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

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

ABLA PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO INTERVENE

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I. INTRODUCTION

It has now been over five years since the ABLA Plaintiffs attempted to air their objections to the ABLA Redevelopment Plan. At the Gautreaux parties'[1] urging, this Court ruled that the ABLA Plaintiffs' initial suit, which had been assigned to Judge Gettleman, was a collateral attack on a revitalizing order entered here. When the ABLA Plaintiffs sought to intervene in this case, as they had been invited to do, the Gautreaux parties objected, claiming that the ABLA Plaintiffs were too early to court because the redevelopment plan was not yet final. Now, the Gautreaux parties oppose intervention, crying that the ABLA Plaintiffs are too late. What the opposing parties fail to acknowledge (in over 90 pages of briefing) is that they are culpable for not following this Court's express directions, and are therefore responsible for any prejudice or delay. Given the opposing parties' failure, the appropriate procedural course now is for this Court to allow intervention, set a discovery schedule, and hold a hearing on the ABLA Plaintiffs' Motion for a Preliminary Injunction.

A. The Gautreaux Parties Were Required to—and Did Not—Ask for a Hearing.

On September 25, 2000, this Court expressly ordered that an open hearing be held to determine the legality of the final ABLA redevelopment plan:

> Finally, once a development plan is finalized, we expect to hold a hearing on the merits of the plan, which would involve receiving either written or oral submissions from all interested parties. At that time, if the CRA believes the final plan is in violation of the law, it may renew its motion to intervene.

[1] Hereinafter, for purposes of convenience, the term "Gautreaux parties" refers to CHA, HUD, the Gautreaux Receiver, and the Gautreaux Plaintiffs, collectively. The term "Defendants" refers only to the CHA, HUD, and the Gautreaux Receiver.

Order of September 25, 2000, Exhibit D of ABLA Plaintiffs' Memorandum (emphasis added). See also Transcript of Proceedings of May 20, 2004, at 12, attached hereto as Exhibit A. (Court: "Assuming that ABLA could have come in earlier and had ample time to do it, weren't you still obligated to come before the Court?") Neither CHA nor the Court-appointed Receiver nor the Gautreaux Plaintiffs' counsel – the only parties with standing to do so – has attempted to comply with this merits hearing requirement. Indeed, these parties have done their utmost to prevent any sort of public hearing regarding the plan and its legality. After waiting four years for the Gautreaux parties to meet their court-imposed obligation, during which time the ABLA Plaintiffs also collected additional information and attempted to negotiate with the opposing parties. Given that the proper parties abdicated their duty to request a hearing on the ABLA redevelopment plan, the ABLA Plaintiffs, through their intervention and related motions, seek now to do so.

* * *

At their core, the Gautreaux parties' arguments can be simply stated: Trust us. The Gautreaux parties suggest that this Court act as a rubber stamp for their plans, without a full and appropriate consideration of the ABLA Plaintiffs' well-founded allegations of housing discrimination. However, as Judge Castillo admonished in Wallace, in reference to a similar argument for deference:

> Instead, Defendants insist that we must allow them an appropriate opportunity to exercise their discretion in choosing the appropriate course of corrective action. We disagree. It is both within this Court's province and duty to hear and decide claims alleging racially motivated housing discrimination.

Wallace v. Chicago Hous. Auth., 298 F. Supp. 2d 710, 725 (N.D. Ill. 2003).

Turning now to the substance of the ABLA Plaintiffs' actual motion to intervene, the ABLA Plaintiffs will demonstrate in Section II that they satisfy the criteria of Rule 24(a)(2) for intervention as of right, and why the Gautreaux parties' statute of limitations argument is

incorrect. In Section III, they will explain why the "hearing" procedures suggested under Isby v. Bayh are entirely inappropriate here. Finally, in Section IV, they will explain why they also meet the requirements for permissive intervention under Rule 24(b)(2).

II. THE ABLA PLAINTIFFS HAVE THE CLEAR RIGHT TO INTERVENE PURSUANT TO WELL-ESTABLISHED RULE 24(A)(2) DOCTRINE.

The parties agree that the operative four-part analysis requires the ABLA Plaintiffs to establish each of following criteria: (1) their application is timely; (2) they have an interest relating to the subject matter of the action; (3) they are at risk that their interest will be impaired by the action's disposition; and (4) their interest is not being adequately represented by the existing parties. See ABLA Plaintiffs' Memorandum in Support of Their First Amended Motion to Intervene [hereinafter "ABLA Memorandum"] at 4 and CHA Response at 8, both citing Nissei Sangyo Am., Ltd. v. United States, 31 F.3d 435, 438 (7th Cir. 1994) (granting motion to intervene).

A. Appropriate Standard for Intervention.

In evaluating a Rule 24 motion, courts must accept as true all non-conclusory allegations contained in the pleadings. Reich v. ABC/York-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995) (reversing district court's denial of petition to intervene as of right); In re Discovery Zone Sec. Litig., 181 F.R.D. 582, 592 (N.D. Ill. 1998). Moreover, a motion to intervene as a matter of right should be granted unless it appears "to a certainty" that the intervenor is not entitled to relief under any set of facts that could be proved under the complaint. Reich, 64 F.3d at 321.

Once a court grants a party intervenor status, it "is treated just as if it were an original party." In re Brand Name Prescription Drugs Antitrust Litig., 1996 U.S. Dist. LEXIS 14529, at *14-15 (N.D. Ill. 1996) (finding this proposition "unremarkable"). "When a party intervenes, it

becomes a full participant in the lawsuit. . . . The intervenor renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party." Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985) (internal citations and quotations omitted); Save the Valley, Inc. v. EPA, 223 F. Supp. 2d 997, 1013 n.15 (S.D. Ind. 2002) (citing Schneider).

The Gautreaux parties misunderstand the standards that must apply to this motion. Rather than disputing that the ABLA Plaintiffs' allegations, taken as true, satisfy Rule 24, the opposing parties attempt to attack the strength of the ABLA Plaintiffs' legal theories, and offer a voluminous alternative account of the "facts," and assert self-serving legal conclusions that are reserved for this Court.[2] This is not the appropriate stage for these arguments. See, e.g., Reich, 64 F.3d at 321. Rather, once the ABLA Plaintiffs are allowed to intervene and discovery is completed, the Gautreaux parties may present whatever well-founded challenges to the intervention complaint they desire. However, it is both practically impossible and legally unwarranted (in four business days without discovery) for the ABLA Plaintiffs to be forced to respond the Gautreaux parties' critique of the proposed First Amended Intervenors' Complaint. Therefore, the ABLA Plaintiffs limit their arguments to intervention and save discussion of any unrelated issues raised by the Gautreaux parties for a later day.

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[2] For example, the Gautreaux parties opine on the merits at great length, stating: "the number of public housing units [at] ABLA . . . is not shown to be unlawful." (Gautreaux Plaintiffs Response at 9); the challenged plan "has drawn a responsible balance between maximizing housing for low-income families . . . ." (Id. at 13); "it is unwise and financially reckless, to plan for or commit to developing more than the 755 public housing units currently planned" (Receiver Response at 23); and "[t]he objections of some professors . . . are irrelevant and do not warrant any finding that the plan is unreasonable or unfair." Id. at 15.

B. The ABLA Plaintiffs' Motion to Intervene is Timely Because They Were Instructed to Renew Their Motion to Intervene Only After This Court Held a Hearing on the Merits of the Redevelopment Plan.

The ABLA Plaintiffs meet the first intervention factor, timeliness. In September 2000, this Court established a process that would trigger a motion to intervene: after a hearing on the merits of the ABLA Redevelopment Plan, the ABLA Plaintiffs could move to intervene if they still believed the plan violates the law. See Order of September 25, 2000, Exhibit D of ABLA Memorandum. The trigger event – a merits hearing – has yet to occur. Contrary to this Court's own Order, the Receiver argues that "the initiative to act" belonged with the ABLA Plaintiffs, and the duty was triggered when the plan became "final." Receiver Response at 7. Nowhere does the Receiver explain why it failed to seek the Court-ordered hearing once it knew the redevelopment plan was final.[3] See Part I, Section A, supra (Need for a Hearing).

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[3] The Gautreaux parties unhesitatingly use settlement discussions apparently to "prove" that the ABLA Plaintiffs knew various details at various times. In doing this, however, the opposing parties have omitted key items.

Beginning in May 2002, the ABLA Plaintiffs were led to believe that the objections contained in their initial Complaint would be resolved. Thus, the ABLA Plaintiffs would not need to move to intervene subsequent to the mandated merits hearing if their objections had been met. The Gautreaux parties originally opposed discussing any resolution of the ABLA Plaintiffs' objections until funding for the already-planned public housing units had been secured. Once chosen, LR Development Company LLC ("LR"), the Master Developer, subsequently detailed a financial plan to solve this financial gap and to construct 755 public housing units.

After the financial plan was approved by the ABLA Working Group, the ABLA Plaintiffs made a settlement offer to the Gautreaux parties. While the Gautreaux Plaintiffs were willing to meet and discuss possible settlement, the Gautreaux Receiver and CHA were not as willing to sit down and talk. As well, CHA and the Receiver refused to allow the ABLA Plaintiffs to meet with LR, and settlement discussions stalled. During the same time, however, LR apparently conducted ninety-six separate meetings "with the various ABLA stakeholders to refine the plan, consider objections and build support for the venture." Receiver Response at 20.

In addition, beginning in late 2002, the ABLA Plaintiffs became co-counsel with the Gautreaux Plaintiffs' counsel in order litigate more than one-third of the fair housing and related relocation claims originally brought by the ABLA Plaintiffs. In January 2003, former public housing residents relocated from CHA developments into segregated housing with Housing Choice (Section 8) vouchers sued CHA. Wallace v. Chicago Hous. Auth., No. 03-C-0491 (Jan. 21, 2003).

Settlement discussions intensified from June 2003 until August 2003, after which the Gautreaux parties finally admitted that even if funding were available for additional public housing units, they were unwilling to provide more units. Although impasse had been reached, the fact remains that none of the Gautreaux parties sought a hearing to fulfill this Court's Order.

This is a crucial omission. Since this Court's September 2000 Order, the ABLA Plaintiffs have been caught in a paradigmatic Catch-22. In designing the process outlined in the Order, this Court presumably hoped that if a hearing was held prior to the ABLA Plaintiffs' renewed Motion to Intervene, the parties could avoid needless and costly litigation. Prior to the hearing, the ABLA Plaintiffs were left with little recourse. On the one hand, they were to wait until after the Court hearing to seek leave to intervene. On the other, they – nonparties in the ongoing litigation – lack standing to petition the Court for that hearing, absent being first allowed to intervene. Now, when the ABLA Plaintiffs move to intervene to seek a public hearing on the merits, they are told they are too late. In light of the particular facts of this case, the opposing parties' timeliness argument must be rejected.

Furthermore, while prejudice to the original parties is one many factor to be weighed in assessing timeliness, there is no demonstration by the Gautreaux parties that Phase I of the ABLA Plain is truly in peril due to the ABLA Plaintiffs' challenge. The ABLA Plaintiffs dispute these facts, however clearly the Gautreaux parties' voluminous briefs dictate the need for discovery so that the ABLA Plaintiffs can adequately test these claims.

Nonetheless, the Gautreaux parties' arguments are facially unsupported. The Gautreaux parties argue that any delay, including a merits hearing, will jeopardize the financing of this development, but this argument does not hold up under scrutiny. Based on the Gautreaux parties' own documents, the only pending deadline is that LR must certify to the expenditure of 10% of the reasonably expected total eligible project cost within six months of the award, in this case, by June 18, 2004. Declaration of Stephen M. Porras, at 3, Exhibit D of Joint Appendix. According to Mr. Porras, LR has already made approximately $1.5 million in eligible payments,

leaving an additional $2 million to be expended for materials, such as lumber and steel, prior to June 18, 2004. Id. Mr. Porras does not state that LR is unable to make such procurements. Instead, he states that LR may not be willing to expend the money if a ruling on this motion keeps open the possibility that the Phase I financial and real estate closings will be "substantially" delayed, or that the project will never be allowed to start construction, or that construction may be stopped at some point after its commencement. Id. at 4. Whether any of these possibilities will occur is speculative at best. The only action that must occur by June 18 is that LR must certify to having timely met the 10% carryover test. If LR passes the test with the $2 million in material purchases, which Mr. Porras does not say will not be done, there will be no serious delay to Phase I.

Likewise, HUD's alarmist predictions of the prejudice allegedly caused by delay are illusory. HUD claims that any delay due to the ABLA Plaintiffs' motion to intervene may have disastrous consequences in that Congress has mandated HUD to "recapture" capital funds from housing authorities that fail to use them. HUD further speculates that it may place HOPE VI grantees in default for failure to implement their HOPE VI redevelopment plans. It then notes that Congress dramatically cut HOPE VI funding in 2003 and 2004, which trend it surmises is likely to continue. HUD Response at 2. All of these dire predictions are simply not relevant to this motion.

First, the statute cited by HUD regarding capital funds, Consolidated Appropriations Resolution, 2003, 117 Stat. 486-487 (2003), states that any capital funds provided by HUD to housing authorities shall remain available until September 30, 2006, but that the Secretary shall recapture any unobligated capital funds for fiscal years 1999, 2000, 2001, 2002 or 2003 if such funds remain unobligated as of September 30, 2006. Id. CHA has made no assertion that its

capital funds for the requisite fiscal years have not been obligated, or that they will not be obligated by 2006. HUD's implication that somehow the ABLA Plaintiffs' motion, if granted, will cause CHA to lose capital funding is unfounded. In addition, there is nothing in LR's ABLA Sources and Uses Chart to suggest that capital funds are being used at all to implement the ABLA Redevelopment Plan. See ABLA Sources and Uses Chart of July 20, 2001, attached hereto as Exhibit B. Thus, even if CHA fails to obligate the funds by 2006, absent additional discovery (as requested by the ABLA Plaintiffs) it does not appear that this failure would have any effect on ABLA.

As to HUD's claim that it might have to hold CHA in default, it would be the height of irony if HUD, who is charged with enforcing federal housing laws, held CHA in default for failing to implement a HUD-approved redevelopment plan, where that plan is alleged to violate those same laws. Finally, it is beyond the scope of this motion, and this litigation, to attempt to forecast Congressional housing policy, and such speculation is best left to Sunday morning political pundits.

C. The ABLA Plaintiffs Clearly Have An Interest In the ABLA The Redevelopment Plan.

The ABLA Plaintiffs also clearly meet the second intervention factor, namely that they have an interest relating to the subject matter of this litigation. Indeed, CHA concedes that the individual ABLA Plaintiffs have an interest in the ABLA redevelopment plan. CHA Response at 22. Nor could they argue otherwise. "A motion to intervene as a matter of right . . . should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." In re Discovery Zone Sec. Litig., 181 F.R.D. at 592-93 (allowing a non-class member to intervene as of right in a federal securities fraud class action). The ABLA Plaintiffs, bolstered by several expert affidavits, have alleged

(which allegations must be taken as true at this time) that the ABLA redevelopment plan fosters discrimination and deprives them of the ability to live in a racially integrated neighborhood. These allegations are sufficient to meet the interest factor, and the opposing parties have failed to argue otherwise. See, e.g. Avery v. Pierce, 1983 U.S. Dist. LEXIS 12416, at *4-5 (N.D. Ill. Oct. 24, 1983) (allowing an individual plaintiff to intervene in a class action because "she is being or will be deprived of living in a racially integrated community as a result of defendants' conduct"); Cook v. Boorstin, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (freedom from race discrimination is a "significantly protectable interest" within the ambit of mandatory intervention).

D. The ABLA Plaintiffs' Interest Will Be Impaired If They Are Denied the Right to Intervene.

The ABLA Plaintiffs have also sufficiently shown that their interest will be impaired, thus meeting the third intervention factor. With the support of several well-known and well-respected experts in the field of housing and urban planning, the ABLA Plaintiffs have demonstrated that their interest in living in a racially integrated community will be impaired if they are denied the ability to intervene in the Gautreaux litigation. The ABLA Plaintiffs allege that a large percentage of current ABLA residents will not be allowed to return to the development once the "revitalization" is complete, and that the small percentage of residents allowed to return will be relegated to the area of ABLA south of Roosevelt Road, effectively being quarantined from the gentrifying mixed income community located to the north.

Rather than directly refute that the ABLA Plaintiffs' interests will be impaired, the Gautreaux parties generally attempt to pigeonhole the ABLA Plaintiffs' interests into those of the existing Gautreaux class members, claiming that the ABLA Plaintiffs cannot intervene

because the Gautreaux class adequately represents them.[4] As discussed in Section E, below, this argument must fail.

E. The ABLA Plaintiffs Are Not Adequately Represented By The Existing Parties.

The final intervention factor, inadequate representation, is also satisfied here. The Gautreaux parties correctly note that the ABLA Plaintiffs' obligation to show inadequate representation is minimal, with any doubt resolved in the ABLA Plaintiffs' favor. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); Gautreaux v. Pierce, 548 F. Supp. 1284, 1287 n.3 (N.D. Ill. 1982); 6-24 Moore's Federal Practice - Civil § 24.03(4)(a) (2004). The proposed-intervenor should also be treated as the best judge of whether existing parties adequately represent its interests. United States v. Georgia, 1996 WL 453543, at *4 (N.D. Ga. 1996) (quoting 7C Charles A. Wright et al., Federal Practice and Procedure § 1908, at 263 (1986)).

Defendants do not argue that they adequately represent the ABLA Plaintiffs. Nor could they. These parties represent an adversarial interest, defending what the ABLA Plaintiffs contend is an illegal redevelopment plan. The Gautreaux Plaintiffs, although in lock-step with the Defendants in defending this redevelopment plan and opposing the ABLA Plaintiffs' efforts to intervene, claim to adequately represent the ABLA Plaintiffs' interests. This is simply not true.

[4] The opposing parties also argue that, because the statute of limitations has run, the ABLA Plaintiffs no longer have an interest in this action. The argument is addressed in Section F, below.

1. Not all of the ABLA Plaintiffs are members of the Gautreaux class.

The Gautreaux Plaintiffs first assert that all of the ABLA Plaintiffs are members of the Gautreaux class, whether as an organizational plaintiff or plaintiffs displaced from ABLA's public housing, and that there is therefore a presumption of adequacy. This is simply over-reaching. The Gautreaux class is defined to include public housing residents and public housing applicants. The ABLA organizational plaintiff, the named plaintiffs displaced from ABLA, and the proposed class of over 1,000 families displaced from ABLA, including those who left without Housing Choice Vouchers, are neither current residents or applicants. Accordingly, no presumption of adequacy arises. Jenkins v. Missouri, 78 F.3d 1270, 1275 (8th Cir. 1996) (presumption of adequacy does not arise unless "the persons attempting to intervene are members of a class already involved in the litigation").

In an attempt to bypass this problem, the Gautreaux Plaintiffs claim that a "defendant's illegal action cannot strip away a resident's class status." Gautreaux Plaintiffs Response at 3. While this may be true (although they cite no cases to support this proposition), the Gautreaux Plaintiffs allowed, for years, the alleged illegal displacement of these families without any attempt to stop. Any presumption of adequacy of representation must fall where a representative fails to protect the interests of class members. More importantly, Gautreaux Plaintiffs' counsel is currently representing a class, which includes individuals relocated from public housing into the private market with Housing Choice Vouchers, in the Wallace v. CHA case.[5] This separate

[5] There appears to be confusion about the nature of the ABLA Plaintiffs' claims, and their relationship with the plaintiffs' claims in a separate case, Wallace v. Chicago Hous. Auth., No. 03-C-0491, currently pending before Judge Castillo. Wallace alleges that CHA racially steered African-American families into private-market housing using Section 8 vouchers, triggering disparate impact and perpetuation of segregation claims related to these private-market moves. See Wallace First Amended Complaint, Exhibit E of Joint Appendix of Receiver, CHA and the Gautreaux Plaintiffs [hereinafter Joint Appendix]. In contrast, ABLA only challenges one site-specific redevelopment plan that threatens to re-segregate families within the development in public housing. See First Amended Intervenors' Complaint. While

representation clearly indicates that Gautreaux Plaintiffs do not, unless it is to beat back a Motion to Intervene, consider the interests of families displaced from public housing the province of the Gautreaux Court.

Even if the Gautreaux Plaintiffs arguably represent the ABLA Plaintiffs, this representation merely establishes a weak presumption of adequate representation, easily rebutted under these circumstances. See Clark v. Putnam County, 168 F.3d 458, 461 (11th Cir. 1999). The Gautreaux Plaintiffs have failed to protect the ABLA Plaintiffs' rights when they allegedly failed to stop the illegally displacement of ABLA families, and when they summarily agreed to a plan which offered these families little chance to live in the revitalized ABLA while illegally segregating housing within that development. These actions and failures to act satisfy the ABLA Plaintiffs' minimal burden of showing inadequate representation. See Wade v. Goldschmidt, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (inadequacy of representation established where class representative failed in fulfillment of duty to protect interests of class members); Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) (environmental group overcame higher parens patrie presumption of adequate representation because of government's inaction enforcing regulations and laws.); Meeks v. Metro. Dade County, Fla, 985 F.2d 1471, 1477-78 (11th Cir. 1993) (party's greater willingness to compromise can impede them from adequately representing the interests of others).

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some of the individual ABLA Plaintiffs are indeed also members of the separate Wallace class, that matter is irrelevant, since the cases are predicated on two separate sets of claims.

The ABLA Plaintiffs are especially confused by Defendant CHA's statement that, "Wallace alleges many of the very same claims Intervenors propose here: including violations of the Fair Housing Act, QHWRA, the URA, and Executive Orders nos. 11063 and 12892, as well as state law claims for breach of contract regarding relocation." CHA Response at 15. The ABLA Plaintiffs' First Amended Intervenors' Complaint alleges neither violations of the Uniform Relocation Act nor breach of the Relocation Rights Contract. See First Amended Intervenors' Complaint. And their remaining claims, although based on the same federal laws as relied upon in Wallace, deal with substantively different facts.

2. The ABLA Plaintiffs and the Gautreaux Plaintiffs do not share the same ultimate objective.

The Gautreaux Plaintiffs next argue that both parties share the same ultimate objective. This is not, however, as the Gautreaux Plaintiffs would have this Court believe, a "disagreement about implementation details along the road to a shared ultimate objective." Gautreaux Plaintiffs Response at 4. The Gautreaux Plaintiffs support the very plan the ABLA Plaintiffs assert is illegal, violative of a myriad of federal laws, and most importantly, will hinder any hope of an integrated community. By limiting the number of very-low income units and segregating most of this housing south of Roosevelt Road, the plan discriminates against the very poor African-Americans, women and children who currently live at, have been displaced from, and/or desperately need the housing at ABLA.

Similarly, in Gautreaux v. Pierce, this Court granted intervention to non-class members because the parties did not have a shared ultimate objective: The intervenor's goal was to oppose the plan creating the housing that the Gautreaux Plaintiffs sought. Pierce, 548 F. Supp. at 1286. Likewise, in Bradley v. Pinellas County Sch. Bd, 961 F.2d 1554 (11th Cir. 1992), parents of children in the class were allowed to intervene when they argued that one of the school board's remedial plans was discriminatory and disparately impacted African-American students by forcing them to bear the brunt of busing. Here, the ABLA Plaintiffs do not disagree with the Gautreaux Plaintiffs merely about the "roadmap" to revitalization, but rather on the destination itself.

HUD makes a different argument about inadequacy of representation. It argues, that because the legal duty to affirmatively further fair housing is so vague as to be meaningless, that duty cannot provide a basis for finding that a party was somehow inadequate in its representation. HUD Response at 10. As an initial matter, this argument ignores case law

clearly holding that HUD and public housing agencies such as CHA indeed have a duty to affirmatively further fair housing. NAACP, Boston Chapter v. HUD, 817 F.2d 149 (1st Cir. 1987) (finding HUD's duty to affirmatively further fair housing enforceable under the Administrative Procedure Act); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33 (D. Mass. 2002) (finding public housing authority's duty to affirmatively further fair housing is enforceable under 42 U.S.C. § 1983). Moreover, this argument ignores the opposing parties' duty to consider the adverse disparate impact their actions may have on protected classes, and their related duty to seek the least discriminatory alternative when this is such an effect. In enacting the Fair Housing Act, Congress believed that only "strict reference to the anti-discrimination provisions of the [A]ct" would eliminate "racially discriminatory housing practices [and] ultimately would result in residential integration." Burney v. Hous. Auth., 551 F. Supp. 746, 767-70 (W.D. Pa. 1982) ("Benign housing quotas are impermissible if they restrict black entry into low-income housing more than is necessary to prevent resegregation." Defendants must show "that no alternative course of action could be adopted that would enable [the interest in promoting integration] to be served with less discriminatory impact.").

As alleged by the ABLA Plaintiffs, which allegations must be taken as true here, there is a considerably less discriminatory method of revitalizing the ABLA community while at the same time maximizing the opportunity for real integration. For example, Professor Feldman states, and the opposing parties acknowledge, that Roosevelt Road is a "barrier" within the development. See Receiver Response at 34. See ABLA Memorandum at 9. Professor Feldman also found that the opposing parties ignored Brooks and suggested that Brooks should have been considered when determining where to place housing units within the entire redevelopment

plan.[6] Id. Professor Wright, using 2000 Census Data, updated housing data from the new developments currently being built in the ABLA neighborhood, and post-2000 data from CHA's proposed ABLA redevelopment plan, concludes that most of the public housing built south of Roosevelt Road will be concentrated into one census tract which is already predominately African-American. Id. Professor Goetz, using the updated data from Professor Wright, compared ABLA to thirty-two HOPE VI redevelopment sites across the country, and concluded that if the plan remains unchanged, gross disparities of wealth, poverty, and race will exist on the north and south sides of Roosevelt Road. Id. Professors Wright and Goetz conclude the ABLA neighborhood, due to its rapid gentrification over the past several years, could house many more low-income families, thereby providing housing for likely many more African-American low-income families. First Amended Intervenors' Complaint at ¶¶ 74, 75. If more low-income housing is not constructed or the unit distribution remains unaltered, Professors Wright and Goetz conclude that the neighborhood will indeed "tip"—becoming an overwhelmingly white, wealthy neighborhood with an isolated, racially segregated pocket of poverty. Id.[7]

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[6] Contrary to the Defendants' assertions, Brooks is not merely an "existing condition" akin to a heating plan or community center. Brooks represents 329 units of housing that will remain segregated by very low-income African-Americans. Defendants' failure to consider this existing condition when allocating the new very low-income units of ABLA perpetuates the segregation south of Roosevelt Road. Finally, Defendants' exhaustive arguments about the distribution of land north and south of Roosevelt Road are best left for determination after discovery.

[7] Although the ABLA Plaintiffs are not required to craft an alternative plan for the development at the Motion to Intervene stage, or really any stage of litigation, the Gautreaux parties continuously argue that the ABLA Plaintiffs did not come up with their own plan for constructing additional, less segregated housing. The Gautreaux parties however ignore the Chicago Partners Report, attached as Exhibit G to the First Amended Intervenors' Complaint, which explained how the Gautreaux parties could have solicited proposals from private developers willing to maximize the number of public housing units built at ABLA. By providing even minimal flexibility on density and unit distribution (meaning that they would allow for actually more market rate housing to be built), Defendants would have provided more housing to the poor minority families in need of it. First Amended Intervenors' Complaint at ¶ 77.

a) The parties represent different interests.

Moreover, where one party's interests are different or broader than another party's, there is no presumption of adequate representation. See Vision Church v. Village of Long Grove, 2004 U.S. Dist. LEXIS 5724 (N.D. Ill. April 6, 2004); see also South Dakota v. Ubbelohde, 330 F.3d 1014, 1025 (8th Cir. 2003) (finding that intervenors overcame presumption of adequacy when they sought to represent portion of Missouri River and Army Corps represented entire river and balanced multiple interests).

Here, the Gautreaux Plaintiffs and the ABLA Plaintiffs represent different interests. The ABLA Plaintiffs raise claims that the Gautreaux order does not address, including familial status discrimination and violations of the Housing and Community Development Act. They also raise claims the Gautreaux parties have elected not to address, such as the redevelopment plan's alleged adverse disparate impact on poor, African-American women and their children. At the same time, the ABLA Plaintiffs represent only families interested in living at the new ABLA, while the Gautreaux Plaintiffs represent all of the families living in Chicago's public housing and families on the public housing waiting list. Since at least 1999, the Gautreaux Plaintiffs have been part of seven working groups, the closed-door decision making bodies for each development, and have negotiated on the redevelopment plan. These development-wide interests necessarily require the Gautreaux Plaintiffs to compromise, perhaps giving something at one development, such as ABLA, in order to gain something else at another. This compromising, however, inevitably leaves current and former ABLA families, as well as public housing applicants interested in living at the future ABLA site, without a representative who has their interests solely in mind. See Fed. Sav. & Ins. Loan Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993) (finding that a party's engagement in settlement negotiations

as opposed to vigorously prosecuting the claims creates interests antagonistic to one of the intervenor's ultimate objectives).

Finally, even if the ABLA Plaintiffs did share, or were found to share, the same ultimate objective as the existing parties, representation by those parties would be still be inadequate because the proposed intervenors have demonstrated that, at the very least, "some conflict" exists. Meridian Homes Corp. v. Nicholas W. Parassas & Co., 683 F.2d 201, 205 (7th Cir. 1982). The Gautreaux Plaintiffs are therefore incorrect that only a showing of collusion can rebut adequacy. See Daggett v. Comm'n on Gov'tl. Ethics & Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) (rejecting argument that there is an exclusive list of circumstances to rebut a presumption of adequacy). Accordingly, as shown above, the ABLA Plaintiffs have met the minimum requirement, and should be allowed to intervene.[8]

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[8] Although consideration of HUD's arguments about the ABLA Plaintiffs' Cranston-Gonzalez National Affordable Housing Act (NAHA) and Housing and Community Development (HCDA) claims are inappropriate at this stage, it is worth noting some of the more obvious errors in HUD's thinking. First, public housing agencies within the meaning of 42 U.S.C. § 1437 have previously been sued for failing to appropriately use HUD community development funds. See Reese v. Miami-Dade County, 210 F. Supp. 2d 1324 (S.D. Fla. 2002). ABLA is clearly a "development project" as it is defined within 42 U.S.C. § 5304(d). HUD apparently concedes that it is certainly liable for allowing such funds to be put to uses in violation of the Act. HUD's argument that the replacement housing requirements for HOME funds do not apply in HOPE VI projects is equally meritless. 42 U.S.C. § 5304(d) sets forth an unconditional list of obligations for "development projects assisted" under this Act, including that "governmental agencies or private developers shall provide within the same community comparable replacement dwellings for the same number of occupants as could have been housed in the occupied and vacant occupiable low and moderate income dwelling units demolished . . . ." ABLA, as it appears from Defendants' Sources and Uses Chart, a document given to the ABLA Plaintiffs by the opposing parties and attached as Exhibit B, is a development project assisted with HOME funds and thus potentially liable. Reese at 1330. Likewise, HUD's own regulations interpret this obligation broadly, providing that the replacement housing requirement applies whenever lower income dwellings are demolished or converted "in connection with an assisted activity." 24 C.F.R. § 42.375(a). If the opposing parties are asserting, as Ms. Jarrett's affidavit suggests, that HOME funds are not being used presently but may be used in the future, this is a factual question that cannot be resolved without discovery. Affidavit of Valerie Jarrett, at 20, Exhibit A of Joint Appendix. As HUD again concedes, it is unclear how many ABLA units would be considered "occupied" or "occupiable," thus raising another question of fact, appropriately argued at a later stage in these proceedings.

F. Defendant CHA's Statute of Limitations Argument Is Neither Best Considered At This Stage of the Proceedings Nor Meritorious.

CHA raises the statute of limitations to argue that the ABLA Plaintiffs' Motion to Intervene should be denied and their proposed First Amended Intervenors' Complaint "dismissed." CHA Response at 8. As CHA's word choice implies, a complete analysis of the operative statute of limitations is more appropriate in response to a future motion to dismiss, or perhaps even a future motion for summary judgment. Cf. Del Korth v. Supervalu, Inc., 46 Fed. Appx. 846, 848 (2002) (holding that only when facts alleged lead to "no other conclusion than that a complaint is untimely," claims may be dismissed at the motion to dismiss stage; but when "the record does not make it clear when the statute of limitations began to run," such questions should be resolved at summary judgment). At that time, the ABLA Plaintiffs would be afforded the opportunity to brief fully (and this Court would be afforded the opportunity to consider fully) not only their continuing violations theory, but also their substantive legal claims, to the extent that the particulars of the substantive claims inform an analysis of the operative statute of limitations. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

However, even if considered now, CHA's statute of limitations argument must be rejected. First, the ABLA Plaintiffs have properly pled a continuing violation of the Fair Housing Act. Moreover, the ABLA Plaintiffs' dispute CHA's characterization of the operative date from which the statute of limitations began to run. (Indeed, newly discovered evidence suggests that the redevelopment gained "final" HUD approval less than 2 months ago.) Regardless, CHA mistakenly conflate finality—a requirement for ripeness—with the time from which a statute of limitations runs. A discriminatory plan might be final and ripe for proper justiciability purposes without triggering the statute of limitations.

* * *

For the reasons stated above, the ABLA Plaintiffs meet the Rule 24(a)(2) requirement for intervention as of right and their motion to intervene should be granted.

III. ISBY IS CLEARLY INAPPLICABLE IN THE CONTEXT OF THIS CASE

The Gautreaux parties' efforts to avoid a public hearing regarding the ABLA plan are evident. As a last-ditch effort, they argue that this matter should be handled by an Isby-type fairness hearing, even though Isby and its progeny are clearly procedurally and factually distinguishable from the situation here. Isby v. Bayh, 75 F.3d 1191 (7th Cir. 1996).

The underlying case here ended 35 years ago in a judgment order, not a settlement agreement like Isby.[9] There was thus no need for a fairness hearing in Gautreaux under Federal Rule of Civil Procedure 23. Rule 23 provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs," and none occurred.

In contrast, in Isby, the plaintiffs, Indiana prisoners challenging prison conditions and their assignment to a "super max" prison, were certified as a class pursuant to Rule 23(b)(2). Isby, 75 F.3d at 1193, 1194. After lengthy negotiations, the parties submitted a proposed settlement agreement to the court. As mandated by the federal rules, the court held a fairness hearing regarding the settlement agreement, with class members receiving notice pursuant to Rule 23(e). After the hearing, the court approved the class-wide settlement agreement. Id. at 1194. Five prisoners objected to the agreement and appealed, arguing that the district court abused its discretion in approving the settlement. Id. The Seventh Circuit applied a narrow

[9] As this Court is well aware, the Gautreaux Plaintiffs' suit against HUD was settled by consent decree in 1981, but that decree only dealt with the Section 8 program, and is thus unrelated to the ABLA Plaintiffs' First Amended Intervenors' Complaint.

scope of review, setting forth "general principles governing approval of class action settlements" and determining whether the court approval of a settlement met the 23(e) fairness requirement. Id. at 1197.

Isby is not, as the Gautreaux parties would have this Court believe, an instrument for review of matters outside of the Rule 23(e) context. Nor have the Gautreaux parties argued, which they could not, that the entry of the ABLA Revitalization Order was in the context of a class action settlement requiring a Rule 23(e) fairness hearing. Thus, Isby, and its progeny, are entirely irrelevant here.[10]

A. ABLA Plaintiffs Are Not Required to Show "Certain Illegality."

As the Gautreaux parties see it, Isby would limit the Court's analysis to whether the ABLA Revitalization Order is "lawful, fair, reasonable, and adequate" and would allow the opposing parties to attack the merits of the ABLA Plaintiffs' substantive case now. Receiver Response at 11. Under this theory, the ABLA Plaintiffs would have to prove that the complained-of "illegality or unconstitutionality [appears] as a legal certainty on the face of the agreement." Id. However, the case law is clear that this is not the standard that applies to motions to intervene. See Section II.A., supra (Standard for Intervention). Rather, the ABLA Plaintiffs' non-conclusory allegations must be taken as true. Nonetheless, it is worth noting the ample legal support for the ABLA Plaintiffs' claims: See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 375 (1982) (plaintiffs suffer injury when they lose opportunities to live in integrated housing); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33 (D. Mass. 2002) (adverse disparate impact and duty to affirmative further fair housing). Reese v. Miami-Dade

[10] The Gautreaux parties also cite Armstrong v. Board of Directors, 616 F. 2d 305 (7th Cir. 1980), a school desegregation case which settled after 10 years of litigation. Armstrong, at 308-9. However, like Isby, Armstrong merely applies to Rule 23(e)'s fairness hearing requirements, and is not applicable here.

County, 210 F. Supp. 2d 1324 (S.D. Fla. 2002) (statutory requirement to affirmatively further fair housing enforceable under § 1983); Cabrini-Green LAC v. Chicago Hous. Auth., 1997 U.S. Dist. LEXIS 625 (adverse disparate impact); NAACP, Boston Chapter v. HUD, 817 F.2d 149 (1st Cir. 1987) (HUD duty to affirmatively further fair housing enforceable under the APA). Though not at this juncture, ABLA Plaintiffs look forward to the day when they can prove the illegality of the ABLA redevelopment plan.

B. The Receiver's Inability to Apply the Reasonableness Isby Standard Here Further Demonstrates that Isby Is Inapplicable.

The Receiver's pained attempt to fit the facts of this case into the Isby reasonableness standard, one which actually shifts the view of the case to the "light most favorable to the settlement," is further evidence of Isby's inapplicability. Receiver Response at 12. As the Receiver acknowledges, the five-factor test to determine if a settlement is "fair, reasonable and adequate" does "not apply literally to our current post-judgment posture." Id. Indeed, they do not apply at all. For example, the first, second, and fifth factors, the "strength of plaintiff's case on the merits" compared to the settlement offer, the "complexity, length, and expense of litigation," and the "stage of the proceedings and amount of discovery completed at the time of settlement" are, as the Receiver concedes, ill-suited for consideration here. Receiver Response at 13-14. Each factor clearly relates to situations where class members, at a Rule 23 fairness hearing on the settlement, may want to continue to pursue litigation of the underlying case. Mangone v. First USA Bank, 206 F.R.D. 222 (S.D. Ill. 2001). Finally, the "opinion of competent counsel" (an even more deferential standard than adequacy under Rule 24) and the "evaluation of the amount of opposition to settlement among the affected parties" (the third and forth factors), are clearly references to the settlement of a class action suit, where the class and its counsel have an opportunity to speak for or against its proposed resolution. Fed. R. Civ. Pro.

24 (emphasis added). The Gautreaux parties cannot fit this square peg—Isby—into this round hole—Gautreaux v. CHA.

C. This Court's Previous Orders Demonstrate That It Envisioned Intervention Rather Than an Isby-style Hearing as the Proper Process for Resolving the ABLA Plaintiffs' Claims.

Further, this Court's previous orders in this case confirm that intervention is the appropriate process for challenging the ABLA redevelopment plan. In its Order of November 4, 1999, this Court adopted the arguments pressed by the Gautreaux parties at that time, and dismissed the ABLA Plaintiffs' original complaint, then pending before Judge Gettleman, with instructions that the ABLA Plaintiffs could seek intervention in Gautreaux. See Order of November 4, 1999, Exhibit C of ABLA Memorandum. In its Order of September 25, 2000, this Court once again dismissed the ABLA Plaintiffs' complaint, denying their motion to intervene but inviting them to reinstate their "motion to intervene" if objections remained after a hearing on the merits of the plan.

In its November 1999 order, this Court cited Hines v. Rapides Parish Sch. Bd., 479 F.2d 762 (5th Cir. 1973), which suggests that intervention was the proper remedy for allowing parents to challenge the remedial implementation of a settled school desegregation consent decree. Id. at 765. The Hines court explained that if intervention were granted, it would involve "the opportunity to present the claims to the court and to [other involved parties] . . . to have the allegations considered on the merits." Id. This Court's recognition of Hines is significant, because subsequent cases have read Hines to set the liberal standard for parents' intervention in school desegregation cases, where it is of paramount importance that children reap the benefits of integrated education. See Bradley v. Pinellas County Sch. Bd., 961 F.2d 1554, 1556-57 (11th Cir. 1992). As Bradley noted:

> This court has long recognized the intense interest of parents in the education of their children, and it has been solicitous of their opportunity to be heard. Intervention in suits concerning public schools has been freely allowed . . . .

Id. at 1557. Equally important, the Supreme Court in Havens recognized the intense interests individuals have to be free of housing discrimination, and to enjoy the benefits of interracial association. Havens, 455 U.S. at 376.

In that same order, this Court also cited Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1046 (5th Cir. 1975), which confirms as well that intervention is the proper procedure for individuals challenging the remedial implementation of a settled school desegregation consent decree. There, as here, the potential intervenor asserted civil rights claims aside from claims about violations of the consent decree. Id. at 1049. The Davis court explained that those claims could all be litigated on the merits if the court granted intervention:

> Intervention would not result in the loss of substantive or procedural rights under Title VII. It will result in better management of the pending [] class action. It will enable the district court to consider [potential intervenor's] Title VII rights alone, as well as in conjunction with rights which may be due him under other statutes and under the consent order.

Id.

IV. PERMISSIVE INTERVENTION SHOULD BE GRANTED.

The Gautreaux parties' briefs in opposition to the ABLA Plaintiffs' motion to intervene conflate the concepts of intervention as of right and permissive intervention. The Gautreaux parties argue that since intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is allegedly improper, permissive intervention under Federal Rule of Civil Procedure Rule 24(b)(2) must also be improper. However, this reasoning fails to grasp the fundamental difference between the two types of intervention.

It is generally understood that permissive intervention under Federal Rule of Civil Procedure 24(b)(2) is discretionary in nature; that is, the district court has broad discretion in determining whether to grant permissive intervention. United States v. 36.96 Acres, 754 F.2d 855, 860 (7th Cir. 1985) (finding "[p]ermissive intervention is wholly discretionary with the district court and will be reversed on appeal only for an abuse of discretion").

A court's determination of permissive intervention is independent of its decision on intervention as of right since, among other things, certain elements are mandatory for the latter but not for the former. For example, a permissive intervenor need not have any direct personal or pecuniary interest in the subject matter of the main action, even though a "significant protectable interest" is necessary for intervention as of right. Compare SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459 (1940), with United States v. 39.96 Acres, 754 F.2d 855, 858 (7th Cir. 1985).

It follows that a court's denial of intervention as of right does not directly bear on its determination of permissive intervention, which, as the courts have held, is purely discretionary and may take into account other relevant factors not considered under the rubric of intervention as of right. See infra. Thus, the Gautreaux parties' conflation of the two intervention concepts, and their implication that the denial of one must result in the denial of the other, is utterly misplaced.

Even though the decision to allow permissive intervention is ultimately a discretionary one, courts have generally agreed that three threshold requirements must be met: (1) whether the intervention is timely; (2) whether there is a common question of law or fact with the main action; and (3) whether the court has independent jurisdiction over the proposed claim(s).

Coburn v. Daimler-Chrysler Servs. N. Am., L.L.C., 218 F.R.D. 607, 610 (N.D. Ill. 2003); 6-24 Moore's Federal Practice § 24.11 (2004).

A. As Set Forth Previously, the ABLA Plaintiffs' Motion to Intervene Is Timely.

As set forth in Section II.B., above, the ABLA Plaintiffs' motion to intervene was filed in a timely manner.

B. The ABLA Plan's Discriminatory Site-Selection Presents Common Questions of Law and Fact With The Underlying Gautreaux Order.

Judge Posner has noted that the presence of a common question of law and fact is "all that is required for permissive intervention . . . . Once this condition is satisfied, . . . the judge must then decide as a matter of discretion whether intervention should be allowed." Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 509 (7th Cir. 1996) (vacated denial of permissive intervention). Here, all the claims involved in the ABLA Plaintiffs' lawsuit arise out of a common factual or legal question. All claims arise out of the ABLA redevelopment plan and whether or not the plan is discriminatory, violating both federal fair housing and other federal laws. The opposing parties' defense to this challenge is the revitalizing order entered by this very Court. A common question of fact exists if evidence on the same issue is relevant to both an intervenor's claim and the claims in the underlying action. Moore's Federal Practice, supra, § 24.11.

Here, evidence of the discriminatory siting of ABLA housing would be relevant to the ABLA Plaintiffs' claims as well as to the claims in Gautreaux. Just as the ABLA Plaintiffs challenge the discriminatory siting of housing in the ABLA Redevelopment Plan and its discriminatory effect on African-Americans, women, and children (who are also former or current public housing residents or waiting list applicants), the Gautreaux order prohibits discriminatory siting of Chicago's public housing and discrimination against its African-

American residents and waiting list applicants. Clearly then, the issues and facts about which the ABLA Plaintiffs claims are made are inextricably intertwined with the underlying issues and facts of Gautreaux. Thus, ABLA Plaintiffs have met this permissive intervention requirement.

C. The Court Has Independent Jurisdiction Here.

The Gautreaux parties do not dispute the fact that this Court has independent jurisdiction over the ABLA Plaintiffs' claims, based on 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 42 U.S.C. § 3613 (fair housing).

* * *

Once the above three requirements are satisfied, a district court's discretionary determination of whether to grant permissive intervention relies in large part on two factors: whether intervention will unduly (1) delay or (2) prejudice the adjudication of the rights of the original parties. EEOC v. Regis Corp., 2001 U.S. Dist. LEXIS 11351, at * 2 (N.D. Ill. Jan. 17, 2001).

1. Intervention will not delay the adjudication of rights.

The Gautreaux parties do not argue that permitting the ABLA Plaintiffs to intervene would unduly delay the adjudication of the underlying lawsuit. Rather, their focus is on the issue of whether the ABLA Plaintiffs delayed in bringing their intervention motion in the first place. Since the latter issue is an entirely separate question having to do with intervention as of right under Rule 24(a)(2), it has no bearing on the analysis for permissive intervention. Indeed, this Court, when it dismissed the ABLA Plaintiffs' original complaint before Judge Gettleman, recognized the need for all the claims to be heard at one time so there would be no delay. See Order of November 4, 1999, Exhibit C of ABLA Memorandum.

While the Gautreaux parties have argued that the ABLA Plaintiffs are coming in at the eleventh hour, nearly forty years after a judgment, post-judgment intervention has often been allowed, even years after a suit has been resolved by the original parties; this is particularly true when the intervenor is being affected by court-ordered relief during the remedial stage of the case. See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) (allowing intervention by gas company in antitrust action so it could participate in formulation of remedial decree, after consent judgment had been entered). The Seventh Circuit has recognized that persons whose interests are harmed by a decree entered in a race discrimination case have a right to be heard through intervention, particularly where, as here, they themselves are members of federally protected classes. United States v. City of Chicago, 870 F.2d 1256, 1263 (7th Cir. 1989) (recognizing post-judgment intervention based on consent decree).

2. Denial of intervention will greatly prejudice the adjudication of ABLA Plaintiffs' rights.

While the Gautreaux parties passionately argue that they would be prejudiced by allowing the ABLA Plaintiffs to intervene in the case, that assertion is simply exaggerated. Notwithstanding their failure to make clear arguments against permissive intervention, choosing instead to incorporate and repeat their arguments against intervention as of right, and conflating the two concepts, their heavily exaggerated arguments still miss the mark. In fact, the very opposite is true: It is the ABLA Plaintiffs, not the Gautreaux parties, who would be prejudiced if they are not allowed to intervene because, with the dismissal of their complaint before Judge Gettleman, they will have no forum for their claims, the ultimate prejudice to any litigant.

Furthermore, as the Gautreaux Plaintiffs noted in their Responses, courts are able to consider whether the intervenor will benefit by intervention. United States Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978). Clearly, the ABLA Plaintiffs will benefit by being

allowed to intervene in this case. After weighing the extreme prejudice (no forum for their claims) to the ABLA Plaintiffs against the exaggerated prejudice asserted by the Gautreaux parties, and after taking into account the benefit to the ABLA Plaintiffs, this Court should find that granting permissive intervention to the ABLA Plaintiffs is lawful and necessary.

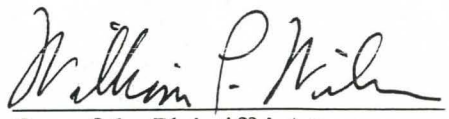
Moreover, the Gautreaux Plaintiffs' brief prematurely concludes that just because they believe there already is an "adequacy of representation" of the ABLA Plaintiffs' interests by existing parties in the action that permissive intervention must be denied to the ABLA Plaintiffs. While inadequacy of representation is a necessary factor, albeit slight, for intervention as of right under Rule 24(a)(2), this factor is merely a discretionary factor for permissive intervention under Rule 24(b)(2). See, e.g., Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 101 F.R.D. 497, 502 (E.D.N.Y.) (granting permissive intervention and holding that adequacy of representation of intervenors' interest by existing parties is "minor factor at most" in determining motions for intervention). Even assuming arguendo adequate representation by the existing parties of the ABLA Plaintiffs' interests, it does not necessarily follow that a court must deny the ABLA Plaintiffs permissive intervention on this ground alone.

Based on the foregoing principles, this Court should grant the ABLA Plaintiffs permissive intervention under Rule 24(b)(2).

V. CONCLUSION

For the above stated reasons, the ABLA Plaintiffs hereby respectfully request that the Court grant the ABLA Plaintiffs' First Amended Motion to Intervene.

Dated: June 9, 2004

By: 
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List of Exhibits

Exhibits	Description
A	Transcript of Proceedings of May 20, 2004
B	ABLA Sources and Uses Chart of July 20, 2001

Exhibit A

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

DOROTHY GAUTREAUX, et al.,	)	No. 66 C 1459
	)	66 C 1460
Plaintiffs,	)	
	)	
vs.	)	May 20, 2004
	)	10:30 o'clock a.m.
CHICAGO HOUSING AUTHORITY, et al.,	)	Chicago, Illinois
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HON. MARVIN E. ASPEN

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THE CLERK: 66 C 1459, Gautreaux versus CHA.

THE COURT: Good morning.

MR. HIRSHMAN: Good morning, your Honor. Harold Hirshman, representing the concerned citizens.

MR. WILEN: William Wilen on behalf of the intervenor plaintiffs as well.

MS. LEGENZA: And Sharon Legenza for the intervenor plaintiffs.

MR. FELDMAN: Good morning. Edward Feldman for the Receiver.

MR. JOHNSON: Good morning, Judge. Tom Johnson for the CHA.

MR. POLIKOFF: Alex Polikoff for the plaintiffs.

MS. WAWZENSKI: Linda Wawzenski for HUD.

THE COURT: Good morning to you all.

I have two motions by the intervenor plaintiffs, one for preliminary injunction and one for the proposed scheduling order. I assume that the parties want some time to respond?

MR. FELDMAN: Yes.

There's actually three motions, because one of them is a motion to intervene, which the scheduling order relates to.

THE COURT: I have that one as well.

MR. FELDMAN: Yes, we do, and we appreciate your hearing us this morning. The schedule we want to suggest is

very close to what you had set yesterday before we called.

We wanted to give you a brief status report on the status of the development and a sense of urgency, which I think the briefing schedule is consistent with. But we wanted to advise you of an urgency with respect to phase one as well as the rest of the development so that we can ask the Court to give a prompt ruling according to a schedule that we're going to suggest to the Court, particularly on the threshold motion, which is the intervention motion, because if there is going to be opposition to intervention, and if intervention is denied, then there is no preliminary injunction motion, although there might still be some sort of hearing that the Court contemplated a few years ago, when it found the case at that procedural juncture unripe.

The parties agreed that by May of 2002 this matter was ripe, and actually probably several months before May 2002, when the Telesis group finished the planning process. And they have not sought intervention until now.

Phase one is scheduled to close imminently. Phase one will have 419 units, of which 126 are public housing units, and they are scheduled to begin construction on July 1st. That means the closing has to occur before July 1st. That July 1st date is critical, and there's a couple of reasons for that.

One is that because of the tax credit rules -- and

tax credit financing is, of course, part of the mixed finance contemplated for this development -- the development has to be completed by December 31, 2005, so a year-and-a-half from now.

If construction begins as scheduled on July 1st, the construction schedule is fairly ambitious and the time line for the completion of construction is December 1, 2005. So there's only a one-month cushion in a construction schedule before the tax credits would go away.

So that's --

THE COURT: That is interesting.

MR. FELDMAN: And everybody knows what can happen in construction.

So, as I said, the closing needs to occur before so that the funding is there to do the construction.

The other deadline that is significant happens a few days before July 1 and is another tax credit driven deadline.

By June 24th the developer must be obligated on ten percent of the construction development expenses. What that means is, they have to have placed order and have delivered to the site by the July 1 date the initial construction materials to go forward with the development, and those are the materials that are, of course, tailored to the design and architectural drawings that are already in place.

Permits are already pulled and stamped. This is ready to go. All that's waiting is the closing process.

The pendency of this motion and the pendency of litigation puts a cloud over the ability to close because the lenders and investors will be reluctant and, we believe, will not close if this Court has not ruled on the pending matters.

There have been, since the matter became ripe, thousands of person hours expended on the further planning and development, and that includes not only the developer and not only the Receiver and CHA, but the elected tenant leadership, the LAC for ABLA, which fully supports this plan, the Gautreaux plaintiffs, which represent the class in this case of tenants, and waiting list CHA applicants, who fully support this plan.

So we have before the Court a group of CHA residents, people who allege that they were kicked out of CHA, waiting list applicants -- they have certain objections to this plan that the elected tenant leadership and the class representatives support. We would simply ask the Court to move in an expedited fashion to resolve this so that we can begin on July 1 and start, after all these many years, providing the housing.

The schedule we're suggesting is slightly different from what the Court had set. That would be June 3rd for responses to the filing, June 9 --

THE COURT: I will enter an order. Because you're going to be doing the responding, is that all right as far as

--

MR. JOHNSON: Right. We have talked about it, Judge. June 3rd is great.

THE COURT: All right.

MR. FELDMAN: Then we are suggesting June 9th for any reply, and ask that the Court rule by June 18th.

And between that briefing and the 18th, if the Court feels it needs --

THE COURT: I will order myself to rule on June 18th; is that the idea?

(Laughter.)

MR. HIRSHMAN: Your Honor, I want to start by objecting to the schedule that's being proposed.

We too want this expeditiously decided, but the salami approach of first dealing with intervention and taking three weeks to do that, and then deciding what we're going to do, strikes me as a way to perhaps get us to go away without addressing the fundamental issues we've raised but doesn't leave the Court time to contemplate the serious issues we have raised.

Now, Mr. Feldman's proposition is that it's --

THE COURT: You think I need more than they have given me to decide the motion; is that what you're saying?

MR. HIRSHMAN: It isn't only -- if he is to be accepted at face value, on the 18th, if we are allowed to

intervene, we still have to deal with our expedited motion for discovery, discovery and the hearing on the preliminary injunction.

He says that everything falls apart on July 1. So under his theory, after your Honor has been ordered to rule on the 18th, if he wins, then we -- you know, everything is copacetic. And if we win, there will be another rush to judgment. You'll have twelve days to look at all of these issues and reach some kind of conclusion.

THE COURT: Not necessarily. I think the only urgency at this point is whether or not to allow you to intervene.

Now, if you intervene, I'm certainly going to give you enough time to present your position adequately.

MR. HIRSHMAN: Your Honor, on that point I would like to read from your order of September 25th of 2000:

"Finally, once a development plan is finalized, we expect to hold a hearing on the merits of the plan which would involve either receiving oral or written submissions from all interested parties. At that time, if the CRA believes the final plan is in violation, it may renew its motion to intervene."

That hearing has never been held. The Receiver never came forward, the CHA never came forward, no one came forward to ask your Honor to hold the hearing contemplated by that

order.

So the problem that now, all of a sudden, there is development that's supposed to start, you know, imminently, is a problem of their making, not ours. And we believe, your Honor, that in order to decide the motion to intervene, you have to understand the genesis of the 1998 order and what's happened since.

THE COURT: That's set forth fully in your papers, is it not?

MR. HIRSHMAN: It is, your Honor.

THE COURT: All right. It's not going to take me more than two or three weeks to understand it, is it?

MR. HIRSHMAN: The other issue, your Honor, is that I believe that the reasons for intervention would be buttressed by demonstrating the failure to take into consideration the very facts which form the expert opinions that we have tendered to your Honor.

We have no explanation, as your Honor contemplated, of why this plan is indeed, quote, the plan and the one that conforms with the law. And I don't see why it would be inconsistent to permit us to have limited discovery, while your Honor is looking at that issue, to see whether we can supplement the facts as we already know them to demonstrate to your Honor that the valid legal points we're making deserve a hearing.

THE COURT: Okay. Any reply?

MR. JOHNSON: Can I reply on behalf of CHA?

THE COURT: Yes.

MR. JOHNSON: Okay. More than four years ago they came in and raised some claims when the plan was just being developed. Your Honor quite properly said, hey, this is just starting out. All right?

Their intervention was denied. That was in 2000.

MR. HIRSHMAN: '99.

MR. JOHNSON: It was filed in '99, the Judge ruled in 2000. All right.

Then the plan went forward, and by November of 2001 the plan had been developed, it had been approved by the CHA board, it was approved by HUD, November of 2001. That's two-and-a-half years ago. After that the process went forward, a very complicated, very substantial process.

You know, your Honor, that at ABLA there are many stakeholders. A very complicated process went forward that included RFPs, the selection of a developer, that developer doing a site plan, then doing all the architectural planning, then putting together all the financing.

Throughout that entire two-and-a-half year period everyone knew what was going on, including these plaintiffs. There's quarterly reports that your Honor receives that they received that talked all about it. There were hundreds of

meetings at ABLA with all kinds of people doing this planning.

So we get to this point. Two-and-a-half years later we're within a few weeks of closing and they show up and say, oh, now we have all these legal issues. It's a real practical problem for us.

And I think the suggestion that somehow we are at fault for not coming in earlier when there was a plan that everybody agreed to, including the elected tenant leaders and including the lawyer for the tenants as well as many other stakeholders, the idea that that is our fault that we are at this juncture just seems to me to be ludicrous.

MR. HIRSHMAN: Your Honor, could I say two things?

THE COURT: Sure.

MR. HIRSHMAN: First of all, we are met with the sort of Goldilocks argument: We're here too soon, now we're here too late. But the point is that Mr. Johnson was obliged to come to this Court for a hearing. That's what this Court ordered. That hearing has never been held.

They went forward and did all these things without the Court's permission. And we went to the trouble of going to a whole series of experts to make sure we didn't just have our own views here and put them out for them to look at and understand.

THE COURT: Yes.

Okay. Assuming that ABLA is correct that -- or, I'm

sorry.

Assuming that ABLA could have come in earlier and had ample time to do it, weren't you still obligated to come before the Court?

MR. JOHNSON: I don't know if Mr. Feldman wants to answer that, or I will.

What we have done on -- remember, ABLA is one -- as your Honor well knows --

THE COURT: I understand --

MR. JOHNSON: There are many developments going on.

THE COURT: I understand that.

MR. JOHNSON: And we have done -- for each one of those developments, we have kept your Honor apprised through the Receiver's reports of what is going on.

When we go to where we are now at ABLA, that is, we have selected a developer and that developer gets ready to build, we don't come in for contested hearings. We apprise your Honor of what is going on, and as long as everybody is in agreement, your Honor signs off on it. We have apprised you of what is happening at ABLA consistently through those reports.

Where there is an objection, then sometimes your Honor -- or in the case of an objection -- not sometimes -- your Honor hears that objection.

THE COURT: So you read the earlier order to require

a hearing only if there are objections?

MR. JOHNSON: We didn't know there was any objection to this until --

THE COURT: No. I understand that.

But do you read the earlier order to require a hearing only if there are some objections?

MR. JOHNSON: Well, there's really nothing to resolve at a hearing unless there are objections, I guess is our sense of it.

MR. POLIKOFF: I would like to add, your Honor, that the pattern in similar developments across the city for years has been precisely what you just stated.

THE COURT: I understand that. Nobody has ever objected to that pattern before; that's the only point I'm making.

MR. FELDMAN: We were planning -- in our response to be filed on the 3rd, we were planning on addressing the hearing question and address why the plan is appropriate.

THE COURT: All right. I am going to enter the briefing schedule on the motion to intervene as suggested by Mr. Feldman, June 3rd to respond, June 8th to reply.

MR. WILEN: I think he said June 9th.

THE COURT: I'm sorry, excuse me. June 9th to reply. And I may even beat the deadline that Mr. Feldman has given me.

After I rule -- and if I've ruled in your favor, I assure you I will give you ample time to do what you have to do to fairly pursue the other two motions, but I will deal with it at that time.

MR. WILEN: Your Honor, since we only have six days to respond and we have four sets of lawyers to respond to, I would request that they combine their resources into one brief so that we don't have to deal with four sets of, you know -- I mean, if they have something to say, they can do it in one brief and that will allow us to respond in six days. I don't want to have to come in and ask for more time because there are 15, you know, different arguments made by four different lawyers representing four different parties that have slightly different interests.

THE COURT: Well, I'm not going to order them to do that. If it makes sense for you to file a joint pleading, that's fine. I will ask them not to be redundant, so not only will you not have to respond separately, but I won't have to read the same thing over and over again as well.

MS. WAWZENSKI: I'm assuming, your Honor, that -- HUD is no longer a party to Gautreaux and -- but we will have leave to respond?

THE COURT: Yes.

MS. WAWZENSKI: Thank you, your Honor.

THE COURT: And what I will do, I will set this on my

status call for June 22nd.

I'm going to try to meet your deadline, Mr. Feldman, but I am giving myself a little cushion, all right?

MR. FELDMAN: Yes, Judge. I'll consider your request for an extension, your Honor.

(Laughter.)

THE COURT: Instead of an extra month, I'm giving myself a few extra days and hopefully I'll have a decision well before then. Unless you hear contrary from me, I'll see you on June 22nd at 10:30.

MR. JOHNSON: Thanks, Judge.

MR. HIRSHMAN: Thank you, your Honor.

MR. FELDMAN: Thank you, your Honor.

(Which were all the proceedings had at the hearing of the within cause on the day and date hereof.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

Marie E. Hacker
Official Court Reporter
U.S. District Court
Northern District of Illinois
Eastern Division

6/8/04
Date

Exhibit B

ABLA Revitalization Plan
Sources and Uses - Entire Development

	SOURCES OF FUNDS				
	Units		Totals	For Sale - HOMESTART & TRADITIONAL	Rental (9% LIHTCs)
3	HOPE VI Grant		46,973,862	-	46,973,862
4	Federal Tax Credit Equity		78,000,000	-	78,000,000
	Competitive Allocation:	*10,000,000*			
6	TIF		39,013,829	23,843,844	15,169,985
7	HOME / GAP FINANCING**		54,908,223	-	54,908,223
8	New Homes for Chicago		5,850,000	5,850,000	-
9	IAHTF		3,750,000	750,000	3,000,000
10	FHLB AHP		2,500,000	500,000	2,000,000
11	City/HOPE VI Demolition/ Relocation Funds		12,000,000	3,500,000	8,500,000
12	Home Sales		322,864,797	322,864,797	18,968,621
13	City Infrastructure Funds (waiting for estimates)		38,445,750	21,278,250	17,167,500
14	Private Debt - Rental Units		-	-	-
	TOTAL SOURCES		608,806,460	378,086,890	244,688,191
	USES OF FUNDS				
	Site Acquisition and Development:				
19	Land		8,610,000	5,098,108	3,511,892
20	Environmental Remediation		2,500,000	-	2,500,000
21	Relocation		2,000,000	-	2,000,000
22	Demolition		10,000,000	3,500,000	6,500,000
23	Infrastructure		38,445,750	21,278,250	17,167,500
24	Site Improvements & Landscaping		24,410,000	13,510,000	10,900,000
	Building Construction:				
27	Residential Buildings	$ 110.00	329,725,220	201,516,150	128,209,070
28	Non Dwelling Structures		-	-	-
29	Hard Cost Contingency	5.00%	20,129,049	11,990,220	8,138,829
30	Construction Management	3.00%	12,681,301	7,553,839	5,127,462
	Soft Costs:				
33	Appraisals & Market Study		244,100	135,100	109,000
34	Architecture & Engineering	4.00%	16,103,239	9,592,176	6,511,063
36	Closing, Survey & Title	For Sale 10.00% / Rental DOH Max.	1,355,600	810,600	545,000
37	Developer Fees		41,398,889	29,871,352	11,527,537
38	Program Management	2.00%	8,992,916	5,462,146	3,530,770
39	Finance Fees & Interest		18,793,063	17,124,364	1,668,698
40	Taxes & Insurance		3,094,250	2,276,750	817,500
41	Legal & Accounting	1.50%	7,656,546	4,734,322	2,922,223
42	Marketing & Rent Up		21,961,888	20,871,888	1,090,000
43	CHA Admin/Mgmt Improvements		-	-	-
44	Reserves - ACC		2,718,000	-	2,718,000
45	Reserves - Rent Up		1,649,460	-	1,649,460
46	Reserves - Operating		2,474,190	-	2,474,190
47	IHDA and Miscellaneous Fees		575,000	-	575,000
48	Inflation --Rental Costs Only		24,067,841	-	24,067,841
49	Soft Cost Contingency	3.00%	2,093,511	1,666,356	427,155
	TOTAL USES		601,679,812	356,991,620	244,688,191
	Surplus/Shortfall (+/-)**		21,095,270	21,095,270	-
	Number of Units		2,441	1,351	1,090
	Cost per Dwelling Unit*		207,728	238,085	170,101
	Cost per Square Foot*		$ 169	$ 176	$ 159

* Cost excludes all acquisition, remediation, infrastructure, demolition, non-dwelling construction, program management and inflation costs.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 9, 2004 he served copies of Notice of Filing and ABLA Plaintiffs' Reply Memorandum In Support of Their Motion to Intervene on the parties listed below causing true and correct copies of the same to be delivered by messenger tendered to the following parties:

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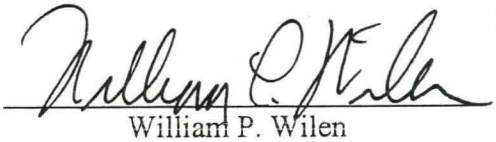

William P. Wilen