

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Cabrini-Green Local Advisory Council,	)	
	)	
Plaintiff,	)	96 C 06949
	)	
v.	)	Honorable Edmond E. Chang
	)	
Chicago Housing Authority and	)	
the City of Chicago,	)	
	)	
Defendants.	)	

ORDER

I.

Plaintiff Cabrini-Green Local Advisory Council (LAC) has filed a motion to compel [R. 203] enforcement of the Consent Decree which settled this case almost 11 years ago in September 2000. In the lawsuit that led to the settlement, LAC challenged the Chicago Housing Authority and the City of Chicago's redevelopment initiative of the Near North area, primarily alleging that the displacement of public housing residents violated federal housing laws and regulations. Among other things, the Consent Decree provides for the eventual construction of 700 replacement public housing units and 270 affordable rental units in the defined Near North area. R. 160 § II.A, II.B. Furthermore, the Consent Decree specifies a required "income mix" for housing developed in the area on City-owned and CHA-owned land: 50% market rate, 20% affordable, and 30% public housing. *Id.* § II.D.

In the motion to compel, LAC seeks to enforce a specific land-acquisition and land-restriction provision in the Consent Decree:

The City will acquire additional land and/or impose appropriate restrictions and requirements on land owned by other persons or entities to make it possible to maintain the commitment by it and by CHA to construct at least 700 public housing units and 270 affordable rental units Land acquired, in the process of being acquired, or otherwise anticipated to be subject to appropriate restrictions and requirements for mixed-income development to date is described in Appendices B and C to the consent decree.

R. 160 § II.C. One of the parcels of land designated in the appendices is an 11-acre parcel (coincidentally designated as Parcel 11) upon which the shuttered Near North High School sits. The appendices “rough estimates” state that 382 residential units would be built on the site, including 115 public housing units. The City asserts, without contradiction, that the Chicago Board of Education owned Parcel 11 in 2000 – and still does. R. 208 at 4.¹ In LAC’s view, that is the problem: the City has neither acquired the land nor taken any concrete steps to acquire it. Nor has the City imposed any restrictions on Parcel 11.

In addition to the sheer passage of time since 2000, LAC is also concerned that inaction could open the door to an alternative, non-residential use of Parcel 11. LAC points to what it characterizes as a close call in late 2008 and 2009, when the Chicago High School for the Arts had proposed to the Chicago Public School (CPS) District that the Arts School would occupy the former Near North High School building for three years, with an option for a fourth year. *See* 02/19/09 Minutes of Working Group Meeting at 4-5 (attached as Exh. A to Zalmezak Supp. Declaration, R. 214). The Arts

¹The Board of Education of the City of Chicago is a municipal corporation with a separate identity as a body politic. 105 ILCS 5/34-2. The Board governs the Chicago Public School District.

School had been in discussions with CPS about the site since late Fall 2008. The LAC first learned about the discussions during a February 2009 meeting of a Working Group created by the Consent Decree to monitor and review, among other things, the Near North redevelopment initiative, R. 160 § I.A. The City's primary development coordinator for the Near North area, Paul Zalmezak, described the situation as "what we are working on right now is finalizing an agreement that gets the new high school out of the building in four years; it will start in August or September of this year and they will be finished no later than the fourth year, which puts them at 2013." 02/19/09 Minutes at 4. Mr. Zalmezak explained that CPS had not been aware of the Consent Decree, that there was a "battle" where the City informed CPS of the Consent Decree's requirements and emphasized that the site was going to be redeveloped for housing, and that CPS understood. *Id.* at 5. Ultimately, however, the Arts School did not move into the building.

More recently, LAC sought information from the City, in May 2011, about what steps had been taken to obtain Parcel 11 for replacement housing. According to LAC, the City's lawyer stated that the City was involved in discussions about a mixed-use proposal that would include some housing. The City could not guarantee that the proposal would provide for 382 residential units, including the 115 public housing units listed on the "rough estimates" appendix to the Consent Decree.

The City responds that it has made substantial overall progress toward meeting the Consent Decree's mandate of 700 public housing units and 270 affordable units. Specifically, when combining City-owned, CHA-owned, and privately-owned land, some

395 public housing units and 111 affordable units have been completed so far. Furthermore, the City argues that the Arts School would have occupied the site only temporarily, and that even if actual demolition and construction of Parcel 11 could not have occurred during the Arts School's tenancy, redevelopment planning (such as soliciting and evaluating requests for proposals) could have moved forward without interference during that time. The City also represents, and Mr. Zalmezak affies, that the City "is committed to obtaining control of the parcel of land . . . and to cause that parcel to be developed with a substantial number of residential units at the 50/30/20 income mix required by the Consent Decree" R. 208, Exh. A, Zalmezak Declaration ¶ 8.

II.

Before assessing the competing arguments, the Court sets forth the legal standards by which the motion is measured. The terms of the Consent Decree are interpreted as if it were a contract – and for good reason, because the Consent Decree is indeed a negotiated agreement between the parties. *Bailey v. Roob*, 567 F.3d 930, 940 (7th Cir. 2009) ("A court interprets the meaning of a consent decree in the same way it interprets the meaning of a contract") (citing *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1037-38 (7th Cir. 1995)). In light of the contractual nature of the Consent Decree, during the in-court argument LAC characterized the motion to compel as a "motion to enforce" the contract. Ordinarily, a breach of contract must be proven by a mere preponderance of the evidence, and this standard has been applied by the Seventh Circuit to settlement agreements incorporated into a court order. *Prima Tek*

II v. Klerk's Plastic Indus., 525 F.3d 533, 538 (7th Cir. 2008). But the City argues that the motion to compel is in effect a motion to find the City in civil contempt, which requires that the complaining party show a violation of the court order by clear and convincing evidence. *Bailey*, 567 F.3d 934-35.

In one respect, there is reason to justify LAC's view that the motion to compel is something short of civil contempt: in the motion, LAC does not ask for any particular coercive or compensatory *sanctions* – at least not yet. “Civil contempt sanctions are properly imposed for two reasons: to compel compliance with the court order and to compensate the complainant for losses caused by contemptuous actions.” *Tranzact Technologies v. 1Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005). Instead of asking for sanctions flowing from a civil contempt finding, LAC seems to ask only that the City acquire Parcel 11 or restrict its use. In other words, LAC asks for a declaration that the time has come for the City to start taking concrete steps toward an eventual residential redevelopment of the site, but LAC does not yet suggest that some form of coercive sanction must be immediately imposed to spur action (nor does LAC suggest that a compensatory sanction is warranted). This sounds like a two-step process, where there is first a finding that there is a breach of the agreement and a specific order to comply, and afterwards if there is no compliance, imposition of sanctions. In light of the requested relief – a declaration of a breach rather than imposition of sanctions – it is understandable that LAC argues that, at this stage, the motion to enforce is not a civil contempt proceeding requiring a clear and convincing burden of proof.

But the Seventh Circuit has explained, in *Bailey v. Roob*, why the higher standard does apply, particularly in the context of a consent decree governing a public agency. 567 F.3d 937-38. In *Bailey*, the Indiana agency that decided Medicaid disability eligibility entered into a consent decree to govern what medical information the State would have to collect and consider before deciding an applicant's eligibility. Many years after the consent decree's entry, the plaintiffs filed a petition to hold Indiana in contempt for failing to collect "complete" medical histories of some applicants. In deciding what burden of proof would apply, *Bailey* held that once a consent decree grants relief, then the issue at the enforcement stage is whether the government agency is in civil contempt. *Id.* at 938. The Seventh Circuit repeated the Supreme Court's admonition that consent decrees over public agencies present the risk that district courts will find themselves "deeply entangled with the development and management of a city or state agency." *Id.* at 937. *Bailey* thus held that "a district court is entitled to require clearer and more convincing evidence of non-compliance before imposing coercive sanctions." *Id.* at 938. It is also appropriate to apply this standard when determining whether there has been a violation of the order at all, because the Consent Decree, even more so than the non-self-defining term "complete medical history" in *Bailey*, provides for some flexibility in attaining the fixed 700-unit / 270-unit promise and the fixed income mix.

So it is LAC's burden to show by clear and convincing evidence that the City has violated the order based on its inaction with respect to Parcel 11. One way to prove a

violation of the order is to show a “willful” violation. *Bailey*, 567 F.3d at 935. But there is another way: contempt will be found if the alleged contemnor “has not been reasonably diligent and energetic in attempting to accomplish what was ordered.” *Id.* at 935 (citing *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1036 (7th Cir.1995)). That best describes LAC’s argument: the City has not been reasonably diligent in obtaining control over Parcel 11 and putting it on the path of redevelopment.

In light of the lack of progress spanning 11 years since the date of the Consent Decree’s entry, this is a close question, but the Court concludes that the Consent Decree’s flexibility and deference demand that the motion to compel be denied – but without prejudice. Parcel 11 is one of the largest sites identified in the Consent Decree’s appendices for residential redevelopment, and so LAC is understandably focused on it. But the City correctly points out that, overall, it has made some progress in meeting the total required unit numbers in the entire Near North area. So far, the City and CHA have built a combined 395 public housing units and 111 affordable units in the area, more than half-way to the required numbers. To be sure, 11 years has come and gone since the Consent Decree’s entry, but there is no set time-table for reaching the required numbers, not even an aspirational time period. Moreover, as the City’s redevelopment coordinator, Mr. Zalmezak, explained in his declarations, for the past few years neither the housing market nor the financing market has been favorable for residential redevelopment in the area. There have also been, according to Mr. Zalmezak, competing projects that have weighed against proceeding with redevelopment at a faster pace.

Additionally, the City avers through Mr. Zalmezak and represents through counsel that the City remains committed to accomplishing the transfer of Parcel 11 from CPS, and to begin discussions with CPS to do so “in the near future.” R. 208, Exh. 1, Zalmezak Declaration ¶ 9. And, the City points out, the proposed Arts School would have been a temporary occupancy only, and would not have prevented residential redevelopment planning for the site during the occupancy. Based on the progress made, the obstacles to redevelopment, and the City’s commitment to start transfer discussions with CPS in the near future, the Court finds that there is no violation of the Consent Decree.

At least not yet. There might come a time soon when the City’s failure to take even the preliminary step of obtaining control of the site from CPS will result in a breach of the Consent Decree. Redevelopment on Parcel 11, one of the area’s largest sites, is necessary if the City is going to meet the promised number of public housing units and affordable units. When the Consent Decree was entered, the City believed that Parcel 11 must be redeveloped in order to meet the promise; the City believed it in 2009 when the Arts School proposed to occupy the site temporarily; and the City believes it now (barring some unforeseen change in the area), as reaffirmed by the City’s counsel during the in-court hearing. Given Parcel 11’s necessity, either losing control over the site or developing substantially fewer units on the site than originally estimated could prove fatal to satisfying the Consent Decree. The site must be redeveloped, and the first step is to ensure its availability to the City. The City fears that taking title to the property too far in advance of actual redevelopment will burden

the City with the costs of maintaining a vacant lot and securing a vacant building (the closed high school). That is a legitimate concern, but at some point the maintenance costs (which are borne by City taxpayers in any event, whether Parcel 11 is in CPS's or in the City's hands) will be outweighed by the lack of progress in ensuring Parcel 11's availability for redevelopment under the Consent Decree. In other words, the City must hold fast both to its short-term commitment to begin transfer discussions with CPS "in the near future," as well as to its longer-term commitment to redevelop the site consistent with the Consent Decree.

III.

A final point is worth noting. There does appear to have been a break-down in communication between the City and the Working Group in 2009. The minutes of the February 2009 Working Group meeting demonstrate that LAC was clearly surprised by what sounded like advanced-stage negotiations between CPS and the Arts School to a Parcel 11 lease as long as possibly four years. Although the City's representatives appeared to have insisted to CPS that the Consent Decree required the eventual residential redevelopment of the site, it would have better served the Working Group's function of providing overall development direction to have earlier informed the Working Group of the Arts School proposal. To be sure, not every idea or discussion with every proposed developer or occupant need be shared with the Working Group, particularly where there might be business reasons to maintain confidentiality early on in the discussions. But, where feasible, it is better to err on the side of including the Working Group as early as possible to avoid miscommunication and to preserve the

Working Group's decree-dictated place as monitor and reviewer of development activities.

For the reasons discussed above, the motion to compel [R. 203] is denied without prejudice.²

ENTERED:

A handwritten signature in black ink that reads "Edmond E. Chang". The signature is written in a cursive, flowing style.

EDMOND E. CHANG
United States District Judge

Date: August 15, 2011

²Out of an abundance of caution, LAC also filed the same motion to enforce in the *Gautreaux* case.