IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1807

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	Appeal from the United
	)	States District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
CHICAGO HOUSING AUTHORITY,	)	
a corporation, and JOSEPH SHULDINER,	)	No. 66 C 1459
Executive Director, in his official capacity,	)	
	)	Chief Judge Marvin E. Aspen
Defendants.	)	

DEFENDANTS-APPELLANTS' RESPONSE
TO APPELLEES' MOTION TO DISMISS APPEAL

Defendants-Appellants, the Chicago Housing Authority and Joseph Shuldiner (collectively, the "CHA"), submit, pursuant to this Court's order of April 17, 1998, this response to Appellees' Motion To Dismiss Appeal (the "Motion To Dismiss" or "MTD") and Memorandum In Support Of Appellees' Motion To Dismiss Appeal ("Plaintiffs' Memorandum" or "Pl. Mem."), filed on April 13, 1998.

Preliminary Statement

The Gautreaux injunction entered in 1969 against the CHA (the "Injunction") created the "scatter-site housing program" that originally required the CHA to build three units (later reduced to one unit) of scattered housing in majority "white" neighborhoods (known as the "General Area") for each new unit of public housing built in a majority "non-white" neighborhood (known as the "Limited Area"). Twenty-nine years later, the district court held that the Injunction governed the CHA's use of federal funds provided under a demonstration program

created by Congress in 1992 ("HOPE VI") that is designed to revitalize the neighborhoods that contain some of the worst public housing in the country and to create economic opportunity in those neighborhoods.

For the past five years the CHA has applied for and obtained HOPE VI grants for massive redevelopment projects at Cabrini-Green, Robert Taylor, and ABLA, and has engaged in substantial work on these projects, without planning or even attempting to comply with the Injunction. During all of this time the plaintiffs never asked the district court to hold that the Injunction governed the CHA's use of HOPE VI funds. Moreover, in late 1997, the plaintiffs actually filed a motion to modify the Injunction to add Section 8 rent vouchers to the Injunction, contending that they were entitled to further relief because there were no new federal funds for development of scattered sites in the General Area. Plaintiffs did not even mention HOPE VI as a source of funds that was subject to the Injunction.[1]

The district court's holding would subject a vast, complex federal program to the jurisdiction of the federal court, and it necessarily would extend the duration of the Injunction for many, many years. The appeal of the district court's order presents questions never previously decided in this case. The CHA has raised substantial arguments that the district court did not properly interpret the Injunction and in fact imposed substantial new obligations on the CHA. The district court ignored the principles of interpretation set forth by this Court in Youakim v.

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[1] The district court agreed that the Section 8 program was not subject to the Injunction because the program did not exist at the time the Injunction was entered. Nevertheless, the district court declared that the Injunction's mandatory building program must be imposed on the CHA's HOPE VI programs, despite the fact that HOPE VI was not in existence at the time the Injunction was entered.

McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995). Before the district court, the CHA argued that the language and structure of the Injunction, its historic and legal context, and its history of enforcement must be considered. The district court instead "stared hard"[2] at a phrase from the Injunction's definition of "Dwelling Unit," which by its terms applies to all public housing units made available after the entry of the Injunction, and concluded that since HOPE VI funds would be used to build replacement housing for residents displaced by the demolition of the high-rise projects at Cabrini-Green, Robert Taylor, and ABLA, those replacement units would have to conform to the locational requirements of the Injunction.

The district court found no incompatibility between the Injunction and HOPE VI because the HOPE VI statute does not require that all the replacement units be built on-site of the demolished projects and, based on one sentence from the HUD Guidebook on HOPE VI and one sentence from the legislative history, concluded that the CHA was free to build the replacement units in scattered sites in the General Area. The district court ignored entirely the congressional purpose to revive the very neighborhoods in which the high-rise projects had been located and to create a mixed-income environment that would attract new families to those neighborhoods in an effort to end the racial and economic isolation and extreme poverty in those neighborhoods. While the district court recited one line of legislative history that referred to replacement units at "scattered sites," it ignored the heart of the legislation as described in the legislative history:

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[2] As this Court has observed, "It is a great fallacy to think that by staring hard at an isolated sentence one can come up with a meaningful interpretation." Alliance To End Repression v. City of Chicago, 742 F.2d 1007, 1013 (7th Cir. 1984) (en banc).

> HOPE VI is an attempt by the Committee to invest Federal resources directly into communities to create the conditions to bring about citizen self-responsibility and resident self-sufficiency in the most distressed areas of urban America. For too long, these areas have been the victim of either gross neglect by government or the victim of large bureaucracies that have wasted limited resources in an attempt to impose top down strategies to do good to the residents of these areas. Neither approach has worked.
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> As a result, the Committee, in HOPE VI, has adopted an empowerment strategy built on the twin anchors of self-sufficiency and self-responsibility. It is a program that calls upon both the residents and political leaders of America's large cities to join together to develop strategies that will transform these distressed areas into productive residential and commercial centers.
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> * * *
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> The Committee recognizes that these goals are, in fact, ambitious ones, that will not be realized through the enactment of HOPE VI alone. Nor will they be achieved with a large grant program that simply guarantees all urban centers and their residents with funds to conduct business as usual. But by making the program competitive among the Nations largest cities, HOPE VI seeks to give those areas with the best proposals an opportunity to begin this transformation process.

App., Tab 4, Excerpt of S. Rep. 102-356 at E-1 (emphasis added).[3]

The district court's interpretation of the Injunction is clearly wrong. Requiring the CHA to build one-half of the replacement units in the General Area defeats the purpose of HOPE VI. The Injunction is based on a model of integration that calls for the movement of minority public housing residents into majority "white" neighborhoods. HOPE VI seeks to achieve desegregation by improving the very neighborhoods that have been victimized by massive public housing projects and by giving public housing residents the choice of where they want to live. Under HOPE VI and HUD regulations, the CHA is free to build enough replacement units on-site so that all residents who choose to remain in the neighborhood will be

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[3] Relevant documents referred to in this response are collected in a separate appendix filed simultaneously with the filing of this response. References to documents in the appendix appear as follows: App., Tab ___, [document name] at ___.

guaranteed that opportunity. Many residents have already been displaced by the demolition of their homes and they have made their choice of where they want to live. The district court's order takes away the choice that the statute grants to public housing residents.

The Order Is Appealable

Plaintiffs' Motion to Dismiss the Appeal argues that this Court does not have jurisdiction to review an order that merely interprets an injunction. (MTD at ¶ ¶ 1-2) However, appellate jurisdiction in this case is proper under both 28 U.S.C. § § 1291, 1292(a)(1) ("Section 1291" and "Section 1292(a)(1)," respectively) because the district judge's order is final and impermissibly modifies the Injunction as originally drafted.

Section 1292(a)(1)

With regard to Section 1292(a)(1), all of the cases cited by plaintiffs (many of which are also cited by the CHA in its docketing statement), demonstrate the same principle: an erroneous interpretation of an injunction is appealable under 28 U.S.C. ¶ 1292(a)(1), because an erroneous interpretation of an injunction is actually an (appealable) modification of the same. See, e.g., Motorola, Inc. v. Computer Displays Int'l., Inc., 739 F.2d 1149, 1155 (7th Cir. 1984) (explaining that an erroneous interpretation of an injunction, as opposed to a "true" interpretation, modifies an injunction because it changes the parties' original relationship), quoted in Pl. Mem. at 7. The CHA has stated its position: it sought a clarification of the Injunction; however, the interpretation it received (the Order) was erroneous, and thus constituted an unsought, improper, and appealable modification of the Injunction. (App., Tab 1, Docketing Statement at

2) Cf. Reply Memorandum In Support Of CHA's Emergency Motion To Clarify Injunction at 1-2, attached as Exhibit C to Pl. Mem. and quoted in Pl. Mem. at 5-6.[4]

Where an appellant appeals the interpretation of an injunction, this Court must consider the merits of the case, at least to a certain degree, in order to determine whether it has the jurisdiction to hear the case in the first instance. See Motorola, Inc. v. Computer Displays International, Inc., 739 F.2d 1149 (7th Cir. 1984) (stating that in some cases a cursory review is sufficient, while in others, the court must actually hear the case to determine its jurisdiction). In Buckhanon v. Percy, 708 F.2d 1209, 1213 (7th Cir. 1983), this Court conducted a cursory review of the appellant's arguments on the merits before concluding that it had appellate jurisdiction to review an order that had issued in response to a "motion to clarify." Upon finding that the issue on appeal was a "close case," the Court went on to consider whether the appeal also raised new issues, or whether it merely relitigated issues that had already been decided by the district court. Id. Because the case raised genuine issues, and because it raised new issues that had not been decided, the Court determined that it had jurisdiction to hear the appeal. Id. After so concluding, the Court proceeded to the merits of the case.

As in Buckhanon, this case raises a new issue that had not been decided by the district court prior to the entry of the Order. Further, and as demonstrated below, the question whether the district court erroneously interpreted the Injunction is a genuine issue. See Section I(A), below. Plaintiffs' apparent attempt to suggest that the CHA somehow agrees with the Order, as well as their reliance on the case of Mikel v. Gourley, 951 F.2d 166 (8th Cir. 1991),

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[4] Pl. Mem. cites to Pl. Mem. "Exh. B, pp. 2, 3, emphasis added," although the quoted language actually appears at Exhibit C to Pl. Mem at pages 1-2.

should be rejected. See Sections I(B) and I(C) below, respectively. Accordingly, the Order setting forth the district court's erroneous interpretation of the Injunction is appealable pursuant to Section 1292(a)(1), and the Motion To Dismiss should be denied.[5]

Section 1291

In any event, the Order is appealable under Section 1291 as a final order. This case is a post-judgment case in which a new question has been decided for the first time nearly thirty years after entry of an injunction. "[I]n cases involving a protracted remedial phase, [courts] give § 1291 a practical rather than a technical construction." United States v. Yonkers Board of Education, 946 F.2d 180, 183 (2d Cir. 1991) (per curiam) (internal quotations and citations omitted). The HOPE VI litigation is a "separate lawsuit" that is now final. See S.E.C. v. Suter, 832 F.2d 988, 990 (7th Cir. 1987) (final orders issued in post-judgment proceedings may be appealed under 28 U.S.C. § 1291 because such proceedings are treated as "separate lawsuit[s]"); Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1224 (7th Cir. 1993) (same).

Plaintiffs' discussion of their motion for further relief, pending in the district court, Pl. Mem. at 4, 9-10, suggests that they would dispute the assertion that the HOPE VI litigation is "final" for purposes of Section 1291. However, plaintiffs' pending motion can have no affect on the current appeal. Instead, as plaintiffs' docketing statement states, plaintiffs are seeking further relief under a separate order (an order appointing a receiver) that was issued for

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[5] A cursory review of the CHA's arguments demonstrates that the Motion To Dismiss should be denied, and that briefing on the merits should proceed as scheduled. See Section I(A), below. However, if the cursory review is not sufficient to convince this Court that it has jurisdiction to hear the appeal, the appropriate response is to order briefing on the merits in order to resolve the Motion To Dismiss.

the purpose of enforcing the Injunction. See App., Tab 2, Pl. Docketing Statement at 3. Because the Order is a final order under Section 1291 with regard to the HOPE VI litigation, this Court has jurisdiction to review the Order on that basis alone.

Background

The Injunction and Its Locational Requirements

The Injunction creates a mandatory building program that requires the CHA to build new units of public housing in accordance with a specific plan set forth by the district court in the Injunction. Specifically, the Injunction prohibits the CHA from making any new housing units available in the "Limited Area," unless an equivalent number (originally 3 to 1) of housing units are made available in the "General Area." 304 F. Supp. 736, 738, Article III (N.D. Ill. 1969). This geographical requirement was intended to slow the "growth rate" of public housing in the Limited Area, while simultaneously providing African-American public housing tenants and applicants (the plaintiff class) with the opportunity to move into the General Area. The Injunction also requires the CHA to build new units through the administration and implementation of a "scattered-site" building program, which constitutes the building of individual units (non-high rises) in a scattered pattern throughout the City. Id. at 739, Article IV.

The Injunction does not speak to the CHA's activities with regard to the units of housing that existed in the Limited Area at the time of the entry of the Injunction, nor to the myriad number of other activities in which the CHA is (and was) engaged. Those activities included and continue to include, among other things, rehabilitation of public housing units, demolition of public housing units, acquisition of property, and general community improvement programs. Instead, the Injunction is limited to regulating the CHA's site selection with regard to

new public housing developments and tenant selection policies, the two policies found in 1969 by the district court to be unconstitutional.

HOPE VI

HOPE VI is a model demonstration program created by Congress in 1992, and funded by Congress in fiscal years 1993 - 1997. See App., Tab 3, CHA Mem., Ex. B.[6] HOPE VI is appended to Section 14 of the Low-Income Housing Act (the "Act"), the Act that sets forth various requirements that a housing authority must meet in order to obtain federal funds for public housing assistance. Section 14 of the Act sets forth the requirements for the use of funds provided to housing authorities for the purpose of rehabilitating and/or maintaining their existing aggregate housing stock. See 42 U.S.C. 1437*l*(a). Under the terms and structure of the Act, HOPE VI funds must be used to build "replacement units;" a housing authority cannot use HOPE VI funds to add units to its existing aggregate housing stock. In other words, HOPE VI funds are a specific and non-traditional form of rehabilitation funding, used primarily to rehabilitate housing that is so obsolete that actual demolition and replacement makes more sense than traditional forms of rehabilitation.

HOPE VI is not, however, merely a source of rehabilitation funding. The purpose of the statute is to provide housing authorities with grants to rehabilitate and modernize severely distressed or obsolete public housing projects and to revitalize the neighborhoods in which those

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[6] Plaintiffs have not attached a copy of the the CHA's Memorandum In Support of the Motion To Clarify (the "CHA's Memorandum" or "CHA Mem.") to the Motion To Dismiss. The CHA has included a copy of that document in the accompanying Appendix at Tab 3.

housing projects are located. See e.g., App., Tab 3, CHA Mem., Ex. B; App., Tab 4, Excerpt of S.Rep. 102-356.

The CHA applied for and was granted HOPE VI funds in 1993 and 1996. To date, none of the CHA's HOPE VI funds has been "drawn down" or used for the construction of replacement housing (although the CHA has begun preparations for use of HOPE VI funds by demolishing several high-rise developments). In order to draw down the funds, the HOPE VI statute requires the CHA to first submit a final "implementation plan" to HUD, one that has been approved by the City of Chicago and by CHA residents. See App., Tab 3, CHA Mem., Ex. B at "256," 1st Column, 2nd full proviso. In August of 1997, the CHA submitted its final implementation plan to HUD, as approved by the the City of Chicago and the community, for the purpose of drawing down some of the funds from its 1993 HOPE VI grant. On September 9, 1997, HUD approved the CHA's implementation plan, but imposed several conditions upon the release of the HOPE VI funds. One of the conditions asked the CHA to determine conclusively whether the terms of the Gautreaux Injunction governed the CHA's HOPE VI projects. In response to that condition, the CHA filed the Motion To Clarify, and asked the court to declare that the Injunction could not be used to control the CHA's use of its HOPE VI funds.

Motion To Clarify and Order

In support of the Motion To Clarify, the CHA made three principal arguments. First, the CHA argued, relying on the district court's August 1997 interpretation of the Injunction,[7] that the Injunction did not govern HOPE VI because HOPE VI was enacted after entry of the Injunction. Second, the CHA argued that the structure of the Injunction, the context of its

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[7] See App., Tab 3, CHA Mem., Ex. A at *4, n.3.

enactment, and the history of its enforcement demonstrate that the Injunction was not intended to govern a program such as HOPE VI, which replaces existing housing rather than increases the CHA's aggregate housing stock. Third, the CHA argued that any other interpretation of the Injunction would raise serious separation of powers and federalism concerns because, inter alia, any other interpretation would essentially "rewrite" the HOPE VI program in Chicago with regard to issues such as resident involvement, the involvement of local political leaders, and the focus on distressed areas.

The district court judge rejected the CHA's arguments, and declared that the Injunction "governs the CHA's use of HOPE VI funds," and further that "any construction for public housing in Cook County must conform to the [Injunction's] location requirements." The district court based its interpretation of the Injunction primarily on the Injunction's definition of "dwelling unit." (Pl. Mem., Ex. A, Order at 3-4) The district court based its apparent rejection of the CHA's separation of powers and federalism arguments on its interpretation of the requirements of the HOPE VI statute, and on a serious misstatement of the CHA's arguments with regard to urban renewal. (Id. at 4)

Argument

I. THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE DISTRICT COURT ERRONEOUSLY INTERPRETED THE INJUNCTION

A. A Cursory Review Of The CHA's Arguments On Appeal Demonstrates That The District Court's Interpretation of the Injunction Was Erroneous

The standard of review of a district court's interpretation of an injunction is plenary. Motorola, Inc. v. Computer Displays Int'l, Inc., 739 F.2d 1149, 1155 (7th Cir. 1984); Wilder v. Bernstein, 49 F.3d 69, 72 (2d Cir. 1995); Int'l Ass'n of Machinists v. Eastern Airlines,

849 F.2d 1481, 1485 (D.C. Cir. 1988). See also Youakim v. McDonald, 71 F.3d. 1274, 1283 (7th Cir. 1995)(appellate court need not show deference to district court's interpretation of injunction, where judge interpreting injunction did not draft injunction).

1. The district court's August 1997 interpretation of the Injunction demonstrates that the court's current interpretation of the Injunction is erroneous.

On May 21, 1997, plaintiffs filed a motion to modify the Injunction, asking the district court to bring the federal Section 8 program under its jurisdiction in order to provide plaintiffs with further relief. (Section 8 is a voucher program whereby public housing tenants are provided with rent vouchers accepted by private landlords who participate in the Section 8 program). On August 27, 1997, the district court entered an order denying plaintiffs' motion to modify, and wrote as follows:

> Although the plaintiffs belatedly attempt to characterize their request as one for "particularization, not expansion, of the judgment order," we agree with their earlier acknowledgment that "because the Section 8 rent subsidy program was not in existence when the judgment order was entered, CHA's Section 8 program was not part of the relief provided to the plaintiff class." Indeed, it was the later HUD consent decree [terminated on August 27, 1997] that purported to indirectly oversee CHA's use of § 8 rent subsidies by imposing limits on HUD's ability to approve CHA's contract authority.

App., Tab 3, CHA Mem., Ex. A at *4, n.3 (citations omitted) (emphasis added). The Court's August 27 interpretation is equally applicable to HOPE VI which, like Section 8, "was not in existence when the [Injunction] was entered."

In addition, as with Section 8, if anything, it was "the later HUD Consent Decree" which purported to provide relief to the plaintiffs with HOPE VI funds. HUD did provide plaintiffs with some HOPE VI funds in 1996.[8] If plaintiffs were already entitled to HOPE VI

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[8] In direct response, Congress promptly amended HOPE VI afterward to insure (continued...)

funds under the Injunction, they would not have had to obtain the use of such funds pursuant to a later (amended) Consent Decree with HUD. Indeed, the Seventh Circuit permitted the case against HUD to go forward, reversing Judge Austin's decision to the contrary, on the grounds that "a decree utilizing certain HUD programs still remains a possible form of relief not already available through the other case [i.e., against the CHA]." Gautreaux, et al. v. Romney, 448 F.2d 731, 736 (7th Cir. 1971) (emphasis added). Despite all of this, the district court found that the Injunction "governs the CHA's use of HOPE VI funds."

2. The district court's interpretation of the Injunction is untenable in view of the language and structure of the Injunction, the context of its enactment, and the history of its enforcement.

The language and structure of the Injunction, like "any other disputed writing," must be construed in the proper context. Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995). Yet, in imposing the terms of a nearly thirty year old injunction onto a housing demonstration program created by Congress less than six years ago, the district court overlooked all of these factors, and instead focused on one phrase from one subsection of the Injunction's definitional section – the definition of "dwelling unit" -- relied upon by plaintiffs in the Motion To Dismiss. (Pl. Mem. at 7-9.) The district court's interpretation of the Injunction is flawed.

a. The Injunction was not intended to regulate rehabilitation efforts.

When all of the relevant factors are considered, it is clear that the Injunction was not intended to regulate any future efforts by the CHA to revitalize the housing stock already existing at the time of the entry of the Injunction, i.e., those units in the Limited Area that are

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[8] (...continued)
that HOPE VI funds would not be used in that manner again. App., Tab 3, CHA Mem. at 8, n.6.

being replaced with HOPE VI funding. Instead, the Injunction was crafted to to insure that any aggregate increases in the CHA's housing stock would occur in a particular manner, i.e., in a one-for-one building pattern.

*(i) **Structure of Injunction.*** While the Injunction is comprehensive with regard to the CHA's development activities, it simply does not speak to the CHA's rehabilitation activities with regard to housing already existing in the Limited Area at the time of the entry of the Injunction. The Injunction does not require the destruction, demolition, or retirement over time of the then-existing housing stock located in the Limited Area. Cf. Walker v. HUD, 734 F.Supp. 1231, 1270 (N.D. Tex. 1989)(demolition of existing housing a "recognized, legitimate" part of a desegregation remedy, notwithstanding objections by several hundred plaintiff class members). Indeed, Judge Austin specifically refrained from cutting off all federal funding to the CHA. 296 F.Supp. 907, 914-15.

*(ii) **Context of Entry.*** The harm found in the case was not the building of public housing in majority African-American neighborhoods per se; the harm found was the building of public housing in impoverished majority African-American neighborhoods for the purpose of denying African-Americans the right to choose where to live. 296 F.Supp. at 914. To remedy that harm, the district court created a narrowly tailored remedy that had the effect of increasing the aggregate number of units in the General Area at a faster rate than any aggregate increase of units in the Limited Area. HOPE VI, of course, works no aggregate increase in the CHA's housing stock, and permits public housing resident to choose where they want to live.

*(iii) **History of Enforcement.*** The Injunction has been used to regulate the CHA's use of federal funds designated to be used to increase the CHA's aggregate housing

stock; all other funds, including funds designated for rehabilitation and demolition work, have never been regulated, controlled, or in any other way affected by the Injunction's building proscriptions. See, e.g., App., Tab 3, CHA Mem., Ex. I, 1991 U.S. Dist. LEXIS 4123 (N.D. Ill. 1991) (district court denied plaintiffs' request to enjoin the CHA's use of rehabilitation funds).

b. "Replacement" housing is a non-traditional form of rehabilitation.

There is no dispute that HOPE VI housing is replacement housing, and that the Injunction does not explicitly speak to the issue of replacement housing. Pl. Mem., Ex. D., Transcript of Oral Argument at p. 42, line 25 - p. 44, line 15 (plaintiffs concede that Injunction does not explicitly discuss "replacement" housing). How, then, is replacement housing to be treated under the Injunction? The district court answered this question simply by looking to one phrase from one subsection of the Injunction's definitional section -- the subsection that defines the term "dwelling unit." The Injunction defines "dwelling unit," in part, as any unit "initially made available to and occupied by a low income, non-elderly family, subsequent to the date hereof." According to the district court, housing units constructed with HOPE VI funds "obviously qualify" because they will initially be made available after 1969, and thus, HOPE VI funded units are governed by the Injunction. (Article II of the Injunction requires, inter alia, that "[a]ll Dwelling Units provided for in such plan shall be located in conformity with the provisions of Article III hereof [the one-for-one building/leasing requirement].) Following the district court's reasoning to the end, all HOPE VI replacement units must be built in conformance with the Injunction's locational restrictions.

The CHA does not disagree that a "Dwelling Unit" is a public housing unit made available for occupancy after the entry of the Injunction, and that HOPE VI-funded units, being

created for occupancy 30 years later, would come within the literal language of the definition. Cf. Pl. Mem. at 7-8. But that is why the Injunction needs to be clarified. What does "made available" mean in the context of the Injunction? The Injunction does not explicitly speak to replacement housing because replacement housing was not an issue in 1969. But the HOPE VI statute indicates that a replacement unit is merely a substitute for a unit that, in this case, was already available to CHA tenants prior to the entry of the Injunction. Replacement in this context is a (non-traditional) form of rehabilitation. Was the Injunction intended to govern replacement units built with HOPE VI funds? The CHA argues that it was not, just as it was not intended to govern the CHA's use of other rehabilitation funds.

The district court did not consider any of these issues, nor did it consider the structure of the Injunction, the context of its enactment, or the history of its enforcement. Instead, the district court simply "stared hard" at one isolated phrase from the Injunction, and failed to offer any meaningful interpretation of the Injunction. See Schering Corp. v. Illinois Antibiotics Co., 62 F.3d 903, 906 (7th Cir. 1995) (the invocation of "narrow literalism" is not a proper method for interpreting injunctions).

3. The district court's interpretation raises serious separation of powers concerns.

In Alliance to End Repression v. Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984) (en banc), this Court refused to interpret a consent decree to conflict with guidelines drafted by the FBI, in part, out of a "due regard for the separation of powers." In this case, the district court has taken the liberty of rewriting a program created not by a federal agency, but by Congress itself.

The Order rewrites HOPE VI by overriding resident involvement, the involvement of local political leaders, and the focus on distressed areas. HOPE VI requires a collaborative process between the CHA, its residents (who are represented by their local advisory councils),[9] and local elected political officials. Yet, the district court cites to one sentence from the legislative history, apparently for the proposition that HOPE VI can be used to fund the Gautreaux scattered site program, and thus concludes that there is no conflict between HOPE VI and the Injunction's mandatory building program. See Pl. Mem., Ex. A, Order at 4 ("The balance of the [demolished] units could be replaced through . . . traditional replacement means, including major reconstruction and *scattered-site development*.").

First, the reference to scattered-site housing is not a reference to the specific scattered site building program set forth in the Injunction. Second, the CHA agrees that, through the process described in the HOPE VI statute and legislative history, it could be that the CHA would choose to build some scattered site units with its HOPE VI funds. But that is a far cry from a mandatory building program.

One sentence from the legislative history, read out of context, is not a sufficient justification for imposing the Injunction's mandatory building program on HOPE VI.[10] HOPE VI does not require nor does it permit the mandatory imposition of the Injunction's scattered site building program in Chicago. HOPE VI funds cannot be funneled into the *Gautreaux* scattered site program simply because the funds for that program have run out. Cf. Pl. Mem., Ex. A,

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[9] See, e.g., 42 U.S.C. 1437*r*; 24 C.F.R. § § 964.11, 964.100.

[10] The district court also found that HOPE VI permits building off-site. The CHA has never argued otherwise; indeed, the CHA's HOPE VI plans contemplate some off-site replacement units.

Order at 3 (indicating that if district court granted the CHA's motion, there would be no further funding for the Gautreaux scattered-site program). HOPE VI is the antithesis of Gautreaux centralized planning; it is the antithesis of the Gautreaux model of integration -- one that seeks to integrate minority citizens into "white" society, rather than creating communities in which minority citizens (and others) would and can choose to live. A review of the language of the statute alone demonstrates that fact.

There is no claim here that HOPE VI, or the CHA's HOPE VI plans, are in anyway violative of the Constitution. HOPE VI permits the CHA's residents (many of whom are members of the plaintiff class) to choose where they want to live, and to participate in the revitalization of the communities in which they now live. Nevertheless, the Order has re-written HOPE VI for Chicago by simply imposing a mandatory building program on to the statute.

B. Plaintiffs' Suggestion That The CHA Agrees With The District Court's Interpretation Of The Injunction Is Incorrect And Misleading

The Motion To Dismiss suggests that the CHA has conceded that the district court's interpretation of the Injunction is proper and that, therefore, the question of this Court's jurisdiction can be resolved solely on the basis of the CHA's "concessions" or "admissions." See Pl. Mem. at 7-8. Plaintiffs' arguments on this point are misleading and frivolous.

First, the Motion To Dismiss suggests that the CHA has conceded that the district court's interpretation of "dwelling unit" leads to a reasonable or meaningful interpretation of the Injunction. Pl. Mem. at 7 (stating that Order is not surprising given that the "CHA itself conceded that HOPE VI-funded units come within the [Injunction's] definition of 'Dwelling Unit'"). Plaintiffs' presentation of the CHA's position is misleading. The CHA has always

argued[11] that the ambiguity in the Injunction arises from the literal definition of dwelling unit, and that the ambiguity cannot be resolved simply by staring hard at the definition in isolation. See, e.g., Pl. Mem., Ex. C, CHA Reply Brief at 5-6 (stating that definition of dwelling unit "only begins the inquiry"). See also Section I(A)(2), above. Plaintiffs' attempt to use one statement from oral argument taken out of context, for the purpose of dismissing an appeal, should be rejected. Cf. Pl. Mem., Ex. D., Transcript of Oral Argument at p. 42, line 25 - p. 44, line 15 (plaintiffs concede that the language of the Injunction is ambiguous with regard to its treatment of "replacement" housing).

Plaintiffs' citation to plaintiffs' counsel's reading of an August 11, 1993, letter from CHA to HUD, which states that proposed HOPE VI units will be built "in accordance with the consent decree and subsequent order of the Gautreaux litigation," is also irrelevant and misleading. (Pl. Mem. at 8) First, the letter is ambiguous. Does it refer to the HUD consent decree or the CHA Injunction? The HUD consent decree was terminated in August of 1997. App., Tab 3, CHA Memo, Ex. A. Second, a prior administration's "interpretation" of the Injunction is not precedent. If the CHA's interpretation of the Injunction was binding, it would have had no need to file the Motion To Clarify. What is relevant is the structure of the Injunc-

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[11] The claim that the CHA has "assume[d] a contrary position" to that taken below, Pl. Mem. at 5-6, is refuted by a comparison of the portion of the CHA's Reply Memorandum cited in Pl. Mem. at 5-6 with the CHA's Docketing Statement. The CHA sought a clarification. What it received, in its opinion, is an unsought, improper, and appealable modification. The CHA's logic is the same logic used by this Court in Motorola and other cases cited by plaintiffs in Pl. Mem. Perhaps more importantly, while plaintiffs make much of the CHA's characterization of its arguments below, Pl. Mem. at 5-6, they later concede that "[i]n determining appealabilty this Court will of course look beyond labels." Pl. Mem. at 7.

tion, the context of its enactment, and the history of its enforcement, all of which contradict the view that the Injunction governs a program such as HOPE VI. See Section I(A)(2), above.

Third, and perhaps more importantly, HUD, the recipient of the letter and the agency charged with enforcing HOPE VI, has not interpreted the letter as a binding commitment or a relevant interpretation. See App., Tab 5, HUD Response To Motion To Clarify. Plaintiffs have failed to advise the Court that the parties have been discussing the Injunction's (and related orders') treatment of HOPE VI for years. Each party could cite to isolated statements or actions of the other party to support the view that the other party "concedes" its own position. None of those statements or actions are relevant to the question of the proper interpretation of the Injunction. See, e.g., Pl. Mem., Ex. C, CHA Reply Mem. at 12 (stating that factual disputes need not be resolved in considering the Motion To Clarify). The district court did not make any factual findings with regard to either parties' prior conduct, but instead, offered an advisory opinion on the Injunction pursuant to In re Hendrix, 986 F.2d 195, 200 (7th Cir. 1993). See App., Tab 3, CHA Mem. at 11, citing Id. (citations omitted)("If this looks like a request for an 'advisory opinion,' it is one that even a federal court can grant, in order to prevent unwitting contempts."). The Motion To Clarify is a proper attempt by the CHA (at the direction of HUD) to definitively resolve the "discussions" that have been ensuing for years.

C. The Case of Mikel v. Gourley Is Inapposite

Plaintiffs' reliance on Mikel v. Gourley, 951 F.2d 166 (8th Cir. 1991), is misplaced. As an initial matter, the Mikel court, unlike this Court, did not conduct even a cursory review of the merits of the case. In addition, the issue in Mikel was a relatively minor administrative matter. In Mikel, the defendant welfare agency was required to take final

administrative action on welfare hearings within 90-days of the hearing. Under the terms of the injunction, however, the 90-day period would be tolled if the hearing was delayed because of the welfare claimant's actions. After entry of the Injunction, regulations were promulgated that permitted welfare recipients to obtain a telephone hearing. The substantive issue raised in Mikel was the question whether a claimant's decision to forgo a telephone hearing would also toll the 90-day "action" period. See id. at 168. The clarification of the relatively minor, administrative matter at issue in Mikel is a far cry from the question whether a thirty year old injunction governs an entire federal statutory scheme that Congress promulgated years after entry of that injunction.

II. IN THE ALTERNATIVE, THE QUESTION OF THE COURT'S JURISDICTION MUST BE RESOLVED BY BRIEFING ON THE MERITS

In Motorola, 739 F.2d at 1155, this Court found that that it could only answer the question of jurisdiction in a case such as this by considering the parties' arguments on the merits. As that case had already been briefed on the merits, the Court considered those briefs to determine its jurisdiction. Here, of course, the parties have not had an opportunity to brief the case on the merits. Therefore, in order to decide the jurisdictional question and the motion to dismiss, this Court should order the briefing on the merits to proceed as scheduled.

III. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER BECAUSE IT IS "FINAL" FOR PURPOSES OF APPELLATE JURISDICTION

The Motion To Clarify sought a declaration of the CHA's rights with regard to HOPE VI, an issue that the district court had never decided prior to entry of the Order. The district court issued a declaration in response to the motion. The declaration is final. None of the current proceedings in the district court will have the effect of reversing the declaration that HOPE VI is governed by the Injunction. The only thing left for the district court, at least with

regard to HOPE VI, is the litigation to insure compliance with the declaration. Cf. Henry v. Farmer City State Bank, 808 F.2d 1228, 1240 (7th Cir. 1986) (district court retains jurisdiction during appeal to aid in execution of judgment that has not been stayed or superceded). On appeal, the CHA seeks review of that declaration in the first instance.[12]

The case of Major v. Orthopedic Equipment Co., Inc., 561 F.2d 1112 (4th Cir. 1977), cited by plaintiffs in the Motion To Dismiss, is unavailing. In Major, the injunction at issue was essentially a consent decree that required both parties to take (or refrain from taking) certain actions. In that litigation, one party filed a motion to clarify to determine if the other had violated the injunction. The district court made a factual finding that a violation had occurred, but did not offer a remedy for the violation. According to the Major court, the order being appealed was not final because it could be mooted by further proceedings in the district court. Finding that appellate review of an order that could be mooted by further proceedings in the district court would constitute an advisory opinion (and not one sought to avoid unwitting

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[12] A modification of a permanent injunction is, in reality, nothing more than another form of a permanent injunction. Entry of a (second) permanent injunction is a final order sufficient to confer appellate jurisdiction under § 1291. E.g., Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3916, n.12 (2d ed. 1992) (noting the "common phenomenon" that "orders with respect to injunctive decrees often may be appealable either as final decisions or as interlocutory orders with respect to injunctive relief under 28 U.S.C. § 1292(a)(1)"). As such, because this case is properly appealable under § 1292(a)(1) as a new injunctive order, it is also appealable as a final order under § 1291. See Gautreaux v. Chicago Housing Authority, 436 F.2d 306, 311 (7th Cir. 1970) (holding that modification of injunction was appealable as a final order because it was "positive, final, complete, and unequivocally directed the CHA to take certain action"); see also Walker v. United States Dep't of Housing & Urban Development, 912 F.2d 819 (5th Cir. 1990) (holding that the interpretation of a consent decree to require government subsidization at a specified level of vacant public housing units was a final judgment).

contempts), the court found that it was without appellate jurisdiction. Here, the Order will not be mooted by plaintiffs' pending motion for further relief. If anything, it is the opposite.

Plaintiffs' motion for further relief will be mooted, for the most part, if the CHA prevails on appeal. The main thrust of plaintiffs' motion is to ask the district court to force the CHA to transfer its authority for the HOPE VI program over to the court-appointed receiver (the "Receiver") who was appointed in 1987 to implement the Injunction's scattered-site program. In other words, plaintiffs' motion asks the district court to modify an order other than the Injunction (the "Receivership Order"), so that the Receivership Order reflects the newly explicit terms of the Injunction (i.e., the HOPE VI requirement). Clearly, if this Court determines that the Injunction's scattered site program does not apply to HOPE VI, there will be nothing new for the Receiver to implement, and any question of the amendment of the Receivership Order will be moot.[13]

Finally, plaintiffs argue that this Court should await a ruling on the plaintiffs' pending motion, and an appeal of that ruling, before hearing the CHA's appeal. Plaintiffs' suggestion is based on their argument that a ruling on their pending motion would be appealable, and thus, the Court would be subjected to "piecemeal" appeals if it does not dismiss the CHA's appeal while awaiting the supposedly upcoming appeal. The argument is frivolous. The case of ACORN v. Edgar, 75 F.3d 304 (7th Cir. 1996), on which plaintiffs rely, does not require an

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[13] Plaintiffs' docketing statement suggests that the pending motion for further relief will not be mooted if the CHA prevails on appeal. App., Tab 1, Pl. Docketing Statement at 3. If the CHA prevails on appeal, the portions of plaintiffs' pending motion that relate to HOPE VI will be moot. It is true that other issues will not be mooted by the HOPE VI appeal. But all that demonstrates is that HOPE VI constitutes a "separate lawsuit," that is severable from other post-judgment issues.

appeal as of right to await the resolution of a second appeal as of right. If anything, the ACORN case supports the CHA's argument that the Order is a final appealable order under Section 1291.

In ACORN, the Court indicated that it would not and could not take jurisdiction over a post-judgment order that merely required a defendant to submit a compliance plan for the district court's review and approval. Id. at 306. If the Court were to take jurisdiction over such orders, the Court would be "besieged by successive appeals in injunctive proceedings" because such a rule "would make virtually all postjudgmenrt orders immediately appealable." Id. (emphasis added). The Court continued as follows:

> Although an order to submit a plan of compliance, like a discovery order, is not an injunction, the refusal to obey such an order might be punishable as a contempt, and if so the refuser could then obtain appellate review of the order by appealing from the judge's imposition of a sanction for contempt. Were there any doubt about the mandatory character of the judge's order, he could embody it in a mandatory injunction, which would be appealable without the interim steps of defiance and sanction.

An order to submit a compliance plan is a far cry from an order that has the affect of subjecting a $100 million federal program to the jurisdiction of the district court.

A review of the Order will not require this Court, in the future, to review every order entered in the Gautreaux case, or any other post-judgment case. Instead, the Order is appealable because it is the "embodiment" of a mandatory injunction which is "appealable without the interim steps of defiance and sanction." That is the whole point of the Order. The CHA, being enjoined by a mandatory injunction, has the right to obtain a final declaratory judgment rather than to take certain actions and await a possible contempt sanction. In re Hendrix, 986 F.2d 195, 200 (7th Cir. 1993). See App., Tab 3, CHA Mem. at 11, citing Id. (citations omitted)("If this looks like a request for an 'advisory opinion,' it is one that even a federal court can grant, in order to prevent unwitting contempts."). The fact that plaintiffs'

pending motion might also be appealable has no bearing on the CHA's right to avoid "unwitting contempts." If the Order is not appealed now, there may never be another opportunity to appeal it. Without the opportunity to appeal, the CHA could, of course, file a motion to modify the Injunction. However, such a motion raises issues that are entirely different from the issues on appeal – namely, how the Injunction should be interpreted in the first instance.

There is a problem of judicial economy here. After the Order was issued, plaintiffs filed a motion for further relief asking the district court to force the CHA to transfer to the Receiver the CHA's authority over a $100 million dollar federally-funded construction program (HOPE VI). The CHA has refused to do so on the grounds that it cannot abdicate its public duties absent a clear and unambiguous order to do so. Nothing in the Order speaks to the role of the Receiver in HOPE VI, and it is the CHA's position that nothing in the Receivership Order can be read as containing such a clear and unambiguous requirement.[14] As a result of plaintiffs' motion for further relief, the CHA filed a motion to stay the Order, and further asked the district court to dismiss without prejudice to reinstatement after the appeal the plaintiffs' motion for further relief. The CHA filed its motion to stay on March 20, 1998. The district court has yet to rule on the motion.

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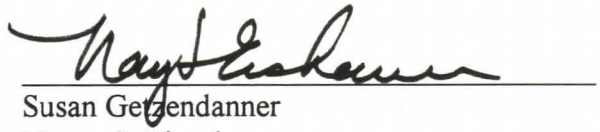
[14] The question of the role of the receiver was specifically reserved by the CHA for further litigation, if the district court held that the Injunction governs the CHA's use of HOPE VI funds. See, e.g., App., Tab 3, CHA Mem. at 10, n.7. It is the CHA's position that litigation over the role of the receiver should be delayed until this appeal is decided.

WHEREFORE, for all the forgoing reasons, the CHA respectfully requests that this Court permit briefing on the merits of this appeal to go forward as scheduled, whether as a result of a denial of the Motion To Dismiss, or as a means of determining the proper ruling on the Motion To Dismiss.

Dated: April 27, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Nancy Eisenhauer, an attorney, hereby certify that on Monday, April 27, 1998, I caused a copy of the foregoing DEFENDANTS-APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS APPEAL to be served by hand on counsel listed below:

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17 E. Monroe Street, Suite 212
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Nancy S. Eisenhauer

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1807

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	Appeal from the United
	)	States District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
CHICAGO HOUSING AUTHORITY,	)	
a corporation, and JOSEPH SHULDINER,	)	No. 66 C 1459
Executive Director, in his official capacity,	)	
	)	Chief Judge Marvin E. Aspen
Defendants.	)	

APPENDIX ACCOMPANYING
DEFENDANTS-APPELLANTS' RESPONSE
TO APPELLEES' MOTION TO DISMISS APPEAL

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JOSEPH SHULDINER

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Dated: April 27, 1998

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CHICAGO HOUSING AUTHORITY,	)	
a corporation, and JOSEPH SHULDINER,	)	No. 66 C 1459
Executive Director, in his official capacity,	)	
	)	Chief Judge Marvin E. Aspen
Defendants.	)	

DOCKETING STATEMENT

Defendants-Appellants, the Chicago Housing Authority and Joseph Shuldiner (collectively, the "CHA"), submit this docketing statement pursuant to Circuit Rule 3.

Jurisdiction of the District Court

The district court has jurisdiction over this civil action, which arises under the Fourteenth Amendment of the Constitution and 42 U.S.C. § § 1981, 1983, pursuant to 28 U.S.C. § 1331.

Jurisdiction of the Appellate Court

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 or, in the alternative, 28 U.S.C. § 1292(a)(1). The order being appealed (the "Order") was entered by the district court on February 25, 1998. The notice of appeal of the Order was filed on March 26, 1998. The following additional information is provided pursuant to Circuit Rules 3 and 28(b)(1) and (3):

(a) 28 U.S.C. § 1291 The Order requires the CHA to build public housing funded by a new federal program known as "HOPE VI," in accordance with certain locational restrictions set forth in an injunction entered in this case in 1969 (the "Injunction"). Thus, the Order is a post-judgement order that sets forth the steps that the CHA must take to comply with the Injunction. Accordingly, the Order is appealable as a final decision under section 1291. ACORN, et al. v. Illinois State Bd. of Elections, et al., 75 F.3d 304, 306 (7th Cir. 1996) (holding that post-judgment orders "setting forth the steps that [defendant] must take to comply with [injunction]" are "appealable as final decisions under section 1291").

(b) 28 U.S.C. § 1292(a)(1) The Order was issued in response to the CHA's motion to clarify the Injunction. Specifically, the CHA asked the district court to clarify that the Injunction does not govern the HOPE VI Program. Denying the CHA's motion, the district court held that the HOPE VI program must be subjected to the Injunction's proscriptions. The CHA believes that the Order is a misinterpretation of the Injunction, and thus a modification of the Injunction, "because it changes rather than clarifies the meaning of the Injunction." See ACORN, 75 F.3d at 306. Accordingly, the Order is appealable as an interlocutory order modifying an Injunction under section 1292(a)(1). Buckhanon, et al. v. Percy, et al., 708 F.2d 1209, 1212-13 (7th Cir. 1983) (holding that order issued in response to motion to clarify is appealable under section 1292(a)(1), and that court must look beyond form of motion to the actual effect or function of the motion). Cf. ACORN, 75 F.3d at 306 (accord); Motorola, Inc. v. Computer Displays International, Inc., 739 F.2d 1149, 1155 (7th Cir. 1984) (court must "look beyond the characterization given the [order] by the parties and the district court to the actual effect of that order" to determine whether order "alters the legal relationship between the parties," and is thus appealable).

Current Proceedings In District Court

There are three motions pending in the district court.

(1) Plaintiffs' Motion For Further Relief, filed March 18, 1998.

Plaintiffs' motion asks for further relief to aid in the enforcement of the Injunction as currently interpreted by the district court. However, the issue on appeal is whether the district court's current "interpretation" of the Injunction is correct. Therefore, if the CHA prevails on appeal, plaintiffs' motion will be moot. On March 23, 1998, the CHA filed a response to plaintiffs' motion, arguing, inter alia, that plaintiffs' motion should be dismissed without prejudice pending appeal of the Order. The district court has ordered plaintiffs to reply to the CHA's response by April 6, 1998.

(2) CHA's Motion To Stay Order Pending Appeal, filed March 20, 1998.

The CHA's motion asks the district court to stay the Order pending appeal. On April 1, 1998, plaintiffs filed a response, arguing that the stay should not be granted. The district court has ordered the CHA to reply to plaintiffs' response by April 6, 1998.

(3) Plaintiffs' Motion To Name Additional Class Representatives

Plaintiffs' motion asks the district court to name seven individuals as representatives for the plaintiff class. On March 30, 1998, the CHA filed a response to the motion, as well as a motion of its own seeking a hearing and discovery with regard to the question whether the seven individuals adequately represent the class. The district court has ordered plaintiffs to reply/respond to the CHA's response/motion by April 8, 1998.

Major, Prior Appellate Proceedings

The following is a list of the major, prior appellate proceedings in this case. None of the proceedings is directly related to the current appeal, although the CHA relied on the holding in Gautreaux, et al. v. Romney et al., 457 F.2d 124 (7th Cir. 1972) (Nos. 71-1732, 71-1734, 71-1807), in support of its arguments below. Note that on November 24, 1971, this case was consolidated with a companion case filed against HUD (the consent decree entered in the companion case was terminated in August of 1997). Therefore, some of the cases listed below are more directly related to the companion case.

Gautreaux, et al. v. CHA, et al., 436 F.2d 306 (7th Cir. 1970) (No. 18681) (affirmed order that modified Injunction to include deadline by which building sites selected by CHA had to be submitted to Chicago's City Council).

Gautreaux, et al. v. Romney et al., 448 F.2d 731 (7th Cir. 1971) (No. 71-1073) (reversed order dismissing case against HUD)

Gautreaux, et al. v. Romney et al., 457 F.2d 124 (7th Cir. 1972) (Nos. 71-1732, 71-1734, 71-1807) (reversed order prohibiting HUD from dispersing certain federal funds to the CHA)

Gautreaux, et al. v. City of Chicago, et al. v. Roti et al. v. Vrdolyak, et al. v. CHA, et al., 480 F.2d 210 (7th Cir. 1973) (Nos. 72-1409, 72-1410, 72-1485, 72-1486) (affirmed order directing the CHA to ignore state statute that required the CHA to obtain the approval of Chicago's City Council prior to acquiring land for building)

Gautreaux, et al. v. CHA, et al., 503 F.2d 930 (7th Cir. 1974) (Nos. 74-1048, 74-1049) (remanded to the district court, holding that relief must not be limited to Cook County, but must be provided on a suburban or metropolitan basis)

Hills, et al. v. Gautreaux, et al., 425 U.S. 284 (1976) (No. 74-1047) (affirmed and remanded to district court to craft relief on a suburban or metropolitan basis)

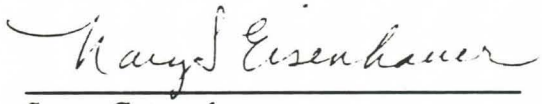
Gautreaux, et al. v. CHA, et al., 690 F.2d 601 (7th Cir. 1982) (No. 81-2223) (affirmed order granting interim attorneys fees)

Official Capacity

The office of the Executive Director of the CHA is currently occupied by Joseph Shuldiner.

Dated: April 2, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Nancy Eisenhauer, an attorney, hereby certify that on Thursday, April 2, 1998, I caused a copy of the foregoing DOCKETING STATEMENT to be served on counsel listed below in the manner indicated below:

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Nancy S. Eisenhauer

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs-Appellees,	)	
v.	)	No. 66 C 1459
	)	Hon. Marvin E. Aspen
CHICAGO HOUSING AUTHORITY, and Executive Director Joseph Shuldiner in his official capacity,	)	No. 98 - 1807
Defendants-Appellants.	)	

DOCKETING STATEMENT

Plaintiffs-Appellees, Dorothy Gautreaux, et al., by their attorneys submit this Docketing Statement pursuant to Circuit Rule 3(c). The Appellant's docketing statement is not complete and correct under Circuit Rules 3(c) and 28(b). Plaintiffs refer the Court to their Motion to Dismiss Appeal, which is being filed herewith.

The District Court's Jurisdiction

The District Court has jurisdiction over this civil action which arises under the Fourteenth Amendment of the Constitution of the United States and 42 U.S.C. 1981 and 1983, pursuant to 28 U.S.C. Sec. 1343 and 28 U.S.C. Sec. 1331.

The Appellate Court's Jurisdiction

The order appealed from ("Order") is not appealable; therefore this Court has no jurisdiction. The Order is neither a final judgment nor an interlocutory order appealable under 28 U.S.C. Sec. 1292(a)(1).

The Order decided CHA's "Emergency Motion to Clarify" the 1969 judgment order in this case. The Order neither concludes a discrete collateral proceeding (Resolution Trust Corp. re Ruggiero, 994 F.2d 1221, 1224 (7th Cir. 1993), nor does it "set forth the steps . . . to comply with the [pre-existing] injunction." ACORN v. Illinois State Bd. of Elect., 75 F.3rd 304, 306 (7th Cir. 1996). Litigation continues in the district court on related motions. (See "Current Proceedings in the District Court," below.) Thus the Order is not a final judgment.

Neither is the Order an interlocutory order appealable under 28 U.S.C. Sec. 1292(a)(1). The Order clarifies rather than modifies the pre-existing injunction. ACORN, 75 F.3rd at 306. Both CHA (the moving party) and the District Court treated the motion as one to clarify, rather than to modify, the judgment order. Although the Court will look beyond labels in determining appealability, Motorola, Inc. v. Computer Displays Intern., Inc., 39 F.2d 1149, 1155 (7th Cir. 1984), the Order neither sets forth any steps to be taken by CHA, nor particularizes in any way the conduct to be required of CHA. Thus it does not in any way change the legal relationship of the parties. (Id.) (Relying upon the definition of "Dwelling Unit" in the original judgment order, the Order merely makes explicit what was already plain -

that the term "Dwelling Unit" applies to all public housing, however funded.) Further, because litigation continues in the District Court on related motions, allowing this appeal would result in the Court's being subjected to piecemeal appeals. ACORN, 75 F.3rd at 306 (7th Cir. 1996).

The Order was signed by the District Court on February 23, 1998 and entered on the docket on February 25, 1998. The notice of appeal was filed on March 26, 1998. There were no motions to alter or reconsider the Order.

Current Proceedings in the District Court

There are five motions pending in the district court:

1. **Plaintiffs' Motion for Further Relief, filed March 18, 1998.**

Plaintiffs' Motion for Further Relief is based on the District Court's order of August 14, 1987 appointing Daniel Levin and The Habitat Company as Receiver for development of CHA public housing. Plaintiffs' motion is based on a course of conduct by CHA that violates the Receivership order's requirement that CHA cooperate with and assist the Receiver and refrain from interfering with the Receiver's performance of its court-imposed duties. The motion asks the District Court to particularize the cooperation requirement of the August 14, 1987 order. CHA's violations of the August 14, 1987 order and the relief requested include, but go far beyond, the HOPE VI program. Contrary to CHA's Docketing Statement assertion (p. 2), plaintiffs' motion will therefore not be moot should CHA prevail on this appeal. Briefing was completed on the motion on April 6, 1998.

2. **CHA's Motion to Stay Order Pending Appeal filed March 20, 1998.**

CHA seeks a stay from the District Court of the Order involved in this appeal. Briefing was completed on April 6, 1998.

3. **Plaintiffs' Motion to Name Additional Class Representatives, filed March 26, 1998.**

Plaintiffs' motion asks leave of the District Court to name seven individuals as additional representatives for the plaintiff class. Briefing was completed on April 8, 1998.

4. **Motion for Hearing and Discovery on the Issue of Adequacy of Representation of Counsel and Proposed New Class Representatives, filed March 30, 1998.**

CHA's motion requesting hearing and discovery on the adequacy of class counsel and proposed additional class representatives is based in part on CHA's theory that the Order creates conflicts among class members. While plaintiffs disagree with this view, CHA has taken the position that the motion to name additional class representatives and its motion for a hearing and discovery in large part involve the issues in the Order. CHA's motion and plaintiffs' response have been noticed for presentation to the District Court on April 14, 1998.

5. **Motion to Strike Receiver's Response to CHA's Motion to Stay, to Strike Exhibits to Plaintiffs' Response, or in the Alternative, to Substitute Instanter the Attached Reply for the Reply Submitted by the CHA, filed April 6, 1998.**

CHA's motion to strike the Receiver's response and plaintiffs' exhibits to their response respecting CHA's stay motion, and the Receiver's and plaintiffs' responses thereto,

have also been noticed for presentation to the District Court on April 14, 1998.

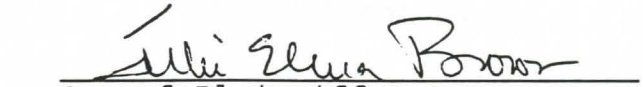
Major Prior Appellate Proceedings

While there are a number of major prior appellate proceedings, none is related to the current appeal.

Official Capacity

The office of the Executive Director of the CHA is currently occupied by Joseph Shuldiner.

Respectfully submitted,



One of Plaintiffs' Attorneys

April 13, 1998

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

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

MEMORANDUM IN SUPPORT OF
THE CHICAGO HOUSING AUTHORITY'S
EMERGENCY MOTION TO CLARIFY INJUNCTION

Background

The Injunction

On July 1, 1969, this Court, Judge Austin presiding, entered a judgment order that constituted a mandatory injunction (the "Injunction") against the CHA. Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969). The purpose of the Injunction was to end the CHA's use of race-based site selection and tenant assignment policies, and to remedy the effects of those policies. Id., at 737. Only Articles II, III, IV and VIII, which address the remedy for the CHA's site selection policy, are the subject of this Motion.

The Court, in its Memorandum Opinion and Order of August 26, 1997, Gautreaux v. CHA, 1997 U.S. Dist. LEXIS 12924 (attached as Exhibit A), summarized the proscriptions of the Injunction: Article III prohibits the CHA from making any additional housing units available in predominantly black neighborhoods, called "Limited Areas," unless

an equivalent number (originally 3 to 1) of housing units are made available in predominantly white neighborhoods, called "General Areas." Exhibit A at *3-4. This geographical requirement was intended to deconcentrate public housing in Limited Areas and provide African-American public housing tenants and applicants with the opportunity to move into General Areas.

Article IV of the Injunction requires the CHA to add to its aggregate supply of public housing stock through the administration and implementation of a "scattered-site" building program, which constitutes the building of individual units (non-high rises) in a scattered pattern throughout the City. In this regard, Article IV states that "the CHA shall not concentrate large numbers of Dwelling Units in or near a single location."[1]

The HOPE VI Program

HOPE VI is a model demonstration program created by Congress in 1992. Urban Revitalization Demonstration Program ("HOPE VI"), 42 U.S.C. § 1437*l* (note, located at pp. 255-57 of the 1994 bound volume of the U.S.C.A.), P.L. 102-389, Title II, 106 Stat. 1579 (attached as Exhibit B).[2] The purpose of the statute is to provide housing authorities with grants to rehabilitate and modernize severely distressed or obsolete public

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[1] Article IV contains detailed prohibitions regarding the concentration of public housing units at both the individual building and neighborhood levels. Id. Subsection A prohibits the building of housing projects designed for more than, at a maximum, 240 persons; subsection B prohibits the concentration of public housing units in any one area of the City, by permitting only a 15% concentration of public housing in any one census tract; and, subsection C prohibits the building or leasing of dwelling units above the third story of any structure. Id.

[2] The program was reauthorized and its requirements amended in 1995, 1996, and 1997. See Excerpt from HUD's Office of Public Housing Investment Guidebook on HOPE VI: Building Communities of Opportunity (1997) (see Exhibit B).

housing projects, and to revitalize the neighborhoods in which those housing projects are located. HOPE VI has been described by HUD as the "key ingredient" in its efforts to "transform" the existing public housing system. Id. The HOPE VI statute envisions the deconcentration of public housing in existing mid- and high-rise public projects, calls for local housing authorities to be innovative in revitalizing distressed public housing projects and the communities in which that housing is located, and encourages housing authorities to integrate into their revitalization plans existing federal housing resources (such as Section 8) that provide public housing residents with a greater opportunity to choose where to live or to exit the public housing system entirely. Id.

HOPE VI is appended to Section 14 of the Low-Income Housing Act, which provides funds to be used to maintain the viability of a housing authority's existing aggregate housing stock. See 42 U.S.C. 1437*l*. HOPE VI funding can be used to create replacement housing when other units are demolished, but it cannot be used by housing authorities to add to the aggregate existing housing stock.[3] HOPE VI is not, however, merely a source of rehabilitation funding. HOPE VI is also about revitalizing public housing communities. For example, while HOPE VI encourages deconcentration of public housing, it also permits the building of replacement housing on the site of the original public housing, 42 U.S.C.

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[3] While two newly constructed units of housing may look the same, in Congress' public housing funding scheme they can be very different, depending on whether the unit adds to an authority's housing stock or simply replaces existing stock. The classification of a newly constructed unit as truly "new" as opposed to "replacement" has real meaning to Congress; many funding decisions depend on the size of a housing authority (judged by its aggregate housing stock), and the authority's competency record with regard to that aggregate stock.

§ 1437p(f), as amended September 23, 1996, and encourages housing authorities to work with tenants in existing public housing communities.

In 1996, after HUD had used the HOPE VI program to provide funding to the CHA as a part of the relief it owed to plaintiffs under the Gautreaux-HUD consent decree ("Consent Decree"), Congress specifically enacted an amendment to the HOPE VI statute providing that HOPE VI funds shall not be used "directly or indirectly . . . to settle litigation or pay judgments." Exhibit B, Guidebook, 1.C.7. As noted in the Congressional Record, Congress "inserted [the amendment] to ensure that HOPE VI funds are used for the purpose of revitalizing severely distressed public housing facilities." 142 Cong Rec H 10733, 10748.

The CHA's Revitalization Projects in Limited Areas

During the past two years, the CHA began a number of neighborhood revitalization projects at sites in Limited Areas. The revitalization projects are being or will be funded in whole or in part by federal grants to the CHA under three federal programs, including HOPE VI, or by "development" money awarded to the CHA for the development of new housing. To the extent development funds have been allocated to any of the revitalization projects, the CHA, the plaintiffs, the Receiver and HUD have treated the expenditure of those funds as covered by the Injunction.

However, the projects violate the terms of the Injunction. The projects are located entirely in Limited Areas or in isolated parts of Limited Areas that are considered to be Revitalizing Areas. The Injunction does not permit building in Revitalizing Areas, but instead requires equal building in both the General and Limited Areas. Thus, compliance with the Injunction is not possible. However, HUD and the plaintiffs agreed that the

development funds could be diverted from use under the Injunction in General Areas, and instead used in Revitalizing Areas. The parties then proceeded to negotiate agreed waivers of the Injunction, which this Court approved.[4] Under the Court's orders, the geographical limitations and other requirements of the Injunction are waived because the projects are in Revitalizing Areas, and thus meet the criteria for building that was provided for by the Consent Decree.[5]

The revitalization projects at Horner and the Lakefront are very much like the revitalization projects at Cabrini, ABLA and Robert Taylor that have been approved by HUD for HOPE VI funding. However, the HOPE VI projects are very different from the projects in Revitalizing Areas that this Court has approved by waiving the requirements of the Injunction. HOPE VI requires local housing authorities to concentrate on the most severely distressed housing projects, wherever they are located, without regard to whether the neighborhood is predominantly black, predominantly white, or revitalizing. Because all of

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[4] Orders have been entered by the Court in connection with Horner and North Kenwood-Oakland ("Lakefront") Limited Areas. See Exhibits G and H, respectively, attached hereto. This Court also waived the requirements of the Injunction for the construction of units in Lawndale, a Limited Area.

[5] The relief against HUD required any aggregate increase in the CHA's existing housing stock to take place in the General or Revitalizing Areas. Gautreaux, 523 F.Supp. at 668-69 (relief against HUD was "in sharp contrast" to relief under the Injunction, which does not provide for building in revitalizing areas). While no specific Revitalizing Areas were designated by the Consent Decree, Judge Crowley defined the concept, for purposes of the HUD litigation, as areas having a "substantial minority population and undergoing sufficient redevelopment to justify the assumption that [the] area will become more integrated in a relatively short time." Id. at 669. The concept of building in selected Limited Areas deemed to be Revitalizing Areas, without simultaneous building in General Areas, was specifically "introduced" in the HUD litigation in 1981 because, at the time of its entry, it was "recogniz[ed] that total relief to Gautreaux families outside of the Limited Area could not be provided in the foreseeable future" Id.

the most severely distressed housing projects in Chicago are located in the Injunction's Limited Areas, HOPE VI projects could not meet the locational requirements of the Injunction. If HOPE VI projects were deemed to be governed by the Injunction, they could only be approved by this Court as a complete exception to the Injunction.

The different purposes of the Gautreaux remedy and of HOPE VI explain the programmatic differences discussed above. Gautreaux was created to remedy an adjudicated violation of the Fourteenth Amendment based on the over-concentration of public housing in predominantly African-American neighborhoods in Chicago. The remedy required the CHA to provide housing units in the predominantly white areas of the City at the same or greater rate as units are built in the predominantly black areas. The Gautreaux remedy requires programs designed, by way of the locational requirements of the Injunction, to focus exclusively on racial integration. In direct contrast, HOPE VI focuses on both economic and racial integration for those public housing tenants now living in the most severely distressed projects, wherever located. Thus, HOPE VI funding cannot be restricted, as Gautreaux revitalization development funds have been, to projects in areas that can be described as "revitalizing."

The CHA's Applications for HOPE VI Funding

Eligible housing authorities, such as the CHA, are required to compete for HOPE VI grant money. The application must set forth a detailed plan for the revitalization of existing distressed public housing projects that complies with detailed HOPE VI requirements. Once a housing authority has been awarded HOPE VI funding for any given year, the authority must submit to HUD a program implementation plan that, *inter alia*, has been

approved by the local governing body. Id., Ex. B, at 256, column 1. In the event that the authority does not proceed in a manner consistent with its implementation plan, the Secretary of HUD may withdraw any unobligated balances of funding, and make such funds available to other eligible communities. Id., at 257, column 2.

The CHA made application to HUD for HOPE VI funding in 1993, 1996, and 1997. The CHA was awarded grants in 1993 and 1996, and is awaiting the results of the 1997 application process. The CHA's position has been and remains that the CHA has the right to apply for HOPE VI funds, that such programs are not covered by the Injunction, and that the Receiver has no development authority with respect to HOPE VI projects. Up until very recently, HUD had taken no actions that would indicate that it interpreted this Court's orders in the Gautreaux case as affecting the HOPE VI program. However, HUD's most recent action, conditioning its approval of the implementation plan for the Cabrini project on, among other things, obtaining the approval of the plaintiffs and this Court in 30 days, indicate that the agency is acting on the belief that the Injunction applies to HOPE VI.

Neither plaintiffs nor the Receiver have raised the question of the Court's jurisdiction over HOPE VI with this Court. Indeed, neither plaintiffs nor the Receiver, well knowing that the CHA intended to and did apply for HOPE VI funding, formally objected to the CHA's preparation and filing of the applications. If the plaintiffs believed that the HOPE VI applications were covered by the Injunction and the order appointing the Receiver, then the Receiver was the entity that should have prepared and made the applications. See Order Appointing Receiver (August 14, 1987), ¶ 2(a)(i) (attached as Exhibit C).

In only two circumstances has the CHA requested plaintiffs' limited cooperation in a HOPE VI application, neither of which implies that the CHA considered HOPE VI to be covered by the Injunction. The first instance was in connection with the CHA's 1996 applications. HUD's 1996 notice of funds availability ("NOFA") for HOPE VI provided an absolute priority for 350 replacement units if the CHA's application met the statutorily mandated requirements of the NOFA. See, e.g., Letter to A. Polikoff from H. Cisneros, dated July 11, 1996, at 1 (attached as Exhibit D). See also 1996 NOFA 61 FR 38024, 38025-026. HUD did this to fulfill part of its obligation to the plaintiffs under the Gautreaux/HUD consent decree.[6] Id. In accordance with the 1996 NOFA, one of the CHA's 1996 applications included a request for HOPE VI funds for the construction of 350 units. The 1996 applications also sought HOPE VI funds for a project to demolish some of the Robert Taylor Homes.

The CHA asked Alexander Polikoff of BPI to sign-off on the ABLA/Horner portion of the 1996 applications because the funds were to be used to provide Gautreaux housing units under the HUD Consent Decree. See Letter to J. Shuldiner from A. Polikoff, dated July 25, 1996, at 1 (attached as Exhibit E). BPI did not participate in any respect with regard to the portion of the CHA's 1996 HOPE VI applications that related to the Robert Taylor Homes development project.

The second instance occurred in connection with the CHA's application under the 1997 HOPE VI NOFA, which required the application to be approved by any litigants in

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[6] It was this use of HOPE VI funds that led Congress to amend HOPE VI to prevent HUD's use of HOPE VI funds for litigation purposes and to insure that the funds are used for their legislative purpose: revitalization of existing public housing.

Receiver performed some general consulting activities on the project. However, contract terms were not reached, and, since that time, the Receiver has not had any development authority at Cabrini, and has not been involved in formulating any final plans or implementing those plans.

Following the dispute over the Receiver's role on the Cabrini project, the Receiver also argued that it had development authority over the CHA's Horner and ABLA projects. Again, the CHA disagreed, based on its understanding of the Injunction and the order appointing the Receiver. However, due to the Receiver's experience in working with the CHA and HUD, the CHA entered into a contractual arrangement with Dan Levin and The Habitat Company, under which they would act as the development manager for the project.[7]

On September 18, 1997, HUD approved the CHA's implementation plan for the Cabrini funds, but linked it to a number of conditions. One condition is that within 30 days the plaintiffs and the Court approve the implementation plan (which has already been approved by the City of Chicago as per the HOPE VI statute). HUD took this action despite the fact that it had approved the CHA's 1993 application for the HOPE VI funds without requiring the plaintiffs' approval. HUD has imposed this condition acting on the belief that

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[7] It is axiomatic that if HOPE VI is not governed by the Injunction, the Receiver lacks authority over HOPE VI. However, if the Court denied CHA's Motion to Clarify the Judgment Order, there would still be a dispute whether the Court's 1987 Order appointing the Receiver gives the Receiver authority over the CHA's HOPE VI projects. Accordingly, if the Court determines that the Injunction covers HOPE VI, the CHA will ask the Court to clarify the Receiver's authority with regard to the CHA's HOPE VI projects, or alternatively to amend the order appointing the Receiver to exclude HOPE VI projects. This would be a completely separate motion requiring extensive briefing by the parties.

this Court's Injunction and orders require such approval. The CHA disagrees with the interpretation and, accordingly, has filed this Motion seeking clarification of the Injunction.

Argument

A party whose conduct is governed by the terms of an injunction has the right to seek clarification of the injunction, or a declaration of rights under the injunction, at any time. Matter of Hendrix, 986 F.2d 195, 200 (7th Cir. 1993). The CHA believes that HOPE VI funding and its HOPE VI demonstration programs clearly fall outside of the scope of the Injunction. Nevertheless, because plaintiffs' counsel has recently asserted a contrary view in a concrete manner, see Ex. F, and because of HUD's conditional approval of the implementation plan for Cabrini funds already allocated as a result of the CHA's 1993 HOPE VI application, the CHA has filed this Motion.

HOPE VI did not Exist When Injunction was Entered and is not Part of the Remedy Available to the Plaintiffs

This Court recently held that because the federal Section 8 voucher program was not in existence at the time the Injunction was entered, the Injunction did not govern the program and the program is not part of the relief granted to the plaintiffs. (Ex. A) Similarly, the HOPE VI Urban Revitalization Demonstration Program, created by Congress in 1992, did not exist at the time of the entry of the Injunction. Indeed, the program is one of many initiatives undertaken by the 101st and 102nd Congress in an effort to "reform" the "conventional" housing programs of the previous decades. Accordingly, the relief provided the plaintiffs in the Injunction does not include HOPE VI, and the Injunction should not now be interpreted as governing the program.

The Injunction Has Not Been Used to Govern Funds

Provided to CHA to Revitalize Housing in Limited Areas

The Injunction has not been used over the past nearly thirty years to control all of the CHA's resources, or to regulate or direct the CHA's plans with regard to the aggregate housing stock and public housing communities located in Limited Areas. Indeed, in the early 1990's, this Court, over the plaintiffs' objection, permitted the CHA to use "modernization" funds provided under Section 1437*l* of the Low-Income Housing Act (the "Act"), without interference. See Gautreaux v. CHA, 1991 U.S. Dist. LEXIS 4123 (April 4, 1991) (attached as Exhibit I). At that time, the plaintiffs tried to stop the rehabilitation of some high-rise buildings in the North Kenwood-Oakland Limited Area (Lakefront). Notably, the plaintiffs did not argue that they had a right under the Injunction directly to control the CHA's modernization funds. See Memorandum In Support Of Plaintiffs' Motion For Further Relief, filed November 21, 1990 (attached as Exhibit J); Plaintiffs' Reply To Responses Of CHA And HUD To Plaintiffs' Motion For Further Relief, filed January 22, 1991 ("Pl. Reply") (attached as Exhibit K).

Instead, the plaintiffs argued that the proposed rehabilitation violated the Injunction merely because the proposed rehabilitation might frustrate a scattered site opportunity. The plaintiffs made only a "limited" request for the "additional relief" of a court-ordered time delay of the commencement of the rehabilitation projects in order to allow for the exploration of alternatives to rehabilitation. See Ex. I. The Court denied plaintiffs' requested relief. HOPE VI funds are also "modernization" funds;[8] indeed, the HOPE VI

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[8] A second current source of modernization funds is the Housing and Community Development Act. The CHA intends to use such funds for the Darrow revitalization project. (continued...)

statute is appended as a note to the statutory section authorizing grants of such funds. Accordingly, the use of HOPE VI funds should not be governed by the Injunction.[9]

The Injunction, Interpreted in Proper Context, Does Not Purport to Regulate Revitalization Programs

The Injunction is composed of eleven articles. Articles II, III, IV, and VIII set forth the "scattered-site" building program. Articles V and VI set forth requirements relating to the CHA's tenant assignment policy. The remaining Articles I, VII, IX, X, and XI set forth the Injunction's definitional section, reporting requirements, and other non-programmatic requirements. None of the Articles refers to the maintenance or operation of housing stock that already existed in the Limited Areas of the City at the time of the entry of the Injunction. None of the Articles purports to bring all of the CHA's operations, including work to be done in then-existing public housing communities, under the direct control of this Court. None of the Articles requires the destruction, demolition, or retirement over time of the housing stock located in the Limited Area that existed at the time of the entry of the Injunction. Thus, while comprehensive with regard to the regulation of the aggregate

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[8](...continued)
Consistent with its position on this Motion, the CHA does not believe that it must seek a waiver of the Injunction from the Court to proceed with the project. However, plaintiffs and the CHA are currently attempting to prepare a joint motion to waive the Injunction's proscriptions. The CHA is willing to negotiate the joint motion with regard to Darrow, and with regard to Darrow only, in an effort to commence construction activities at Darrow without any further delay. However, the CHA will only agree to file the joint motion if it can obtain an agreement from plaintiffs that the Darrow motion will not prejudice the CHA's present Emergency Motion.

[9] The HOPE VI program is also analogous to a prior demonstration program funded by the federal government, the "Model Cities Program," which the Seventh Circuit found to be a separate program from the scattered-site building program established by the Injunction. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

increase in the supply of CHA's total housing stock, the Injunction simply does not purport to regulate all of the CHA's activities with regard to its total housing stock.

Some of the provisions of the Injunction, however, are broadly-worded. The two most sweeping provisions of the Injunction are in Articles II and VIII. Article II states that:

> [the] CHA shall not authorize, approve or implement any plan for Dwelling Units, nor shall CHA seek any approval or request or accept any assistance from any government agency with respect thereto, . . . unless such plan affirmatively requires that,
>
> A. All Dwelling Units provided for in such plan shall be located in conformity with the provisions of Article III hereof [the one-for-one building/leasing requirement].

"Dwelling Unit" is defined broadly as including each and every unit of family-public housing in the CHA system rather than being limited to scattered housing units. Id., at 737. Article VIII states that:

> [the] CHA shall affirmatively administer its public housing system in every respect (whether or not covered by a specific provision of the judgment order) to the end of disestablishing the segregated public housing system . . .. Id., at 741.

Such provisions, on their face, suggest that the CHA must use any and every method available to it to "disestablish" segregation in public housing, and that any and all of the CHA's plans regarding any housing unit under its jurisdiction are governed by the Injunction. However, such a broad reading of the Injunction has already been rejected by this Court. Compare Ex. K, Pl. Reply at 4-5 (urging relief based on reading of "affirmatively administer clause") with Ex. I, Gautreaux, 1991 U.S. Dist. LEXIS 4123 at *2-3 (court, "while not unsympathetic to plaintiffs," refuses to grant plaintiffs' requested relief on the

ground that "the extremely broad reading of the consent decrees [HUD consent decree and CHA Injunction] advocated by the plaintiffs is [not] justified.")

The language and structure of the Injunction, like "any other disputed writing," must be construed in the proper context. Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995). Here, the relevant context includes prior interpretations of the Injunction, the parties' past conduct, as well as the circumstances under which the Injunction was entered. See Youakim, 71 F.3d at 1283 (factors to consider include, among other things, nature of original claim, the relief that was sought, the issues actually decided by the earlier tribunal, and the mischief the injunction was designed to eradicate). All of these factors show that the Injunction, interpreted in context, does not apply to HOPE VI.

The Injunction itself, and Judge Austin's contemporaneous actions, are inconsistent with a broad reading of the general language in Article II and VIII. At the time the Injunction was entered the public housing system was already segregated and yet the specific relief awarded by Judge Austin was detailed and limited to the remedy of the scattered-site housing program. Judge Austin did not require the CHA to increase the aggregate number of units only in the General Areas to the exclusion of the Limited Areas, which in theory would have more quickly achieved desegregation. Instead, the Injunction seeks to deconcentrate public housing in Chicago by insuring that some definable percentage of the future aggregate increase in the supply of public housing would take place in the General Areas of the City.[10]

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[10] Judge Austin specifically refrained from cutting off all federal funding to the CHA. 296 F.Supp. 907, 914-15 (summary judgment on Count II denied because, "in the context of (continued...)

It is clear that the Injunction was not intended to regulate any future attempts by the CHA to revitalize the housing stock and public housing communities already existing at the time of the entry of the Injunction. The Injunction was intended to regulate and control only the aggregate increase in the supply of public housing stock, as well as the CHA's tenant assignment policies with regard to all housing stock. Accordingly, because the goal of the HOPE VI program is the revitalization of existing housing stock and public housing communities, the Injunction should not be read to govern the program.

The Plaintiffs' Actions Are Consistent with the Fact that HOPE VI is not Governed by the Injunction

Plaintiffs' course of conduct with regard to HOPE VI demonstrates that they do not understand the Injunction to govern the HOPE VI program. For example, in the recent litigation over Section 8, plaintiffs argued to this Court that funding for the scattered-site building program was almost exhausted. Motion To Modify Judgment Order, filed March 21, 1997, ¶ 4. This statement was made in the face of nearly $120 million unspent dollars of HOPE VI funding, and the fact that the scattered-site building program permits building of scattered-site housing in the Limited Areas in which HOPE VI work is taking place. Thus, plaintiffs as recently as six months ago, did not appear to believe that HOPE

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[10](...continued)
this case," granting summary judgment would lead to the cutting off of all federal funds). Judge Austin did not even attempt to deconcentrate public housing in Chicago, for example, by ordering the CHA to tear down, or retire over time, its existing housing stock in African-American neighborhoods. Cf. Walker v. HUD, 734 F.Supp. 1231, 1270 (N.D. Tex. 1989)(demolition of existing housing a "recognized, legitimate" part of a desegregation remedy, notwithstanding objections by several hundred plaintiff class members).

VI money could be used for the Gautreaux scattered-site housing program or that HOPE VI was somehow governed by the Injunction.

In addition, plaintiffs have failed, since 1993, to object to the CHA's HOPE VI applications, despite the fact that the applications do not meet the one-for-one building requirements as required under Article II of the Injunction, and despite the fact that the Receiver has not been involved in making the applications. See Gautreaux, 304 F.Supp. at 738; Ex. C, Order Appointing Receiver, ¶ 2(a)(i). Perhaps more tellingly, plaintiffs have, on one occasion, asked HUD for the right to control or direct some HOPE VI funding. Plaintiffs did so not in the context of the case against the CHA, but instead in the context of the Gautreaux/HUD consent decree. Specifically, in that instance, plaintiffs asked for control of a limited amount of HOPE VI funding, and then only as a form of alternative relief "comparable" to 350 new-construction Section 8 certificates that HUD was already obligated to provide under the consent decree. See Exhibits D and E, Letters to and from A. Polikoff. See also Gautreaux, 523 F.Supp. at 681-82, Section 8.6 (providing for comparable alternative relief after negotiation between plaintiffs and HUD). In response to plaintiffs' request, the then-Secretary of HUD (Henry Cisneros) indicated that he could not provide plaintiffs/the Receiver with a HOPE VI "set-aside" because the HOPE VI statute did not provide the Secretary, "as a matter of law," with the authority to do so.[11]

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[11] In the end, plaintiffs (with the "assistance" of HUD) negotiated a deal with the CHA which permitted plaintiffs and HUD to substitute some HOPE VI funds as alternative relief under the Consent Decree. Of course, there is no more relief available to plaintiffs under the Consent Decree, and the deal with the CHA did not (and could not) alter the terms of the Injunction or the HOPE VI statute.

The limited actions actually taken by the plaintiffs in the HUD case, and their failure to act with respect to the CHA's HOPE VI applications, are consistent with only one conclusion, and that is that HOPE VI is not governed by the Injunction and is not part of the relief to which the plaintiffs are entitled under the Injunction.

Any Other Interpretation of the Injunction Raises Serious Separation of Powers and Federalism Concerns

HOPE VI funds cannot be used to fund the Injunction's scattered-site program. Even if the CHA were allowed to use HOPE VI funds, the CHA would have to obtain complete waivers of all of the requirements of the Injunction, just as the CHA was required to obtain waivers to use its development funds in revitalizing projects in Limited Areas. The mandates of the HOPE VI program, while complementary in a larger sense to the Injunction (i.e., economic integration may lead to racial integration), are in direct conflict with the mandatory building program created by the Injunction. Any interpretation that the Injunction requires the CHA to use its HOPE VI funds in compliance with the building program set forth in the Injunction raises serious separation of powers concerns.[12]

Conversely, to force the CHA to submit to a waiver process in order to comply with federal law in the use of its HOPE VI monies, is to require the CHA to negotiate with private individuals (plaintiffs' counsel) and obtain federal court approval,

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[12] See Alliance To End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984) (consent decree interpreted in order to avoid separation of powers concerns); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26, 98 S.Ct. 2010, 2015 (1978) (noting the difference between filling in gaps in a statute and "rewriting rules that Congress has affirmatively and specifically enacted"). See also United States v. Board of Educ. of the City of Chicago, 11 F.3d 668, 673 (7th Cir. 1993) (noting that consent decree cannot bind a unit of government that is a non-party to fund the activities required of a defendant-governmental unit).

despite HOPE VI's focus on the approval of the local governing body, and despite the fact that there has been no finding that the HOPE VI program is itself violative of the Fourteenth Amendment. The cases of Alliance To End Repression, cited in n. 12, and Gautreaux v. Romney, cited in n. 9, seek to avoid such effects of mandatory injunctions.

In addition, to require the CHA to submit to such a procedure raises serious federalism concerns. See Hoover v. Wagner, 47 F.3d 845, 850 (7th Cir. 1995) (explaining that a mandatory injunction against a unit of state government is truly "extraordinary" because of comity concerns). See also ACORN v. Edgar, 56 F.3d 791, 797-98 (7th Cir. 1995) (stating that any federal injunction against a state agency is, because of comity concerns, a heavy burden on the state). Here, the burdens on the CHA of submitting to such a process are heavy, even aside from the general burden on comity. For example, to require the CHA to negotiate with plaintiffs' counsel to obtain a waiver in this context is to improperly cede some of the CHA's prioritizing power (although not accompanying accountability) to private individuals and the federal court. Cf. Ex. I, Gautreaux, 1991 U.S. Dist. LEXIS 4123 at *2-3 (where court refused to enjoin work proceeding under a separate program, despite the fact that court was "not unsympathetic" to plaintiffs' questioning of CHA's work prioritization scheme).

Conclusion

WHEREFORE, for the above reasons, the CHA respectfully requests that this Court grant the CHA's Emergency Motion to Clarify the Injunction and declare that the Injunction does not apply to the CHA's use of HOPE VI funds or its HOPE VI projects.

Dated: September 29, 1997

Respectfully submitted,

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DOROTHY **GAUTREAUX** et al., Plaintiffs, v. CHICAGO HOUSING AUTHORITY et al., and ANDREW CUOMO, Secretary of the Department of Housing and Urban Development, Defendants.

Case No. 66 C 1459 / 66 C 1460 (Consolidated)

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

1997 U.S. Dist. LEXIS 12924

August 26, 1997, Decided

August 27, 1997, Docketed

DISPOSITION: [*1] Plaintiffs' motion to modify the judgment order against CHA denied; HUD's motion to terminate the consent decree while retaining jurisdiction over the plaintiffs' attorneys' fees petition granted; plaintiffs' motion to declare that HUD has a continued obligation for FY1997 denied; and the plaintiffs' motion to enforce P 5.8.1. denied.

COUNSEL: For CHICAGO HOUSING AUTHORITY, defendant (66-CV-1459): Susan Getzendanner, Nancy S. Eisenhauer, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL.

JUDGES: MARVIN E. ASPEN, Chief Judge.

OPINIONBY: MARVIN E. ASPEN

OPINION: MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

This litigation dates back to 1966 when black residents of Chicago's public housing brought a class action n1 against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD), alleging that the defendants violated federal constitutional and statutory provisions by basing public housing policies and practices on race. Specifically, CHA intentionally limited the number of black families living in white housing projects and deliberately targeted only predominantly black neighborhoods in which to build public housing, while HUD knowingly assisted [*2] CHA in carrying out this discrimination. ***Gautreaux** v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969)* (liability against CHA); ***Gautreaux** v. Romney, 448 F.2d 731 (7th Cir. 1971)* (liability against HUD). In 1969, a judgment order was entered against CHA, ***Gautreaux** v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969)*, and after years of litigation at all levels of the federal judiciary, a consent decree was entered into with HUD, ***Gautreaux** v. Landrieu, 523 F. Supp. 665 (N.D. Ill. 1981)*, aff'd, *690 F.2d 616 (7th Cir. 1982)*. Numerous disputes since then have generated several other orders dealing with the implementation of the CHA judgment and the HUD consent decree. E.g., ***Gautreaux** v. Chicago Housing Authority, 1991 U.S. Dist. LEXIS 4123, 1991 WL 49568* (N.D. Ill. April 4, 1991).

n1 The class was defined as black tenants of and applicants for public housing in *Chicago. 304 F. Supp. 736, 737 (N.D. Ill. 1969)*. Although we understand that the lead named plaintiff, Dorothy **Gautreaux,** has passed away, we presume that substitution of new class representatives has or will take place. See *Hassine v. Jeffes, 846 F.2d 169, 176 n.3 (3d Cir. 1988)* (if named plaintiff-inmate transferred from institution, current inmate may be substituted to represent class); *Van Horn v. Trickey, 840 F.2d 604, 608 (8th Cir. 1988)* (same); *Doe v. Reivitz, 830 F.2d 1441, 1451 (7th Cir. 1987)* ("Substitution of named parties might be necessary in the future to assure representativeness if additional proceedings take place in this case . . . ."); *Wilson v. Huntingdon Housing Authority, 770 F.2d 168, 1985 WL 13513,* at *1 (6th Cir. 1985) ("If this case is to continue as a class action, some current resident of public housing administered by the Huntingdon Housing Authority should be substituted as a named plaintiff . . . .").

[*3]

Presently before us are four motions: (1) the plaintiffs' motion to modify the judgment order against CHA; (2) HUD's motion to terminate the consent decree; (3) the plaintiffs' motion to enforce a provision of the consent decree prohibiting HUD from approving CHA's use of certain forms of § 8 housing assistance payments, *42 U.S.C. § 1437f,* unless specific location requirements are met; and (4) the plaintiffs' motion to declare that HUD must set aside § 8 contract authority for fiscal year 1997. For the reasons discussed below, we deny the plaintiffs' motion to modify the judgment order, grant HUD's motion to terminate the consent decree, and deny the plaintiffs' two motions under the consent decree.

I. Modification of CHA Judgment Order

At the outset, we explain generally the 1969 judgment order to provide background for the plaintiffs' motion to modify it. The judgment order divided Cook County's census tracts into two categories: the Limited Public Housing Area and the General Public Housing Area. The Limited Area was essentially defined as those census tracts composed of 30% or more non-white population, while the remaining tracts constituted the General Area. Attempting [*4] to remedy the effects of past discriminatory site-selection and tenant assignment procedures, the judgment order in essence prohibited any development of public housing in the Limited Area without simultaneous development in the General Area. Judgment Art. II(C), *304 F. Supp. at 738.* Because CHA proved inept at building public housing on scattered-sites, we appointed a Receiver for the program in 1987 and it was not until then that construction began in earnest.

Now, as the scattered-sites program continues under the Receiver, the plaintiffs contend that § 8 rent subsidies n2 have replaced new construction as the primary means for providing public housing. Pls.' Mot. P 4. According to the plaintiffs, this shift in federal housing policy justifies modifying n3 the judgment order in order to bring the CHA's use of § 8 certificates under the order's auspices. Furthermore, the plaintiffs point out, fewer than 3000 scattered-sites units have been built so far and approximately only 7000 more families have been assisted by the separate HUD § 8 program under the consent decree; meanwhile, the members of the class comprise 40,000 families.

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n2 Section 8 of the United States Housing Act, *42 U.S.C. § 1437f* (as amended), authorizes the Secretary of HUD to enter into "annual contributions contract[s]" with public housing agencies, § 1437f(b), (o), which in turn make assistance payments on behalf of recipients who hold the § 8(b) "certificates" or § 8(o) "vouchers," 24 C.F.R. § 982.1.

[*5]

n3 Although the plaintiffs belatedly attempt to characterize their request as one for "particularization, not expansion, of the judgment order," Pls.' Reply at 3, we agree with their earlier acknowledgment that "because the Section 8 rent subsidy program was not in existence when the judgment order was entered, CHA's Section 8 program was not part of the relief provided to the plaintiff class," Pls.' Mot. P 5. Indeed, it was the later HUD consent decree that purported to indirectly oversee CHA's use of § 8 rent subsidies by imposing limits on HUD's ability to approve CHA's contract authority. See Consent Decree P 5.8.1.

In order to prevail on a motion to modify the judgment order, the plaintiffs must show that the "principal objects" of the order have not been achieved. *United States v. United Shoe Machinery Corp., 391 U.S. 244, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968);* see *United States v. Local 560 (I.B.T.), 974 F.2d 315, 331-32 (3d Cir. 1992); Gautreaux v. Weaver, 535 F. Supp. 423, 426-27 (N.D. Ill. 1982).* We examine the "specific facts and circumstances," *United Shoe Machinery, [*6] 391 U.S. at 248,* and weigh the equities at stake in determining the propriety of modification, *Weaver, 535 F. Supp. at 426.* Importantly, even if the "principal objects" of the original order have not yet been fully achieved, we must consider whether other reasons outside the control of the defendant have prevented success and whether adherence to, rather than modification of, the current injunction may be the most fair alternative. These latter considerations inform our inquiry because, as the school desegregation cases instruct us, federal court supervision of local government operations should be a "temporary measure to remedy past discrimination" and is "not intended to operate in perpetuity." *Board of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237, 247, 248, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991).*

We start, then, with the judgment order's principal objects: "to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures." *304 F. Supp. at 737.* By 1968, CHA's site selection had placed 99.5% of 30,848 public housing units in mostly black neighborhoods and [*7] tenant assignment had reserved four projects to be populated almost entirely by whites. *296 F. Supp. at 909-10.* n4 While

it might be expedient to simply accept the plaintiffs' assertion that "the vast majority of CHA's family public housing still consists of the same segregated units, in the still segregated neighborhoods," Pls.' Reply at 5, as well as the plaintiffs' unstated assumption that the assertedly segregative situation is entirely a result of CHA's original discrimination, we must insist on specific facts supported by evidence. For example, relevant information to test the first assertion would include the number of public housing projects that remain predominantly white and the number of projects located in the Limited Area and the General Area. If the evidence shows that segregation in public housing still exists, then we must explore the link between the current segregation and CHA's original discrimination, past remedial efforts (or lack thereof), current remedial efforts, and future plans. For example, we would examine the quantity and location of affordable land in the General Area remaining for site selection, the effects of private decisionmaking on the current segregative [*8] state, and the effects of the shift in demographics over the years.

n4 The 99.5% figure did not include the four almost entirely white public housing projects. *296 F. Supp. at 910.*

Without such evidence, we cannot grant the plaintiffs' motion to modify the judgment order. In the absence of a showing that the judgment order's objectives are not being accomplished and that the extent of the lack of progress is largely grounded in the original discrimination, it would be improper to add thousands of § 8 rent subsidy certificates and vouchers to the judgment order. The Receiver has, relatively speaking, only recently begun to implement the judgment order and we should allow time for the scattered-site program to work before turning to another form of relief, especially if CHA is now cooperating in implementing the order to the extent practicable. Indeed, the scattered-side program most directly deals with CHA's original violations--placement of public housing projects solely in black neighborhoods--while § 8 rent [*9] subsidies are already usable by the recipients throughout Illinois, see *42 U.S.C. § 1437f*(r). Although it is likely that some § 8 recipients would rather live in the General Area but cannot find affordable rental units in the private market, the plaintiffs have not shown that the original site selection and tenant assignment proximately created this situation. Cf. *Freeman v. Pitts, 503 U.S. 467, 496, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992).* n5 Accordingly, we conclude that the record fails to support the plaintiffs' proposed modification.

n5 We acknowledge that the "vestiges of segregation . . . may be subtle and intangible," *Freeman, 503 U.S. at 490,* but even though the location of public housing sites is strongly linked to CHA's original site selection practices, the plaintiffs have thus far failed to proffer evidence that the private rental market is the product of the original discrimination.

II. Termination of HUD Consent Decree

Next, HUD moves to terminate the consent decree entered [*10] into in 1981. The consent decree divided not only Cook but its collar counties as well into Limited, General, and "Revitalizing" *Areas. 523 F. Supp. at 668.* "Recognizing that total relief to **Gautreaux** families outside the Limited Area could not be provided in the foreseeable future, the proposed decree introduced the concept of Revitalizing Areas, that is, areas which have substantial minority population and are undergoing sufficient redevelopment to justify the assumption that these areas will become more integrated in a relatively short time." *Id. at 669.* With this expanded metropolitan-wide relief, the primary goal was to place 7100 public housing residents in the General and Revitalizing Areas:

5.1. Following the effective date, HUD will provide assisted housing to eligible persons as set forth in this Part 5 until the number of occupancies of assisted housing units in the General Area and/or in the Revitalizing Area, pursuant to the contracts referred to in paragraph 5.4, commenced by eligible persons equals 7,100.

Consent Decree P 5.1.

HUD now moves to terminate the consent decree because on October 2, 1996, the 7100 target was met, although HUD acknowledges [*11] that we should retain jurisdiction over the plaintiffs' attorneys' fees petition. The plaintiffs do not object to termination of the consent decree, but have moved for enforcement of specific provisions of the decree that would continue to place certain obligations upon HUD. We deal with those motions below, and thus grant HUD's motion to terminate the consent decree and retain jurisdiction over the plaintiffs' attorneys' fees petition. n6

n6 It appears that HUD has voluntarily agreed to continue certain commitments to the **Gautreaux** programs, HUD's Resp. at 11, and we take this as a salutary sign. We hope HUD, having once assisted a local government violate the constitutional rights of thousands, will adhere to its declaration of policy: "to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing

> conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." *42 U.S.C. § 1437.*

[*12]

III. HUD's Set Aside Obligation in Fiscal Year 1997

As indicated above, the plaintiffs acknowledge that the 7100 target was met October 2, 1996. Even though HUD has attained this target, however, the plaintiffs contend that HUD must still authorize § 8 New Construction/Substantial Rehabilitation units as provided for in PP 5.5.2 and 5.5.3 of the decree. n7 Those paragraphs provided:

5.5.2. HUD will set aside contract authority for 250 Section 8 New Construction and/or Substantial Rehabilitation units per year commencing at the beginning of Fiscal Year 1982 for use in multifamily projects to be located in the General Area or in the Revitalizing Area and that are insured under the National Housing Act. . . .

. . . .

5.5.3. HUD will set aside contract authority for 100 Section 8 New Construction and/or Substantial Rehabilitation units per year, commencing at the beginning of Fiscal Year 1982, for use in projects that will increase housing choice for large minority families living in the Limited Area of the City of Chicago by providing Section 8 New Construction and/or Substantial Rehabilitation assisted housing for such families at locations in the General Area [*13] or in the Revitalizing Area accessible to public transportation.

According to the plaintiffs, HUD's obligation to "set aside contract authority" for fiscal year (FY) 1997 arose on October 1, 1996, and was not extinguished by the attainment of the 7100 target one day later.

> n7 Because the particular § 8 programs referred to in PP 5.5.2 and 5.5.3 were repealed in 1983, the plaintiffs actually seek comparable relief as provided for in P 8.6 of the decree. See HUD's Resp at 3 n.3; *523 F. Supp. at 681-62.*

It is true that HUD's obligation to "set aside" the § 8 units arose on the first day of FY1997. We earlier held that the appropriate reading of the consent decree required HUD to set aside the funds on that particular day, rather than permit HUD to set aside funds anytime during the fiscal year. ***Gautreaux** v. Pierce, 548 F. Supp. 1298, 1300-01 (N.D. Ill. 1982).* Setting a firm date for the set aside obligation comported best with the purpose of the decree: to provide a "continuous stream of relief" [*14] instead of "repeated gaps [in funding] of indeterminate length." *Id. at 1300.*

We did not, however, expressly or implicitly determine that HUD, having set aside the funds at the start of the fiscal year, would be required to continue to execute the § 8 contracts after reaching the 7100 target. We are instead persuaded that P 5.1 means exactly what it says when it directs HUD to provide assisted housing "until" the 7100 target is reached. Although HUD must "set aside" the § 8 units at the start of the fiscal year, the units are "for use" after that date, PP 5.5.2, 5.5.3, and nothing in P 5.1 suggests that HUD must continue to provide the units after the 7100 goal is reached. Indeed, even "unused" units otherwise available "for use" in the next year expire when "HUD's obligations have terminated pursuant to paragraph 5.1, 5.2, 8.1 or 8.2." PP 5.5.2.c., 5.5.3.b. n8 Accordingly, we conclude that HUD's obligation to provide further assistance under PP 5.5.2 and 5.5.3 ended on October 2, 1996.

> n8 We find unpersuasive the plaintiffs' reliance on a purported implication contained in an October 1992 agreement entered into with HUD. In that agreement, HUD received, in exchange for some other consideration, a 50 occupancy credit toward the 7100 target; the parties conditioned the agreement so that if the 7100 target would be reached at the end of the fiscal year because of the credit, then the credit would not be counted that year. Letter of October 28, 1992. However, the agreement can be read as simply ensuring that the set aside obligation would arise in those circumstances and the plaintiffs could take advantage of the funds in the next fiscal year until the 7100 target was reached without the 50 occupancy credit.

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IV. HUD's Approval of CHA § 8 Contract Authority

Finally, the plaintiffs move to enforce P 5.8.1 of the consent decree. Paragraph 5.8.1 generally prohibits HUD from approving certain § 8 assistance in Chicago unless at least one-third of the units are used in the General Area and no more than one-third of the units are used in the Limited Area:

5.8.1. In any fiscal year unless otherwise ordered by

the Court under paragraph 8.4, HUD will not approve housing assistance plans or approve or set aside contract authority for Section 8 New Construction or Existing (other than Moderate Rehabilitation) housing in the City of Chicago unless (a) not less than one-third of the units of Section 8 New Construction housing and not less than one-third of the units of Section 8 Existing housing (other than Moderate Rehabilitation) within the City of Chicago are to be physically located within the General Area, and (b) not more than one-third of the units of Section 8 New Construction housing and not more than one-third of the units of Section 8 Existing housing (other than Moderate Rehabilitation) within the City of Chicago are to be physically located within the Limited Area.
[*16]

523 F. Supp. at 679-80. According to the plaintiffs, and not seriously disputed by HUD, over one-third of the § 8 assistance units have been used in the Limited Area since the entry of the consent decree in 1981. Apparently, the plaintiffs and HUD have been negotiating for several years to resolve the noncompliance without success. Now, the plaintiffs seek unspecified relief.

We deny the motion because of the impracticality of shaping appropriate relief for the noncompliance after the plaintiffs year-after-year failed to enforce the provision. The plaintiffs themselves admit that "the last thing plaintiffs would have desired was a cut-off of Section 8 funding for Chicago families," Pls.' Reply at 11, but that is precisely what the consequence of enforcing P 5.8.1 would have been. Moreover, the decree itself contains a mechanism under which HUD could have annually petitioned this court to waive the requirements of P 5.8.1 by reclassifying Limited Areas as Revitalizing or General Areas. See Decree P 8.4. After the plaintiffs' failures to move to enforce P 5.8.1, HUD each year lost a meaningful opportunity to petition for reclassification under P 8.4. Cf. *Zelazny v. Lyng, [*17] 853 F.2d 540, 543 (7th Cir. 1988)* (laches applied where plaintiff inexcusably delayed and defendant suffered prejudice). Furthermore, each year's approval of § 8 contract authority in Chicago resulted in the use of the subsidies; the plaintiffs provide no suggestion regarding how to undo or remedy those tenants' voluntary uses of the subsidies. Indeed, we cannot identify the contours of the harm inflicted by HUD's annual approval, and without ascertaining the scope of the harm, fashioning relief would be arbitrary. Finally, we point out that HUD's duties under paragraph 5 of the decree ended when the 7100 target was reached, see Decree P 5.1, including the limitations imposed by P 5.8.1.

V. Conclusion

For the reasons explained above, we deny the plaintiffs' motion to modify the judgment order against CHA; grant HUD's motion to terminate the consent decree while retaining jurisdiction over the plaintiffs' attorneys' fees petition; deny the plaintiffs' motion to declare that HUD has a continued obligation for FY1997; and deny the plaintiffs' motion to enforce P 5.8.1. It is so ordered.

MARVIN E. ASPEN

United States District Judge

Dated 8/26/97

~~tance by formula under such section 14~~ [this section].

~~"(2) **Modifications.**—The Secretary shall submit a report to Congress, within 2 years after the date of enactment of this Act [Nov. 28, 1990], recommending any changes to such section 14 that the Secretary determines are appropriate to take into account the relative needs of public housing agencies for assistance to carry out lead-based paint testing and abatement activities. The Secretary shall not adopt any changes to the formula for this purpose except by law."~~

Urban Revitalization Demonstration Program

Pub.L. 103–124, Title II, Oct. 28, 1993, 107 Stat. 1285, provided in part that: "For the urban revitalization demonstration program under the third paragraph under the head 'Homeownership and Opportunity for People Everywhere grants (HOPE grants)' in the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Public Law 102–389, 106 Stat. 1571, 1579 [set out below in this note], $778,240,000 [is appropriated], to remain available until expended: *Provided*, That notwithstanding the first proviso in such third paragraph [set out below in this note], the Secretary shall have discretion to approve funding for more than fifteen applicants: *Provided further*, That no part of the foregoing amount that is used for the urban revitalization demonstration program shall be made available for an application that was not submitted to the Secretary by May 26, 1993: *Provided further*, That of the foregoing $778,240,000, the Secretary may use up to $2,500,000 for technical assistance under such urban revitalization demonstration, to be made available directly, or indirectly under contracts or grants, as appropriate: *Provided further*, That nothing in this paragraph shall prohibit the Secretary from conforming the program's standards and criteria set forth herein, with subsequent authorization legislation that may be enacted into law: *Provided further*, That of the $778,240,000 made available under this heading, $20,000,000 shall be made to eligible grantees under the urban revitalization demonstration program, to implement programs authorized under subtitle D of title IV [section 12899 et seq. of this title], and of which, $10,000,000 shall be made for youth apprenticeship training activities for joint labor-management organizations pursuant to section 3(c)(2)(B) of the Housing and Urban Development Act of 1968, as amended [section 1701u(c)(2)(B) of Title 12, Banks and Banking]."

Pub.L. 102–389, Title II, Oct. 6, 1992, 106 Stat. 1579, provided in part that: "Furthermore, $300,000,000 shall be for grants to carry out an urban revitalization demonstration program involving major reconstruction of severely distressed or obsolete public housing projects, to be administered by local public housing agencies: *Provided*, That such funding shall be made available to up to 15 cities selected from either the 40 most populous United States cities or, from any city whose housing authority was considered to have been on the Department's troubled housing authorities list as of March 31, 1992: *Provided further*, That no more than $50,000,000 shall be provided to each participating municipality: *Provided further*, That no more than 500 units shall be funded for each participating city and such units shall be located in up to 3 separately defined areas containing the community's most severely distressed projects, including family high-rise projects: *Provided further*, That at least 80 per centum of the funding provided to each participating public housing agency shall be used for the capital costs of major reconstruction, rehabilitation and other physical improvements, for the capital costs of replacement units and for certificates under section 8(b) [section 1437f(b) of this title] used for replacement and for management improvements for the reconstructed project and for planning and technical assistance purposes and not more than 20 per centum shall be used for community service programs (as defined by the Commission on National and Community Service) and for supportive services, including, but not limited to, literacy training, job training, day care, youth activities, administrative expenses, and the permissive and mandatory services authorized under the Gateway Program established in the Family Support Centers demonstration program, provided for in 42 U.S.C. 11485e–f [probably means section 11485(e), (f) of this title]: *Provided further*, That each participating city shall make contributions for supportive services in an amount equal to 15 per centum of the funding provided for supportive services pursuant to the

immediately preceding proviso: *Provided further*, That all such contributions from participating jurisdictions for supportive services shall be derived from non-Federal sources: *Provided further*, That each participating community shall submit a plan for program implementation which is consistent with the local comprehensive housing affordability strategy prepared pursuant to section 105 of the Cranston–Gonzalez National Affordable Housing Act [section 12705 of this title] and which has the approval of the local governing body: *Provided further*, That each plan shall include a community services component, but no funds are to be disbursed pursuant to this paragraph until such community services program has been approved by the Commission on National and Community Service: *Provided further*, That funds made available pursuant to this paragraph may be used in conjunction with, but not in lieu of, funding provided under the head 'Modernization of Low–Income Housing Projects' for the modernization of existing public housing projects pursuant to section 14 of the Act (42 U.S.C. 1437*l*) [this section]; for construction or major reconstruction of obsolete public housing, other than for Indian families; for the replacement of public housing units pursuant to section 18 of the Act [section 1437p of this title]; and for the HOPE for Public and Indian Housing Homeownership program as authorized under title III of the Act [subchapter II–A of this chapter]: *Provided further*, That notwithstanding the provisions of section 18(b)(3) of the Act [section 1437p(b)(3) of this title], units demolished, disposed of or otherwise eliminated under this demonstration may be replaced as follows: one-third by certificates under section 8(b) [section 1437f(b) of this title] and the balance by any combination of conventional public housing and units acquired or otherwise provided for homeownership under section 5(h) of the Act [section 1437c(h) of this title] , housing made available through housing opportunity programs of construction or substantial rehabilitation of homes meeting essentially the same eligibility requirements as those established pursuant to sections 603–607 of the Housing and Community Development Act of 1987 (Public Law 100–242)[set out as a note under section 1715*l* of Title 12, Banks and Banking], or under the HOPE II or III programs, as established under sections 421 and 441 of the Cranston–Gonzalez National Affordable Housing Act [sections 12871 and 12891 of this title]; persons displaced by the reconstruction activities provided for herein shall be eligible for these replacement units: *Provided further*, That, in order to be eligible for funding under this paragraph, applications for funding must be received within 180 days from the date the Notice of Funds Availability is published in the Federal Register: *Provided further*, That the Secretary of the Department of Housing and Urban Development shall issue a notice of funds availability within 90 days of enactment of this paragraph [probably means date of enactment of this paragraph, Oct. 6, 1992]: *Provided further*, That the Secretary shall determine which cities have been selected to participate in the program within 90 days of the timely receipt of the last eligible application: *Provided further*, That housing authorities, in submitting their application for funds under this paragraph, shall identify all severely distressed public housing developments, using the criteria set forth by the National Commission on Severely Distressed Public Housing: *Provided further*, That nothing in this paragraph shall prohibit the Secretary from conforming the program standards and criteria set forth herein, with subsequent authorization legislation that may be enacted into law: *Provided further*, That the authority in the immediately preceding proviso shall not apply to any legislation that excludes or otherwise limits self-sufficiency or community service activities set forth in this paragraph, or authorize reallocation of amounts available for obligation which are included in this paragraph: *Provided further*, That any troubled housing authority that applies for funds under this paragraph, shall not be eligible if the Secretary certifies to the Congress that they are not making substantial progress to eliminate their troubled status in accordance with section 6(j) of the Housing Act of 1937 [section 1437d(j) of this title], as amended: *Provided further*, That in the event that communities applying for funding under this paragraph also request funding under any other HOPE program authorized under title III or title IV of the Cranston–Gonzalez National Affordable Housing Act [Title III or Title IV of Pub.L. 101–625, Nov. 28, 1990, 104 Stat. 4129, 4148, for classifications of which see Ta-

bles], the Secretary shall process such applications concurrently and in an expeditious manner: *Provided further*, That, in the event that any application received from the cities initially selected to participate in this program is determined to be unacceptable, the Secretary shall select another city from the 40 most populous United States cities to receive funding under this paragraph: *Provided further*, That, in the event that communities selected to receive funding do not proceed in a manner consistent with the plan approved for that community, the Secretary may withdraw any unobligated balances of funding made available pursuant to this paragraph and distribute such funds to other eligible communities."

CROSS REFERENCES

Abatement, inspection and reporting requirements for assistance under this section for purposes of elimination of lead paint poisoning, see 42 USCA § 4822.

Choice in Public Housing Management Act, financial assistance for grants available under this section, see 42 USCA § 1437w.

Comprehensive improvement assistance under this section for purposes of—
- Lower income housing projects, see 42 USCA § 1437c.
- Public housing homeownership, see 42 USCA § 1437s.
- Public housing resident management, see 42 USCA § 1437r.

Home Investment Partnerships, funds not available to carry out activities authorized under this section, see 42 USCA § 12742.

Local housing assistance plan, formula allocation not applicable to assistance approved under this section, see 42 USCA § 1439.

Mutual Help Homeownership Opportunity Program for Indian families, assistance provided for comprehensive modernization under this section, see 42 USCA § 1437bb.

Performance indicators for public agencies for purposes of evaluation of management operations, see 42 USCA § 1437d.

Public and Indian Housing Program, modernization grants available under this section, see 12 USCA § 1701u.

Rehabilitation of vacant public housing units in accordance with this section for purposes of replacement plan under homeownership program, see 42 USCA § 1437aaa–3.

Severely distressed public housing defined for purposes of revitalization, see 42 USCA § 1437v.

LIBRARY REFERENCES

Administrative Law

Low-income housing programs, requirements, see 24 C.F.R. § 813.101 et seq.

American Digest System

Building health regulations, slum clearance and public housing, see Health and Environment ⇐32.

Federal benefits for Native Americans, see Indians ⇐7.

Federally controlled housing and home finance organizations, see United States ⇐53(9).

Encyclopedias

Building health regulations, slum clearance and public housing, see C.J.S. Health and Environment § 28 et seq.

Federal benefits for Native Americans, see C.J.S. Indians § 46 et seq.

Federally controlled housing and home finance organizations, see C.J.S. United States § 70.

WESTLAW ELECTRONIC RESEARCH

Health and Environment cases: 199k[add key number].

Indians cases: 209k[add key number].

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

PURPOSE OF THE HOPE VI PROGRAM

HOPE VI was originally conceived as a demonstration program which would promote fundamental changes in the way PHAs developed and administered public housing, and in the way HUD related to those PHAs. Its purpose was and remains to revitalize severely distressed or obsolete public housing developments. HOPE VI is a key ingredient in the Department of Housing and Urban Development's Transformation of Public Housing efforts. The elements of public housing transformation that have proven key to HOPE VI include:

1. Changing the physical shape of public housing. This includes tearing down the eyesores that are often identified with obsolete public housing and replacing them with homes that complement the surrounding neighborhoods and are attractive and marketable to the people they are intended to serve, meeting contemporary standards of modest comfort and liveability. HOPE VI funds should be used to create institutional and physical structures that serve the needs of public housing residents over the long term in a cost-effective manner.

2. Establishing positive incentives for resident self-sufficiency and comprehensive services that empower residents. Programs should be outcome-based, directed at residents moving up and out of public housing.

3. Enforcing tough expectations through strict occupancy and eviction rules, such as the "One Strike and You're Out" policy supported by the Housing Opportunity Program Extension Act of 1996 (Pub. L. 104-120; approved March 28, 1996). The goal of these rules is to improve the quality of life for residents, create safer, family-friendly environments conducive to learning, and make areas around public housing more attractive to businesses that can create well-paying jobs.

4. Lessening concentrations of poverty by placing public housing in nonpoverty neighborhoods, or by promoting mixed-income communities where public housing once stood alone, thereby ending the social and economic isolation of public housing residents, increasing their access to quality municipal services such as schools, and increasing their access to job information and mentoring opportunities.

5. Forging partnerships with other agencies, local governments, nonprofit organizations, and private businesses to leverage support and resources, whether financial or in-kind.

PROGRAM AUTHORITY AND FUNDING HISTORY

FY 1993 and FY 1994

The HOPE VI Program was created by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 (Pub.L. 102-389), approved on October 6, 1992 (the 1993 Appropriations Act). Congress has never passed an authorization bill for the program, and, therefore, HUD has not issued program regulations. Grants are governed by each Fiscal Year's Notice of Funding Availability (NOFA) and each recipient's Grant Agreement.

The FY 1993 Appropriations Act made $300 million available for Planning and Implementation grants to PHAs in the 40 most populous cities in the U.S., or in any city whose PHA was on HUD's current troubled housing authority list. A NOFA was published in the Federal Register on January 4, 1993 and revised and restated on March 29, 1993. On May 4, 1993 the deadline was extended to May 26, 1993. 41 applications were received by HUD. In August 1993, 2 Planning and 6 Implementation applications received full funding and 7 Implementation applications received partial funding.

The FY 1994 Appropriations Act (Pub.L. 103-124, approved on October 28, 1993) allocated an additional $778.24 for HOPE VI. Of that amount, $2.5 million was allocated for technical assistance, and $20 million was allocated for the Youthbuild program, leaving $755.74 million available to fund additional HOPE VI applications submitted in FY 1993. In November 1993 the 7 partially-funded applications from FY 1993 were fully funded, and 2 new Planning and 5 new Implementation grants were fully funded from the FY 1994 appropriation. A total of 13 Implementation grants totalling $543,836,418 and 2 Planning grants totalling $1 million were awarded as FY 1993 grants. An additional 13 Implementation grants totalling $507,838,089 and 6 Planning grants totalling $2,725,472 were awarded as FY 1994 grants. The total amount awarded for FY 1993 and FY 1994 was $1,055,399,979.

FY 1995

The FY 1995 Appropriations Act (Public Law 103-327, approved September 28, 1994) allocated $500 million for HOPE VI. Of that amount, $2.5 million was allocated for technical assistance, leaving $497.5 available for HOPE VI Planning and Implementation grants.

A letter from HUD dated January 9, 1995 invited the 8 Planning grantees from FY 1993 and 1994 to apply for Implementation grants. Those Implementation grants, totalling $349,999,018, were awarded on January 19, 1995.

A letter from HUD dated February 3, 1995 invited all eligible PHAs to apply for Planning and Implementation grants. Applications for Planning grants were due to HUD on February 28, 1995. $10,726,609 was awarded on a non competivite basis to 27 PHAs for Planning grants of $400,000 apiece.

Applications for Implementation grants were due to HUD on April 17, 1995. Six finalists were invited to submit revised submissions by August 30, 1995. On September 28, 1996, 5 PHAs were awarded Implementation grants totalling $103,257,000.

FY 1996

The FY 1996 Appropriations Act (Pub.L. 104-134, approved April 26, 1996) allocated $480 million for HOPE VI. Of that amount, $3,216,000 was allocated for technical assistance, leaving $476,784,000 available for implementation grants. A NOFA was issued on July 22, 1996, and 138 applications were received on the September 10, 1996 due date. 20 grants totalling 403,313,070 were awarded for demolition and revitalization activities. 24 grants totalling 73,470,930 were awarded for demolition only. The total amount awarded in FY 1996 was $476,784,000.

FY 1997

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (The FY 1997 Appropriations Act) (Pub.L. 104-204, approved September 26, 1996) allocated $550 million for HOPE VI under the heading "Revitalization of Severely Distressed Public Housing." Of that amount, $2.5 million was allocated for technical assistance, $70 million for Section 8 assistance, $30 million for demolition grants, and $447.5 million for demolition and revitalization grants. Separate NOFAs are expected to be published for the Section 8, Demolition only, and Demolition and Revitalization portions of the appropriation.

FY 1995 APPROPRIATION ACT

H.R. 4626, Public Law 103-327, Approved on 9-28-94

SEVERELY DISTRESSED PUBLIC HOUSING

For the HOPE VI/urban revitalization demonstration program under the third paragraph under the head "Homeownership and Opportunity for People Everywhere grants (HOPE grants)" in the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Public Law 102-389, 106 Stat. 1571, 1579, $500,000,000, to remain available until expended:

Provided, That notwithstanding the first proviso of such third paragraph, the Secretary shall have discretion to approve funding for more than fifteen applicants:

Provided further, That notwithstanding the third proviso of such third paragraph, the Secretary may provide funds for more than 500 units for each participating city:

Provided further, That in selecting HOPE VI implementation grants recipients in fiscal year 1995, the Secretary must first award such grants to those cities or jurisdictions which have received HOPE VI planning grants in fiscal year 1993 or fiscal year 1994:

Provided further, That the requirement of the immediately proceeding proviso shall not limit the Secretary's discretion to limit funding to amounts he deems appropriate, nor shall it prevent the Secretary from guaranteeing that all implementation grant recipients conform with the requirements of the HOPE VI/ urban revitalization demonstration program:

Provided further, That of the foregoing $500,000,000, the Secretary may use up to $2,500,000 for technical assistance under such urban revitalization demonstration, to be made available directly, or indirectly, under contracts or grants, as appropriate:

Provided further, That nothing in this paragraph shall prohibit the Secretary from conforming the program standards and criteria set forth herein, with subsequent authorization legislation that may be enacted into law.

FY 1996 APPROPRIATION ACT

Public Law 104-134, Approved on 4-26-95
Omnibus Consolidated Rescissions and Appropriation Act of 1996

PUBLIC HOUSING DEMOLITION, SITE REVITALIZATION, AND REPLACEMENT HOUSING GRANTS

For grants to public housing agencies for the proposes of enabling the demolition of obsolete public housing projects or portions thereof, the revitalization (where appropriate) of sites (including remaining public housing units) on which such projects are located, replacement housing which will avoid or lessen concentration of very low=income families, and tenant-based assistance in accordance with section 8 of the United States Housing Act of 1937 for the purpose of providing replacement housing and assisting tenants to be displaced by the demolition, $480,000,000, to remain available until expended;

Provided, That the Secretary of Housing and Urban Development shall award such funds to public housing agencies based upon, among other relevant criteria, the local and national impact of the proposed demolition and revitalization activities and the extent to which the public housing agency could undertake such activities without the additional assistance to be provided hereunder;

Provided further, That eligible expenditures hereunder shall be those expenditures eligible under section 9 and section 14 of the United States Housing Act of 1937 (42 U.S.C. 1437f and l);

Provided further, That the Secretary may impose such conditions and requirements as the Secretary deems appropriate to effectuate the proposes of this paragraph;

Provided further, That the Secretary may require and agency selected to receive funding to make arrangements satisfactory to the Secretary for use of an entity other than the agency to carry out this program where the Secretary determines that such action will help to effectuate the propose of this paragraph;

Provided further, That in the event an agency selected to receive funding does not proceed expeditiously as determined by the Secretary, the Secretary shall withdraw andy funding made available pursuant to this paragraph that has not been obligated by the agency and distribute such funds to one or more other eligible agencies, or to other entities capable of proceeding expeditiously in the same locality with the original program;

Provided further, That of the foregoing $480,0000, the Secretary may use up to .67 per centum for technical assistance, to be provided directly or indirectly by grants, contracts or cooperative agreements, including training and cost of necessary travel for participants in such training, by or to officials and employees of the Department and of public housing agencies and to residents;

Provided further, That any replacement housing provided with assistance under this head shall be subject to section 1809 of the Untied States Housing Act of 1937, as amended by section 201(b(2) of this Act.

FY 1997 APPROPRIATION ACT

H.R. 3666, Public Law 104-204, Approved on 9-26-96

Department of Veterans Affairs and
Housing and Urban Development and Independent Agencies
Appropriation Act, 1997

REVITALIZATION OF SEVERELY DISTRESSED PUBLIC HOUSING

For grants to public housing agencies for assisting in the demolition of obsolete public housing projects or portions thereof, the revitalization (where appropriate) of sites (including remaining public housing units) on which such projects are located, replacement housing which will avoid or lessen concentrations of very low-income families, and tenant-based assistance in accordance with section 8 of the United States Housing Act of 1937; and for providing replacement housing and assisting tenants to be displaced by the demolition, $550,000,000, to remain available until expended, of which the Secretary may use up to $2,500,000 for technical assistance, to be provided directly or indirectly by grants, contracts or cooperative agreements, including training and cost of necessary travel for participants in such training, by or to officials and employees of the Department and of public housing agencies and to residents;

Provided, That no funds appropriated in this title shall be used for any purpose that is not provided for herein, in the Housing Act of 1937, in the Appropriations Acts for Veterans Affairs, Housing and Urban Development, and Independent Agencies for the fiscal years 1993, 1994, and 1995, and the Omnibus Consolidated Rescissions and Appropriations Act of 1996;

Provided further, That none of such funds shall be used directly or indirectly by granting competitive advantage in awards to settle litigation or pay judgments, unless expressly permitted herein;

Provided further, That, notwithstanding any other provision of law, the funds made available to the Housing Authority of New Orleans, under HOPE VI for purposed of Desire Homes, shall not be obligated or expended for on-site construction until and independent third party has determined whether the site is appropriate.

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

DOROTHY GAUTREAUX, et al., Plaintiffs, vs. SAMUEL R. PIERCE, JR., Secretary of the Department of Housing and Urban Development, and CHICAGO HOUSING AUTHORITY, et al., Defendants.	)	Civil Action No. 66C1459 66C1460 (Consolidated)

ORDER

This matter coming on to be heard pursuant to plaintiffs' motion dated May 8, 1987 for the appointment of a receiver for the scattered site program (defined below), due notice having been given and the Court having heard the presentations of the parties, the Court makes the following findings of fact and conclusions of law:

(A) The Chicago Housing Authority (the "CHA") has joined in plaintiffs' motion for the appointment of a receiver for the reasons which CHA has heretofore stated in this cause.

(B) This Court has concluded that it has no reasonable alternative but to exercise its inherent power to effectuate its own orders and to so appoint said receiver for the scattered site program in accordance with the provisions of this order. It is the expectation of this Court that the appointment of a receiver will facilitate cooperation between the United States

Department of Housing and Urban Development ("HUD"), CHA and the receiver respecting the scattered site program.

(C) For purposes of this Order the "scattered site program" shall mean (i) the buildings and vacant sites listed in Exhibit A attached hereto (collectively, the "Uncompleted Units") and (ii) CHA Development Programs numbered Il 2-096, Il 2-098, Il 2-103 through Il 2-109, and Il 2-113 (excluding any completed buildings in such programs) and all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of Civil Action No. 66 C 1459.

WHEREFORE, IT IS HEREBY ORDERED:

1. The Court hereby appoints Daniel E. Levin and The Habitat Company jointly as receiver ("Receiver") to develop and administer the scattered site program as effectively and expeditiously as possible in compliance with the orders of this Court, such appointment to be effective as of the Effective Date (defined below). Until the Effective Date, CHA shall continue to be responsible for implementing the scattered site program in compliance with the prior orders of this Court. On the Effective Date CHA shall turn over to the Receiver possession and control of the Uncompleted Units, it being understood, however, that title to the Uncompleted Units shall remain in the name of CHA.

2. The Receiver shall have and exercise all powers of CHA respecting the scattered site program necessary and incident to the development and administration of such program, including:

(a) Making all determinations governing the scattered site program in compliance with prior and future orders of this Court, including without limitation (i) submission to HUD of applications for funding, development programs and other documents, (ii) site selection and acquisition (including policies respecting the location of sites and buildings to be acquired), (iii) the relocation of occupants, when necessary and (iv) construction and rehabilitation of dwelling units and the design and specifications therefor in compliance with applicable laws and ordinances; and

(b) Carrying out the determinations so made, including without limitation (i) negotiating and executing any contracts or other documents necessary or appropriate to implement the scattered site program, (ii) employing, transferring and discharging staff for the scattered site program, (iii) purchasing insurance insuring the Receiver, and the interest of CHA if feasible and available at no additional cost, against liability for such risks and in such amounts as the Receiver and HUD shall from time to time agree upon, (iv) managing and administering buildings included within the scattered site program prior to the turnover thereof to the CHA in accordance with Paragraph 5 below, and (v) doing such other acts and things, including site selection and acquisition in the name of CHA, construction and rehabilitation of dwelling units and retaining the services of such personnel, consultants, attorneys, accountants and other professionals, as are determined by the Receiver to be necessary and appropriate to implement the scattered site

program and to enable the Receiver to discharge its duties pursuant to the provisions hereof.

3. The Receiver shall have the right at any time, upon due notice to the parties hereto, to make application to the Court requesting that the Receiver be excused from complying with some or all of the provisions set forth in the Annual Contributions Contracts heretofore entered into between HUD and CHA (collectively, the "ACC"), the HUD Procurement Handbook for Public Housing Agencies No. 7460.8, the HUD Public Housing Development Handbook No. 7417.1, or other applicable rules and regulations, or applicable laws or ordinances, or that as to the Receiver, the requirements of such agreements, provisions, laws, ordinances, rules and regulations be modified, if the Receiver determines that compliance therewith would be costly, inefficient or otherwise impede or restrict its ability to carry out this Court's orders. Nothing contained herein shall be deemed to constitute a determination by the Court, or the consent or an acknowledgement by HUD or CHA, that the Court has the jurisdiction or authority to grant any of the foregoing relief.

4. The Receiver shall have no obligation to make any expenditure except from funds provided by HUD in accordance with procedures to be agreed upon between HUD and the Receiver. The Receiver shall keep separate accounts for costs incurred in connection with the scattered site program from and after the Effective Date. The Receiver shall not be responsible for (i) payment of any costs or performance of any obligations incurred

by CHA prior to the Effective Date, except obligations incurred pursuant to the ACC unless the Receiver is excused from complying with the terms thereof pursuant to Paragraph 3 above, or (ii) payment of any costs or performance of any obligations incurred by CHA thereafter, except as may be specifically authorized by the Receiver in writing. Notwithstanding the foregoing, the Receiver shall not be responsible for (iii) compliance with the provisions of any ACC with respect to buildings and sites previously acquired or completed by CHA except those described in Exhibit A, or (iv) any act or omission of CHA either before or after the Effective Date.

5. The Receiver shall promptly turn over to CHA, and CHA shall accept, any building within the scattered site program upon completion of construction or rehabilitation of each such building. For purposes hereof, subject to the reasonable approval of HUD, construction or rehabilitation of a building shall be deemed to be completed when the Receiver's project architect determines that such building is ready for occupancy, and, if required by applicable law or ordinance, a certificate of occupancy has been issued for such building.

6. The Receiver shall prepare reports respecting the status and implementation of the scattered site program as of the end of each month in the year 1987, commencing with the month of September, 1987, and thereafter quarterly as of March 31, June 30, September 30 and December 31 of each year. Copies of the same shall be filed with the Court and served on

the parties within 20 days following the end of the period covered by each such report.

7. CHA, its agents, servants and employees shall provide full cooperation and assistance to, and shall not interfere with, the Receiver in the performance of the Receiver's responsibilities hereunder, including without limitation providing full access to all information, records, documents, files relating to the scattered site program.

8. There shall be paid to the Receiver from funds provided by HUD pursuant to the ACC or Annual Contributions Contracts entered into between the Receiver and HUD, or by CHA if appropriate, (i) all direct costs and expenses reasonably incurred by the Receiver in connection with the performance by the Receiver of its duties pursuant hereto, (ii) to the extent not included in clause (i), a pro-rata share of all salary, compensation and other direct costs of those employees of The Habitat Company (other than Daniel E. Levin, James P. McHugh and Douglas R. Woodworth), James McHugh Construction Co. (other than James P. McHugh) or other entities which are affiliates of or controlled either directly or indirectly by the Receiver, who at the direction of the Receiver perform services on behalf of the scattered site program, for the actual time devoted by said employees to the performance of services for the scattered site program, and (iii) a fee in the amount of three percent (3%) of the aggregate development costs (excluding the costs described in clause (ii) above and any costs previously incurred by CHA)

for each building in the scattered site program (except buildings developed pursuant to a turnkey development) as reflected on the original development budget(s) therefor submitted by the Receiver and approved by HUD, the fee for such building being payable upon the completion thereof as determined in accordance with Paragraph 5 hereof. The Court will set a reasonable fee with respect to turnkey developments. The Court hereby determines that included in the category of expenditures for which the Receiver shall be entitled to reimbursement are all costs, expenses and liabilities (including reasonable attorneys' fees and court costs) reasonably incurred or sustained by the Receiver by reason of the performance by the Receiver of its duties pursuant to the provisions hereof to the extent said costs, expenses and liabilities are not covered by the insurance described in Paragraph 2(b)(iii) above.

9. Nothing in this Order shall (i) preclude or restrict the Receiver or any party hereto from asserting any claims against the Receiver or any other party hereto for any matter in connection with the scattered site program or otherwise; provided, however that the foregoing shall not constitute a waiver by the Receiver or any other party of any defense which it may have to such claim, including, but not limited to, a defense by the Receiver that it enjoys immunity from such claim, (ii) obligate HUD to furnish funds to the Receiver in addition to any funds which HUD would otherwise be obligated to provide

to CHA by virtue of any previous order of this Court or otherwise, or (iii) constitute a determination of the amount of funds which HUD is obligated to furnish by virtue of such previous orders or otherwise.

10. The Receiver is hereby excused from complying with Rule 9(b) of the Civil Rules of the United States District Court for the Northern District of Illinois.

11. The effective date of this Order (the "Effective Date") shall be the date upon which the Receiver has filed with this Court and served upon the parties hereto a notice signifying that the Receiver is satisfied that there is in force the insurance coverage referred to in Paragraph 2(b)(iii) above.

12. Except as and to the extent specifically provided in this Order, this Court's judgment orders previously entered herein, as previously modified, remain in full force and effect. The Court retains jurisdiction of this matter for all purposes, including enforcement and issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information or material changes in conditions existing at the time of this order or any other matter.

ENTER:

United States District Judge

August 14, 1987

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE SECRETARY
WASHINGTON, D.C. 20410-0001

July 11, 1996

xander Polikoff, Esq.
iness and Professional People
for the Public Interest
East Monroe Street, Suite 212
cago, Illinois 60603

Gautreaux

r Mr. Polikoff:

This is in response to your June 10, 1996 letter to sociate General Counsel Carole W. Wilson requesting a "set de" of 1996 HOPE VI funding for the receiver of the Chicago using Authority.

We regret that HUD cannot accede to your request. A "set de" to the receiver is not appropriate because the statute in first instance leaves to a PHA's discretion whether it wants apply for a HOPE VI grant at all and how it would want to use funds for which it applies. For example, if CHA applies for OPE VI grant to enable the demolition of a public housing oject, it may want to focus on site revitalization without any placement housing, or, if it plans to have any replacement using, it might want to use the money for Section 8 tificates rather than replacement public housing units. Since a matter of law, we cannot provide the "set aside" you seek, believe we have no obligation under paragraph 8.6 of the sent decree to do so. That provision, which requires parable relief, makes it clear that plaintiffs are only titled to comparable relief that is "consistent with HUD's vised funding or statutory authority."

For your information, the HOPE VI grants will be awarded ier a competitive process. However, the NOFA will provide an solute priority for a CHA HOPE VI application seeking funding up to 350 replacement public housing units in order to lfill the present obligation to provide comparable relief in eu of 350 section 8 new construction units that were required the decree.

Of course, the award depends on CHA submitting an approvable PE VI application for the replacement housing you seek, which ets the statutorily mandated requirements of the NOFA. Because this uncertainty, we again ask whether the plaintiffs want to ceive the 350 Section 8 certificates, with $1500 per rtificate in mobility counselling funds, as we offered earlier

.s year, in satisfaction of HUD's FY 1996 comparable relief .igations. There are other pressing needs for these funds and) needs to make them available, if plaintiffs do not want to -e them provided under the consent decree.

I would hope that you will be able to provide a response in ıe for your meeting on July 16th with my staff and Joseph ıldiner.

Please feel free to call me if I can be of assistance to :. Keep up your good work. Gautreaux is a model of success : our nation!

Sincerely,

Henry G. Cisneros

Edwin Eisendrath
Joseph Shuldiner
Kevin Marchman

Business and Professional People
for the Public Interest

July 25, 1996

COPY BY FAX
ORIGINAL BY MAIL

Mr. Joseph Shuldiner
Executive Director
Chicago Housing Authority
626 West Jackson Boulevard
Chicago, Illinois 60661

Dear Joe:

This letter attempts to set out the understanding I believe we reached at our meeting in Betsy Julian's conference room on July 16 concerning the FY1996 <u>Gautreaux</u> set-aside.

Although we do not agree, HUD is taking the position that the FY1996 set-aside must be made available to <u>Gautreaux</u> plaintiffs pursuant to a CHA HOPE VI application for demolition of one or more CHA buildings under a NOFA to be issued shortly. Nonetheless HUD has said,

> "For your information, the HOPE VI grants will be awarded under a competitive process. However, the NOFA will provide an absolute priority for a CHA HOPE VI application seeking funding for up to 350 replacement public housing units in order to fulfill the present obligation to provide comparable relief in lieu of 350 section 8 new construction units that were required by the decree."

Under these circumstances, we have agreed as follows:

(1) CHA will work with the <u>Gautreaux</u> plaintiffs to prepare and submit an application under the forthcoming NOFA for the specific purpose of obtaining the "absolute priority" funding for 350 replacement public housing units referred to in Secretary Cisneros' letter. (CHA intends to submit a separate NOFA application for funding in addition to this "absolute priority" amount.)

(2) The FY1996 <u>Gautreaux</u> set-aside funding will only be expended, and the buildings to be demolished for which any part of the FY1996 <u>Gautreaux</u> set-aside is

to be used as replacement housing will only be selected, upon the mutual agreement of CHA and the Gautreaux plaintiffs, or pursuant to a decision of the Gautreaux court under paragraph (3) below.

(3) If after a reasonable time CHA and the Gautreaux plaintiffs are unable to agree upon the expenditure of some part or all of the FY1996 Gautreaux set-aside funding, or upon such selection of buildings to be demolished, the disagreement of the parties shall be submitted for resolution to the Gautreaux court. Either party shall be free to initiate such submission.

Cordially,

Alexander Polikoff

ALP:mm

AGREED:

Joseph Shuldiner, Executive Director
Chicago Housing Authority

cc: Edwin Eisendrath

BPI
Business and Professional People
for the Public Interest

July 15, 1997

BY FAX: 312/207-0249

Mr. Andrew Rodrigues
Director/Redevelopment Division
Chicago Housing Authority
626 West Jackson Boulevard
Chicago, Illinois 60661

Dear Andy:

Here is a draft of the ABLA letter we discussed yesterday. Let me know if you'd like any changes to be made. As you can see, the letter calls for the current NOFA docket number, which I'd appreciate your filling in.

In the present circumstances I feel compelled to point out it remains the Gautreaux position that court orders require the Receiver to develop all public housing units, including any to be developed at ABLA, even though HOPE VI funds are used. Accordingly, unless and until court orders are changed or we agree to some other arrangement (as we have at Darrow pending a court order), I can only authorize CHA to use our ABLA letter upon the understanding that it too accepts that position.

Cordially,

Alexander Polikoff

ALP:mm
cc: By Fax:
Jerome Butler (312/726-6053)
Joseph Shuldiner (312/627-0346)
Edwin Eisendrath (312/886-2729)
Rosanna Marquez (312/744-2324)

17 East Monroe Street, Suite 212, Chicago, Illinois 60603 312.641.5570 phone 312.641.5454 fax

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	)	
HENRY CISNEROS, Secretary of	)	(Consolidated)
Department of Housing and Urban	)	
Development,	)	
	)	
Defendants.	)	

ORDER

This matter coming on to be heard on the presentations of the parties, and the Court having heard the same, it is hereby ordered:

1. The Court hereby designates as the Horner Revitalizing Area ("HRA) that portion of the City of Chicago that lies between Damen Avenue on the East, Western Avenue on the West, Lake Street on the North, and the Eisenhower Expressway on the South.

2. Notwithstanding any other order in this cause, the joint venture between the Receiver, previously appointed by the Court to develop scattered site public housing on behalf of the defendant, Chicago Housing Authority ("CHA"), and Chicago Metropolitan Housing Development Authority, CHA's not-for-profit development affiliate, may arrange for the development of such number of public housing units within the HRA, subject to such conditions, as may be approved and specified by further order of

the Court.

3. The Court has examined and now hereby approves Paragraphs 2.C, 8, 14 and 15 of the proposed Consent Decree in Henry Horner Mothers Guild v. CHA, 91 C 3316 (USDC N.D. Ill).

ENTER

March 9, 1995

Alexander Polikoff
Julie Elena Brown
Business and Professional People
For the Public Interest
17 East Monroe Street - #212
Chicago, Illinois 60603
312/641-5570

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

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

ORDER

This matter coming to be heard on the Joint Motion of Plaintiffs, and Defendants Chicago Housing Authority and Department of Housing and Urban Development, for an order designating a North Kenwood-Oakland Revitalizing Area and permitting development of family public housing units therein, and the Court having heard presentations concerning the proposed order; and

The Receiver, Daniel Levin and The Habitat Company, having represented to the Court that they have examined the proposal respecting the appropriate number of public housing units to be provided therein and the conditions to be made applicable thereto, and that they support the Joint Motion; and

The Court being cognizant that the principal remedial purpose of the orders previously entered in these consolidated cases has been and is to provide plaintiff class families with desegregated housing opportunities; and

The Court also being cognizant that on occasion it has

permitted public or assisted housing to be provided in census tracts not within the General Public Housing Area upon a sufficient showing of "revitalizing" circumstances such that a responsible forecast of economic integration, with a longer term possibility of racial desegregation, could be made; and

The Court being of the view that such a forecast can be made with respect to the North Kenwood-Oakland Revitalizing Area if the terms and conditions of this order are met;

Now, therefore, IT IS HEREBY ORDERED:

1. The Court designates as the North Kenwood-Oakland Revitalizing Area ("Revitalizing Area") that portion of the City of Chicago that lies between Oakwood Boulevard on the north, the Illinois Central Railroad right-of-way on the east, 47th Street on the south, and Cottage Grove Avenue on the west;

2. The Receiver, previously appointed by the Court to develop scattered site public housing on behalf of the defendant, Chicago Housing Authority, shall be free to develop, through new construction or rehabilitation of existing buildings, up to 241 units of public housing within the Revitalizing Area, subject to the following conditions:

a) No more than 100 units of public housing shall be developed on CHA-owned land that is the site of CHA's Lakefront high-rise buildings (the area bounded by 40th Street on the north, the Illinois Central Railroad right-of-way on the east, 42nd Place on the south, and Lake Park Avenue on the west).

b) No more than approximately 50 units of public housing shall be developed on the site of the demolished Washington Park buildings (the CHA-owned property bounded by 41st Street on the north, Drexel Avenue on the east, Cottage Grove Avenue on the west, and Bowen Avenue on the south) and adjacent property.

c) The balance of such units of public housing within the Revitalizing Area, in addition to those referred to in subparagraphs (a) and (b) above, shall be developed on other sites distributed throughout the Revitalizing Area.

d) One-half of the public housing units developed pursuant to subparagraphs (a) and (b) above shall be occupied by families whose incomes are in the range of 50-80% of the median income in the Chicago Metropolitan Area, and such units shall be geographically distributed approximately evenly among the units developed pursuant to subparagraphs (a) and (b).

3. The CHA Tenant Selection and Assignment Plan previously approved by this Court shall be modified to afford eligible displaced Lakefront tenant families, as defined in the "Revised Agreement Regarding Former Residents of the Lakefront Properties and the Future Use of Those Properties," dated September 22, 1995, between CHA and the Lakefront Community Organization, first

priority to all public housing units developed pursuant to subparagraphs 2(a), (b) and (c) of this Order, subject only to the provisions of subparagraph 2(d) of this Order.

ENTER:

Judge

Date: June 3, 1996

DOROTHY **GAUTREAUX**, et al., Plaintiffs, v. CHICAGO HOUSING AUTHORITY and JACK KEMP, Secretary of Department of Housing and Urban Development, Defendants

Case Nos. 66 C 1459, 66 C 1460

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

1991 U.S. Dist. LEXIS 4123

April 2, 1991

April 4, 1991, Docketed

JUDGES: [*1]

Marvin E. Aspen, United States District Judge.

OPINIONBY: ASPEN

OPINION: MEMORANDUM OPINION AND ORDER

We have before us the **Gautreaux** plaintiff's motion for further relief, in which they ask for a court order staying the rehabilitation of four high-rise public housing buildings in the North Kenwood-Oakland area of Chicago and directing the Chicago Housing Authority ("CHA") and Receiver to cooperate in the implementation of any development plan for that area that would increase scattered-site housing. Oral arguments on the motion were heard March 1, 1991. n1 As set forth below, we deny plaintiff's motion.

n1 We appreciate the input of the SouthEast side Residents for Justice ("S.E.R.J."), which filed an amicus brief arguing that the motion be denied.

The plaintiffs' argument is essentially this: the CHA is obligated to provide as much scattered site public housing as possible, pursuant to a consent decree, and the Department of Housing and Urban Development ("HUD") is obligated to use its "best efforts" to aid the CHA in this regard. Now, [*2] a plan has been developed that, if implemented, would put 600 new scattered site units into the North Kenwood-Oakland area. The plaintiffs contend that plans to renovate four high-rises (of a group of six; two have already been renovated) would severely compromise, if not destroy, the viability of the scattered site plan. Indeed, plaintiff's counsel at oral argument contended that it was a virtual certainty" that the 600 units of scattered site housing "would go down the drain" without the order sought in the plaintiffs' motion.

The scattered site plan, plaintiffs' counsel argued, constitutes "special and extraordinary circumstances" that would justify a broad reading of the consent decree in this case and other orders of this Court. What plaintiffs desire, the court was told at oral argument, is a signal to CHA and HUD that other alternatives to rehabilitation of the four high-rises are available -- that rehabilitation is not a "fait accompli." Plaintiffs' counsel repeatedly emphasized the limited nature of plaintiffs' requested relief, characterizing it as a court-ordered delay for sufficient time to explore alternatives and choices to rehabilitation.

While we are not unsympathetic [*3] to the plaintiffs' presentation, we do not believe that the extremely broad reading of the consent decrees advocated by the plaintiffs is justified. Further, it is not apparent to us that plaintiffs will necessarily lose what they seek without an order from this court. As the CHA showed, both in its brief and at oral argument, rehabilitation work on the first of the four high-rises at issue will not being until February 1, 1992. Funding requests for the remaining three buildings will not even be made "four months," let alone be granted, and renovation work on those high-rises may not begin for years. That strikes us as ample time for "alternatives" and "choices" to be fully explored.

In short, we deny plaintiffs' motion both for the reason that it seeks relief beyond the scope of the various orders of this Court and because, in any event, plaintiffs have failed to present a case for such relief. Lakefront Community Organization's petition to intervene as plaintiff is moot. It is so ordered.

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

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FURTHER RELIEF

Plaintiffs, by their attorneys, file this Memorandum in Support of their Motion for Further Relief, dated November 21, 1990.

I. Legal Background.

The basic remedial order against the defendant, Chicago Housing Authority ("CHA"), obligates CHA to provide as much scattered site public housing as possible, as rapidly as possible. Gautreaux v. Chicago Housing Authority, 304 F.Supp. 736, 74[redacted] The Consent Decree entered into by the defenda[redacted] Department of Housing and Urban Development ("HUD"), obligates HUD to use its best efforts to aid CHA in this regard. Gautreaux v. Landrieu, 523 F.Supp. 665, 680 (1981).

The essential thrust of these portions of the cited orders is that, as rapidly and to the maximum degree reasonably possible,

CHA and HUD shall strive to provide scattered site public housing opportunities to members of the plaintiff class in conformity with the Court's orders.

II. Factual Background.

A. The North Kenwood-Oakland Communities.

The North Kenwood-Oakland communities are located along Chicago's lakefront, approximately four miles south of the Loop. A portion of these communities, designated the "North Kenwood-Oakland Conservation Area" (sometimes the "Area" or the "Conservation Area"; see Section IIC, below), comprises 368 gross acres. The Conservation Area is generally bounded by East 36th Street on the North, the Illinois Central-Gulf Railroad right-of-way on the East, East 47th Street on the South, and South Cottage Grove Avenue on the West.

In 1949 the Conservation Area was a thriving and well-populated community; thereafter it experienced a decline in health and character that left it scarcely populated and in various states of disrepair.1/ Over 50% of the remaining structures in the Area are now deteriorated or dilapidated.2/ According to the 1980 United States Census the median household

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1/ Kenwood[redacted] Neighborhood Conservation Plan, prepared for Illinois Hou[redacted]velopment Authority by Skidmore, Owings & Merrill, November 1990, attached hereto as Exhibit A ("IHDA/Skidmore Plan"), page 1.

2/ City of Chicago Department of Housing Report to the Department of Urban Renewal on THE DESIGNATION OF NORTH KENWOOD-OAKLAND CONSERVATION AREA, January 1990, attached hereto as part of Exhibit B ("Department of Housing Report"), page 10.

income in the Area was $5,317, about one-third of the City of Chicago median household income of $15,301.

Following World War II six CHA high-rise buildings known as the "Lakefront Properties," having a total of approximately 900 apartments (approximately 150 apartments in each of six buildings), were constructed in the north portion of the Area. In the mid-1980s, by reason of severe deterioration, the buildings were vacated (except for approximately 30 families who remained in one of the six buildings) preparatory to rehabilitation. However, over the ensuing several years no rehabilitation was performed and the buildings deteriorated further. Commencing in 1989 rehabilitation of the two northernmost buildings began and is scheduled to be completed in early 1991, but rehabilitation of the other four buildings, having a total of about 600 apartments, has not yet started.

B. Staff Report To The Urban Renewal Board On North Kenwood-Oakland Conservation Area.

The Illinois Urban Renewal Consolidation Act of 1961 (Ill. Rev. Stat., ch. 67-1/2, Section 91.101 et seq.) defines a "Conservation Area" as an area of not less than 40 acres in which the structures in 50% or more of the area are residential and have an age of 35 years or more, and which is not yet a slum or blighted area but by reason of various factors, including dilapidation, obsolescence, deterioration, decline of physical maintenance and lack of community planning (or any combination of these), may become a slum and blighted area. (Id., Section 91.103(m).)

In January 1990 the Staff of the Department of Urban Renewal of the City of Chicago determined that the North Kenwood-Oakland Area was eligible for designation as a Conservation Area and recommended that the Urban Renewal Board so designate it.3/ The DUR Staff Report states that persons attending two public meetings to consider designation of the Area as a Conservation Area (on November 28, 1989 and January 11, 1990) expressed "overwhelming support" for the designation of the Area as a Conservation Area. (Id., p. 3.)

C. Designation Of The North Kenwood-Oakland Conservation Area.

On January 23, 1990, the Department of Urban Renewal of the City of Chicago duly found that the Area met the statutory requirements and designated it as the North Kenwood-Oakland Conservation Area.4/ The "eligibility" findings of the DUR Designation Resolution were that the Area consisted of 368 acres, that structures in 71.82% of the Area were residential, that the average age of structures in the Area was 90 years, and that the Area was at risk of becoming a slum or blighted area. (Id., p. 4.)

3/ Staff [redacted]t to Department of Urban Renewal Board Meeting, January 23[redacted], attached hereto as part of Exhibit B ("DUR Staff Report"), pages 2-3. Exhibit B consists of the DUR Staff Report and the Department of Housing Report referred to in footnote 2.

4/ Resolution No. 90-DUR-1, TO APPROVE THE DESIGNATION OF THE NORTH KENWOOD-OAKLAND CONSERVATION AREA, adopted January 23, 1990, attached hereto as Exhibit C ("DUR Designation Resolution").

Under the Urban Renewal Consolidation Act, following designation of an area as a Conservation Area and upon nomination by the Department of Urban Renewal, the Mayor of the City of Chicago is to appoint a Community Conservation Council from among the residents of the area (Ill. Rev. Stat. ch. 67-1/2, Section 91.121), a process that has recently been initiated with respect to the Conservation Area. (Staff Report of Department of Urban Renewal, October 16, 1990, attached hereto as Exhibit D.) Following approval of a conservation plan for the area by the Community Conservation Council and the City Council, the Department of Urban Renewal certifies the plan and may thereafter exercise numerous powers granted to it under the Urban Renewal Consolidation Act to carry out the plan. (Ill. Rev. Stat. ch. 67-1/2, Section 91.120-91.123.)

D. Community Planning Process.

Prior to the designation of the Area as a Community Conservation Area, the Department of Planning of the City of Chicago, in July 1988, began to coordinate a planning process for the North Kenwood-Oakland Area. The purpose of the planning process was "to prepare a land-use plan and action statement which reflects the aspirations of community residents for the future of the community and which would serve as a guide for future public action and private investment."5/

5/ Neighborhood Planning Committee Report, North Kenwood-Oakland Neighborhood Planning Process, produced by the City of Chicago, Department of Planning, attached hereto as Exhibit E ("NPC Report"), page 1.

In July 1988, a Neighborhood Planning Committee ("NPC") was formed whose membership included residents, property owners, merchants and representatives of local community organizations and institutions. (NPC Report, p. 7.) Over 200 persons participated on the NPC, approximately 75 of whom formed a stable, working group. (Id.)

The first step of the planning process was to generate a set of overall goals and objectives, identifying what the community wanted to achieve. The NPC then identified the key issues facing the neighborhood and the obstacles to achieving the community's goals. Finally, the NPC generated a set of potential strategies and a list of resources available to assist the neighborhood in assessing the key issues. (Id.)

After a two-day workshop, three teams were formed (Housing, Economic Development, and Open Space/Community Facilities) and each team prepared a land-use map for its functional area. City of Chicago staff then prepared a summary map of the three sets of recommendations. A final land-use map was then reviewed by the full committee and approved in March 1989. (Id., pp. 7-8.)

The NPC recommendations respecting housing included the following:

> "To [redacted] that public housing continues to exist (pr[redacted] as scattered-site development)." (NRC Rep[redacted]10.)

The NPC li[redacted] key issues included the following:

> "Public Housing/CHA Lakefront Properties -- The presence of the Chicago Housing Authority (CHA) Lakefront Properties and the negative image of public housing deters investment in the community both by existing homeowners who are reluctant to maintain their property and by outside developers who are reluctant to

invest in new development." (Id., p. 12.)

"Market Conditions -- Investment in new commercial development is deterred by the concentration of public housing . . ." (Id., p. 13.)

In its "Development Guidelines" the NPC Report states:

"View corridors to the lake should be preserved. No high rise development should occur on the lakefront. In the event that the CHA Lakefront Property becomes available, new residential construction on the site should be limited to three stories." (Id., p. 25.)

E. Illinois Housing Development Authority Planning Process

The Illinois Housing Development Authority, a public body (Ill. Rev. Stat., ch. 67-1/2, Section 301 et seq.) also initiated a planning process for the North Kenwood-Oakland Area. (Resolution No. 87-IHDA-140, attached hereto as Exhibit F.) The IHDA/Skidmore Plan (Exhibit A hereto) was the result. The Plan states that it seeks "to restore and preserve the neighborhood character of the area." (Exhibit A, p. 1.) It also states that it is based on the commitment:

"that no habitable low-rise housing units will be torn down and that prior to the demolition of any CHA high-rise building the single-family/ townhouse replacement units for that building will be built and occupied." (Id.)

The Plan includes the following component:

". . . demolition of 4 of the 6 vacant public housing high-rises in order to provide new low-rise, neighborhood homes for CHA residents on the lakefront as well as assimilated throughout the community. . ." (Id. at p. .)

Overall the IHDA/Skidmore Plan calls for both new market-rate residential units and the rehabilitation of a large number of existing occupied and unoccupied homes. (Id., pp. 1-2.) Key elements of the plan include:

(a) Financing by IHDA of up to 400 low-moderate income new residential units.

(b) Market rate development of an additional 850 new units.

(c) Construction of one-for-one replacement units prior to any CHA demolition.

(d) Rehabilitation of existing residential units. (Id, p. 2.)

The Plan states that its implementation would constitute "one of the largest and most extensive civic neighborhood urban initiatives ever undertaken in this country . . ." (Id.)

The IHDA/Skidmore plan has received a Citation for Excellence in Urban Design from the American Institute of Architects. (Id., p. 18.)

III. Prospects for the Plaintiff Class in North Kenwood-Oakland.

Implementation of the NPC/IHDA plans for the North Kenwood-Oakland Conservation Area would provide for 600 or more new scattered site public housing units for members of the plaintiff class in a community which, by reason of the projected improvements under the plans, would potentially provide both economically and racially integrated living opportunities for Gautreaux [redacted] in a residential neighborhood possessing striking [redacted] amenities. (Coupled with the nearly completed rehabilitation of the two northernmost of the Lakefront Properties buildings, it would also provide adequate public housing for the return to the Area, into public housing, of those

former tenants of the six CHA high-rise buildings who desire to return and remain eligible for public housing.)

This prospect appears at a time when, by reason of the changing demography of the City of Chicago, opportunities to build scattered site housing in the City have diminished. (See the affidavit of Daniel J. Levin, as Receiver, attached hereto as Exhibit G.) Under these circumstances, it is imperative to furthering the remedial interests of the plaintiff class that the opportunity to realize the possibilities of the NPC/IHDA process for the North Kenwood-Oakland Area not be lost.

IV. Position of CHA and HUD.

CHA presently plans to rehabilitate the southernmost four of the Lakefront Properties high-rise buildings (now largely or completely vacant), and HUD is apparently willing to supply CHA with funds for that purpose. (See affidavit of Alexander Polikoff attached hereto as Exhibit H.) As indicated in Section II above, such rehabilitation would be inconsistent with the NPC/IHDA plans for the Conservation Area. Moreover, as indicated by the NPC/IHDA plans and by the affidavit of Daniel E. McLean, President of MCL Development Corporation, attached hereto as Exhibit [redacted] rehabilitation would risk deterring the private investment [redacted] is an essential ingredient of both plans and of the revitalization of the entire Conservation Area.

Thus, it is highly likely that rehabilitation of the four Lakefront Properties high-rises will frustrate the prospect of providing hundreds of scattered site public housing units under

highly advantageous circumstances for members of the plaintiff class.6/

V. Violations Asserted.

Under the circumstances set forth above, for CHA and HUD to proceed to rehabilitate the four high-rise buildings in question, and thereby risk frustration of the unique scattered site opportunity presented in the North Kenwood-Oakland Conservation Area, would be inconsistent with and a violation of CHA's Court-

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6/ There is an additional question -- apart, that is, from the potential frustration of the scattered site remedial program as described in the text -- of whether it is in the best interests of the Gautreaux class for CHA and HUD to use funds that could be employed to provide further relief for plaintiffs to instead rehabilitate deteriorated, mostly vacant high-rise public housing buildings instead. Plaintiffs are informed and believe that the cost of the high-rise rehabilitation would be virtually the same (on a bedroom basis) as the cost of new low-rise scattered site public housing, and that the life-cycle costs of the high-rise units would far exceed the life cycle costs of low-rise scattered site public housing. In 1988, a mayoral-appointed advisory council on CHA, co-chaired by Philip M. Klutznick, former U. S. Secretary of Commerce, and Warren H. Bacon, then President of Chicago United, reported as follows:

> "The cost to rehabilitate high-rise buildings to keep them habitable may well exceed the cost of acquiring alternate housing, which could be more suitable, particularly for family use."
>
> "[T][redacted]lem, in addition to the large sums required for [redacted]tation [of high-rise buildings], is the int[redacted]ntration of large, poor, primarily single-par[redacted]ies in buildings poorly designed to support their[redacted]."
>
> "The funds to be used to modernize the high-rise buildings can more effectively be used to acquire older housing and construct new units."

The quotations are from The Report of the Advisory Council on the Chicago Housing Authority, June 1988, pages 19, 20 and 24.

VII. Conclusion.

Given the long and frustrating delay in providing scattered site public housing under the orders in this case, the Court should enter the order proposed by plaintiffs to assure that a unique opportunity to provide hundreds of such units under extremely favorable circumstances is not lost. The Court's retention of jurisdiction, together with the proposed reporting requirement, will assure that the stay of rehabilitation provided in the proposed order will not be inappropriately prolonged.

Respectfully submitted,

November 21, 1990

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

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

PLAINTIFFS' REPLY TO RESPONSES OF CHA AND HUD TO PLAINTIFFS' MOTION FOR FURTHER RELIEF

Introduction

CHA and HUD argue that the limited order plaintiffs seek is not justified by the "best efforts" clauses of the CHA judgment order (CHA) or of the consent decree (HUD). In Section I below we show that both arguments are wrong -- they are semantic, technical, and contend for a crabbed reading of remedial decrees that should be read expansively.

Moreover, both CHA and HUD ignore the "frustration principle." CHA's proposed rehabilitation threatens to frustrate an opportunity to develop 600 scattered site public housing units for Gautreaux families. In Gautreaux v. Chicago Housing Authority, 342 F.Supp. 827, 829 (1972), aff'd., 480 F2d 210 (1973), cert. denied, 414 U.S. 1144 (1974), this Court made it

clear that frustrating implementation of a court-ordered remedy ("frustrating and preventing this Court from assuring that relief is provided"; "thwart the correction of federal constitutional wrongs") will not be countenanced. In that instance the frustration emanated from someone not a party to the original suit. Here the frustration comes from original party defendants who have best-efforts duties to assist in providing corrective action. "Frustration" is incompatible with "best efforts."

But suppose the best efforts clauses should not be read to embrace the relief now sought. We also show in Section I that plaintiffs should nonetheless receive the relief they request under the "affirmative administration" clause of the CHA judgment order and the "modification" clause of the HUD consent decree. It is quite impossible to conclude that the limited relief plaintiffs seek is beyond the reach of these far-ranging clauses.

Next, CHA suggests that the Court is presented with two competitive plans and asked to choose between them, implying that CHA's plan - its MINCS experiment - would be prejudiced were the Court to grant the order plaintiffs seek. Not so. As we show in Section II below, plaintiffs strongly support MINCS and their requested order has nothing to do with that experiment, would not prejudice or interfere with it in any way, and indeed might help assure its success. Why? Because the MINCS experiment, including its proposed 564 units of private housing, involves the two high-rise buildings now being rehabilitated that are unaffected by plaintiffs' proposed order, and does not involve the rehabilitation of additional buildings. The very number, "564," is directly linked to those two unaffected buildings, and

only to those two. CHA's argument on this score is a straw man.

With these two contentions set aside, there is little left to the CHA/HUD arguments. Both defendants assert that demolition is legally impermissible. We show in Section III below that this is quite wrong. HUD also contends that a breach of CHA's accord with the former tenants of the Lakefront Properties would ensue if plaintiffs' motion were granted. This too, as we show in Section IV, is not the case.

* * *

At bottom, the situation is this:

1. After 20 years of frustration in obtaining any significant degree of the scattered site relief to which they are entitled -- frustration caused in great part by CHA -- plaintiffs are presented with what may be a golden, once-in-a-lifetime opportunity to obtain some 600 units of scattered site housing, six times as much new housing as the Receiver has been able to place under construction in over three years, and several times as much scattered site housing as CHA built in 17 years!

2. Instead of cooperating to help realize that possibility, as the best efforts and affirmative administration clauses require it to do, CHA now proposes, for reasons unfathomable to plaintiffs, to take action that may irremediably destroy that golden opportunity.

3. The limited order plaintiffs seek -- wholly non-prejudicial to CHA's proposed MINCS experiment which plaintiffs enthusiastically support -- would merely stay that proposed

action for a reasonable time, subject to the Court's ongoing supervision, to give the Community Conservation Council bud a chance to flower, and with it some 600 scattered site units.

Surely, after 20 years, plaintiffs are entitled to cooperation rather than frustration from the two parties whose wrongful conduct harmed them in the first place.

I. The Judgment Order Against CHA And The Consent Decree Against HUD Entitle Plaintiffs To The Order They Seek.

"Best efforts" means, try hard to bring about the desired result, work toward the objective "to the extent of [one's] total capabilities." Bloor v. Falstaff Brewing Corp., 454 F.Supp. 258, 267 (S.D.N.Y. 1978), aff'd, 601 F.2d 609 (2d Cir. 1979).

Under this Court's judgment order CHA is obliged to use its "best efforts" to increase the supply of scattered site units as rapidly as possible and to take "all steps" necessary to that end. (304 F.Supp. at 741, emphasis added.) CHA's essential argument is that this best efforts obligation relates only to the direct development of scattered site units ("the explicit obligations within the 1969 order" -- CHA Response, p. 13). Therefore, on this view, action respecting CHA's non-scattered site units, even though such action threatens to frustrate scattered site development, would not be covered.

To state the argument is to answer it. The judgment order says "all steps." The word "all" is unmodified, and is certainly not qualified as CHA now proposes to qualify it.

Were there any doubt on this point another clause of the judgment order would resolve it: CHA is to "affirmatively

administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) . . ." to disestablish its segregated system. (304 F.Supp. at 741, emphasis added). This clause plainly says "public housing system in every respect," not "scattered site public housing system," and thus embraces high-rises as well as scattered sites.

CHA argues (p. 13) that even this "every respect" language should somehow be limited so as not to refer to plaintiffs' present concerns. But the stated purpose of the "every respect" clause is "disestablishing" CHA's segregated system. The chosen disestablishment method is building scattered sites. If proposed CHA conduct respecting its high-rises frustrates the employment of that very chosen method, how could this Court responsibly say that that conduct is not one of the "every respect[s]" to which the judgment order speaks?

In like fashion, HUD would constrict its best efforts obligation to aid CHA. If we have correctly read CHA's obligation, then we have correctly stated what HUD has a best efforts duty to "aid."

But if HUD were right and we were asking the Court to stretch its best efforts clause too far, plaintiffs should still receive the very limited relief they seek from HUD as a "modification" of HUD's duty under paragraph 8.2 of the consent decree:

> "At any time after the fifth anniversary of the effective date, either HUD or the plaintiffs, without the consent of the other, may request the Court to review the progress made in providing assisted housing to eligible persons hereunder and, based upon such review, to modify or terminate any or all of the rights

or obligations provided herein. The party seeking review will not be required to demonstrate changed circumstances to obtain such Court review." (523 F.Supp. at 681.)

We are nearly at the tenth anniversary, not merely the fifth. Plaintiffs are authorized, without HUD's consent, to "request the Court to review the progress made . . ." In scattered site housing the progress, as the Court well knows, is abysmal, and the Receiver's affidavit tells the Court that glory days are not just ahead. Based on such review the Court may be asked "to modify . . . obligations provided herein."

HUD says that in considering plaintiffs' present motion as such a modification request, the Court should "weigh the equities to determine the hardship on the moving party if the modification is denied and the hardship on the party opposing modification if the Court grants the relief sought. . ." (HUD Response, p. 16.) We agree.

The hardship on plaintiffs, should their motion be denied, is the likely loss of an opportunity to obtain at one fell swoop some 600 units of scattered site housing in a potentially premier residential location1/ -- more scattered site relief than plaintiffs have received since CHA was first ordered to build scattered sites more than 20 years ago. The hardship on HUD, should the motion be granted, lies somewhere between nil and none. HUD is merely asked to stay its funding of additional

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1/ Half of the North Kenwood-Oakland area is already classified "revitalizing," and the other half would surely qualify for that classification if a conservation plan for the entire area were approved.

rehabilitation for a reasonable time -- to give the community planning process a chance to work rather than be confronted with a fait accompli that may forever preclude scattered site housing as part of its plan. HUD has not even argued that such a limited order would visit a hardship upon it.

* * *

If plaintiffs' request is justified on the merits, the judgment order against CHA and the consent decree against HUD thus clothe the Court with ample authority to grant the order plaintiffs seek. We turn to the merits arguments.

II. The Order Plaintiffs Seek Does Not Affect Or Prejudice CHA's Proposed MINCS Experiment In Any Way.

CHA argues that under its proposed MINCS experiment it strives for beneficial goals, and that the Court should not interfere. We agree. The trouble with this argument, when directed against plaintiffs' proposed order, is that the order would not interfere with or prejudice MINCS in any way.

MINCS,2/ an experiment we enthusiastically support, has three essential components. First, "newly constructed or rehabilitated housing units that are privately developed and owned." (§522(e)(1).) Second, once developed, up to 25% of the private units may be leased by CHA on behalf of CHA families.

2/ MINCS is an acronym for "Mixed Income New Communities Strategy." It was enacted in 1990 as Section 522 of the National Affordable Housing Act of 1990, Public Law 101-625, 104 Stat. 4079. Citations in the text are to Section 522 as printed in the Congressional Record of October 22, 1990, pp. H11556-558.

(§522(e)(5).) Third, CHA may then rent the public housing units thus vacated to families having somewhat higher incomes than the usual public housing tenants.3/ However, not more than 50% of a public housing project's units may be rented to such families. (§522(f)(2)(B).)

According to CHA the two Lakefront Properties buildings now being rehabilitated will have exactly 282 units when completed. If the maximum permissible 50% of these units were used in CHA's MINCS experiment, that would be 141 units. Since the 141 CHA families to be moved into newly developed private MINCS housing cannot occupy more than 25% of the total number of private development units, that development must have four times 141 units, or a total of 564 units. This is of course the exact number of units CHA says an unnamed developer has agreed "in principle" to build as the private housing part of MINCS. (CHA Response, p. 8.) Because the number is exactly 564, not 500 or 600, or some other number, we can be sure that this MINCS experiment involves the two buildings -- and only the two -- that CHA is now rehabilitating. Since these buildings would be unaffected by plaintiffs' proposed order, nothing in that order would prejudice or negatively affect CHA's proposed MINCS experiment.

Indeed, the community planning process CHA seems bent on

3/ "Low-income families" rather than "very low-income families." (§522(f)(1).) The former may have incomes up to 80% of the metropolitan area median; incomes of the latter may not exceed 50% of the median. (CHA Response, p. 6.)

ignoring is likely to be helpful in assuring -- and may be essential to -- the success of the MINCS experiment.

Notwithstanding CHA's assertion, MINCS is not "ready for implementation." (p. 18.) CHA is not even eligible to conduct a MINCS experiment until the Mayor of Chicago appoints a twelve-member coordinating committee to "participate in developing a plan for implementing the [MINCS] demonstration program," and to perform other functions. (§§522(b)(1),(2).) CHA does not say that the required coordinating committee has yet been appointed by the Mayor (our information is that it has not), the same Mayor, not so incidentally, who has just received from his Department of Urban Renewal the formal nomination of the members of the Conservation Community Council for the North Kenwood-Oakland Conservation Area.4/

Moreover, even after the coordinating committee is appointed and performs its various functions, the following must be complied with:

> "A participating [in MINCS] public housing agency and the applicable unit of general local government shall jointly determine the location of any newly constructed or rehabilitated housing to be utilized under the [MINCS] demonstration program . . . and the number of units to be developed annually, with approval of the legislative body of the local government." (§522(e)(7)(A).)

In other words, CHA's MINCS experiment will not be "ready for implementation" until the coordinating committee (having been

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4/ On December 18, 1990, the Department of Urban Renewal formally nominated 15 community residents as members of the North Kenwood-Oakland Conservation Community Council. Excerpts from the December 18 meeting of the Urban Renewal Board are attached as Exhibit A.

appointed) does its work, and the City of Chicago, including the City Council, approves the number and location of the to-be-developed private housing units which are an essential part of MINCS.

Will a City government which is fostering a community planning process (through staff work of the Departments of Planning and Housing, nominations by the Department of Urban Renewal, and appointments by the Mayor) that has so far evidenced a clear preference for scattered sites rather than high-rise units, foster a separate process that looks in precisely the opposite direction?

On the other hand, MINCS would be strengthened by a successful community process. Some 423 units in the private housing part of the MINCS experiment (564 minus 141) must be occupied by non-public housing families.5/ How much more likely are these units to be attractive to market-rate families if they are part of a comprehensive, community-wide plan which involves other market-rate units as well, and which assures that low-rise scattered public housing units will replace the present "curtain wall" of six high-rise towers?

In short, although plaintiffs have not been able to discern the reasons for CHA's uncooperative stance, it seems clear that CHA's own MINCS interests are not only not prejudiced by the

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5/ These non-public housing, market-rate families constitute the true "mixed income" potential of a MINCS experiment, for the public housing units - even under MINCS - continue to be occupied exclusively by lower-income families, none of whose incomes can exceed 80% (and only half of whose incomes can exceed 50%) of the area median.

order plaintiffs seek but, by leading to cooperation with a comprehensive community planning process, would be advanced by it.

III. Demolition Of The Southern Four Lakefront Properties High-Rises Could Be Done Lawfully.

CHA and HUD argue that the relief plaintiffs seek hinges on whether the four Lakefront Properties high-rises can be lawfully demolished. While plaintiffs' motion does not seek demolition, plaintiffs agree that demolition of the four southernmost Lakefront Properties high-rises may in the future be necessary to carry out a community plan. However, with the cooperation of CHA and HUD, demolition could be accomplished entirely within existing statutory and administrative requirements.

First, HUD and CHA mistakenly argue that the standard for demolition is to be found in the first phrase of 42 U.S.C. §1437p(a)(1). But the appropriate standard here is the second phrase of that statute, which applies to the demolition of a portion of a housing project:

> " . . . in the case of an application proposing the demolition of only a portion of a project, the demolition will help to assure the useful life of the remaining portion of the project." (42 U.S.C. §1437p(a)(1) (emphasis added).

HUD's regulations specifying the criteria for demolition of a portion of a project similarly state:

> "(b) In the case of demolition of only a portion of a project, the demolition will help to assure the useful life of the remaining portion of the project (e.g., to reduce project density)." (24 C.F.R. §970.6(b).)

HUD recently invoked exactly this "useful life" provision to support demolition of three public housing high-rises to be replaced by scattered site housing. Project B.A.S.I.C. v. Kemp, 721 F. Supp. 1501 (D.R.I. 1989). Accepting HUD's arguments, the Court noted that the law "merely requires that if only a portion of a project will be demolished, 'the demolition will help to assure the useful life of the remaining portion of the project.'" 721 F. Supp. at 1509. One argument advanced, which the court termed "sensible," was that "without the three towers as a detrimental catalyst," the environment and quality of life for the remaining households would be enhanced. Id., at 1510.

Demolition has also been approved by a federal court as a "recognized, legitimate" part of a desegregation remedy, notwithstanding objections by several hundred plaintiff class members. Walker v. HUD, 734 F.Supp. 1231, 1270 (N.D. Tex. 1989). Accepting the plaintiffs view that rehabilitation would leave vestiges of segregation in place, the court said rehabilitation would

> "continue to subject several thousand members of the class to the same choice of all black housing in an all black area as they were subjected to under de jure segregation. . . [and would] not cure the vestige of the adverse social and environmental conditions caused by the concentration of such a large number of low income housing units in this particular area, which is also a low income impacted neighborhood." 734 F.Supp. at 1270.[6]

6/ CHA's proposed rehabilitation of an additional (third) building is apparently on a "Fix-As-Is" basis that excludes design changes evidently deemed desirable but too costly. As to this CHA's consultant says, among other things,

CHA also argues (p. 17) that demolition could not be accomplished lawfully because, lacking separate appropriated funds to replace demolished housing units, it could not submit a plan for the one-for-one replacement required by 42 U.S.C. § 1437p(b)(3). This argument is clearly unsupportable. Nothing in the statute requires funds to be appropriated before a demolition plan is developed, submitted or even approved. In fact, 42 U.S.C. § 1437p(c) authorizes HUD to "make available financial assistance for applications approved under this section," and requires HUD "upon approving a plan under subsection (b)(3). . . [to] agree to commit (subject to the availability of future appropriations) the funds necessary to carry out the plan . . ." HUD is also required, in allocating assistance for the development of public housing, to "give consideration to housing that replaces demolished public housing units in accordance with a plan under subsection (b)(3). . ." Id. Thus, a demolition application plan clearly does not require the prior appropriation of funds.

...Continued...

- "The exposed gallaries [of the third building] are a life quality, building maintenance and aesthetic failure."
- "The present two-elevator system is not adequate for demand."
- "The building exterior and interior circulation pattern seriously limit quality of life for occupants as well as appearance in the marketplace."

(Consultant Reports supplied by CHA and referred to in ¶3 of Exhibit 5 to CHA Response.)

CHA's related argument that Gautreaux funds could not be used for the replacement scattered site units is also wrong. Nothing in Gautreaux orders prohibits using allotted funds to build scattered site units simply because they would replace units of a demolished high-rise. The Gautreaux definition of "dwelling units" applies fully as much to scattered site units built to replace a demolished high-rise as to any other scattered site units. The Receiver currently has funding for more than the maximum of 600 hundred units that would be needed to replace any Lakefront Properties demolished units.7/

Finally, CHA adds that it would be required to consult with affected tenants, tenant organizations and local officials before demolition. Such a requirement does not of course indicate that lawful demolition would not be possible.

Plainly, demolition of one or more of the Lakefront Properties high-rises, if necessary to accomplish a community plan for Kenwood-Oakland, could be lawfully done.

7/ HUD and CHA both imply that money available for rehabilitation of Lakefront Properties high-rises might be lost if not used there. (Though CHA "intends" to rehabilitate all of the Lakefront Properties high-rises -- HUD Response, p. 7. -- funds have so far been allocated for only the first of the remaining buildings.) In fact, CHA has desperate rehabilitation needs throughout its family public housing system. With a waiting list of many thousands, vacancies in CHA's family public housing projects (according to information supplied by CHA) exceed 5,000! There can be no question but that, if they wished to do so, HUD and CHA could find other rehabilitation uses for Lakefront Properties rehabilitation dollars.

IV. The Memorandum Of Accord Does Not Bar The Relief Plaintiffs Seek.

It is clear that the relief to which members of the plaintiff class in a desegregation case have been determined to be entitled is not subject to withdrawal or curtailment because some members of the class would prefer something different.8/ Thus, it would not matter if, as HUD asserts, the order plaintiffs seek would "abrogate" (HUD Response, p. 16) CHA's accord with former Lakefront Properties tenants.

But HUD has made no showing that that will happen. It has offered no figures concerning how many of the original approximately 600 tenant families are still eligible to return to the high-rises. The Memorandum of Accord lists a number of circumstances under which tenants would not be eligible to return: (1) no longer eligible for CHA because of income or family composition; (2) prior to moving out were subject to a court eviction order; (3) were evicted for cause or lease violation during the period of relocation; (4) committed acts while relocated constituting a threat to CHA tenants or employees; and (5) left owing rent and had failed to resolve the arrearage. (¶6, Memorandum of Accord.) (With respect to the final circumstance alone, a CHA memorandum attached to the Memorandum of Accord states that approximately 118 families were

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8/ Constitutional rights are not subject to majority vote, Haney v. County Board of Education of Sevier County, Ark., 410 F.2d 920, 925, 926 (8th Cir. 1969), nor are remedies in class action litigation where "there will almost inevitably be dissent within a class of litigants." League of Martin v. City of Milwaukee, 588 F.Supp. 1004, 1023 (D.C.E.D. Wisc. 1984). See also, Walker v. HUD, supra, 734 F.Supp. at 1265.

then in arrears in rent.)

Nor has HUD offered figures as to how many families have elected to permanently relocate under the Section 8 program (¶7, Memorandum of Accord), nor how many, having sought in 1986 a right to return to the high-rises, might now prefer the option -- not then available -- of scattered-site, single-family townhouses in the same neighborhood.

Absent a showing as to how many families are eligible for and still desire to move back to the Lakefront Properties high-rises, and that all of those could not be housed in the 282 apartments being rehabilitated, HUD has advanced no basis to assert that the relief plaintiffs seek will have any effect on CHA's ability to comply with the Memorandum of Accord, let alone that that consideration should be decisive.

Conclusion

Vincent Lane has been a breath of fresh air at CHA and plaintiffs have been happy to cooperate with him. We have not opposed CHA's plan to get back into development activities. (Order of March 9, 1990.) We have not only worked with CHA to foster private management, but have arranged with HUD to have $9.5 million made available to CHA to repair deteriorated scattered site units as part of the preparation for private management. (Order of May 24, 1990.) We do not gladly or lightly place ourselves on opposite sides of the present issue.

But, unlike these other occasions, we have not been able on the present matter to engage CHA in meaningful dialogue. Nor

have we been able to discern the reasons for CHA's intransigence, seemingly so contrary to its own MINCS interests.

What plaintiffs do know is that their own golden opportunity for 600 scattered site units is at stake, an opportunity they must seek to protect. CHA is right in noting that this is but an opportunity, a chance; it is not a certainty. But it is certain that the chance will be prejudiced, possibly snuffed out, if CHA is allowed to proceed to rehabilitate yet more Lakefront Properties high rises. (Neither CHA nor HUD seriously contest plaintiffs' point, Exhibit I, in this regard.) After 20 years of scattered site frustration, surely plaintiffs are entitled not to have CHA prejudice that chance without compelling reason to do so. Here, we have not been presented with any such compelling reason; indeed, analysis suggests that the order plaintiffs seek is really in CHA's own MINCS interest.

Plaintiffs' proposed order is very narrowly drawn. Under the continuing jurisdiction of the Court, which could release its stay at any time suitable progress was not being shown (quarterly reports are proposed to keep the Court advised), plaintiffs seek only a reasonable time for the community planning process to proceed free of the prejudicial impact of six public housing high-rises towering above a community that could otherwise become a residential haven for 600 Gautreaux families.

Neither CHA nor HUD has shown why plaintiffs should not, after 20 years of frustration, have the benefit of that golden opportunity.

Respectfully submitted,

January 22, 1991

One of the Attorneys for Plaintiffs

Alexander Polikoff
Julie Elena Brown
BUSINESS AND PROFESSIONAL PEOPLE
FOR THE PUBLIC INTEREST
17 East Monroe Street - #212
Chicago, Illinois 60603
312/641-5570

CERTIFICATE OF SERVICE

I, Nancy S. Eisenhauer, counsel for the CHICAGO HOUSING AUTHORITY, hereby certify that on Tuesday, September 30, 1997, I caused a copy of MEMORANDUM IN SUPPORT OF CHICAGO HOUSING AUTHORITY'S EMERGENCY MOTION TO CLARIFY INJUNCTION to be served via hand delivery on counsel listed below:

Alexander Polikoff, Esq.
BUSINESS AND PROFESSIONAL PEOPLE
FOR THE PUBLIC INTEREST
17 E. Monroe Street, Suite 212
Chicago, Illinois 60603

Linda Wawzenski, Esq.
Deputy Chief, Civil Division
OFFICE OF THE U.S. ATTORNEY
219 South Dearborn Street, Suite 500
Chicago, Illinois 60604

Michael L. Shakman, Esq.
Barry A. Miller, Esq.
MILLER, SHAKMAN, HAMILTON, KURTZON & SCHLIFKE
208 South LaSalle Street, Suite 1100
Chicago, Illinois 60604

Lewis M. Nixon, Esq.
John Jensen, Esq.
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
77 West Jackson Boulevard, Suite 2620
Chicago, Illinois 60604

Nancy S. Eisenhauer

~~request and the House proposed funding the voucher portion of the program in the "Annual contributions for assisted housing" account~~.

HOPE VI: HOPE for the empowerment of residents of severely distressed and obsolete public housing. Finally, the Committee has included $500,000,000 for a new initiative, designated as HOPE VI, HOPE for the empowerment of residents of severely distressed and obsolete public housing. HOPE VI is an attempt by the Committee to invest Federal resources directly in communities to create the conditions to bring about citizen self-responsibility and resident self-sufficiency in the most distressed areas of urban America. For too long, these areas have been the victim of either gross neglect by government or the victim of large bureaucracies that have wasted limited resources in an attempt to impose top down strategies to do good to the residents of these areas. Neither approach has worked.

As a result, the Committee, in HOPE VI, has adopted an empowerment strategy, built on the twin anchors of self-sufficiency and self-responsibility. It is a program that calls upon both the residents and political leaders of Americas large cities to join together to develop strategies that will transform these distressed areas into productive residential and commercial centers.

The goal of HOPE VI is three-fold: (1) Shelter to eliminate dilapidated, and in many instances, dangerous structures that serve as homes for hundreds of thousands of Americans; (2) self-sufficiency to provide residents in these areas with the opportunity to learn and acquire the skills needed to achieve self-sufficiency; and (3) community sweat equity to instill in these Americans the belief that with economic self-sufficiency comes an obligation to self-responsibility and giving back something to ones community.

The Committee recognizes that these goals are, in fact, ambitious ones, that will not be realized through the enactment of HOPE VI alone. Nor will they be achieved with a large grant program that simply guarantees all urban centers, and their residents, with funds to conduct business as usual. But by making the program competitive among the Nations largest cities, HOPE VI seeks to give those areas with the best proposals an opportunity to begin this transformation process.

The major components of HOPE VI are as follows:

First, eligibility. Funds would be made available for up to 15 cities in amounts up to $50,000,000 per recipient. Eligible applicants would include any of the Nations 40 most populous cities, or a city whose housing authority is included on the Departments troubled housing authority list as of March 31, 1992. In providing eligibility for these troubled authorities, the Committee has included authority for the Secretary to deny eligibility to any housing authority on the troubled list that is not making, in the judgment of the Secretary, substantial progress on matters that would eliminate their troubled status. Cities would be selected on a competitive basis upon the submission of an application that complies with the goals of HOPE VI as enumerated above.

Second, empowerment strategy. Awards would be selected by the Department, in conjunction with the Commission on National and Community Service, on the basis of which applicants most effectively propose a strategy that meet the three goals set forth for HOPE VI: shelter, self-sufficiency, and community sweat equity. Proposals would have to be consistent with the comprehensive affordable

housing strategy (CHAS) required under the 1990 Housing Act. In addition, each authority that submits an application will have to have had active public housing resident participation in the preparation of the application and demonstrate how that representation effected the proposals final form. Finally, each application must have the support of the local governing body.

Third, shelter. Each city would have to target its revitalization effort in no more than three distinctly identifiable severely distressed areas, which include severely distressed public housing, including family high-rise projects. Not less than 80 percent of the funds requested by the given authority would have to go for shelter. The maximum number of public housing units involved could be up to 500. In eliminating these severely distressed and obsolete projects, the housing authority would have to provide one-third of the replacement units through the use of section 8 certificates. The balance of the units could be replaced through either traditional replacement means, including major reconstruction and scattered-site development, or through Nehemiah-like homeownership opportunities.

Fourth, self-sufficiency and community sweat equity. The Committee believes that providing individuals and families with adequate shelter or a home to own is, by itself, not enough to transform these distressed areas. Instead, the citizens in these areas must be given the chance to acquire skills that will make them economically self-sufficient. And once self-sufficient, they must understand that reinvesting in ones own neighborhood and community is a cornerstone of good citizenship. As a result, up to 20 percent of the funds provided to each city can be targeted to self-sufficiency and community sweat equity or community service activities. All applications must contain some request for both categories, with a commitment to provide a non-Federal match of 15 percent for funds used for these two purposes. No application can be funded until and unless they have been approved by the Commission on National and Community Service.

(a) Self-sufficiency. Public housing residency, for many reasons within the last two decades, has all too often become a way of life, instead of a bridge to a better way of life. As a result, each housing authority must use a portion of the funds they receive for self-sufficiency support services and training for residents. Eligible activities include those authorized through the Gateway Program provided in the family support center legislation. They include, but are not limited to, literacy training, job training, day care, youth activities (including Boys Clubs and Girls Clubs), appropriate health services, personal management skills, community policing or security activities, and drug treatment. Particular attention should be given to program applicants to offering literacy and job training skills, since they address what are frequently considered the largest impediments to full employment.

By providing funds directly to the authority through HUD, the Committee has provided an administrative one-stop shop that seeks to avoid the current administrative maze and expense that plagues many efforts to bring supportive services to distressed urban areas. Housing authorities can utilize existing service programs in a particular State or municipal jurisdiction so as to avoid duplication of effort. If tenants are relocated out of the designated area as part of a citys replacement unit strategy, the Committee wishes to make clear that these individuals remain eligible for the services provided by the housing authority under Hope VI.

(b) Community sweat equity. Participating cities would have to establish a community sweat equity and service program for residents in the effected areas as part of the application. Self-sufficiency requires self-responsibility from individuals. And self-responsibility entails also reinvesting something of the benefits one has received back into the community where one lives. As a means of ensuring that residents of these severely distressed areas do become stakeholders in their communities, each authority would have to establish a community service program as a condition to receive any funds under the program.

While the program would not be mandatory for all residents in the effected housing developments, the Commission on National and Community Service, in reviewing applications seeking funds, would be expected to carefully review the level of resident participation that would be integrated into these service programs. Special attention will be given to the comprehensive nature of the projects approach, as well as to quality and innovation. This community service component could include any number of models: youth conservation corps, school-based service programs like literacy training, sweat equity initiatives like habitat for humanity, or other community service type activities. These activities should build upon existing community service programs, but it is essential that residents of distressed housing be the substantial participants in the components that will be funded through HOPE VI. In the preparation of the notice of fund availability, HUD shall rely heavily upon the Commission for preparing the section on community sweat equity.

The Committee strongly believes that the community service component of the program, coupled with the gateway type services, administered through a single source, offers a distinct and credible alternative from programs offered for distressed areas in the past. It is the Committees belief that the ethic of service should be instilled as a core value of those citizens who will directly benefit from the resources provided under Hope VI. It is service to others in ones own community that helps broaden individuals and families stake in ones neighborhood, ones city, and ones country.

The Committee has included a provision that requires the Department to issue the NOFA for Hope VI within 90 days of the enactment of the Appropriations Act, with applications due from potential recipients no later than 180 days from the issuance of the NOFA. The Committee has also given the Department the authority to withdraw unobligated balances of funds made available to a recipient community who does not proceed in a manner consistent with the plan approved for that community.

Mutual housing. The Committee has also included bill language earmarking not less than $10,000,000 of HOPE II funds for mutual housing associations and other organizations in the Neighborhood Reinvestment Corporations neighborworks network. This is consistent with the 1992 program approved by the Congress.

The Committee has also included language that would require the Department to reduce, if necessary, HOPE I, II, and III on a pro rated basis to meet the first $100,000,000 shortfall in section 8 contract renewals in fiscal year 1993.
annual contributions for assisted housing (including rescission and transfer of funds)

Appropriations, 1992 $8,070,201,000

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al., Plaintiffs,	)	
v.	)	No. 66 C 1459
CHICAGO HOUSING AUTHORITY, Defendant.	)	Chief Judge Aspen

RESPONSE OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TO CHICAGO HOUSING AUTHORITY'S EMERGENCY MOTION TO CLARIFY INJUNCTION

On September 30, 1997, the Chicago Housing Authority ("CHA") filed an emergency motion requesting clarification of the 1969 remedial order entered against CHA. For the reasons set forth in its supporting memorandum, CHA sought confirmation that the 1969 order does not govern CHA's HOPE VI funding and programs and that such funding and programs are not part of the remedial relief granted to plaintiffs in this case.

CHA alleges that the emergency was caused by HUD's inclusion of a requirement for court approval in its September 18, 1997 letter approving CHA's revised Revitalization Plan and Budget for the Cabrini-Green HOPE VI/Urban Demonstration Program. That letter stated "that within 30 days of the date of this letter, CHA provide evidence that the [Gautreaux] plaintiffs and Court ... have approved or have no objection to the development/acquisition of replacement public housing in the quantities and locations proposed in the HOPE VI Revitalization Plan". See Exhibit A, Declaration of Kevin Marchman, ¶¶ 1&2.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,)
)
Plaintiffs,)
)
v.) No. 66 C 1459
) Chief Judge Aspen
CHICAGO HOUSING AUTHORITY,)
)
Defendant.)

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The stated requirement did not, and was not intended, to reflect any independent determination by HUD that CHA's HOPE VI program was covered by the 1969 judgment order. Rather the purpose of the quoted passage was to insure that CHA promptly obtained plaintiffs' agreement to the Authority's understanding of the Order or alternatively obtain appropriate clarification from the court. Exhibit A, ¶ 3.

HUD believes that CHA presents substantial arguments raising serious question as to whether the 1969 judgment order governs HOPE VI funding and programs and whether the court intended its remedial order to encompass HOPE VI funding and programs. HUD has a strong interest in insuring that the Cabrini-Green HOPE VI/Urban Demonstration Program proceeds promptly and that this implementation not conflict with the judgment order entered against the CHA in this case. To that extent, HUD supports CHA's motion for clarification of the 1969 judgment order.

Respectfully submitted,

SCOTT R. LASSAR
United States Attorney

By: Linda A. Wawzenski

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

DOROTHY GAUTREAUX, et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	NO. 66 C 1459
	)	
	)	
CHICAGO HOUSING AUTHORITY	)	
	)	
Defendant	)	

DECLARATION OF KEVIN MARCHMAN

I, Kevin Marchman, the Acting Assistant Secretary for Public and Indian Housing of the United States Department of Housing and Urban Development hereby declare under penalty of perjury, based upon my personal knowledge and information provided to me by my staff:

1. My Deputy Assistant Secretary for Public Housing Investments, Elinor R. Bacon, issued a September 18, 1997 letter approving the Chicago Housing Authority's (CHA) Revitalization Plan and Budget for the Cabrini-Green HOPE VI/Urban Demonstration Program. I have been advised that this letter is referenced in paragraph 7 of CHA's Emergency Motion To Clarify Injunction.

2. The letter contains a requirement that by October 18, 1997, "CHA provide evidence that the Plaintiffs and the Court in the Dorothy Gautreaux, et al., case have approved or have no objection to the development/acquisition of replacement public housing in the quantities and locations proposed in the HOPE VI Revitalization Plan."

3. That requirement does not reflect any independent determination by the Office of Public and Indian Housing that the HOPE VI program was covered by CHA's judgment order. It has been my understanding that the CHA believed that the HOPE VI program is excluded from that order. The purpose of the requirement was to insure that CHA promptly obtain the plaintiffs' agreement to that position or to seek a clarification from the Court. HUD has an interest in insuring that the Cabrini HOPE VI program be able to proceed promptly and that it not conflict with the CHA's judgment order.

Kevin Marchman
Acting Assistant Secretary for
Public and Indian Housing
U.S. Department of Housing and
Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Executed on: OCT 14 1997

AFFIDAVIT OF MAILING

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

MARY ANNE MARTIN being first duly sworn on oath deposes and says that she is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 20th day of October 1997, she placed a copy of RESPONSE OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TO CHICAGO HOUSING AUTHORITY'S EMERGENCY MOTION TO CLARIFY INJUNCTION in a postage prepaid envelope addressed to each of the following named individual(s) and caused each envelope to be deposited in the United States mail chute located in the Everett McKinley Darken Building, Chicago, Illinois on said date at the hour of 5:00 p.m.

To: See Attached Service List

Mary Anne Martin

SUBSCRIBED AND SWORN TO before me this 20th day of October, 1997

Catherine A. Manahan

NOTARY PUBLIC

My Commission Expires:

"OFFICIAL SEAL"
CATHERINE A. MANAHAN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4/26/2000

SERVICE LIST

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   & Flom (Illinois)
   333 W. Wacker Drive, Suite 2100
   Chicago, Illinois 60606
   Counsel for CHA

CERTIFICATE OF SERVICE

I, Nancy Eisenhauer, an attorney, hereby certify that on Monday, April 27, 1998, I caused a copy of the foregoing APPENDIX ACCOMPANYING DEFENDANTS-APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS APPEAL to be served by hand on counsel listed below:

Alexander Polikoff, Esq.
BUSINESS AND PROFESSIONAL
PEOPLE FOR THE PUBLIC INTEREST
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Nancy S. Eisenhauer