Bible
Team

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

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

STATEMENT OF THE RECEIVER CONCERNING THE CENTRAL ADVISORY COUNCIL'S (1) MOTION FOR CLARIFICATION OF JULY 14, 2005 ORDER, AND (2) MOTION TO AMEND THE COURT'S JULY 27, 2005 ORDER

The Central Advisory Council ("CAC") has asked two questions concerning the Court's July 14, 2005 rulings. First, it asks whether the Court's rulings constitute a waiver of certain HUD regulations. See Central Advisory Council's Motion for Clarification of the Court's July 14, 2005 Order ("Motion to Clarify") ¶8. Second, it asks whether the July 14 Order allowing a site-based waiting list at Lake Park Crescent also applies to all the remaining public housing units referenced in paragraphs 2(a) and 2(b) of the June 3, 1996 revitalizing order, or is limited to the public housing units in Phase One of the Lake Park Crescent development. Id. ¶9.

The Receiver respectfully submits that the Court's July 14 rulings are clear. As discussed below, the answer to both questions is "no."

The CAC has also filed a Motion to Amend the Court's July 27, 2005 Order ("Motion to Amend"), which had set a briefing schedule concerning the Motion to Clarify. The Receiver's comment concerning the Motion to Amend is set forth in Section III below.

I.

THE COURT DID NOT WAIVE HUD REGULATIONS, AND NO WAIVER IS REQUIRED BECAUSE THE ORDER DOES NOT CONFLICT WITH ANY REGULATIONS.

As the CAC acknowledges, the "specific requirements and prohibitions contained in HUD's regulations [were] not briefed by the parties" in their detailed briefs preceding the July 14 rulings. Motion to Clarify ¶4. Nothing in the Court's rulings suggests that it was intending to waive any HUD regulations that might apply. Thus, while only the Court can speak definitively as to its intent, it seems clear to the Receiver that the rulings were not intended to waive any HUD regulations.

The CAC's first question, however, appears not to speak to intent, but to effect. It asks whether the rulings "constitute" a waiver of certain HUD regulations. Its question is premised on its apparent belief that the rulings conflict with certain HUD regulations, and that a judicially-imposed waiver is therefore necessary. It may be hoping for an affirmative answer to the question to set up an appeal issue, which would ask whether a federal court implementing an order to remedy racial segregation adjudicated to have violated the Fourteenth Amendment can override federal regulations in order to effect the constitutional remedy. Although the Receiver believes that a federal court has such power, this Court need not reach this question because its July 14 rulings do not conflict with HUD regulations, and no waiver is required.

CAC relies principally on two regulations, 24 C.F.R. § 903.2(d) (2005), and on uncited "applicable HUD regulations" that CAC contends would not permit CHA and Draper & Kramer to go outside the existing CHA waiting list.

A. 24 C.F.R. § 903.2(d) Does Not Apply.

The first regulation, 24 C.F.R. § 903.2(d) (2005), does not apply for several reasons. First, 24 C.F.R. § 903.2(b), the subpart in which the cited regulation appears, does not apply to the CHA. In its response to the Motion to Clarify, the CHA explains why that is so, and the Receiver adopts that position. Second, even if the subpart and § 903.2(d) applied to the CHA, the July 14 rulings do not conflict with them and no waiver is required.

That section reads in its entirety (emphasis added):

> (d) Fair housing requirements. All admission and occupancy policies for public housing and Section 8 tenant-based housing programs must comply with Fair Housing Act requirements and with regulations to affirmatively further fair housing. The PHA may not impose any specific income or racial quotas for any development or developments.

Contrary to the Motion to Clarify ¶7, the 50-80% income requirement in the June 3, 1996 revitalizing order, which pertains to half of the public housing units, does not conflict with this regulation. In the first place, the regulation does not apply on its face. The CHA did not "impose" any specific income quota. It is not clear what is meant by "income . . . quotas," since the term is not defined. But if the 50-80% requirement is construed as an "income quota," it was "imposed" by the Court as part of a desegregation remedy, not by CHA, and it was imposed in 1996, years before the regulation was even promulgated, as discussed below. The regulation only applies to a PHA imposing a quota of its own accord. For the regulation to apply here, it would have to say that no Court can impose an income quota, and that the regulation applies retroactively to pre-existing Court orders. Such a reading of the regulation is unreasonable, contrary to its plain language, and would raise serious constitutional questions if it were so read.

As just noted, the regulation did not exist in 1996. It was promulgated on December 22, 2000 (65 FR 81222), and amended on August 6, 2002 (67 FR 51033). See Motion to Clarify, Exhibit One at 298. Nothing in the regulation suggests or implies that HUD was intending to override federal court injunctions or consent decrees that might conflict with its regulation. Indeed, if that were HUD's intent, the flip side of the implicit constitutional question posed by the CAC would be raised: whether the executive branch, through an administrative agency, has the power to waive or overrule existing federal court remedial orders? Such a position would raise serious questions under the Supremacy Clause and separation of powers principles. Fortunately, nothing in the regulations hints that this was HUD's intent. Indeed, the regulations suggest otherwise. Section 903.2(c)(1)(iv)(A) states that as part of its reporting requirements to HUD, a PHA can explain and justify its income profiles for a development by stating that the development is "subject to consent decrees or other resident selection and admission plans mandated by court action." Thus, HUD clearly recognized the co-existence of judicial remedies and had no intent to interfere with them.[1/] If there were any doubt on this point, the regulations should be construed to avoid the constitutional question, and be read as not intended to override any existing federal court remedial orders, including the June 3, 1996 order. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578, 588 (1988) (construing NLRA to avoid constitutional question).

The remaining sections cited by the CAC pose no problem and require no waiver. Section 903.2(a)(2) merely states that the statutory requirement for deconcentrating poverty and mixing

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1/ As noted earlier, this regulation, and the entire subpart, do not apply to CHA, for reasons explained in CHA's filing. However, this regulation demonstrates that HUD did not intend to interfere with or override federal court injunctions.

incomes "is not to be construed to impose or require any specific income or racial quotas for any development or developments." No one is arguing that the statute requires income quotas, and the June 3, 1996 order, which predated the relevant statutory section, 42 U.S.C. § 1437n(a)(3)(B), by over two years, was not based on any such understanding. Similarly, nothing in the June 3, 1996 order conflicts with 24 C.F.R. §960.206(b)(2) (2005), which merely provides that a "PHA may adopt a preference for admission of working families."

Finally, it is important to note that the June 3, 1996 order has been in place for nine years, is well-known to HUD, and it has not raised any objection to its provisions. A similar provision is in the Horner consent decree, to which HUD was a signatory, and was approved by this Court and Judge Zagel. Further, RFP's were issued pursuant to the June 1996 order and financial closings have occurred with private developers, reviewed and approved by HUD, without objection.

B. Use of the Site-Based Waiting List Does Not Conflict with HUD Regulations.

CAC argues that HUD regulations "appear" to prohibit CHA from renting to persons in the general public who are not current CHA families or on its current waiting list, Motion to Clarify ¶7, and it refers to "applicable HUD regulations" on the subject. Id. ¶8. However, it cites no such regulations, so the point should be denied for lack of development. The Receiver is not aware of any HUD regulation that prohibits the preferences established in the July 14 order, which still gives preference to existing CHA families and those on its existing wait list, while permitting use of a broader pool of applicants from the community if there are not eligible tenants on the existing lists. Thus, unless CAC can identify any HUD regulation in conflict with the Court's July 14 order, that order cannot be deemed to "constitute a waiver" of the regulation.

II.

THE SITE-BASED WAITING LIST APPLIES TO THE LAKE PARK CRESCENT PUBLIC HOUSING UNITS IN THE 50-80% CATEGORY.

The answer to CAC's second question is simple and follows from the plain language of the July 14 order and the June 1996 revitalizing order. CAC's question is whether the site based waiting list "applies to all the remaining public housing units referenced in [paragraphs] 2(a) and 2(b) of the June, 1996 Order, or is limited to the public housing units in Phase One of the Lake Park Crescent development." Motion to Clarify at 4.

First, ¶2(a) of the 1996 order refers to the site on which Lake Park Crescent is being developed. Paragraph 2(b) of the 1996 order refers to the site on which Jazz on the Boulevard is being developed by a different private developer. The July 14 Order refers only to Lake Park Crescent, and thus applies only to paragraph 2(a) of the 1996 order. Whether a similar order will be necessary for Jazz on the Boulevard is not known at this time. The July 14 Order is without prejudice to anyone's position on that question.

Second, nothing in the July 14 Order suggests that it is limited to Phase One of Lake Park Crescent. It is not.

Third, the July 14 Order does not apply to "all" of the public housing units at Lake Park Crescent, but solely to those (one-half of the total) that are limited to families whose incomes fall within 50-80% of area median income, pursuant to ¶2(d) of the 1996 order. (These are referred to in the July 14 order as the "50%-60% ami units" due to the tax credit restrictions pertaining to most of these units.)

III.

THE MOTION TO AMEND IS MOOT.

The CAC's Motion to Amend is not clear about what CAC is seeking. It is premised on the allegation that neither the CAC nor the Gautreaux plaintiffs "had an opportunity to submit written arguments regarding that portion of the Court's Order which allows the [CHA] to solicit potential tenants from the general public, effectively providing relief to persons who are not members of the Gautreaux class; even though there was no such motion before the Court." Motion to Amend at 1. The premise is incorrect. The CHA's proposed order for a site-based waiting list was attached as part of Exhibit B to its May 26, 2005 Response to CAC's Motion to Amend the June 3, 1996 Order Establishing Minimum Income Limits for Certain Public Housing Units. Additionally, the Receiver's May 26, 2005 Statement Concerning the Central Advisory Council's Motion to Amend the June 3, 1996 Revitalizing Order supported the proposed waiting list. See Receiver's Stmt. at 2, 12. Thus, the CAC had "ample opportunity to submit written arguments" in its Reply, and acknowledged at page 2 of its Reply that the Receiver "supports the creation of a site-based waiting list as proposed by the Developer." The CAC again had ample opportunity to submit written arguments in its Motion to Clarify, which precipitated the July 27, 2005 scheduling order it now seeks to amend. Finally, it had ample opportunity to comment orally at the hearing held by the Court on July 7 concerning the CAC's prior motion.

Apart from these inaccuracies, the CAC's Motion to Amend is moot. In essence, it appears to be asking for an opportunity to file a brief regarding the site-based waiting list. On August 8, 2005 the Court provided such an opportunity when it entered a briefing schedule providing for responses to CAC's two motions to be filed on August 18 and replies on August 25. The CAC is free to submit its arguments in its August 25 filing. However, in light of the fact that the CAC may

submit new arguments for the first time in a reply brief, the Receiver reserves the right to seek leave to submit a sur-reply to any such arguments.

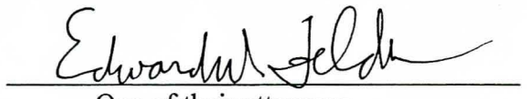
CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court answer "no" to both clarifying questions of the CAC, in a manner consistent with that set forth above. The Receiver also requests that the Motion to Amend be denied as moot.

Respectfully submitted,

DANIEL E. LEVIN AND
THE HABITAT COMPANY LLC, RECEIVER,

DATE: August 18, 2005



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CERTIFICATE OF SERVICE

Edward W. Feldman, an attorney, hereby certifies that on August 18, 2005 he caused a copy of the foregoing **Statement of the Receiver Concerning the Central Advisory Council's (1) Motion for Clarification of July 14, 2005 Order, and (2) Motion to Amend the Court's July 27, 2005 Order** to be served by facsimile and First Class mail, proper postage prepaid, to:

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