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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,)	
)	
Plaintiffs)	
)	Nos. 66 C 1459
v.)	66 C 1460
)	(Consolidated)
CHICAGO HOUSING AUTHORITY,)	
PATRICIA HARRIS,)	
Secretary, et al.,)	
)	
Defendants)	

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR FURTHER RELIEF AGAINST
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

I

INTRODUCTION

On September 22, 1978 plaintiffs, by their attorneys, filed a motion for further relief against the Department of Housing and Urban Development (HUD) with exhibits. As further relief, plaintiffs ask this court for an order enjoining HUD from providing FY '78 Community Development Block Grant (CDBG) funds to the City of Chicago, unless HUD agrees to impose specific enforceable conditions on the City's funding approval. The conditions, which plaintiffs seek, apparently would require the City to amend its housing assistance plan (HAP), a component part of the City's CDBG

application, to include specific actions which, plaintiffs believe, will augment the City's performance in making available housing units for low-income persons, including members of plaintiff class.

II

STATEMENT OF FACTS

On ^{July 14} May 31, 1978, the City of Chicago submitted its application for CDBG funds for its fourth program year in accordance with the provisions of Title I of the Housing and Community Development Act of 1974, 42 USC §5301 et seq. and its implementing regulations. 24 CFR §470.300. (Exhibit 1.) The City's application requested HUD funding for a broad range of eligible community development activities of principal benefit to low-and-moderate income persons.

On July 15, 1978, HUD accepted the City's application for review in accordance with the standards and criteria set forth in 24 CFR, Part 570.311. HUD must notify an applicant in writing within 75 days of the date of receipt of the application whether the application has been approved or disapproved; if a notification is not mailed within 75 days, the application is deemed to be approved. 42 CFR 5304(f)

On September 27, 1978, the 74th day of the review period, HUD Chicago Area Office Manager Elmer C. Binford notified Chicago Mayor Michael A. Bilandic that the City's application had been approved in the amount of \$117,803,631.93, and forwarded the grant agreement for execution by the Mayor. (Exhibit 2) In his letter informing the Mayor of funding approval, however, Mr. Binford cautioned that, while HUD had determined the City's response to its prior recommendations concerning Chicago's Third Year Program had been acceptable and that the City had made progress toward achieving its Housing Assistance Plan Goals, HUD continued "to firmly believe that there are additional actions that the City can and should take to assure continued acceptable performance."

The Area Manager's letter continued:

"We therefore find that while progress has been made toward meeting Housing Assistance Plan Goals, the continuing need for housing assistance for families and large families of low income requires action by the City of Chicago as provided for in Section 570.910 of the regulations for the Community Development Block Grant Program. Actions begun by the City in response to the conditions and recommendations of HUD included as part of the approval of the FY 1977 CDBG Program shall be continued during the FY 1978 Program Year. The City shall report to HUD on its progress in carrying out recommendations on January 15, 1979 and on June 30, 1979.

Notwithstanding any other provisions of this

agreement, the City must take the following actions during the FY 1978 program year:

The City shall take all necessary actions within its control, and in a timely fashion, to bring about the actual construction of new Section 8 family and large family units with resources to be allocated to the City of Chicago during the federal fiscal year 1979. The City shall use CDBG funds as necessary to facilitate such construction. Moreover, the City must make substantially improved progress in meeting the goals for large family new construction and substantial rehabilitation of rental units identified in its Housing Assistance Plan.

Failure to accomplish these actions may constitute cause for the Secretary of Housing and Urban Development to reduce the Community Development Block Grant of the City of Chicago for Fiscal Year 1979 as provided in Section 570.911 of the CDBG regulations."

The provisions of this paragraph are included verbatim as Item I of Paragraph 20, Special Conditions and Modifications of Grant Agreements, HUD-7082 Funding Approval Under Title I of the Housing and Community Development Act of 1974 enclosed with the letter.

Plaintiffs apparently are of the opinion that other, more stringent requirements ought to have been imposed on the City by the Department, and request judicial imposition of additional conditions they seek.

III

LITIGATION BACKGROUND

In order to understand the context in which plaintiffs' motion is made, it is necessary to set forth a brief summary of certain features of the Gautreaux litigation.

As Part II of plaintiffs' motion recounts, in February 1969 this court found that defendant Chicago Housing Authority had administered its subsidized housing program in the City of Chicago in an unconstitutionally discriminatory manner. The court subsequently entered an order which required new public housing units to be located predominantly in white neighborhoods of the City of Chicago, and ordered CHA to use its best efforts to increase the supply of low-rent public housing as rapidly as possible.

In September 1971, the U.S. Court of Appeals for the Seventh Circuit held that HUD's knowing acquiescence in the funding of CHA's admitted discriminatory housing program violated the Fifth Amendment to the United States Constitution 1/ and the Civil Rights Act of 1964.

1/ Although the issue of HUD liability was never presented for review by the U.S. Supreme Court and thus comprises the law of this case, in Washington v. Davis, 426 U.S. 229, 244 and 245 f.12, (1976), the Court identified the Appellate Court's finding rejecting HUD's "good faith" defense as being one which "with all due respect, to the extent [it] rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation we are in disagreement." [Query whether further relief is warranted against HUD in this case on the basis of HUD's "adjudicated liability to members of the plaintiff class." (Plaintiff's motion, p. 17)?]

This finding of liability was made notwithstanding the appellate court's recognition that HUD had made numerous and consistent efforts to persuade CHA to locate low-rent housing projects in white neighborhoods, and notwithstanding the court's understanding that HUD's decision was based on the premise that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy black families of that City. The court remanded the case to the District Court for entry of appropriate relief stating that by its holding it did not "in any way wish to limit the exercise of [the Secretary's] discretion in housing related matters." It further cautioned that its holding of liability

"should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered 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."

Almost immediately plaintiffs asked the court to provide "relief" by enjoining HUD's funding of the Model Cities Program of the City of Chicago. On October 1, 1971, Judge Austin granted plaintiffs' motion and entered an order enjoining HUD from releasing Second Year Model Cities funds unless and until sites for at least 700 new housing units in

white areas of the city of Chicago were approved by the Chicago City Council. In March 1972 the Court of Appeals reversed Judge Austin and ruled that enjoining disbursement of Model Cities funds to the City of Chicago was not appropriate relief.

The Seventh Circuit reiterated the caveat of its prior opinion and pointedly commented that "the District Court did not choose to follow our suggestions in this respect." In ruling that the District Court's injunction was an abuse of discretion, the appellate court observed some poignant facts:

1. Under the Model Cities programs, the Secretary of HUD is authorized to grant funds for the purpose of enabling cities to undertake various programs for the benefit of low and moderate income persons.
2. The chief beneficiaries of the Chicago Model Cities programs are the poor people of Chicago, many of whom are black.
3. HUD's decision to release the Model Cities funds was based on a concern "at the devastating impact upon the City's poor which would follow cutting off of the Model Cities Program and which . . . would far outweigh the hope of spurring the Chicago City

Council into action approving low cost public housing sites in predominantly white areas."

The court's opinion stated:

"Intervenor-appellants well state the question before us to be: "But here one party (HUD) had been ordered to stop financing a program, Model Cities, which is free from taint, in order to force a non-party (City of Chicago) to comply with an order in a case in which it was not a party, nor charged with anything, nor found to have done anything improper and of course, not ordered to do anything."

The court answered that question accordingly:

We think it was improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was found to have been so tainted.

Certainly, the District Court's order lacked a balancing of the individual and collective interests involved. The Court ignored the interest of poor people, mostly black, intended by Congress to be the beneficiaries of the Model Cities Programs while seeking enforcement of a timetable for the erection of housing units in white areas which, although laudable, could not be achieved in time to prevent the catastrophe threatened by the District Court's order terminating federal funds to a program not found to be discriminatory.

A strong parallel can be drawn to the CDBG program, whose funding is sought to be enjoined by plaintiffs' pending motion. Title I of the Housing and Community Development Act of 1974 is a funding mechanism for a broad variety of eligible community development activities of principal

benefit to low and moderate income persons, many of whom in the City of Chicago are black. It has never been either alleged or proven that there has been discriminatory administration of the CDBG program by either HUD or the City of Chicago (which, subsequent to the entry of the district Court's injunction in the Model Cities decision, was joined as a party defendant to the litigation for the purpose of relief).

HUD, however, recognizes that unlike the Model Cities program, the CDBG program by virtue of its component "Housing Assistance Plan" possesses a greater degree of "housing-relatedness" than the prior program. The housing assistance plan, of course, is a plan and not a funded Title I activity. However, it is of great importance in HUD's allocation of funds for subsidized housing programs including the Section 8 program which constitutes the primary federal program for addressing the City's housing needs for low and moderate income persons. See 42 U.S.C. §1439.

Having failed in their attempt to enjoin the release of Model Cities funds to the City of Chicago, the plaintiffs filed a motion for ruling on the propriety of metropolitan relief. The federal defendants opposed that motion. On September 11, 1973 Judge Austin entered a final judgment

order against HUD. The order, which had been proposed by the Department, provided that HUD "use its best efforts to cooperate with CHA in its best efforts to increase the supply of low-rent public housing on a non-discriminatory basis."

Plaintiffs appealed from the order denying consideration of its proposal to require HUD to implement a program of metropolitan wide relief. After appeals to the Seventh Circuit and the Supreme Court, the Order was reversed and the matter remanded for consideration by the District Court. However, with respect to intra-city aspect of the Gautreaux litigation, the "best efforts" order continues to constitute the final order against HUD. 2/

IV

ARGUMENT

A.

HUD's decision to approve the FY '78 CDBG application submitted by the City of Chicago was neither arbitrary, capricious nor unreasonable, but rather an exercise of discretion by HUD in full accord with law and regulations.

2/ This intra-city order has been amended on several occasions upon motion of the parties and recommendation of the Special Master.

The standards for judicial review of discretionary agency actions were set forth in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). That suit was brought to restrain the Secretary of Transportation from authorizing the use of Federal funds to finance construction of highways through public parks. The statute prohibits such assistance if a feasible and prudent alternative exists. If no such route is available, he may approve construction only if there has been meticulous planning to minimize the harm to the park. Plaintiffs contended that the Secretary's authorization of expenditure of funds for construction of a highway through a park violated these statutes procedurally, in that his announcement of approval of route and design was not accompanied by factual findings, and substantively, since there were in fact feasible and prudent alternatives.

With regard to the substance of the decision, the court sought to determine whether the challenged agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The court considered whether the action that was challenged was based upon a clear error of judgment, and stated that "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Overton

Park v. Volpe, supra, at 416. The standard established by the Court for review of compliance with procedural requirements was more stringent: the court must determine whether the Secretary's actions were in compliance with procedural requirements. See also South East Chicago Com'm. v. Department of H. & U. Dev. 488 F.2d 1119, 1127-1129 (7th Cir. 1973).

In the present case there is no challenge to the procedures followed by the Department; plaintiffs are challenging substantively the decisions of the Department in approving the FY '78 CDBG application submitted by the City of Chicago, in particular HUD's approval of the component HAP. Applying the standards of review set forth in Overton Park v. Volpe to this case, it is clear that HUD has not acted arbitrarily, capriciously, or unreasonably, or otherwise in violation of law.

As the District Court for the Western District of Pennsylvania recognized in the recent case of Broaden v. Harris, 451 F. Supp. 1215, with respect to HUD's approval of CDBG applications submitted by the City of Pittsburgh:

"Of course, in determining whether the agency decision was arbitrary or an abuse of discretion, one must consider the role delineated by Congress for that agency in the administrative process. Here, that role is a very limited one in

application approval. The Secretary's function in this regard is to approve unless she determines the needs and objectives in the application are plainly inconsistent with facts and data generally available, the proposed activities are plainly inappropriate to meeting these needs and objectives, and the application does not contain those components required by the Act and the activities are not eligible under the Act. Section 5304(c). The Secretary has a more active role in annual post-audit review and taking remedial action. But, again, the Court's role in reviewing these functions is merely to discern whether the Secretary has abused her discretion in the exercise of her judgment in this role." 451 F. Supp. at 1225 (Emphasis in original)

Thus, under Title I of the Housing and Community Development Act of 1974, the Secretary is given affirmative direction to approve CDBG applications from entitlement communities, except under defined, limited circumstances.

The Department's implementing regulations; 24 C.F.R. §570.311(c)(2) (promulgated at 43 Fed. Reg. 8433 et seq. March 1, 1978) provide several examples of situations in which activities may be determined to be "plainly inappropriate" to meeting the identified needs of applicants. Among the cited examples, which are alluded to in plaintiffs' motion, are the following:

(i) Experience over a period of time has demonstrated that the types of activities proposed have not been or are unlikely to be effective in alleviating the conditions they were designed to affect;

(v) Housing goals, locations and strategy do not

meet the criteria of §570.306(c);

(vi) Actions essential to accomplish housing assistance goals, including supportive development activities, are not proposed;

(vii) The proposed program does not reflect previous requirements of the Secretary for corrective or remedial actions, or activities proposed have previously been the basis of such requirements.

within the parameters of those disapproval criteria, HUD Area Manager Elmer C. Binford applied the standards and criteria set forth at 24 CFR 570.306(c) to his review and determination of acceptability of the housing assistance plan submitted by the City of Chicago as part of its Fourth Year CDBG application. Mr. Binford carefully considered the City's past performance in providing assisted housing pursuant to the performance standards for implementing housing assistance plans and the City's response to the housing performance recommendations that HUD had inserted in its approval letter of the City's Third Year FY '77 application.

The requirements set forth by HUD in its Third Year application approval letter were divided into two general categories covering:

1. Activities to stimulate the development of Section 8 Assisted Housing through new construction and substantial rehabilitation and
2. Activities to stimulate the occupancy of units under

the Section 8 Existing Housing Program.

In the new construction and substantial rehabilitation area the HUD requirements were as follows:

A. The City was required to approve under Section 213 Procedures major variations to its annual housing goals for any housing proposals received by HUD that exceeded current annual goals by more than 20% or 20 units.

B. The City was required to consider establishing a requirement that a portion of all nonelderly units developed as part of any Planned-Unit-Development (PUD) be reserved for Section 8 eligible families.

C. In its Fiscal Year 1977 HAP, the City identified three project areas in the general public housing area (areas where Section 8 projects could be developed without Gautreaux restrictions) namely; Haskins-Hermitage, Armitage-Kedzie and the Uptown conservation area, where special efforts would be made to provide sites for Section 8 new construction and buildings suitable for Section 8 substantial rehabilitation. The City was required to report on its activities in these identified areas -- said reports were required to include specific timetables for:

- (1) The acquisition and sale of housing sites, and
- (2) The acquisition and sale of structures suitable for Section 8 rehabilitation.

D. The City was required to develop and implement a program that would lead to the accomplishment of all housing goals pursuant to Section 570.909(e)(2) of the Regulations. The following were recommended for inclusion in the program:

- (1) An active program of housing site identification and acquisition using CDBG funds,
- (2) The convening of conferences with developers to identify any impediments to their submitting of proposals for housing developments in the City,

E. Requirement:

A program to assure actual occupancy of units under the Section 8 Existing Housing Program to achieve:

- (1) Full occupancy of 100% of the first year goal in the Fiscal Year 1975 HAP by April 1, 1978.
- (2) Full occupancy of 100% of the first year goal in the Fiscal Year 1976 HAP by September 30, 1978.

City Performance:

Despite its objection to this requirement, the City has performed under this requirement. The program to improve occupancy was developed as required and in the final report on this requirement the City reported that as of June 30, 1978, 4,057 units had been leased surpassing the requirements of HUD by 262 units. HUD records as of August 31, 1978, indicate occupancy of 4,070 units.

*per. 2 -
correction 5/23*

In addition to the foregoing, the City carried out actions beyond those specifically required by HUD during the current program year. Most important of these actions has been the following:

- (1) A solicitation of proposals from developers on a national scale utilizing both trade journals and newspapers. *results?*
- (2) Assistance to developers in obtaining exceptions to the Gautreaux Orders facilitating the development of assisted housing in the Black community. *did they?*
- (3) Cooperation with the HUD Area Office in the provision of Section 8 assistance to existing 221(d)(3) and 236 projects through the special set-aside program for Loan Management and Property Disposition.

Having reviewed progress toward achievement of its HAP Goals, the HUD Area Manager reviewed the City's Housing

Assistance Plan component of its FY 1978 CDBG application for compliance with the regulatory provisions set forth in 24 C.F.R. §570.306.

In view of the City's HAP, and its performance thereunder, the Area Manager determined that the response of the City to HUD's previous recommendations had been acceptable and he made a finding that the City had a continuing capacity to carry out its program. Based upon his determination and findings, Mr. Binford approved the City's Fiscal Year 1978 CDBG application.

As noted previously, however, while determining the City's response to prior HUD requirements to have been acceptable and while determining that the City had made progress toward achieving its Housing Assistance Plan Goals, the Area Manager's letter advised that "we continue to firmly believe that there are additional actions that the City can and should take to assure continued acceptable performance". Due to the continuing need for housing assistance for families and large families of low income, the Area Manager directed that "actions begun by the City in response to the conditions and recommendations of HUD included as part of the approval of the FY '77 CDBG program shall be continued during the Fiscal Year 1978 Program Year".

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CERTIFICATE OF SERVICE

John Jensen, Associate Regional Counsel, U. S. Department of Housing and Urban Development, certifies that he has caused to be served a copy of the foregoing Memorandum in Opposition to Plaintiffs' Motion for Further Relief Against Department of Housing and Urban Development upon:

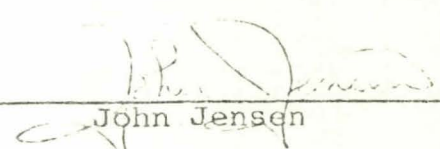
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by personal delivery of such Memorandum to their offices on this 24th day of October, 1978.



John Jensen