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

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	66 C 1459
	)	66 C 1460
CHICAGO HOUSING AUTHORITY and	)	
ANDREW CUOMO, Secretary of	)	(Consolidated)
Department of Housing and Urban	)	
Development,	)	
	)	
Defendants.	)	

NOTICE OF FILING

To: Attached Service List

Please take notice that on Tuesday, July 8, 1997 I filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, the attached Plaintiffs' Opening Brief on Three Matters.

One of the Attorneys for Plaintiffs

Dated: July 8, 1997

Alexander Polikoff
Julie Elena Brown
Business and Professional People
for the Public Interest
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al., Plaintiffs,	)	
v.	)	66 C 1460
ANDREW CUOMO, Secretary of Department of Housing and Urban Development, Defendant.	)	

PLAINTIFFS' OPENING BRIEF ON THREE MATTERS

This brief addresses three matters:

(1) HUD's Motion to Terminate Consent Decree;

(2) Plaintiffs' Motion for a FY1997 Set-Aside; and

(3) Plaintiffs' Motion Under Paragraph 8.1 of Consent Decree Respecting Paragraph 5.8.1 of Consent Decree

By order entered May 20, 1997 the Court directed the parties to file simultaneous opening and reply briefs addressing all three matters on July 8 and August 8, 1997, respectively.

I. HUD's Motion to Terminate Consent Decree

Plaintiffs agree that the Consent Decree should be terminated subject to the Court's retention of jurisdiction to determine three matters:

A. Plaintiffs' motion for an award of attorney fees. HUD agrees that jurisdiction should be retained for this purpose. (HUD motion, p. 4)

B. Plaintiffs' Motion for a FY1997 Set-Aside. This motion is the subject of Part II of this brief.

C. Plaintiffs' Motion under Paragraph 8.1 of Consent Decree Respecting Paragraph 5.8.1 of Consent Decree. This motion is the subject of Part III of this brief.

II. Plaintiffs' Motion for a FY1997 Set-Aside

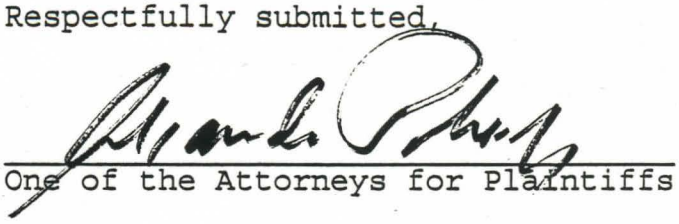
For their opening brief on this matter plaintiffs attach as Exhibits A and B, respectively, an exchange of letters between the parties setting forth their positions respecting a FY1997 set-aside. Plaintiffs believe that Exhibits A and B clearly demonstrate that under the language of the Consent Decree and the uncontroverted facts, plaintiffs are entitled to a FY1997 set-aside. The effect of granting plaintiffs' motion would be to declare that plaintiffs are so entitled, and to "remand" the parties to the comparable relief process of the Consent Decree.

III. Plaintiffs' Motion under Paragraph 8.1 of Consent Decree Respecting Paragraph 5.8.1 of Consent Decree

For their opening brief on this matter plaintiffs incorporate by reference their pending motion relating to paragraph 8.1 of the Consent Decree. We do not believe any relevant facts are in dispute. The effect of granting plaintiffs' motion would be to declare that HUD has breached

paragraph 5.8.1 of the Consent Decree to provide plaintiffs with appropriate relief therefor.

Respectfully submitted,



One of the Attorneys for Plaintiffs

Dated: July 8, 1997

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EX. A

U.S. Department of Justice

United States Attorney
Northern District of Illinois

Linda A. Wawzenski
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April 1, 1997

Alexander Polikoff
Business and Professional People
for the Public Interest
17 East Monroe Street, Suite 212
Chicago, Illinois 60603

Re: Dorothy Gautreaux, et al. v. HUD, et al.
Nos. 66 C 1459 and 66 C 1460 (N.D. Ill.)

Dear Alex:

This letter outlines HUD's position on why it has no legal obligation under the Gautreaux Consent Decree to provide any funding this fiscal year for assisted housing.

Approximately fifteen years ago the plaintiffs and HUD agreed that HUD would provide on a yearly basis funding for 150 Section 8 certificates and 350 Section 8 new construction/ substantial rehabilitation units. It was also agreed that those obligations would continue only until the number of occupancies in the General Area by eligible class members equals 7,100. See Para. 5.1. of the Decree. Based on our review of the occupancy count, 7,092 occupancies had occurred on October 1, 1996,[1] and based on information from the Chicago Housing Authority and the Chicago Section 8 program (CHAC), we believe that 8 additional occupancies occurred no later than October 7th. Accordingly, as of that date HUD was relieved by operation of para. 5.1. from having to provide assisted housing.

You have indicated, however, that HUD cannot rely on the language of para. 5.1. because it was obligated by the Court's opinion of September 1, 1982 to have set aside contract authority

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[1] As you may recall, you informed us that only 8, and not 32, occupancies occurred in the Habitat units during September. When we attempted to verify those numbers, we found that actually 13 units were occupied by September 30th.

for the aforementioned 500 units on October 1, 1996. Your position we believe is contrary to the literal language of para. 5.1, which permits HUD not to "provide" assisted housing once the 7,100 figure has been reached. The statutory mechanism under the U.S. Housing Act of 1937 for providing assisted housing is an annual contributions contract. Whether or not HUD was required to set aside contract authority on October 1st, para. 5.1. relieves HUD of the obligation to execute annual contributions contracts once the 7,100 figure has been reached. This interpretation is consistent with the bargain that was struck in 1981 when HUD entered into this decree. Your interpretation would result in the plaintiffs receiving more than the 7,100 units.

In any event, we believe your premise that HUD was obligated to set aside funds on October 1, 1996 is wrong. With regard to the 150 Section 8 certificates, please note that the "set-aside may be reduced to the extent the aggregate amount of Section 8 existing contract authority available to the Leadership Council . . exceeds 360 units." Para. 5.5.1. of the decree. You have advised us recently in connection with the request to extend the term of the Leadership Council's contract that it had 535 unused certificates. Accordingly, pursuant to para. 5.1.1, HUD may reduce the amount of the 150 certificates to be set aside to zero.

Additionally, while paragraphs 5.5.2 and 5.5.3. require HUD to set aside the 350 Section 8 new construction/substantial rehabilitation units, HUD was relieved of that duty when Congress repealed those programs in 1983.[2/] In its place, para. 8.6 of the decree conveys to the plaintiffs a right to receive comparable relief. The date, however, on which the comparable relief is to be set aside is not specified in the decree. Rather, para. 8.6. sets out a process in which the parties will "consult in an effort to agree upon a proposed modification of this Decree" and "[I]f after a reasonable time the parties cannot agree" the court would adjudicate the matter. Until this process is complete, HUD has no

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[2/] Para. 8.6 of the decree provides: "HUD shall not be hold in contempt, or otherwise punished, for non-compliance with this Decree on account of failure to perform resulting from. . . revocation of statutory authority."

obligation to set aside any contract authority. Indeed, it is only after the completion of the process that HUD would know what would have to be set aside. Accordingly, it is HUD's position that there was no set aside obligation for either the 350 Section 8 new construction/substantial rehabilitation units or for comparable relief on October 1, 1996 that would preclude HUD from relying on the termination of funding provision in para. 5.1. on October 7th when the 7,100 occupancy figure was reached.

I hope you will agree that HUD has no further obligation to provide funding and that we can jointly move for the termination of the decree.

Very truly yours,

JAMES B. BURNS
United States Attorney

By: Linda A. Wawzenski

LINDA A. WAWZENSKI
Assistant United States Attorney

cc: Carole W. Wilson
Associate General Counsel for
Litigation and Fair Housing Enforcement
Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410-0500

EX. B

BPI
Business and Professional People
for the Public Interest

April 15, 1997

BY FAX: 312/886-4073
ORIGINAL BY MAIL

Ms. Linda Wawzenski
Assistant U. S. Attorney and
Deputy Chief
Civil Division
U. S. District Court
219 South Dearborn - #500
Chicago, Illinois 60604

Dear Linda:

This responds to your letter of April 1, 1997 respecting the fiscal year 1997 Gautreaux set-aside and termination of the Gautreaux consent decree between HUD and the plaintiffs. Plaintiffs agree with your conclusion that under para. 5.5.1 of the consent decree HUD may reduce to zero the number of Section 8 existing housing certificates to be set aside for fiscal year 1997. With respect to the 350 unit set-aside obligation under paragraphs 5.5.2 and 5.5.3 of the consent decree, the issue seems to us to be less clear. Let me set forth the argument on the other side of yours.

The first of your two contentions is that the literal language of paragraph 5.1 of the consent decree "permits HUD not to 'provide' assisted housing once the 7,100 figure has been reached," that therefore "as of [October 7th, 1996] HUD was relieved by operation of para. 5.1 from having to provide assisted housing," and that our interpretation -- that HUD had a matured obligation to set aside contract authority for 350 units on October 1st -- "would result in the plaintiffs receiving more than the 7,100 units."

Plaintiffs do not agree either with your reading of para. 5.1 or with your implication that receiving more than 7,100 units would be contrary to the language of the consent decree or the parties' intention. Under Judge Aspen's decision of September 1, 1982, HUD's annual obligation to set aside contract authority for 350 units matures as of the beginning of each fiscal year.

> "[T]he language in question [in paragraphs 5.5.1 through 5.5.3 of the consent decree] imposes an obligation on HUD to set aside the requisite contract authority on a date certain, namely, at the beginning of the fiscal year." (Memorandum Opinion and Order of 9/1/82, p. 5.)

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Since the consent decree had not terminated at the beginning of fiscal year 1997, a HUD obligation to set aside contract authority for 350 units matured on October 1, 1996.[1]

This view is consistent with applicable interpretative rules. A consent decree is to be construed for enforcement purposes basically as a contract, U.S. v. ITT Continental Baking Co., 420 U.S. 223, 238 (1974). It is familiar law that termination of a contract, which of course ends the arrangement between the parties as respects further transactions, does not affect obligations already accrued. 17A CJS Contracts, Sec. 404 (1968, 1996); U.S. v. Southern Gulf Lumber Co., 10 F. Supp. 815, 818 (D.C. Ala. 1952). ("It is of course axiomatic that, although a contract may be terminated, vested rights which have arisen under such contract are not and cannot be destroyed by such termination." Cantor v. Berkshire Life Ins. Co., 171 NE2d 518, 520 (Ohio, 1960).)

Accordingly, HUD was not relieved on October 7 from having to provide the assisted housing it became earlier (on October 1) obligated to provide. HUD was only relieved on October 7 from having to provide assisted housing beyond what it was already obligated to provide; attaining the 7,100 figure on October 7 did not relieve HUD from whatever its assisted housing obligations were on October 6th, or 5th, or 4th,... or 1st.

Par. 5.1 is not to the contrary, for it says HUD will provide assisted housing "as set forth in this Part 5" until the 7100 figure is reached. Since "this Part 5" obligated HUD to provide assisted housing in the form of a 350 unit set-aside on October 1, 1996, it would violate the "as set forth" language of para. 5.1 to relieve HUD of its October 1 obligation on the ground that 7,100 occupancies were reached on October 7.

We think the fundamental problem with your "more than 7,100" argument is the implicit assumption that the consent decree entitles plaintiffs to no more than 7,100 occupancies. We believe the consent decree entitles plaintiffs to whatever

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[1] I do not believe I informed HUD that only 8 of the 32 September Habitat turnover units had been occupied by September 30, but rather that we had been given that information by the private managers and that the information needed to be verified.

number of occupancies HUD is required to fund before HUD's obligations to provide further funding are terminated by attaining 7,100 occupancies. Plaintiffs bargained not for a number of occupancies, but for a continuing HUD obligation to fund housing in agreed ways (regardless of the number of units thereby produced) until the obligation to provide further funding was terminated by reaching 7,100 occupancies. Given the realities of the HUD funding mechanism, it was a foregone conclusion that plaintiffs would wind up with some number of occupancies in excess of 7,100.

Which is in fact the case. Quite apart from the fiscal year 1997 set-aside, the units already in the "pipeline" -- i.e., funded by HUD from previous set-asides but not yet developed by Habitat -- will carry beyond 7,100 occupancies. The logic of the "more than 7,100" argument, if it were sound, would have led HUD to attempt to terminate set-aside funding at some prior date -- which it has not done. (While there is a factual distinction between funding provided but not yet used and funding obligated but not yet provided, it is a distinction without a difference so far as the "more than 7,100" argument is concerned.)

The parties' understanding and acceptance of this reading of the consent decree is evidenced by the agreement, respecting two elderly cluster buildings, which the parties entered into before Judge Aspen on October 23, 1992. Our agreement states that "if the total occupancies are between 7050 and 7099 on September 30th of the then current fiscal year, the 50-unit credit [attributable to two elderly cluster buildings] will not be counted in that year." (My letter to John Jensen of October 28, 1992.) Plainly the parties' agreement was intended to give plaintiffs the benefit of HUD's first-day-of-the-fiscal-year set-aside obligation even though we had reached 7099, but not 7100, occupancies on September 30th of any year. That, lacking a few units, is precisely where we now know we were on September 30, 1996.

Finally, the para. 5.5.1 provision which entitles HUD to reduce the Section 8 Existing housing set-aside depending on the contract authority available to the Leadership Council "at the beginning of any fiscal year . . ." speaks tellingly to the contrary of your argument, for the consent decree contains no similar "reduction" provision as to the 350 unit set-aside. It is precisely because of the para. 5.5.1 reduction provision that plaintiffs agree with your conclusion that HUD may reduce to zero the number of certificates to be set aside under that paragraph for fiscal year 1997.

Your second and final contention is that the premise -- that HUD was obligated to set aside contract authority for 350 units on October 1 -- is wrong. You argue that the comparable relief process somehow supersedes and extinguishes the first-day-of-the-fiscal-year obligation and substitutes a different, whenever-the-comparable-relief-process-ends, obligation.

It is true, as you say, that the comparable relief process was not complete on October 7, 1996. Howard Schmeltzer and I had discussed comparable relief before September 30 but agreed not to bring that matter to a head because of the possibility that the 7,100 occupancy figure might be reached by September 30, which would have rendered the discussion moot. (As you know, the process of determining whether we did or did not reach 7,100 by September 30 consumed a great deal of time, both before and after September 30. Indeed, it is only by your letter that HUD has definitively acknowledged that we did not.) In addition, Howard's view was that HUD would probably take the position, now espoused in your letter, that the post-October 1, 1996 attainment of the 7,100 figure would cut off any October 1 HUD obligation respecting the 350 unit set-aside, an issue we likewise agreed not to address until we were sure it wouldn't be academic to do so. So the question becomes: Does HUD's 350 unit set-aside obligation, which under Judge Aspen's ruling matured as of October 1, 1996, become retroactively eliminated if the comparable relief process is not complete by the time the 7,100 figure is subsequently reached? Or, is the October 1 obligation extinguished entirely by the comparable relief process and a new and different obligation substituted?

Relying on the language of para. 8.6 of the consent decree, you contend that until the comparable relief process is complete, "HUD has no obligation to set aside any contract authority." But it is perfectly commonplace that contracts create rights and duties even though some event (here the comparable relief process) must occur before performance can be completed. The fact that the process for implementing or enforcing an obligation necessarily carries the parties beyond the maturity date, and indeed beyond the termination of their contract, does not result in extinguishing the obligation. 4 Corbin on Contracts, Sec. 625 (1962). (Para. 8.6 says plaintiffs "shall be entitled to receive alternative relief comparable to that specified herein"; relief can hardly be termed "alternative" and "comparable" if it results in extinguishing the underlying obligation!)

Your argument that para. 8.6 "trumps" the first-day-of-the-fiscal-year obligation and substitutes a new one is unpersuasive for several additional reasons. First, there is no hint in Judge Aspen's order of such a reading of the consent decree. The Judge's ruling was preceded by meticulous briefing with supporting affidavits, and lengthy oral argument. Although the line of reasoning you now advance was not included in HUD's briefing and argument at that time, that is in a sense the point. HUD was then arguing, just as you do now, against a first-day-of-the-fiscal-year obligation, but advancing a different reason. It is unlikely that, in the context of the thorough 1982 presentation to Judge Aspen, HUD would have suffered a definitive and unqualified ruling to be entered, establishing that its full set-aside obligation matured as of October 1 of each year, without mentioning that the obligation would be qualified, indeed superseded, in the way you now suggest. As it is, we have an unqualified order which your present argument seeks to undermine.

Second, the interpretation for which you now contend is implausible. Whenever the 7,100 occupancy figure neared, HUD would have an incentive to deliberately delay the comparable relief discussions, thereby -- if it could delay long enough -- to extinguish entirely its 350 unit set-aside obligation. Such an interpretation is hardly one to be read into a bargained-for consent decree, especially when in hard-fought litigation over the meaning of the very provision at issue, HUD never mentioned its present argument.

Third, our agreement of October 23; 1992, is quite inconsistent with your present argument. On that day, <u>long after the parties had begun employing the comparable relief process</u> (which, as you point out, dates back to 1983), we mutually agreed that if occupancies were between 7050 and 7099 <u>on September 30th</u> of the then current fiscal year, the 50-unit credit attributable to two elderly cluster buildings would not be counted in that year. If the 350 unit set-aside obligation matured not on October 1 but at the end of the comparable relief process, that latter date, not the first day of the fiscal year, would have been the focus of the parties' agreement.

Finally, here the parties agreed to delay the comparable relief discussion until it could be determined whether the 7,100 figure had been reached by September 30. It would plainly be inappropriate to permit HUD to transform an agreement to put off the comparable relief discussion until the parties could determine that it was not academic into a

reason for extinguishing the very HUD obligation to which the comparable relief process is supposed to be directed.

(You also say it is only after completion of the comparable relief process that HUD would know what to set aside. In fact, evidencing the parties' acceptance of Judge Aspen's matured obligation reading of the consent decree, for a variety of reasons HUD and the plaintiffs have on a number of occasions continued the comparable relief discussion for weeks and months past the first day of the fiscal year, always however viewing the agreement reached as satisfying HUD's matured set-aside obligation for that year. The conduct of the parties makes it clear that there is no practical objection to satisfying the first-of-the-year obligation at a later date.)

* * *

Accordingly, our view is that plaintiffs are entitled to a 350 unit fiscal year 1997 set-aside and that -- now that we are in agreement that the 7,100 occupancies figure was not reached by September 30, 1996 -- we should complete the comparable relief process. As in recent years our preference is to take the set-aside in the form of replacement public housing. I hope we can hear from you promptly on that.

As to termination of the consent decree, we agree with you that, the 7,100 figure having been reached, a joint motion for termination of the decree would be appropriate. Would you like to draft the papers, or should we? (Let's remember that there must be an exception for the para. 5.8.1 matter. We'll either file that motion or, if we reach agreement in the current negotiations, settle it that way, but either way the issue may not be put to rest before you'd like to file the termination motion.)

Cordially,

Alexander Polikoff

ALP:mm
cc: Carole Wilson
(by fax: 202/708-3351
copy by mail)

CERTIFICATE OF SERVICE

I, Alexander Polikoff, an attorney, certify that on July 8, 1997 I served copies of the foregoing Plaintiffs' Opening Brief on Three Matters, by personal or facsimile service on the persons listed on the attached service list.

Alexander Polikoff

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