UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al. Plaintiffs, THE CHICAGO HOUSING AUTHORITY, et al., Defendants.	)	No. 66 C 1459 Hon. Marvin Aspen

NONPARTY DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S MEMORANDUM IN SUPPORT OF *GAUTREAUX* PARTIES' OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE

The U.S. Department of Housing and Urban Development (HUD) files this memorandum in opposition to the motion to intervene recently filed by Concerned Residents of ABLA and eight individuals (hereinafter "the intervenors" or "prospective intervenors"). Because HUD anticipates that the *Gautreaux* parties and the Receiver will address in detail the relevant background facts and plan details that relate to the intervenors' motion, this memorandum will not reiterate such material herein, but rather assumes the court's familiarity with all such matters as a consequence of having first considered the memoranda of the *Gautreaux* parties.[1] Also, HUD will speak only to selected legal issues that HUD is best qualified to address.

I. Prospective Intervenors Have No Right To Intervention Under Rule 24(a)(2).

A. Prejudice Caused by Delay.

The *Gautreaux* parties and the Receiver will no doubt document far better than can HUD, that the intervenors' delay in filing their motion threatens enormous harm to the CHA and the

[1] Also, due to the time constraints of the instant situation, any supplemental assertions of facts that are made by HUD herein are not repeated in the declaration that accompanies this memorandum; rather, in the accompanying declaration, a competent HUD declarant attests that all such factual assertions at Section 1.A of this memorandum are true and correct.

Receiver. However, HUD seeks to bring to the court's attention some additional factors from HUD's perspective.

HUD has devoted a massive amount of personnel time and effort to the formulation, review, and now implementation of the ABLA HOPE VI plan. HUD does not have the personnel or monetary resources to twice, rather than once, perform an undertaking as massive as the ABLA HOPE VI pre-development design and planning. New site plans, new architect drawings, new financing documents — and much, much more — obviously would be called for by the type of wholesale revisions of the ABLA HOPE VI plan that the intervenors envision.

Also, Congress in recent years has begun to mandate that HUD take action with regard to public housing authorities that fail to expend their capital funds in a timely fashion. *See* Pub. L. 108-7, Consolidated Appropriations Resolution, 2003, Division K, Title II, "Public Housing Capital Fund," third proviso, 117 Stat. 486-487 (2003). Housing authorities with unexpended federal funds from previous years could be subject to Congressionally mandated recapture of those funds by HUD. And independent of such Congressional mandates, in the past HUD has placed more than one HOPE VI grantee in default for failure to implement its plan in a timely fashion, thereby jeopardizing the grantee's retention of its funding altogether. This is obviously an eventuality that HUD hopes it will not be compelled to consider with regard to the ABLA grant as a consequence of the granting of the intervenors' ill-timed motion and the protracted litigation that may thereafter ensue.

Finally, HUD seeks to make it clear that appropriations for the HOPE VI program have been dramatically cut over the past two years from $574,000,000 in fiscal 2003 to $150,000,000 in fiscal 2004.[2] *Compare* Pub. L. 108-7 (2003), Consolidated Appropriations Resolution, 2003, Division K, Title II, "Revitalization of Severely Distressed Public Housing (HOPE VI)," 117 Stat. 488, with Pub. L. 108-199, Consolidated Appropriations Act, 2004, Division G, Title II,

[2] Indeed, only late in the legislative process was the HOPE VI appropriation level set as the $150,000,000 advocated by the Senate; the House version of HUD's appropriations bill had provided for only a $50,000,000 appropriation.

"Revitalization of Severely Distressed Public Housing (HOPE VI)", 118 Stat. 375. Therefore, the HOPE VI program may not have a long future. If CHA were to lose its funding for the ABLA project by a mandatory recapture or other HUD action, there might not be a HOPE VI program under which the CHA could apply for a new grant. Obviously a demonstrated failure of the CHA to promptly obligate HOPE VI funds would make it an unlikely candidate to ever receive additional funding in future HOPE VI competitions, even if Congress continues to fund the HOPE VI program.

B. No Legally Protectable Interest of the Intervenors Will Be Impaired by the Disposition of *Gautreaux* Without Intervenors' Participation.

To the extent that prospective intervenors raise any claims that necessarily relate to the *Gautreaux* litigation, those claims concern the number, configuration, and types of housing that CHA will create or fail to create under the ABLA HOPE VI plan — matters that intervenors seek to challenge as violations of the Fair Housing Act. The intervenors' relocation and other claims are independent enough to be raised outside the *Gautreaux* context.

Intervenors' Fair Housing Act claims, however, are plainly non-meritorious. This conclusion can best be explained by examining separately what housing the HOPE VI plan (1) eliminates, (2) creates, (3) leaves in place, and (4) does not create.

1. Reduction in Housing Stock Available to Very-Low-Income Families.

Intervenors appear to contend that any significant reduction in a housing authority's public housing stock *per se* has Fair Housing Act implications when the housing authority serves a predominantly minority population. Quite apart from the fact that at least one court has already rejected the notion that demolition of a predominantly minority very-low-income project makes out any *prima facie* case of discrimination under the Fair Housing Act, *see Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 299 F. Supp.2d 952, 957-959 (E.D. Mo. 2004), there are independent reasons to reject the intervenors' assertion as a matter of legislative intent.

The ABLA HOPE VI plan does not have significance solely as a racial segregation remedy. Demolition of public housing — either under Section 18 of the U.S. Housing Act, 42 U.S.C. § 1437p, or under the HOPE VI program, 42 U.S.C. § 1437v — is a means of eliminating, and sparing residents from continuing to live in, blighted properties that are "unsuitable for housing purposes" (42 U.S.C. § 1437p(a)(1)(A)(i)) or otherwise "obsolete" or "seriously deficient" (42 U.S.C. §§ 1437v(a)(1), 1437v(j)(2)(A)(i)). Over the past nine years, Congress has repeatedly either directed housing authorities — or given housing authorities the freedom — to eliminate, and not replace, such public housing, without any suggestion whatsoever that such reduction in the public housing stock *per se* has fair housing implications or otherwise should not be done if it adversely impacts any racial group, sex, or type of family.

First, in 1995, Congress eliminated any requirement that housing authorities replace public housing that HUD certified for demolition as meeting the statutory standards. *See* Section 1002 of Pub. L. 104-19, 109 Stat. 194, 235 (1995), striking 42 U.S.C. § 1437p(b)(3) — the "one for one" replacement requirement — as it existed prior to enactment. Later, in October 1998, Congress changed the law to *require* HUD to approve any demolition application that a housing authority *certifies* meets the statutory demolition standards. *See* 42 U.S.C. § 1437p(a). Accordingly, as early as 1995, Congress no longer demonstrated concern about the preservation or reduction of a housing authority's public housing stock, although Congress is clearly aware that public housing in cities such as Chicago serves a very-low-income population in which minorities are over represented.

In 1996, Congress enacted Pub. L. 104-134, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321-279, Section 202 of which required PHAs to identify certain projects with over 300 dwelling units that were, among other things, "distressed housing that the [PHA] cannot assure the long-term viability" of "through reasonable revitalization, density reduction, or achievement of a broader range of household income." PHAs were to remove units meeting these criteria from their public housing inventory pursuant to a plan

developed by the PHA for that purpose. In 1998, Congress made this requirement permanent and ongoing each year. *See* 42 U.S.C § 1437z-5. Again, Congress manifested no intention that such a mandated reduction of the public housing stock be subjected to fair housing scrutiny.

Of course, consistent with the *Gautreaux* remedial process, HOPE VI demolition also carries with it the additional Congressionally-endorsed purpose of "decreas[ing] the concentration of very low-income families." 42 U.S.C. § 1437v(a)(3). Though the HOPE VI program can provide a housing authority funding to create new public housing as well as to demolish existing public housing, Congress expressly made it clear that HUD can make HOPE VI "demolition only" grants that serve only to reduce substandard public housing stock and decrease low-income concentration. *See* 42 U.S.C. § 1437v(d)(3); *see also Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 339 F.3d 702, 715 (8th Cir. 2003) (demolition-only grants reflect Congressional approval of significant reduction of public housing stock via HOPE VI plans, even when HOPE VI grant provides funding for redevelopment as well as demolition).

Hence, it is implausible to think that by Congress's general and vaguely stated obligation of housing authorities to "affirmatively further fair housing," *see* 42 U.S.C. § 1437c-1(d)(15), Congress meant to qualify the much more specific authorities and directives mentioned above. It is far more likely that Congress simply did not view the reduction of public housing stock *per se* as any sort of fair housing issue.

2. Creation of Mixed-Income Public and Other Housing.

The ABLA HOPE VI plan will create new housing that will be highly integrated by income. Market-rate for-sale homes, market-rate rental units, "affordable" for-sale homes and rental units, and public housing units are highly intermeshed with one another. Such housing undeniably achieves the HOPE VI objective of "providing housing that will avoid or decrease the concentration of very low-income families." 42 U.S.C. § 1437v(a)(3). It also serves the goal of creating public housing that does not serve as a warehouse for the poorest of the poor, an

objective that Congress advanced in 1998 by enacting legislation requiring all housing authorities to make efforts to deconcentrate the low-income public housing population by admitting middle-income tenants. *See* 42 U.S.C. § 1437n(a)(3)(B).

Though intervenors may express minor quibbles about the interconnectedness of housing for various income groups with one another, the intervenors' primary objections are obviously that there are not "enough" rental units for very-low-income families both overall as well as north of Roosevelt Road. And in this regard, they decry the "cap" on the number of public housing units reflected in the court's June 19, 1998 order. However, intervenors fail to fully recognize why that number is capped and, indeed, why this court and HUD believe that it is justifiable to create any new public housing units in the ABLA neighborhood at all.

Congress expressly endorsed the public housing units for very-low-income families that CHA seeks to create in the ABLA Revitalizing Area in 1995, when Congress enacted Section 18(d) of the U.S. Housing Act, 42 U.S.C. § 1437p(d). That legislation provides that

> Notwithstanding any other provision of law, replacement public housing units for public housing units demolished in accordance with this section may be built on the original public housing location or in the same neighborhood as the original public housing location if the number of the replacement public housing units is significantly fewer than the number of units demolished.

However, it is important to understand why Congress included the words "Notwithstanding any other provision of law" at the beginning of this provision. Without this language, HUD's public housing "site and neighborhood" regulations might have prevented a housing authority from constructing units in the same neighborhood if that neighborhood were minority-concentrated. *See* 24 C.F.R. § 941.202. These regulations were issued to implement HUD's duty to "affirmatively further fair housing" under the Fair Housing Act, as interpreted in decisions such as *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), and those of this court in *Gautreaux*[3], and have a structure and

[3] The Supreme Court has recognized that HUD's reasonable regulatory interpretations of the Fair Housing Act are entitled to deference by the courts. *Meyer v. Holley*, 537 U.S. 280, 288, (2003).

logic that closely tracks that of this court's orders. Under the regulations, new construction of low-income housing in an "area of minority concentration" is prohibited, unless (1) "sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration," or (2) "the project is necessary to meet overriding housing needs which otherwise cannot be feasibly met in that housing market area." 24 C.F.R. § 941.202(c)(1)(i). Likewise, new construction was prohibited in "[a] racially mixed area" if "the project will cause a significant increase in the proportion of minority to non-minority-residents in the area." 24 C.F.R. § 941.202(c)(1)(ii). The "overriding need" proviso corresponded to language in decisions such as *Shannon* which held that in some instances it is permissible to put public housing in a minority-concentrated area if it is part of "rebuilding" that area. 436 F.2d at 822 ("There will be instances where a pressing case can be made for the rebuilding of a racial ghetto."). Accordingly, the site-and-neighborhood standards' treatment of new public housing construction is nearly identical to this court's development rules, as set forth in *Gautreaux v. Landrieu*, 523 F. Supp. 665 (N.D. Ill. 1981), *aff'd*, 690 F.2d 616 (7th Cir. 1982), which bar CHA from developing public housing in Limited Areas (areas that are more than 30% minority) unless (a) CHA simultaneously develops new public housing elsewhere or (b) the Limited Area in question has been designated by the court as a Revitalizing Area. 523 F. Supp. at 668-669. The ABLA area is one such Revitalizing Area, and the court's June 19, 1998 order establishes the mix of housing for various income groups that the court would allow therein.

In essence, the prospective intervenors, largely by statistical diversion and subterfuge, attempt to imply that the ABLA area somehow should no longer be considered a "Limited Area." But all concerned should note that, while the intervenors present many statistics showing how the ABLA neighborhood has *changed* between 1990 and 2000, they never in fact say that the ABLA neighborhood is no longer more than 30 percent nonwhite, and there is a good reason

for their not saying so: the statement would be manifestly untrue.[4] It cannot be denied that the ABLA area is still a "Limited Area." Accordingly, only by virtue of the court's designation of the ABLA area as a "Revitalizing Area" is any new public housing being sited there at all. And it is difficult to imagine that prospective intervenors would have an objection to the court's creation of that authority.

3. What the ABLA HOPE VI Plan Leaves In Place.

While intervenors suggest that the Jane Addams development, though "nearly or actually uninhabitable" (Intervenors' Complaint, para. 52) and virtually 100 percent minority (Intervenors' Complaint, para. 39, first sentence), is a "historically significant, low-rise public housing development" (Intervenors' Motion at 9) that they imply ought to be preserved, intervenors characterize the equally minority-concentrated Brooks Homes, which were fully rehabilitated with comprehensive grant funds and are to be preserved by CHA, as "barracks-type housing" that is the centerpiece of a "'pocket' of isolated, poor African-American families concentrated south of Roosevelt." (Intervenors' Motion at 9; Intervenors' complaint, paragraph 73). The intervenors hold a similarly dim view of the planned rehabilitation of the Loomis city-state financed development south of Roosevelt, despite the fact that rehabilitated units at Loomis are earmarked for middle-income public housing families who will increase the income diversity of the neighborhood.

It is unclear what intervenors would advocate be done with Brooks and Loomis at this point to mitigate their status as parts of a "pocket" of African-American concentration. However, there simply is no support for the proposition that there is fair housing significance to a housing authority's preservation, through rehabilitation, of an existing public housing project that is in a good enough condition to be rehabilitated. Moreover, because of Section 18(d) of the

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[4] As is demonstrated by the 2000 Census data displayed on page 7 of the Nathalie P. Voorhees Neighborhood Center presentation accompanying the intervenors' complaint, the ABLA area, including the areas both north and south of Roosevelt, is 71.1 percent minority (100 percent minus the 28.9 percent "White non-Latino" percentage indicated), including a 49.1 percent Black non-Latino population and a 12.9 percent Asian non-Latino population.

U.S. Housing Act and this court's designation of the ABLA area as a Revitalizing Area (discussed *supra*), even if Brooks had been, and Loomis were, in unsalvageable condition and therefore demolished or scheduled for demolition, the rebuilding of those developments on the same site would not have been problematic under the Fair Housing Act. Consequently, that hypothetical redevelopment of Brooks and Loomis would still necessarily end up with significantly fewer public housing units at ABLA than what existed prior to such a demolition. In a larger sense, there is no authority for the proposition that, in formulating a remedy for housing segregation, a court must order the elimination of every "pocket" of minority concentration that exists within a public housing system, any more than a court in a school desegregation case must order the eradication of racial identifiability in every school in a system or bar any school from having a heavy concentration of one racial group.

4. What the ABLA HOPE VI Plan Will Not Create.

Intervenors allege that the ABLA HOPE VI plan will fail to maximize the number of public housing units for very-low-income families with available funds, fail to maximize the potential for further interweaving such housing with housing for higher-income groups north of Roosevelt, and fail to create any five-bedroom units for very large public housing families. Though the *Gautreaux* parties and the Receiver may well demonstrate that the former two alleged failures are factually false,[5] the reality is that, as a matter of law, the intervenors' "failure to produce" and "failure to maximize" claims have no support in the Fair Housing Act to begin with.

Intervenors misconstrue the obligation of HUD and housing authorities to "affirmatively

[5] Given the fact that HOPE VI dollars cannot be used to construct units other than for low-income families, the CHA and Receiver may contend that the maximum number of public housing units are being produced with the funds available. However, the large number of *Section 8 vouchers* that have and will be awarded by the CHA for relocation – and, if the recipients so choose, permanent relocation — should not be ignored in the calculus of housing opportunities for very-low-income families created under the HOPE VI plan. *See Walker v. City of Mesquite*, 169 F.3d 973, 986-987 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (Section 8 vouchers serve as adequate substitute for construction of public housing units in housing desegregation).

further fair housing" — *i.e.*, housing made available on a nondiscriminatory basis — to be an obligation to affirmatively produce housing. However, it was long ago recognized that the Fair Housing Act — the source of HUD's duty to affirmatively further fair housing, *see* 42 U.S.C. § 3608(e)(5) — is not a housing production statute that would require the construction of housing simply because there is a need for low-income housing for minorities in a community. *Acevedo v. Nassau County*, 500 F.2d 1078, 1082 (2d Cir. 1974) ("The Fair Housing Act does not impose any duty upon a governmental body to construct or 'plan for, approve and promote' any housing.") Accordingly, HUD's duty to affirmatively further fair housing does not require HUD to compel grantees to provide housing for all those in need. *NAACP, Boston Chapter v. Secretary of HUD*, 817 F.2d 149, 156 (1st Cir. 1987), citing 114 Cong. Rec. 4975 (statement of Senator Mondale) ("policy 'to provide . . . for fair housing' is not a mandate to 'provide housing' but only to 'eliminate discrimination in the sale or rental of housing"); *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086, 1103-04 (6th Cir. 1985); *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1537 (11th Cir. 1984), and *Acevedo supra*. Nor is there any obligation to provide subsidies to make housing affordable, *Growth Horizons v. Delaware County, Pennsylvania*, 784 F. Supp. 258, 262-263 (E.D. Pa. 1992), or any right of access to housing of a certain quality, *Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1068 (2d Cir. 1974).

Were the ABLA HOPE VI plan one that created one-bedroom public housing units exclusively or a number of public housing units that was vastly at odds with the funding provided by HUD under HOPE VI, both HUD and this court would be within their rights to question whether those elements of the plan were a pretext for discrimination on the part of CHA or the Receiver. However, the fact that no five-bedroom units are being created in the Revitalizing Area or that perhaps a handful of additional public housing units for very-low-income families might conceivably be squeezed out of available funds does not remotely create such a suspicion. Therefore, the intervenors' attempt to compel modification of the ABLA

HOPE VI plan on fair housing grounds must be seen for what it is: a benignly motivated, but non-legally-based, ploy to compel the CHA and the Receiver to house additional very-low-income families of color in the Revitalizing Area — and especially in the Revitalizing Area north of Roosevelt — without regard to the risk that doing so will *resegregate* an area that this court correctly predicted is gradually becoming *de*segregated. And such resegregation could not be more antithetical to either the desegregatory interests that the intervenors purport to assert or CHA's duty to affirmatively further fair housing.

Because the *Gautreaux*-relevant claims that the prospective intervenors seek to assert are facially non-meritorious, denying them the right to intervene in *Gautreaux* will not prejudice intervenors' legitimate interests; to the contrary, it will accord them the benefit of not wasting their time further.

C. Intervenors Have Failed to Demonstrate that They Are Not Adequately Represented by the Existing Parties.

HUD will largely leave it to the *Gautreaux* plaintiffs and their counsel to demonstrate why they adequately represent the interests of the *Gautreaux* plaintiff class as a whole. However, HUD is better positioned to address at least one of the rationales that intervenors cite for their claim of lack of adequate representation. Intervenors allege that they seek to assert a "replacement housing" claim under the Cranston-Gonzalez National Affordable Housing Act (NAHA) and Housing and Community Development Act (HCDA) that counsel for the plaintiff class has not asserted in *Gautreaux*. This claim is grounded in the allegation that some housing *development* activities, encompassed by the CHA's HOPE VI plan, and "leveraged" by the HOPE VI funds, will be paid for by the City with funds under HUD's HOME Investment Partnerships program (HOME), 42 U.S.C. § 12741-12756. This claim is completely non-meritorious for a host of reasons.

First, the type of "replacement housing" obligation that intervenors describe in paragraphs 84 and 85 of their complaint is one that Congress has lodged with units of general

local government such as the City of Chicago or City grantees of HUD community development assistance — not public housing authorities such as the CHA. The asserted "replacement housing" obligation derives from an assurance that must be contained in the "Consolidated Plan"[6] that cities submit to HUD as a condition of their receipt of HUD community development funds such as Community Development Block Grants under the HCDA or HOME funds under the NAHA. *See* 42 U.S.C. §§ 12705(a) and 12705(b)(16) (requiring certification and Consolidated Plan to be submitted by the "jurisdiction"), 12704(3) (defining "jurisdiction" to mean "unit of general local government"), and 12704(1) (defining the latter term ultimately to mean the "agency or instrumentality . . . that is . . . designated by the chief executive to act on behalf of the jurisdiction with regard to provisions of this Act," *i.e.*, NAHA). *See also* HUD's Consolidated Plan regulations at 24 C.F.R. §§ 91.225 (certification by "jurisdiction") and 91.5 ("jurisdiction" defined).[7] Accordingly, the replacement housing assurances made by such city recipients of HUD community development funds can be enforced only against such city recipients. *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 2001 U.S. Dist. LEXIS 6153, **11-12 (E.D. Mo. 2001), *aff'd* 339 F.3d 702, 710 (8th Cir. 2003).

More importantly, however, HUD regulations interpret the "replacement housing" obligation that intervenors advance as one applicable only to *loss* of housing stock that *directly* results from the expenditure of HUD community development funds. The HUD regulations that set forth the relevant replacement obligation indicate that:

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[6] Though NAHA talks in terms of the jurisdiction's submission of a "comprehensive housing affordability strategy" (CHAS), 42 U.S.C. § 12705(a)(1), HUD has folded the CHAS into a more wide-ranging document called a Consolidated Plan by regulation. *See* 24 C.F.R. § 91.5 (defining "consolidated plan" to include the CHAS contents and address CDBG and homeless grant issues).

[7] Moreover, the HOME regulations, at 24 C.F.R. § 92.353(e), make it clear that the replacement requirements set forth in Subpart C of 24 C.F.R. Part 42 are those of a "participating jurisdiction" as defined in 24 C.F.R. § 92.105 — namely, the recipient of the jurisdiction's annual HOME formula grant from HUD (see 24 C.F.R. § 92.102-.103) and the entity on behalf of which the jurisdiction's Consolidated Plan has been submitted (24 C.F.R. § 92.104).

> This subpart applies only to CDBG grants under 24 CFR part 570, subparts D, F, and I (Entitlement grants, HUD-Administered Small Cities, and State programs); grants under 24 CFR part 570, subpart G (Urban Development Action Grants), and Loan Guarantees under 24 CFR part 570, subpart M; and assistance to State and local governments under 24 CFR part 92 (HOME program).

24 C.F.R. § 42.301. This list of HUD community development programs does not include the HOPE VI program or any other program authorized by the U.S. Housing Act — the act in which Congress deals with housing authorities and public housing funding, rather than with cities and funds for community development. Next, consistent with pertinent HCDA statutory language (42 U.S.C. § 5304(c)(2)), HUD regulations state that the replacement obligation applies to units "demolished . . . in connection with an assisted activity", *i.e.* an activity assisted with the above-referenced community development funds, 24 C.F.R. § 42.375(a). To further amplify on the words "in connection with," HUD regulations go on to make clear that the activity in question must be one that "will *directly result* in the *demolition* of lower-income dwelling units." 24 C.F.R. § 42.375(c) (emphasis added). To HUD's knowledge, HOME funds are being used solely in support of housing *development* activities under the ABLA HOPE VI plan.

But quite apart from whether there is any replacement obligation for the City to meet, there is no necessary relationship between any such City replacement obligation and either (a) the units for *very*-low-income families that the intervenors seek to have created, (b) the *number* of such units they seek to have created, or (c) the ABLA *neighborhood* in which they seek to have those units created.

Only units that were either "occupied" or "occupiable" prior to demolition need to be replaced. *See* 42 U.S.C. § 5304(d)(2)(A)(i), 24 C.F.R. § 42.375(a). It is conceivable that many of the units demolished under the ABLA HOPE VI plan would not meet this standard. Also, the replacement obligation is not a "like kind" replacement obligation. Rather, the statute treats low-income and *moderate*-income units as interchangeable — "low and moderate income" units demolished must be replaced with "low and moderate income" units. *See* 42 U.S.C. §

5304(d)(2)(A)(i).[8] In HUD regulatory terms, "lower-income" units must be replaced with "lower-income" units, 24 C.F.R. § 42.375(a), with "lower-income person" defined to mean "low *and moderate* income person." 24 C.F.R. § 42.305 (emphasis added). Therefore, nothing would prevent the City from replacing units for very-low-income families with units likely to be affordable only by *moderate*-income families; the preamble to the HUD regulations in question, when first issued, expressly addresses this point. 55 *Fed. Reg.* 29296, 29302 (1990). Significantly, any moderate-income units that the City created would *not* need to have any *government subsidy* for the occupants of those units associated with them, as a public housing or Section 8-assisted unit would. Therefore, while the rent for the unit could not exceed HUD's "fair market rent" (FMR) for the area (*see* 24 C.F.R. § 42.375(b), 24 C.F.R. Part 888), the occupants could be expected to pay that full rent, rather than a percentage of their household income as in HUD-assisted housing. *See* discussion at 55 *Fed. Reg.* 29296, 29297-29298 (1990).

Finally, in terms of location of replacement units, the statutory replacement obligation in Section 104 of the HCDA is one that would require such units to be located only "within the same community" as those demolished, or in regulatory terms, within "the recipient's *jurisdiction*". 42 U.S.C. § 5304(d)(2)(A)(i), 24 C.F.R. § 42.375(b)(1) (emphasis added). While HUD regulations go on to provide that "*[t]o the extent feasible and consistent with other statutory priorities*, the units shall be located within the same neighborhood as the units replaced," *id.*, even this heavily-qualified regulatory embellishment of the statutory requirement could be waived by HUD upon request. *See* 24 C.F.R § 5.110.

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[8] The words "very low-income" are used in HUD's public housing and Section 8 programs to refer to families whose incomes are below 50 percent of the median income in a jurisdiction. *See* 42 U.S.C. § 1437a(b)(2), 24 C.F.R. § 982.4(a)(1). For purposes of HUD's community development programs, however, these same families are referred to as "low-income" families (*see* definition of "lower-income person" in 24 C.F.R. § 42.305, cross-referencing 24 C.F.R. § 570.3 (definitions of "low-income household" and "low-income person")), while families whose incomes are between 50 and 80 percent of median are referred to as "moderate-income" families. *Id.* (definitions of "moderate-income household" and "moderate-income person").

In summary, there is no need for the HCDA/NAHA replacement housing claim that intervenors seek to assert to be raised in the context of the *Gautreaux* litigation. Furthermore, the *Gautreaux* plaintiffs' failure to assert this claim in no way serves to demonstrate the inadequacy of the representation that the *Gautreaux* class representatives are providing for their class. [9]

II. The Prospective Intervenors Should Not Be Granted Permissive Intervention.

For the same reasons set forth above regarding the intervenors' motion for mandatory intervention, their motion for permissive intervention should be denied.

Conclusion

For the reasons set forth herein, the prospective intervenors' motion for intervention should be denied.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

BY: Linda A. Wawzenski
LINDA A. WAWZENSKI
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-1994

OF COUNSEL:

CAROLE W. WILSON
Associate General Counsel
for Litigation

HOWARD SCHMELTZER
Assistant General Counsel
for Litigation

HAROLD RENNETT
C. ALLEN VILLAFUERTE
Trial Attorneys
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., Room 10258
Washington, D.C. 20410
(202) 708-1042

[9] The claims in the intervernors' complaint against HUD are meritless because they are derivative of the claims against CHA and the Receiver.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 66 C 1459**
	)	
THE CHICAGO HOUSING AUTHORITY, et al.,	)	**Hon. Marvin Aspen**
	)	
	)	
Defendants.	)	
	)	

DECLARATION OF MILAN M. OZDINEC

1. My name is Milan M. Ozdinec. I am employed by the United States Department of Housing and Urban Development (HUD) as a Deputy Assistant Secretary in the Office of Public and Indian Housing, Office of Public Housing Investments. The HOPE VI program, as well as other public housing capital programs, are within the purview of the Office of Public Housing Investments.

2. Because of my position, and because of the length of time that I have occupied this position or other positions within the Office of Public and Indian Housing over the years, I am familiar with what is involved in HUD's review of public housing authorities' HOPE VI plans, familiar with the instances in which HOPE VI grantees have been put into default for failure to implement their plans in a timely fashion, and knowledgeable about the provisions of recent HUD appropriations acts dealing with recapture of public housing Capital Fund monies and funding for the HOPE VI program. Also, through consultation with Office of Public Housing Investments staff, I have

acquainted myself with what HUD HOPE VI staff is doing, and has done in the past, with regard to the processing of the ABLA HOPE VI plan. For these reasons, I am competent to testify to various facts relating to HUD's position with regard to the intervention motion that I understand recently has been filed in the *Gautreaux* litigation.

3. Specifically, I have read each of the factual assertions in part I.A of HUD's legal memorandum regarding the intervention motion. As a matter of my first-hand personal knowledge or well-founded good faith belief, I can and hereby do attest to the truth of each of those factual assertions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JUN 21 2004

MILAN M. OZDINEC

AFFIDAVIT OF MAILING AND HAND DELIVERY

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

PAULA M. GABRIEL 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 3rd day of June placed a copy of:

1. **NONPARTY DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S MEMORANDUM IN SUPPORT OF GAUTREAUX PARTIES' OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE.**

in a postage prepaid envelope addressed to each of the following named individuals and caused each envelope to be deposited in the United States mail chute located in the Everett McKinley Dirksen Building, Chicago, Illinois on said date at the hour of 5:00 p.m.

SEE ATTACHED SERVICE LIST

Paula M. Gabriel

SUBSCRIBED AND SWORN TO before me this 3rd day of June, 2004

Mary Anne Martin
NOTARY PUBLIC

My Commission Expires: 10/28/06

"OFFICIAL SEAL"
MARY ANNE MARTIN
Notary Public, State of Illinois
My Commission Expires 10/28/06

SERVICE LIST

Via U.S. Mail

Alexander Polikoff
Julia Elena Brown
Business and Professional People
for the Public Interest
25 E. Washington St., Suite 1515
Chicago, IL 60602

Gail Niemann
Chicago Housing Authority
200 W. Adams Street, Suite 2100
Chicago, IL 60606

Thomas E. Johnson
Johnson, Jones, Snelling, Gilbert
& Davis
36 S. Wabash Av., Suite 1310
Chicago, Illinois 60603

Michael L. Shakman
Barry A. Miller
Edward, Shakman & Hamilton
208 S. LaSalle St., Suite 1100
Chicago, Illinois 60604

Via Hand Delivery

William P. Wilen
Katherine E. Walz
Rajesh D. Nayak
Sargent Shriver National
Center on Povery Law
111 N. Wabash, Suite 500
Chicago, IL 60602

Clyde D. Murphy
Sharon K. Legenza
Chicago Lawyers' Committee
for Civil Rights Under Law, Inc.
100 N. LaSalle St., Suite 600
Chicago, IL 60602

Harold C. Hirshman
Elizabeth Leifel
Annie Albertson
Sonnenschein, Nath & Rosenthal LLP
8000 Sears Tower
Chicago, IL 60606