IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1807

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees,

v.

GEORGE W. ROMNEY,

and

Defendant,

CITY OF CHICAGO, CENTRAL ADVISORY COUNCIL, and CHICAGO HOUSING AUTHORITY,

Intervenor-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois

Honorable Richard J. Austin, District Judge

REPLY BRIEF FOR INTERVENOR-APPELLANT CHICAGO HOUSING AUTHORITY

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REPLY BRIEF OF INTERVENOR-APPELLANT CHICAGO HOUSING AUTHORITY

I. The Legality or Illegality of HUD's Approval Must be the Subject of a Separate Lawsuit

The first 24 pages of plaintiffs' brief, including virtually the entire Statement of the Case, is devoted to showing why plain-

tiffs believe HUD's final approval of the Chicago Model Cities program was illegal. In effect, without benefit of a complaint, answer or any of the other procedural mechanisms required for the proper resolution of disputes in a trial court, plaintiffs proceed here as if they had succeeded below in trying and winning a case against HUD for supposed wrongdoing in administering the Model Cities program in Chicago. Plaintiffs' stance serves only to mask and confuse the issues still open for decision in this litigation.

It must be pointed out that a case is now pending before the district court, which involves the same issues plaintiffs seek to litigate by indirection in this proceeding, i.e., whether HUD should be enjoined from funding NDP and Model Cities programs: Stout, et al. v. Daley, et al., No. 71C 2291 (Hon. Richard B. Austin, presiding).

The only question left in this case for decision is what type of relief as against HUD should be granted plaintiffs because of HUD's acquiescence in the pre-1969 site selection procedures of CHA which have been found to have been unconstitutional. The order on appeal shows that the district court, along with plaintiffs, has forgotten what it is that is still before him, has, in fact, in tort parlance embarked on a "frolic and detour", and,

of course, abused his discretion.

II. The District Court's Order Constituted an Abuse of Discretion

Although plaintiffs seek to characterize the question before the court as one of "power" (pltfs.' br. p. 2), the true question is whether the district court abused its discretion in entering the order on appeal. The principal and clearest indication of the district judge's abuse of discretion is that his order upon HUD to withhold Model Cities funds from the City of Chicago because of HUD's involvement in CHA's pre-1969 procedures for the selection of sites for low income public housing projects is an order upon HUD to do what § 602 of the Civil Rights Act of 1964 forbids.*/

No finding of the district court at any stage of this protracted and seemingly interminable litigation supports the conclusion that operation of the Chicago Model Cities program is tainted with racial discrimination.**/ Therefore, there is no basis in law for

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*/ The other indicators of the district court's abuse of discretion are spelled out in more detail in the opening briefs of CHA and the other appellants.

**/ The claim of plaintiffs at p. 33 of their brief that HUD made a specific determination that the Chicago Model Cities Program was "infected by a discriminatory environment," is simply wrong, and without support in the record. The quotation at page 34 of plaintiffs' brief, in support of this assertion, says no such thing. And, of course, there is no such finding by the district court binding upon the City of Chicago (or anyone else) that the City's actions in connection with low income family housing have been tainted with unconstitutional racism.

ordering HUD to cut off Model Cities funds to the City of Chicago to coerce it into compliance with each detailed provision of the 1969 order against CHA: § 602 of the Civil Rights Act of 1964 expressly prohibits the Secretary from withholding funds under one program (Model Cities) to enforce desegregation measures under another (low income public housing).

According to plaintiffs, language in Swann v. Board of Education, 402 U.S. 1 (1971) disposes of appellants' argument on this point. In Swann, it was argued that a section of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, denied federal courts the power to order student busing as part of an order in a school case. The Supreme Court pointed out (402 U.S. at p. 17) that §2000c-6 was, by its terms, intended only to make it crystal clear that the Civil Rights Act of 1964 conferred no new powers upon the federal courts and left the traditional remedial equitable powers intact. Since, in a school case, the inherent equity power obviously would include requiring a defendant school district, among other things within its power, to bus students as a means of school desegregation, the Supreme Court found that § 2000c-6 did not affect the power of a federal court to enter such orders in a proper case.

The case now on appeal presents a completely different question: can a district court, as a means of coercion of a non-party, order a federal administrator to do an act which the law prohibits? To conclude that the holding in Swann disposes of the instant question is a non sequitur. It is obvious that a federal court's inherent powers include the power to order one party before it to stop financing another party's proven unconstitutional practices. But here one party (HUD) has been ordered to stop financing a program, Model Cities, which is free of taint, in order to force a non-party (City of Chicago) to comply with an order entered in a case in which it was not a party, not charged with anything, not found to have done anything improper and, of course, not ordered to do anything.

III. Neither the Supposed Illegality of HUD's Acts Nor the Necessity for a Remedy Supports the District Court's Order

Throughout plaintiffs' brief, there runs the line of reasoning that because HUD acted unlawfully in finally deciding to release the Model Cities monies, the district court was justified in enjoining the release of Model Cities monies as part of the relief in this case. But the express purpose of plaintiffs and the district court was to apply pressure upon the Chicago City Council to approve housing sites submitted by CHA. Thus,

doesn't become irrelevant because of court's purpose, or ours.

of what relevance is the legality or illegality of HUD's actions? If the current order is allowed to stand, the next logical step is an order cutting off federal monies regardless of whether the monies were about to be disbursed unlawfully. What, for example, is the logical objection, in light of the proceedings below, to cutting off federal mass transit subsidies benefiting the City of Chicago, as a means of coercing it into complying with the wishes of plaintiffs and the district court? — mass transit $ is not conditioned on housing performance.

The district court refers to its July 1969 order against CHA as the "law of the Northern District of Illinois". This cannot be true. As this Court points out: "* * * the decree in the CHA case, thorough though it may be, is not binding against HUD or its Secretary" 448 F.2d at p. 736. Obviously, it does not bind anybody but CHA and its officers. Reasonable men might believe that "* * * the Gautreaux judgment order represents a short-sighted and narrow response to the problem it attempts to remedy, and that such poor performance is a direct result of a court's failing to recognize its own limitations in making policy decisions" (Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority, 79 Yale L. J. 712, 713 (1970)) and, if not bound by the order, go about their business as they see fit. Neither the

Constitution nor Congress ever intended the power of the federal judiciary to extend as far as claimed by the district court.

IV. The Reference Throughout Plaintiffs' Brief to Supposed "Intransigence, etc." of CHA are without Merit

Plaintiffs' argument, insofar as it refers to CHA, is based upon references to "facts" which are either incomplete, improper or untrue.

Plaintiffs argue that "pervasive intransigence" of local agencies (including, obviously, CHA), the necessity for a "prod" to be applied before CHA will take "remedial action" and "frustrating. . . non-cooperation" of HUD ought to be considered by this Court in assessing the propriety of the order on appeal (pltfs.' br. p. 25). Insofar as these labels are intended to apply to CHA, the record will show that CHA has invested thousands of man hours, and has done everything within its power, to carry out the letter and spirit of the July 1969 judgment order--the order CHA did not appeal.*/ The same record shows that CHA has gone far beyond providing "minimal performance of housing obligations", contrary to what is alleged by plaintiffs (pltfs.' br. p. 38).

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*/ CHA notes its exception to the view expressed below that its failure to appeal the orders of February and July 1969 was because those orders were deemed unassailable and appeal would have been "hopeless".

① 1st mention was re mayoralty election
② did not progress plan when RBA asked
③ stay lawsuit
④ modification previous order

CHA consistently has maintained in the district court that a meaningful program of dispersed public housing for low income families stood little chance of success in the City of Chicago unless it was part of a metropolitan program. This belief led CHA in the summer of 1970 to oppose disclosure of the scattered sites identified and selected by its staff in the City of Chicago until the time when some sites throughout the metropolitan area had been identified with some hope of availability. Plaintiffs and the district court disagreed and an order was entered which CHA believed and said would do more harm than good to the cause of dispersal of low income public housing. (Events since then suggest that CHA--and its supporting experts--were better prophets than plaintiffs.) True, plaintiffs were successful in this court (see 436 F.2d 306), but the litigation points scored by plaintiffs are no proper basis for plaintiffs' claim of CHA's "pervasive intransigence." What plaintiffs' persistent rhetorical slashes at CHA charge is that CHA has flouted orders of the district court. It is high time for plaintiffs either to stop making such serious charges or to make them where they can be tried and CHA can formally demonstrate to an objective trier of facts that plaintiffs simply do not know what they are talking about.

Moreover, it is both strange and untrue to state that CHA has indicated "it will appeal rather than comply" with a January 3, 1972 order on it to present various plans to the district court (pltfs.' br. p. 26). It is strange to read such a statement in an appeal having nothing to do with recent events in the district court; not surprisingly it is unaccompanied by any reference to any events of record below. Plaintiffs' statement is untrue because no such indications have been given by CHA which has not appealed and will not appeal from the January 3, 1972 order of the district court. But, should the proceedings pending below result in an order upon CHA which, in its view, is unlawful, directs futile action or is harmful to the cause of low income family housing, CHA, of course, will appeal.

Conclusion

For the foregoing reasons and those stated in CHA's opening brief, we respectfully submit that the district court's order of November 11, 1971, should be reversed.

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PROOF OF SERVICE

Patrick W. O'Brien, one of the attorneys for Chicago Housing Authority, certifies that on January 17, 1972, he caused two copies of the above and foregoing brief to be served upon counsel for each party separately represented.

Patrick W. O'Brien