No. 05-3968

In the United States Court of Appeals for the Seventh Circuit

DOROTHY GAUTREAUX, *et al.*,	§	*Appeal from the United States District Court for the Northern District of Illinois, Eastern Division*
Plaintiffs-Appellees,	§	
v.	§	*No. 66 C 1459*
CHICAGO HOUSING AUTHORITY, *et al.*,	§	*The Honorable MARVIN E. ASPEN, Judge Presiding*
Defendants-Appellants.	§	

BRIEF AND APPENDIX OF APPELLEES DANIEL E. LEVIN AND THE HABITAT COMPANY LLC, AS COURT-APPOINTED RECEIVER

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 05-3968

Short Caption: Gautreaux v. Chicago Housing Authority (Appeal of Central Advisory Council)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Daniel E. Levin and The Habitat Company LLC in their capacity as receiver for the Chicago Housing Authority pursuant to order dated August 14, 1987

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Miller Shakman & Hamilton LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Edward W. Feldman Date: October 20, 2005

Attorney's Printed Name: Edward W. Feldman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ✓ No ____

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Daniel E. Levin and The Habitat Company LLC are the Court-appointed Receiver for the Chicago Housing Authority in the District Court ("Receiver"). The Receiver objected to the motions of the appellant, Central Advisory Council ("CAC"), which were denied in the two orders from which CAC appeals. [A.18-22, RA.1-2.][1/] The Receiver is, therefore, an appellee with respect to those orders and submits this brief in support of affirmance. On October 26, 2005 the District Court gave the Receiver permission to participate in this appeal.[2/] [CAC Br. at 21, R.182.]

JURISDICTIONAL STATEMENT

The Statement of Jurisdiction contained in the Individual Brief and Appendix for the Central Advisory Council Nonparty, as Appellant ("CAC Br.") at 1-6 is not complete and correct under Seventh Circuit Rules 3(c)(1) and 28(a)(1). In particular, the discussion in CAC Br. at 3-5 recites several factual assertions without citation to the record, which are irrelevant to jurisdiction.

[1/] The abbreviation "RA" refers to the Receiver's Supplemental Appendix attached to this Brief. Citations will simply refer to the page number, e.g., "RA.5." The abbreviation "A" refers to the Appendix attached to appellant's brief. Because the copy of one of the July 14 orders attached to the CAC's brief, A.18-19, is of poor quality, a better copy is included in the Receiver's Appendix at RA.1-2.

[2/] Although the Receiver may not need formal permission from the District Court in order to participate in this appeal as an *appellee*, see Holland v. Sterling Enterprises, Inc., 777 F.2d 1288, 1291-92 (7th Cir. 1985) (receiver may defend claims against estate in his possession); Troelstrup v. Index Futures Group, Inc., 130 F.3d 1274, 1276-77 (7th Cir. 1997), to eliminate any question concerning the Receiver's authority it successfully moved in the District Court for leave to participate in this appeal. See Gautreaux v. CHA, 178 F.3d 951, 955 n.1 (7th Cir. 1999). The order granting the Receiver leave, R.182, was entered after the record was transmitted to this Court. The Receiver intends to file a motion in the District Court to supplement the record with that order.

Basis for the District Court's Subject-Matter Jurisdiction – Circuit Rule 28(a)(1).

This lawsuit was originally filed because of alleged intentional racial segregation in the development of public housing by the CHA. The case arises under the Fourteenth Amendment of the Constitution and was brought under 42 U.S.C. §§ 1981 and 1983. The District Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343.

The District Court ultimately awarded permanent injunctive relief, Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969) ("Injunction Order"), and has entered numerous subsequent remedial orders implementing and/or amending the original permanent injunction, including the orders on appeal here.

Basis for Jurisdiction of the Court of Appeals – Circuit Rule 28(a)(2)

(i) The CAC seeks review of two orders entered July 14, 2005. [A.18-22, RA.1-2.] The first July 14 Order, RA.1-2 ("July 14 Order I"), denied without prejudice a motion by the CAC to modify an agreed remedial order entered by the District Court on June 3, 1996, which concerned eligibility criteria for tenants to occupy newly built public housing units in the North Kenwood-Oakland neighborhood of Chicago. The 1996 order (A.1-4) had modified the Injunction Order as amended, and modified prior remedial orders with respect to priorities given to tenants to move into new public housing units. The second July 14 Order, A.20-22 ("July 14 Order II"), amended the CHA's Tenant Selection and Assignment Plan to permit CHA to allow for the possibility of leasing certain vacant, new public housing units to income-eligible tenants from the general public who are not already living in public housing or are not on CHA's waiting list.

(ii) On July 25, 2005, the CAC filed a Motion for Clarification. [R.137.][3/] The preamble of that motion stated that it was "seeking clarification of the Court's July 14, 2005 Order allowing the creation of a site base [sic] waiting list," which refers only to July 14 Order II. [Id. at 1.] However, in paragraph 8 of this motion the CAC appears to request "clarification" of July 14 Order I as well, as it refers to "the Court's July Order allowing CHA to maintain the 50 to 80% income requirement authorized in the June, 1996 Order." [Id. at 3 ¶8.]

(iii) The District Court denied the CAC's Motion for Clarification on September 9, 2005. [A.23.]

(iv) The CAC filed a Notice of Appeal on October 11, 2005, in which it seeks reversal of both July 14 Orders and the September 9 Order. [R.172.]

The CAC asserts appellate jurisdiction under 28 U.S.C. § 1291. CAC Br. at 6. The Receiver agrees that the July 14 Orders terminated the post-judgment phase of this lawsuit regarding the CAC's motion to modify the June 3, 1996 order, and, therefore, appellate jurisdiction could exist under § 1291 over a timely appeal by a party entitled to appeal. Tranzact Technologies, Inc. v. Isource Worldsite, 406 F.3d 851, 854 (7th Cir. 2005). Alternatively, appellate jurisdiction could exist under 28 U.S.C. § 1292(a)(1), since July 14 Order I denied a motion to modify an injunctive order, the June 3, 1996 Order, and July 14 Order II modified other injunctive orders regarding tenant assignment priorities. Bogard v. Wright, 159 F.3d 1060, 1064-65 (7th Cir. 1998); Ford v. Neese, 119 F.3d 560, 562 (7th Cir. 1997).

[3/] Record documents with docket entries numbered R.171 or lower, are contained in the record in No. 05-3578, which is a separate, unrelated appeal in this case filed by the CHA concerning an attorney's fee award. Those numbered R.172 and higher are contained in the record in this appeal, No. 05-3968.

With respect to July 14 Orders I and II, if the July 25 Motion for Clarification is considered a motion made pursuant to Fed. R. Civ. P. 59(e) that is directed to both July 14 orders, there appear to be no timeliness issues regarding the appeal pursuant to § 1291 from those Orders or from the September 9 denial of the Motion for Clarification of those Orders. Similarly, this Court would appear to have jurisdiction under §1292(a)(1) over the CAC's appeal of the District Court's September 9, 2005 order denying its Motion for Clarification if that Mo tion is considered "functionally the equivalent" of a motion to modify an injunction. Buckhanon v. Percy, 708 F.2d 1209, 1212 (7th Cir. 1983).

CAC's Standing as a Non-Party.

On November 23, 2005, this Court entered an Order that referred to the panel considering this case a question raised by the Receiver in its Docketing Statement: whether the CAC has standing as a non-party to pursue this appeal. The CAC, by its own admission in the first sentence of its jurisdictional statement, is not a party in this case. See CAC Br. at 1; Central Advisory Council's (A Nonparty) Jurisdictional Statement in Support of Appeal at 1; Notice of Appeal at 2 (R.172.) ("[t]he CAC, a nonparty in this litigation, is a City-wide not for profit public housing tenant organization, duly organized under the laws of the State of Illinois"). It is well-settled that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Devlin v. Scardelletti, 536 U.S. 1, 7 (2002) (quoting Marino v. Ortiz, 484 U.S. 301, 304 (1988)). While unnamed class members may be parties for certain purposes (including appeals), see id. at 9-11, the CAC is not itself an unnamed class member, but rather an incorporated entity asserting that it acts

as a representative of CHA residents, who are class members.[4/] A question therefore exists as to whether, under Devlin, the CAC may be considered a "party" with a right to appeal any of the underlying orders. This question appears to be one of first impression. The CAC cites no authority addressing whether an incorporated entity may in this context act as appellant simply because the entity's officers are unnamed class members who may have standing individually under Devlin if they were to proceed in their individual capacities. See CAC Brief at 26-27.

As a general matter, while the Receiver has sometimes objected to formal intervention by non-parties, the Receiver has not objected to giving tenants or tenant organizations an opportunity to present their views to the District Court on various remedial matters, and the District Court has been liberal in permitting such groups to express their positions. The Receiver did not object below, nor did the parties, to giving CAC an opportunity to present its motion to modify the June 3, 1996 order or its subsequent motions. And while it believes CAC's appeal is meritless, the Receiver also does not oppose, as a general policy matter, granting CAC an opportunity to appeal from the adverse rulings below. However, the Receiver, the parties and non-parties cannot create appellate jurisdiction, and Circuit Rules 3(c)(1) and 28(a) require a complete and correct statement regarding jurisdiction. The Receiver submits this statement pursuant to its obligation to the Court to do so.

Finally, there is one other respect in which CAC's jurisdictional statement is not complete and correct. Contrary to the CAC Br. at 4, the District Court's order of June 27, 2000 (R.85 Ex.A) did not afford CAC the right to bring its motion to modify the June 3, 1996 revitalizing order. The

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[4/] The Court may take judicial notice of public records of the Illinois Secretary of State, posted on the internet, which show that the CAC is an Illinois not-for-profit corporation. See http://cdsprod.ilsos.net/CorpSearchWeb/CorporationSearchServlet?fileNumber=49819897&sysId=CD&nameType=MST.

Whether the District Court abused its discretion in entering July 14 Order II, which permitted CHA to lease the vacant 50-80% Units to qualified tenants from the general public if there were no tenants from within CHA or its waiting list who qualify for the Units.

Whether the District Court abused its discretion in denying the CAC's Motion for Clarification.

STATEMENT OF THE CASE

A. Nature of the Case.

The history of this litigation is summarized in this Court's 1999 opinion. Gautreaux, 178 F.3d at 952-53. See also Gautreaux v. Pierce, 690 F.2d 616, 619-20 (7th Cir. 1982). Plaintiffs brought a class action under 42 U.S.C. §§1981 and 1983 alleging that *de jure* housing segregation practiced by the CHA violated plaintiffs rights under the Fourteenth Amendment. In 1969 Judge Austin found the CHA liable for intentional segregation. Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969). He entered an injunction (the "Injunction Order"). Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969). The Injunction Order required CHA to locate "Dwelling Units" in conformity with the requirements of the Order, which originally provided that three Units would have to be located in the "General Public Housing Area" ("General Area") for every unit located in the "Limited Public Housing Area" ("Limited Area"). Broadly speaking, "General Areas" are census tracts in Chicago whose population is less than 30% "non-white." "Limited Areas" are those census tracts with greater than 30% "non-white" population as defined by the U.S. Census Bureau. Id. at 737. See also Gautreaux, 690 F.2d at 619-20. The 3:1 ratio was later amended to a 1:1 ratio. "More generally, the injunction required that the CHA 'affirmatively administer its public housing system in every respect

(whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures.' . . . The idea was to bring about a gradual cure of the CHA's constitutional violations over time, as the CHA made new units available to public housing residents." Gautreaux, 178 F.3d at 953 (quoting Injunction Order, 304 F. Supp. at 741).

From 1969 to 1987, the CHA made virtually no progress in implementing the Injunction Order. On August 14, 1987, Judge Aspen appointed Daniel E. Levin and The Habitat Company (predecessor to The Habitat Company LLC) as the Receiver for the development of new, non-elderly public housing by the CHA ("Receiver Order"). [A.7.] See also Gautreaux v. Pierce, 1987 WL 13590 at * 1 (N.D. Ill. July 9, 1987). The Receiver Order gave the Receiver broad powers with respect to the development of "scattered site housing," which the Order defined as certain existing housing development programs and "all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of Civil Action No. 66 C 1459." [A.8] The Receiver was appointed "to develop and administer the scattered site program as effectively and expeditiously as possible in compliance with the orders of this Court." Id. The scope of the Receiver's authority was defined broadly: "The Receiver shall have and exercise all powers of CHA respecting the scattered site program necessary and incident to the development and administration of such program," including "[m]aking all determinations governing the scattered site program in compliance with prior and future orders of this Court" and a non-exclusive list of enumerated powers. [A.8-9 ¶2 (emphasis added).]

Since 1987 the Receiver has either developed new, non-elderly public housing or overseen such activities undertaken pursuant to contracts with private developers. As described more fully

below, this appeal concerns a mixed-income development (containing public housing, subsidized housing and private housing) developed by a private developer overseen by the Receiver working closely with CHA and the Gautreaux plaintiffs.

B. Course of Proceedings Leading to These Appeals.

This appeal concerns redevelopment of public housing in the North Kenwood-Oakland ("NKO") area on Chicago's South Side, approximately adjacent to the Hyde Park-Kenwood area. The redevelopment area is commonly referred to as the "Lakefront" development. High-density, racially segregated, dilapidated public housing had been concentrated in the Lakefront area until CHA demolished the high-rises. On June 3, 1996 Judge Aspen entered what the parties commonly refer to as a "revitalizing order" regarding the new public housing that would be developed in the Lakefront area, including on the Lakefront site now known as Lake Park Crescent. [A.1-4.] Revitalizing orders are limited waivers of the 1969 Injunction Order to permit public housing to be developed in portions of Limited Areas found to be "revitalizing." See Gautreaux v. Pierce, 743 F.2d 526, 528 n.1, 530-31 (7th Cir. 1984) (describing revitalizing areas as those "having substantial minority occupancy and undergoing substantial physical development"); Gautreaux, 690 F.2d at 636 (discussing Revitalizing Area criteria in the context of a consent decree with HUD). In order to prevent a reconcentration of very low income public housing units, the June 3, 1996 revitalizing order required that any new public housing to be developed in the NKO area be economically integrated: one-half of the public housing units were reserved for low-income public-housing families earning between 50-80% of area median income ("AMI"), while the other half could be occupied by very low-income families earning 0-50% of area median income. [A.3 ¶2d.]

After various delays and an extensive planning process, a private developer ("Developer") was jointly retained by the Receiver and the CHA to develop mixed-income housing to be called Lake Park Crescent, which would include public housing units interspersed with private, market-rate units and so-called "affordable" housing units typically financed by tax credits. The Developer constructed the first rental phase of Lake Park Crescent, which had sixty public housing units, thirty of which were reserved for families earning from 50-80% of AMI. However, the Developer had difficulty finding eligible existing public housing tenants to occupy these "50-80% units," so many of them were vacant. Discussions ensued among the parties and the Developer about how to locate eligible tenants.

On May 3, 2005, the CAC, a non-party, filed a motion to amend the June 3, 1996 revitalizing order. [R.85.] The motion sought to modify the June 3, 1996 revitalizing order to "allow working public housing families, regardless of income, to occupy the public housing units normally reserved for families making 50-80% of AMI." [Id. at 1.] The CHA's position was that its priority was to fill the vacancies, and to that end, it proposed an order that would permit the developer to expand its search to include families from outside of public housing who met the 50-80% AMI requirement of the 1996 revitalizing order. In the alternative, CHA stated that it would not object to CAC's request to modify the 1996 order to fill the vacancies with very low income, existing public housing families. [R.109 at 5.] The Gautreaux plaintiffs (who represent the public housing class in this case) filed a brief stating that there was merit to both sides of the question. [R.102.] The Receiver opposed the motion, for reasons explained in detail below. [R.110.]

C. Disposition Below.

After the motion to modify was briefed, on July 7, 2005 Judge Aspen heard oral presentations from the parties, the CAC, and representatives of the NKO community: Fourth Ward Alderman Toni Preckwinkle and Shirley Newsome, chair of the North Kenwood-Oakland Conservation Community Council. [R.128, A.19, RA.2, RA.3-49.][5/] On July 14, 2005, Judge Aspen entered the two July 14 Orders, which CAC has appealed. The first Order summarized the parties respective positions, and noted that "the current number of units at Lake Park Crescent affected by this motion appear to be no more than fifteen." [RA.2.] He then held:

> Giving due consideration to all of the valid and important public concerns and issues expressed to us on both sides of this motion in the briefs and at the July 7, 2005 hearing, we do not see an extraordinary change in circumstances at this time which suggests we must modify our June 3, 1996 order by removing the 50-80% ami provision. If circumstances do change and suggest that this issue should be revisited, we will openly entertain a motion to do so. Accordingly, we deny CAC's motion without prejudice.

[Id.] The second Order, July 14 Order II, had been submitted in draft form by CHA in its response to the CAC's motion. [R.109.] That Order amended the CHA's Tenant Selection and Assignment Plan to permit the Developer "to maintain an on-site waiting list of households eligible for the 50%-60% units located at the [Lake Park Crescent] Development." [A.20 ¶2.] This "Waiting List" would include income-eligible families currently living in CHA housing, families listed on CHA's waiting lists, and families solicited from the general public pursuant to a marketing campaign. [Id.] Priority

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5/ The transcript of the July 7 hearing, which is attached hereto as the Receiver's Supplemental Appendix [RA.3-RA.49], was apparently omitted inadvertently from the record transmitted by the district court clerk. CAC cited to the transcript in its brief. The Receiver has spoken with counsel for CAC, and understands that CAC will present an agreed motion to supplement the record to include the transcript.

for the vacant units would go to current CHA tenants and families on the CHA waiting lists, over prospective tenants from the general public. Such "general public" families would be offered a unit only if eligible tenants could not be found from the universe of current CHA tenants and those on the CHA's waiting list. [Id. ¶3.]

On July 25, 2005, the CAC filed a "Motion for Clarification." [R.137.] That Motion did not ask to vacate or amend the July 14 Orders, but instead asked whether the Orders were intended to waive certain HUD regulations, and whether July 14 Order II was intended to apply beyond the thirty 50-80% Units in Lake Park Crescent Rental Phase 1A, or also to future phases. After the matter was briefed, the District Court denied the Motion for Clarification on September 9, 2005. [A.23.]

STATEMENT OF FACTS

The immediate problem presented to the District Court by the CAC's motion to modify was that several of the thirty new public housing units at Lake Park Crescent reserved for tenants earning 50-80% of AMI remained vacant months after being completed. The CAC's motion to modify sought to eliminate the 50-80% requirement in order to fill the current and future vacancies with tenants earning 0-50% of AMI. The Receiver's position was to retain the 50-80% provision, while broadening the pool of families who could meet the income qualification. To place that issue in context, it is necessary to review the events that occurred during the years leading to entry of the June 3, 1996 revitalizing order.

A. Events Leading to Entry of the June 3, 1996 Revitalizing Order.

In connection with the CAC's motion to modify, Judge Aspen considered, *inter alia,* the following information presented to him in writing by the Receiver. [R. 110.] The points were amplified at the July 7, 2005 hearing. [RA. 17-35, 39-40, 43.]

The 1996 agreed revitalizing order [A.1] resulted from a consensus that was forged among CHA, the Receiver, the Gautreaux plaintiffs and leaders from the surrounding community, including Alderman Preckwinkle and Shirley Newsome, chair of the North Kenwood Oakland Conservation Community Council ("CCC"). The CCC is a planning body appointed by the Mayor to oversee redevelopment of that part of North Kenwood-Oakland that has been designated a "conservation community area." The consensus was not easily achieved. [R. 110 at 4.]

Recent years have seen the landscape of public housing in Chicago change dramatically, as numerous high rises have been demolished and are being replaced by lower-density, mixed-income housing, in which the public housing units, rather than concentrated in segregated enclaves, are interspersed with private market units and subsidized "affordable" units. Back in June 1996, this new approach of developing and incorporating public housing units in mixed-income developments was in its infancy. The consensus that emerged regarding the NKO redevelopment that is the subject of this appeal, reflected in the 1996 revitalizing order, was the first of its kind in Chicago: a true mixed income on-site redevelopment, in which publish housing units would not simply replace public housing units. Rather, public housing units would be woven into the fabric of a neighborhood, interspersed with market rate units, thereby contributing to economic revitalization of the area, with a long-term possibility of racial integration. This income-mixing model, and the policy of deconcentrating poverty, has become more common (and is now a centerpiece of federal

statutes and regulations,[6/] but it was novel in 1996. Even today, it is an experiment in progress through the City, whose ultimate success is uncertain. [R. 110 at 4-5.]

The Receiver has always tried to work closely with community leaders and elected officials (including aldermen) to foster community acceptance of public housing residents, whether it involved development of three-flats under the traditional scattered site program (in which buildings were developed across the City within existing neighborhoods) or town-homes as part of an on-site mixed income development, in which a new neighborhood is created from scratch. The Receiver had encountered, and Judge Aspen was familiar with, the "not-in-my-backyard" prejudice that communities often have against public housing residents. Community outreach is vital to defusing this problem. (An example among many is extensive community work the Receiver engaged in regarding development of scattered site units in the near west side of Chicago as part of the Henry Horner redevelopment.) NKO was no different than many areas of the City. The surrounding NKO community did not want any public housing rebuilt in the area. Securing community acceptance of new public housing was an important component of implementing the Gautreaux remedy of replacing isolated, racially segregated housing with new housing that would be part of the City, not apart from the City, and would have a long-term prospect of becoming racially integrated. [R.110 at 5.]

To that end, prior to June 1996 numerous meetings were held with NKO community leaders and residents, in which the Gautreaux plaintiffs, CHA, the Receiver, the Alderman and the CCC

[6/] See, e.g., 42 U.S.C. § 1437n(a) (concerning income-mixing and poverty deconcentration of public housing projects); § 1437v(a)(3)-(4) (HOPE VI program, whose purposes include "providing housing that will avoid or decrease the concentration of very low-income families" and "building sustainable communities"); 24 C.F.R. § 903.2 (income-mixing and deconcentration of poverty for certain public housing agencies).

participated. Significant, heated community opposition to the redevelopment was expressed in these meetings. The public housing that was being replaced had been a serious blight on the community, a concentration of extreme poverty within a larger community that already was substantially impoverished. At these meetings, community members expressed fear, anger and opposition to replacement of old, high-density poverty with new poverty at a lower density. Community members expressed fears that replacement public housing would defeat the community revitalization that had begun. [R.110 at 5, id. Ex.B ¶5, id. Ex.C ¶7, id. Ex.D ¶8, RA.17-35, 39-40.]

The income and housing mix that was ultimately included in the June 3, 1996 revitalizing order was presented to the community as a means of preventing a re-concentration of public housing poverty. Though enough indicia of community revitalization existed to support entry of a revitalizing order waiving the locational restrictions of the Injunction Order, the NKO area's stability and prospects were precarious. The redevelopment was as much a means to further the revitalization as the revitalization was a condition justifying the redevelopment. The Alderman and the CCC agreed to support the revitalizing order and redevelopment of public housing in large part because the number of very low income public housing units, i.e., those occupied by families earning less than 50% of AMI, would constitute no more than half of the public housing units on site. Since market rate and affordable housing development was contemplated, it was hoped that such very low income units would constitute an absolute minority of the total redevelopment. In particular, regarding the site now known as Lake Park Crescent, the agreement that became embodied in the 1996 revitalizing order provided that no more than 100 public housing units would be developed, one-half of which would be occupied by families earning between 50-80% AMI. (The order was

later amended to increase the total on that site to 120 public housing units, with half (60) in the 50-80% category.) [R.110 at 6, id. Ex.B ¶6, id. Ex.C ¶8, id. Ex.D ¶9, A.2-3.]

From the Receiver's perspective, the 50-80% provision was intended to serve several important beneficial ends that would promote the ultimate remedial objective of desegregation. First, because families earning that level of income would almost certainly include at least one working member, the income-tiering ensured that at least half of the public housing units and a majority of all of the units (public and private), would be occupied by working families, which would boost the economic revitalization of the area and the stability of the redevelopment. Second, the income tiering would further deconcentrate poverty, thus serving many social ends, including boosting of income levels to support the local community's economy and revitalization prospects. Third, the 50-80% provision was critical to securing the support of the Alderman and the CCC, and, through them, some level of acceptance by the broader community, without which the success of the Gautreaux remedy would be jeopardized, or, at least, impeded. [R.110 at 6-7, id. Ex.B ¶8, RA.17-35, 39-40.]

In the end, the Alderman and the CCC supported the redevelopment and entry of the June 3, 1996 revitalizing order, and the 50-80% provision was an important factor in securing their support. Moreover, they and the Receiver presented this provision to the larger community as a critical component of the redevelopment, one intended to address the community's opposition to the reconcentration of poverty and its desire to support the incipient revitalization that was underway. [R.110 at 7, id. Ex.B ¶9, id. Ex.C ¶7, id. Ex.D ¶8, RA.17-35, 39-40.]

In 1996 no one was sure whether this effort would succeed. Both the public housing tenants and community leaders were mistrustful. For their part, the former Lakefront public housing tenants

were skeptical that CHA would keep its promise to build new public housing units; on the other side, the community leaders were skeptical that there would be both market and public housing units built, as opposed to a *deja vu* result in which a new public housing poverty enclave would replace the old one. These concerns are reflected in a letter of May 13, 1996 from the Receiver and plaintiffs' counsel, Mr. Polikoff, to the Alderman, the CCC and the tenant's counsel. This letter assured them that (1) the Receiver will use its best efforts to achieve development of market rate units as well as public housing and (2) if the community leaders or tenant leaders became dissatisfied with the pace of development of either form of housing, the Receiver and Gautreaux plaintiffs would support a request by either group to be heard on the issue by the Gautreaux court. As this letter clearly implies, the income mix of units and deconcentration of poverty were important to the community leaders. [R.110. at 7, id. Ex.E.]

B. Objections by the Receiver and Community Leaders to CAC's Motion.

Against this background, in May 2005 the Receiver, the Alderman and Ms. Newsome (on behalf of the CCC) objected to CAC's request to replace the 50-80% provision in the June 3, 1996 order with one allowing any working family, regardless of income, to occupy the thirty Lake Park Crescent units in that category. In briefs and at the July 7 hearing, they informed Judge Aspen, as described above, how each had advocated for the redevelopment based in part on representations to the community that the 50-80% restriction would protect against re-concentration of poverty in NKO and would boost the revitalization and local economy. They asserted that to renege on this commitment would engender community animosity and resentment against the Receiver, Alderman and CCC. But, more importantly, they advised him that reneging on the commitment would engender animosity and resentment toward the very low income public housing residents who would

populate the units under the CAC's proposal. The Receiver also advised Judge Aspen of its belief that its credibility would be damaged not only in NKO, but, since word travels fast, throughout Chicago. The Receiver further advised Judge Aspen that the fallout from CAC's proposed change may impair the Receiver's efforts to gain community acceptance of public housing development in other areas of the City. [R.110 at 7-8, id. Ex.B ¶10, id. Ex.C ¶8, id. Ex.D ¶9, RA.17-35, 39-40.]

The Receiver and community leaders also presented their views that more than promises, credibility and community acceptance are at stake. The 50-80% requirement continues to serve important goals that are not achieved by the "working" requirement proposed by CAC. A work requirement alone, while salutary and preferable to no requirement, will not serve the Gautreaux remedial objective of desegregation as well as the existing 50-80% requirement. A mere work requirement can be met by a minimum wage job or, under the terms of the CHA policy, someone in a training or educational program with no income. It does little to deconcentrate poverty, certainly far less than the 50-80% provision does. Indeed, the change CAC seeks carries the potential that all 60 of the Lake Park Crescent public housing units could be occupied by very low income families. [R.110 at 8, id. Ex.B ¶11, id. Ex.C ¶9, id. Ex.D ¶11.]

Finally, the Receiver opined that workers in the higher income category are almost certainly in more stable job positions, which creates greater stability in the development and neighborhood. The higher income level boosts the continuing revitalization of the community, thereby furthering the stability and attractiveness of the development, increasing the long-term prospects for racial integration. [R.110 at 8-9, id. Ex.B ¶11.]

C. Alternatives Presented to the District Court.

After explaining its objections to modifying the 50-80% provision, the Receiver addressed the question of how to fill more expeditiously the vacant public housing units in Lake Park Crescent. If the only options were to adopt the requested change or permit vacant units to lie fallow indefinitely, then the Receiver advised Judge Aspen that it would perhaps support the change as a temporary measure, since long-term vacancies are the least desirable outcome. But those were not the only two options. The Receiver recommended three other options, two of which ultimately were followed. [R.110 at 9-14.]

The first option was the continued effort to locate qualified tenants earning above 50% AMI from the CHA waiting list of families seeking public housing. The second was to locate qualified tenants earning above 50% AMI from the pool of existing CHA tenants who have already made permanent housing relocation choices in Section 8 or other CHA housing. The third was the creation of a site-based waiting list drawing from members of the broader community, who would fill any units that might remain vacant if the waiting list approach bears insufficient fruit. [R.110 at 9-14.] The third option was ultimately adopted in July 14 Order II.

1. Receiver's Option 1: CHA and Developer should continue their efforts to recruit from within CHA or from its waiting list.

The Receiver summarized to Judge Aspen that CHA and Developer were continuing to mine the CHA's waiting list to search for qualified tenants who satisfy the existing income limits. The use of the waiting list had, at that time, been underway only for about three months. The search had filled 3 units and yielded about 11 prospective tenants, shrinking the number of vacant units with

no current prospects to ten.[7/] Given the recent use of the waiting list and its modest success as of June 2005, the Receiver's view was that additional qualified tenants could be located from the waiting list to fill the vacancies. It stated that continuing that process was preferable to eliminating the income limitation, for reasons expressed above. It was not necessary to eliminate the income limitation in order to fill the units. [R.110 at 9.]

The Receiver presented a summary of the timeline of events of Lake Park Crescent, Rental Phase I to help illustrate its position as to why the waiting list search should continue:

April 2003	Finance closing. Start of Construction.
February/March 2004	CHA began sending Developer names of families (without income information) from the "HOP list" (but not the wait list).
July 2004	CHA gave Developer a list of 1,143 families with incomes at or above 40% AMI. After sorting for those families at or above 50% AMI and families who had already made permanent housing choices, the list was pared to 257 prospective families at or above 50% AMI.
August 2004	Developer held its first of three open houses targeted to CHA families at or above 50% AMI.
October & November 2004	All 60 CHA units completed and transferred.
February 2005	CHA begins outreach to waiting list families in the surrounding communities.
March 2005	CHA begins outreach to the entire waiting list.

[7/] In July 14 Order I, based on oral presentations made at the July 7 hearing, Judge Aspen stated that the approximate number of vacancies was fifteen. [RA.2.] At the hearing, CHA reported that fifteen units were vacant and four units had prospects in the pipeline. [RA.10.]

Based on the Receiver's review of occupancy information it had received from Developer, as of the first week of March 2005, at the outset of the wait-list effort, 6 of the 30 low income public housing units (50-80% AMI) were filled, and none of the remaining 24 units had been assigned to qualified applicants (i.e., no tenants were in the pipeline). The numbers improved thereafter. As of May 20, 2005, 9 of the 30 units were occupied and 11 units were assigned to tenants who were being processed. Thus, 20 of the 30 units either were occupied or had tenants in the pipeline. While some of the 11 prospective tenants in the pipeline might not ultimately move in, this still represents a substantial improvement over the 2.5 month period. In light of this progress, the Receiver recommended continuation of the process rather than abandonment of the 50-80% requirement. [R.110 at 10-11.] The Gautreaux plaintiffs agreed that this process "seem[ed] to be bearing fruit, and agree[d] with the Receiver that these should continue." [R.115 at 2.]

2. Receiver's Option 2: CHA could offer the units to tenants who have made permanent housing relocation choices.

The Receiver recommended that CHA draw tenants from another pool: current CHA residents who have not been offered the opportunity to consider moving to the 50-80% units at Lake Park Crescent, i.e., those who have already made permanent housing choices at other CHA developments. Such tenants include those who have moved into rehabilitated public housing units, Section 8 units, or new units in mixed-income developments (but not in units subject to a similar income limitation). Permitting such tenants to apply would serve several objectives, and address some of the concerns raised by the CAC: (i) it would make the units available to an expanded group within the existing Gautreaux class; (ii) existing public housing tenants who would qualify and move would create a vacancy elsewhere (in a unit without income restriction) that would become available

for the working tenant population for which CAC was advocating in its motion; and (iii) the expansion would retain the integrity and benefits of income-tiering at Lake Park Crescent. [R.110 at 11.]

The Receiver informed Judge Aspen that CHA did not support this approach. [Id.] The Gautreaux plaintiffs supported this approach, with certain modifications. [R.115 at 2.] In any event, this option was not mentioned in either of the July 14 Orders, and appears to have been reserved for another day, if necessary.

3. Receiver's Option 3: Permitting a site-based waiting list.

The Receiver also recommended to Judge Aspen that he enter a proposed order attached to the CHA's response to the CAC Motion. That order would amend the Tenant Assignment Plan to permit CHA and Developer to create a site-based waiting list that would permit, if necessary, qualified tenants from the broader community to occupy the vacant units. Such tenants would have a lower priority than those already permitted to rent the units, i.e., qualified tenants already living in CHA housing or on its waiting list. [R.110 at 12, citing CHA Proposed Order ¶¶2-3, R.109 Ex.B.] A site-based waiting list, drawing applicants not only from CHA but from the community-at-large, has been employed elsewhere: to fill the 50-80% units at Horner Phase I and the rehabilitated 50-80% units at Lake Park Place, another CHA development. [R.110 at 12.]

The Receiver advocated entry of the CHA's proposed order because it would solve the immediate problem—filling vacancies—while appropriately balancing other interests: giving priority to existing CHA residents and those already on its waiting list, while preserving the income-tiering requirements that serve the goals discussed earlier. The creation of such a list could further an additional goal. It permits NKO residents to apply for the units and possibly live in the new

development. The Alderman and the CCC believe that there is community interest in such an opportunity, which, if realized, would help knit the new development into the surrounding community and foster its acceptance. [R.110 at 12, id. Ex.C ¶10, id. Ex.D ¶12.]

D. The July 14 Orders and Aftermath.

As described above, following an oral hearing on July 7, 2005, Judge Aspen entered the two July 14 Orders, which, respectively, denied the CAC's motion to amend the 50-80% requirement and entered the CHA's proposed order permitting rental of vacant units to eligible members of the general public if there were no available CHA families. [A.18-22, RA.1-2.] The CAC's ensuing Motion for Clarification was denied on September 9, 2005. [A.23.]

SUMMARY OF ARGUMENT

The Orders on appeal are subject to broad deference and should be affirmed. Judge Aspen has been overseeing the remedial process in this case for twenty-five years. He is intimately familiar with the myriad issues that have arisen in the course of replacing dilapidated, crime-ridden, unconstitutionally segregated enclaves of poverty and despair with safe, healthy economically integrated neighborhoods. Whether to modify the June 3, 1996 revitalizing order to deal with the issue of vacant units required him to balance competing equities and bring to bear his quarter-century of hands-on experience. His denial of the CAC's motion, which at the time it was entered would have a direct impact on no more than about fifteen units, and perhaps none, without prejudice to CAC's right to renew it as further circumstances unfold at Lake Park Crescent, was not remotely an abuse of discretion.

Sometimes judges are presented with pure "judgment calls." They are asked to make a choice between two courses of action, either one of which would be legally permissible and reasonable. They are called upon to exercise discretion and decide which is the better course to take. This appeal concerns such a choice between two options.

The question raised by CAC's motion to modify presented an immediate problem, which plaintiffs' counsel believed was a "tough call." [RA.16.] All of the parties and non-parties agreed that it was undesirable for the fifteen or so vacant units to remain unoccupied. Solving the problem required a choice as to whether economic integration and poverty deconcentration, both furthered by the 50-80% provision, should remain a priority. Judge Aspen made a choice between two rational approaches, the one favored by his Receiver, supported by the CHA, and only mildly opposed by the plaintiffs after making a "tough call." That exercise of discretion should not be disturbed on appeal.

The CAC concedes that its burden is daunting: "[a]buse of discretion exists only where the result is not one that could have been reached by a reasonable jurist, or where the District Court decision is fundamentally wrong, or is clearly unreasonable, or arbitrary." CAC Br. at 22. CAC's brief devotes only a sentence to the position advocated by the Receiver. Id. at 16. When that position is considered rather than ignored, the argument that any abuse of discretion occurred quickly dissolves.

The Receiver presented strong reasons for retaining the provisions of the pre-existing 1996 order regarding the 50-80% requirement. The 50-80% provision was intended as a safeguard against a reconcentration of poverty in NKO, and was painstakingly negotiated with community leaders and promised to them, in exchange for which they promised to support the redevelopment. CAC's proposal would have required breaking the agreement reached with NKO community leaders. This

would have impaired the credibility of the Court's Receiver and the Court. Judge Aspen's choice to retain the 50-80% provision was reasonable. He acted well within the broad discretion a District Court judge may exercise in these circumstances, especially because it was provisional, "without prejudice" to CAC's right to renew its motion as circumstances unfolded.

Having chosen to retain the 50-80% provision, Judge Aspen was equally well within his discretion in entering the proposed order that CHA had tendered (July 14 Order II), which permitted (but did not require) the Developer to make available the vacant units to income-eligible families from the general public if, and only if, qualified families could not be located from other public housing developments or from the CHA's waiting list. The prejudice to Gautreaux class members in the 0-50% category is slight, and the order provided a safety-valve that would facilitate more prompt filling of the vacancies. Because current income-eligible CHA residents and families on the CHA waiting list retain priority and outreach to such families was ongoing, it was likely that only few 50-50% Units would be offered to eligible members of the general public.

ARGUMENT

I.

THE MOST DEFERENTIAL STANDARD OF REVIEW APPLIES TO THE ORDERS ON APPEAL.

The CAC concedes, as it must, that appellate review is highly deferential here. CAC Br. at 22. The July 14 Orders concerned implementation of desegregation remedies that Judge Aspen had been supervising for 25 years. His decisions are entitled to substantial deference and should not be disturbed absent an abuse of discretion.

Cases establishing very broad deference in this remedial context are legion. See Rufo v. Inmates of Suffolk Jail, 502 U.S. 367, 394 (1992) (O'Connor, J., concurring) (stating that "deference to the District Court's exercise of its discretion is heightened where, as in this litigation, the District Court has effectively been overseeing a large public institution over a long period of time" and that "substantial deference [is owed] to 'the trial judge's years of experience with the problem at hand'") (quoting Hutto v. Finney, 437 U.S. 678, 688 (1978)); People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 171 F.3d 1083, 1087 (7th Cir. 1999) (affirming trial court's decision to enter budget orders implementing remedial consent decree, and stating that with respect to specific remedial programs the appellate court has "no practical alternative to deferring broadly to the judgment of the district court" because the "required determinations are quintessentially judgmental") (emphasis added); Ferrell v. Pierce, 743 F.2d 454, 461 (7th Cir. 1984) ("wide discretion" of district court in deciding whether to modify consent decree).

Other Circuits agree that broad deference is required because the district court has an "intimate understanding of the workings of an institution and [has learn[ed]] what specific changes are needed within that institution in order to achieve the goals of the consent decree." Thompson v. HUD, 404 F.3d 821, 827 (4th Cir. 2005) (quoting Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1338 (1st Cir. 1991)); Jeff D. v. Kempthorne, 365 F.3d 844, 850 (9th Cir. 2004) (affirming denial of motion to vacate consent order: "Deference to the district court's use of discretion is heightened where the court has been overseeing complex institutional reform litigation for a long period of time"); Jenkins v. Missouri, 122 F.3d 588, 600-01 (8th Cir. 1997) (review of modification of post-judgment remedial order is "restricted" and "limited" because the district court has "firsthand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-

day implementation of constitutional commands"). Thus, "the basic responsibility for determining whether and to what extent an injunction should be modified rests primarily on the shoulders of the district court that issued the injunction in the first place." Jenkins, 122 F.3d at 601 (internal quotation omitted).

II.

THE JULY 14 ORDERS INVOLVED "QUINTESSENTIALLY JUDGMENTAL" DETERMINATIONS THAT FELL WELL WITHIN JUDGE ASPEN'S DISCRETION.

If a litigant is going to accuse a United States District Court Judge of rendering a decision that no "reasonable jurist" could make, to be fair to the jurist in question it is incumbent upon the litigant to at least explain fairly the context and background of the decision. The CAC has, unfortunately, not done so. It relegates the objections raised by the Receiver to a mere sentence in its fact section, CAC Br. at 16, and its argument section ignores them entirely. It is easier to claim that an abuse of discretion has occurred when only one side's position is presented. Here, however, when both views are considered, the argument that any abuse of discretion occurred evaporates. Neither of the July 14 Orders was remotely an abuse of discretion.

A. July 14 Order I, Which Retained the 50-80% Provision, Was Not an Abuse of Discretion.

1. Judge Aspen's decision to adopt the position favored by the Receiver was reasonable.

CAC ignores the strong reasons the Receiver presented below for retaining the status quo regarding the 50-80% requirement of the 1996 revitalizing order. Public housing does not get developed in a vacuum. It is developed within a broader community. Here, the community in question, NKO, was a victim of the CHA's decision, decades earlier, to concentrate segregated

islands of poverty in its neighborhood. After suffering from the crime and other negative effects of that failed and unconstitutional experiment, the NKO community was wary of and opposed to repeating the past by rebuilding such an enclave on top of the demolished buildings. The allocation of half of the new public housing units to the 50-80% range was intended to prevent such reconcentration. It was painstakingly negotiated with community leaders and promised to them. In exchange they promised to support the redevelopment. CAC's proposed abandonment of this requirement would have exacted a significant social cost: breaking the agreement that had been made with the community. This would have tarnished the credibility of the Court's Receiver and the Court. While that promise was a political one that does not have the sanctity of a legal contract, neither was it one to treat lightly.

Judge Aspen heard extensive written and oral presentations from the parties and the Receiver. He also entertained presentations from non-parties: the CAC, Alderman Preckwinkle, the CCC, and a HUD representative (oral only). He weighed the competing equities. His choice, to retain the 50-80% provision, cannot credibly be called irrational or an abuse of the broad discretion a district court judge may exercise in these circumstances. That is particularly so because it was provisional. The present problem involved only about fifteen units, CHA was continuing the process of contacting families on its waiting list (which CAC did not object to), and Judge Aspen's decision was expressly "without prejudice" to CAC's right to renew its motion as circumstances unfolded.

Solving the vacancy problem required a choice as to competing priorities. Counsel for the plaintiffs believed this was a "tough call." [RA.16.] CAC's solution was that current CHA tenancy or a place on its waiting list should trump the goals of economic integration, deconcentration of poverty and the promises made to the NKO community. It proposed to give priority to existing

public housing residents in other developments and to abandon, if necessary, the income tiering requirement of the June 3, 1996 revitalizing order. The Receiver, supported by community leaders, advocated the opposite priority, which had been promised to the community in 1996, and proposed filling the vacancies, if necessary, from public-housing eligible members of the general public who satisfied the 50-80% requirement of the 1996 order. The CHA's priority was to fill the units, and it was amenable to either solution. Judge Aspen made a choice between two rational approaches. That exercise of discretion in the context of a "tough call" is precisely the sort of decision that should not be disturbed on appellate review. At bottom, CAC's plea is based on a policy preference, not legal entitlement.

In addition, contrary to CAC Br. at 28, its proposed "work-requirement" solution does not adequately promote economic integration. As discussed earlier, the Receiver does not believe that the 50-80% provision and a work requirement are equivalent or fungible. A working family earning 30% of AMI obviously does not promote economic integration or contribute to deconcentration of poverty as effectively as one earning 60% of AMI. The higher earners (who are still "low income" families) provide greater stability to the community and income to support the ongoing revitalization of NKO.[8/]

[8/] In the District Court, CAC belittled this argument by pointing to census data and accusing the Receiver of suggesting that certain jobs whose salaries might generate incomes below 50% AMI for a family, such as teachers or bus drivers, are somehow inferior or not worthy of respect. That is a straw man. The promise made to the community, and the policy goal, was to deconcentrate poverty and have public housing tenants woven into a diverse community. It is simple mathematics: a family earning 60% of AMI is far less poor than one earning 30% of AMI, and can contribute more greatly to the economic well being of the surrounding community. There is no intention to pass moral judgment on one job category versus another or to label lower-paying jobs as morally inferior.

2. CAC's objections do not demonstrate that Judge Aspen abused his discretion.

The CAC argues that its position was the only rational one. Such is rarely the case in remedial circumstances, and was not the case here. "We have observed that, '[w]hen a district court is vested with discretion as to a certain matter, it is not required by law to make a particular decision. Rather, the district court is empowered to make a decision—of *its* own choosing—that falls within a range of permissible decisions.'" Barcia v. Sitkin, 367 F.3d 87, 99 (2d Cir. 2004) (italics in original) (quoting Zervos v. Verizon New York, Inc., 252 F.3d 163, 168-69 (2d Cir. 2001)).

Judge Aspen chose an outcome that "falls within a range of permissible decisions." Had he adopted CAC's position, the Receiver would have disagreed with the judgment call, but it could not have fairly tarred it as an abuse of discretion. The converse should be, but is not, the case. Though CAC disagrees with the discretionary decision, entered without prejudice, to leave the June 3, 1996 order intact, its attack on that decision as an abuse of discretion is neither fair nor correct. Its reasoning does not withstand scrutiny.

a. The positions of the parties below do not support reversal.

The CAC contends that Judge Aspen's decision was "clearly arbitrary" because he "ignore[d] the undisputed facts and denies a motion that was not opposed by any of the parties to the litigation." CAC Br. at 24. See also id. at 30. But it is CAC who is ignoring undisputed facts: those presented by the Receiver and NKO community leaders, which it passes over in a sentence. CAC may believe that the equities of its position outweigh those presented by the Receiver, but it was not "arbitrary" for Judge Aspen to consider the Receiver's objections weigh the equities differently than CAC. That is precisely the type of discretionary call that ought not be disturbed on appeal.

The posture of the "parties to the litigation" hardly supports CAC's view that the ruling was arbitrary. The 1996 order that CAC sought to modify was entered by agreement of the parties and the Receiver. While, as CAC states, neither the Gautreaux plaintiffs nor the CHA objected to CAC's motion, neither did those parties see fit to file a motion seeking the CAC's proposed change. Moreover, the CHA was also fully supportive of the Receiver's position, and the Gautreaux plaintiffs supported the Receiver's view that the CHA should continue the late-starting but fruitful efforts to identify eligible tenants from CHA's waiting list, as well as the Receiver's alternative suggestion of making the units available to some income-eligible tenants who had relocated to other CHA housing. (The Gautreaux plaintiffs did not stake out a firm position in their briefs, see R.102, R.114, and ultimately, at the July 7 hearing, stated "with reluctance" that their preferred resolution of the "tough call" was to modify the 50-80% provision.) And the CAC forgets that the Receiver has and exercises "all powers" of CHA respecting development issues, and the terms of the June 3, 1996 order plainly presented development concerns within the Receiver's jurisdiction.[9/] Thus, to rely upon CHA's

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[9/] CAC's factual statement, CAC Br. at 15-16, could be read as including argument that the Receiver's powers do not include the questions raised by its motion because they concern "tenant assignment policies." If the CAC is advancing such an argument, it is waived because it was not raised in the district court. See, e.g., Cody v. Harris, 409 F.3d 853, 857 (7th Cir. 2005) ("An argument raised for the first time on appeal is waived"); McGoffney v. Vigo County Div. of Family and Children, Family and Social Services Admin., 389 F.3d 750, 753 (7th Cir. 2004) (same). In any event, the questions regarding income-mixing go to the heart of the Receiver's development powers, expertise, and mission. It has "all powers of CHA respecting the scattered site program necessary and incident to the development and administration of such program." [A.8.] The question of who is eligible to occupy the public housing units goes directly to issues such as (i) whether the development may achieve economic and racial integration, (ii) whether the development of market and affordable units will be financially viable, and (iii) whether and how the surrounding community will accept the public housing tenants. All of these are development issues within the Receiver's jurisdiction. The CAC does not and cannot contend that the Receiver did not have jurisdiction over the formulation of the June 3, 1996 revitalizing order. It surely has jurisdiction over proposed modifications of that order, particularly when such modifications run contrary to important commitments the Receiver made to the community as part of the early development planning process.

neutral position, while ignoring the Receiver's position, is incomplete and, as such, misleading.

When this full picture is understood, the "arbitrariness" painted by CAC fades. Judge Aspen could obviously see that the "parties" were either on the fence or slightly in favor of CAC, while the change to an agreed order sought by a non-party, CAC, was firmly opposed by an independent actor, the Receiver, a highly experienced and sophisticated developer, whom he had appointed and supervised for eighteen years. Faced with a choice between two rational approaches, it was not an abuse of discretion to select the one favored by his Receiver, acceptable to CHA and not strongly opposed by the plaintiffs. In any event, even if the parties had formally joined CAC's motion and taken a firm position contrary to that of the Receiver, Judge Aspen's decision to adopt the Receiver's recommendation would have been within his discretion.

b. The alleged "change in circumstances" did not require modification of the June 3, 1996 order.

Contrary to CAC Br. at 27, it was not "clearly erroneous" for Judge Aspen to conclude in July 14 Order I that there was no "extraordinary change in circumstances at this time which suggest we must modify our June 3, 1996 order by removing the 50-80% ami provision." [A.19, RA.2.] The "changes" CAC identified were either not changes, or were not of a nature that rendered the ruling "clearly erroneous."

First, CAC points to the fact that, since 1996, CHA has demolished "thousands" of public housing units in and near NKO. CAC exaggerates the number, but the precise number is not germane, because the demolition is not a "change" warranting modification. That was the plan from the outset. The very point of the 1996 order was to develop public housing on and near the sites of demolished public housing, and to do so in a manner that would deconcentrate poverty and promote

economic integration with the long-term prospect of racial integration. Thus, the fact that public housing units were demolished was entirely anticipated and was a precondition to the 50-80% provision, not a reason for abandoning it. Demolition cannot fairly be relied upon as a basis for calling Judge Aspen's ruling "clearly erroneous."

The same is true of CAC's second point, that "there has been significant strengthening of the NKO neighborhood since 1996." CAC Br. at 28. That, too, was the objective in entering the order. That the objective is being achieved provides no reason for changing the order that was part of the success. In any event, the strengthening of the neighborhood is not a factor that requires a modification to the 1996 order or renders "clearly erroneous" Judge Aspen's denial of modification.

The CAC also relies on the alleged "delay that Gautreaux class members will experience" if the 50-80% provision is retained and if a site-based waiting list is created. CAC Br. at 28. CAC again fails to explain why this alleged factor requires a modification. The fact that the Gautreaux plaintiffs, the class representatives, did not appeal the July 14 Orders suggests that the "prejudicial delay" point is not weighty. CAC does not mention what is implicit in its "delay" argument. The class members in question (those in the 0-50% AMI category) will be offered new or rehabilitated units somewhere. Perhaps they won't be located at Lake Park Crescent and perhaps they won't be offered units on the precise time line favored by CAC. But none have a legal entitlement to the units in question or to a deadline to receive a new unit. Moreover, families earning 50-80% AMI in public housing or on the waiting list are class members too, and it is perfectly proper to offer them new units in an economically integrated setting. And the delay to the 0-50% AMI families posited by the CAC could occur only to the extent that CHA's continuing outreach could not find eligible 50-80% tenants from other CHA developments or the CHA's waiting list, which concerned a relatively few

units. CAC cannot establish that the 50-80% provision must yield to the possible delay a few families might experience in being relocated. Again, potential "delay" was, at most, an equity for the District Judge to weigh, not a trump card that rendered his conclusion "clearly erroneous" or "arbitrary."

Contrary to CAC Br. at 29, the possibility that a few of these units might be leased to non-class members was also not "extraordinary" or a trump card requiring modification. Again, these are not the only new public housing units being developed. Thousands are being and will be developed and rehabilitated across the City. If a few of the 50-80% Units at Lake Park Crescent were offered to a member of the general public, no Gautreaux class member will be denied a remedy. Another 0-50% unit, in NKO or somewhere else, will become available, because extensive development is proceeding in NKO and throughout the City. It is not that non-class members are being given an absolute "priority" over class members. Class members in the 50-80% category are also class members, and they retain priority over non-class members under the July 14 Orders. The priority selected by Judge Aspen was to retain the 50-80% requirement, and to fill such units with non-class members if, and only if, no eligible class member could be located to fill such units. Unless class members in the 0-50% category have a legal entitlement to such units, and they do not, then this issue is again, merely a matter of equitable discretion that Judge Aspen did not abuse.

B. July 14 Order II, Which Permitted A Site-Based Waiting List, Was Not an Abuse of Discretion.

For reasons just explained, Judge Aspen was well within his discretion in addressing the vacancy problem by entering July 14 Order II, the proposed order supported by the CHA, the Receiver and NKO community leaders. For those reasons, and additional ones now described, Judge

Aspen's adoption of CHA's proposed order permitting the creation of a site-based waiting list was not an abuse of discretion.

CAC's first objection exalts form over substance. It calls the July 14 Order II "arbitrary" because no party had filed a formal motion seeking approval of a site-based waiting list. CAC Br. at 30. CAC identifies no prejudice from the lack of a formal motion, and there was none. CAC had a full and fair opportunity to be heard, and does not suggest otherwise. The CHA attached the proposed order to its response to CAC's motion, and supported its entry. [R.109.] The Receiver discussed the proposed order in its response as well. [R.110.] CAC filed a reply brief thereafter, objecting to a site-based waiting list, and asserted its position at the July 7 hearing. [R.115, RA.5-12.] There was no abuse of discretion for Judge Aspen to enter the proposed order in these circumstances.

CAC's second objection is that the site-based waiting list permitted in July 14 Order II somehow violates federal regulations. CAC Br. at 31-32. Not so. CAC's "federal regulation" argument has been an amorphous and moving target. CAC first raised the federal regulation argument only after July 14 Order II was entered, when it filed its July 25 Motion for Clarification. [R.137.] It asserts these regulations in support of its incorrect argument that the September 9 Order, denying the Motion for Clarification, was an abuse of discretion. Even then, CAC merely asserted that certain 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. [R.137 ¶7.] While it referred to "applicable HUD regulations" on the subject, id. ¶8, its Motion cited no such regulations prohibiting the site-based waiting list.

CAC's regulatory argument in its appeal brief is hard to follow, but it appears to claim that the creation of the site-based waiting list violated 24 C.F.R. §1.4(b)(2)(ii). CAC Br. at 31-32. This argument is waived (as to both July 14 Order II and the September 9 Order) because the CAC does not quote from the provision in question or develop its argument as to why July 14 Order II violates it. See, e.g., Weinstein v. Schwartz, 422 F.3d 476, 477 n.1 (7th Cir. 2005) ("failure to develop an argument constitutes a waiver") (and cases cited therein); Smith v. Northeastern Illinois University, 388 F.3d 559, 569 (7th Cir. 2004) ("undeveloped argument constitutes waiver") (and cases cited therein). Indeed, it unfairly chides the district court for an abuse of discretion for supposedly "ignor[ing] . . . the regulatory provisions cited above" (CAC Br. at 32) when the operative provision that was supposedly "ignored" was only cited below in passing in a similarly undeveloped manner, after the July 14 Order II had already been entered.. [R.151-2 at 6.][10/]

In any event, the regulation in question does not prohibit the site-based waiting list. 24 C.F.R. §1.4 is a fair housing, anti-discrimination provision, concerned with preventing discrimination on the basis of race, color or national origin. §1.4(a). See also 24 C.F.R. §1.1. Nothing in the July 14 Order II violates such principles, nor does CAC contend otherwise. See R.151-2 at 5 ("CAC is not contending that any action, or proposed action has or will result in discrimination because of race, color or national origin"). The particular provision CAC relies principally upon, 24 C.F.R. 1.4(b)(2)(ii), reads in relevant part:

10/ CAC advanced a different argument below. It asserted that the June 3, 1996 order's income restrictions unlawfully discriminated on the basis of "familial status." [R.151-2 at 4-5.] This argument, which is not raised on appeal, was frivolous, as shown in a joint brief submitted by the Receiver and the CHA. [R.167 at 2-4.] CAC had also argued that another provision, also not cited on appeal, 24 C.F.R. § 903.2(d), was violated by the July 14 Orders. [R.137 at 3.] The Receiver and the CHA filed briefs showing that this argument was meritless as well. [R.154 at 3-5, R.157 at 6-10.]

> A recipient, in operating low-rent housing with Federal financial assistance under the United States Housing Act of 1937, as amended . . . , shall assign eligible applicants to dwelling units in accordance with a plan, duly adopted by the recipient and approved by the responsible Department official, providing for assignment on a community-wide basis in sequence based upon the date and time the application is received, the size or type of unit suitable, and factors affecting preference or priority established by the recipients regulations, which are not inconsistent with the objectives of title VI of the Civil Rights Act of 1964 and this part 1.

This provision concerns, in the first instance, "eligible applicants." Under the June 3, 1996 revitalizing order, to be "eligible" tenants must earn between 50-80% AMI. July 14 Order II in turn permits assignment of these units to eligible existing CHA residents and those on its waiting list, in sequential order based on date and time of application, and only goes to those not on the wait list after exhausting these "eligible" tenants. Nothing in this regulation restricts the discretion of a federal court, in implementing a desegregation remedy, from assigning priorities on the basis of an income restriction.

The other "HUD regulation at issue, 24 C.F.R. 960.206(a)," nowhere "*requires* leasing by date of application." CAC Br. at 32 (italics added). Again, CAC fails to actually quote this regulation, and thereby fails to disclose inconvenient language. Section 960.206(a) says nothing about "date of application." Further down, §960.206(e)(1), reads (emphasis added): "The PHA must use the following to select among applicants on the waiting list with the same priority for admission: (i) Date and time of application; or (ii) A drawing or other random choice technique." Clearly, "date and time of application" apply only to applicants who already enjoy "the same priority for admission." Nothing in this procedural regulation sets those priorities, contradicts either July 14 Order, or restricts a court, implementing a constitutional remedy, from establishing criteria applicable to applicants not already on the waiting list.

C. The Relocation Rights Contract is Irrelevant.

In the district court the CAC relied on the 2000 Relocation Rights Contract ("RRC") between the CHA and the CAC. In particular, it cited "CHA's promise" that "guarantees to all CHA leaseholders in occupancy as of October 1, 1999 the right to return to newly constructed or rehabilitated housing." [R.85 at 2.] To similar effect, it asserts in its jurisdictional statement in its brief that the RRC grants priorities to CHA residents as of October 1, 1999 over those not on CHA's waiting list. CAC Br. at 3-4. See also CAC Br. at 9-10 (reference to RRC in statement of case). It is unclear whether CAC is relying on the RRC as a basis for reversal, since the point is not raised again in its brief, yet it is not germane to the jurisdictional section in which it is made. If CAC is citing the RRC as a ground for reversal, the argument is waived, since it develops no argument on the point in its argument sections. See cases cited above at 36. Waiver aside, the argument is meritless. The CAC concedes that the RRC, entered in 2000, expressly provides that it is subject to any orders entered in Gautreaux. CAC Br. at 3-4. See also R.85 at 3 ¶4 (citing Relocation Rights Contract at 1).[11/] Thus, the June 3, 1996 revitalizing order was effectively incorporated into the RRC and overrode any contrary provisions or promises, and the RRC expressly recognized the primacy of Gautreaux. The RRC was no bar to either July 14 Order.

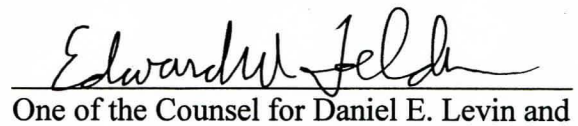
[11/] The Receiver participated in some of the negotiation sessions concerning the Relocation Rights Contract, and insisted upon this language.

CONCLUSION

For the foregoing reasons, the Receiver requests that the orders below be affirmed.

Respectfully submitted;

Date: January 27, 2006



One of the Counsel for Daniel E. Levin and
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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count of the word processing system used to prepare this brief, Corel WordPerfect 11.0.

Dated: January 27, 2006

Edward W. Feldman, Attorney

CERTIFICATION OF UNAVAILABILITY OF ELECTRONIC MATERIALS

Pursuant to Seventh Circuit Rule 31(e)(1), I hereby certify that the documents included in the Receiver's Supplemental Appendix attached to the paper copy of this brief are not available electronically. The brief is submitted digitally pursuant to Circuit Rule 31(e).

Dated: January 27, 2006

Edward W. Feldman, Attorney

CERTIFICATE OF SERVICE

Edward W. Feldman, an attorney, hereby certifies that on January 27, 2006, he caused to be served two physical copies and 1 electronic copy of the foregoing **Brief of Appellees Daniel E. Levin and the Habitat Company LLC, as Court-Appointed Receiver** by first class mail, proper postage prepaid, to:

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Dated: January 27, 2006

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RECEIVER'S SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS OF

RECEIVER'S SUPPLEMENTAL APPENDIX

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Marvin Aspen	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	66 C 1459	DATE	7/14/2005
CASE TITLE	Gautreaux vs. CHA		

DOCKET ENTRY TEXT:

CAC's motion to amend/correct (85) is denied without prejudice.

[For further details see text below.]

Notices mailed by judge's staff.

STATEMENT

(Reserved for use by the Court)

ORDER

Presently before us is the Central Advisory Council's ("CAC") motion to amend this court's June 3, 1996 Order. Our June 3, 1996 Order concerned the revitalization and development of public housing in the North Kenwood-Oakland area. Among other provisions, the Order requires that half of the public housing units in the North Kenwood-Oakland area be reserved for families earning between 50-80% of area median income ("ami"). The CAC now requests that this court remove this provision, thereby opening up public housing units at the Lake Park Crescent development to be potentially occupied by public housing families who earn less that 50% ami. We took written submissions from interested parties, and on July 7, 2005, we heard from the parties and others who have an interest in this matter.

Although it would be impractical to provide a full statement here of all of the concerns expressed to us, we will attempt to briefly summarize the main positions on the CAC's motion. The CAC's primary concern is that the number of currently eligible public housing families is not sufficient to fill the group of units restricted by the 50-80% ami provision. Because of this deficiency, the Chicago Housing Authority ("CHA"), along with the property developer at Lake Park Crescent, plans to create a site-based waiting list drawn from the general public to supplement the existing CHA population and waiting lists to fill the 50-80% ami units. The CAC opposes this plan because it will bypass many current and former public housing families who are waiting to exercise their right to return to CHA housing. The U.S. Department of Housing and Urban Development appears to be in general agreement with the CAC's position.

The Receiver, previously appointed to develop public housing on behalf of the CHA, opposes the motion, emphasizing that the 50-80% ami provision was intended to ensure the revitalization of the community and deconcentration of poverty, and that this particular provision was an important factor in securing the support of the community for the June 3, 1996 Order.[1]

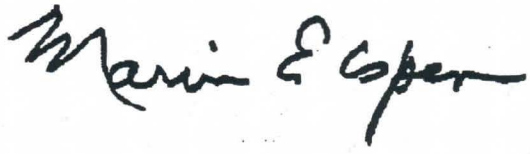
The plaintiffs in this case have stated that they support the CAC's proposed removal of the 50-80% ami provision in order to prioritize the placement of current public housing families who are waiting to return, but they have also expressed their appreciation of the Receiver's position and its concerns about the promises made to the residents of North Kenwood-Oakland about the development of public housing in their community.

STATEMENT

The CHA has expressed that it is amenable to either the position of the CAC or the Receiver and simply asks that we decide promptly in order to promote the leasing of these units as soon as possible. The CHA has also brought to our attention the fact that it has been able to fill half of the units at Lake Park Crescent subject to the 50-80% ami provision with eligible families from existing CHA residents and CHA waiting lists, and the current number of units at Lake Park Crescent affected by this motion appears to be no more than fifteen. If the 50-80% ami provision remains in place, the CHA will continue to seek out and give priority to those within the current CHA population and waiting lists, but it also wishes to implement the site-based waiting list drawn from income-eligible families in the general public.

Giving due consideration to all of the valid and important public concerns and issues expressed to us on both sides of this motion in the briefs and at the July 7, 2005 hearing, we do not see an extraordinary change in circumstances at this time which suggests we must modify our June 3, 1996 order by removing the 50-80% ami provision. If circumstances do change and suggest that this issue should be revisited, we will openly entertain a motion to do so. Accordingly, we deny the CAC's motion without prejudice.

[1] Although not parties to these proceedings, with the acquiescence of the other parties, we also heard from Alderman Toni Preckwinkle of the Fourth Ward, and Shirley Newsome, chair of the North Kenwood-Oakland Conservation Community Council. They represented that the 50-80% ami provision was and continues to be a necessary component for the revitalization of the North Kenwood-Oakland community and for the continued support for public housing in the area.



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.	)	July 7, 2005
	)	10:30 o'clock a.m.
CHICAGO HOUSING AUTHORITY, et al.,	)	Chicago, Illinois
	)	
Defendants.	)	

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

APPEARANCES:

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For the Central Advisory Committee:	MR. ROBERT WHITFIELD 10 South LaSalle Street Suite 1301 Chicago, Illinois 60603

APPEARANCES: (continued)

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ALSO PRESENT:	MS. SHIRLEY NEWSOME MS. TONI PRECKWINKLE MS. MARY WIGGINS

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behalf of the North Kenwood Oakland Conservation Community Council.

THE COURT: I will be happy to hear what you have to say. Again, I would appreciate it if you would keep your remarks to five or ten minutes. I want to get out of here and have lunch and do some other things as well.

MS. PRECKWINKLE: Did you want us to begin, your Honor?

THE COURT: No. I think it would be more beneficial if you heard what these other folks had to say and then you can respond, all right?

MS. PRECKWINKLE: That would be great. Thank you.

THE COURT: Sure.

MR. JOHNSON: I would like to point out, too, Judge, that Ms. Elson from HUD is also present with us today.

THE COURT: Would you like to address the Court as well?

MS. ELSON: I just found out about this session about 15, 20 minutes ago, so I don't have any prepared remarks. But depending on what people say, I might have some kind of comment.

THE COURT: All right. We'll start with the counsel. If you want to sit down and make yourselves comfortable. Again, I think all I need is five or ten minutes. Proceed.

MR. WHITFIELD: Your Honor, the motion that we filed

is rather straightforward and, as you said, you have read it.

THE COURT: How many units are covered in your motion?

MR. WHITFIELD: I believe 120 public housing units total. So we're talking about amending the June 1996 revitalizing order requiring 50 percent of those units be reserved for persons making 50 to 80 percent of the median income.

And basically our motion -- and let me point out that we have tried to work with CHA, the CAC leadership, throughout this process, which is one reason why we brought the motion as opposed to also bringing a motion for a restraining order. We are not about trying to hold up leasing, which we feel is very important, even though we are aware that even as we speak some units might be filled by persons other than people that we represent.

But what we do think is that going forward it's important that the right of return that was promised to the 25,000 families who negotiated the relocation rights contract be preserved as best as possible.

Also I want to clarify, we are not talking about doing away with the priority altogether. Let me clarify. The priority can stay in place for 50 to 80 percent of the people who get served first.

What we propose is that that be first offered to

everybody who has a right to return to the extent that those people are exhausted. And there are no more people making 50 to 80 percent. It would then be offered to people who have a right to return who are working families. That is not a requirement in all mixed income developments, including Lake Park Crescent. Once those are exhausted -- and that's an eligibility requirement -- then, of course, you know, the units will be filled, you know, by going to a waiting list and so forth.

THE COURT: You say you have talked with the CHA.

MR. WHITFIELD: Yes.

THE COURT: Have you talked to the Receiver as well?

MR. WHITFIELD: We have not talked to the Receiver. We have talked to counsel for the Gautreaux plaintiff class. In fact, we had extensive meetings with them --

THE COURT: Yes, I know you have.

MR. WHITFIELD: -- and basically I think --

THE COURT: You're basically at odds with the Receiver?

MR. WHITFIELD: Right. The Receiver is the only one opposing, basically for the three main reasons. They say, first of all, 50 to 80 percent is required to prevent --

THE COURT: Yes, I know what they say. I was just wondering whether there was any common ground that the two of you could or should have explored even before you came here.

MR. WHITFIELD: We are hoping to do that, your Honor. As I say, we are not trying to do away with the priority altogether. It would stay in place. And to the extent anyone arises who meets that qualification, they would always be served first. But going outside the people who have a right to return to either the waiting list or outside, would just simply not only penalize the people who are waiting there but also have a ripple effect in other developments.

CHA, in effect, owes us 25,000 units for the family -- 25,000 families want occupancy. Every unit is occupied by someone other than that. It doesn't relieve them of that obligation. So money spent on that is money that won't be spent for our 25,000 to meet that obligation.

So we're concerned that, you know, in other words meeting that obligation for families who aren't covered by the right to return may exhaust those resources for families later on down the road, not to mention which there's really no rationale for making an exception for (unintelligible) mixed income as opposed to average mixed income as opposed to Kenwood Oakland, which is right adjacent to Lake Park Crescent and does not have this 50 to 80 percent requirement and has some of the very same people on the working group, myself included, who did not oppose that.

THE COURT: Okay.

MR. WHITFIELD: So that's basically our argument.

I would really like to sort of just, you know, emphasize the fairness in this. There is really no overwhelming reason why the 50 to 80 percent, which was imposed almost ten years ago, should stay in effect now.

THE COURT: All right. You're the movant, so I'll give you a few minutes to make any further comments if you want after I have heard from the others. All right?

MR. WHITFIELD: Thank you. I would appreciate that.

I also have here, just to identify, Mary Wiggins, who's a chairperson of the Central Advisory Council, who would like to make some comments after the community has spoken, if that's okay with your Honor.

THE COURT: Sure.

MR. WHITFIELD: Okay.

MR. JOHNSON: Judge, Tom Johnson on behalf of the CHA.

Our views are set forth in our brief, and as you know, we have been working on this, trying to solve this problem since December of 2004. The brief lays out all the twists and turns of the meetings and discussions that we have had in an effort to try to resolve this.

We also were very clear in our brief that we will live with and implement either of these sort of options that are on the table, the site-based waiting list option, which is attached to our brief, or the CAC proposal.

I think my time is best spent just updating you as to exactly where we are in terms of leasing. You know from the briefs that we started with 30 units at Lake Park Crescent that are in this 50 to 80 category which, as you know, is really a 50 to 60 category based on the financing of the units, for the most part.

As we stand here this morning, 15 of those units are as yet unleased. There are four applicant families in the final stage of being leased but we don't count them as leased until the person has moved in. So there are 15 still sitting there. Since these units were turned over in November of 2004, that crystalizes the problem.

THE COURT: So then how many units does this motion --

MR. JOHNSON: How many does this motion relate to? Well, it relates to the 15 that are presently unleased, although, as I say, there are families in the pipeline.

Your Honor should know, too, that while we are talking about the 15 at Lake Park Crescent out of the total of 30, this 50 to 80 requirement is also in place at another development called Jazz on the Boulevard located not too far away from Lake Park Crescent --

THE COURT: The camel's nose under the tent.

MR. JOHNSON: Yes, sort of that way, although it's not too big a nose, I guess, because Jazz on the Boulevard has

about 15 units coming on later this year that are in this category. But probably whatever we resolve here is going to be the resolution for down there as well. But that's sort of the scope of the problem.

As you know from our brief, we explored at great length at Draper & Kramer what the problems were. Draper & Kramer is not a small player; they are a very experienced real estate firm. They said they could resell these units. When they encountered problems, they brought them to us.

At first they thought the ceiling rent on these units was a problem. We went around the block on that. In the end Draper & Kramer felt they would prefer the site-based waiting list.

While all those discussions were going on, while all those attempts to resolve the problems were going on, we did go through -- just so your Honor knows, we've invited all of the displaced lakefront families that fit this income criteria to come to these units. We have invited every CHA family in any CHA building in the entire city who fits these income criteria to come to these units. And then we embarked upon this process of contacting everyone on the CHA waiting lists and the scattered site waiting lists, and at this point, just to update the figures, we have contacted 7400 families.

This is an extremely time-intensive process because, as you can imagine, when you contact families, you get lots of

phone calls, lots of correspondence back.

Again, looking for people in this income category, the last mailing -- Draper & Kramer told us that most of the vacant units were one-bedroom units at this point, so the last mailing of 1500 just went to one-bedroom families, but 7400 in all. And out of those mailings we got interest from people within the range -- the income range from about 164 families that have all been referred over to Draper & Kramer.

Now, that process is going to continue and is continuing today as we speak. The question really before you is, do we supplement that with the site-based waiting list or the CAC's proposal. So we stand --

THE COURT: Can we do it without any precedent -- or should we do it without any precedent in regard to similar matters that might come up in the future?

MR. JOHNSON: Other 50 to 80 units? Right. I mean, one thing we have learned from this plan of transformation is usually it's good to go slow and see what works, stay with what works; if it doesn't, be ready to change. So maybe we should confine ourselves just to Lake Park Crescent at this point.

Pretty much, I think -- oh, just one other point. In the Receiver's papers, and I think it might have also been in the Gautreaux plaintiffs' papers, there was a suggestion that in addition to going to the site-based waiting list, that

somehow we would contact all of those 50 to 60 percent of AMI families, CHA families, who are already placed in permanent housing, okay, who have already gone through the whole process and are now sitting in their new units, and somehow solicit that group to see if they wanted to go down to Lake Park Crescent.

So the reality of that means to go to families up at Cabrini, North Town Village, at Hilliard on the south side and other developments like that, people who have now been in place, presumably whose kids are in school, they are situated, and somehow entice them to come down to a neighborhood that they have no interest in, without any difference in the economics.

So that is one part of the proposal that we think is probably not warranted. We take a lot of time, we don't see any likelihood of any significant success in enticing those families to come down.

Thank you, Judge.

THE COURT: Mr. Polikoff?

MR. POLIKOFF: Well, your Honor, this is a tough one.

The community understandably is concerned about the elimination of this requirement, this 50, 80 requirement. And we have to remember that this was one of the few communities in Chicago that went through a responsible planning process with respect to CHA development and ultimately not only didn't

oppose the Lake Park Crescent development, but really welcomed it and supported it as part of a larger community structure.

And although very many good things have happened to North Kenwood Oakland, it's still not the equivalent of Lincoln Park. And Shirley Newsome and Tony Preckwinkle, the Alderman, have poured many, many days and months and weeks, years, I guess, of blood, sweat and tears into the strengthening of the fabric of their community, and they are to be commended for that.

And it's not easy for the Gautreaux plaintiffs to take a position different from one that they espouse. Nonetheless, there are tough decisions that have to be made, and for the Gautreaux plaintiffs, for an understandable reason, I hope, we come down on the other side of this one.

That reason is that if we go to a site-based waiting list, we are, in effect, offering remedial units, units that are designed to provide relief for Gautreaux plaintiff families, to persons who are outsiders, who are not members of that class, while as Mr. Whitfield points out, members of that class will not have access to those units because of this income restriction.

It's very difficult for the Gautreaux plaintiffs to espouse an approach after all these years that they have spent seeking to foster a remedy for a large class of families who have not yet been given a remedy, to see some available

remedial units go to outsiders. That's the key point, your Honor.

THE COURT: I understand.

MR. POLIKOFF: I want to add to that that with great deference, and understanding the concerns of the community, we can't address this question of whether or not to drop the 50 to 80 income requirement without recognizing the great strides forward that the community has taken.

We aren't where we were in 1996. North Kenwood Oakland is a lot stronger today than it was then. The Receiver's motion details a lot of respects in which the community is enormously strengthened as compared to what it was then.

I also want to point out that in 1996, when this 50 to 80 percent requirement was imposed, there were thousands of public housing units on the northern border of the community, in the Clarence Darrow and Madden Park and Ida B. Wells, CHA developments, most of which were populated virtually exclusively by extremely low income families.

Today many of those high-rise some of them, mid-rise, low-rise units, are gone. They are on a trajectory to be replaced with a vibrant mixed income community newly named Oakwood Shores, lots of infrastructure development by the city as part of that plan. It received a large Hope VI grant, as your Honor knows, and it's one of the exciting new ventures in

the city.

So far as the North Kenwood Oakland community is concerned, this is an enormous plus; that overhanging group of low income public housing developments is now well on the way to being history, to be replaced by a new community, and that's an important change in the community circumstances from 1996 and a very, very positive one.

To summarize, I said it's a tough call. I don't like taking a position in opposition to one of the aldermen in the city whom I think most highly of, any public official, for that matter. But bearing in mind our responsibilities to the Gautreaux families whom we represent, our obligation to see to it that they get these units rather than outsiders, and balancing against that what we perceive -- it's a subjective call -- what we perceive to be the enormously strengthened community, and bearing in mind importantly, as Mr. Whitfield emphasized, the existing working requirements. After all, it was the razon detra for the Gautreaux plaintiffs proposing this requirement in the first place. I recognize there is some dispute about that, but historical events get murky.

What I can tell you with assurance, that our thinking was the same as it was at Henry Horner one year earlier, when in 1995 we proposed a mixed income requirement for Henry Horner and it was clearly then for the purpose, as we said, of getting working families in. And we do have a working family

requirement operative and that will remain operative at Lake Park Crescent even if the 50, 80 percent income limitation is eliminated.

So on balance, and with reluctance for the reasons I've stated, the Gautreaux plaintiffs would oppose a site-based waiting list and would support an elimination of the 50, 80 percent requirement in your Honor's order.

THE COURT: Okay.

MR. POLIKOFF: Thank you.

MR. SHAKMAN: Good morning, Judge. Michael Shakman for the Receiver.

As you can see, Mr. Levin is present in court this morning, as is Valerie Jarrett. Both are prepared to address questions the Court may have.

But I would like to outline for you briefly why the Receiver opposes the CAC motion and why the Receiver attaches considerable importance to it even though it involves, we believe, only six units currently. We will talk about the numbers in a moment.

The reason the Receiver opposes this motion is that it threatens the Receiver's ongoing efforts as the agent of this Court to generate public support for replacement public housing that the Receiver is responsible for developing, not only in the North Kenwood Oakland community but throughout the city.

The CAC motion is clearly an effort to cancel, do away with an important commitment to the community and to the city that was made in planning the new public housing that's being constructed now in this neighborhood.

As you know, the commitment was more than just talk; it was incorporated into the Court's order of June 3, 1996, and it's been in effect since that time. That commitment said that one-half of the replacement public housing units on the lakefront site and the Drexel Avenue site would be occupied by families who fell into the 50 to 80 percent of median income range. That commitment grew out of an intense and sometimes contentious community consultation process involving the city, the CHA, Mr. Polikoff, tenant representation, the Receiver, the North Kenwood Oakland residents, a community that has had a tradition of strong local community interest in what happens, and, of course, the Conservation Community Council and the Alderman, both being representatives -- in the case of the Alderman, an elected representative, in the case of the Conservation Community Council, a governmental body appointed by the mayor of the city to represent the community in community planning.

You may or may not recall, but the fact is that the community was strongly opposed to new public housing in Kenwood Oakland. The community residents felt that the community already had far more than its share of public

housing, and clearly it did. It did have far more than its share.

In response to what would have been a strong no vote by the community, the consultation process that the Receiver was involved in with all of the other parties that I mentioned, led to what can fairly be called a consensus or a compromise. And a key part of that consensus and compromise was that significant efforts would be made to assure that there would be economic integration at work in the public housing units. And that meant addressing the fact that, sadly, the public housing units in the City of Chicago had become isolated islands of very low income population who cut off from association with others and cut off from the broader community.

The city participated through Valerie Jarrett, who was then the Commissioner of Planning. Alderman Preckwinkle participated as the elected representative of the community. Shirley Newsome, who is here today and will address the Court shortly, was and is the chair of the Conservation Community Council appointed by the mayor, and of course the Receiver was involved as was Mr. Polikoff, the CHA, tenant representation. This was a considerable, impressive consultation process and it generated a result that got incorporated in the Court's order.

The 50 to 80 percent minimum, which what is we're

talking about, assured the community concerned that the housing involved would include residents who were not solely very low income and would take an important step in breaking the pattern of very low income only residents in Chicago public housing.

The Receiver believes that developing and maintaining community support is vital to his work, and his work is not just brick and mortar but it also involves generating support in the communities where replacement public housing is being built so that the residents of those -- of that replacement housing receive a welcome. As Mr. Polikoff correctly said, this community welcomed them after we went through this process, and that welcome is very important to the long-term social objective of breaking the pattern of isolation and segregation that led to the Gautreaux lawsuit in the first place.

The Receiver's conclusion is that his commitment to the community would be breached, and the credibility of his work in this community and elsewhere, where the Receiver is called on to become involved in sensitive and difficult discussions with the community and local representatives, would be compromised if a commitment of this sort that's documented in a court order and was the result of an exemplary public debate is done away with. And there's really no compelling reason for it to be done away with in this case.

Ms. Newsome is here and Alderman Preckwinkle is here; they will address the Court. All were participants in the process. They will confirm, as the affidavits we filed with you do confirm, that the 50 to 80 percent requirement was not intended simply as a substitute for having a requirement that a portion of the public housing residents be employed. That requirement, the 50 to 80 percent requirement, was fully discussed, it was debated. It was agreed to and ordered to increase the probability that there would be true economic diversity in the new public housing component of this development. It was tailored to encourage -- also to encourage market rate occupants and to break up the concentration of very low income residents.

A requirement that public housing residents be employed is not the same thing at all. In any case, that is not the agreement that was reached with the community or the city or reflected in the Court's June 1996 order.

Ms. Jarrett reminded me that the city contributed land for approximately 90 units that are involved in this development, and the city's commitment to that contribution was based expressly on the planning commitment that Ms. Jarrett spearheaded and is confirmed in the Court's order to generate this level of integration within the public housing component. So there's also a city component of commitment here.

Let me talk about the number of units involved because our understanding is a little different than what you have heard.

We understand that the motion now involves only six units in the 50 to 60 percent range in the Lake Park Crescent project. And my source for that is Lawrence Grisham, who is part of the Receiver's staff and who will be happy to expand on how he comes to that number.

The other 24 units have been and will be occupied, we understand, with the families who meet the requirement. It's very likely that if additional time is allowed, because this has been a relatively compressed process that's been going on, that eight -- or the six remaining units will also be occupied by families who meet the requirement.

It's our view that it's much too early in the rental process to give up on the effort. The remaining units can be filled from the CHA waiting list or from among Section 8 residents in other housing or by using a site-based waiting list. Any of those will work, and all of them should be tried, in the Receiver's view, to ensure compliance with the Court's order and the commitment to the community.

THE COURT: If we do try and are not successful?

MR. SHAKMAN: We recognize that after an appropriate effort has been made -- we don't think that's happened yet -- the Court may want to take another look at this.

But a strong point I want to make this morning is that an appropriate effort has not yet been made and a grant -- approving the CAC motion at this point would send the wrong message not only to the community, but it would send the wrong message to the CHA.

The CHA admits at page 3 of its brief -- and Mr. Johnson acknowledged when he made comments a few minutes ago that the CHA only began to address this issue, the need to identify tenants for this 50 to 60 component, in December of last year; that's a little more than six months ago.

You will hear from Alderman Preckwinkle, when she talks to you, that she has been meeting with the CHA regularly, Terry Peterson of the CHA, the Executive Director, for years and has been telling him you need to get started on this process, you can't wait until the last moment and you have to consider alternatives together.

So part of our --

THE COURT: How much time do you think it would take to accomplish that?

MR. SHAKMAN: I think without -- at least a process that's given a full year's real effort. It hasn't been done, and I think candidly the CHA was late in starting it, late in dealing with this. And it sends the wrong message to the CHA to say that if you don't start a process that is admittedly novel, because they haven't done this before, and you wait

until you're on the -- long past the startup of the project and on the eve of having units come on line --

THE COURT: Did you talk to Mr. Whitfield about him entering and continuing his motion to give them --

MR. SHAKMAN: I confess I have not. And I have to confess as well that I am here as Mr. Feldman's substitute because he got called out to an emergency, so I don't have the full background. Mr. Feldman may or may not have had conversations.

THE COURT: According to Mr. Whitfield, he hasn't had conversations with him.

MR. SHAKMAN: I have no reason to question Mr. Whitfield on that issue.

THE COURT: I'm not suggesting that there can be an amicable resolution among you. All that I'm suggesting is that it would have made some sense for Mr. Whitfield to speak with you and some of the others who oppose this position to see if there could be some kind of meeting of the minds. You propose one yourself, which could simply mean me delaying action on his motion until the CHA had a reasonable amount of time to do the things you say it should be doing to give some credibility to Mr. Whitfield's proposal.

Does that make sense at all?

MR. SHAKMAN: It all makes perfect sense to me. The one year number I picked as an example is not written in

stone.

THE COURT: I'm not holding you to the one-year number or giving that one-year number any credibility. But it seems to me that there may very well be a reasonable period of time that everybody could agree on that would be long enough for the CHA to exhaust a good faith effort to do what it has to do.

MR. SHAKMAN: That makes a lot of sense to me, Judge.

It may be that Ms. Newsome or Alderman Preckwinkle can elaborate on contacts with Mr. Whitfield that I don't know about. And I apologize to the Court, being a pinch-hitter today I don't bring the full background --

THE COURT: That's all right.

MR. SHAKMAN: Thank you, Judge.

THE COURT: Alderman Preckwinkle, would you like to say a few words?

MS. PRECKWINKLE: Thank you, your Honor.

You know, I think the first thing I would say is that I am profoundly disappointed to be here today. I thought that we would settle this matter nine years ago in 1996 with a revised memorandum of accord, and I never expected to appear in court again on this matter.

I am by profession a history teacher, so forgive me if I give you a little history; it's probably history you're well aware of but let me remind you nonetheless.

I was elected in 1991 and I promised that I would try to take down the vacant CHA buildings on the lakefront and try to work for a mixed income community, low-rise, lower density, mixed income community on the site, and for several years got virtually nowhere.

I was fortunate, though, in 1993. When Bill Clinton was elected president he chose one of my colleagues, Edwin Eisendrath, to be regional director of HUD. And shortly after Edwin was sworn in I went to him and said, you know, look, I need your help, colleague. We're not getting anywhere on the lakefront in trying to redevelop this site and I could use your help.

Edwin was good enough to convene monthly meetings for a year-and-a-half that included all the parties that you have heard from, not just resident leadership at CHA, but CHA and the Receiver and BPI and the Department of Housing and Shirley Newsome and myself. I may have forgotten someone or some entity. Shirley can help you on that. We met for a year-and-a-half every month to try to work out a revised memorandum of accord that we could all sign onto, and eventually that was the case.

When we came to court to support that revised memorandum of accord, we were opposed in court by community residents, residents for responsible redevelopment of North Kenwood Oakland who made the case that you've heard from Mr.

Shakman; that is, that our community already had an abundance of not only public housing but subsidized housing and very low income families and that it was not in the community's interest to have any more public housing at all.

My vision for the community has always been a mixed income -- as a mixed income community, and I have always said that we have to have a place in redevelopment of North Kenwood Oakland for those who are very poor. This was not a position that was greeted with uniform enthusiasm as I expressed in the community over time. Hence, the creation of RRR and some very difficult community meetings in which yours truly and Shirley Newsome and other community representatives took a great deal of abuse for their support, the return of public housing residents to the community.

So having been in your courtroom nine years ago supported by people who are now at odds on this issue, and coming to an agreement and having sold that agreement to the community, that is, we're not recreating concentrations of poverty, we're going to have mixed income communities and mixed income even in terms of our public housing population -- as I said, it's discouraging to be here.

You know, I also want to say that in those discussions over a year-and-a-half in Edwin Eisendrath's office at HUD, there was never any discussion of working families, never, that I can recall. I don't even recall

working families coming up. It was always about income tiering because it's quite true that you can be very poor in this country and have a full-time job. It's a disgrace but it's surely true.

So it was never about working. There are lots of people in CHA who work full or part time. That wasn't the issue. It was always income tiering. So my recollection is different from others who have spoken to you this morning.

I think the third point I wanted to make, other than my beginning point that government needs to keep its promises and the idea we should revisit this nine years later is discouraging to me, and that there was never -- it's my second point that there was never any discussion about working families, it was always about income tiering.

The third thing I find discouraging is Mr. Johnson's testimony about CHA. You know, CHA has known since December of 2003 -- 2004, rather -- I take it back, has known since 1996 that they were going to have to provide 50 percent of these units at 50 to 80 percent of median. And the testimony I think is December of 2004, that they began looking for people to fill these positions.

Now, if you've known for eight years at that point that you have to find these residents, you would think it would have occurred to somebody that they needed to be working on this so that they could fill the units when they were

available. As a matter of fact, in May of 2004 we had a grand opening for the development, so somebody might have started thinking about it, you know, six months prior to that, in May.

So I'm appalled that CHA would defend itself by saying how difficult this is when they had years and years and years to work on it and didn't. It reflects, I think, their general ineptitude. I find that discouraging as well.

You know, as an elected official my major currency is my credibility, and I made a commitment to the community that I represent that I was going to try to work toward the creation of mixed income communities and try to eliminate the pockets of concentrated poverty that existed in my ward. And working on the revised memorandum accord was part of that strategy and part of that commitment. So I'm here today to support the agreement that we reached in 1996 and the income tiering that was part of it.

Thank you.

THE COURT: Thank you very much.

Ms. Newsome?

MS. NEWSOME: Good morning, your Honor.

THE COURT: Good morning.

MS. NEWSOME: I'm here on behalf of the North Kenwood Oakland community as a whole.

While I am an appointed representative, I am also a resident. And the very first thing that I would like to have

as a part of the record is that the community as a whole is not an adversary of residents of public housing and we have worked very hard over the years to be a representative of them in various forms where they could not be a representative of themselves.

Secondly, I would like to interject my bit of history, which goes back a bit further than that of the elected official, Alderman Toni Preckwinkle, in that in the early '80s, when then Vince Lane was the Executive Director of the Chicago Housing Authority, he himself approached the residents of the community to help him develop a mixed income scenario at Lake Park Place. He actually came with his staff to what was then basically a block club association meeting. He told us that what he envisioned for Lake Park Place, he could not do it alone; he needed the help of the community and he asked us for our commitment and we gave him our commitment to work with him. Although we felt at the time the suggested mixed income that he was proposing, which was 50/50, was not proper and proved to be the case, we did, in fact, agree to give assistance to him. So we were invited into this process.

And over the years I believe we have played a vital role in what has happened in North Kenwood Oakland. Our community at one point was very much divided along the lines of the public housing residents, their return, and the greater community itself. We have been able to overcome that and we

were a part of a process that is very much like the present day working groups. I believe we kind of set the precedent for today's working groups under the plan for transformation in that we had all of the players who were involved in this process and who were capable of making this process successful at the table.

At the time that promises were made to the residents of Lake Park Place and to the residents of North Kenwood Oakland, we had a different set of players but there are some constants that remain today. Mr. Vince Lane is no longer there, Mr. Eisendrath is no longer there, but basically all of the other players remain.

The one other player who was very, very important to the process and is no longer at the table is Izora Davis. She at the time represented the residents of Lake Park Place, and we have -- as the alderman has alluded to, we had some very difficult meetings but we were able to work together.

Her focus was on that of the greater community and not just the population of her buildings there on Lake Park Avenue. And so we were able to come up with agreements, we were able to get her to make concessions that previously had not been made, and we continued to maintain a relationship with her and most of the residents of Lake Park Place. They are our neighbors.

What I am concerned with is that we were

pre-transformation. We were able to forge agreements, we were able to come together as a working group. We were able to determine that the mix should be one-third, one-third, one-third, which set the precedent for the CHA transformation, and we did that basically without the CHA transformation hanging over our heads, so to say.

I think what has happened over the course of time is that we have changed administration, we have been presented with CHA transformation as a plan, and to a certain extent it overshadows agreements that were made initially by the group that was not a part of transformation. And I am concerned that the promises that were made not only to the residents of the community but to the residents of public housing at that time, not be overshadowed by laws that have come into effect since.

The CHA has continued to come back to the community and has gotten concessions from the community with regard to plans that were a part of transformation. They are looking forward to coming to the community in the near future again so that we might even amend our conservation plan, which is law, to accommodate the residents of public housing.

We cannot in good faith support what has been presented because it goes against the promises that were made to us prior to CHA transformation.

As the Alderman has stated, there was no discussion

of working requirements because that was not what our efforts were geared toward at the time. We specifically raised the issue of the greater population of North Kenwood Oakland which did not occupy public housing but shared the same economic status. And we informed the residents at that time, because we knew at some point many of those poorer residents, some of whom who were working, some who were not, would be possibly displaced as the community went through its transition; some Section 8 units would be converted into market rate units and those people were concerned as to where would we go.

All of the emphasis was on public housing residents, but what about the other poor that occupied the North Kenwood Oakland community. So we had to ensure that some consideration would be given to them. And we, as a part of our agreement, we thought, more or less were assuring or guaranteeing that they, too, would be served along with the public housing population.

Now, the units that we are discussing today, they are not an enormous number of units. I do believe that if additional time were granted for this process to take its course, that CHA, along with Draper & Kramer as the developer, would be able to find residents for those particular units. But I'm also very conscious of the fact that the effort has not been made to extend itself to the greater population of North Kenwood Oakland who were promised that they would be

given consideration after the residents who had the initial right to return to those units.

And so, what I wish to leave with you today is the fact that while the CHA is presently concerned with promises that they are making and have made as the result of CHA plans for transformation, there were promises made prior to CHA transformation and those promises need to be kept as well, particularly if CHA is going to continue to be successful in the North Kenwood Oakland community. And I do believe that this community has, more or less, set the precedent for public housing, mixed income development throughout the city as well as the nation.

It was Mr. Lane's theory that if it could work in North Kenwood Oakland, it could work anywhere. For that reason, it has to work in North Kenwood Oakland, and promises made have to be promises kept to the community as well as to the residents.

Thank you.

THE COURT: Thank you, Ms. Newsome.

MS. PRECKWINKLE: Your Honor, if I may, there's something that I neglected to mention in my remarks which I ought to put on the record.

I meet every month or two with Terry Peterson, and the issue of filling the 50 to 80 percent of median units in Lake Park Crescent and Jazz on the Boulevard is a recurring

topic in our meetings. I repeatedly told him that I didn't care how he found people to fill those units, whether they went to other developments and asked people if they were interested, whether they went to the waiting list, the CHA waiting list, whether they took people who had permanent placements elsewhere and invited them to be residents of Lake Park Crescent. I didn't care as long as they met their commitment as part of the memorandum of the Court.

So I just want the record to reflect the fact that I repeatedly raised this issue with Terry Peterson and let it be known to him what my position was; that is, that CHA needed to do as the memorandum of the Court in 1996 required them, and that is, find residents in the 50 to 80 percent median.

Thank you.

THE COURT: Okay. I will let you respond, Mr. Johnson. I want to make sure I've heard -- yes?

MS. ELSON: If you don't mind, I would like to make a few comments on behalf of HUD.

I did call Linda Wawzenski as soon as I heard about this session. She was not able to attend. She had some paralegal interviews set up already.

THE COURT: Yes.

MS. ELSON: She had not been informed either.

Just a little bit of my history. I have been an attorney with HUD for almost 27 years, I have been involved

with working with the CHA before the appointment of the Receiver, and I've come to the courtroom frequently when John Jensen was Mr. Gautreaux within the HUD organization, so I do certainly have some familiarity. And my current major responsibility is working on mixed finance projects with the CHA and Receiver and developer, so I am fairly familiar with most of these materials.

A few points I would like to make quickly, your Honor. First of all, I think there was a little bit of confusion about the number of units we have been talking about at this point and I think it's fairly important that we get a good understanding of what the number of units really in question are.

We have figures ranging from the need to fill six, eight, twelve or 15 units, and that number out of 30 I think possibly casts a different light on the significant effect here. So, again, I just want to point that out.

One of the things I would like to mention is that in a perfect world it would be great if we had more time and just let the process continue. And I'm not a financing expert but I think the answer to that question is that this project is now behind schedule and in terms of the original financing, some things really are called into question if units are not filled promptly.

On the other hand, to counterbalance that, I would

have to say that the notion of a campaign to bring in people who are not on the current CHA waiting list is problematic to HUD.

When you look at our regulations, the regulations talk about the acceptability of waiting lists, site-based waiting lists and certain circumstances, but they are written on the expectation -- or presumption that indeed all of those applicants have been public housing applicants. The notion that there is a list of public housing applicants currently of many thousands of families and now some folks who have not been part of that process, are not on that list, all of a sudden being brought in to form a -- either immediate occupancy or a site-based waiting list, is something that is just not envisioned in our regs. So as a general principle, we're not in favor of the notion of going to the outside.

On the other hand, I think there's maybe somewhat of a compromise position that should be considered here. I was in a couple of meetings in the last several months discussing this issue and one of the things we talked about was the notion that of the many, many people who have called or responded to inquiries, the CHA folks, the applicants and those currently at other sites and on other waiting lists who have responded, many were very interested but they did not meet the 50 percent threshold.

According to Lilian Fuentes, who used to be in CHA

legal and is now a major person in their occupancy area, the sense of the people receiving the phone calls and the inquiries and doing this work was that if the 50 percent was lowered to 40 percent, maybe 35 percent, but somewhere in the 35 to 40 percent range, that these units would have filled very quickly; that there's a fairly large number in the CHA demographic that fit into that band, although they are not yet up and hopefully will be up to the 50 to 60 percent band, but they are not at that point quite yet.

So I think there should be some serious discussion of the possibility of maybe not eliminating this threshold but just lowering it.

I think if you -- you know, what is the difference in the quality of the family who makes 40 percent of area median income instead of 50 percent? They're working, they're meeting that criteria. Of course there's always a financial consideration, but as long as the CHA operating subsidy is providing an adequate source of funding to make up the difference between the family's income and what the expenses of running the building are, I don't think you need to worry about deterioration of the real estate. They're working families, they should be good tenants. I don't know what makes them bad tenants just because they fall below the 50 percent mark.

And I think the only -- a couple things I wanted to

add to that. Mr. Polikoff talked about some of the other activity in the community. We are hoping that either by today or by tomorrow morning HUD will be approving the next phase of the Madden-Wells project; the first phase has gone very well. As we understand all aspects, physically, occupancy, providing social services -- another phase hopefully will be approved certainly no later than noon tomorrow. So that again adds to the notion of an additional mixed income community moving forward hopefully very quickly, like the first phase.

And in terms of the Receiver's credibility, I guess my reaction would be that the Receiver has developed their credibility and their reputation over the last 17 years. They are no longer at a stage where acquiring vacant parcels is the major burden that it was during the late '80s and the early '90s. And so, I feel fairly convinced that the Receiver's credibility can withstand an assault based on this one fairly small issue in the overall scheme of things that's been going on for the last 17 years.

MS. PRECKWINKLE: Excuse me. Your Honor --

THE COURT: Everything has to come to an end, Ms. Preckwinkle.

MS. PRECKWINKLE: I'm sorry, your Honor.

You know, I have never met this woman before in my life. I am distressed by what she says. It's not just the Receiver's credibility that is on the line here. It's all of

us who stood behind the memorandum of accord in 1996. And particularly, it's me and Shirley and Valerie.

I don't know where this woman came from, but she surely wasn't part of our discussions in 1996. And I'm appalled that she would think that it doesn't matter about the Receiver's credibility. This is an issue for me and my community, the community I represent. I committed to trying to create a mixed income community, and if she doesn't care about my credibility or Shirley's credibility or Valerie's credibility, we ought to talk to her outside the chambers.

MR. LEVIN: What about my credibility?

MS. PRECKWINKLE: I'm sorry. Dan Levin's credibility, too.

MS. ELSON: I did not say anything about the Alderman's credibility or Ms. Newsome's credibility. I was referring specifically to the point of the Receiver's credibility, which I think speaks for itself based on the last 17 years.

THE COURT: Let me say that everyone in this room has extraordinary credibility, I think, and this motion is not going to be resolved by me weighing anyone's credibility or the extent of the ire that someone may have in regard to someone's credibility or their lack of it.

I appreciate, you know, the intense emotion that everyone has on this issue. I appreciate how you're involved

in this issue and I commend it, I don't denigrate it. But I assure you that this will be resolved in a very calm manner and that no one need to be bringing into the mix the credibility of anyone.

Before I let -- oh, yes --

MR. JOHNSON: I just want --

THE COURT: You're going to have the next to the last word. Mr. Whitfield is going to have the last word. And I think there's only one other person who wishes to be heard other than Mr. Johnson and Mr. Whitfield about summing up. I'm sorry, will you identify yourself?

MR. WHITFIELD: This is Mary Wiggins. She's the Chairperson of the Central Advisory Council.

THE COURT: Why don't you come up and tell me what you would like me to hear.

MS. WIGGINS: Good morning, your Honor.

I would like to make a statement that I am not against the Receiver or Ms. Preckwinkle or Ms. Newsome. I'm just here to make sure that our residents and the people use our right of return, the relocation rights contract.

Ms. Preckwinkle gave a statement that Izora Davis was the spokesperson for what happened on the lakefront, which shouldn't have never been because our tenants at Randolph at that time was the LAC president, too, Washington Park, who should have had input on the meetings they were having in '96

since she done passed in '97.

All I'm saying is, if they could lower it to the 45 percent to 40 percent income, our people could reach that medium. The site specific criteria takes care of everything else that the residents would have to do in order to move into Lake Park Crescent.

I'm not fighting against the site specific or anything -- the residents are not being able to meet the 50 to 80 percent of the median income, so that keeps you from renting these units.

If they follow all the site specific guidelines and everything that's a part of the Lake Park Crescent lease, I don't think our people would have a problem coming in there because they are not going to do anything -- they're not -- they're going to meet the social criteria.

I believe in them having any kind of social service that they need to have to make them to be able to fit into this community. They're just not fitting into the income part, and I don't think it's fair for you to keep it there at the 50 to 80 percent if the people can't meet the income, and then you accuse CHA of not looking for the people. Maybe from November to this July hasn't been enough time to find the people that meet the 50 to 80 percent income.

So my thing with the CAC and the reason why we fought is because we didn't want them to go to a waiting list to keep

our people out because they have a right of return. And 25,000 of our people have to be satisfied before 2009, because that's when the plan for transformation is over.

That's all I have to say, your Honor. Thank you.

THE COURT: Thank you.

MR. SHAKMAN: Judge, is there any chance you would entertain 60 seconds of additional comment from me?

THE COURT: 60 seconds and then we will go to Mr. Johnson.

MR. SHAKMAN: I'm informed by the Receiver that it's relevant to note that at Horner there is an identical requirement of 50 to 80 percent and that a quarter of that number is about 100 units. And CHA did undertake an extended outreach program before the units came on line and did fill those units.

THE COURT: Okay.

MR. JOHNSON: I think I can make mine in fifteen seconds, Judge.

I only rise because the Receiver and the Alderman suggested that CHA began identifying families for these 50 to 80 units in December of 2004. That is not what I said in the brief; that is not what I said to you. That's not, in fact, what happened.

Just so your Honor knows, many months before the construction was complete on these units, CHA gave Draper &

Kramer information on all of the families in CHA across the entire city that met this income requirement. There were nearly 400 families living all over the city. We also gave them all the information of the families amongst the lakefront displacees, which was a very small number, that met the income requirements.

What happened in December of 2004 is that Draper & Kramer came to us and said, all of these CHA families are not enough. We need to find another source of families for these units because all of the CHA families were entitled to this relocation; we have gone through and we have vacancies. And that's when, in December of 2004, we began exploring these alternatives of reducing the ceiling rent, going to the waiting list and doing site-based waiting. So just for point of clarification.

The only other thing is on the vacancies, I did check yesterday. Our information is there's seven one-bedrooms, five two-bedrooms and three three-bedrooms without signed leases right now.

THE COURT: Mr. Whitfield?

MR. WHITFIELD: Judge, I think starting off, I do want to say a response to a couple comments you made.

I did reach out before we filed a motion to CHA, to -- Mr. Polikoff I had a meeting with; I also talked to Alderman Preckwinkle several times. She and I are neighbors

and we meet in Hyde Park sometimes. And I had advised her that if this came to pass, that our families with the right of return were passed over for people on the waiting list or people who hadn't even applied, that the CAC would oppose this. That was several months before we actually filed a motion.

So I must admit I did not reach out to the Receiver. I did place a call, I think to Ms. Jeffers; she might have been on vacation, but I did not follow that up, so I was remiss in that.

I think it boils down to this: You know, is the working requirement, the CHA is unopposed, not only Lake Park but all mixed income, does it serve -- I know it's not the same as the 50, 80, but does it serve the same fundamental purpose which Mr. Polikoff alluded to? I think it does, creating economic diversity. If it's true, then there is no breach, you know, to any agreement or understanding that was made.

I also want to point out that the CAC was not a party to these negotiations in 1996 that led to this -- Ms. Wiggins alluded to that. CHA was, in fact, controlled by HUD in 1996 and --

THE COURT: Well, I mean, just because you weren't a party to it really is not relevant. There are new organizations that spring up all the time.

MR. WHITFIELD: Very true.

THE COURT: If we were to revisit every agreement just because there's a new organization that has an interest that didn't exist at the time of the agreement, I would be spending a lot of time reviewing agreements.

MR. WHITFIELD: You asked, you know, will we be amenable to some type of resolution, maybe continuing our motion? I talked to Ms. Wiggins briefly. We're open to that to a certain extent. We don't think a year is necessary because our review of some of the statistics of CHA -- there may not be that many people left.

We don't think it prudent, as Mr. Polikoff pointed out, to take people who have already had other mixed income who meet these criteria, and then take them from those places -- that's creating the same problem or adding to it.

But we are amenable to continuing the motion, however, with the proviso -- there are only about six or seven units to be filled. I don't think a great deal of harm would be done if those units were leased to people with a right to return who, as Ms. Elson pointed out, don't meet the 50 to 80 but are working families who maybe meet the 30 to 50 percent median income.

You would fill the units, we could continue our discussions, try to enter into some kind of resolution. We're open to that, the CAC is open to that if, you know, the other

parties are.

THE COURT: Thank you very much.

MR. WHITFIELD: Yes.

THE COURT: All right.

Let me say this: I am ready to rule and I could rule right now, but I'm not going to. I'm going to rule probably next Thursday or Friday. The reason for that is that there are people who have differences with each other in regard to the agreement in this room and in their oratory expressed those agreements quite vociferously.

But having said that, you people live together in the community and work together in the same community and I see no one in this room of ill will. And for that reason I think it makes sense to give you an opportunity, which may or may not be successful, to sit down and see if there's some kind of an accommodation that can be made that won't make everybody happy but that everyone can live with to resolve what I perceive is a very small problem, because we're only talking about a handful of units, but a big problem in terms of perhaps a precedent or perhaps a demeaning of a position that has been put forth in the community by various parties.

So what I'm saying is that, you know, I make decisions all the time, I make them quickly, I am not the least bit reluctant to make them, even hard decisions, and this is not a hard decision. I'm not going to make it today.

I want, Mr. Whitfield, for you to sit down with the Receiver, with your neighbor, the Alderman, with HUD, CHA, Mr. Polikoff, and see if you can work something out that you all can live with. Again, something that's not going to make you all completely happy, but it seems to me that the greater good is not to make two or three parties extremely happy; the greater good is to make you all live together and work together because you're all people essentially of good will trying to accomplish something for the community. You have different views as to what is best for the community, but I think you all have the very same goal of trying to do what is best for the community.

Since Mr. Polikoff, by seniority, not only in age but in terms of endurance, has been around, I would like for you to let me know by Thursday morning, A, if there has been some kind of an accommodation made or, B, if you want me to delay my ruling because you're working on one that can be made, or, C, if you are completely at loggerheads and want me to rule.

Thank you very much.

(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.

Mary Ann Hacker

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

10/27/05
Date