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United States District Court, N.D. Illinois, Eastern Division.

Sheena HODGES, et al., Plaintiffs,
v.
PUBLIC BUILDING COMMISSION OF CHICAGO; Chicago Board of Education, and the City of Chicago, Defendants.
CHICAGO BOARD OF EDUCATION, Defendant/Cross–Plaintiff,
v.
PUBLIC BUILDING COMMISSION OF CHICAGO, Defendant/Cross–Defendant.

No. 93–C–4328.
|
Dec. 23, 1994.

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

***1** On September 24, 1980, the court[1] approved a "Consent Decree" requiring the City of Chicago to "develop" and "implement a system-wide plan to remedy the present effects of past segregation of [African–American] and Hispanic students." The Decree gave the Chicago Board of Education ("CBOE") considerable discretion to select a "Desegregation Plan" which would satisfy the United States Constitution and meet the needs of the Chicago Public School District. Pursuant to this Decree, CBOE adopted a Desegregation Plan which was approved by the court[2] in 1983.

The Desegregation Plan selected by the CBOE has been implemented by various initiatives, including a Magnet Schools Program. The Plan provides that the number and composition of the students enrolled in magnet schools should roughly reflect the proportion of minority and white students participating in the school system. In addition, the total enrollment of a magnet school should fall within a required range of 65–85% minority and 15–35% white. Research shows, however, that because only 11.9% of the Chicago Public School System's student body are white, magnet schools admit every single white student who applies, but cannot reach the 30% level of white enrollment which the CBOE believes is essential for a school to be classified as desegregated.[3]

This case involves the proposed expansion of CHSAS. The CHSAS is a Chicago magnet high school located in Mount Greenwood, Illinois.[4] Plaintiffs, a class composed of "all present and future African–American and Hispanic students and applicants of [CHSAS]," have alleged that the defendants, the Public Building Commission ("PBC"), the Chicago Board of Education ("CBOE") and the City of Chicago ("City"), have engaged in intentional racial discrimination, denying them equal protection of the law under the Fourteenth Amendment, by blocking and then "scaling back" plans to expand CHSAS, and by placing certain restrictions and conditions on the expansion through a zoning ordinance amendment, approved by the Chicago City Council on February 9, 1994.

The CBOE has filed a cross-claim in this case, alleging that PBC's revised plan to expand the CHSAS facilities (adopted by the Chicago City Council on February 9, 1994, as a Zoning Ordinance Amendment) breaches the "Standard Public Building Commission Lease Agreement" ("lease agreement") executed by CBOE and PBC on or about May 1, 1990. CBOE also contends that it will not be able to implement the goals of the Consent Decree and Desegregation if PBC is permitted to complete the expansion of CHSAS according to the revised plan.

The lease agreement and the effect of the revised plan on CBOE's future implementation of the Consent Decree and Desegregation Plan are now the subject of cross-motions for summary judgment filed by PBC and CBOE on CBOE's cross-claim. After careful review, the court finds that summary judgment should be entered in favor of PBC and against CBOE on the cross-claim, with one exception.

I. LEGAL STANDARDS

***2** Federal Rule 56(c) Summary Judgment is appropriate when there remains no genuine issue of material fact upon which a reasonable jury could find in favor of the non-moving party, or the moving party is entitled to judgment as a matter of law. "One of the principle

purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses....” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–27, 106 S.Ct. 2548, 2552–55 (1986). Thus, although the moving party on a motion for summary judgment is responsible for demonstrating to the Court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file, to demonstrate through specific evidence, that there remains a genuine issue of material fact and show that a rational jury could return a verdict in the non-moving party’s favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–27, 106 S.Ct. 2548, 2552–55 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254–55, 106 S.Ct. 2505, 2513–14 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 1355–56 (1986). Consequently, the inquiry on summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether the evidence is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251–52. Disputed facts are material when they might affect the outcome of the suit. *First Ind. Bank v. Baker*, 957 F.2d 506, 507–08 (7th Cir.1992). A metaphysical doubt will not suffice. *Matsushita*, 475 U.S. at 586. Nonetheless, the Court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 247–48; *Beraha v. Baxter Health Corp.*, 956 F.2d 1436, 1440 (7th Cir.1992). If the evidence is merely colorable, or is not significantly probative, or is no more than a scintilla, summary judgment may be granted. *Id.* at 249–250.

II. FACTUAL BACKGROUND[5]

The undisputed facts are as follows. For the past several years, the CBOE and PBC have attempted to execute a construction project at CHSAS to provide better educational facilities and permit expansion of student enrollment at some time in the future. (Ed. Specs. at 3, PBC App.A; CBOE 12(M) ¶ 75 & PBC 12(N) ¶ 73).

A. Lease Agreement

To accomplish this goal, the CBOE entered into a lease agreement with the PBC on or about May 1, 1990, to “construct, improve, alter, repair, renovate, equip and rehabilitate the existing buildings and facilities which comprise the CHSAS.” (Lease Agreement at 3, CBOE Ex. 20). In this lease agreement, the PBC agreed to sell bonds and construct an expanded facility for the CHSAS, and CBOE agreed to lease the facility and levy a tax to pay the rent. (Lease Agreement at 3, CBOE Ex. 20). According to the agreement, the PBC would transfer title to the CBOE when the CBOE made its last rent payment. *Id.* The relevant provisions in the lease include the following clauses: (1) Section 1(B) provides that, “[t]he Commission [PBC] shall, in cooperation with the Lessee [CBOE] cause detailed plans for the Project to be prepared, subject to the Lessee’s approval”; (2) Section 2(C) provides that CBOE, as lessee, “shall be entitled ... to sole possession and occupancy of the Site, Buildings and Facilities” at CHSAS; (3) the Educational Specifications (incorporated into the lease) state that PBC “should attempt to make provision for appropriate structural, mechanical, electrical and architectural features which will allow modifications to provide for an additional 25% increase in student capacity at some time in the future”; and (4) Sections 1(E) and 9, provide that PBC will engage the necessary contractors for the expansion of CHSAS, “as soon as practicable” and will “use its best efforts ... to construct and/or complete the Buildings and Facilities ... at the earliest possible date in accordance with the construction contracts therefor.” (Ed. Specs. at 3, PBC App. A).

B. Original Plans

***3** After execution of the lease agreement in 1990, the PBC spent the next two years developing a set of detailed architectural and engineering plans (“original plans”), in conformity with CBOE’s Educational Specifications, to expand the size of CHSAS. (CBOE 12(M) & PBC 12(N) ¶ 83). In response to these Educational Specifications, the original plans provided for an immediate increase in enrollment to 600 students and sufficient space to accommodate another expansion.[6] (Walker Dep. at 183–186 (App. R); LaPlaca Aff. ¶ 9 (App.EE)). On July 17, 1991, the CBOE approved the original plans. (CBOE 12(M) & PBC 12(N) ¶ 83). The PBC then filed an application for an IPD with the Chicago City Council’s Chairman of the Committee on Zoning[7] (“Zoning Committee”) (“initial application”). (CBOE 12(M) & PBC 12(N) ¶ 84).

C. Initial Application

Hearings were never scheduled for the initial application (CBOE 12(M) ¶ 87; PBC 12(N) ¶ 88), however, because the PBC requested and was granted extensions of time,

which § 11.11–3 of the Zoning Ordinance deems a waiver of the thirty day period for completion of the hearing. (CBOE 12(M) & PBC 12(N) ¶ 85). The PBC did not proceed with its initial application for an IPD, at least in part,[8] because the Mount Greenwood community and its Alderwoman, Virginia Rugai, opposed both the original building plan and the potential for increased student enrollment which were part of the initial application.[9] (CBOE 12(M) ¶ 88–94; PBC 12(N) ¶ 88).

D. Revised Plans

During the next several years the PBC, through its architects, prepared a revised building design which altered the original plans to conform, not only with CBOE's Educational Specifications, as incorporated in the lease agreement, but also with Mount Greenwood's concerns, as advocated by Alderwoman Rugai.[10] (CBOE 12(M) & PBC 12(N) ¶ 93). In particular, the design was several thousand square feet smaller,[11] placed a 600–student cap on enrollment,[12] provided for mandatory local student recruitment, instituted a land use plan, and prohibited future construction on a portion of the CHSAS property.[13]

F. Approval Process

When PBC completed the revised plans, it formally submitted the plan for approval at meetings before the CHSAS Local School Committee ("LSC")[14] and the PBC Board, before moving forward to obtain approval for the revised IPD application from the Chicago City Council. (PBC 12(M) & CBOE 12(N) ¶ 21–25; CBOE 12(M) & PBC 12(N) ¶ 68). Dr. Bristow, CBOE's representative on the PBC Board, knew about the revised plan and was fully aware of the revision process followed by PBC, because he was present at the November 9, 1993, PBC Board Meeting. (Bristow Dep. at 7–11; 31, 47–48, PBC Ex. FF).

1. Dr. Clinton Bristow

Dr. Clinton Bristow[15] is a CBOE Board Member, the CBOE representative to the PBC Board, and a PBC Commissioner. As CBOE's representative, Dr. Bristow's responsibilities include participating in discussions and voting on behalf of the CBOE on school related matters that come before the PBC Board. (Bristow Dep. at 8–9 (App.FF)). In his deposition testimony, Dr. Bristow indicated that a resolution by the full Board of the CBOE is not required on every issue raised by the PBC. (*Id.* at 10–11). Rather, the position Dr. Bristow takes on any given issue depends upon several variables. First, if an issue appears on the PBC's agenda, it may have been previously raised by the CBOE facilities committee. In those cases, Dr. Bristow indicates that he would adopt the facilities committee position. Second, if the CBOE Board has taken a position on issues which appear on PCB's agenda, then Dr. Bristow would represent that position. However, in the third category of cases, decisions must be made on issues upon which the CBOE has not deliberated. In these cases, Dr. Bristow testified that he exercises his own judgment, without the benefit of a CBOE Board position.[16] (*Id.* at 9–10).

***4** Dr. Bristow's vote on November 9, 1993, falls into this third category. During the CBOE facilities committee meeting, CHSAS Principal Valerious (and some others) presented the revised plan and "indicated that the new programmatic configuration was one that met their programmatic concerns." (Bristow Dep. at 47–48, PBC App. FF). This presentation was made at a regularly scheduled meeting of the facilities committee,[17] before members of the CBOE, including Dr. Bristow. Following that meeting, Dr. Bristow voted to support the PBC's decision to move forward with development of the revised plans before the City Planning Commission, without seeking the CBOE's input. (Bristow Dep. at 31; PBC 12(M) & CBOE 12(N) ¶ 23).

2. Zoning Ordinance Amendment

On November 24, 1993, after obtaining the approval of Alderwoman Rugai and the PBC Board (on which Dr. Bristow sits), PBC submitted its revised plan as a revised application for designation of the CHSAS site as an Institutional Planned Development ("revised application"). (IPD App., Nov. 24, 1993, PBC App. CC) (PBC 12(M) & CBOE 12(N) ¶ 27; CBOE 12(M) ¶ 96–97). The application by PBC included a provision for local recruitment to CHSAS, and was later amended to include a cap on the number of students enrolled at CHSAS or a land use provision. (PBC 12(M) & CBOE 12(N) ¶ 27; CBOE 12(M) ¶ 96–97).

On January 6, 1994, the day that PBC submitted the revised plan to the City Planning Commission for approval, Patricia Whitten, the acting attorney for CBOE, wrote a letter to PBC, stating that PBC had no legal

obligation to obtain CBOE approval of revisions; CBOE had not approved the revised plans or the proposed Zoning Ordinance Amendment; CBOE had serious legal concerns with the plans; and CBOE had not initiated the revisions. (Letter P. Whitten, Jan. 6, 1994, PBC App. D).

Although the CBOE maintains that it did not give "formal approval" to the revised application/plan before it was filed[18] and thus has not approved the revised plans or the Zoning Ordinance Amendment (CBOE 12(M) ¶ 94), the PBC was ultimately successful in obtaining approval for the revised design plans. The revised design was approved by the Chicago Plan Commission on January 6, 1994, and approved again by the Zoning Committee on January 7, 1994, after Alderwoman Rugai spoke in its favor. Similarly, the Chicago City Council approved the Zoning Ordinance Amendment embodying the revised plan on February 9, 1994, (PBC 12(M) & CBOE 12(N) ¶ 28; CBOE 12(M) ¶ 101), PBC authorized a contract for the first phase of the construction project, preparing the foundation, on October 3, 1994, and that work is now underway. (PBC SJ Mem. at 30 n. 12).

III. DISCUSSION

The cross-motions for summary judgment currently before the court raise a single issue: do the revised plans designed by PBC violate the terms of the lease agreement executed between the PBC and the CBOE. Although CBOE contends that completion of the revised plans by PBC will deliberately impede the School District's fulfillment of its obligations under the Consent Decree and the Desegregation Plan previously approved by the Court, we find that the Consent Decree is not directly violated by allegations related to the revised plans for expansion of CHSAS.

A. Consent Decree

***5** CBOE contends that it will not be able to implement the goals of the Desegregation Plan and the Consent Decree if the PBC is permitted to complete the expansion of CHSAS according to the revised plan. In particular, CBOE asserts that the actions of PBC limiting the potential enrollment at CHSAS, both by the physical design and by an explicit enrollment cap of 600 students will directly impede CBOE's ability to conform to its duty under the Consent Decree to maximize desegregation. In addition, CBOE argues that the consent decree is violated by the requirement that CBOE recruit local residents from Mt. Greenwood for enrollment in CHSAS to the maximum extent possible under the provision for the Comprehensive Student Assignment Plan and the Student Desegregation Plan for the Chicago Public Schools. CBOE argues that this mandatory local recruitment requirement is:

> totally inconsistent and irreconcilable with CBOE's student assignment plan, policy and Consent Decree, under which the Board has a policy of city-wide enrollment for magnet schools and seeks roughly to approximate the racial composition of the system. The intent and effect of this restriction is to maximize the number of non-minority students (the surrounding community is 98% white) and to minimize the number of minority students at CHSAS. The CBOE's discretion under the Consent Decree to have up to 85% minority enrollment at CHSAS has been directly limited by the PBC's and City's conduct in requiring that 35% of the students, ("the maximum extent possible") be recruited from the local community, thus reducing minority enrollment to 65%.

The allegations raised by CBOE have already been rejected by the court in *United States v. Board of Education*, 1994 WL 159366 (N.D.Ill. April 25, 1994) (Kocoras, J.). In *Board of Education,* the plaintiffs in this case sought to intervene based on their belief that the Zoning Ordinance Amendment for CHSAS violates the Consent Decree. Although the plaintiffs did not have standing to intervene, because they were not parties to the Consent Decree, Judge Kocoras found that the Consent Decree "did not ... prescribe the size of any particular school but instead focused on means for achieving system-wide desegregation." Judge Kocoras then held:

> The appropriate architectural design and maximum enrollment of a single school are discrete issues

> that do not have system-wide implications. Therefore, these issues do not necessarily implicate the Consent Decree and do not require adjudication before the Court that is charged with enforcement of the Consent Decree.

Id. at * 3. We find, as we found in *Hodges I*, that Judge Kocoras' ruling is entitled to deference. Accordingly, we hold that the Consent Decree is not violated by the allegations in CBOE's cross-claim.[19] However, even if PCB's revised plans implicated provisions in the Consent Decree, CBOE would need to seek a ruling from Judge Kocoras, who retains jurisdiction to enforce the Decree. Moreover, even if this court had jurisdiction to rule on alleged violations of the Consent Decree, CBOE's allegations (discussed below) do not have any merit.

1. Delay

***6** CBOE alleges that the revised plan for CHSAS and the Zoning Amendment adopting this plan violate the Consent Decree because PBC delayed construction on the expansion. (CBOE SJ Mem. at 16). PBC denies this claim arguing that the original plan could not be built within budget or within the available funds. (PBC 12(N) ¶ 87). PBC also claims that it was required by the terms of the lease agreement, the Planned Development Ordinance, and Department of Planning practice to take account of community concerns in developing plans for the CHSAS addition. (*Id.*). According to PBC, the original plan was revised because "[t]he community expressed numerous legitimate concerns ... [which] PBC was obligated to, and did, revise ... to meet those concerns." (*Id.*). PBC also argues that "without PBC's efforts to prepare a new design, the expansion would still be but a proposal, mired in the constraints of insufficient funds and community concerns." (PBC Resp. at 4). Moreover, "CHSAS students would face untold years of continued schooling under existing conditions." (*Id.*). Despite these arguments, neither party has specified how "delay" would violate any provision of the Consent Decree. This claim, therefore, has no merit.

2. Revised Design

CBOE also alleges that PBC imposed a revised design for CHSAS which limits the potential enrollment and interferes with CBOE's ability to implement educational and desegregation goals. (Cmplt. P. 26). In particular, CBOE claims that "there is a great demand for admission to CHSAS" and "no educational reasons exit why CHSAS could not accommodate and serve 1,200 students." (CBOE SJ Mem. at 13 n. 3).[20]

PBC argues that the Consent Decree is silent concerning the issue of total enrollment at particular schools (as Judge Kocoras also recognized). (PBC Opp.Mem. at 3). Instead, the Consent Decree requires the CBOE to create "stably desegregated schools." (*Id.* at 4, citing Consent Decree at 4). A stably desegregated CHSAS, according to PBC, can be formed by adhering to the racial composition requirements, without regard to the total number of students enrolled. (*Id.*). PBC also argues that CBOE has produced no evidence that the revised plan cannot support a 25% expansion in enrollment. Instead, PBC offers the affidavit of architect David LaPlaca, who testified that the revised plan allows for the addition of an additional floor with six classrooms—enough space for an additional 25% (or 150 students). (*Id.* citing LaPlaca Aff. ¶ 9 (App. E)).

The Consent Decree is silent on the issue of total enrollment for any particular school. This silence, given the facts of this case, supports judgment in favor of PBC on the merits, since CBOE as the moving party must demonstrate that there is no genuine issue of material fact with respect to whether the Consent Decree is violated by the construction of a building which will hold only 600 students. CBOE cannot meet this burden, because it has not pointed to any provision in the Consent Decree pertaining to the total numerical enrollment at any particular school. CBOE's assertion that no educational reasons exist why CHSAS cannot be expanded to accommodate 1,200 students simply fails to establish a violation of the Consent Decree.

3. Enrollment Cap

***7** The enrollment cap contained in the Zoning Ordinance Amendment provides that CHSAS is "for not more than 600 students" and incorporates an Illinois statute which imposes a limit on CHSAS admissions. (Zoning Ordinance Amendment ¶ 5 (citing 105 ILCS 5/34–21.1 (1994)). CBOE argues that the enrollment cap was added only because Alderwoman Rugai, not Illinois law, required it. (CBOE SJ Mem. at 19–20). CBOE then asserts that PBC has never before included "enrollment cap provisions against the School District's wishes like

those contained in the application submitted with regard to CHSAS." (*Id.,* CBOE Ex. 2 at 202). In addition, CBOE claims that the PBC commissioners were not notified of the enrollment cap (*Id.,* CBOE Ex. 3 at 47–65), or notified that CBOE "disapproved of the design changes and revisions to the application." (*Id.,* CBOE Ex. 3, at 58, 79).

PBC argues that: (1) other Chicago Public Schools have imposed enrollment caps; (2) this claim is not ripe because "once an expansion to accommodate 600 students is operational, it will be another four years before all places are filled;" and (3) Illinois statute 105 ILCS 5/34–21.1(8) & (9) mandates the cap. The PBC also argues that CBOE may seek amendment of the Zoning Ordinance and the Illinois Statute if it wishes to further expand enrollment at CHSAS. (PBC SJ Mem. at 13–14; PBC Opp. Mem. at 4).

The enrollment cap does not violate the Consent Decree for several reasons. The short answer to this claim is that Illinois law supports, even if it does not mandate, inclusion of the student enrollment cap. *See* 105 ILCS 5/34.21.1(8) & (9). Furthermore, there is no language in the Consent Decree expressly prohibiting its inclusion.

The issue of ripeness is also relevant. A case is unripe if it "involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." *Hometown Co–Operative Apartments v. City of Hometown,* 515 F.Supp. 502, 504 (N.D.Ill.1981); *In re Chicago, M., S.P. & P.R.R.,* 701 F.2d 604, 609 (7th Cir.), *cert. denied,* 463 U.S. 1233 (1983). Furthermore, "concern about the future effect of zoning ordinances will not support injunctive relief where the anticipated injury is not imminent and irreparable." *Chacon v. Granata,* 515 F.2d 922, 925 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975). PBC correctly argues that CBOE's allegations regarding the student cap is non-justiciable because it has "no current impact." (PBC SJ Mem. at 28). We therefore grant summary judgment in PBC's favor on this claim.

4. Local Recruiting Requirement

The local recruiting requirement ("LRR") contained in the Zoning Ordinance Amendment is, perhaps, CBOE's only legitimate claim alleging a violation of the Consent Decree. CBOE argues that the LRR conflicts with CBOE's authorized discretion to implement the desegregation plan by enrolling students in magnet schools on a citywide basis. CBOE also claims that the LRR limits its discretion to set policy regarding the racial composition of CHSAS within the 15–35% nonminority range. This argument is based on CBOE's assertion that, because the CHSAS locale is overwhelmingly white, an LRR in Mount Greenwood translates into a preference for white students.

***8** The LRR, however, is race neutral on its face, requiring only that residents from "surrounding communities" be recruited "to the maximum extent permissible under the Desegregation Plan." PBC has submitted evidence establishing that several communities surrounding Mount Greenwood are predominately minority areas (i.e., Morgan Park, Beverly, West Pullman and Washington Heights). (PBC 12(M) & CBOE 12(N) ¶ 34; PBC 12(N) ¶ 64; Valerious Dep. at 83 (App. J)). PBC therefore argues that the local recruitment provision does not necessarily favor white applicants. PBC also argues that the admission of white students to CHSAS is expressly subject to the Consent Decree's requirement that magnet schools maintain a 15–35% nonminority composition. (*Id.*). At most, argues PBC, the LRR means that CHSAS would admit white students from Mount Greenwood up to the 35% maximum permitted by the Consent Decree. Thus, the only students affected by the LRR, according to PBC's argument, would be white students outside Mount Greenwood who seek admission to CHSAS. Minority students in the city would still be permitted to fill 65% of the seats at CHSAS, a percentage expressly sanctioned by the Consent Decree.

The Consent Decree does mandate that magnet school enrollment be on a citywide lottery basis, with student enrollments reflecting the racial composition of the total citywide student population. In other words, magnet schools must maintain a student ratio balance of 65–85% minority and 15–35% white to satisfy the Consent Decree. Although the Decree does not expressly prohibit local recruiting preferences/requirements, the citywide lottery system implicitly recognizes a preference against such practices. Nonetheless, PBC has submitted evidence indicating that local recruitment is permitted, even if it is not favored. CHSAS Principal Valerious also admits that slots which are not filled through the lottery are saved for Mount Greenwood students within the relevant racial quotas. (Valerious Dep. at 64 (App. J)). Additionally, Alvin Peterson, the CBOE official who administers the Decree as it applies to magnet schools like CHSAS, testified that CBOE does not exercise any discretion within the range set by the Decree, since white students make up only 11.9% of the total student body. In fact, Peterson testified that "because of this dearth of non-minority applicants, CBOE automatically admits every white student to the magnet school of his or her own choice up to the 35% maximum." (Peterson Dep. at 30–41, 47, PBC App. Z).

This evidence establishes that the local recruiting requirement in this case does not violate the Consent Decree because the Consent Decree does not expressly forbid the practice. Moreover, the requirement is expressly subject to the Decree, so that the effect of the recruiting provision is always subject to the 35% limit on white applicants, which is within the parameters of the Decree.

5. Land Use Provision

***9** Section 2(C) of the Lease Agreement provides that the CBOE, as lessee, "shall be entitled ... to sole possession and occupancy of the Site, Buildings and Facilities" at CHSAS. The revised building plan for CHSAS implements a land use plan which expressly reserves a large portion of the CHSAS property for farming. It then grants the PBC, not the CBOE, authority to implement this land use plan.

The CBOE argues that this land use restriction limits the physical expansion of CHSAS, preventing an increase in future enrollment. The CBOE also argues that this land use provision limits the discretion given to CBOE by the Consent Decree by giving the PBC authority to oversee use of the CHSAS property. In addition, the CBOE alleges that this restriction was added without the approval of all PBC commissioners, and thus was not the product of "any rational process to determine whether such provisions were necessary or educationally appropriate."

The PBC responds that the CBOE has failed to identify a connection between the land use provision and the desegregation concerns of the Consent Decree. The PBC, therefore, requests the entry of judgment against the CBOE on this claim for its failure to produce evidence establishing a violation of the Decree, as a matter of law. We grant this request for the reasons asserted by PBC.

6. Discretion

A common thread running through the CBOE's allegations regarding the Consent Decree involves the issue of discretion. The CBOE claims that it has complete discretion to "set policy" regarding the implementation of the desegregation goals embodied by the Consent Decree, including the determination of the number of students enrolled at CHSAS, the physical size of the CHSAS expansion, the use of CHSAS property and the determination of racial composition and student recruitment. (CBOE SJ Mem. at 23 n. 8–25; Cmplt. ¶ 27). In support, the CBOE cites *Board of Educ. v. Carter,* 119 Ill.App.3d 857, 458 N.E.2d 50 (3d Dist.1983) (Fire marshal had no authority to order a school board to remedy certain conditions because a state statute specifically governed schools), and *Board of Educ. v. City of West Chicago*, 55 Ill.App.2d 401, 205 N.E.2d 63 (2d Dist.1965) (state building code prevailed over a local building code).

PBC claims that the CBOE does not possess the "total autonomy it desires," but is subject to the enrollment cap mandated by 105 ILCS 5/34–21.1(8) and the Zoning Ordinance. In support, PBC cites, *Village of Bolingbrook v. Citizens Utilities Co.*, 158 Ill.2d 133, 632 N.E.2d 1000 (1994) (municipality permitted to impose reasonable controls over a utility company regulated by the Public Utilities Act); *Cook County v. City of Chicago,* 311 Ill. 234, 248, 142 N.E. 513, 516 (Ill.1924) (city fire and building ordinances are applicable to county jail); and *Town of Cicero v. Weilander,* 35 Ill.App.2d 456, 183 N.E.2d 40 (1st Dist.1962) (upholding town ordinance regulating trailer camps against challenge based on state regulatory statute).

***10** The language of the Consent Decree is extremely permissive, but does not expressly give the Chicago Board of Education complete discretion to set policy. However, even if it did, CBOE has offered no evidence that its discretion escapes the force of a valid zoning ordinance amendment, passed by the Chicago City Council, itself. CBOE therefore has failed to meet its burden on summary judgment. Accordingly, we grant judgment in favor of PBC on the issue of discretion.

B. The Lease Agreement

We now turn to the primary issue in this case: whether the revised plans designed, promoted, and now currently being constructed by the PBC, violate the provisions of its lease agreement with the CBOE. The CBOE contends that the PBC will breach the lease agreement if it completes the construction of CHSAS facilities according to the revised plan. The PBC claims that it has fully complied with its obligations under the lease, and the CBOE is estopped from claiming otherwise. Both parties claim that they are entitled to summary judgment as a matter of law.

1. Approval of Revised Plans

CBOE claims that PBC did not obtain the approval of the Board as a whole for the revised plans as required by the lease agreement. (CBOE SJ Mem. at 36; CBOE Resp. at 5–7). In support of this claim, the CBOE asserts that the revised plans ultimately approved in the Zoning Ordinance Amendment were not seen, contributed to or approved by any member of the CBOE, including Dr. Bristow. The CBOE also argues that ILCS 5/34–19 (1994), prohibits CBOE from delegating its powers with respect to lease agreements.

The PBC claims that the CBOE is estopped from arguing that it did not approve the revised plans because: (1) Dr. Bristow had actual or apparent authority to bind the CBOE under § 1(B) of the lease agreement when he voted to send the revised plans to the City Planning Commission for approval; and (2) CBOE waited to object[21] until January 6, 1994, the day that the City Planning Commission held a hearing on the revised plan.[22]

a. *Agency Standard*

Estoppel generally arises where a party by its statements or conduct leads another to do something it would not have done but for the statements or conduct of the other, and where the party responsible for the expressions or conduct should not be allowed to deny its actions to the loss of the party relying on them. *Bank of Pawnee v. Joslin,* 166 Ill.App.3d 927, 937, 521 N.E.2d 1177, 1185, 118 Ill.Dec. 484, 492 (4th Dist.1988). "While the doctrine of estoppel may be applied against school boards, it should be invoked only in extraordinary circumstances and may not be used to defeat the effective operation of a policy adopted to protect the public." *Premier Electrical Construction Co. v. Bd. of Educ.,* 70 Ill.App.3d 866, 27 Ill.Dec. 125, 388 N.E.2d 1088 (1st Dist.1979) (citing cases). *Cf. Pawnee,* 166 Ill.App.3d at 938–39 (distinguishing case involving municipal corporation, as opposed to municipality, where application of estoppel depends upon consideration of all "surrounding circumstances" rather than "compelling circumstances").

***11** The general rule is that a city cannot be estopped by the actions of its agents beyond the authority expressly conferred upon them. *Cities Service Oil Co. v. City of Des Plaines,* 21 Ill.2d 157, 160, 171 N.E.2d 605, 607 (1961). This rule applies with equal force to municipal corporations, like the Chicago Board of Education in this case. *Stahelin v. Bd. of Educ.,* 87 Ill.App.2d 28, 38, 230 N.E.2d 465, 470 (2d Dist.1967); *Bank of Pawnee v. Joslin,* 166 Ill.App.3d 927, 939, 521 N.E.2d 1177, 1185, 118 Ill.Dec. 484, 492 (4th Dist.1988). Apparent authority is not enough to bind a municipality. *See Heritage Commons Partners v. Village of Summit,* 730 F.Supp. 821, 823 (N.D.Ill.1990) (Posner, J. by designation). *Cf. City of Burbank v. Illinois State Labor Rel. Bd.,* 185 Ill.App.3d 997, 133 Ill.Dec. 821, 541 N.E.2d 1259 (4th Dist.1989) (discussing apparent authority and ratification theories, but finding that agent had actual authority). Whether apparent authority is enough to bind a municipal corporation, like a school board, appears to be an open question in Illinois. Nonetheless, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of [its] authority," even though the agent may have been unaware of the limitations of its authority. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947).

Although courts apply the estoppel doctrine against a city where the city, itself, rather than an unauthorized agent, commits affirmative acts of fraud and the other party relies on those acts to its detriment, *Pawnee,* 166 Ill.App.3d at 939, the issue raised by PBC is not about fraud; the issue is about ratification (i.e., "silent acquiescence")—a theory which is viable only if a municipal corporation, like the CBOE, can be bound by an agent's apparent authority. We do not believe it can. *See Heritage Commons Partners,* 730 F.Supp. at 832. However, we need not rule on this basis, because Dr. Bristow's deposition testimony indicates that he may have had actual authority to bind the CBOE.

b. *Approval of Revised Plan*

Lease § 1(B) provides:

> SECTION 1. To accomplish the acquisition of the Site and the constructing, improving, altering, repairing, renovating, equipping and rehabilitating of the Leased Premises in accordance with the Act, the following actions shall be taken by the Commission [PBC]:
>
> > (B) The Commission [PBC] shall, in cooperation with the Lessee [CBOE] cause detailed plans for the Project to be prepared, subject to the Lessee's approval.

(CBOE Ex. 20 at 4).

The lease agreement required the PBC to obtain the CBOE's approval of the revised plans before it submitted them to the City Planning Commission as a revised IPD

application for a Zoning Ordinance Amendment. The lease agreement does not specify, however, the manner of approval contemplated by the parties. Further, although the record indicates that the CBOE approved the original plans for expansion, neither party has submitted evidence indicating the manner in which this original approval was obtained. This evidence is material to the issue before us, namely, whether the CBOE approved the revised plans incorporated into the zoning ordinance amendment approved on February 9, 1994.

***12** Also material to the court's inquiry is PBC's concession that the revised plan Dr. Bristow voted to send to the City Planning Commission for approval contained the local recruiting requirement under challenge, but did not contain the student enrollment cap or land use provision. (PBC 12(M) ¶ 27; PBC S.J. Mem. at 11). The enrollment cap and land use provision were subsequently added by amendments to the zoning ordinance application after it was initially filed on November 24, 1993. (*Id.*). Although the CBOE does not expressly make this argument, the court may reasonably infer from these facts that the CBOE did not approve the revised plans which were actually adopted by the City Council on February 9, 1994. The court will reserve ruling on this issue until the completion of trial.

Certainly, CBOE's bare assertion that the full Board did not approve the revisions is not enough to defeat PBC's Motion for Summary Judgment. To defeat PBC's Motion for Summary Judgment, the CBOE is required to demonstrate, through specific evidence, that there is a genuine issue of material fact with respect to whether Dr. Bristow had the authority to bind the CBOE. However, the evidence CBOE offers to satisfy this burden is somewhat lacking.

The Illinois statute cited, 105 ILCS 5/34–19, does not provide authority for the proposition that CBOE's powers regarding lease agreements is non-delegable. By its own terms, this provision prohibits delegation to the "general superintendent or to the attorney." This provision does not prohibit delegation to a Board member, officially charged with representing the CBOE before the PBC. In addition, § 5/34–19 expressly prohibits delegation of its powers with respect to lease agreements "in excess of 10 years" pursuant to § 5/34–21. Subsection (2) is the only provision contained in § 5/34–21 which refers to lease agreements "in excess of 10 years." Subsection (2), however, refers to cases where the CBOE acts as the lessor, rather than the lessee, in contracts involving land used for schools. In this case, CBOE acts as a lessee, rather than the lessor, and the statute is distinguishable on this basis. The only other evidence in the record supporting CBOE's assertion is the letter written by CBOE's attorney on January 6, 1994, declaring that CBOE had not approved the revised application. This letter is not material evidence, however, because it is merely a legal assertion.

Nevertheless, we believe that there are genuine issues of material fact with respect to the degree of authority Dr. Bristow possessed. Dr. Bristow expressly indicated that he represents the CBOE with respect to "board-related matters that come before the [PBC]" in one of three ways: (1) by representing "the interests of the board pursuant to the action of the [CBOE's] facilities committee." (Bristow Dep. at 9); (2) by representing the position taken by the full board; or (3) by using his own judgment in cases where the board has not deliberated and taken a formal position. (*Id.* at 9–10). Dr. Bristow then indicated that the entire Board was involved in decisions regarding PBC issues only when the facilities committee "did not feel comfortable taking a position or ... felt that the full board should have further deliberation." (*Id.*). Given that Dr. Bristow's deposition testimony is uncontroverted, the court might reasonably infer that he had either actual or apparent authority to bind the CBOE with his vote.

***13** However, the absence of evidence in the record on the question of Dr. Bristow's authority leaves this court without a basis for drawing any clear lines with respect to the decisions for which Dr. Bristow could exercise his judgment, and those which required the approval of the entire Board. The court finds it difficult to conclude that Dr. Bristow was given authority to make decisions on the Board's behalf on all (or even some) PBC issues, but not on the question before us. Thus, evidence concerning other PBC issues on which Dr. Bristow voted or expressed opinions, either by adopting facilities committee positions, or by exercising his own judgment, would be extremely material. Although the ambiguity in the record compels us to deny summary judgment on this claim, the court advises both parties to address the issues the court has outlined during the trial of this case.

2. The Taking Claim

The CBOE claims that "the PUD [revised plan], in perpetuity, constrains the [CBOE's] use of its property, in essence taking its property." (CBOE SJ Mem. at 39.) The Zoning Ordinance Amendment, adopting the revised expansion plan, retains the use of CHSAS land for farming and gives PBC oversight of this land use plan. CBOE claims that this provision violates § 2(C) of the lease, which provides that CBOE, as lessee, "shall be entitled ... to sole possession and occupancy of the Site,

Buildings and Facilities" at CHSAS. The CBOE contends that the Zoning Ordinance Amendment amounts to a taking of its property by constraining its use. In other words, CBOE challenges the validity of the land use provision included in the Zoning Ordinance Amendment.

The PBC argues that "[t]he zoning provision imposing limits on the *way in which the property may be used* is in no way inconsistent with the lease term granting CBOE sole *possession* and *occupancy* of the leased property." (PBC Opp. Mem. at 12). According to the PBC, "[a] lease's grant of "possession" and "occupancy" merely define the lessor-lessee relationship; and are subject to lawful uses and restrictions on use which are imposed by valid zoning laws or a landlord. (*Id.*). PBC concludes, therefore, that the "[l]ease's grant of sole possession and occupancy [to CBOE] carries no implication that CBOE can use the land however it wants." (PBC SJ Mem. at 22). Moreover, the lease is silent with respect to the lawful uses for the land. (*Id.*) This silence, argues PBC, leaves the City Council "free to impose restrictions and to police compliance with those restrictions." (*Id.*) PBC also argues that "[i]f constraining the use of land by a lessee amounted to a taking, then almost every lease would be a taking." (PBC Opp. Mem. at 12). *See Illinois Central R.R. v. Michigan Central R.R.*, 18 Ill.App.2d 462, 480, 152 N.E.2d 627, 635 (1st Dist.1958) (lessee's possession is "almost always ... subject to certain restrictions, controls or reservations by the lessor").

***14** The land use provision does not violate the lease. No lease term prohibits PBC from exercising discretion regarding the use of CHSAS property, and CBOE has provided no authority establishing that the lease agreement is not subject to valid zoning ordinances. Therefore, for the reasons expressed by PBC, the court grants summary judgment for PBC on this claim.

3. PBC's Remaining Claims

The CBOE's Educational Specifications state that PBC "*should attempt* to make provision for appropriate structural, mechanical, electrical and architectural features which will allow modifications to provide for an additional 25% increase in student capacity at some time in the future." (Ed. Specs. at 3 (App. A)). In its cross-claim CBOE alleges that the revised design for the CHSAS expansion does not comply with CBOE's Educational Specifications, incorporated into the lease, because the revised plans limit potential enrollment at CHSAS by physical design. (Cmplt. ¶ 26). In particular, CBOE asserts that PBC violated this clause because the revised plans resulted in "a more compact school which does not allow for modifications to provide for an additional [25%] increase in student capacity." (Cmplt. ¶ 18).

PBC claims that the "should attempt" clause does not impose a mandatory requirement and therefore does not constitute a cognizable basis for a claim that PBC breached the lease. PBC also argues that, even if this clause is enforceable, it satisfied its obligations by designing the original plans, which CBOE approved on July 1, 1991. The fact that the original plans could not be implemented due to community concerns and financial constraints, does not undermine the evidence which shows that PBC did "attempt" to build an expandable school. Furthermore, PBC also argues that it satisfied its obligations because the revised design can be physically expanded to hold a 25% larger student body (i.e., another 150 students) by adding another floor or constructing another building on a small portion of the farm fields. (Aff. of David LaPlaca ¶ 9 (App. E)).[23] Moreover, PBC contends that CBOE has not produced any evidence that physical expansion of the revised plan is not possible.

David LaPlaca's affidavit is uncontroverted. Furthermore, the "should attempt" clause is, as PBC argues, a nonmandatory provision which cannot be used as a basis upon which to impose liability. The fact that the revised plans apparently do not provide for a 25% in addition to the 150 student increase contemplated by the revisions is not a basis for finding that PBC violated the lease agreement. Although the lease agreement incorporates the Educational Specifications state that the PBC "should attempt" to design features allowing for a 25% increase in student enrollment at some time in the future, it is not clear that PBC has failed to attempt to satisfy this nonmandatory goal. The enrollment of CHSAS at the time expansion plans began in 1990 was 450 students. Twenty-five percent of 450 is approximately 112 students, capping enrollment at 600 students. The revised plan permits an increase in enrollment at CHSAS of 150 students. Using this analysis, PBC has not only satisfied the goal expressed in the Educational Specifications, but also exceeded it.

***15** The lease agreement provides that PBC will engage the necessary contractors for the expansion of CHSAS, "as soon as practicable" (Lease § 1(E)) and will "use its best efforts ... to construct and/or complete the Buildings and Facilities ... at the earliest possible date in accordance with the construction contracts therefor." (Lease § 9). CBOE claims that PBC has violated these provisions, because the expansion of CHSAS according to the revised plans will "take longer to complete" than if PBC had implemented the original design. (Cmplt. ¶ 20). PBC

argues that "lease or contract provisions to use one's "best efforts" or to act "as soon as practicable" are too vague to support an action for breach. *See Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir.1992) (defendant's written agreement that it "would 'do [its] very best to make this project a success' is merely a vague expression of goodwill; it is not an enforceable contractual promise") (applying Illinois law); *Garbelmann v. Creditcard Keys Co.*, No. 89 C 6020, 1992 WL 73531, at * 2 (N.D.Ill. Mar. 27, 1992) (a promise to utilize "best efforts" is too indefinite and uncertain to be enforceable); *Penzell v. Taylor*, 219 Ill.App.3d 680, 688, 579 N.E.2d 956, 961 (1st Dist.1991) ("the phrase 'best efforts' is too indefinite and uncertain to be an enforceable standard."); *see also, e.g., Kraftco Corp. v. Kolbus*, 1 Ill.App.3d 635, 639–640, 274 N.E.2d 153, 156 (4th Dist.1971); *Goodman v. Motor Prods. Corp.*, 9 Ill.App.2d 57, 71–72, 132 N.E.2d 356, 363–64 (2d Dist.1956).

After reviewing the cases cited by PBC, we agree that the relevant language in the lease is too indefinite and uncertain by itself, to form grounds for liability against PBC. Furthermore, even if these provisions were sufficient to hold PBC liable, the Court cannot conclude that the PBC did not use its "best efforts" to design a plan which would provide for the expansion of CHSAS *and* qualify for zoning approval. In fact, PBC has already engaged contractors, who have begun construction on the revised plans. It is CBOE, at this point, who seeks an injunction delaying the expansion of CHSAS which has been approved by the Chicago City Council.

Only CBOE's claim regarding approval of the revised plan under § 1(B) of the lease survives PBC's Motion for Summary Judgment ("§ 1(B) issue"). This court grants PBC's Motion for Summary Judgment with respect to the remainder of CBOE's claims under the lease agreement and the Consent Decree. Thus, the issue of whether injunctive relief (i.e., specific performance) is legally appropriate or effective on those claims is not relevant at this time. The Court is denying CBOE's Motion for Summary Judgment on the § 1(B) issue, however, because CBOE has failed to demonstrate that there is no genuine issue of material fact with respect to whether it approved the revised plans through its agent, Dr. Bristow (among others). Similarly, PBC, as a moving party on this issue, has failed to demonstrate the absence of a genuine issue of material fact—although it has provided specific evidence sufficient to create a genuine issue of material fact.

***16** The Clerk of the Court is therefore directed to enter summary judgment in favor of the Public Building Commission on all allegations contained in the CBOE's cross-claim except for the claim regarding lease § 1(B), which required PBC to seek CBOE's approval of the revised plan before submitting the plan for zoning approval ("§ 1(B) issue"). The Clerk of the Court is further directed to deny summary judgment for both parties on the § 1(B) issue, because genuine issues of material fact preclude the entry of summary judgment for either party on the record before us. The Court will resolve the § 1(B) issue at trial.

All Citations

Not Reported in F.Supp., 1994 WL 716300

CONCLUSION

Footnotes

1 This Decree was entered by the Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois.

2 *See supra* note 1.

3 "The Plan identifies a desegregated school as one in which the Board establishes, by student assignment techniques, an enrollment that has significant numbers of both white and minority children. It is different, therefore, from an integrated school, which in general derives its diversity of enrollment from natural residential attendance patterns.

A desegregated school serves a residential area that, in itself, does not result in such an enrollment. The desegregation of the school results from attendance at the school of students residing outside its attendance area." (CBOE Desegregation Plan, Ex. 14 at 123, entitled "Comprehensive Student Assignment Plan").

[4] For the sake of judicial economy we will not repeat all the underlying facts previously reported in *Hodges v. Public Building Comm.* 1994 WL 506899 (N.D.Ill. Sept. 14, 1994) ("Hodges I").

[5] The undisputed facts summarized in this opinion are those facts that appear "without substantial controversy" pursuant to Fed.R.Civ.P. 56(d). To the extent possible, these facts should not be relitigated during trial.

[6] The parties dispute whether "it was ever contemplated that the CHSAS expansion would accommodate 1200 students." (CBOE 12(M) & PBC 12(N) 73).

[7] The Chicago Zoning Ordinance (Title 17 of the Municipal Code of Chicago) ("Zoning Ordinance") requires that the CHSAS site, in view of the proposed expansion, be designated as an Institutional Planned Development ("IPD") pursuant to § 11.11 *et seq.* of the Zoning Ordinance. *See* Chicago Municipal Code Art. 12, § 17–44–480(c) ("[t]he development of land to be used for ... schools ... consisting of two acres or more ... shall be permitted only when processed as a planned development subject to the provisions herein"). While the Chicago City Council has the ultimate authority to approve a planned development, the application must first be reviewed by the Zoning Committee. The Zoning Ordinance provides that no planned development application shall be considered by the Zoning Committee in the absence of the report and recommendations of the Chicago Plan Commission. *See* Zoning Ordinance § 11.11–3. Prior to making a recommendation to the Committee on Zoning, the Chicago Plan Commission was required to set a public hearing on the defendants' application by September 1991, and to complete the hearing by November of 1991. (CBOE 12(M) ¶¶ 85–87).

[8] The parties dispute the financial feasibility of the original plans. *Compare* PBC 12(N) ¶¶ 87–89 (alleging that "PBC did not pursue approval of the original plans because they could not be built within budget or available funds"), *with* CBOE SJ Mem. at 42 ("specific performance of the original design is absolutely practical. The plans and specifications were already complete and the funding of the project was obtained years ago").

[9] The concerns of Alderwoman Rugai and her constituents are reported in *Hodges I,* 1994 WL 506899, *2.

[10] CBOE does not admit that the revised plan complies with the Educational Specifications permitting physical expansion of CHSAS to accommodate a 25% increase in student enrollment. (CBOE 12(M) ¶ 95). CBOE also claims that a 25% increase at some time in the future would violate the enrollment cap included in the revised plans. (CBOE 12(M) ¶ 96). PBC does not admit that the plans were revised solely to accommodate Alderwoman Rugai's concerns.

[11] "PBC denies that the revised IPD application incorporated a meaningfully smaller building design." (PBC 12(N) ¶ 93).

[12] The court finds that the enrollment limitation of 600 students is mandated by 105 ILCS 5/34–21.1(8) and (9), despite CBOE's assertion to the contrary. *See* CBOE 12(N) ¶ 38.

[13] The revised plans incorporate the following conditions and restrictions. First, the revised plan expressly prohibits the building of any permanent structures outside the 12 acre campus area. Second, the revised application caps student enrollment at 600 students. Third, the revised application implements a land use plan which expressly reserves a large portion of the CHSAS property for farming. The revised plan then grants the PBC, not the CBOE, authority to implement this land use plan. Fourth, the revised plan includes a local recruitment provision which requires the CBOE to develop and implement a program to affirmatively recruit residents of the surrounding community neighboring CHSAS for enrollment as students to the maximum extent permissible under the provision for the Comprehensive Student Assignment Plan and the Student Desegregation Plan for the Chicago Public Schools. This provision requires that the magnet school guidelines apply (i.e., the requirement that magnet schools maintain a racial composition of 65–85% minority and 15–35% white). (CBOE 12(M) & PBC 12(N) ¶ 96; PBC 12(M) & CBOE 12(N) ¶ 27, 28, 29, 31, 33, 34).

[14] On October 19, 1993, the Local School Council of CHSAS ("LSC") voted against approval of the revised design and in favor of the original plans. However, on May 25, 1994, the LSC voted to approve the revised plans. (PBC 12(M) ¶ 25). CBOE maintains, however, that the LSC does not have authority to make final decisions regarding lease agreements involving CHSAS, pursuant to 105 ILCS 5/34–2.3. (CBOE Resp. at 3–4). CBOE is correct on the latter point.

[15] From October 1990 through May of 1992, Dr. Bristow held the position of CBOE President, the highest ranking official of that governmental body. During that period, Dr. Bristow also served as CBOE's official representative on the PBC Board. Although Dr. Bristow's tenure as CBOE's President ended in May of 1992, the current President of the CBOE, D. Sharon Grant, reappointed Dr. Bristow to PBC's Board as CBOE's official representative in 1992, and he currently serves in this position. (Bristow Dep. at 7, PBC Ex. FF).

[16] Dr. Bristow then indicated that the CBOE Board is the governing body responsible for CBOE policy, not the facilities committee. (Bristow Dep. at 10–11, PBC Ex. FF).

[17] CBOE claims that the facilities committee meeting agendas for October and November of 1993 do not reflect a PBC presentation of the revised plans. (CBOE Resp. at 7). However, Dr. Bristow, even though he could not remember the date of this meeting during his deposition, testified that he attended a facilities committee meeting before he voted on the revised plans. CBOE's evidence does not directly contravene Bristow's testimony and will, therefore, be taken as true for purposes of the motions before this court.

[18] Thomas Walker, the Executive Director of the PBC, testified that CBOE had not given "formal approval" to the final application for a Zoning Ordinance Amendment before it was filed on November 24, 1993. (Dep. of Thomas Walker at 203, CBOE Ex. 2).

[19] This holding, however, does not in any way change the court's prior ruling that the terms of the Consent Decree are relevant background to the plaintiffs' remaining constitutional claims. *See Hodges I,* 1994 WL 506899, * 14–16 (N.D.Ill. Sept. 14, 1994).

[20] PBC denies that "it was ever contemplated that the CHSAS expansion would accommodate 1200 students." (PBC 12(N) ¶ 73). PBC also claims that the "statement in the original IPD application that the CHSAS expansion was for 1200 students was an error." (PBC 12(N) ¶ 84).

[21] The CBOE's objections were contained in a letter, written by its' Acting Attorney, P. Whitten, dated January 6, 1994. The letter raised concerns regarding the student enrollment cap (arguing that inclusion of the cap in the zoning ordinance amendment was duplicative with the cap requirement contained in the statute, 105 ILCS 5/34–21.1); the land use provision, the local recruiting requirement; and the additional cost associated with revising the plan. (Letter at 2) (App. 2).

[22] In the alternative, the PBC claims that CBOE has admitted, through the statements of its attorney, that the CBOE "is not legally required to approve scheme plans or revision to plans drawn by the PBC." (Letter of P. Whitten, Acting Attorney for CBOE, Jan. 6, 1994, at 1, PBC App. D).

[23] LaPlaca, the architect of the revised plan, confirms that "[a] one-story, six classroom addition" to accommodate a 25% (150 student) increase in enrollment "could easily be constructed" in a number of locations at CHSAS").