GJP
(34)
7/29/80

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

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	Nos. 66 C 1459
	)	66 C 1460
v.	)	(Consolidated)
	)	
MOON LANDRIEU*, SECRETARY OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND CHICAGO HOUSING AUTHORITY, et al.,	)	
	)	
Defendants,	)	

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION

I. STATEMENT OF THE FACTS

A. Plaintiffs' Motion for Further Relief Against HUD

On September 22, 1978 plaintiffs filed a Motion for Further Relief Against the Department of Housing and Urban Development, alleging that "only a negligible amount of remedial housing (had) so far been provided to members of the plaintiff class," and requesting additional relief against HUD in the form of an order prohibiting HUD from disbursing funds under the City of Chicago's (City) fourth year Community Development Block Grant (CDBG) application

* Pursuant to F.R.C.P. 25(d)(1), Moon Landrieu is substituted as named defendant for Patricia Roberts Harris, whom he replaced as Secretary of HUD.

"unless specific, enforceable conditions are imposed on the City that will facilitate the utilization of CHA's public housing reservation and the development of Section 8 family housing in the General Public Housing Area of the City."

On March 30, 1979, the Court denied plaintiffs' Motion for Further Relief, holding that an injunction against HUD which precluded disbursement of funds under the City's fourth year CDBG application was too broad a remedy and therefore inappropriate.

B. Plaintiffs' Motion for Reconsideration of Court Denial of Further Relief

On April 10, 1979, plaintiffs requested the Court to reconsider its March 30, 1979 ruling denying their Motion for Further Relief against HUD. On October 22, 1979, the Court granted plaintiffs' Motion for Reconsideration, citing as the basis for its decision a misunderstanding as to the nature of relief sought by plaintiffs:

> Contrary to the Court's earlier understanding, plaintiffs do not propose that the entire fourth year CDBG grant be enjoined. Rather, plaintiffs merely request that the approval of the grant be subject to specific conditions pertaining to public housing. If, and only if, the City fails to fulfill these conditions will funds be

enjoined. Further, specific and designated amounts of the grant, rather than the entire grant, would be subject to these terms.

C. Parties' Response to Court Order on Motion for Reconsideration

The Court's Order granting plaintiffs' Motion for Reconsideration directed the parties to "draw up a joint proposal of implementation of the relief to be submitted to the Court for final approval." By the time the Court entered its Order on October 22, 1979, HUD had not only approved the City's fourth year application on September 27, 1978, but had also approved on September 14, 1979 the City's fifth year application, and signed a contract with the City for the distribution of the funds.

Upon notification of the Court's Order on reconsideration, HUD, the City, and plaintiffs held a series of meetings to attempt to reach agreement on the nature of the relief which would be proposed to the Court for approval. The meetings failed to yield a consensus on appropriate terms for relief.

D. Plaintiffs' Proposed Order Conditioning the City's CDBG Funding

Plaintiffs now seek to condition the City's sixth year CDBG application. The proposed conditions would

subject the City to loss of its CDBG funds if it failed to take steps to assure the production of Section 8 assisted housing according to the schedule plaintiffs consider appropriate. In light of the City's performance since plaintiffs' motion was originally filed, HUD opposes these conditions.

II. STATUTORY AND REGULATORY BACKGROUND

Before addressing the merits of plaintiffs' motion, a brief explanation of the statutory and regulatory framework of the CDBG program is necessary. The Housing and Community Development Act of 1974, 42 U.S.C. §5301 et seq. ("the Act"), created the Community Development Block Grant program to consolidate ten urban development grant programs into a single program designed to afford local communities discretion in addressing community development needs.

Under the Act, federal assistance is provided for the support of community development activities directed toward any of various objectives, such as elimination of slums and blight, conservation and expansion of the housing stock, or promotion of spatial deconcentration of low income housing. 42 U.S.C.§5301(c).

Applicants which qualify as metropolitan cities 1/ or urban counties receive entitlement funds each year, pursuant to an application for the funds which is submitted to HUD for approval (42 U.S.C. §5304(a), §5306(a)). The application is divided into two parts: a community development program, under which the applicant describes the activities to be carried out with the CDBG assistance, and a Housing Assistance Plan (HAP) which identifies lower-income housing needs in the community and establishes goals for the number of units or persons to be assisted. 42 U.S.C. §5304(a). The applicant's performance in meeting its HAP goals is assessed annually; failure to meet goals is excused where an applicant has utilized all resources available to it. 24 C.F.R. §570.909(e)2)(ii), as amended at 45 F.R. 42605 (1980). Although CDBG funds may be used to obtain sites, or pay for certain housing preconstruction costs, CDBG funds may not be used for the construction of low income assisted housing to meet a HAP goal. 42 U.S.C. §5305(a); 24 C.F.R. §570.207(f).

1/ Defined as "(A) a city within a metropolitan area which is the central city of such area, as defined and used by the Office of Management and Budget, or (B) any other city, within a metropolitan area, which has a population of fifty thousand or more." 42 U.S.C. §5302(a)(4). Chicago is a metropolitan city.

The city, unlike the CHA, is not in the business of developing public housing. While the city is responsible for implementing its HAP plan to the extent of available resources (24 C.F.R.§570.306(a)(3)), the actual development of new housing is done by either the CHA or private developers. The scope of resources is largely determined by the allocation of Section 8 funds to the locality by HUD, primarily according to a national fair share formula. 24 C.F.R. §891.401 - .405. The city's responsibility is to "facilitate the implementation of an approved housing assistance plan .... " Id. Otherwise, the responsibility for production is shared by HUD and private developers.

Metropolitan cities and urban counties are "entitled" to their yearly CDBG funds unless the Department takes some action to disapprove or adjust a grant. (42 U.S.C. §5304(c) and (d)). Accordingly, the burden is always on the Department to demonstrate why an entitlement grantee should not receive its entire grant. Rather than disapproving or reducing an entitlement grant, in some circumstances HUD places conditions on receipt of funds.2/ The Department may condition an

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2/ The House Banking Committee has recently registered concern "about the extent and nature of the conditions which the Department has placed on the approval of Community Development Block Grant applications" maintaining that "(c)onditioning a grant approval should only be used to provide a community with an opportunity to correct a defect in its application which otherwise would have necessitated a formal disapproval." House Report No. 96-979, 96th Congress, 2nd Sess. 13 (1980)

applicant's entitlement grant if, inter alia, "(t)here is substantial evidence that there has been, or there will be, a lack of substantial progress, nonconformance, noncompliance, or a lack of continuing capacity" in carrying out its program. 24 C.F.R. §570.311(f).

III. ARGUMENT

A. Conditioning the City's CDBG Application is Not a Remedy "Commensurate With the Violation to be Repaired"

1. Introduction

In granting the plaintiffs' Motion for Reconsideration in 1979, the Court noted that although a district court enjoys broad equitable power to remedy a past wrong, a remedy should be designed which is "'commensurate with the violation to be repaired.'" (Opinion, p. 3, quoting Hills v. Gautreaux, 425 U.S. 284, 295 (1975)). In view of the City's performance in providing assisted housing, the Court should not order HUD to condition the City's CDBG application when the Department could not do so administratively, especially where such a remedy

would exceed the Supreme Court's measure of appropriate relief in this case.

2. Measure of Relief

Under the Supreme Court's standard for equitable relief, it is critical to focus on the nature of the violation to be remedied and to agree on a yardstick for measuring progress towards a remedy. The violation to be repaired in this case is the conduct of the Chicago Housing Authority and HUD which this Court found in 1969 resulted in the provision of an inadequate amount of assisted housing in the predominantly white areas (subsequently labelled the "General Public Housing Area" (GPHA)) of the City. Gautreaux v. Chicago Housing Authority, 296 F.Supp. 907 (N.D. Ill. 1969).

Plainly, only the provision of housing outside areas of minority concentration can remedy such a violation. As yet, there is no ultimate resolution of this case to look to for a measure of progress towards this remedy. Lacking this, a suitable measure of the progress is the City's

Block Grant HAP, to the extent that funds are made available to the City through the Section 8 allocation process. This measure of progress was implicitly accepted by the plaintiffs in their September 1978 Motion for Further Relief, where they pointed out that the City's HAP "'must address itself to the needs of the plaintiffs in the Gautreaux litigation.'" (Para. 15.) We agree. Accordingly, to the extent the HAP is sufficient in view of the needs of the class, and performance in meeting the HAP goals is satisfactory, there is neither an administrative basis for HUD nor an equitable basis for this court to condition the City's sixth year block grant.

See revised §909(e)(2)

Plaintiffs do not contend that the HAP itself is deficient. Rather, they argue that the City's performance has been inadequate, indeed, so inadequate as to destroy its presumptive entitlement to CDBG funds. Accordingly, the measure of the necessity for relief by the Court or the Department is further narrowed to the performance standard: has the City made

substantial progress in meeting the goals established in its HAP? The Government will show that, since 1978, the City's progress toward meeting its HAP goals to the full extent of available resources has rendered conditioning of its sixth year block grant inappropriate and superfluous.

3. The City's Performance in Meeting its HAP Goals

Applicants for CDBG entitlement funds must submit both one and three-year HAP goals. 24 C.F.R. §570.306(a)(4)(ii). A comparison of the City's performance with its 1976 three-year HAP goals confirms HUD's conclusion that the City has made substantial progress toward meeting its 1976 three-year HAP goals. See Table I.

An analysis of the performance figures in Table I reveals that the City has met 77.6% of its family new construction three-year HAP goal; 104.1% of its family rehabilitation goal; and 66.2% of its combined family and large family

existing units goal.[4/] This is clearly substantial performance by the City towards meeting its HAP goals.

The record of performance also reveals that the City has provided substantial amounts of housing in the GPHA:

Section 8	Production of Family and Large Family Units in the GPHA
New	494
Rehab.	993
Existing [5/]	570
	2057

In addition, the HUD Area office now has under consideration applications for 1,079 family units in the GPHA, received in response to the

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4/ Counsel for HUD and the plaintiffs have informally agreed on the accuracy of the City's First Year, 1976 Three Year, Fifth Year, and proposed Sixth Year HAP goals. In addition counsel have agreed on the performance figures except that counsel for plaintiffs neither confirm nor deny the existing housing performance figures.

5/ On information from the CHA, approximately 57% of the 1000 units leased which were non-exempt from the Gautreaux distribution requirements are located in the GPHA. No breakdown is available for the location of the 589 exempt units.

latest HUD notification of funding availability for Section 8 units in Chicago.

The total of 2057 units provided in the GPHA reflects considerable progress since September of 1978. At that time, plaintiffs alleged in their motion for further relief that "fewer than 400 remedial housing units have been provided to members of the plaintiff class in the General Public Housing Area of the City ...." (para. 9.) This performance record does not support plaintiffs' current demand for relief against the City.

4. Improvements Needed In City's Performance

Although the City has made substantial progress in meeting its HAP goals, there is room for improvement in the City's performance in two areas: assisting the Chicago Housing Authority (CHA) in the production of public housing in the GPHA, and producing more large family assisted housing.

i. Assistance to CHA

The performance of CHA in producing public housing in the GPHA has been undeniably poor. Since 1969, only 114 - 117 units of public housing have been built in the GPHA. 6/ However there has been recent progress. In denying a motion filed by plaintiffs to appoint a receiver for CHA, the Court noted that:

> While the Court is not satisfied with the efficiency or the extent of CHA activity at this time, CHA's recent attempts to comply with the May, 1979 order evidence some efforts to cure its inefficient bureaucratic procedures. Major obstacles to the development of public housing have been removed. Procedural roadblocks have been removed and prototype construction cost limits have been raised. The regular January 8, 1980 meeting and the special meeting on January 16, 1980 are indicative of the increased pace at which CHA can move when it feels the pressure to do so. Moreover, with its increased staff, and the benefits of the suggestions of the urban consultant and the Special Master, the CHA has every opportunity to finally render the relief to the members of the plaintiff class which they so justly deserve and which is to long overdue.

6/ June 6, 1980 Opinion of Court, p.5.

June 6, 1980 Opinion and Order, p. 7.

CHA has responded. HUD has already preliminarily approved a CHA development program involving construction of 327 units, of which 82 units are in the GPHA. 1/ In addition, the City pledged in its fifth year CDBG application that it, in cooperation with the CHA and HUD, would take all necessary steps within its control to facilitate the construction or rehabilitation of 2,223 public housing units now under reservation, as directed by this Court on May 18, 1979.

Plaintiffs have not demonstrated that any other action by the City would cure the lingering deficiencies in the CHA's performance. In any event, it should be evident that if CHA's poor performance does not warrant further relief against that institution, it does not justify further relief against the City.

1/ According to the most recent CHA quarterly report filed with the Court.

In short, conditioning approval of the City's CDBG application is not necessary to improve CHA performance. To the contrary, it is superfluous. Plaintiffs' motion to appoint a receiver for CHA was denied "without prejudice." In its June 6, 1980 Opinion, the Court directed CHA "to make an immediate and substantial start toward full compliance with the May, 1979 order within six months." (Opinion, p. 7.) If the CHA continues to make poor progress in producing public housing in the GPHA, the Court has effectively warned that it may order further relief by appointing a receiver. Such an order would, under those conditions, constitute relief commensurate with the problem.

ii. Provision of Assisted Large Family Units

The City must improve its performance in providing assisted large family units. It has met only 12.2% of its 1976 three-year new construction large family unit goal, and only 25.3% of its substantial rehabilitation large family goal. However, steps have been and are

being taken which make conditioning unnecessary to improve performance. In connection with overall settlement negotiations with plaintiffs, HUD has offered to require that 10% of all future Section 8 new construction and substantial rehabilitation family units in the Chicago SMSA be reserved for large family units. Other methods to stimulate development of large family units are also the subject of negotiations between the parties.

5. Conclusion

The City has made substantial, progress in meeting its 1976 three-year HAP goals. There has been a dramatic increase in the amount of assisted family housing being constructed in the GPHA, despite its narrowly drawn boundaries. While there are areas in which the City could improve its performance, efforts are being directed at remedying those identified problems. Under these circumstances, sufficient grounds do not exist for HUD to decide administratively to condition the City's sixth year CDBG grant. Nor do these

circumstances warrant the imposition of conditions by the Court. While conditioning the City's grant is a remedy which may have been appropriate in the past, it is no longer commensurate with the violation to be repaired or necessary to the provision of the relief ultimately required in this case.

B. The Court May Order the City To Do Directly What Plaintiffs Request, Rather Than Forcing Compliance Through the Placement of Conditions on the City's CDBG Funds

If the Court determines that the additional actions requested by plaintiffs should be implemented, conditioning the City's sixth year grant is not its sole available tool. The Court may order the City directly to take such steps, rather than coerce the City to take the requested actions at peril of losing its CDBG funds.

The City has been adjudicated to have violated the constitutional rights of the plaintiff class, just as have HUD and the CHA. As plaintiffs pointed out in their Reply Memorandum In Support of Motion for Further Relief:

> Moreover, the City is no longer a 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).

Plaintiffs' Reply Memorandum in Support of Motion for Further Relief at 12n.

The Court reaffirmed the City's liability when it granted plaintiffs' Motion for Reconsideration in October of 1979:

> Preliminarily, we must keep in mind that HUD has been found to be equally culpable, along with the City and CHA, of deliberately perpetuating segregated housing. Gautreaux v. Romney, 448 F.2d 731 (7th Cir., 1971).

Opinion of Court at 3. (Emphasis added.)

Accordingly, this Court has authority to order the City directly to acquire sites in the GPHA for use in Section 8 and public housing developments; to pay site assemblage and site clearance costs; to make sites owned by the City publicly available; and to take any other steps deemed appropriate to facilitate the development of assisted housing in the GPHA.

A court order directing the City to take steps to promote the development of assisted housing in the GPHA is a remedy commensurate with the violation to be

repaired, unlike an order directing HUD to condition the approval of the City's CDBG grant. While HUD and the City have been adjudicated to have violated the constitutional rights of the plaintiff class, the people of the City of Chicago have not. If conditions are placed on the City's CDBG funding and the conditions are not met, low and moderate income people of the City will lose the funding for vital services, such as day care services, modernization of CHA projects, removal of architectural barriers, transportation services for the elderly, and in-home services for the handicapped. 8/

Conversely, if the City is ordered directly to take certain actions, and it refuses to do so, the Court may impose sanctions directly against the responsible officials without imperilling funds for services badly needed by the people of Chicago in a period of recession.

8/ All projects which are proposed in the City's Sixth Year CDBG application. While under plaintiffs' proposed order the City would not immediately lose its CDBG funding, if the conditions are not met HUD must propose to the court remedial action "including without limitation the reduction of (the City's sixth and seventh year) grants."

Given a choice of two remedies to achieve a desired result, the Court should adopt the direct remedy which does not jeopardize the interests of innocent parties if is concludes that further relief is necessary.

C. The Proposed Conditions Are Inappropriate

Not only is conditioning the City's CDBG funds unwarranted, but the conditions proposed by plaintiffs are inappropriate in the following respects: 9/

1. Condition IIA would require the City to use all of its "lawful powers" to aid the CHA in the production of assisted housing, but this requirement is without regard to the reasonableness of any request which might be made by CHA.

2. Condition IIB would require that by July 15, 1981 the City "achieve production" (defined as the commencement of construction) on (1) all Section 8 family and large family new construction units in

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9/ In addition to the major objections enumerated, HUD has a number of technical objections to the proposed conditions.

the GPHA, and (2) all Section 8 substantial rehabilitation units in the GPHA and in the Limited Public Housing Area (LPHA) which received firm financial commitments between September 16, 1976 and September 30, 1979. In the absence of any evidence of delays in the progression of units from the firm financial commitment stage to the commencement of production, such a condition is completely unwarranted. Furthermore, even if there were such evidence, delays may be attributable to factors completely beyond the control of the City, such as the recent precipitous rise in interest rates.

3. Condition IIC would require that by July 15, 1981 the City "achieve production (defined as the execution of an Agreement to Enter Into a Housing Assistance Payments Contract between an owner and HUD, the Illinois Housing Development Agency (IHDA), or the CHA, as appropriate) of its CDBG year 5 HAP goals for all proposed Section 8 family and large family new construction units in the GPHA, and all proposed family and large family Section 8 substantial rehabilitation and Section 8

moderate rehabilitation units in the GPHA and the LPHA.

This condition is objectionable because it exceeds HUD regulatory requirements. Plaintiffs would require that units intended to meet CDBG year 5 goals (established in September 1979) proceed to the stage of an Agreement to Enter Into a Housing Assistance Payments Contract by July 15, 1981, less than two years later. HUD regulations clearly require only that a "firm financial commitment" be obtained within two years:

> In measuring progress in achieving one-year goals, HUD will consider the extent to which the recipient has received <u>firm financial commitments</u> which have not subsequently been cancelled or specific projects or units identified in the HAP by household and tenure type <u>within a two year period</u>.

24 C.F.R. §570.909(e)(2)(i) as amended at 45 F.R. 42605 (1980). (Emphasis added).

"Firm financial commitment" is given the following definitions in instructions to applicants for preparing a HAP: for Section 8 new and substantial rehabilitation projects, HUD approval of a preliminary proposal of a developer

or a public housing agency (PHA); for Section 8 existing projects (including moderate rehabilitation), HUD approval of an application of a PHA. Both these stages occur well in advance of the execution of an Agreement to enter into a Housing Assistance Payments Contract.

Condition IIC is also objectionable because it fails to take account of the fact that the City may not receive the funding necessary to achieve its HAP goals. Under the HUD fair share formula for allocating Section 8 funding (see II, supra), the City has thus far only received funding (including the allocation to IHDA) for an estimated 625 Section 8 family and large family new construction units, 703 Section 8 family and large family substantial rehabilitation units and 227 Section 8 family and large family moderate rehabilitation units, toward meeting its year 5 HAP goals. HUD itself recognizes that CDBG applicants cannot be held responsible if insufficient resources are made available for an applicant to achieve HAP goals:

> Where the ... review of progress against goals demonstrates that performance falls substantially short of meeting such goals, HUD will review the extent to which the grantee has utilized resources available to it which are consistent with its H&P ....

24 C.F.R. §570.909(e)(ii), as amended at 45 F.R. 42605 (1980).

It would be inequitable to impose a condition unrelated to the actual resources allocated to the City to produce housing.

4. Condition IID would require the City to "achieve production" (defined as the submission of development proposals to HUD, IHDA or the CHA, as appropriate) of its CDBG year 6 HAP goals for all proposed Section 8 family and large family new construction units in the GPHA, and all proposed family and large family Section 8 substantial rehabilitation and Section 8 moderate rehabilitation units in the GPHA and the LPHA.

This condition is objectionable because it (1) anticipates HAP goals which have not yet even been approved by HUD, (2) takes no account of the amount of Section 8 funding the City will eventually receive, and (3) establishes a goal

(submission of a Section 8 proposal) to be accomplished by July 15, 1981, less than one year after HUD approval of the City's HAP in September 1980. This requirement has no support in HUD regulations, which contain no goal to be attained within one year of approval of a HAP plan.

For the foregoing reasons, the Government urges the court to refuse to require the Department to condition the City's sixth year CDBG funds.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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31

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on this 25th day of July, 1980, I have filed plaintiffs' Motion 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, including the draft order referred to therein, is attached hereto and herewith served upon you, and that at 11:00 A.M. on July 29, 1980, I will appear before the Honorable Judge Crowley in the courtroom or chambers normally occupied by him at 219 South Dearborn Street, Chicago, Illinois, and then and there present the same and move the Court to enter such draft order.

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DATED: July 25, 1980