

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, ET AL.,

Plaintiffs-Appellants

v.

GEORGE W. ROMNEY, Secretary of the
Department of Housing and Urban
Development,

Defendant-Appellee.

No. 71-1073

APPELLEE'S RESPONSE TO OBJECTIONS TO MOTION
TO ISSUE MANDATE FORTHWITH

On October 29, 1971, the Government filed a motion to issue the mandate forthwith in the above styled cause. The only other party to the appeal, appellants Gautreaux, et al., did not interpose any objection to the granting of the motion. Accordingly, the motion was granted by Chief Judge Swygert on November 1, 1971.

The following day, the City of Chicago -- which was not a party to the appeal -- filed an opposition to the motion to issue the mandate. In its opposition, the City recited the fact that after this Court's decision on September 10, 1971, it had intervened in the district court. Thereafter, on October 1, the district court had entered an order under Rule 62(c), F.R. Civ. P., which had enjoined "pending the termination of the [present] appeal" the making available by HUD to the City of certain Model Cities Program funds (unless the City complied with certain conditions). The City has appealed from that order.

Upon the receipt of the City's opposition, Chief Judge Swygert stayed his November 1 order directing the transmission of the mandate forthwith. He further directed a response from the parties to the appeal.

To begin with, it is difficult to understand the basis upon which the City can properly object to the transmission of the mandate in an appeal to which it was not even a party -- particularly when none of the parties to that appeal has interposed an objection to the mandate being sent to the district court promptly. In this connection, it should be noted that, had it not been for the fact that the Government had requested and obtained a stay of the mandate in September (to allow it to consider seeking Supreme Court review), the mandate would have been transmitted to the district court long ago; i.e., on about October 1.

Secondly, the City's opposition is anomalous when regard is given to the fact that, just as soon as the mandate of this Court reaches the district court, the October 1 order (from which the City has appealed) expires by its own terms. As above noted, that order was issued under Rule 62(c), to be effective only until this Court had terminated the Gautreaux appeal -- by the transmission of the mandate. Thus, the City is taking these inconsistent courses of action: on the one hand, dissatisfied with the district court's October 1 order, the City is asking this Court to reverse it; on the other hand,

the City is opposing the issuance of the Gautreaux mandate which issuance would have the immediate effect of terminating the October 1 order. Stated otherwise, while prepared to tell this Court on its appeal that the October 1 order was improvidently entered by the district court, the City is asking this Court to prolong its life indefinitely. For the City desires that the mandate not only be withheld until November 15 (when it would issue in normal course under the stay granted to the Government in late September) but, in addition, that its issuance be further stayed until after this Court decides the City's appeal (which, if it proceeds, will be argued on December 10).

It is hard to imagine any circumstances in which a court of appeals should stay a mandate for the sole purpose of allowing a non-party to the appeal to force the court to decide the validity of a district court order which, if the mandate issues, will automatically terminate. In any event, no good reason for requesting such extraordinary relief is presented by the City. The sole ground assigned by the City is that, if the mandate issues and the October 1 order thereby terminates by its own terms, HUD may nevertheless continue -- as a voluntary matter free from any judicial restraint -- to withhold the Model Cities Program funds in question. But quite apart from the legal irrelevance of what HUD may decide to do voluntarily (even if this Court should reverse the October 1 order, HUD would not be under a legal compulsion to make the funds available), the City is engaging in nothing short of

rank speculation and conjecture. Moreover, even were HUD to withhold the funds for a short time to allow the district court to consider the effect of this Court's mandate, that period would undoubtedly be shorter than the interval between now and the time when this Court might decide the City's appeal (i.e., the interval during which, according to the City, the October 1 order should be left in effect).

In sum, the order of Chief Judge Swygert directing the forthwith issuance of the mandate was plainly called for by sound judicial administration. It obviated the need for this Court to consider a district court order which was intended to do no more than preserve the status quo pending the transmission of the mandate. Once the mandate reaches it, the district court will be obliged to make a rapid determination as to whether, consistent with this Court's decision in Gautreaux, it can continue to direct the withholding of Model Cities Program funds. If it concludes that it both can and should do so, and enters either a preliminary or permanent injunction, it will be time enough for this Court to consider the matter on an appeal from that injunction.

We respectfully submit that the stay of Chief Judge Swygert's order should be vacated and the mandate transmitted forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1971,
I served the foregoing Appellee's Response To Objections To
Motion To Issue Mandate Forthwith upon counsel for the appellants
and intervenors by causing copies to be mailed, air mail, postage
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