IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 66 C 1460
	)	
GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development of the United States,	)	
	)	
Defendant.	)	

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT
AND RELATED MOTIONS

Plaintiffs, by their attorneys, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court for summary judgment in their favor on the ground that there is no genuine issue as to any material fact and that plaintiffs are therefore entitled to summary judgment in their favor as a matter of law.

Plaintiffs also move the Court as follows:

1. For leave to add the Chicago Housing Authority as a party defendant to this cause;

2. For leave to withdraw plaintiffs' pending motion to consolidate this cause with the companion case, Gautreaux et al. v. CHA, 66 C 1459; and

3. For leave to withdraw plaintiffs' pending motion for discovery.

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October 31, 1969

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NORTHERN DIVISION OF ILLINOIS, EASTERN DIVISION

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

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On June 19, 1967 this Court ordered that "all proceedings herein are stayed and the matter continued generally until such time as there is a disposition of the companion case [Gautreaux v. CHA] ..." With the entry of an order on tenant assignment imminent, the companion case will shortly be disposed of, subject only to the Court's continuing jurisdiction. Accordingly, plaintiffs believe it appropriate to resume proceedings in this case and have filed their motion for summary judgment (and certain

related motions) together with this supporting brief.

In this brief we review the status of the case (Part I); show how decisions rendered subsequent to the filing of the last briefs in 1967 have made it doubly clear that the pending motion to dismiss the action of the defendant Secretary of the Department of Housing and Urban Development ("HUD") should be denied (Part II); and show why plaintiffs' motion for summary judgment should be granted (Part III).

I. THE STATUS OF THE CASE.

The complaint in this case was filed simultaneously with that in the companion case, Gautreaux v. CHA, No. 66 C 1459. The allegations of discrimination in the two complaints are identical. Liability of HUD is predicated upon its being a "joint participant" (Burton v. Wilmington Parking Authority, 365 U.S. 715, at 725) in that discrimination, and is based on the Fifth Amendment to the Constitution (Count I of the Complaint), as well as upon Section 601 of Title VI of the Civil Rights Act of 1964 (Count II of the Complaint; 42 USC. §2000d).

HUD filed a motion to dismiss the action on five grounds:

(1) lack of standing to sue;

(2) failure to exhaust administrative remedies;

(3) lack of jurisdiction;

(4) failure to state a claim for relief; and

(5) failure to join an indispensable party.

HUD then filed three briefs and several affidavits in support of its motion.* Plaintiffs filed a brief in opposition plus a motion (with supporting memorandum) to consolidate this and the companion case. HUD filed a reply brief and an additional affidavit and plaintiffs filed a motion for discovery respecting that affidavit. Then, on its own motion, the Court entered its order of June 19, 1967, as follows:

> "Noting that the substantive issues presented by the allegations of the Complaint here are virtually identical with those presented by the Complaint in the companion case brought by these same plaintiffs, 66 C 1459, Gautreaux, et al. v. Chicago Housing Authority, et al., and that the determination of those issues may render this action moot or greatly facilitate discovery and trial of the action,
>
> IT IS HEREBY ORDERED that all proceedings herein are stayed and the matter continued generally until such time as there is a disposition of the companion case and that all pending motions presently under advisement shall continue under advisement until such time as it becomes necessary to rule thereon."

There were no further proceedings until the filing of plaintiffs'

*Thus, under the last sentence of Federal Rule 12(b), HUD's motion is to be treated as one for summary judgment.

motion for summary judgment and this supporting brief.

II. HUD'S MOTION TO DISMISS THE ACTION SHOULD BE DENIED.

A number of decisions rendered subsequent to the filing of briefs on HUD's motion to dismiss make it doubly clear that the motion must be denied. For convenience we will set forth our full argument on the five grounds of the HUD motion here, so that the Court will have our entire argument before it in a single document.

A. Plaintiffs Have Standing To Sue.

Plaintiffs have standing to sue on two separate grounds - under the Fifth Amendment to the Constitution (Count I) and under Section 601 of Title VI of the Civil Rights Act of 1964 (Count II).

(1) Plaintiffs Have Standing Under the Fifth Amendment.

Count I of the Complaint charges, in effect, that HUD's involvement in and financing of segregated public housing in Chicago has deprived plaintiffs of the equal protection of the laws, in violation of the due process clause of the Fifth Amendment to the United States Constitution. Bolling v. Sharpe, 347 U.S. 497 (1954).* It is beyond dispute that an aggrieved citizen may sue a federal

*In Bolling, the original school desegregation case in the District of Columbia, the Supreme Court interpreted the due process clause of the Fifth Amendment as including the guarantee of equal protection of the laws. 347 U.S. at 499. See also, Schneider v. Rusk, 377 U.S. 163, 168 (1964).

official for violation of his rights secured by the federal constitution. E.g., Flast v. Cohen, 392 U.S. 83 (1968); Kent v. Dulles, 357 U.S. 116 (1958); Bolling v. Sharpe, supra.

HUD's briefs do not contest this proposition but argue that, "Plaintiffs do not possess the personal injury which would be required for any constitutional ... right to maintain this suit." (HUD's first brief, p.7a.) The argument is supported with quotations from taxpayer cases such as Frothingham v. Mellon, 262 U.S. 447 (1923), to the effect that, "(where an interest) is shared with millions of others, (it) is comparatively minute and indeterminable ..." (HUD's first brief, p.8.)

The answer to this argument and these cases is that, unlike an undifferentiated class of taxpayers, plaintiffs do possess the personal injury, i.e., the personal stake or interest, required to assert the constitutional right to maintain this suit. This Court has succinctly described that personal interest in the companion case:

> "[P]laintiffs, as present and future users of the [public housing] system, have the right under the Fourteenth Amendment [here, the Fifth Amendment] to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves. Possessing this right and being of the opinion that it is being denied them, plaintiffs

may maintain this action ..." Gautreaux v. CHA, 265 F.Supp. 582, 583.

Moreover, Flast v. Cohen, decided after HUD's briefs were filed, carves an exception out of the Frothingham doctrine which is plainly applicable to the plaintiffs. In Flast, after a careful review of Frothingham, the Supreme Court determined that federal programs may be attacked on constitutional grounds by parties who have "the personal stake and interest that impart the necessary concrete adverseness to [constitutional] litigation ..." Flast v. Cohen, 392 U.S. 83, 101 (1968).* There can hardly be even a cavil about the fact that the interest of plaintiffs meets the "concrete adverseness" test of Flast. It seems beyond dispute that plaintiffs do have standing under the Fifth Amendment.

(2) Plaintiffs Have Standing Under the Civil Rights Act of 1964.**

Count II of the Complaint alleges that HUD's conduct

*"...[T]he Supreme Court has significantly broadened the concept of standing to sue. For example, in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the Supreme Court, modifying the long standing rule of Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), has recognized the standing of persons, whose interest is only that of taxpayer, to sue when constitutionality of federal action is involved." Western Addition Community Organization v. Weaver, 294 F.Supp. 433, 443 (N.D. Cal. 1968).

**This is a separate and distinct ground for standing. Standing to sue under the Fifth Amendment does not depend upon finding that plaintiffs also have standing under the Civil Rights Act of 1964.

has been in violation of Section 601 of Title VI of the Civil Rights Act of 1964. (In relevant part Section 601 provides that no person shall be discriminated against on racial grounds under any program receiving Federal financial assistance. 42 U.S.C. §2000d.) HUD asserts that plaintiffs have no standing to sue it for a violation of that section, relying principally on Green Street Ass'n v. Daley, 373 F.2d 1 (7th Cir. 1967). (HUD concedes that "under some circumstances" Section 601 may "give standing to private persons to seek relief against the local agency" (HUD's first brief, p.25), and this Court has so held. Gautreaux v. CHA 265 F.Supp. 582, 583-84.)

The language of the Green Street opinion supports HUD's view. 373 F.2d at 8-9. However, we believe, (1) that Green Street was in error in this respect, as do several courts which have expressly declined to follow it; (2) that Green Street is distinguishable on its facts; and (3) that in any event the later decision of the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), has substantially undermined Green Street on the issue of standing. Although the Court might ordinarily feel bound to follow Green Street, this should not be true where that case has been so clearly undermined by a later United States Supreme Court decision.

The reasoning in Green Street was that since Sections 602

and 603 of Title VI provide a procedure for federal officials to follow if they wish to cut off funds to recipients who violate Section 601, direct judicial action for Section 601 violations should not be permitted lest that administrative procedure be by-passed. 373 F.2d at 8-9. We believe this conclusion to be erroneous for several reasons:

First, courts will imply judicial power to enforce federal statutory rights absent clear and convincing evidence of a contrary congressional intent. Although Title VI of the 1964 Civil Rights Act does not specifically provide for suit by persons denied the rights granted in Section 601, it contains no such clear and convincing evidence of a contrary congressional intent.*

*An example of such "clear and convincing evidence" is contained in Section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3):

> "...No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, ..."

See Breen v. Selective Service Board, 284 F.Supp. 749, 752-53 (D. Conn. 1968).

The most recent and forceful statement of this rule is in Abbott Laboratories, sustaining judicial review of actions taken by the Secretary of Health, Education and Welfare and the Commissioner of Food and Drugs. The Court said (387 U.S. 136, 139-41, emphasis added):

> "...[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. [citations omitted] Early cases in which this type of judicial review was entertained, e.g., Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701(a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,[2] and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. [citations omitted.] Again in Rusk v. Cort, supra, 369 U.S. at 379-380, 82 S.Ct. at 794, the Court held that only upon a showing of 'clear and convincing evidence' of

effort to employ [plaintiffs'] administrative remedy would be 'futile'." (HUD reply brief, p.5.) The exchange of letters does show that further complaint would have been futile (see the next subsection of this brief); but the point here is that the 1965 exchange of letters constituted an exhaustion of the supposed administrative remedy.

(2) Application for further relief would have been futile.

The familiar rule is that when an administrative agency's announced views or policies are such that a plaintiff's application for administrative relief would almost certainly be rejected, the courts will not require the plaintiff to make the futile gesture of applying to the agency as a prerequisite to granting judicial relief. See, for example, School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59, 63-64 (4th Cir. 1956), and Koepke v. Fontecchio, 177 F.2d 125, 128 (9th Cir. 1949).

HUD's rejection of the complaint respecting the 1965 sites plainly brings this case within that rule, particularly because of the ground for rejection noted above. So too does HUD's action in approving 1966 sites which furthered the pattern of segregation still more (see 296 F.Supp. at 911), notwithstanding HUD had the 1965 complaint before it. Thus, under the above authorities, further

complaints to HUD concerning segregated site selection patterns in Chicago were not required as a prerequisite to seeking judicial relief.*

(3) In the circumstances of this case the supposed administrative remedy was clearly inadequate and resort to it was not required.

The supposed administrative remedy is not really an administrative remedy at all. The supposed remedy consists of a regulation which says that a person may file a "written complaint." (The regulation is quoted at page 19 of HUD's first brief.) There is no provision for a hearing, none for the taking of evidence, none requiring HUD to take any action at all based upon the "complaint" - only to "investigate." HUD's argument

*It may also be noted that, as the opinion in Hicks v. Weaver discloses, a similar letter of complaint was filed with HUD in November, 1965 respecting site selections in Bogalusa, Louisiana. The complaint was rejected in June, 1966, by the same person - Marie C. McGuire - who rejected the complaint here, on the ground that the Bogalusa sites were in racially mixed neighborhoods. HUD was asked to, and said it would, consider a request for reconsideration in July and August, 1966, because the complainant contended that HUD's facts were wrong and that the proposed sites were not in racially mixed neighborhoods. (August, 1966 was the month the complaint in this case was filed.) HUD never communicated thereafter with the complainant and he learned of HUD's approval of the Bogalusa sites only through the newspapers. ~~(pp. 8-10 of the opinion.)~~ 303 F. Supp. at 621.) The Court found, contrary to HUD's view that the sites were in racially mixed neighborhoods, that "All of the proposed 98 units would be built in the Negro sections of Bogalusa." (id., ~~p. 3.~~ 625.)

appears to be that if a government agency issues a regulation authorizing a citizen to write it a letter of complaint, which it promises to investigate, it has thereby created an administrative remedy. The short answer is that citizens do not need government agencies to authorize them to write letters, and such purported authorization is not an "administrative remedy" within the meaning of the exhaustion doctrine.

Moreover, by the time the HUD regulation was promulgated a decade and a half of discrimination had produced a nearly all-Negro segregated housing system of approximately 30,000 dwelling units. We do not believe that an authorization to write a letter coupled with a promise to investigate constitutes a remedy at all. But can it seriously be asserted that a regulation authorizing citizens to write letters, with a promise to investigate, constituted an adequate administrative remedy for that situation? The rule is that, "Exhaustion is not required when the administrative remedies are inadequate." NLRB v. Shipbuilding Local, 391 U.S. 418, 426, n.8 (1968); and see the authorities there cited. Cf. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 206 (1944): "We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy." We think it plain that no adequate administrative remedy has been

provided for remedying the existing condition of an all-Negro public housing system in Chicago.

* * * *

For these three separate reasons, the exhaustion of administrative remedies doctrine is not a bar to Count II.

C. The Court Has Jurisdiction.

HUD asserts that the Court "lacks jurisdiction" over this action. (HUD's first brief 23-25.) It is not clear what HUD means by this assertion.* Most of the argument in support of it consists of the same standing arguments (citing Harrison-Halsted and Section 602 of the 1964 Civil Rights Act) we have already disposed of. The only exception is one paragraph (p.23) in which it is said, "There is no specific statutory consent to bring an action such as this against the defendant."

There are at least two answers. First, as has been observed by the United States Attorney General's Committee on Administrative Procedure,

*See Norwalk CORE, supra, where (HUD being one of the defendants) the court said: "It is clear that the District Court has subject matter jurisdiction." 395 F.2d at 926, n.6.

> "While the Government enjoys sovereign immunity from suit, its officers do not share in that immunity. They are answerable, as private individuals, for wrongs committed even in the course of their official work ... To be sure, the officer may justify his conduct by referring to the law under which he is acting. But that raises precisely the issue whether the law does indeed authorize his conduct under the circumstances - the typical issue for judicial determination."
>
> Administrative Procedure in Government Agencies, S.Doc. No. 8, 77th Cong., 1st Sess. 80-82 (1941); quoted in full and discussed in Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv.L. Rev. 1479, 1485 (1962).

Second, Section 10 of the Administrative Procedure Act, 5 U.S.C. §702, "implies a comprehensive waiver of sovereign immunity in all actions otherwise sustainable against federal officers or agencies." Powelton, supra, 284 F.Supp. at 834.

Whatever HUD may mean, these authorities as well as the cases discussed under standing above, involving successful suits against government officers and agencies, including HUD, show plainly that courts have jurisdiction over actions such as this one.

D. Plaintiffs Have A Claim For Relief.

HUD argues that CHA, not it, selects sites, and that therefore "plaintiffs' real controversy is with the Chicago Housing Authority,

not the Federal Government." (HUD's first brief, p.27.)

The argument is untenable. It is clear that, although it does not make the initial selection of sites, HUD is deeply involved in every aspect of the CHA operation, sets the site selection standards and criteria with which CHA must comply, and has and exercises the power to approve or disapprove every site selected by CHA. This is acknowledged in HUD's own briefs, as the following material shows:

> "In practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." (HUD's first brief, p.5.)*

> "...HUD also requires Housing Authorities to execute and record Declarations of Trust in favor of HUD and its Note or Bondholders on all project property, both real and personal, and on all income, rents, revenues, or other personalty held or used or derived from the projects." (Id., pp.6-7.)

> "Upon failure to live up to the requirements of the Federal law or certain provisions of the Annual Contributions Contract ... the Federal Government reserves the right to demand title or possession of the projects." (Id., p.6.)

> "HUD, under the Annual Contributions Contract, requires certain approvals by it of some of the actions taken by the Housing Authorities. One of these approvals relates to the Chicago Housing Authority's action which is the subject matter of

*The affidavit of Marie McGuire, filed by HUD with its first brief, discloses that since 1950 HUD has spent nearly 350 million dollars in financing CHA projects (¶10) and that in 1965 HUD paid 96.67% of the debt service on CHA projects (¶12).

this suit, i.e., site selection." (HUD's first brief, p.7.)

"Section 103, together with section 102, of Part Two of the Annual Contributions Contract, also recognizes the right of HUD to approve or to disapprove a site selected by the Housing Authority." (Id.)

HUD's Low-Rent Housing Manual establishes detailed site selection standards and criteria. (Attachment to HUD's second supplemental brief.)

"HUD has approved the sites selected by the Chicago Housing Authority for the 1965 projects, referred to in the Complaint in this suit as 'The Five Proposed Projects.' With respect to the sites for the 1966 projects, referred to in the Complaint as the 'Twelve Proposed Projects,' HUD is negotiating with the Chicago Housing Authority the question of approval of these sites." (Id.)

"[T]he following sites included in the 1966 projects have been approved: [listing omitted] Determination as to the remaining sites involved in the 1966 projects has not been made, and no approval has been given by HUD as to those remaining sites which are being held in abeyance." (HUD's first supplemental brief, p.2.)

An inspection of HUD's "Annual Contributions Contract" with CHA (filed with HUD's first brief) also shows the detailed role HUD plays in CHA's operations. Indeed, virtually every clause

of the contract conditions CHA activity on approval by HUD.* Part One of the Contract is 22 single-spaced typewritten pages and deals with a variety of topics. (There are, in addition, numerous amendments to the Contract.) Part Two is a 56 page printed booklet (plus a 15 page index) containing ninety-seven different sections, each dealing with a separate subject. A random sample of a dozen of the section headings will give the Court some idea of the exquisite precision with which the relationship between HUD and CHA has been spelled out (but is no substitute for a quick inspection of the document):

Sec.	
101	Efficiency and Economy in Development
103	Acquisition of Project Sites
106	Architectural and Engineering Services

*Even before such a contract is entered into with respect to any project HUD's Low Rent Housing Manual ("LRHM") requires, (1) that a local housing authority formally apply to it for assistance (LRHM 201.1); (2) that if this application is approved a "program reservation" be issued by HUD stating the number of housing units HUD approves for the proposed project (LRHM 201.1, 8a); (3) that HUD and the local housing authority then enter into a preliminary loan contract (LRHM 206.3, 1a); (4) that HUD tentatively approve the proposed site and determine that it meets HUD's site selection criteria (LRHM 205.1); and (5) that HUD approve the local authority's "development program" with regard to site, design, budget, relocation of displaced persons and plans for executing the project (LRHM 206.3).

Sec.

121 Fees for PHA Representatives at Project Sites

206 Eligibility for Admission

208 Tenant Selection

213 Repair, Maintenance, and Replacement

306 Procurement

307 Personnel

309 Books of Account and Records

404 Development Cost Budgets

509 Right of PHA to Terminate Contract

These contractual provisions are, of course, supplemented by the voluminous regulations which HUD issues from time to time. (See, e.g., the eight pages of regulations on Site Selection and Tentative Site Approval which are attached to HUD's second supplemental brief.)

It borders on the ridiculous to argue that HUD, upon which CHA is "entirely dependent" financially, which regulates in consummate detail almost every conceivable aspect of CHA's operations, which establishes site selection criteria for CHA, which has among its many other powers the power to approve or disapprove (tentatively and finally) CHA's site selections, and which in fact exercises that power and "negotiates" such approval or disapproval, has no function

to perform in connection with CHA's site selections and is therefore not subject to suit if CHA's site selection practices are racially discriminatory.

In Hicks, supra, the court said in language equally applicable here:

> "Likewise, through its Secretary Weaver, HUD has violated the plaintiffs' rights under 42 U.S.C. §2000d. As noted above, HUD was not only aware of the situation in Bogalusa but it effectively directed and controlled each and every step in the program. Nothing could be done without its approval. HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. §2000d." 302 F.Supp. at 623 (emphasis added.)

(As to HUD's "awareness" of the situation in Chicago, the Court will recall that HUD rejected the complaint about the 1965 sites because it was,

> "advised that sites other than in the south or west side, if proposed for regular family housing, invariably encounter sufficient objection in the [City] Council to preclude Council approval." Exhibit B to plaintiffs' brief in opposition, p.6.)

The Supreme Court has held in a number of cases that a government agency may be sued for discrimination if it participates in the activities complained of "through any arrangement, management, funds or property." Cooper v. Aaron, 358 U.S. 1, 4 (1958). In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), a state agency

sought to insulate itself from the discriminatory practices of a restaurant lessee on the ground that it had "not purported to dictate to the restaurant as to how its business should be run." 150 A.2d 197, at 198. But the Supreme Court said,

> "The State has so far insinuated itself into a position of interdependence with [the restaurant lessee] that it must be recognized as a joint participant in the challenged activity ..." 365 U.S. at 725.

Just as in Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), involving discrimination by hospitals receiving federal funds, the housing programs in Chicago "operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs." (323 F.2d at 967.) Plainly HUD's "joint participation" in CHA's discriminatory administration of a comprehensive intermeshing state and federal housing program is government action of which plaintiffs may complain.

E. CHA Is Not an Indispensable Party, but Should Be Joined as a Courtesy.

HUD says that CHA is an indispensable party to this action. (HUD's first brief, p.28.) We have no objection to joining CHA as a nominal party defendant and have filed a motion to that

effect.*

(There is also a pending motion to consolidate this and the companion case which plaintiffs have asked leave to withdraw. Plaintiffs believe it would now be preferable to join CHA as a party to this action. Because of subsequent developments in the law, there is no longer any venue problem under 28 U.S.C. §1391(e) if HUD and CHA are joined in the same action. See Powelton, supra, 284 F.Supp. at 832-34; and Brotherhood of Locomotive Eng. v. Denver & R.G.W. R.Co., 290 F.Supp. 612, 615-16 (D.C. Colo. 1968).)

* * * *

For the several reasons given we believe HUD's pending motion to dismiss the action should be denied. None of the grounds on which that motion is based is tenable.

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*We doubt, however, that CHA is indispensable. Powelton, supra, was an action against HUD to restrain it from disbursing funds to the Philadelphia Redevelopment Authority. The court said,

> "...[T]he Philadelphia Redevelopment Authority was named as a party defendant merely as a courtesy and in order to allow the Court to hear the local agency's point of view. They were not indispensable defendants; nor have they been legally affected by our decision in this case." 284 F.Supp. at 814.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED.

A. Plaintiffs are Entitled to Judgment as a Matter of Law.

The facts are undisputed. Pervasive discrimination in site selection in the public housing system in Chicago over a period of many years is established. HUD's involvement, both financial and administrative, in that discrimination is also established. As we have seen, that involvement is not confined to providing funds so that, "In practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." (HUD's first brief, p.5.) It also includes, in addition to detailed regulation of almost every aspect of CHA's operation, establishment of site selection criteria, specific consideration of each proposed site, "negotiation" over sites with the CHA, and final specific approval or disapproval of each site. (Id. p.7; first and second supplemental briefs.) It includes, too, HUD's awareness of the "invariable" City Council opposition to sites outside the Negro areas of Chicago. (Exhibit B to plaintiffs' brief in opposition.)

There can be no doubt that public housing systems, in Chicago and elsewhere, are operated as "comprehensive joint or inter-meshing state and federal plans or programs." Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 967 (4th Cir. 1963).

Thus, this is a far stronger case than Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). There, it will be recalled, a state agency sought to insulate itself from the discriminatory practices of a restaurant lessee on the ground that it had not purported to dictate to the lessee how to run its restaurant business. (150 A.2d 197, at 198.) Although the relationship between the state and the lessee was not in any respect as close as that between CHA and HUD, the Supreme Court said:

> "The State has so far insinuated itself into a position of interdependence with [the restaurant lessee] that it must be recognized as a joint participant in the challenged activity ..." 365 U.S. at 725.

See also Cooper v. Aaron, 358 U.S. 1, 4 (1948), to the effect that a governmental agency may be sued for discrimination if it participates in the activity complained of "through any arrangement, management, funds or property," and Colon v. Tompkins Square Neighbors, Inc., 294 F.Supp. 134, 137 (D.C.S.D.N.Y. 1968), to the effect that "there exists sufficient and continuing government participation and involvement in the [urban renewal] project so as to bring any discriminatory operational practices within the gambit of constitutional protection." (citations, including Burton and Cooper, omitted.)

B. An Order Against HUD is Necessary to Give Plaintiffs the Full Relief to Which They are Entitled.

This Court has held that plaintiffs are entitled to the formulation of a comprehensive plan to remedy the past effects of unconstitutional site selection in Chicago's public housing program. 265 F.Supp. at 914. This is consistent with the view expressed by the Supreme Court in considering a decree designed to remedy the past effects of voting discrimination:

> "... the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. U.S., 380 U.S. 145, 154 (1965).

It is of course impractical to relocate buildings already erected. The Court's judgment order in the companion case accordingly provides for remedying the past by prescribing the location of future housing units. Thus, the extent and swiftness of the remedy will depend upon how many and how rapidly housing units are supplied in the future. The Court's order recognizes this by directing that,

> "CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible ... and shall take all steps necessary to that end ..." (Subsection A of Article VIII.)

The Court and the class represented by the plaintiffs therefore have a keen interest in the factors affecting the future production and

supply, not just the location, of Dwelling Units.

A second major element of truly effective relief will be the ability to utilize areas beyond the geographic boundaries of the City of Chicago. Indeed, the recent Report of the National Commission on Urban Problems says that the urban slum problem cannot even be stated accurately without reference to suburbia:

> "To say that the urban problem is essentially a problem of big-city clums is not only simplistic, to a large degree it is erroneous ... The people in the slums are the symptoms of the urban problem, not the cause. They are virtually imprisoned in slums by the white suburban noose around the inner city ... The urban problem can be described as the big-city slum, and as the white suburban noose ..." (Report of the National Commission on Urban Problems, Chairman Paul H. Douglas, House Document No. 91-34 (1968), p.1.)*

*The Report added:

> "Perhaps the most potentially explosive problem we face in our cities is the fact that the increase of nonwhites in central cities is accompanied by just as big a movement of whites from the center city to the suburbs. The result is an almost unyielding pattern of segregation ... The overwhelming majority of the future nonwhite population growth is likely to be concentrated in central cities unless major changes in public policies come about. But one searches in vain to find current programs of Federal, State, or local governments aimed at significantly altering this tendency." Report of National Commission, supra, p. 4-5.

Compare a noted urban expert's similar view:

> "All evidence points to the conclusion that future nonwhite population growth will continue to be concentrated in central cities unless major changes in public policies are made. Not one single significant program of any federal, state, or local government is aimed at altering this tendency, or is likely to have the unintended effect of doing so." Anthony Downs, The Future of American Ghettos, in Daedalus (Journal of the American Academy of Arts and Sciences), Fall 1968, p. 1333.

This element, too, is recognized by the Court's judgment order which provides (Subsection E of Article III) that CHA shall receive "credit" to the extent dwelling units are located outside the City of Chicago.

It is plain, therefore, that full relief for the plaintiffs requires an order against HUD. Only HUD, whose powers and jurisdiction include but also extend geographically beyond Chicago, can assure that full advantage will be taken of opportunities to implement the Court's judgment order outside the City.* And HUD self-evidently plays at least as important a role as CHA in determining what the production and therefore the supply of future Dwelling Units will be. (The Court has already heard CHA's Chairman blame HUD for CHA's failure to move promptly toward implementation of the Court's judgment order.) Indeed, HUD's own regulations require that, as a precondition to the federal financing of CHA projects (42 USCA §1451(c)), there by submitted to it for review and approval "a program to expand the supply of housing for

*"At the same time that the Federal Government has been deeply involved in the minute details of housing programs, its posture with respect to the great fundamental issues has been a passive one; it has largely been content to respect and act upon proposals initiated and submitted by local housing agencies. This passive approach is one of the important reasons the Nation has failed to meet the problem of those in greatest need." Report of the National Commission, supra, p. 184.

minority and low - and moderate - income families and individuals." Workable Program for Community Improvement, a HUD Handbook, RHA 7100.1, p.1 (October 1968).

It is plain that the plaintiff class cannot be assured that everything is being done which can be done to provide them with speedy and effective relief unless an order is entered against HUD which, as in the case of the order against CHA, directs HUD to do everything which may appropriately be done to that end.* As in the case of the Court's February 10 order in the companion case, the first step should be to invite HUD to propose the form of such an order.

*Note the following provision of the Court's Judgment Order in the companion case:

> "CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this Judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures." (Article VIII)

CONCLUSION

In the "Memorandum for the United States" filed in the companion case, HUD and the Department of Justice advised the Court that they supported "the objective of constructing housing outside the City of Chicago" (p.6), as well as "the objectives of overcoming segregated and over-concentrated patterns of low-rent public housing in Chicago." (p.18) But they noted the "difficulty of obtaining the required cooperation of local governments" as to construction outside of Chicago (p.6), and intimated some doubt as to whether the in-City objectives "can be achieved together with the production of a substantial volume of sorely needed housing" (p.19).*

Since HUD plays a crucial role, both with respect to local governmental consents and the volume production of housing, it is both necessary and appropriate for the Court to exercise its

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*Contrast the following positive attitude of the National Commission on Urban Problems:

> "We advocate policies which not only promote freedom of residence but programs which would build low-rent housing in the suburbs as well as the cities, provide sites in outlying areas, give States incentives to act where localities do not, lease houses for the poor in middle class neighborhoods, and tie a locality's eligibility for Federal grants such as for highways, sewers and water to that community's effort to house its share of the poor." Report of the National Commission, supra, p.26.

equity powers in the interest of assuring that the plaintiff class receivesthe maximum possible relief as speedily as may be. We have already noted that the Court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past ..." Louisiana v. United States, 380 U.S. at 154. The Court should deny HUD's motion to dismiss, grant plaintiffs' motion for summary judgment, and order HUD to propose a specific plan designed to assure that HUD does everything it may reasonably do to give the maximum possible relief to the plaintiff class as speedily as may be.

Respectfully submitted,

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