No. 05-3578

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,	)	
	)	Appeal from the United States
Plaintiffs-Appellees,	)	District Court for the Northern
	)	District of Illinois, Eastern Division
vs.	)	
	)	
CHICAGO HOUSING AUTHORITY, and,	)	
TERRY PETERSON,	)	
	)	
Defendants-Appellants.	)	
vs.	)	66 C 1459
	)	
DANIEL E. LEVIN and THE HABITAT	)	Marvin E. Aspen,
COMPANY LLC,	)	Judge
	)	
Receiver-Appellees	)	

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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I. STANDARD OF REVIEW

Plaintiffs, citing *DuPuy v. Samuels*, 423 F.3d 714, 718 (7th Cir. 2005), contend that CHA's appeal should be considered under a "clear error" standard, as the District Court's decisions regarding plaintiffs' entitlement to fees and the amount of fees awarded, are "steeped in factual matters." *DuPuy*, however, supports CHA's position that the appropriate standard of review is *de novo*. In *DuPuy*, defendants successfully challenged the district court's determination that plaintiffs were "prevailing parties" for purposes of a fee award under 42 U.S.C. §1988. The specific question was whether plaintiffs had succeeded in a "final enough" manner (entry of a preliminary injunction with ultimate findings on several key issues in the case) to warrant an award of fees. *DuPuy* held that whether plaintiffs were "prevailing parties" was a legal issue, subject to "de novo" review rather than "clear error." The present appeal also concerns whether the *Gautreaux* plaintiffs are currently "prevailing parties." As in *DuPuy*, this Court is asked to construe and apply Circuit precedent to the circumstances of this case to answer a legal issue. Hence, the "de novo" standard governs this inquiry. The "clear error" rule applies only with respect to the amount of fees awarded, if the Court reaches that issue.

II. PLAINTIFFS HAVE NOT WON RELIEF AGAINST CHA AND ARE NOT ELIGIBLE FOR FEES UNDER *BUCKHANNON* AND *ALLIANCE*

A. The District Court Never Made Any Finding that Plaintiffs Had Obtained Relief Against CHA During 2001-03, Since They Did Not

Plaintiffs cannot have it both ways. They claim they prevailed in 1969 by winning an injunction that ***prohibited*** CHA from building in Limited Areas (absent corresponding construction in General Areas) and ***prohibited*** CHA from developing public housing apartments above the third floor. Now they say they prevailed in 2001-03 by ***allowing*** CHA to build in Limited Areas, including above the third floor. *Buckhannon Board and Care Home, Inc. v. West*

Virginia Department of Health and Human Resources, 532 U.S. 598 (2001), and *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004), do not allow such a "Heads I win; Tails you lose" charade. To be paid under 42 U.S.C. § 1988, plaintiffs must win, and in doing so materially alter the legal relationship between the parties in a way that forces a change in the defendant's conduct-----"fruit" in *Alliance's* parlance. There is not a shred of evidence in this record, nor any finding by the District Court, that plaintiffs here did anything to change CHA's plans or conduct. Plaintiffs simply acquiesced in getting out of the way.

1. The Peterson Affidavit Remains Uncontested

Terry Peterson, Chief Executive Officer of CHA, submitted an affidavit to the District Court, defendants' Supplemental Appendix ("SA") at 319, in which he described in detail the genesis and goals of the Plan for Transformation ("Plan"). He emphasized that the Plan was not court-ordered, but rather a policy initiative of CHA, City of Chicago and local officials responsible for public housing. He clearly explained that the *Gautreaux* plaintiffs had nothing to do with the Plan's development. Plaintiffs did not dispute any part of Mr. Peterson's statement in the Court below, by counter-affidavit or otherwise.[1] At each mixed-income site, the private

[1] Plaintiffs note (Pltfs. Br., at 4) that the Plan included a long-term funding commitment from HUD and a waiver of many HUD procurement and program requirements, all embodied in what is called the Moving to Work Agreement ("MWA"), included in plaintiffs' Supplemental Appendix ("PSA"), at 163. They do not claim that they had anything to do with negotiating or drafting this agreement between government agencies that made the Plan workable. Rather, they note that at the end of the Resident Protection Agreement, an attachment to the MWA, CHA promised that it would "seek all appropriate review and approval under the terms of the [*Gautreaux*] consent decree" and that CHA's redevelopment activities would meet the terms of the consent decree. Apparently, the suggestion is that the *Gautreaux* plaintiffs were involved in requiring CHA to adopt the Plan for Transformation. That, however, is not the case. This language was added to the agreement between CHA and HUD because both parties knew that without obtaining *Gautreaux* waivers, none of the development contemplated by the Plan could occur.

developers (who provide the lion's share of funding), their architects, planners and investors, together with CHA, its Receiver, the City, local officials, and other stakeholders develop a plan for construction. This plan includes the number of units to be built, the mix of public housing, affordable and market units, and the type of buildings (including how many are taller than three stories and where public housing units will be located). Once a plan is complete and a closing is imminent, the developer and its lenders must be provided with what is commonly known as a *Gautreaux* waiver, as the entire notion of building on the site of the demolished CHA housing (a Limited Area) is prohibited by the *Gautreaux* injunction. The lenders will not close without eliminating this legal impediment. Mr. Peterson testified in his affidavit that each of the orders entered during the 2001-03 period were obtained to allow these developments to go forward. In the District Court, plaintiffs did not offer any evidence to suggest this was not the case. Indeed, they did not premise their fee recovery on the idea that they had wrung real relief out of CHA, but rather on the notion that having won in 1969, they are prevailing parties forever. This is also the theory the District Court adopted.

Now, without the benefit of any evidentiary support in the record, or any finding by the District Court, plaintiffs have launched an entirely contrived effort suggesting that these agreed orders were forced upon CHA, rather than proposed by CHA and its developers, or that they were meant to restrict CHA rather than to enable the agency to go forward with its plans. They take several tacks in their brief, none of which bear the "fruit" *Alliance* requires.

2. The Agreed Orders Entered Did Nothing More Than Waive the 1969 *Gautreaux* Injunction

First, plaintiffs take the language of the agreed orders, focusing on the December 12, 2002 order permitting Phase II at Horner (Pltfs. Br. at 6-7, and 16-17) to demonstrate the victory they have secured for the class. In what can only be characterized as Alice-in-Wonderland logic, plaintiffs have the audacity to say that this order first and foremost "authorized remedial public housing to be developed for plaintiff families where before it could not have been" Pltfs. Br., at 17. Of course, the housing could not have been built on the Horner site because plaintiffs' own *Gautreaux* judgment forever prohibited it. The entire area is 100% African-American. So, under plaintiffs' logic, they have "won", i.e. obtained real "fruit", by agreeing to vacate or modify their own order. Thus, they claim the right to be paid for relinquishing their own initial victory.

They go on to say, however, that they let CHA proceed with Phase II at Horner only subject to "multiple conditions imposed at the behest and for the benefit of plaintiffs." Pltfs. Br., at 18. "For example, to assure the mixed-income character of the new units, CHA's flexibility was limited by imposing a ceiling on the number [of public housing units] to be permitted. Not only a ceiling but a floor, because the new public housing was to bear a continuing, specified percentage relationship to the other housing to be developed." *Id.* There is no evidence in the record, however, that CHA and its developer ever proposed to build more or less units than the number set forth in the December 12, 2002 order. In fact, they never did. The record shows that plaintiffs were not constraining CHA and its developers, as par. 9A of Peterson's affidavit makes clear. SA at 323. The number of public housing units to be built and the ratio between these public housing units and the affordable and market units were not negotiated with plaintiffs.

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Rather, they were developed by the people who were on the hook to finance and market the units.[2] These numbers were then merely given to plaintiffs to plug into the agreed order entered in court.[3] Nor does plaintiffs' agreement to add up to $12 million in federal funds, long held by them for public housing, to the amounts supplied by CHA and HUD in the December 12, 2002 agreed order, somehow make plaintiffs "prevailing parties." This was a change in plaintiffs' conduct, not CHA's.

Similarly, plaintiffs claim that they obtained the September 7, 2001 order vacating the 1969 judgment's three-story height restriction "at the behest of plaintiffs and for their benefit" (Pltfs. Br., at 18-19). Again, however, plaintiffs were waiving or modifying their own order. More importantly, while they tout the specific number of units permitted in the various mid-rise and walk-up buildings in the order, they offer no proof that CHA, the Receiver, or its developers wanted to build any more public housing units than what the order specifies. In fact, as Mr. Peterson says in his affidavit, SA at 323, these buildings (as well as the number of public housing

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[2]Though these mixed-income developments are subsidized with federal HOPE VI dollars and city monies, the bulk of the funds to build units comes from developers who raise tax-credit syndication proceeds and sell market units (often providing part of the proceeds as an internal subsidy for the public housing units).

[3] There were tenant lawyers at Horner who had input into the number of public housing units in Phase II, but they were not *Gautreaux* counsel. Horner is one of two sites around the city where classes of tenants have brought federal litigation against CHA, using their own non-*Gautreaux* counsel. The case at Horner is *Henry Horner Mothers' Guild v. CHA and HUD,* 91 C 3316. The *Mothers' Guild* is therefore one of the stakeholders at Horner and its counsel insisted that CHA build at least 220 public housing units for families with income below 50% of the area median, and that existing Horner families (virtually all of whom met this income limitation) be given first priority for these units. CHA and the Receiver agreed with the *Mothers Guild* counsel on this point and it was set out in an order in that case, pending before Judge Zagel. SA at 308. *Mothers' Guild* counsel did not seek or obtain fees for this work, as that decree, consistently with the current law, limits fee awards to instances where plaintiffs force CHA to provide relief it is not otherwise planning to provide.

units to be included in each and the number above the third floor) were all proposed by the developers. There was no negotiation with the *Gautreaux* plaintiffs on the number of units involved, and plaintiffs offered no evidence to show that there was. These numbers were all given to plaintiffs' counsel to plug into the agreed order that was necessary for closing, because the *Gautreaux* judgment flatly prohibited any and all public housing above the third floor.

Because plaintiffs could not identify any order entered between 2001-2003 that formed the basis of any real victory against CHA or produce any evidence that CHA was coerced into doing something it otherwise was not planning to do, plaintiffs resort to inference. They dredge up quotes by CHA's outside counsel from a 1997 argument, suggesting that the *Gautreaux* plaintiffs leveraged CHA into presenting to the Court redevelopment programs other than what CHA "would have created without having to negotiate with plaintiffs' counsel." Pltfs. Br. at 5. But even if these mere comments are considered "evidence," plaintiffs were paid for this activity in the previous fee awards. Where is "evidence" of any changes caused by plaintiffs in the 2001-2003 period? Under *Alliance*, it is incumbent on plaintiffs to establish the "real fruit" which they achieved in this period. What units were built that CHA did not want to build? What developments were tackled that CHA had no plans to redevelop? In the District Court, they made no showing, and the District Court made no such finding.

3. None of the New Units CHA Builds in Limited Areas Is Court-Ordered Relief Flowing from the *Gautreaux* Judgment

Second, unable to show that any feature of these agreed orders originated with plaintiffs, they take the tack of saying that any new public housing CHA builds is remedial housing under the *Gautreaux* judgment order and they have the right to claim credit for it and be paid for it

Pltfs. Br., 6, 13, and 15-17. In their words, "the *Gautreaux* judgment order is not simply an injunction prohibiting CHA from future discrimination; it is a mandatory remedial order that, among other things, requires CHA to develop remedial housing ..." Pltfs. Br., at 15, citing *Gautreaux v. CHA*, 304 F. Supp. 736 (N.D.Ill. 1969).

This misconstrues the original litigation and 1969 judgment order. In its summary judgment decision, the District Court found that CHA had, for racially discriminatory reasons, sited virtually all its family developments in predominantly African-American census tracts. Four small white family developments were kept white by use of a tenant assignment plan that imposed strict quotas on African-American occupancy. All of the evidence presented related to the location of CHA developments and the assignment of tenants. *Gautreaux v. CHA*, 296 F.Supp. 907 (N.D.Ill. 1969). Accordingly, when the remedial order was entered, 304 F.Supp. 736 (N.D.Ill. 1969), it directly addressed the problems the evidence presented. CHA was enjoined from building any more units in a Limited Area (unless it also developed housing in General Areas) and barred from assigning tenants by race. These are classic prohibitory injunctions. The order did not require CHA to build a certain number of additional units as relief.[4]

To be sure, paragraph VIII of the judgment order requires CHA, in general terms, to "administer its public housing system in every respect ... to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures" and this included requiring CHA to "use its best efforts to increase the supply of Dwelling Units [i.e. public housing units] as rapidly as possible in

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[4] Compare plaintiffs' consent decree with HUD, which did require HUD to provide subsidy assistance to a specific number of families (7100), at which point it was terminated. *Gautreaux v CHA,* Order dated August 26, 1997.

conformity with the provisions of this judgment order..." The idea was that unless CHA built some new public housing in General Areas, the existing discriminatory pattern would never be broken. *Hills v. Gautreaux*, 425 U.S. 284, 251 n.8 (1976) (construing this provision to require CHA to use best efforts to increase housing opportunity in white areas as rapidly as possible).

CHA, however, has not built additional units in General Areas. Rather, CHA embarked on a new strategy for revitalizing public housing. During the 2001-2003 period, and for most of the last decade, ***all*** of the new CHA housing development has occurred in Limited Areas. Indeed, the original 1969 injunction, including paragraph VIII (to the extent that it requires construction in General Areas) has been specifically modified or waived so that building can occur in Limited Areas. So plaintiffs cannot claim they have enforced paragraph VIII.

To the extent that plaintiffs ignore the history and Supreme Court construction of this provision, and insist that it requires the building of new housing, even if it is in Limited Areas (without corresponding construction in a General Area), they still cannot claim to have won relief against CHA in connection with the Plan for Transformation. CHA undertook on its own, without the prodding or participation of plaintiffs, to develop the Plan that will add thousands of new public housing units in the city and therefore has ***complied*** with the "best efforts" language. Plaintiffs did not force the development of these new units while CHA resisted. CHA built the units on its own. Compliance with the terms of the 1969 judgment does not generate fee liability under *Alliance.*

4. CHA's 1995 Settlement of the Horner *Mothers Guild* Litigation and Subsequent Waiver of the *Gautreaux* Injunction Does Not Make the *Gautreaux* Plaintiffs Prevailing Parties

Third, plaintiffs attach the transcript of a March 8, 1995 court appearance before Judge Aspen, PSA at 15, where they say they asked "Judge Aspen to consider a new form of relief for plaintiff families----public housing in a mixed-income context" and Judge Aspen agreed. Pltfs. Br., at 3. The suggestion is that plaintiffs devised this mixed-income scheme to benefit the plaintiff class. In fact, the March 8, 1995 court appearance was prompted by an agreement CHA had reached in the *Mothers Guild* litigation at Horner, where the tenants were represented by attorneys other than *Gautreaux* counsel. PSA at 17. As the transcript makes clear, a final sixty-four page consent decree had already been executed by the *Mothers' Guild* plaintiffs, CHA and HUD, before Judge Zagel, and he had scheduled a preliminary hearing on the consent decree for March 10, 1995. PSA at 18. The *Mothers' Guild* consent decree predated the Plan for Transformation, but was similar in design and concept. It called for the demolition of buildings at Horner and their replacement with on-site, new, mixed-income public housing. Horner is a Limited Area. Therefore, the *Gautreaux* injunction blocked the Horner plan from going forward, so the Horner parties prevailed upon *Gautreaux* counsel to support waiver of the provisions of the injunction. On March 8, 1995, Judge Aspen did just that, finding that CHA could build in this Limited Area, on grounds it was "revitalizing."' PSA at 59. Later, Judge Aspen approved replacing 100% of the demolished Horner units (466 in all) with new public housing units in the

Horner Limited Area, though there was no corresponding construction of units in a General Area. PSA at 63.[5]

The 1995 Horner experience thus mirrors what occurred in 2001-03. Mixed-income plans developed outside the context of *Gautreaux* proceeded because the *Gautreaux* injunction was waived, not because plaintiffs have obtained "real relief" as a result of the 1969 judgment order. *Gautreaux* counsel were paid for their work in 1995 and later, though they had not won relief against CHA, but rather ceded authority to CHA. The reason was that neither *Buckhannon* nor *Alliance* had been decided.[6] Now, with the law clear that a post-decree plaintiff must win relief to collect, CHA has refused to pay for the time plaintiffs spend in waiving the terms of their injunction.

B. *Gautreaux* Cannot Be Characterized as an "Inseparable" Forty-Year Long Piece of Litigation Forever Entitling Plaintiffs to Fees Regardless of Whether They Win Any Real Relief

The District Court did not award fees because it found plaintiffs had won any relief against CHA. Rather, it awarded fees because it found:

> the post-decree proceedings and related work for which fees are presently sought are not 'clearly separable' from the original judgment order [citing *Gautreaux v. CHA*, 690 F.2d at 604, 605 (7th Cir. 1982)]. . . Unlike

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[5] In 1995, Judge Aspen recognized that the original *Gautreaux* judgment order had become essentially obsolete, stating, "clearly the initial thrust of *Gautreaux* was to provide integrated neighborhoods and to break down segregated parts of the City of Chicago. ***I think the thrust of the relief, and perhaps properly so because times change, has been to provide housing for poor people, sometimes putting aside the considerations of integration that were—that was the main consideration at the time of Gautreaux."*** PSA at 38 (emphasis added); *see also* PSA 54-57.

[6] In addition, there were fights between CHA and *Gautreaux* counsel during this period that CHA lost, making fees due even under the *Alliance* standard. *Gautreaux v. CHA,* 178 F.3d 951 (7th Cir. 1999).

> *Alliance*, this case involves post-judgment work and proceedings that are all part of one active equitable case, in which compliance has always been at issue, and modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances.

A at 4. The District Court's finding conflicts directly with *Alliance*, and is completely unsupported by the record.

1. *Alliance's* Holding Is Not Confined to Specific Factual Circumstances and Forbids the Award of Post-Decree Fees on the Theory that the Post-Decree Work Is "Intertwined" with the Original Decree

Plaintiffs say that "*Alliance* did not of course decide that all post-judgment proceedings were always separate, but only that under its factual circumstances the post-decree proceedings at issue there should be viewed as separate for fee purposes." Pltfs. Br. at 13-14. They cite nothing from the opinion to support this point and it is incorrect. The *Alliance* court broadly addressed the classes of cases in which plaintiffs seek fees and in no way suggested that the facts of *Alliance* were an unusual departure from the court's straightforward analysis. The *Alliance* court specifically rejected the notion that judgment orders can ever be "intertwined" with post-decree proceedings forever so that plaintiffs are entitled to fees regardless of the relief they secure.

The *Alliance* Court analyzed cases awarding postjudgment fees:

> In only two classes of case governed by section 1988(b) or similar fee-shifting provisions [cite omitted] has a plaintiff who obtained no relief in postdecree proceedings nevertheless been awarded fees for those proceedings.

356 F.3d at 770. There is no fact specific inquiry. As the court further explains, a case must now fall into the first category to be entitled to fees since the second category no longer supports a fee award.

The *Alliance* Court continued:

> The first class consists of cases in which the consent decree itself authorized the court to award fees to the plaintiff that would be incurred in disputes brought to the court in the wake of the decree [citations omitted]. The contractual entitlement (there is none in our case) supplemented or superceded the statutory one.

Id. at 770. The decree itself made plaintiffs' lawyers "the appointed enforcers of compliance with the decree." *Id.*, at 772. Like *Alliance*, this case does not fall into this first category. The 1969 judgment order gives plaintiffs no right to fees, and no enforcement obligation. Indeed, as in *Alliance*, the District Court opted for a third party (not plaintiffs) to oversee compliance---- a Receiver who stands in the shoes of CHA for purposes of development. PSA at 151.

The *Alliance* court next noted, "In the second and more numerous class of cases, attorneys' fees incurred in efforts to monitor compliance with the consent decree are said or assumed to be compensable even if no postjudgment order results from the efforts." *Id.*, at 770. The *Alliance* court found, however, that these cases are not compensable, as they are "inconsistent with the Supreme Court's rejection in *Buckhannon* of the "catalyst" theory of fee-shifting." *Id.* at 771. Because the District Court did not find that the *Gautreaux* plaintiffs garnered any real relief during 2001-2003, and the judgment order gives them no right to fees, *Buckhannon* and *Alliance* doom their fee petition.

The *Alliance* plaintiffs, like plaintiffs here, tried to add a third category of cases where "postjudgment proceedings are 'inextricably intertwined' with the original decree," *id,* and thus counsel should continue to be paid, regardless of whether they obtained any real relief in post-judgment proceedings. This Court rejected the theory, describing it as:

> a questionable extension of the sound and settled principle that attorneys' fees incurred in interim defeats en route to a successful conclusion are compensable because, as we have noted, such skirmishes are indispensable inputs into a successful conclusion of the litigation. Time, however, runs in only one direction. Interim defeats can contribute to ultimate victory, but failed efforts to follow up that victory contribute to nothing.

Id., at 771. The Court went on to point out that in our Circuit, post-decree proceedings, whether contempt actions like the ones brought under *Shakman v. Democratic Organization of Cook County*, 569 F.Supp. 177 (N.D.Ill. 1983), or ancillary bankruptcy proceedings, are treated as free-standing proceedings for purposes of appellate jurisdiction and fees. Where, as here, plaintiffs are not bound by the terms of the decree to enforce it, they have no duty to police it. *Alliance*, at 772. They can choose to continue litigating in the post-decree phase, but they must win relief by court order to be paid. *Id.*, at 772-773. The Court did not condition its decision here on the particular facts of *Alliance.* Post-decree litigation must be actual litigation and neither in *Alliance* nor *Gautreaux* did the District Court find that plaintiffs had secured real relief.[7]

2. Proceedings to Modify a Decree Are Plainly Separable from the Original Decree

Plaintiffs in *Alliance* confronted a city effort to modify their decree. They fought and lost. Plaintiffs here, during 2001-2003, agreed to a series of modifications. When the *Alliance*

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[7] The Court noted that the postdecree litigation in *Alliance* took place "many years after the consent decree went into effect." *Id.,* at 771. Specifically, the decree was entered in 1981, and the fees were sought for work between 1994 and 2001-----thirteen to twenty years later. This was not, however, a fact that drove the decision. In any event, the fees sought here are for work undertaken thirty-two to thirty-four years after the judgment was entered. Similarly, the Court observed that the *Alliance* decree had become obsolete, *id.* at 774, but this fact had nothing to do with the standard the Court adopted to determine post-decree fee liability. It was only further support for the Court's position that plaintiffs' attorneys were not obligated to defend against the city's modification motion, and would not be paid for doing so. So here, the prohibition on building in Limited Areas has become obsolete.

plaintiffs tried to recover the fees expended in their unsuccessful fight, this Court denied them. The Court made it clear that "we have conceptualized postdecree litigation, including collection litigation, broadly as a discrete phase analogous to a free-standing suit." *Id.*, at 773. In other words, all post-decree litigation is separable, for fee purposes. The Court emphasized that this is particularly true with respect to modification proceedings because "orders modifying or refusing to modify injunctions are appealable immediately, 28 U.S.C. §1292(a)(1), ***and that principle supports treating a proceeding to modify a consent decree as a discrete phase of an otherwise open-ended proceeding***" *Id.*, at 773 (emphasis supplied). Plaintiffs here concede that the 2001-2003 period was characterized by a series of agreed orders modifying the 1969 judgment order, to let mixed-income developments proceed. Under *Alliance,* each is a separate proceeding for purposes of fees, and the success of 1969 cannot confer an entitlement to fees on the *Gautreaux* plaintiffs in 2001.

Plaintiffs cite *Gautreaux v. CHA*, 178 F.3d 951 (7th Cir. 1999), for the idea that the case has a "continuing nature" thereby making it inseparable for purposes of attorneys' fees. Pltfs.' Br. at 15. That decision, however, had nothing to do with fees. The question was whether the new federal HOPE VI program was governed by the 1969 judgment order. This Court found that it lacked appellate jurisdiction to consider the question as the District Court, in deciding the issue, had only re-affirmed its original 1969 judgment order. Importantly, this Court found that if CHA had sought to modify the judgment order (which it made no attempt to do), the matter would have been appealable under 28 U.S.C. § 1291(a)(1), and "separable" from the original judgment order. In 2001-2003, CHA repeatedly asked for this modification relief (and obtained it). Thus,

this Court's 1999 decision underscores the error of the District Court's analysis in the fee decision below.

3. This Court's 1982 Decision in *Gautreaux* Does Not Preclude Application of *Alliance*

Plaintiffs rely heavily on this Court's prior fees decision in *Gautreaux v. CHA*, 690 F.2d 601 (7th Cir. 1982), where plaintiffs were awarded fees for having won the 1969 judgment order and for their litigation through 1980. This case, however, does not control the present controversy, for three reasons.

First, the issue in 1982 was whether the *Gautreaux* case was pending on October 19, 1976, when the Civil Rights Attorneys' Fees Awards Act was adopted. If it was, plaintiffs could seek to recover back to 1966. The Court struggled with what standard to apply to determine "pendency" and ultimately rejected the notion that the case ended with the 1969 final judgment. Instead, it opted for a pragmatic test, finding that a case was still "pending" for fees purposes as long as relief was still being formulated. Given the full-tilt litigation then occurring in *Gautreaux*, the Court found that the case was, in a practical sense, still "pending" in 1976. The present fee dispute does not involve the issue of "pendency." Thus, the 1982 case and the standard it devised have no bearing here, where the issue is whether plaintiffs are "prevailing parties" for the fee period in question.

Second, plaintiffs could properly be awarded fees in 1982 because during the 1966-1980 period, for which they sought fees, they won real relief against CHA. This Court carefully reviewed the history of the litigation, 690 F.2d at 605-607, to show that plaintiffs had not only won the original 1969 judgment, and the 1969 remedial order during this period, but had won

repeated injunctions against CHA to force the agency to submit new sites to City Council, then to bypass City Council, and then to expand its activities to the metropolitan area. To use *Alliance's* phrase, plaintiffs had harvested real "fruit." The 1982 case thus addressed a much different situation than the current one.

Third, to the extent that plaintiffs read the 1982 case to suggest that *Gautreaux* is a "continuously active equitable case" for purposes of attorneys' fees, and therefore plaintiffs' success during any phase of the case is irrelevant, such a reading is plainly inconsistent with *Buckhannon* and *Alliance*. These recent cases have swept away the notion that, for fee purposes, having prevailed in the 1960's, means plaintiffs have prevailed all the way into the 21st century.

4. The District Court's Basis for Awarding Fees Is Not Supported by the Record

The District Court concluded that *Gautreaux* differs from *Alliance* because "compliance has always been at issue." A at 4. There is no basis in the record for this statement. During the entire period at issue here (2001-2003), plaintiffs never suggested that CHA was in violation of the 1969 judgment order and never threatened or filed any contempt petition. On the contrary, CHA has scrupulously followed the District Court's orders and, where necessary, always obtained a modification or waiver of the *Gautreaux* injunction.

Similarly, the District Court said "modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances." A at 4. But the only modifications made during the period at issue were to waive the Court's injunction so that CHA could build housing it was otherwise barred from building. Under *Alliance*, waivers of the injunction are not "fruit" and do not entitle plaintiffs to fees.

5. Unless *Alliance* Is Applied Here, Plaintiffs Will Be Entitled to Fees Forever, Even Where They Fail to Secure Any Relief

In their brief, plaintiffs concede "it is true that these prior determinations [from 1969] are not good from here to eternity because things may change in relevant ways, but relevant change must be shown." Pltfs. Br. at 15. They do not suggest, however, what that relevant change might be, and under their theory that *Gautreaux* is one never-ending, active equitable case, they can continue to put in fee petitions for close to $1 million every two years, without ever showing they have won any real relief.

In fact, the world of *Gautreaux* has changed. The old neighborhood scattered-site program has been concluded and the HUD consent decree has been terminated. There is no longer a concerted effort to build individual units in General Areas of the city. Rather, all of the Receiver's development activity involves building new units on the Limited sites where CHA has demolished old housing. The one-for-one requirement between General and Limited units is no longer an essential concept----even to plaintiffs. Nor are the height restrictions for public housing. It has been decades since CHA assigned tenants to units on the basis of their race. Plaintiffs cannot earn fees merely because the 1969 judgment order remains on the books.

III. THE DISTRICT COURT ERRED IN THE AMOUNT OF FEES AWARDED

If, and only if, the Court finds that despite *Buckhannon* and *Alliance*, plaintiffs are entitled to fees, then it must determine whether the District Court clearly erred in awarding plaintiffs every penny they sought, without a single reduction for their excessive and duplicative hours.

A. The Agreed Orders from 2000 and 2002 Do Not Excuse the Court from Making a Searching Inquiry of this Fee Petition

Plaintiffs and the District Court make much of CHA's agreement to pay fee awards in 2000 and 2002, covering the 1997-2001 period. Plaintiffs suggest that CHA's prior agreement has some type of preclusive effect on its current opposition to a further award of fees. There are, however, two big differences between the earlier fee petitions and the current one. The 2000 and 2002 orders cover a period of real litigation between the parties, (e.g. the dispute over the scope of the injunction that resulted in the orders that were the subject of *Gautreaux v. CHA*, 178 F.3d 951 (7th Cir. 1999)). More importantly, these orders pre-date the new standards for fees established in *Buckhannon* and *Alliance*.

In any event, municipal officials are not bound by the agreements of their predecessors. *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993)(*en banc*) (consent decree governing how city paid judgments modified when new mayor found it limited his flexibility over budgets, as long as no rule of federal law required the enforcement of the decree's provisions).

B. The Number of Lawyers Involved and the Hours Spent Are Unreasonable

CHA has questioned why nine different lawyers for plaintiffs were involved in this case over a two year period, when there was no litigation. Plaintiffs respond that it is unreasonable to say that only one lawyer can be involved. Plaintiffs, however, miss the point. This case, during the 2001-2003 period, did not involve litigation, unlike the cases they cite.[8] There was only a

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[8] Further, *Berberena v. Coler*, 753 F.2d 629, 631 (7th Cir. 1989), noted that one of the four attorneys in this "difficult case" was necessary due to a conflict of interest problem. *In re: Aimster Copyright Lit.*, 2003 WL 2002764 (N.D.Ill. 2003), involved actual litigation where plaintiff was represented by national and local counsel accounting for the five plaintiff's attorneys. Finally, *Egert v. Conn. Gen. Life Ins. Co.*, 768 F.Supp. 216 (N.D.Ill. 1991), involved awarding fees to two attorneys for successfully litigating the case.

series of agreed orders that plaintiffs concede required a mere four hours of in court time. Plaintiffs have not disputed that most of the other 2570 hours claimed were not for traditional litigation: 489 hours (amounting to $148,532) involved plaintiffs' conferences solely among themselves;[9] 105 hours (amounting to $33,525) involved more than one plaintiffs' lawyer attending the same meeting or participating on the same call with a third party; and 1116 hours (amounting to $299,755) was spent going to meetings such as CHA Working Group meetings with CHA, City and Receiver staff, as well as tenants, where generally there were no other attorneys present.[10]

Plaintiffs note that the Plan for Transformation is a multi-year, $1.6 billion program involving many parties. Pltfs. Br. at 22. The size of the project, however, does not justify the inordinate amount of time plaintiffs have billed. City, CHA, and HUD officials have designed the Plan (together with tenants, neighborhood groups and other stakeholders), not plaintiffs. While plaintiffs' counsel may view themselves as urban planners, they are only entitled to reasonable litigation fees and not for time spent as a quasi-governmental body planning a new urban landscape. This is particularly true because the Receiver, who is paid for by CHA, reports directly to the *Gautreaux* court, and participates in all of the planning with development and real estate professionals.[11]

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[9] Even after plaintiffs excluded one-half of the time spent in internal "*Gautreaux* team meetings," they still billed CHA for 489 hours of internal discussion, absent any real litigation.

[10]These figures are based on the second set of affidavits plaintiffs filed with their reply brief.

[11] Plaintiffs argue that the Receiver's duties do not overlap entirely with plaintiffs (Pltfs. Br. at 26), saying that plaintiffs alone are responsible for ensuring that tenant assignment is not racially based, that *Gautreaux* families have access to units being built, and that the 1969

Plaintiffs inexplicably cite *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986), for the proposition that time is compensable, even if it did not "occur in the context of traditional judicial litigation." Pltfs. Br. at 24. That case involved remedial work after entry of a consent decree. Contrary to plaintiffs' theory, the Court divided the case into nine phases, which included administrative proceedings, modification of the decree, contempt proceedings, intervention proceedings, and hearings before the EPA. At issue was a claim for fees for the 1978-1983 period. The *Delaware Valley* Court approved of fees for plaintiffs where they were preparing comments and objections to draft environmental regulations promulgated by administrative agencies. The Court found this work not to be typical of litigation. 478 U.S. at 558, 561. It also approvingly noted that the district court applied reduced hourly rates ($25 per hour) where the work "required little or no legal ability." *Id.*, at 554, 567. Routine associate work also was paid a reduced rate ($65 per hour). *Id.* Even then, the *Delaware Valley* district court approved only 1017 of the 1875 hours sought for five years of litigation, disallowing all time spent by more than one attorney in court. *Delaware Valley Citizens Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1421 (E.D.Pa. 1984). *Delaware Valley* did not involve the kind of claim presented here, huge numbers of hours spent on internal meetings and plaintiffs' lawyers attending meetings with non-lawyers. Here, on the contrary, the District Court

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judgment order is enforced. This is, however, just a makeweight. Plaintiffs have not billed any time for doing any of these things. There was never a thought during the 2001-2003 period that CHA was using a racial quota system in assigning tenants, or that *Gautreaux* families (i.e. public housing families) would not be housed in the new developments. The work during 2001-2003 involved building the mixed-income developments CHA called for in its Plan. The meetings plaintiffs seek compensation for involved the same work the Receiver was examining.

compensated plaintiffs for every hour sought (2574) at premium hourly rates, whether or not the work was legal in character.

C. The District Court Abused Its Discretion in Awarding Plaintiffs Hourly Rates Based on the Sachnoff Affidavit

Plaintiffs' board member offers the only evidence of what the market pays for legal work. He does not offer it for the non-litigation work plaintiffs provided but rather for "all types of litigation." However, an interested party, like plaintiffs' affiant, cannot establish the market rate for lawyers but only a billing rate. *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 408 (7th Cir. 1999). Plaintiffs ignore *Uphoff*, but instead cite *Denius v. Dunlap*, 330 F.3d 919, 930-31 (7th Cir. 2003), which did not involve an opinion about market rates at all, rather only evidence of a lawyer's billing rate. Interestingly, the plaintiff's lawyer in *Denius* attempted to offer evidence of his billing rate using his employer's affidavit and it was rejected. Plaintiffs have not met their burden of adducing competent evidence in support of their rates.

Plaintiffs argue that the District Court did not rely only on Mr. Sachnoff's affidavit but also on its own knowledge of Chicago market rates. Plaintiffs concede that the District Court did not identify what those rates were or the source of its knowledge. Pltfs. Br. at 28-29.

The District Court further noted that CHA did not object to similar rates in 2000 and 2002. However, as argued earlier, agreed orders do not bind the present CHA administration. Nor has this Court indicated that agreed orders are an appropriate basis to determine hourly rates.

The paucity of evidence to support the rates is particularly problematic, given that CHA provided evidence of what the market pays for this kind of litigation. The response to CHA's Request For Proposals for legal services shows that plaintiffs' rates are inflated. The District

Court never mentioned or considered this evidence of the market rate. This was error under *McNabola v. CTA*, 10 F.3d 501, 518 (7th Cir. 1993), and established case law requiring the District Court to make findings and resolve disputes over the market rate charged by lawyers in Chicago.

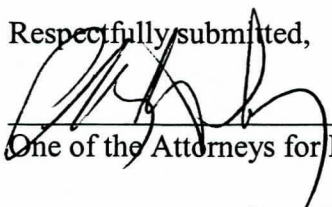
D. Plaintiffs' Two Sets of Time Affidavits

Plaintiffs contend that CHA should have filed a surreply, a motion for reconsideration or moved to strike plaintiffs' new set of fee affidavits attached to their reply brief. It was, however, incumbent on plaintiffs to submit adequate proof when they filed their Rule 54 materials or when they filed their fee petition. This Court, however, does not have to resolve this dispute. The excessive and duplicative nature of plaintiffs' hours are apparent, whichever set of affidavits the Court examines. The insufficient evidence in support of their rates also does not depend upon which set of affidavits is used. In the event of a remand, however, CHA requests that plaintiffs submit one final and complete set of bills for the District Court's consideration.

IV. CONCLUSION

The Chicago Housing Authority, as defendant-appellant, requests that this Court reverse the District Court's award of fees and costs in this case.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I certify that this brief, exclusive of the Cover Page, Table of Contents, the Table of Authorities, and the certificates of compliance and of service is 6,990 words.

Dated: May 22, 2006

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CERTIFICATE OF SERVICE

Phillip H. Snelling, an attorney, hereby certifies that on May 22, 2006, he caused to be served two copies of the Reply Brief of Defendants-Appellants by United States Mail, first class postage, to:

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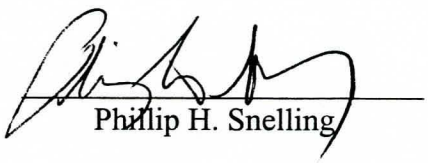

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