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

DOROTHY GAUTREAUX, et al., Plaintiffs, -v- PATRICIA R. HARRIS, Secretary of the U.S. Department of Housing and Urban Development and CHICAGO HOUSING AUTHORITY, et al., Defendants.	)	NO. 66 C 1459 66 C 1460 (Consolidated)

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR FURTHER RELIEF
AGAINST DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

It is undisputed that in the five years since an order was first entered against HUD for the purpose of remedying the effects of its violations of plaintiffs' constitutional rights, fewer than 400 remedial housing units in the General Public Housing Area of Chicago have been provided for the tens of thousands of plaintiff class families.* Under the

* This crux of the factual situation before the Court is set forth in paragraphs 8 and 9 of plaintiffs' motion for further relief and is not disputed in either HUD's or the City's memorandum.

recently developed circumstances described in their motion plaintiffs have therefore moved the Court to employ its broad equitable powers to aid in the provision of remedial housing for plaintiff class families by directing HUD to include strong and precise conditions in its approval of Chicago's Community Development Block Grant (CDBG) application.

In opposing the motion both HUD and the City argue in essence that the Court's power to provide plaintiffs with this further remedy is very limited and that the CDBG condition already imposed by HUD is adequate to provide remedial housing. This Reply demonstrates that HUD and the City are wrong on both points.

I. The Court has Broad Power to Remedy Constitutional Wrongs.

The legal standards which govern the Court's power and duty to remedy the continuing effects of the constitutional wrongs suffered by plaintiff class families were set forth by the Supreme Court in its 1976 decision in this case:

> "...HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. See 418 US, at 744.... Our prior decisions counsel that in the event of a constitutional violation 'all reasonable methods be available to formulate an effective remedy,' North Carolina State Board of Education v. Swann, 402 US 43, 46, ...and that every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation.' Davis v. School Comm'rs of Mobile

County, 402 US 33, 37.... As the Court observed in Swann v. Charlotte-Mecklenburg Board of Education: 'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' 402 US, at 15...." Hills v. Gautreaux, 425 U.S. 284, 297 (1976).*

Both HUD and the City ignore totally this broad scope of the Court's power, and the Court's duty, to fashion an effective remedial order. Instead they refer to the "standards for judicial review of discretionary agency actions" (HUD memo., p.11) in cases brought under the Administrative Procedure Act to establish liability, not to provide a remedy for already adjudicated constitutional violations. But this is not an Administrative Procedure Act petition for judicial review of an agency decision, and the limited scope of judicial authority under such circumstances, to which HUD (pp.10-13, 22-23) and the City (p.7) both refer, is simply not applicable here. None

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* A district judge supervising a desegregation case has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past..." Green v. School Board of New Kent County, 391 U.S. 430, 438, n.4 (1968). There is an "affirmative duty to eliminate all vestiges of the dual system." United States v. Board of School Commissioners of Indianapolis, 474 F.2d 81, 85 (7th Cir. 1973), cert. denied, 413 U.S. 920 (1973). The obligation includes the duty to take account of changing factual situations and to employ whatever equitable remedial powers are necessary to assure "effectiveness" of the desegregation plan, to which end the district court "may and should consider the use of all available techniques." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).

of the cases cited by HUD and the City (Citizens to Preserve Overton Park, South East Chicago Comm., and Broaden v. Harris) involve the scope of the Court's power and duty to provide a remedy for an already adjudicated constitutional violation.*

Here, a constitutional violation having long ago been shown and no effective remedy having yet been provided, plaintiffs have invoked this Court's broad equitable remedial powers, and its duty to use them, to "formulate an effective remedy." North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971). The standards relevant here are those set forth in Hills v. Gautreaux, not Overton Park.

II. Stronger and More Precise CDBG Conditions are Justified to Provide Effective Relief

There is no dispute that HUD has constitutionally wronged plaintiff class families.** Nor is there any dispute that

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* That plaintiffs filed an administrative complaint with HUD does not change the applicable legal standard. While the administrative complaint gave HUD an opportunity, which it declined, to obviate the need for judicial intervention, it obviously does not convert plaintiffs' motion to obtain an effective remedy for an adjudicated constitutional wrong in this ongoing litigation into an Administrative Procedure Act petition for judicial review.

** Although, as the Supreme Court noted, HUD did not dispute that it violated the Fifth Amendment "by knowingly funding CHA's racially discriminatory family public housing program" and HUD did not question the appropriateness "of a remedial order designed to alleviate the effects of past segregative practices," (425 U.S. at 296), in a footnote in its present memorandum which refers to the Supreme Court's Washington v. Davis decision (p.5 n.1), HUD questions whether its liability for constitutional violations is sufficient to warrant further relief.

(Footnote continues on next page.)

since the entry of the September 1973 remedial order against HUD (to use its best efforts to cooperate with CHA to provide more low-rent housing) HUD's best efforts have produced only a miniscule amount of remedial housing. Therefore, plaintiffs are entitled to relief beyond the 1973 "best efforts" order.

Both HUD and the City recognize that conditioning the City's community development grant is an appropriate means of seeking to provide additional remedial housing.* Thus, there

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Washington v. Davis does not cast doubt on the propriety of further relief. That portion of the Seventh Circuit's decision to which the Supreme Court referred in Washington, 426 U.S. at 244, n.12, 245, was noted by the Court to be dictum. Moreover, Washington's requirement that a "discriminatory purpose" be shown to establish an equal protection violation has been met here. The determinations that HUD "knowingly fund[ed] CHA's racially discriminatory ...program" (425 U.S. at 296), and was "aware" that its powers were exercised "in a manner which perpetuated a racially discriminatory housing system" (448 F.2d at 739), make it clear that the "discriminatory purpose" contemplated by Washington was present here. (In this connection a distinction must be drawn between the "purpose" required by Washington and subjective motivation. Here HUD unquestionably had a "purpose" to discriminate, even though the motivation for its purposefully discriminatory actions may have been the benign goal of providing more housing. Washington stands for the proposition that proof of racially discriminatory purpose, not merely of racially discriminatory effect, is required to make out an equal protection violation - e.g., a neutral statute is not to be declared invalid merely because "in practice it benefits or burdens one race more than another..." 426 U.S. at 248. Washington does not stand for the proposition that purposefully discriminatory actions are constitutionally "excused" by benign subjective motivations.)

* "[F]irmly believ[ing] that there are additional actions the City can and should take to assure continued acceptable performance," HUD of course has itself conditioned the City's community development grant on housing performance. (Letter, Elmer C. Binford to Mayor Bilandic, September 27, 1978, p.2, filed as a supplemental exhibit to plaintiffs' motion.)

(Footnote continues on next page.)

is no serious quarrel about whether plaintiffs are entitled to further relief, or whether a CDBG condition is an appropriate means of attempting to provide such relief. The only disputed issue is whether, under the circumstances here, the condition included by HUD in its September 27, 1978, CDBG approval letter constitutes an "effective remedy." North Carolina State Board of Education, supra. As we now show, HUD's condition is an ineffective remedy because it is weak, vague and incomplete, and HUD's defense of it - that a "fair test" of the condition during a "breathing spell" is merited by the City's recent performance record (p.24) - is wholly unsupported by that record.

In view of the negligible amount of remedial housing provided since the entry of the "best efforts" order against HUD, the condition (quoted in full at page 4 of HUD's memorandum) which HUD imposed on the City's fourth year community development grant is weak, vague and incomplete. The condition is weak because it relates to the City's community development block grant for next year (i.e., for the CDBG program year beginning October 1, 1979), not this year; because it says failure to comply with the condition may constitute, not will constitute, cause to reduce the grant; and because it fails

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"It is not disputed that the City's goals have not been accomplished because of deficiencies in HAP performance in the categories of new Section 8 construction for family and large family units - "remedial" units of particular importance to plaintiff class members. The Area Manager has recognized this and directed those corrective actions he believes are called for..." (HUD memo., p.23.)

The City's memorandum says, "the requirements included in the letter of September 27 afford all relief warranted by the facts." (p.5.)

to embody a specific and therefore credible mechanism for carrying out a reduction. The condition is vague because it fails to state with precision what the City is expected to do within what time frame and with respect to what number of Section 8 units to be constructed in the General Public Housing Area of the City. The condition is incomplete because it does not include actions to be taken by the City to aid CHA in utilizing CHA's long unused reservation for approximately 1200 units of public housing.

These deficiencies are well illustrated by contrasting HUD's Chicago condition with conditions imposed on other CDBG recipients (where, it may be added, HUD is merely enforcing CDBG regulations and lacks the additional obligation it has in Chicago to aid in providing relief for its own constitutional wrongs). For example, HUD recently withheld half of Toledo's third year CDBG funds and told that city that the funds would be released in stages and only upon the city's achievement of specified housing goals by specified dates. In Pittsburgh HUD approved the fourth year CDBG application in full but prohibited the expenditure of any fourth year funds until the city submitted a revised housing plan which included various HUD-specified elements. In Philadelphia HUD conditioned the fourth year CDBG application on specific actions to be taken by the city to achieve its housing goals, including if necessary the submission of proposals for subsidized housing by the city itself as developer. (Copies of relevant parts of each of these HUD approval letters are attached in Appendix A.)

> Applicants are responsible for implementation of the housing assistance plan in an expeditious manner. This includes the timely achievement of all goals for assisted housing and particularly those which address the needs of families and large families requiring rental assistance. Applicants are expected to take all actions within their control to facilitate the implementation of an approved housing assistance plan including... the development of Section 8 housing when notifications of funding availability are not responded to by private developers. 24 CFR §570.306(a)(3).*

The entire record of the City's unresponsiveness to HUD's recent prodding (not limited, that is, to new construction) is analyzed at pages 10-20 of the Administrative Complaint, filed as "Exhibit H" to plaintiffs' motion. In plaintifffs' view that record not only affords no basis for HUD's optimism but affirmatively demonstrates that, without clearer and stronger conditions than HUD has so far been willing to impose on the City, effective relief for plaintiff class families will simply not be forthcoming. If its own review of the

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* See also HUD Notice CPD 78-9, p.20, a copy of the relevant portion of which is attached as Appendix B to this memorandum. HUD has in fact imposed precisely this requirement on other cities. For example, HUD included the following condition in its approval of Philadelphia's fourth year grant: "The City must apply for or cause to be applied for, within a reasonable period of time, all subsidized housing units which are made available within the City's boundaries." ("Philadelphia Conditions (Year IV)," Appendix A.) HUD included the same requirement in Philadelphia's third year approval letter. "Should HUD fail to attract developers for Section 8 sites, the City must pick up the obligation to develop housing for families and/or apply for public housing funds to meet the HAP objectives." ("Philadelphia Conditions (Year III)," Appendix A.)

record leaves the Court with any doubt on this score, we believe that, after five years, plaintiffs - and not the City of Chicago which has frustrated relief, and not HUD which for five years has failed to provide it - are entitled to the benefit of that doubt.*

Conclusion

An acknowledged lengthy history of negligible relief plus a lamentably unresponsive recent record of City non-performance compel the conclusion that the weak, vague and

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* HUD purports to find a "strong parallel" (p.8) between the CDBG program and the Seventh Circuit's decision in the Model Cities Program phase of this case. In its Model Cities opinion a sharply divided Seventh Circuit (2-1 on the original decision, 4-3 on rehearing) declined to direct HUD to enforce housing performance conditions on Chicago's "separate" Model Cities program where Chicago "was not a party, nor charged with anything, nor found to have done anything improper..." (457 F.2d 124, 127, quoted at HUD memorandum, p.8.) Here HUD concedes that "unlike the Model Cities program, the CDBG program... possesses a greater degree of 'housing relatedness' than the prior program" (p.9), although "housing relatedness" is hardly an apt phrase to describe a statute whose "primary objective" includes the provision of housing. 42 U.S.C. §5301(c). (Relevant portions of the statute are set forth at page 7 of plaintiffs' motion.) Moreover, the City is no longer an innocent non-party but rather a party who already has been adjudicated in this case to have frustrated the provision of relief to plaintiff class families. Gautreaux v. City of Chicago, 480 F.2d 210 (1973), cert. denied, 414 U.S. 1144 (1974).

incomplete condition imposed by HUD is inadequate to provide an effective remedy. In equity plaintiffs are entitled to more, and more specific, relief. One of the "reasonable methods...available to formulate an effective remedy" (North Carolina State Board of Education, supra, 402 U.S. at 46) is to require the use by HUD of stronger CDBG conditions of the sort it has already employed elsewhere.

Accordingly, plaintiffs request that the Court determine that they are entitled to further relief and consider, as the form of that relief, stronger and more precise conditions in HUD's approval of Chicago's CDBG application. If the Court so desires, plaintiffs will suggest at the status hearing of November 28, 1978, the specific types of CDBG conditions plaintiffs believe would be appropriate.

Respectfully submitted,

Alexander Polikoff
Robert J. Vollen
Elizabeth Lassar
Attorneys for Plaintiffs

November 13, 1978

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A P P E N D I X A

Toledo Conditions

Pittsburgh Conditions

Philadelphia Conditions (Year IV)

Philadelphia Conditions (Year III)

TOLEDO CONDITIONS

Attachment to letter dated June 27, 1977, from Paul G. Lydens, HUD Area Director, to Walter Kane, City Manager of Toledo:

"...Notwithstanding any other provision of this Grant Agreement, and in order to assure that the City of Toledo is achieving adequate progress toward meeting the time-table adopted by the Toledo City Council on June 14, 1977 for development and implementation of a housing action plan, HUD, in accordance with Part 570.910(b)(9) of the Regulations, will withhold from the letter of credit $5,100,000 of approved Third Year (Fiscal Year 1977) CDBG entitlement funds until such time as HUD has:

I. Received from the City of Toledo an acceptable housing action plan in final form as adopted by the Toledo City Council; and

II. Determined that the City of Toledo has taken all affirmative actions within its lawful powers to assure that the following schedule of assisted housing production within the City of Toledo is being met:

   A. Achievement of the First Year (Fiscal Year 1975) HAP goals by December 27, 1977;

   B. Achievement of the Second Year (Fiscal Year 1976) HAP goals by June 27, 1978; and

   C. Achievement of one half of the Third Year (Fiscal Year 1977) HAP goals for new construction units (by household type) by June 27, 1978.

HUD will increase the approved letter of credit by $2,500,000 upon performance of Condition I and Condition II.A.

HUD will increase the approved letter of credit by an additional $1,300,000 upon performance of Condition I, Condition II.A, and Condition II.B.

HUD will increase the approved letter by an additional $1,300,000 upon performance of Condition I, Condition II.A, Condition II.B, and Condition II.C.

If HUD determines that any of the above-described conditions have not been satisfied in a timely manner, HUD will initiate action to reduce the approved Third Year (Fiscal Year 1977) entitlement grant for the City of Toledo by an appropriate amount, up to the amount being withheld from the letter of credit herein, as provided at Part 570.910(b)(10) of the Regulations."

PITTSBURGH CONDITIONS

Excerpt from letter dated May 5, 1978, from Paul Cain HUD Area Director, to Honorable Richard Caliguiri, Mayor of Pittsburgh:

"The applicant shall submit to HUD a revised Housing Assistance Plan containing a strategy for the following:...

B. The deconcentration of lower income households and the geographic dispersion of units for lower income households outside of areas of current lower income concentration. This element must include:

1. The actions the applicant will take to overcome the resistance of developers to the Section 8 New Construction Program;
2. The initiation of the process of identifying land within the many census tracts already designated as suitable for the development of new scattered site family assisted housing;
3. The actions that the applicant will take to make such identified land readily available for new assisted scattered site family housing development, such as land acquisition, zoning changes, and provision of public facilities and services;...

Until HUD approves a revised Housing Assistance Plan which contains the elements set forth in the above paragraphs... no Fourth Year funds shall be obligated or expended for any activity...."

PHILADELPHIA CONDITIONS (YEAR IV)

Excerpt from letter and attachment, dated May 11, 1978, from Don Morrow, HUD Area Director, to Honorable Frank L. Rizzo, Mayor of Philadelphia:

"...In approving the Year IV Application we are imposing specific conditions relating to achievement of housing assistance goals...[S]hould the City violate any provision of conditions, I through IV, HUD will take the necessary steps to reduce the City's Year IV entitlement....

I. By January 1, 1979 the City must take all necessary steps to assure the provision of non-impacted sites which meet HUD site selection criteria for the number of subsidized non-elderly rental housing units which...will bring the City into compliance with [previous HUD requirements]. These sites must be identified no later than July 15, 1978.

II. When a sufficient number of subsidized non-elderly units (new construction) are committed to non-impacted sites...the City must construct at least 50% of all subsequent subsidized family and large family rental units in non-impacted areas.

III. The City must apply for or cause to be applied for, within a reasonable period of time, all subsidized housing units which are made available within the City's boundaries..."

PHILADELPHIA CONDITIONS (YEAR III)

Excerpt from letter, dated May 13, 1978, from Robert J. Clement, HUD Acting Area Director, to Honorable Frank L. Rizzo, Mayor of Philadelphia:

"Shoud HUD fail to attract developers for Section 8 sites, the City must pick up the obligation to develop housing for families and/or apply for public housing funds to meet the HAP objectives."

APPENDIX B

Excerpt from HUD Notice CPD 78-9, respecting review of entitlement grant applications for Fiscal Year 1978, issued by Robert C. Embry, Jr., Assistant Secretary for Community Planning and Development, on April 28, 1978, to all regional administrators and others, p. 20:

"...When [CDBG] recipients have not made substantial progress toward providing the units in established numerical housing goals, the [HUD] Area Office must determine whether lack of progress was due to factors beyond the control of the recipient or whether there were actions within the control of the recipient which, had they been taken, could have resulted in the provision of housing assistance. Actions typically within the control of the recipient are...the formal actions of submission of proposals or applications for assisted housing."

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

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-v-	)	NO. 66 C 1459
	)	66 C 1460
PATRICIA R. HARRIS, Secretary of the U.S. Department of Housing and Urban Development and CHICAGO HOUSING AUTHORITY, et al.,	)	(Consolidated)
	)	
Defendants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on this 13th day of November, 1978, I have filed Plaintiffs' Reply Memorandum in Support of Motion for Further Relief Against Department of Housing and Urban Development with the clerk for the Honorable Judge John Powers Crowley in the United States District Court

for the Northern District of Illinois, Eastern Division, a copy of which is attached hereto and herewith served upon you.

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DATED: November 13, 1978