DEF. MOTION TO DISMISS

Reassertion of Pending Motion to Dismiss

Defendant reasserts all of the arguments asserted heretofore in support of his pending motion to dismiss. (Copies of defendant's original Memorandum and Reply in support of that motion are attached hereto for the convenience of the Court.) For the reasons previously set forth in argument and by that motion, the case should be dismissed for plaintiffs' lack of standing to sue (Memorandum pp. 7 - 18, Reply Brief pp. 1-4), the failure of plaintiffs to exhaust their administrative remedies (Memorandum pp. 19-22), Reply pp. 4-6), lack of jurisdiction over the subject matter (Memorandum pp. 23-25), and lack of justiciable controversy between the parties (Memorandum pp. 26-27), and therefore failure of the Complaint to state a claim upon which relief may be granted.

In addition to the cases previously cited in our 1967 briefs on the foregoing points, we now rely on the more recent controlling cases of Green Street Association v. Daley, 373 F.2d 1, 8 (7th Cir. 1967), cert. den. 387 U.S. 932 and South Suburban Safeway Lines, Inc. v. City of Chicago, et al (7th Cir. No. 17179, decided October 6, 1969).

In the latter case, plaintiff challenged a grant of federal funds to the City and its transit authority pursuant to the Mass Transportation Act of 1964. Federal agency discretion was challenged under statutory provisions requiring certain findings and conditions prerequisite to the grant. Those included decisions (1) that the grant was "essential to a program . . . for a unified or officially

coordinated urban transportation system as part of the comprehensively planned development of the urban area," (2) that "such program, to the maximum extent feasible, provide for participation of private mass transportation companies . . . .," and others. The court found that plaintiffs lacked standing to sue the federal defendants and also expressed doubt that the discretion thus given to the agency head could be reviewed, concluding (slip opinion p. 7)

> "In the instant case the questions (1) whether the statute implies that a private utility claiming it will suffer competitive injury has standing, (2) whether the administrative decision is left so largely to discretion as to be reviewable at all, and (3) as to the scope of judicial review, tend to merge into one. The more the fulfillment of the standards is left to administrative discretion, the less the basis for implication of standing. It is our best judgment that Congress was satisfied that its statutory command to the secretaries was sufficient for its purpose, without resort to judicial review." (Emphasis added)

The same can and should be said of plaintiffs' attack in the case at bar on the judgment of the defendant HUD Secretary and his predecessors.

The recent case of Flast v. Cohen, 392 U.S. 83 (1968), does not aid plaintiffs in any efforts to establish standing to bring this action. The Supreme Court there held that Federal taxpayers can challenge the constitutionality of Federal programs only if the program is an exercise of congressional power under the taxing and spending clause of the Constitution as opposed to being an essentially regulatory program, and if the challenged enactment exceeds a specific constitutional limitation on taxing and spending as opposed to being beyond general powers of Congress. In contrast, plaintiffs here have

not brought this case as taxpayers. Further, they are not challenging the constitutionality of any legislation. Therefore, their complaint does not challenge the constitutionality of statutes on the basis of a specific constitutional limitation on the taxing and spending power of the Federal government, as Flast requires. The Court there specifically recognized that standing will not be conferred "where a taxpayer seeks to employ a federal court as a forum on which to air his generalized grievances about the conduct of government or the allocation of power in the Federal system." 392 U.S. at 106.

Indeed, the recent Seventh Circuit decision in South Suburban Safeway Lines v. City of Chicago, et al. (7th Cir. 17179, decided October 6, 1969), came after the Flast decision.. Plaintiffs in South Suburban were found to possess no standing by reason of being taxpayers, the Flast case being distinguished as a constitutional attack on a statute (slip opinion p.2). The Administrative Procedure Act was found not to create standing, the Seventh Circuit following the majority view in that regard (slip opinion pp. 3-4). Finally the Court held (in the passage quoted above) that plaintiffs had no standing to challenge the administrative discretion. (It then went on to say that, even if standing existed, the Federal defendants had adequately supported their action for summary judgment.)

This Court, under the standards set out in South Suburban Safeway case and others cited, should similarly dismiss this case.

The motion to join C.H.A. as a party defendant herein should be denied.

In our original motion to dismiss, we previously asserted there the plaintiffs' failure to join an indispensable party, in this case the C.H.A.

Inasmuch as plaintiffs' complaint involves and seeks to deny Federal financial aid to the C.H.A. under its contract with H.U.D., and further, inasmuch as the discriminatory actions complained of were taken by the C.H.A. or its agents, that body would seem to be an indispensable party. Moreover, the injunction requested to cut off or re-allocate H.U.D. funds would drastically affect the rights of the local agency. Under these circumstances, the C.H.A. is an indispensable party. Rule 19, Federal Rules of Civil Procedure, Title 28, U.S.C. Without C.H.A. as a party, the court is without jurisdiction. Batler v. Ickes, 89 F.2d 856, 858-9 (C.A. D.C.) involved a very analogous situation. See also Fulton Iron Co. v. Larson, 171 F.2d 994, 998 (C.A. D.C.); State of Washington v. United States, 87 F.2d 421 (C.A. 9); Money v. Wallin, 186 F.2d 411 (C.A.3); Payne v. Fite, 184 F.2d 977, 980 (C.A. 5); Daggs v. Klein, 169 F.2d 174 (C.A. 9); Smart v. Woods, 184 F.2d 714 (C.A. 6); Berlinsky v. Woods, 178 F.2d 265 (C.A. 4); Jacobs v. Office of Housing Expediter, 176 F.2d 338 (C.A. 7); Ainsworth v. Darn Ballroom Co., 157 F.2d 97, 101 (C.A. 4).

Plaintiffs now tacitly conceded the validity of that position by their current motion to join the C.H.A. as a party. They cannot, however, cure the problem in that manner.

The suit has been filed in the United States District Court for the Northern District of Illinois. Venue is presumed to be based on 28 U.S.C. 1391(e)(4) as that is the only statute authorizing jurisdiction and service over the Secretary outside of the District of Columbia. Section 1391(e)(4), however, requires that each defendant be an officer or employee of the United States or any agency thereof. Therefore, any action in which both the H.U.D. Secretary and C.H.A. officials were defendants could not be brought in the District Court for the Northern District for Illinois. Chase Savings and Loan Assn v. Federal Home Loan Bank Board, et al., 269 F.Supp. 965 (E.D. Pa., 1967).

Rule 82 of Federal Rules of Civil Procedure specifically provides that the Federal Rules should not be construed to extend or limit the jurisdiction of the District Court of of the venue of actions therein. Consequently, neither Rule 4(c) nor any state long-arm statute can be invoked to obtain jurisdiction by a court which doesn't have venue, absent a waiver of venue. Venue and jurisdiction could not be obtained over local Chicago officials in the District Court for the District of Columbia. The result of these facts is that while the city is an indispensable party, there is no court in which a single suit can be brought against both the Federal Government and the local officials.

Rule 19(b) of the Federal Civil Rules requires that the whole case be dismissed under this very circumstance, the absent party being indispensable but not joinable.

Wherefore and for the reasons stated the Defendant's Motion to Dismiss should be allowed.

Defendant's Motion to Dismiss to be treated as one in the alternative for Summary Judgment

In addition to the papers originally filed in support of the motion to dismiss (copies of regulations, contract, affidavits, etc), there are submitted herewith additional papers as part of our memorandum in opposition to plaintiffs' motion for summary judgment. Under Civil Rule 12(b), F.R.C.P., Title 28, U.S.C., such papers are to be treated under Rule 56, as if submitted on a motion for summary judgment. We therefore do ask the Court to consider the motion of defendant as one in the alternative for summary judgment. It is clear that the defendant and his predecessors have not engaged in illegal conduct but have, to the contrary, engaged in vigorous enforcement efforts on which no factual issue is raised.

BRIEF

MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Plaintiffs have moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law. Plaintiffs have also moved to add the Chicago Housing Authority as a party defendant, and have asked leave to withdraw plaintiffs' pending motion to consolidate this cause with Gautreaux, et al. v. CHA, 66 C 1459, as well as leave to withdraw their pending motion for discovery.

Defendant contends that the motion for summary judgment must be denied because plaintiffs are not entitled to judgment as a matter of law even if they are able to establish all of the allegations of their complaint. Moreover, as indicated by Exhibits A and B filed in opposition to the motion, there are genuine issues as to material facts and plaintiffs, therefore, are not entitled to the grant of summary judgment. Defendant's motion to dismiss this action, which was stayed by the court's order of June 19, 1967, pending a disposition of the companion case, should now be granted for the added reason that plaintiffs have obtained all the relief to which they are entitled and this action is now moot. Defendant further contends that the motion to add the Chicago Housing Authority as a party defendant should be denied, also on the ground of mootness. No objection is made to the withdrawal of plaintiffs' motion to consolidate and the pending motion for discovery.

I. Plaintiffs' motion for summary judgment should be denied.

A. HUD's actions in connection with the Low-Rent Housing Program in Chicago do not implicate the Defendant in discriminatory practices of the Chicago Housing Authority. Plaintiffs' reliance on Burton v. Wilmington Parking Authority and Hicks v. Romeny is entirely misplaced.

Plaintiffs' complaint seeks a declaration that the Chicago Housing Authority has intentionally discriminated against plaintiffs on racial grounds in site and tenant selection for its low-rent housing projects, contrary to the Fifth Amendment (Count I) and Title VI of the Civil Rights Act of 1964 (Count II). In the second counts plaintiffs merely allege that the Chicago Housing Authority violated the Fifth Amendment (Count III) and Title VI (Count IV) in site selection and tenant assignment; no allegation is included that the Chicago Housing Authority implemented its policies with respect to site selection or tenant assignment with deliberate intent to deprive plaintiffs of their rights. It would appear that plaintiffs have abandoned Counts III and IV because no argument in the brief is addressed to these Counts.

Plaintiffs allege further in their complaint that defendant Secretary "assisted in carrying out and continues to assist in carrying out a racially discriminatory public housing system in the City of Chicago." They demand declaratory judgment that they have the right to end employment of Federal funds in connection with and in support of the racially discriminatory aspects of the public housing system in Chicago, and specifically the use of such funds for the construction of the 1965 and 1966 projects of the CHA on sites which have been selected in a racially discriminatory manner or which

will have the effect of strengthening or continuing existing patterns of Negro residential and school segregation in the City of Chicago. Plaintiffs also pray for an injunction against the Secretary enjoining him from making financial assistance available to the Chicago Housing Authority in this connection.

Relying on these allegations, plaintiffs build an argument to the effect that HUD has discriminated in site selection and tenant assignment in the public housing program on HUD's "involvement, both financial and administrative in discrimination by the Chicago Housing Authority." (Pl Br., p. 32). Plaintiffs do not allege and do not contend that defendant deliberately conspired to produce discriminatory practices in the low-rent housing program in Chicago, but rather talk vaguely of financial and administrative involvement in CHA's deliberately discriminatory acts.

Plaintiffs are quite frank in disclosing their purpose in relying upon a hazy concept of involvement. At page 2 of the Brief plaintiffs state:

> "The allegation of discrimination in the two complaints (No. 67-C-1459 and No. 67-C-1460) 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 ..."

At pages 24 - 30 plaintiffs expand reliance upon Burton to include Simpkins v. Moses H. Cone Mem. Hosp., 323 F. 2d 959 (1963) and Cooper v. Aaron, 358 U.S. 1 (1958). Obviously plaintiffs would

foreclose the factual issues concerning the Secretary's actions and intentions by attributing the intentions and actions of CHA to the Secretary because of HUD's undisputed financial assistance to CHA. This foreclosure and conclusion, they argue, is compelled as a matter of law by the decisions in Wilmington, Simpkins and Cooper.

These cases support the defendant's position rather than the plaintiffs'. In the Wilmington case, the Supreme Court specifically limited its holding to the statement that when a State agency leases public property in the manner and for the purpose shown by the facts in that case the lessee, as well as the State, must comply with the proscriptions of the Fourteenth Amendment. The Supreme Court was careful to emphasize the importance of the facts in that case, "Only by sifting facts and weighing the circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. 715,722. Based on the specific facts in that case, the court found that "The State has so far insinuated itself into a position of interdependence with [lessee] that it must be recognized as a joint participant in the challenged activity..." at p. 725. However, the court warned that "the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." Ibid. It is clear that Wilmington argues against summary judgment in this case, where no such facts exist and no such relationship of interdependence between the Secretary and the CHA has been established.

Cooper, also relied upon, is even further removed from recognizing financial assistance to a discriminating party, standing alone, as sufficient to support a judgment against the Federal Government or any of its officers under the Fifth Amendment. Facts must be proved before the governments, State or Federal, can be held by a judgment to have committed such a grave offense as deprivation of Constitutional rights. And this, we submit, is in full accord with the basic jurisprudential principle of due process for all litigants, private or public. Hale v. Finch, 104 U.S. 261 (1881); Old Dominion Copper Mine & Smelting Co. v. Bigelow, 225 U.S. 111 (1912).

Plaintiffs would supply the facts missing in this suit by the interlocutory opinion in the consolidated suits Hicks, et al. v. Romney, and Hicks, et al. v. Bogalusa Housing Authority, et al., 302 F. Supp. 619 (1969). They quote the opinion extensively, as if what the District Court in Louisiana said as to factual involvement and factual intent of the Secretary in site selection and tenant assignment by the Bogalusa Housing Authority, establishes for every housing authority, including the CHA, the type and extent of participation or involvement by the Secretary, including intent in site selection, tenant selection, financing or management. Aside from the fact that the Hicks decision is interlocutory only, on temporary restraining order pending further hearing, what the Court said there as to the facts is not applicable to this suit. Chicago, Illinois, is not Bogalusa, Louisiana, and a factual finding in this suit based upon facts found in that suit is wholly

unwarranted. Sutphen Estates v. United States, 342 U.S. 19 (1951); Riley v. New York Trust Co., 315 U.S. 343 (1942).

Simpkins also does not hold that financial involvement, standing alone, affords a basis for converting private action, or for that matter State action, into Federal action prohibited by the Constitution. The Simpkins court also relied upon and emphasized the necessity of facts. In that suit, Hill-Burton Act funds administered by the Department of Health, Education and Welfare, were channelled through the State to private hospitals. By statute and formal regulations of HEW, hospitals were permitted to use the funds to build hospitals--openly admitted and declared to be segregated--provided equal facilities were provided elsewhere for the other race. Plaintiffs, Negro practitioners and patients, sued the hospitals only, under the 14th and 5th Amendments, for admission to the facilities. Citing Wilmington, especially the requirement that facts and circumstances be sifted to ascertain whether the hospitals' actions could constitute State or Federal action prohibited by the Constitution, the Court looked at all the facts, including HEW's obvious condonation of the hospitals' discrimination and found a violation of the 14th and 5th Amendments. Neither HEW nor its Secretary was a party to the suit. The Federal Government intervened as a party plaintiff, certainly not seeking an unnecessary judgment against HEW or its Secretary.

The exposition of the law set forth by this Court in its decision of March 2, 1967, in the companion suit No. 67-C-1159 as applicable to the CHA, defendant therein, is equally applicable to HUD's Secretary in this suit, and is entirely compatible and in accord with Wilmington, Simpkins, and Cooper. At page 584 of 265 F. Supp., this Court said:

> "Defendants move to dismiss Counts III and IV of the Complaint for failure to state a claim upon which relief may be granted because they do not allege that defendants implemented their site selection policy with the deliberate intent to deprive plaintiffs of rights secured them by the Fourteenth Amendment. Defendants' motion to dismiss Counts III and IV is sustained because plaintiffs must in fact prove, or prove facts from which the inference necessarily follows, that defendants were prompted in their selection of sites at least in part by a desire to maintain concentration of Negroes in particular areas or to prevent them from living in other areas. A public housing program, conscientiously administered in accord with the statutory mandates surrounding its inception and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative discriminatory state action is required * * * To accept plaintiffs' contention that allegation and proof of an intent to discriminate among the races is unnecessary is to conclude that the mere placement of public housing projects that will in allprobability be occupied largely by tenants of a specific race in neighborhoods containing a significant number of residents of the same race is in itself an act of discrimination forbidden by the Fourteenth Amendment, regardless of the many other factors, imposed here by statute, such as need, cost, and rehabilitation of deteriorating neighborhoods. The Constitution compels no such conclusion; rather it commands only that defendants administer the site selection aspect of their housing program untainted by any design to concentrate Negro or white tenants in some areas to the exclusion of other areas.
>
> "Defendants move for summary judgment as to Counts I and II, asserting that no material issues of fact are present, and that the allegations of those Counts are

> clearly and demonstrably untrue. Summary judgment is rarely, if ever, appropriate where, as here, motive and intent are important to a resolution of the issues and never where, as here, serious questions of fact remain unresolved, as, for example, the racial composition of the neighborhoods involved. For these reasons, defendants' motion for summary judgment is denied." (citations and footnotes omitted.)

B. There are genuine issues of material fact unresolved. HUD has not participated in and has not condoned discrimination by CHA.

There are no facts before this Court clearly entitling plaintiffs to summary judgment, and there is a clear showing of genuine issues of material facts unresolved. Indeed, the face of the opinion rendered February 7, 1969, in No. 67-C-1459, which plaintiffs would use to postulate HUD's discriminatory actions, contains a factual finding which in itself contradicts plaintiffs' claim of entitlement to summary judgment. In the opinion, this Court found that HUD, in 1963, prior to enactment of the Civil Rights Act of 1964, compelled CHA to abandon its "proximity rule", designed to limit occupancy in certain proposed new elderly projects to whites, by giving preference in occupancy to area residents, by informing CHA that unless the rule was revoked, HUD, under Executive Order 11063, would not approve the sites located in the areas of white concentration. Furthermore, the depositions of Marie C. McGuire and Joseph Burstein, taken by plaintiffs by order of this Court in No. 67-C-1459, clearly establish that before the 1964 Civil Rights Act, and continuing

to the date of the depositions, March 25, 1968, rather than aiding and abetting CHA in its discriminatory actions, HUD was moving affirmatively to block such actions. Plaintiffs have not seen fit to file these depositions with this Court in No. 67-C-1459. Defendant's counsel has procured a transcript thereof which is attached hereto as an exhibit, and will ask the reporter to file the original with the Court. 1/

The affidavits attached hereto set forth other actions of HUD over the period of time covered by this Complaint, and disclose the collection of additional facts, contradicting any discriminatory intent of the Secretary and participation by him in CHA discrimination, deliberate or otherwise. Substantial issues of fact precluding summary judgment exist in this matter. Simler v. Conner, 372 U.S. 221 (1963); Fountain v. Filson, 336 U.S. 681 (1949).

1/ Those depositions of Government employees, taken upon request of these plaintiffs in Washington, were attended by counsel for the Government as well as by attorneys for plaintiffs and C.H.A. Although taken in 67 C 1459, the same rights of direct and cross examination were enjoyed by the parties that would apply to a deposition in this case.

C. HUD's financial and administrative involvement in CHA's program is limited.

Since the entry of this Court's decree of July 1, 1969, HUD has not entered into any financial commitments to make loans or annual contributions for the planning, development or acquisition of low-rent public housing units in the City of Chicago. However, it did issue a Program Reservation for 3000 units to the Chicago Housing Authority on September 8, 1969. (A Program Reservation merely sets aside or earmarks a certain number of units for a specific housing authority from HUD's nationwide authorization and is in no sense an undertaking to provide monies). It follows, therefore, that aside from projects in pre-construction and construction, which are subject to the Court's order in No. 67-C-1459, HUD's present financial involvement in low-rent housing in Chicago consists entirely of annual contributions, pursuant to contract, payable generally over a period of 40 years from the date of the contract to assist in the repayment of the bonds issued by the Authority to finance the capital cost of the projects.

The bonds are indeed secured by an undertaking by HUD, pursuant to Section 10 and 22 of the USHAct and the Annual Contributions Contract, guaranteeing to make payments of annual contributions in an amount sufficient, together with revenues from the project, to pay principal and interest on the bonds to maturity. Further, the full faith and credit of the United States is pledged to the making of those payments (Defendant's Memorandum in Support of

Motion to Dismiss, p. 3). Hence, the only "financial involvement" of HUD results from disbursements of annual contributions pursuant to solemn contractual obligations of the United States, which obligations are further secured by a pledge of the full faith and credit of the United States (Defendant's Memorandum in Support of Motion to Dismiss, p. 3).

HUD's administrative involvement, according to the plaintiffs, extends to almost every aspect of CHA's operation including site selection (Plaintiffs' brief, p. 32). The fact is, however, that section 1 of the USHAct declares the policy of the United States to vest in the Authority the maximum amount of responsibility in the administration of the low-rent housing program. The selection of sites is, and has been since the inception of the program, exclusively a local function. Nor does the fact that HUD has established site selection criteria, and reserves the right to approve each site selected based upon conformity to those criteria, convert the power of selection from a local to a federal function.

The legislative history of the United States Housing Act of 1937 and particularly of the policy statement in Section 1 make it emphatically clear that the principal reasons for the approval power in HUD are (1) to assure solvency of the projects; (2) to assure their continued low-rent character, which is necessary to protect the exemption of the projects from state and local taxes; and (3) to assure economy in development and operation of the

projects. In the case of site selection criteria, the mandate to implement Executive Order 11063 and Title VI of the Civil Rights Act of 1964 affords yet another basis in law for the adoption of site selection criteria by HUD. A chronological compilation of the site selection criteria for low-rent housing projects, showing the relationship to the factors of economy and efficiency, together with the factors inherent in the term "low-rent housing character," is attached as Exhibit C.

The promulgation of Executive Order 11063 in November 1962 led to the revision of the criteria which was released in September 1963. This revision, for the first time, incorporates a mandatory provision requiring nondiscrimination in site selection. The later statutory prohibitions of Title VI of the Civil Rights Act of 1964 caused further revision of site criteria in September 1965. These were supplemental to the HUD Regulations adopted by the Secretary after approval by the President. The subsequent revisions and refinements of site selection criteria reflect HUD's response and adaptation in the light of experience gained under the operation of the criteria. Notably in the revision released February 1967, HUD responded to applications for projects which, as a whole, were weighted on the side of a predominance of sites in areas of minority group concentration. The revision released in August 1968, formalizing earlier Circulars, was aimed at situations where the paucity of sites in areas of other than minority group concentration was due to the requirements of local law, such as zoning restrictions or the need for approvals by local bodies.

Those regulations were further implemented with Handbook regulations that were not published in the Federal Register, The fact that HUD evaluated the sites selected by the Authority in terms of those criteria scarcely compels a finding that HUD's "involvement" in the site selection process was somehow unlawful; rather it evidences a commendable concern for the exercise of its approval power in a manner compatible with the requirements of the Civil Rights Act of 1964.

As for HUD's awareness of the resistance on the part of the City Council to sites outside of Negro areas (Plaintiffs' brief, p. 32), what plaintiffs neglect to add is that HUD made strenuous efforts to induce the Authority to come forth with sites that would produce a more balanced program.

One of these efforts, in connection with the sites for CHA's proposed 1966 projects, is referred to in the Deposition of Joseph Burstein, at pages 100-108. The Deposition also reveals (pp. 98-100) that HUD made diligent efforts, and indeed retained a private firm, to obtain precise demographic information concerning the City of Chicago so that HUD could make a more informed review of the sites selected by the Chicago Housing Authority. Further, the decision was made to reject many of the 1966 sites if not withdrawn (as they ultimately were) by C.H.A. These sites were rejected for the very factors complained of by these plaintiffs -- high concentration of public housing in the black community. (Burstein deposition pp. 99-105) Servaites' affidavit attached to Reply in support of Motion to Dismiss)

Faced with the dough dilemma of accepting some other sites proposed by the Authority that were believed to be lawful but not optimal, or

rejecting those sites and depriving potential public housing tenenats of improved shelter, HUD chose the former alternative. If mere knowledge of the City's intention to resist desegregation implicates HUD, then the policeman is indeed implicated in the nefarious activities of those he pursues.

The fact of the matter is that HUD is punctillious in requiring that facilities provided with federal financial assistance shall be operated without discrimination on the basis of race, color, or national origin. Thus, for example, in the urban renewal program a developer who leases or purchases land in an urban renewal project area must accept a covenant in the deed by which he undertakes himself not to discriminate, but also to assure that there will be no discrimination in the operation and use of any portion of the redeveloped structure. In the low-rent housing program, the same objective is sought to be accomplished by provision for nondiscrimination in employment by the Authorities, by tenant assignment plans, and by regulations as to occupancy. Whatever deficiencies they may have in terms of the objective of providing expanded housing choices for minority group members, they constitute some evidence of continuous activity on the part of HUD to preclude the kind of discrimination that was held to be state action in Burton v. Wilmington Housing Authority.

D. The Entry of Judgment Against the Defendant would have Disastrous Consequences for the low-rent program throughout the country.

Plaintiffs seek a judgment against the Secretary because of HUD's financial and administrative "involvement" in discrimination by the Chicago Housing Authority. HUD deals with the Housing

Authority at arm's length; its relationship to the Housing Authority is defined by a meticulously drawn contract; and the rights and duties of the respective parties to the contract are clearly set forth. In the realm of site selection, as we have seen, it is for the Housing Authority to initiate and select, and HUD to approve or disapprove. This is Congressional policy, clearly set forth in the Act, and we submit that it represents sound policy. Nothing would be more catastrophic than to have the Federal Government dictate the sites for low-rent public housing in the areas covered by the more than 2500 housing authorities presently in the program. We have argued that failure to continue the disbursement of annual contributions to the Authority would necessitate repudiation by the United States of a contract obligation that was, with respect to each project, lawful when made. It stretches credulity that plaintiffs should ask this court to terminate a solemn obligation of the United States to the performance of which the full faith and credit of the United States is pledged. And yet that is precisely the relief that plaintiffs demand. The second prayer for relief on each count in the Complaint calls upon the court "after a full hearing * * * [to] permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the public housing system within the City of

Chicago * * *." If by that prayer, plaintiffs seek to have the United States dishonor the pledge of its full faith and credit to the discharge of its contract obligations (supra, p.), it is well that the consequences of such an action be known.

The Housing Authorities of the country are currently marketing an average monthly total of approximately $200,000,000 in short term securities called project notes. Those sales are made to obtain working capital for the construction of low-rent housing projects. The amounts and results of competitive bids for those notes over the last 12 months period are reflected in Exhibit D. Bonds employed to obtain funds for the retirement of project notes and permanent financing of the costs of construction or acquisition of low-rent housing projects are being marketed generally four times per year, with the total amount marketed in 1968-1969 exceeding $1,000,000,000. The amount and the results of competitive bids for those bonds over the last two years are reflected in Exhibit E.

The sad truth is that any injunction based upon the administration by HUD of the federally assisted low-rent housing program has an immediate and an escalating effect upon the cost of money for the entire program and tends to reduce the number of units that can be produced with any

given volume of annual contributions, if, indeed, such injunction did not result in halting financing on the private market altogether, because of the forced default in the security backing these issuances. The cost to the program currently of a 50 point (one half of one percent) increase in the rate for short term funds amounts to millions of dollars per annum. The cost of a similar increase in the rate for long-term funds is even more excessive. Both comparisons appear on Exhibits D-E. Clearly the Court cannot acquiesce in plaintiffs' prayer for relief without repudiating the full faith and credit of the United States, without irreparable damage to the continued provision of low-rent housing for the poor, and without incalculable harm to the very class of persons these plaintiffs represent. As this Court said in denying summary judgment on a Count seeking the cut-off of Federal funds in the companion suit of Gautreaux et al. v. Chicago Housing Authority:

> "In addition to the uncertainty of whether PHA would hold it appropriate to deny funds under the facts as they are now known, it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect." (296 F.Supp. 907, 915)

The Court might well have included in that thought a recognition that a denial of funds anywhere impedes the development of public housing everywhere, and damages poor people in need of public housing throughout the country.

E. The Entry of Judgment Against the Defendant would have Disastrous Consequences for the Administration of the Housing Titles of the Civil Rights Acts of 1964 and 1968.

Title VIII of the Civil Rights Act of 1968 prescribes the policy of the United States "to provide, within constitutional limitations, for fair housing throughout the United States" (42 U.S.C. §3601). The Act provides that "the authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development" (42 U.S.C. §3601). It also directs that "all executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary to further such purposes" (42 U.S.C. §3608(a)). [Underscoring ours].

The Secretary is directed to make studies of discriminatory housing practices; to publish and disseminate the reports, recommendations and information derived from such studies;

and to cooperate with public and private bodies formulating or conducting programs to prevent or eliminate discriminatory housing practices, including the Community Relations Service (42 U.S.C. §3608(d)). The Secretary is specifically enjoined to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title." (42 U.S.C. §3601(d)). [Underscoring ours]. The Secretary is given broad powers of investigation, education and conciliation, as well as quasi-judicial enforcement powers. (42 U.S.C. §3609).

Title VI of the earlier Civil Rights Act of 1964 was addressed to the problem of discrimination in programs or activities receiving Federal financial assistance. Although the President placed the power to coordinate enforcement of Title VI in the Attorney General (Executive Order 11246, 30 F.R. 12327, September 28, 1965), it is clear that the Secretary of HUD has the dominant role in effectuating the policy of the Act as it relates to federally assisted housing. The site selection criteria that govern the evaluation of specific proposals received from local housing authorities implement the more generalized prohibitions upon discrimination in determining the location of housing, that were adopted by the defendant with the approval of the President (24 CFR Part 1). Those regulations

serve to implement the Civil Rights Act of 1964, as do the criteria for local regulations governing tenant selection and continued occupancy.

It would be anomalous in the extreme for this Court to conclude that it has the necessary authority to wrest control of these vast civil rights responsibilities from the Secretary based upon contested approval actions extending back over two decades. The Congress has entrusted the defendant with responsibility for assuring fair housing throughout the United States. He will be called to account by the Congress for any derelictions in the discharge of that responsibility. Plaintiffs do not contend that defendant deliberately conspired to produce discriminatory housing in the City of Chicago. They talk vaguely of his financial and administrative involvement in the discriminatory site selection of the Chicago Housing Authority (supra, p.). This Court's decree of July 1, 1969 establishes a framework for eliminating the consequences of past discrimination by the Authority. HUD has undertaken to cooperate in the achievement of the objectives of that decree, and the Secretary is pursuing a number of avenues toward that end (Exhibit G).

Attached hereto as exhibits to this brief are an affidavit by Don Morrow, H.U.D. Deputy Regional Administrator for this area (Exhibit G) and a copy of the Government Memorandum filed by us in the companion case brought by these plaintiffs against C.H.A. (No. 66 C 1459). These documents reflect some of the undertakings by H.U.D. in cooperation with the decree of this Court against C.H.A. in that companion case.

The Government Memorandum filed in No. 66 C 1459 was more than a statement of legal position in a case; it was a statement of policy jointly expressed by both the Department of Justice and H.U.D., presented in response to the Court's request for views of the Government. That statement expressed support for the objectives previously set forth by the Court in its earlier opinion in that case; endorsed the Court's view that specific criteria were required in the final decree to be entered instead of a generalized order; and supported many of the specific provisions ultimately entered by the Court, while suggesting modification of a few. H.U.D. then went on voluntarily to undertake certain affirmative actions in aid of the Court's objectives:

1. To pay for a survey to locate available and suitable sites.

2. To fund activities to modernize existing public housing so as to make that housing located in the "limited" area as desirable and well-serviced as possible.

3. To encourage and approve use of other H.U.D. programs for improvement of neighborhoods into which housing projects are introduced pursuant to the Court order against C.H.A.

4. To participate in any arrangement whereby C.H.A. proposals pursuant to the order against it in 66 C 1459 are screened or reviewed by H.U.D. in order that this agency may furnish technical advice to the Court as to their conformity with the Court's order.

There has been no response to the fourth undertaking thus stated. We assure the Court that it is an offer still open, should the Court feel it is of assistance.

The first three undertakings have, in the intervening few months, been honored by the United States through H.U.D. activities described in the attached affidavit of the Deputy Regional Administrator Mr. Morrow (Exhibit G). In considerable detail, that affidavit sets forth H.U.D. program reservations for C.H.A. and Cook County Housing Authority, authorization of modernization funds to C.H.A., use of the 23(g) leasing program, and financing of a site selection survey including all of Cook County and parts of other adjacent counties. The affidavit also describes the many other efforts of H.U.D. to advance the purposes of desegregation and production of low-income housing. We invite the Court's attention to that most significant statement. Together with the other attachments hereto, it demonstrates clearly the defendant's committment to and voluntary action in support of the objectives of the Court decree against C.H.A.

The determination of which powers and programs to bring to bear upon the admittedly unsatisfactory housing situation in the City of Chicago belongs to the defendant. The determination of when, where, how, and in what amounts to commit Federal funds is a discretionary determination that belongs to the Executive officer empowered by statute to make it. It is not subject to direction by the judiciary. American Trucking Assn. v. U. S., 344 U.S. 298; Railroad Comm. v. Rowan & N. Oil Co., 310 U.S. 573; Kelly v. Pepco, 261 U.S. 428; Panama Canal Co. v. Grace Lines, 356 U.S. 309; Metalaka Indian Comm. v. Egan, 369 U.S. 45; City of Gary v. Derthick, 273 F.2d 319; J. T. Transport Co., Inc. V. U.S., 18 F.Supp. 838. (See also discussion in regard to Motion of Defendant to Dismiss.)

Moreover, the assumption of that authority by judicial decree, predicated upon a finding that defendant has been "involved" in discriminatory housing practices must necessarily undermine the Secretary's activities in the civil rights area as well as in the administration of the housing programs of the nation. He would lose all credence as the administering and enforcing agent of the Civil Rights Act of 1968, and his efforts to enforce the 1964 Act would be ridiculed as the efforts of a law violator to compel others to obey the law.

Surely, whatever the record of Federal "involvement" in discrimination by the Chicago Housing Authority, the time has not yet arrived for a Court to conclude that the defendant has been so derelict in discharging

his responsibilities under the Civil Rights Act that he must be made to operate within the confines of judicial decrees.

F. The Plaintiff's Objectives Will Be More Readily Achieved By The Voluntary Efforts Of The Defendant Than By The Coercion Of A Judicial Decree.

Plaintiffs' Brief discloses what is not at all apparent from the prayers of their Complaint. They appear to have abandoned their claim to a termination of Federal financial assistance for the program in Chicago, and seek instead to plow new ground by way of "such other and further relief as the Court may deem just and equitable" (Plaintiffs' Brief, p. 34-7).

They proceed from the premise that, under the Opinion of this Court in the companion suit (265 F. Supp. 907, 914) they "are entitled to the formulation of a comprehensive plan to remedy the past effects of unconstitutional sites in Chicago's public housing program." Since existing structures cannot be relocated to other sites, the Court's decree addresses itself to the location of future dwelling units. The speed and scope of the remedy, they conclude, depends upon how many and how rapidly new units are supplied.

Plaintiffs then state categorically that "a second major element of truly effective relief will be the ability to utilize areas beyond the geographic boundaries of the City of Chicago" (PL. Br. p. 35). Full relief, they contend, requires an order against HUD because 1) only HUD "can assure that full advantage will be taken of opportunities to implement the Court's judgment order outside the City," and 2) HUD

"plays at least as important a role as CHA in determining what the production and therefore the supply of future Dwelling Units will be" (PL. Br., p. 36). Therefore, plaintiffs conclude, the Court should enter an order directing HUD "to do everything which may appropriately be done" to provide plaintiffs with speedy and effective relief. Somewhat coyly, they suggest that the Court invite HUD to propose the form of an order.

The Brief Amicus filed by The Lawyers Committee for Civil Rights and others is scarcely less coy in disclosing proposals for solving the housing problems of the City of Chicago. "At this stage of the proceedings," it says, "it would be premature for petitioners to suggest the total nature of the action HUD might take in the circumstances of this case" (p. 11).

However, as a first bite, the Brief would have HUD employ to better advantage FHA foreclosed housing, 221(d)(3) moderate income housing with rentals reduced to public housing levels by rent supplements, 236 housing for lower-income families with rentals similarly reduced to public housing levels by the use of rent supplements, 235 sales housing for lower-income families, and 231 housing for the elderly further subsidized by rent supplements. These programs are said to be illustrative rather than exhaustive and are somehow to be employed throughout the six-county metropolitan area of Chicago.

In short, these proposals suggest the usurpation of the functions of the Executive Department by the Judiciary. The issuance of a decree of this nature would not insure housing activities in the Chicago market beneficial to these plaintiffs -- it would paralyze them! Moreover, the vehicles which are suggested do not serve the income group of which these plaintiffs are a part. The income groups which all HUD housing programs other than the low-rent housing program under the United States Housing Act of 1937 serve are, by statute, above the maximum income limits for admission to low-rent housing. All but a few families in continued occupancy in low-rent housing at or near maximum income limits for such occupancy are unable to afford to live in housing produced under these other programs.

Further, Congressional appropriation for these programs serving this minimal overlap of income groups are limited. The total dollar amount of rent supplement contracts authorized for the fiscal year 1970 is $50,000,000. Who shall decide how much of that total will be allocated to the Chicago metropolitan area? Do the plaintiffs propose that the allocation be accomplished by judicial decree? And when the courts of the nation hasten to enter similar decrees in order to protect the allocations that would otherwise obtain for their communities, will the law establish an order of priority based upon the date of entry of the decree?

These proposals are attempts by the plaintiffs to impose upon the nation their own views of how the enormously complicated

problems of achieving fair housing shall be tackled. Almost heedless of the consequences, they seek to direct the Secretary in the administration of his vast powers and in the expenditure of the vast sums and the vast spending authority placed in his discretion by the Congress and the President. Relief of that nature, however well motivated, is barred as a matter of law. In support of its unprecedented prayer for relief, plaintiff and the briefs amici cite the voting rights case of Louisiana v. U.S., 380 U.S. 145, (1965). Although the quoted portion of that case referred to in plaintiffs' brief (at p. 34) appears to give a court enormous equitable powers to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (p. 154 of 380 U.S.), the decree of the District Court actually did no more than enjoin the state from further use of its voter interpretation test and order voter registration requirements "frozen" in order to obviate the effect of prior discriminatory application.

The relief decreed in Louisiana v. U.S. and that sought in the present case are in no way analogous: "Freezing" or preventing the implementation of a proposed government program is considerably different from demanding that HUD affirmatively create a comprehensive housing plan for low and moderate income people for the entire Chicago metropolitan area.

Louisiana v. U.S., along with several other civil rights cases, was cited in Jackson v. Godwin, 400 F. 2d 529 (1968) to demonstrate the kinds of relief that had been granted to bar future discrimination. None of the cases compelled affirmative official action; each decree merely restrained the implementation of an established state rule or regulation (pp. 539-540 of 400 F. 2d for cases).

The amicus also cite two school desegregation cases in support of their theory for relief. Both cases merely reaffirmed a long standing principle that the court and not HEW has the sole responsibility of determining proper standards of constitutional protection. HEW standards serve as a helpful but not necessarily binding framework to be used by both the courts and school districts in framing acceptable plans. They serve as a broad nation-wide guidepost to aid local school districts to fashion their own individual plans. It in no way functions as a comprehensive plan regarding the administration of future HEW programs. In short, none of the cases relied upon by plaintiffs or the briefs amicus furnishes the slightest legal basis for this extraordinary relief.

Equally important to recognize is that the Secretary has undertaken voluntarily to cooperate fully in the achievement of the objectives of the Court's decree of July 1, 1969. Never once, however, have the plaintiffs or any of the persons who have filed briefs amici in this action come forward with a constructive proposal for the

identification of suitable sites for low-rent public housing or for the employment of HUD's programs so as to speed the expansion of housing opportunities available to these plaintiffs. Defendant on the other hand, has been engaged in continuous efforts to achieve precisely what plaintiffs demand (Exhibit H).[1/]

There is not the slightest evidence that the defendant is any less determined than the plaintiffs, or those who have filed briefs amici, to do what can be done to remedy the effects of past discrimination in the low-rent housing program in Chicago. There is even less reason to believe that this can be better accomplished by judicial decree than by the voluntary efforts of this defendant in action toward local officials.

HUD policy already encourages the utilization of all of HUD's programs for the purpose of housing low-income eligibles and providing suitable neighborhood facilities. A mandatory decree will do nothing to implement or strengthen that policy.

1/ Exhibit H is a compilation of many H.U.D. regulations and requirements applicable to its multitude of Programs, each of which makes careful provision for protection of equal opportunity and enforcement of the requirements of the Civil Rights laws.

A judicial decree will not produce sponsors for 221(d)(3) projects, or 231, 235 or 236 projects. The fact is that the necessity to operate under judicial decree is likely to discourage such sponsors.

Finally, we cannot wish away limitations upon authorizations and appropriations. A judicial decree will scarcely compel the provision of additional authority and funds by the Congress.

Conclusion

Plaintiffs brush aside the offer of cooperation in the Memorandum for the United States filed in their suit against the Housing Authority, and ask the Court to "/C/ contrast the * * * positive attitude of the National Commission on Urban Problems." (Claimants' Brief, p. 38) Plaintiffs ask the Court to enter a decree against the defendant as if the threat of contempt proceedings could constitute the magic wand that would translate the Commission's recommendations into reality. Unfortunately, such is not the case, as the Commission itself clearly recognized:

> "There are no simple mechanisms, and it is inevitable that we will continue to search for the right blend of Federal, State, city, and neighborhood participation." Report of the National Commission on Urban Problems, December 1968, p. 27.

Perhaps more to the point is the warning that the Commission issued with regard to direct Federal intervention in the solution of the Nation's housing problems.

> "Direct Federal intervention also raises serious policy questions. There is the risk of a uniformity and standardization that might result from a single Federal agency contracting for housing in many parts of the country. The size of the bureaucratic structure that could develop might stifle new

developments, new techniques and local variations. Above all, it might curb local initiative and the proper exercise of community prerogatives. That is why we place such emphasis on local, regional, and State action to get the job done." Idem.

However appropriate the recommendations of the Commission as long-range solutions to the problems of our urban centers, including discrimination in housing, they will not necessarily contribute one whit to the correction of the discrimination practiced in the City of Chicago against the class of persons whom the plaintiffs represent.

The formulation and the achievement of fair housing goals is in competent hands. This defendant was in no way responsible for the shortcomings of the low-rent housing program in Chicago, and there is no sound reason why he should be denied a free hand in encouraging and assisting the proper State and local officials to come to grips with those shortcomings.

The decree already entered in the companion case against the Authority provides the plaintiffs with a full measure of effective relief.

The incentives and the financial leverage that the plaintiffs seek to command by a judicial decree affecting political jurisdictions that are not party to this action or to the companion suit can best be exercised by this defendant without judicial oversight or control.

Moreover, as we have seen, there is no basis in law for fettering the exercise of discretionary authority by the Secretary merely because of his failure to terminate annual contributions under contracts that were valid when made, and that continue to be lawful obligations of the United States.

The motion for summary judgment should be denied and defendant's motion to dismiss should be granted.

Respectfully submitted,

THOMAS A. FORAN
United States Attorney
Federal Building
219 South Dearborn Street
Chicago, Illinois 60604
Phone: 353-5315