

indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite 'clear voice,'" and such "[a]mbiguity precludes enforceable rights." 31 Foster Children v. Bush, 329 F.3d 1255, 1270 (11th Cir. 2003) (citing Gonzaga, 536 U.S. at 280).

In this case, the plaintiff's claim for damages appears to be based on Section 215 of the HOME Act, which sets forth the requirements that housing for rental and homeownership must meet in order to qualify as "affordable housing" for purposes of the Act. See 42 U.S.C. § 12745. Of particular importance here, Section 215(b) provides that homeownership housing must be subject to either resale or recapture provisions, and that resale provisions must allow for subsequent purchase at a price that will "provide the owner with a fair return on investment, including any improvements," and "ensure that the housing will remain affordable to a reasonable range of low-income homebuyers." See id. § 12745(b)(3)(A).

No federal court of appeals has expressly decided whether any provisions of the HOME Act confer on individuals a private right of action to enforce those provisions. At least two district courts have summarily concluded that there is no private right of action under the HOME Act. See Bartlinski v. Township of Bricktown, No. 16-8928-BRM-LHG, 2016 U.S. Dist. LEXIS 171800, at *5, 2016 WL 7217613, at *2 (D.N.J. Dec. 13, 2016) (holding that the statutory provisions "do[] not create a private right of action for the misuse of HOME funds") (citing Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 188 F. Supp. 2d 1148, 1166 (D.S.D. 2002), aff'd, 342 F.3d 871, 884 (8th Cir. 2003)); Pinkney v. City of Jersey City Dep't of Hous. & Econ. Dev., No. 00-cv-01049, slip op. at 3 (D.N.J. June 30, 2000) (holding that the HOME Act "does not provide a civil cause of action for a private litigant to proceed in federal court"). Another district court has

"decline[d] to sua sponte" imply a private right of action for "discrimination in the use of HOME funds." See Oti Kaga, 188 F. Supp. 2d at 1166.

For many of the same reasons discussed in Gonzaga, this court concludes that the applicable provisions of the HOME Act do not create a private right of action for money damages. Like the provisions at issue in Gonzaga, the HOME Act does not contain the individually focused, rights-creating language necessary to establish the requisite congressional intent to create new rights. See Gonzaga, 536 U.S. at 287. Although "the owner" of a residence rehabilitated through the use of HOME funds is one of the beneficiaries of the resale provisions described in Section 215 of the Act, the language at issue is directed toward the participating jurisdictions and the Secretary of HUD, rather than the individuals benefitted by the statute. See 42 U.S.C. § 12745(b)(3) (stating that resale restrictions must be "established by the participating jurisdiction and determined by the Secretary to be appropriate"). In other words, the references to individual owners are made in the context of describing what the resale policies established by participating jurisdictions and approved by the Secretary are supposed to ensure. "[S]uch provisions 'cannot make out the requisite congressional intent to confer individual rights[.]'" 31 Foster Children, 329 F.3d at 1272 (quoting Gonzaga, 536 U.S. at 289) (holding that provisions of the Adoption Act describing what a case review procedure is supposed to ensure do not confer individual rights despite the provisions' references to individual children and their placements).

Moreover, the statutory provision as a whole is instructional in nature, in that it delineates the requirements that must be met in order for housing to "qualify as 'affordable housing'" under the HOME Act. See 42 U.S.C. § 12745. Thus, when considered in conjunction with Section 212, the statute serves as a "directive" for the "distribution of public funds," Alexander, 532 U.S. at 289 (citation and internal quotation marks omitted), which must be used for certain "affordable

housing" activities, see 42 U.S.C. § 12742(a). As indicated above, "[s]tatutes that focus on the person regulated rather than the individuals protected" do not tend to create individually enforceable rights. Gonzaga, 536 U.S. at 287 (quoting Alexander, 532 U.S. at 289); see also Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1200 (8th Cir. 2013) (explaining that "[w]here the statutory language primarily concerns itself with commanding how states are to function within a federal program, the statute is less likely to have created an individually enforceable right"); Hughlett v. Romer-Sensky, 497 F.3d 557, 563 (6th Cir. 2006) (holding that the district court properly found that a statutory provision describing the methods that must be in place for the collection and distribution of collected child support payments was "intended to provide instruction to the States and d[id] not contain the rights-creating language necessary to create an enforceable individual right").

In addition, the enforcement scheme of the HOME Act militates against the conferral of individually enforceable rights. Rather than requiring perfect compliance with the Act, participating jurisdictions can avoid the termination of federal funding as long as they "comply substantially" with the Act's provisions. See 42 U.S.C. § 12753 (listing the penalties that may be imposed "[i]f the Secretary finds after reasonable notice and opportunity for hearing that a participating jurisdiction has failed to comply substantially with any provision of this part"). The fact that a statute links funding to substantial compliance with its conditions, while not dispositive of the issue, also suggests that the statute has an aggregate, rather than individual, focus. See Gonzaga, 536 U.S. at 288 (concluding that the provision of FERPA that allows recipient institutions to avoid termination of funding as long as they "comply substantially" with the statutory requirements indicates an aggregate focus); see also Midwest Foster Care, 712 F.3d at 1200-01 (explaining that "[a] substantial compliance regime cuts against an individually

enforceable right because, even where a state substantially complies with its federal responsibilities, a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits").

Finally, the court notes that the centralized enforcement scheme created by Congress, while perhaps not as comprehensive as that provided under FERPA, nonetheless epitomizes the remedies found in legislation enacted pursuant to the Spending Clause. As indicated above, the "typical remedy" for noncompliance with federally-imposed funding conditions is "not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the state [or municipality]." Pennhurst, 451 U.S. at 28. In Gonzaga, the Supreme Court made clear that "unless Congress 'speaks with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." 536 U.S. at 280.

Since Pennhurst was decided, the Supreme Court has only twice found that statutes passed pursuant to the Spending Clause gave rise to enforceable rights, and one of those cases was against the City's public housing authority. See Gonzaga, 536 U.S. at 280-81. In Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), the Supreme Court held that a rent-ceiling provision of the Housing Act created a federal right enforceable under 42 U.S.C. § 1983, since the provision unambiguously conferred a mandatory benefit that was focused on the individual family and its income. 479 U.S. at 430. The statute expressly provided that "tenants could be charged as rent no more and no less than 30 percent of their income." Id. In Gonzaga, the Supreme Court explained that "[t]he key to [the Wright Court's] inquiry was that Congress spoke in terms that 'could not be clearer,' and conferred entitlements 'sufficiently specific and definite to qualify as enforceable rights under Pennhurst.'" 536 U.S. at 280. Likewise, in Wilder

v. Virginia Hospital Ass'n, 496 U.S. 498 (1990), which involved a reimbursement provision of the Medicaid Act, the Supreme Court concluded that "Congress left no doubt of its intent for private enforcement, . . . because the provision required States to pay an 'objective' monetary entitlement to individual health care providers," with no sufficient administrative means of enforcement. Gonzaga, 536 U.S. at 280 (citing Wilder, 496 U.S. at 522-23).

Upon review of the text and structure of the HOME Act, the court is convinced that the same cannot be said in the instant case. Contrary to the statutes at issue in Wright and Wilder, the HOME Act does not "explicitly confer[] specific monetary entitlements upon the plaintiff[]," or otherwise evince Congress' unambiguous intent for the Act's provisions to be privately enforced. Id. Instead, much like the provisions in Gonzaga, the applicable provisions of the HOME Act lack the necessary rights-creating language, have an aggregate rather than individual focus, and serve primarily to direct the distribution of HOME funds by the Secretary and the use of those funds by participating jurisdictions. Therefore, the court concludes that the plaintiff does not have an implied private right of action for monetary damages under the HOME Act.

B. Enforcement under Section 1983

The plaintiff also contends that even if he lacks a right of action under the HOME Act itself, 42 U.S.C. § 1983 provides him with a vehicle to enforce the provisions of the HOME Act and the related federal regulations. Section 1983 imposes liability on anyone who, acting under color of state law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law." Blessing, 520 U.S. at 340 (emphasis in original). "If there is no violation of a federal right, there is no basis for a claim under § 1983." Kalan v. Health Ctr. Comm'n of Orange

Cnty., 198 F. Supp. 3d 636, 641 (W.D. Va. 2016) (Conrad, C.J.) (citing Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988)).

In Gonzaga, the Supreme Court made clear that determining whether a statute confers individual rights enforceable under § 1983 "is no different from the initial inquiry in an implied right of action case." 536 U.S. at 285. In light of the court's conclusion that the provisions of the HOME Act do not confer individual rights enforceable by the plaintiff, it necessarily follows that the plaintiff cannot enforce those provisions under § 1983. See Clear Sky Car Wash LLC v. City of Chesapeake, 743 F.3d 438, 444 (4th Cir. 2014) ("Because we conclude that 42 U.S.C. §§ 4651 and 4655 do not confer individual rights enforceable by Clear Sky, we also conclude that Clear Sky cannot enforce those sections under 42 U.S.C. § 1983.").

The same is true for the federal regulations promulgated pursuant to the HOME Act. It is well settled that a federal regulation, standing alone, "cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987); see also Alexander, 532 U.S. at 291 ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."); Save Our Valley v. Sound Transit, 335 F.3d 932, 943 (9th Cir. 2003) ("Plaintiffs suing under § 1983 must demonstrate that a statute—not a regulation—confers an individual right.") (emphasis in original). Given the court's conclusion that the provisions of the HOME Act do not confer individual rights enforceable by the plaintiff, he cannot maintain a § 1983 action to enforce the HUD regulations promulgated pursuant to the Act. See Johnson v. City of Detroit, 446 F.3d 614, 629 (6th Cir. 2006) ("[I]n the instant case, because we conclude that the relevant provisions of the [federal statutes at issue] do not confer personal federal rights upon plaintiff that are

enforceable under § 1983, the federal regulations promulgated pursuant to these statutes are likewise incapable of independently conferring such rights.").

For these reasons, the court concludes that the plaintiff has no viable claim for damages under the HOME Act itself or § 1983, for alleged violations of the Act and its implementing regulations. Accordingly, to the extent the City seeks summary judgment on such claims, the motion for summary judgment will be granted.

II. Due process claim

Although the HOME Act does not provide the plaintiff with a federal cause of action, the plaintiff's complaint is not limited to claims based on the statute. Instead, the plaintiff also claims that he was denied due process as required by the Fourteenth Amendment. See Compl. ¶ 12.

The Fourteenth Amendment to the United States Constitution protects citizens from being deprived of "property" without "due process." U.S. Const. amend. XIV, § 1. To establish a violation of procedural due process, the plaintiff "must show that (1) [he] had property or a property interest (2) of which the defendant deprived [him] (3) without due process of law." Sunrise Corp. v. City of Myrtle Beach, 420 F.3d 322, 328 (4th Cir. 2005) (citing Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 826 (4th Cir. 1995)). Although the exact procedures required by the Constitution depend on the circumstances of a given case, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

The City did not address the due process claim in the briefs filed in support of its motion for summary judgment. When questioned by the court at the recent hearing, the City appeared to acknowledge that the plaintiff's allegations may implicate a protected property interest. See, e.g.,

Pater v. City of Casper, 646 F.3d 1290, 1294 (10th Cir. 2011) ("Constitutionally protected property interests are created and defined by statute, ordinance, contract, implied contract and rules and understandings developed by state officials. Thus, for example, courts have identified property interests arising from . . . restrictive covenants between government agencies and private parties. And, of course, ownership of land or real estate is a quintessential source of property interests.") (citations and internal quotation marks omitted). The City argued, however, that the plaintiff received adequate process.

The problem with the City's argument is that it is just that—argument. There is very little evidence in the record regarding the substance and extent of the City's communications with the plaintiff regarding the sale of the Property, the Restrictive Covenants, or the formula set forth therein for dividing the proceeds from the sale. For instance, the Restrictive Covenants state that the sale of the Property "shall allow the owner a fair return on investment," and that "[b]y this is meant that the owner . . . may recover the amount of . . . any capital improvement investment." Restrictive Covenants 1 (emphasis added). Although the affidavit submitted with the City's original motion summarily states that the plaintiff "did not make any eligible capital improvements to the Property," Hypes Aff. ¶ 33 (emphasis added), there is no indication that the plaintiff and Ms. Grant were advised of what improvements would be considered eligible for purposes of determining a fair return on their investment. Nor is there any evidence establishing that the City provided the plaintiff an adequate opportunity to be heard on that issue.

In any event, because the City did not address the due process claim in its motions for summary judgment, the plaintiff was not on notice that he was required to produce evidence to support the claim. Accordingly, the court declines to consider the claim sua sponte or to otherwise address the arguments made by the City for the first time during oral argument. See

Fed. R. Civ. P. 56(f) (providing that the court may grant a motion for summary judgment on grounds not raised by a party only "[a]fter giving notice and a reasonable time to respond"); see also Jehovah v. Clarke, 798 F.3d 169, 177 (4th Cir. Va. 2015) (holding that the district court improperly granted summary judgment to the defendant on a ground that was not raised or addressed in the parties' summary judgment briefing). The court will permit the City to file a supplemental motion for summary judgment raising these and any other arguments it wishes to make regarding the viability of the plaintiff's due process claim. Such motion must be filed within twenty-one days of the date of entry of this memorandum opinion and the accompanying order. The plaintiff will have twenty-one days thereafter in which to file a response.

Conclusion

For the reasons stated, the pending motions for summary judgment filed by the City are granted in part and denied in part. The Clerk is directed to send copies of this memorandum opinion and the accompanying order to the plaintiff and all counsel of record.

DATED: This 18th day of July, 2017.

United States District Judge