In the

United States Court of Appeals

For the Seventh Circuit

No. 71-1732-33-34

DOROTHY GAUTREAUX et al., *Plaintiffs-Appellees,* *vs.* **GEORGE W. ROMNEY,** *Defendant,* and **THE CITY OF CHICAGO, CENTRAL ADVISORY COUNCIL, and CHICAGO HOUSING AUTHORITY,** *Intervenor-Appellants.*	On Appeal from the United States District Court for the Northern District of Illinois. — Honorable **Richard B. Austin,** District Judge.

BRIEF FOR INTERVENOR-APPELLANT CITY OF CHICAGO.

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Oral Argument Requested.

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ISSUE PRESENTED.

Whether an order enjoining the defendant, George W. Romney, from releasing funds supporting the Chicago Model Cities program is within the scope of relief available to the district court pursuant to this Court's opinion filed September 10, 1971, in No. 71-1073, either as interim relief pending appeal pursuant to Rule 60(c) of the Federal Rules of Civil Procedure, or as permanent relief.

STATEMENT OF THE CASE.

This proceeding was initiated on September 17, 1971, by the filing of a motion by plaintiffs for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. The appeal in the principal case, *Gautreaux* v. *Romney,* 71-1073, was still technically pending because the mandate pursuant to this Court's opinion of September 10, 1971, had not yet issued.

The motion sought to stay the release of funds by the Department of Housing and Urban Renewal (hereinafter "HUD") for the second period of the Model Cities program in the City of Chicago.

From September 21 until September 24, 1971, a hearing on the motion was held in the district court and, on October 1, 1971, an order was entered enjoining the defendant, George W. Romney, from making available to the City of Chicago, pending termination of the appeal, any funds for the second period of the Model Cities program, unless the City complies with a stated condition.

The City of Chicago, not a party to the original proceedings, was given leave to intervene after the Motion of September 17, 1971, was filed. Also, the Central Advisory Council, representing the residents of the Model Cities areas, and the Chicago Housing Authority were granted leave to intervene.

STATEMENT OF FACTS.

On September 10, 1971, this Court, per Duffy, J., filed an opinion in *Gautreaux* v. *Romney,* No. 71-1073 (hereinafter *Gautreaux* II), remanding the cause to the district court and holding that the United States Department of Housing and Urban Development, through its Secretary, had violated the Due Process Clause of the Fifth Amendment and Section 601 of the Civil Rights Act of 1964 (42 U. S. C. sec. 2000d). Section 601 prohibits racial discrimination in any program receiving federal financial assistance. This case is one of two separate suits filed by the plaintiffs in 1966 and was stayed in the district court pending disposition of the other case, *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (hereinafter *Gautreaux* I). Both suits were concerned with racial discrimination in the placement of the same public housing. The defendant in *Gautreaux* I was the recipient of federal funding; the defendant in *Gautreaux* II was the grantor.

The district court entered a decree in *Gautreaux* I which established regulations for the future construction of public housing. The decree was not appealed. The district court, however, dismissed the companion suit. An appeal of that decision followed, leading to the opinion filed by this Court September 10, 1971, reversing and remanding.

On September 17, 1971, plaintiffs moved in the district court for an order enjoining the release by HUD of $26,000,000 in federal funds to support the second of five planning periods or "years" comprising the Chicago Model Cities program. Plaintiffs asked for a hearing "on the question of whether the unconditional release of such $26,000,000 is appropriate, or whether such release might

substantially prejudice this Court's ability to enforce provisions of its decree in the companion case." (Plaintiffs' Motion Pursuant to Rule 62(c), par. 10.)

A hearing was held from September 21 until September 24, 1971. The attention of the Court is respectfully directed to the Statement of Facts, Brief for Intervenor-Appellant Chicago Housing Authority, pp. 2-16, for a description of the testimony taken by the district court. On October 1, 1971, the district court entered the injunction as requested by the plaintiffs.

ARGUMENT.

I.

THE ORDER APPEALED FROM IS ARBITRARY AND CAPRICIOUS IN THAT IT ENJOINS RELEASE OF FUNDS SUPPORTING A PROGRAM NOT PROPERLY BEFORE THE COURT, EITHER FOR PURPOSES OF PRESERVING THE STATUS QUO PENDING APPEAL OR OF GRANTING RELIEF UPON REMAND, SINCE THE CHICAGO MODEL CITIES PROGRAM IS NOT FUNCTIONALLY RELATED TO THE PROGRAMS BEFORE THE DISTRICT COURT IN EITHER OF THE GAUTREAUX CASES.

After considering jurisdictional questions, this Court, in *Gautreaux* II, considered the merits of the case, defining the dispositive issue as "whether or not . . . HUD's knowing acquiescence in CHA's admitted *discriminatory housing program* violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964." (Emphasis supplied.) The Court's decision was that, "Given a previous court finding of liability against CHA (296 F. Supp. 907 [*Gautreaux* I]), the pertinent case-law compels the conclusion that both of these provisions were violated." (Slip sheet opinion, p. 10.) The precise statutory prohibition, Section 601, reads as follows:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (42 U. S. C. Sec. 2000d.)

The "pertinent case-law" to which the Court referred was, of course, *Gautreaux* I which recognized that plaintiffs had "the right under the Fourteenth 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." (265 F. Supp. 582, 583; emphasis supplied.)

In *Gautreaux* II, plaintiffs "contended that such 'other and further relief' might include a more vigorous utilization of the several different types of *housing programs* which HUD administers" (slip opinion, p. 8) and on this basis the Court declined to find the controversy moot despite the fact that a decree had already been entered in the companion case. It is thus beyond dispute that, until September 17, 1971, the date upon which the plaintiffs filed their motion, all participants in these cases, both the litigants and the courts, characterized the central issue as one involving solely the construction of public housing.

However, rather than exploring the "several different types of housing programs which HUD administers," the plaintiffs have jeopardized a program which as administered is so remote from the construction of public housing that it is entirely beyond the scope of relief made available by this Court's opinion in *Gautreaux* II. An examination of the program will explain why this is so.

"Model Cities" is the short-hand title for Comprehensive City Demonstration Programs funded by HUD under the Demonstration Cities and Metropolitan Development Act of 1966. In accordance with the Congressional declaration of purpose in the Act, 42 U. S. C. sec. 3301, the Chicago Model Cities program seeks to improve the quality of urban life in four geographic areas:

1) Midsouth, bounded by 60th Street on the north; 67th Street on the south; Cottage Grove on the west; and Stony Island Avenue on the east;

2) Near South, bounded by 39th Street on the north, Federal Street on the west; 51st Street on the south to Cottage Grove; north on Cottage Grove to 47th Street; east to Lake Michigan;

3) West, bounded by the Eisenhower Expressway on the north; 21st Street on the south; Rockwell Street on the east; Hamlin Avenue and Independence Boulevard on the west;

4) North, bounded by Irving Park Road and Montrose Avenue on the south; Lawrence Avenue and Foster on the north; Clarendon Avenue and Sheridan Road on the east; and Clark Street on the west.

The first three of the areas have a predominantly Black population; the fourth has a mixed population with a high concentration of Appalachian Whites, Spanish-speaking nationalities, and Orientals (T. 277; App. Vol. I, p. 188).

Model Cities in Chicago is a five-year "phased" plan, that is, there are five periods or "years" (sometimes lasting longer than twelve months), each of which is dependent upon the progress of the preceding period (T. 264; App. Vol. I, p. 175). An example of the plan's continuity is found in the testimony of Theodore Robinson, Model Cities officer for the Regional Administrator of HUD, who was called as an adverse witness by the plaintiffs:

> ". . . The Chicago Model Cities program plans, in a five-year period, to establish in each of the four target areas a full functioning hospital and clinic. The first phase, the first year's program, set up clinics in rented quarters and allocated money for site acquisition for the construction of the buildings where these facilities will be built.
>
> "About six million dollars has been committed in firm contracts for land sites for these hospitals, for equipment that was purchased early in order to avoid the effects of inflation. Staff has begun to be assembled.
>
> "The second year will carry these one step farther, construction of buildings and establishment of the health services in these facilities.

"The five-year result is expected to be a full functioning hospital to take a big part of the load off of Cook County Hospital by having full functioning hospitals and clinic services in each of these areas." (T. 265-6; App. Vol. I, pp. 176-7.)

Among other representative programs in the comprehensive plan are the following:

Project 3789—Kennedy King "Mini-college"—(located in Grant Memorial Church, near Washington Park Homes and Madden Park Homes), primarily to expand upon educational opportunities for area residents. This service is provided to 350 students (50 adults, 50 non-high school graduates, and 150 first-year college students) and grants a general education diploma.

Project 4581—Prevention of Juvenile Delinquency—(Department of Human Resources, adjacent to Taylor Homes and Washington Park Homes in scattered sites), a cooperative service involving the Juvenile Court and Chicago Police Department, providing social and other corrective services to delinquents in cooperation with parents and the institutional community.

Project 6584—Consumer Education—(located in Washington Park Homes)—provides comprehensive services in the area of consumer education for the residents of the area.

Projects 3482 *et seq.*—Community Schools—located in three elementary schools—provides (1) free breakfast and lunch programs, (2) Early Childhood Development Services for 360 children between the ages of three and five years, involving a total paid staff of 45 adults primarily employed from the neighborhood, and (3) community evening schools, structured through local community involvement (Advisory Councils, each of three supported with an allocation of $60,000 for

program planning and each with a local membership of 25).

Project 5384—Day Care Centers—two centers with a capacity for 100 children each; 32 jobs in each center of which 26 in each center are held by CHA residents.

Under the Model Cities program in Chicago, each of the areas has a locally elected council which establishes the priorities for each area and must approve each project before it can be considered by the City Council and HUD (T. 438-441; App., Vol. II, pp. 344-7). When asked what the "topmost priority" was for the residents of Model Cities areas, HUD's Model Cities officer replied:

"Education, health, jobs, in the first year. Similarly, housing has moved up the priority list, but education and jobs are still the highest priority determined by the residents of the neighborhoods as their choice of how they want the program administered for the benefit of their neighborhood." (T. 263; App., Vol. I, p. 174.)

To the extent that Model Cities has any involvement with housing, it is narrowly restricted, and has nothing whatever to do with the construction of public housing. One program supports a leasing program; another provides technical and personal assistance to over-income families in CHA seeking private housing. A third program acquires vacant land where available for later conveyance to community-based not-for-profit developers. Related to this program is one providing technical assistance to the not-for-profit developers, and another providing legal and architectural fees for these same developers (recoverable from the Federal Housing Authority-FHA-at the time of closing. The point of these efforts, of course, is to encourage locally-sponsored private development of housing. The last program, the Community Building Maintenance Corporation, is to establish a locally-operated, prototype business en-

terprise which performs minor repairs to existing housing. The total planned expenditure for all six programs, none of which, again, involve the construction of public housing, is approximately three million dollars, out of a total of approximately 76 million dollars projected for Model Cities' first two periods (T. 466-8; App., Vol. II, pp. 372-4).

A tangential "housing" aspect of Model Cities is found in the statutory requirement that relocation assistance be provided to those who, as a result of Model Cities projects, are displaced. 42 U. S. C. sec. 3307. The regional Model Cities officer for HUD observed that the City completely met its requirement for the second period of the Model Cities program (T. 253-5; App., Vol. I, pp. 164-6). The relocation required was principally due to one project, acquisition of land for a multi-purpose center, which necessitated demolition of approximately 12 buildings. A total of approximately 60 families were provided with relocation assistance by the City of Chicago (T. 295; App., Vol. I, p. 206).

It is thus possible to contrast the Model Cities program in Chicago, which in intention and in accordance with the priorities established by area residents, is a social service funding device, with the two *Gautreaux* cases which are concerned exclusively with elimination of racial discrimination in the placement of public housing. The district court did not confuse the two programs: "I am fully aware that this has nothing to do with housing. . . ." (T. 792.) Nevertheless, the order halting Model Cities funding was entered by the district court.

Beyond the functional realities which distinguish the localized social service program from the city-wide public housing program, there is a specific Congressional policy which separates the two. This Court based the liability of HUD in *Gautreaux* II upon a violation of Section 601 of the Civil Rights Act of 1964 (42 U. S. C. Sec. 2000d), set

out *supra,* at p. 5. This section formed the basis of the decision in *Gautreaux* I, as well, 265 F. Supp. 582, 583-4. This section prohibits racial discrimination in the use of federal funding. In the context of the two *Gautreaux* cases, it was determined that defendants had used federal funds in the construction of public housing in a discriminatory manner. Section 601 is followed by Section 602 (42 U. S. C. sec. 2000d-1) which states, in pertinent part:

> "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance *under such program or activity* to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made *and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found,* or (2) by any other means authorized by law. . . ." (emphasis supplied.)

This provision limits the authority of HUD as to the type of sanctions which may be imposed; it denies the capacity to invoke a blanket revocation of federal financing and requires of HUD that it be selective so as to salvage those programs or parts of programs that are not racially discriminatory. It is thus clear, under the terms of the very statute violated in both *Gautreaux* cases, that Congress intended that the integrity of any complying program be respected and, indeed, protected from guilt by association. Without question, Congress sought to avoid the absurd situation in which the goals of one government policy are thwarted ostensibly because to do so would promote the goals of a different government policy.

That the district court allowed itself to be trapped by the dilemma that Section 602 eliminates is demonstrated

by the court's comment (T. 841-2): "You are now telling me that it is better for some child to have breakfast than to provide an opportunity to move out of the ghetto. . . ." There are two obvious errors in the way the court posed this value judgment. First, there is an illusory dependence between the two clauses in the proposition One is *not* dependent upon the other, i.e., denial of breakfast will not necessarily result in an opportunity to move. Second, the dilemma is essentially irresolvable—it is the policy of the government to provide both breakfast *and* housing, not one at the expense of the other.

In *Board of Public Instruction* v. *Finch,* 414 F. 2d 1068 (C. A. 5, 1969), the Court of Appeals held that Section 602 was enacted specifically in response to Congressional fears that the administrative authority to terminate aid to schools "might also lead to termination of aid to roads and highways," and other programs, 414 F. 2d at 1077. Three separate and distinct programs were before the court. One involved aid for education of children of low-income families; the second concerned grants for supplementary educational centers; the third provided grants for adult education. The court said that "each of the programs has a different objective; each requires a separate plan and separate administrative approval. . . ." and concluded that

> "In order to affirm HEW's action, we would have to assume, contrary to the express mandate of 42 U. S. C. A. sec. 2000d-1 [Section 602], that defects in one part of a school system automatically infect the whole. Such an assumption in disregard of statutory requirements is inconsistent with both fundamental justice and with our judicial responsibilities." 414 F. 2d at 1074.

The court was obviously persuaded by the debates in the Senate and House of Representatives concerning the addition of Section 602 to the Civil Rights Act and cited, for example, the comments of Senator Pastore:

> "'Section 602, by authorizing the agency to achieve compliance "by other means authorized by law," encourages agencies to find ways to end discrimination without refusing or terminating assistance. These careful safeguards certainly demonstrate that the proposed statute is not intended to be vindictive or punitive.'" (Quoted 414 F. 2d at 1075, n. 11.)
>
> "'[The enforcing officer] might go before the court and obtain some kind of injunctive relief or some kind of mandatory relief which would compel compliance subject to a citation for contempt of court. We would not have to cut off assistance to 100 people because 1 person was being discriminatory in the administration of the money.'" (Quoted 414 F. 2d at 1075-6, n. 12.)

It should be noted that there has never been a suggestion that the Chicago Model Cities program has itself been administered in a racially discriminatory fashion. And it should be further noted that the difference between social services and construction of public housing is considerably more obvious than the three arguably related education programs before the *Finch* court.

Thus, HUD could not, on the facts before the district court, have terminated the Chicago Model Cities funds for the violations involved in either of the *Gautreaux* cases. Yet, on these very same facts, the court below has, in effect, directed HUD to violate Section 602—to do precisely what Congress has explicitly commanded should not be done. Platitudes about the general equity jurisdiction must not be allowed to conceal the simple fact that the injunction entered below flouts the expressed will of Congress. The House and Senate were not concerned with *who* should wreck desperately needed social programs; rather, they were concerned that it should not be done at all.

II.

THE INJUNCTION ENTERED BY THE DISTRICT COURT IS DIRECTLY CONTRARY TO THE INTEREST OF THE CITIZENS WITHIN THE SCOPE OF THE MODEL CITIES PROGRAM.

In *Board of Public Instruction* v. *Finch,* 414 F. 2d 1068 (C. A. 5; 1969), the Court of Appeals found it

> ". . . important to note that the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs *not* tainted by discriminatory practices." (414 F. 2d at 1075; footnote omitted.)
>
> "The termination of federal funds affects the lives of persons not represented in the administrative proceedings below. For their protection, we may not regard the limitations on the termination power as mere procedural niceties peripheral to the purposes of the Act. Congressional history indicates that limiting the scope of the termination power was integral to the legislative scheme. 100 Cong. Rec. 7063." (414 F. 2d at 1076.)

The reference, of course, is to Section 602 of the Civil Rights Act of 1964. And the attitude of the Court finds concrete support in the situation of the Chicago Model Cities residents.

It is established that approximately 4,000 persons are employed through the Chicago Model Cities program. Of this total, 140 to 150 are administrative personnel. The remainder are employed by the funded agencies carrying out approved projects. Eighty-one percent of the 4,000 employees are residents of the four Model Cities neighborhoods. Seventy-six percent of the employed residents are the primary wage earners in their households (T. 441-2;

App., Vol. II, pp. 347-8). Over 75 percent of the resident employees are earning more now as a result of their Model Cities work than they were prior to the program (T. 443; App., Vol. II, p. 349). Priority was given to projects maximizing opportunities for neighborhood employment in an effort to direct economic resources to Model Cities areas (T. 442; App., Vol. II, p. 348).

The Model Cities areas are afflicted by health problems. Doctors have left these areas in pursuit of higher-income patients. As a result, the areas have suffered in their accessibility both to emergency care and to general health care. Children, lacking treatment for dental, visual, and other health problems, are handicapped to the extent that they cannot learn in school (T. 445; App., Vol. II, p. 351).

Model Cities' response, at the instance of the residents, was to provide for health centers. One is under construction in the Uptown community; temporary service is available at an interim facility. A second is under construction in the Near South community at 43d Street and Berkeley. A third is under construction at 64th Street and Woodlawn in the Midsouth community. A fourth center has been established through renovation of a clinic at the Provident Hospital; this facility is presently operating (T. 446; App., Vol. II, p. 352).

Perhaps the most succinct statement of the hardship resting on the Model Cities residents as a result of the injunction was made by Mrs. Artensa Randolph to the court below. Mrs. Randolph lives in a housing development, the Washington Park Homes, located in the Near South area. She testified:

> "In the near target area where I live there is free breakfasts, lunch, recreation facilities. Before the Model Cities came along, as you know, when housing developments were put up there was no recreational facilities for our children. Since the Model Cities have

come along and the evening schools are open, there are recreational facilities, arts and crafts, educational status were, as in the building where I live, most people were all on public aid, but since the Model Cities have come along, most families are now off public aid and working for the Model Cities as teacher aids, lunch room helpers, recreational aids and so forth.

"Our children do have a chance through the Model Cities program to participate in the library program which they never had a chance because Model Cities furnished the funds for them to go to and from the library." (T. 723-4; App., Vol. II, pp. 571-2.)

It may be added that, in an effort to continue the programs for Model Cities until the funds can be released, the City has used some $8 million of his own funds, taken from other needed programs in which payment is not yet due. These funds were made available on the assumption that they would be recoverable from the federal grant when that was available. Temporarily available funds cannot, obviously be considered a permanent source for the program. They were used only as a stop-gap in reliance on repayment. Thus, while most urban agencies are simply a conduit for the distribution of Model Cities funds, in this case the City of Chicago is deeply committed and involved in the continuance of the program (T. 543-4; App., Vol. II, pp. 441-2). It, too, will suffer hardship as a result of the injunction. It is true, as plaintiffs' attorney has pointed out (T. 739), that City contracts with operating Model Cities agencies permit the City to terminate the agreement without cause on ten day notice. The observation, however, offers little solace to the residents of the four target areas; or to the City as a whole which hopes to correct the social pathology of urban decay. There are many, it would appear, who view the Model Cities program as something more than "gilding the ghetto", as plaintiffs' counsel described it (T. 780-1).

Finally, it is to be noted that the district court conceded that

"failure to continue the Model Cities Program for the next three months would have a devastating effect on the tens of thousands of the citizens of this City. Four thousand would lose their jobs and many other thousands would be deprived of the benefits derived from the Model Cities Program." (Memorandum opinion, p. 8; App., Vol. I, p. 22.)

For these reasons, it is submitted that the court below committed a gross abuse of discretion in entering the injunction order despite the immediate, direct, and adverse effect it has on the public interest.

III.

NO RIGHTS WERE CREATED BY THE LETTER OF INTENTION.

In a desperate attempt to tie Model Cities to the construction of public housing, plaintiffs rely heavily upon a letter dated May 12, 1971, by Richard J. Daley, Mayor of the City of Chicago, and Charles R. Swibel, Chairman of the Chicago Housing Authority, to George Vavoulis, Regional Administrator for HUD. This document, self-servingly characterized as an "Agreement" by the plaintiffs (see plaintiffs' Motion Pursuant to Rule 62(c), filed September 17, 1971, par. 9; App., Vol. I, pp. 12-13), is by its terms described as a "letter of intention."

The letter was drafted in response to a City of Chicago-HUD joint staff report which identified a housing deficiency in Chicago of approximately 4300 units. As a result of this shortage, virtually all urban renewal development was halted, and demolition has been restricted to dangerous structures. Federal funds for urban renewal under the Neighborhood Development Program (NDP), 42

U. S. C. sec. 1469 *et. seq.* were no longer available, and HUD was concerned with those persons who might be displaced as a result of Model Cities projects. The relatively minute displacement by Model Cities projects was easily remedied (T. 295; App., Vol. I, p. 206) and as already been noted, Model Cities relocation was subsequently approved by HUD (T. 253-5; App., Vol. I, pp. 164-6).

The target number of 4300 units was attacked, however, in meetings between HUD and City representatives (T. 298). In preparing the statement of objectives toward which all agencies with the power to affect the housing supply would work—HUD, the City, CHA—numerous forms were considered. One was, specifically, an "agreement"—but it was rejected (T. 299; App., Vol. I, p. 210). The statement selected was the letter of intent, dated May 12, 1971 (Plaintiffs' Exhibit 4; App., Vol. III, p. 17).

In identifying the possible sources for eliminating the deficit of 4300 units, the flexible language of the letter indicates the lack of rigidity contemplated in the 'mix" of housing sources. Thus, leases will be sought for "up to 1,200 families." (Pl. Ex. 4, p. 3; App., Vol. III, p. 19.) Private developers will be required to make 20 percent of units developed pursuant to Section 236 available under rent supplement contracts—the actual number of units would obviously be beyond the control of any of the signatories of the letter, although it was hoped that "This should provide 600 units within the City of Chicago" (Id., p. 5; App., Vol. III, p. 21). Further, with respect to CHA housing, community meetings and technical reviews notwithstanding, "It is anticipated that sites would be identified and processed by the City" (Id., p. 6; App., Vol. III, p. 22). In addition, the City anticipated that it would pursue six long-range developments affecting the housing supply, with no specific number of units indicated (Id., p.

9; App., Vol. III, p. 25). Finally, "It is agreed that proposed modifications may be made to this memorandum of intent if concurred in by all signators to this statement." (Id., p. 15; App., Vol. III, p. 31.) Clearly, the language of the letter is not the language of a binding legal document upon which, for example, the City of Chicago could base a suit against HUD for specific performance.

Moreover, the letter does not call for adoption by the corporate authorities of either the City or CHA, nor, in fact, was there any such adoption.

Plaintiffs' attempt to read into the letter a conditioning of Model Cities services upon meeting the goals of *Gautreaux* I and II is again contradicted by Section 602 of the Civil Rights Act of 1964 which reads, in pertinent part:

> "Each Federal department . . . is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President."

It is, of course, not possible to consider the letter a "rule . . . of general applicability." The letter was obviously never approved by the President.

In any event, it must be conceded that the City has achieved significant performance in meeting the goal of 4300 units of housing. This fact was recognized by the Regional Administrator of HUD, who informed the Mayor (Pl. Ex. 6; App., Vol. III, p. 110) on June 21, 1971, that "The City has made a great deal of progress toward achieving the objectives set forth in the Letter of Inten-

tion." It was his opinion, however, that "it is evident that the City needs more time to fulfill its housing goals" with respect to CHA sites (Id.).

The progress to which the Administrator referred includes the following: demolition was reduced by 560 units rather than the 500 units mentioned in the letter;

—429 units of Section 235 housing were under construction contract as of September 10, 1971, and an additional 71 units were in negotiation for contracts to be executed. The letter's goal was 500 units.

—As of September 10, 1971, the Cook County Housing Authority had entered into a contract with the Chicago Housing Authority for the construction of 500 units beyoud the territorial limits of the City of Chicago. The letter's goal was 500 units.

—1447 Section 236 units subject to the rent supplement program have been secured and identified. The letter anticipated 600.

—sites for 732 CHA units were approved by the City Council prior to September 10, 1971. Approximately 300 of the units are located in the General Housing Area, as defined by *Gautreaux* I (304 F. Supp. 736, 737), and the balance of approximately 432 units are located in the Limited Area. The letter anticipated 850 units by September 15, 1971.

—two "new communities" have been planned, one at 116th Street and Torrence, another at Lake Calumet, with a total capacity of 8900 units, of which 1334 are reserved for low income families. The letter did not project an anticipated achievement.

In view of the above it is clear that the district court's finding that "there was no intention by each of the above parties to comply with their undertakings," (Memorandum Opinion, p. 7; App., Vol. I, p. 21) is arbitrary and unsupported by any evidence before the court. The court's injunction is thus secured by a chain of error: error in that the evidence indicates that the letter was followed in good faith and with significant achievement of its objectives; error in treating the letter as a legally binding agreement; error in believing HUD could evade statutory restrictions through the device of a letter; error in using the letter to tie together two conceptually and functionally distinct federal programs.

IV.

THE ORDER APPEALED FROM ARBITRARILY INTRUDES UPON A LEGITIMATE COURSE OF ADMINISTRATIVE DISCRETION.

While plaintiff's motion of September 17, 1971, purports to seek maintenance of the "status quo" under Section 62 (c), the language of the motion and the evidence placed before the district court make it clear that the proceedings were, in effect, to review an administrative decision by HUD. Therefore, even though federal jurisdiction has not been invoked under the Administrative Procedure Act, 5 U. S. C. sec. 702 *et seq.*, it is relevant to examine what the scope of review would be in the district court if this were an occasion for administrative review. In such circumstances the district court may set aside agency action if it is 1) contrary to constitutional right, power, privilege, or immunity; 2) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or 3) if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U. S. C. sec. 706.

First, it has never been contended that the Regional Administrator of HUD acted unconstitutionally in deciding to continue Model Cities funding.

Second, the district court acknowledged that the Administrator was under no statutory obligation to terminate Model Cities under the facts of this case (T. 846). Indeed, as has been argued above, the relevant statute, Section 602 of the Civil Rights Act of 1964, proscribes termination under these facts. (Even in situations where termination is permitted, notice of noncompliance is required as well as "a full written report" to Congress.) As has further been demonstrated HUD may not evade the requirements of Section 602 by imposing otherwise illegitimate conditions through the device of a letter of intention.

The remaining considerations for Administrative Review go to the issue of arbitrariness and abuse of discretion. The Rule is that:

> "A court has no warrant to set aside agency action as arbitrary or capricious when those words mean no more than that the judges would have handled the matter differently had they been agency members. Judicial intervention must, instead, be rested upon a demonstration that the agency action has transgressed the statutory boundaries, either because it is beyoud the scope of statutory authority or because the findings underlying it lack significant support in the record." *Calcutta E. Coast of India* v. *Federal Maritime Commission,* 399 F. 2d 994, 997 (C. A. D. C., 1968).

Moreover, administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. *N. L. R. B.* v. *Jas. H. Matthews & Co.,* 342 F. 2d 129, 131 (C. A. 3; 1965). Unless it is unsupportable, court must give deference to the choice of remedy made by the administrative agency. *United Steelworkers of America* v. *N. L. R. B.,* 376 F. 2d 770, 773 (C. A. D. C., 1967).

Under these standards, the Regional Administrator's decision was anything but arbitrary. He held frequent

meetings with City officials; he walked the Model Cities areas seeking resident views (T. 166-7; App., Vol. I, p. 109); he declined to release funds supporting urban renewal activities in the amount of 20 million dollars; he saw to it that the handful of persons displaced due to Model Cities activities was assisted (T. 253-5; App., Vol. I, pp. 164-6); he sought to identify vacant federal land suitable for use in low-income housing (T. 643); and he notified sponsors of Section 236 housing that HUD expected them to provide 20 percent of their units for the use of persons eligible for rent supplements (T. 632, 637; App., Vol. II., pp. 524, 529). The Administrator testified that he had several discussions with plaintiff's attorney because he wanted to find out

> "What would be gained by my cutting of the Model Cities funding program, and I tried to point out that the Model Cities program was a social program and that I could not at this time from my knowledge of the programs, and what I had seen, the Model Cities serving, that it would have any effect on the housing program, and I said, 'What would be gained?' And I said, 'I can't, in my own sense of responsibility deny the poor people of the City of Chicago these services. What would be gained?'
>
> "And at that particular time, I was advised that this is a price you pay for progress.
>
> "Well, this is the judgment factor again." (T. 614; App., Vol. II, p. 512.)

The Administrator was exactly right. It was a judgment factor. The district court obviously disagreed. But it cannot responsibly be suggested that the Administrator's decision was irrational, that it was arbitrary and capricious. Accordingly, the district court should not be permitted to assume the responsibilities of HUD's administrator by making policy judgments beyond the scope of its authority.

V.

THE DISTRICT COURT ACTED ARBITRARILY WHETHER THE ORDER ENTERED IS CONSIDERED ARGUABLY WITHIN RULE 62(c) OR IS CONSIDERED THE FUNCTIONAL EQUIVALENT OF PERMANENT RELIEF.

By its terms the injunction entered by the district court is awarded pursuant to Rule 62(c) of the Federal Rules of Civil Procedure and the opinion of this court in No. 71-1073. As that opinion notes, the relief sought by the plaintiffs in the complaint filed in this case, other than declaratory relief, was for an injunction against HUD to prevent it "from making available to the Chicago Housing Authority any federal financial assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system." *Gautreaux* v. *Romney,* September 10, 1971, slip opinion, p. 1. As has already been explained, Model Cities has neither a "connection with" nor does it "support" public housing in Chicago, whether discriminatory or non-discriminatory. Plaintiffs' utter silence concerning such a relationship from the time of filing the complaint until September 17, 1971, when their motion was filed raises suspicions as to whether they ever considered it as an element of the program of public housing. The answer, of course, is that it has no relationship at all to the *status quo* that might exist between HUD and the programs directed toward the construction of public housing. Rule 62(c) "is merely expressive of a power inherent in the court to preserve the status quo. . . ." 7 Moore, Federal Practice, Sec. 62.05 (2d ed.). There is thus no basis for grounding the injunction in that provision of the Federal Rules.

Plaintiffs only served to obscure the issues when, in the motion for injunctive relief filed September 17, 1971, they stated, at paragraph 10:

> "Under the foregoing circumstances plaintiffs are entitled to a hearing on the question of whether the unconditional release of such $26,000,000 is appropriate, or whether such release might substantially prejudice this Court's ability to enforce provisions of its decree in the companion case."

As we have argued above, the question of whether the release of funds was "appropriate" was a matter within the discretion of the Administrator and not within the jurisdiction of the court. It is submitted that the question of the court's ability to enforce its decree in *Gautreaux* I should such funds be released was never explored by the plaintiffs.

The fact is that the order entered is the functional equivalent of a permanent injunction. It does not maintain the *status quo,* rather it decidedly upsets it. By its nature, the order would only be effective if it were to continue beyoud issuance of the mandate in No. 71-1073. Moreover, there is nothing in the Record to indicate that the district court would not enter the same order once the mandate is issued. Alternatively, the district court might achieve the same result without actually entering a successor injunction, but by simply allowing the threat of possible future repetition to case a shadow over the Model Cities program.

The opinion filed by this Court on September 10, 1971, in No. 71-1073, concluded as follows:

> "In so holding we state *only* that the Secretary must be adjudged liable on these particular facts and again point out that our holding should not be construed as granting a broad license for interference with the programs and actions of an already beleagured federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple 'best efforts' clause will be necessary to remedy the wrongs which have been found to have been committed." (Slip opinion, p. 15.)

In view of the proceedings below, the City believes it necessary to respectfully ask this Court to treat the order entered as the functional equivalent of permanent relief so that its judgment can be conclusive and beyond technical evasion. The people of the Model Cities deserve to know what opportunities will or will not be available to them. They have been treated as pawns for too long in an unhappy contest of wills.

CONCLUSION.

For the above reasons, the City of Chicago respectfully requests this Court to vacate the order of injunction entered October 1, 1971.

Respectfully submitted,

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