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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| DOROTHY GAUTREAUX, et al., | Appeal from the United States District Court for the Northern District of Illinois |
| Plaintiffs, | |
| No. 05-3968 | |
| v. | No. 66 C 1459 |
| CHICAGO HOUSING AUTHORITY, et al | Honorable Marvin E. Aspen |
| Defendants, | |
| and | |
| CENTRAL ADVISORY COUNCIL, | |
| A Nonparty, as Appellant | |

# REPLY BRIEF FOR THE CENTRAL ADVISORY COUNCIL NONPARTY, AS APPELLANT

BY: Robert D. Whitfield
10 South LaSalle Street
Suite 1301
Chicago, Illinois 60603
(312) 917-8888

One of the Attorneys for
the Central Advisory Counci
a Nonparty, as Appellant



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TABLE OF CONTENTS

Pages (s)

Table of Authorities . . . . . i

Summary of Argument . . . . . 1

Argument . . . . . 2

Conclusion . . . . . 8

TABLE OF AUTHORITIES

CASE (S) Page (s)

Dawoud v. Gonzales,
424 F.3d 608 (7th Cir. 2005) . . . . . 5

Divane v. Krull Elec. Co,. Inc.
194 F.3d 845 (7th Cir. 1999) . . . . . 3

Keys v. Barnhart,
347 F.3d 990 (7th Cir. 2003) . . . . . 5

Smith v. Northeastern Illinois University,
388 F.3d 559 (7th Cir. 2004) . . . . . ..7

STATUTES (S)

42 U.S.C. 2000d . . . . . 4,6

## SUMMARY OF ARGUMENT

The District Court's July 14, 2005 Decision and Order denying the CAC's motion to amend the June 3, 1996 Revitalizing Order should be reversed under the abuse of discretion standard. The decision to approve a site based waiting list ignored the undisputed factual data provided by the Appellant clearly indicating that many more families with slightly lower incomes could be housed by modifying the 50 to 80% income requirement; and conversely indicated that the impact of continuing the 50 to 80% requirement would in effect completely deny housing at this location for current public housing families, and families on the waiting list.

The Appellee ignores the fact that the District Court Order authorizing the site based waiting list references the very same regulation, 24 CFR 960.206, at issue on appeal; and ignores the fact that this regulation specifically references provisions at 24 CFR 5.105 (a), which include regulations issued at 24 CFR Part One. The Appellant's brief discusses these regulations, and also references the District Court's failure to provide any explanation for ignoring these mandatory provisions. Appellant did not waive this issue, despite the fact there are no court decisions specifically on point on this issue.

## ARGUMENT

The District Court's July 14, 2005 Decision and Order denying the CAC's motion to amend the June 3, 1996 Revitalizing Order should be reversed under the abuse of discretion standard set forth in the cases cited in Appellant's brief. The arbitrary nature of the Court's decision is apparent from the fact that the Court ignored numerous prior District and Appellate Court Decisions and Orders all aimed at providing the long sought relief to members of the Gautreaux class; and, without explanation, issued an Order allowing persons who are not class members to now obtain housing ahead of class members.

The Receiver also ignores the substantial undisputed impact the Court's decision will have on current Chicago Housing Authority (CHA) public housing residents, and persons on the CHA waiting list. The Appellant submitted data information to the District Court, taken from CHA's own statistical report that indicated there were approximately 35,259 families on the CHA waiting list as of July 1, 2005; and of these, approximately 228 met the 50 to 80% income requirement at issues in this appeal. That means that less than .7% of the 35,259 CHA waiting list families would be eligible to be housed at the Lake Park Crescent development.

CHA's data for current public housing families indicate there were approximately 9,320 CHA families in CHA family housing as of July 1, 2005. Of these, approximately 552 fall within the 50 to 80% income requirement. That would mean that less than 7% of the current CHA families will qualify to live at the Lake Park Crescent development. A Court Order that retains an income requirement that eliminates over 90% of the resident class members, and over

99% of the waiting list class members, cannot be deemed a reasonable alternative, or considered to be consistent with the primary goal of securing remedial housing for member of the Gautreaux class. The District Court's decision was fundamentally wrong, for the reasons cited above, and was therefore an abuse of discretion, and should be reversed. Divane v. Krull Elec. Co., Inc., 194 F.3d 845, 847 (7th Cir. 1999).

It should be noted that even if the Central Advisory Council (CAC) had agreed to the site based waiting list, and had not filed any motion in opposition, CHA would have still needed the approval of the District Court to establish and utilize a site based waiting list; and was in the process of seeking such approval when the CAC filed its motion to amend the June, 1996 Revitalizing Order. This underscores the fact that some Court intervention was required after leasing started, with or without the CAC's motion. This is based on the following facts.

The CHA, after the commencement of leasing by its management agent, quickly realized that there were not enough CHA families, or families on the CHA waiting list, to fill the newly constructed Lake Park Crescent public housing units. Therefore, the CHA could either allow these units to remain vacant while they attempted to obtain enough families from the list of current CHA residents, and or families on the CHA waiting list; or seek a Court Order to either modify the 1996 Order (the result sought by the CAC), or seek a Court Order to allow CHA to begin soliciting persons who were neither current CHA families, or families currently on CHA's waiting list.

This reality also underscores the absurdity of the statement by the District Court, and the Receiver's continued assertion, that no significant change had occurred since the 1996 Order to warrant a modification of the 1996 Court Order; especially since the District Court then did exactly what it claimed was not necessary, approve the change which now allows CHA to solicit families who are not Gautreaux class members. The changes which occurred in 2005, almost ten years later, were 1) the arrival new public housing units, 2) the rental of those new public housing units, and 3) the gradual realization that there were not enough Gautreaux class members to satisfy the 50 to 80% income requirement.

The District Court's July 14, 2005 Order authorizing the site based waiting list specifically states that the list " . . . shall be maintained in accordance with federal regulations concerning the maintenance of public housing unit waiting list, 24 CFR 960.206, including the prohibitions against discrimination." Section 960.206 is contained in 24 CFR Part 960, entitled Admission to, and Occupancy of Public Housing. These HUD regulations are mandatory for all public housing authorities (PHAs), including CHA.

Section 960.103 of this part specifically requires that all PHAs administer its programs in accordance with Federal regulations, including HUD'S regulations governing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, at 24 CFR Part One. The HUD Title VI regulations are specifically referenced in, Section 5.105 (a) as part of the applicable Federal requirements, and are therefore mandatory under HUD regulations at 24 CFR Part 960.

The Title VI regulations require all PHAs to lease their public housing units on a community wide basis, in sequence, and by date and time of application. 24 CFR 1.4 (b) (2) (ii). This regulatory provision is not consistent with the site based plan approved by the District Court's July 14, 2005 Order.

The CAC therefore filed a motion for clarification whether the District Court was waiving the relevant portions of Part 260, and by reference, the Part One provision that required leasing in sequence by date of application. The District Court completely ignored this issue, and issued a September 9, 2005 Order denying, without any explanation, the CAC's motion to clarify. Agency regulations are entitled to substantial deference. Dawoud v. Gonzales, 424 F.3d 608, 62 (7th Cir. 2005) Keys v. Barnhart, 347 F. 3d 990, 993 (7th Cir. 2003) At the very least, the District Court was required to articulate some reason for its decision, and clearly state that the regulations did not apply to the issues before the Court; or state that the cited regulations did apply, but were being waived, and then state why.

Appellant's initial brief discusses the regulations issued by the United States Department of Housing and Urban Development (HUD) at 24 CFR 960.206 and 24 CFR Part One, and clearly states that the District Court failed to respond to the CAC motion seeking clarification whether the District Court was waiving these regulations. The Receiver has not explained, anywhere in its brief, why the Court's could not have simply added a sentence stating that the regulations did not apply, and therefore no waiver was required; or in the alternative, state that

the regulations did apply, but were being waived, and then provide an explanation. The Receiver cannot have it both ways. If the CAC's contention had no merit, the Court should have stated this, and why. Conversely, if the CAC's contention regarding HUD's regulations had merit, but was being disregarded, the Court should have provided an explanation.

The receiver also conveniently ignores, as did the District Court, the testimony of the HUD official in open court that CHA's selection of persons who were not public housing families, or persons on the CHA waiting list would be inconsistent with HUD's policies. It was this testimony which led to Appellant's subsequent motion before the District Court for clarification. That motion cited Part 960 and specifically asked whether the Court's July, 2005 Order constituted a waiver of "applicable HUD regulations allowing the rental of public housing units to person not currently on CHA's Waiting list."

The Receiver appears to argue that a HUD regulatory provision cited in the District Court Order authorizing the site based waiting list (24 CFR 960.206) must be read in complete isolation from any other provision in that subpart; specifically the HUD provisions at 24 CFR 960.103 and 24 CFR 960.202 (a) (2) (ii) and (iv). The last two HUD provisions specifically require all public housing authorities to comply with 24 CFR Part 903 and 24 CFR Part One, which includes the Section at 24 CFR 1.4 implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Appellant has not claimed, and is not claiming now, that any of the parties have engaged in any racial discrimination in violation of that Act; however, that fact does not

eliminate the need for CHA to comply with these provisions, absent an explicit waiver by the Court. This is clear from the mandatory nature of the languages, as pointed out in Appellant's brief.

The arguments and statement in Appellant's brief clearly state why the CAC's contentions regarding the HUD regulations are sound, notwithstanding that Appellant could not find any court decisions specifically on point on the unique issues now before this Court. The statements and arguments contained in Appellant's brief are more than sufficient to preserve this issue on appeal. Smith v. Northeastern Illinois University, 338 F.3d 559, 569 (7th Cir. 2004)

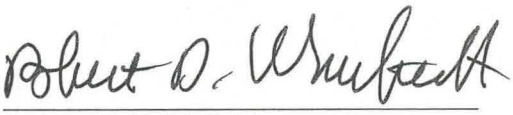
Finally, the Receiver emphasizes that it was reasonable for the District Court to rely on the Receiver, who has been appointed by the District Court to administer the CHA Scattered Site/Development program, and has done so since 1987. However, Appellant contends that the District Court was fundamentally wrong in not giving considerably more weight to the position of the actual parties in this litigation, especially the position of the counsel for the Gautreaux class, who has successfully litigated this complex case since 1969, far longer than the period of participation by the Receiver.

Further, while it might be true that in some instances, the Receiver's duties may slightly overlap into tenant selection matters, this certainly has never been the primary role or responsibility of the Receiver. Conversely, CHA's tenant selection policy was, and remains, one of the major issues in this litigation. That fact alone required the Court to substantially defer to the position of the counsel for the Gautreaux class. The failure to do so, is further evidence of an abuse of discretion by the District Court.

## CONCLUSION

The District Court's decision to retain the 50 to 80% income requirement, and to allow the creation of a site based waiting list was arbitrary, and an abuse of discretion, and should be reversed for the reason set forth herein, and Appellant's initial brief.

Respectfully submitted,



Robert D. Whitfield
Appellant's Attorney

Robert D. Whitfield
10 South LaSalle Street, Suite 1301
Chicago, Illinois 60603
(312) 917-8888, Ext. 3006

**FEDERAL RULE OF APPELLATE PROCEDURE 32 CERTIFICATION**

The undersigned counsel does hereby certify that this Reply Brief complies with Federal of Appellant Procedure 32 (a) (7) (A) (B) and (C) because it contains 2,806 words a counted by the "Properties Information" function of Core Work Perfect 8.0.

Robert D. Whitfield
One of the attorneys for
Appellant, Central Advisory Council

Robert D. Whitfield
10 South LaSalle Street, Suite 1301
Chicago, Illinois 60603

CERTIFICATE OF SERVICE

I, ROBERT D. WHITFIELD, hereby certify that I caused a copy of Appellant's Reply Brief and computer disk of the CENTRAL ADVISORY COUNCIL'S REPLY BRIEF, in the case of Gautreaux v. Chicago Housing Authority, et al., Appeal Case No. 05-3968, to be served on the parties listed below, by U.S. Mail and or messenger delivery on Wednesday, February 15, 2006, before 5:00 pm.

Robert D. Whitfield

Alexander Pilikoff
Julie Brown
Business and Prof. People
for the Public Interest
25 E. Washington Street
Chicago, IL 60603

Edward Feldman
Miller, Shakman
and Hamilton
180 North LaSalle
Suite 3600
Chicago, IL 60601

Gail Nieman
General Counsel
Chicago Hsg Auth.
200 West Adams
Suite 2100
Chicago, IL 60606

Thomas E. Johnson
Johnson, Jones, Snelling,
Gilbert and Davis
36 South Wabash Avenue
Suite 1310
Chicago, Illinois 60603