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

DOROTHY GAUTREAUX, ODELL JONES,
DOREATHA R. CRENCRAW, EVA RODGERS,
JAMES RODGERS and ROBERT M. FAIRFAX,

Plaintiffs,

v.

THE CHICAGO HOUSING AUTHORITY,
a Corporation, and ALVIN E. ROSE,
Executive Director,

Defendants.

No. 66 C 1459

BRIEF OF PLAINTIFFS IN OPPOSITION
TO MOTION OF DEFENDANTS TO DISMISS
THE COMPLAINT, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

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Introduction

Plaintiffs are Negro citizens residing in Chicago who are tenants or applicants for tenancy in regular family public housing projects operated by the defendant, Chicago Housing Authority (the "CHA"). They seek a declaration that the CHA carries on a racially discriminatory public housing system and an injunction against continuance of the discriminatory aspects of the system in the future. Plaintiffs assert that the racially discriminatory site selection policy

of the CHA has the effect of imprisoning them and the class they represent within the Negro ghetto in Chicago, and of intensifying the cancerous consequences of ghetto life to which they are thus subjected.

The motions before the Court may best be discussed after a brief review of the pertinent allegations of the complaint.

Count I of the complaint alleges that the CHA operates a public housing system in Chicago under which it selects and, subject to approval by the Chicago City Council (required by law since 1950), acquires sites for regular family public housing projects (pars. 5, 6 and 7). Since 1950, CHA tenants and applicants have been predominantly Negro; at present, approximately 93% of all CHA applicants and 90% of all tenants are Negroes (par. 8). Since 1950, Chicago has been highly segregated with respect to residence along racial lines; at present over 85% of the approximately 1,000,000 Negroes living in Chicago reside in Negro neighborhoods, referred to as the Negro Ghetto (par. 9). This large scale residential segregation of Negroes in Chicago has highly detrimental effects (which are described in par. 10) upon the Negroes living therein.

Since 1950, substantially all of the sites for regular family public housing projects selected by the CHA and approved by the City Council have been located within the Negro Ghetto (pars. 11, 12). All of the sites for a large group of proposed projects, approved in 1965 and 1966 but not yet constructed by the CHA, are also located in the Negro Ghetto (pars. 13-15). Since 1950, substantially all of the sites selected by the CHA for such projects (including the 1965 and 1966 proposed projects) have been located in the Negro Ghetto because the CHA has deliberately chosen sites which would avoid the placement of Negro families in white neighborhoods (pars. 16, 17). The effect of such site selection practices of the CHA is that, (a) Negro applicants and tenants are forced to live in the Negro Ghetto if they choose to live in public housing and are denied the opportunity to reside in public housing facilities in white neighborhoods, and (b) existing patterns of residential and school segregation are continued and strengthened and the detrimental effects of such segregation alleged in paragraph 10 are enlarged and imposed upon such tenants and applicants (pars. 18, 19). Plaintiffs allege that these facts constitute a violation of their rights, and

those of the class they represent, under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and under Title 42 U.S.C. §§1981 and 1983.

Count II is laid under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. It alleges the gist of Count I and, in addition, that Federal financial assistance has been and will continue to be received and employed by the CHA in connection with the construction of the regular family public housing projects referred to in Count I. Counts III and IV are identical with Counts I and II, respectively, except that the selection of sites within Negro neighborhoods by the CHA is not alleged to have been for the specific purpose of avoiding the placement of Negro families in white neighborhoods.

Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that (1) plaintiffs lack standing, (2) theirs is not properly a class action and (3) they are barred by laches. Each of these arguments is supported by affidavits and is therefore to

be treated under Federal Rule 12(b), as a motion for summary judgment.* Defendants have also moved (again with affidavit support) for a summary judgment upon the ground that the complaint's allegations regarding site selection "are clearly and demonstrably untrue." Plaintiffs have filed counteraffidavits and a Rule 36 request respecting certain documents, and respond to these four "summary judgment arguments" in section I of this brief.

Defendants' motion also attacks Counts II, III and IV of the complaint (without supporting affidavits) on the ground that for two distinct reasons these counts fail to state claims upon which relief can be granted. These two "motion to dismiss arguments" are considered in section II of this brief.

The following discussion shows that each of

*Rule 12(b), Federal Rules of Civil Procedure, provides in part:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

defendants' four summary judgment arguments is legally insupportable, and that in any event the facts upon which the arguments rest are put in issue by the counteraffidavits. Accordingly, the "summary judgment motions" must be denied. The discussion also shows that the arguments directed to Counts II, III and IV of the complaint do not withstand analysis, and that the motions based upon them must likewise be denied.

I. Defendants' Four "Summary Judgment Arguments."

- A. The argument that the complaint's allegations regarding site selection are "clearly and demonstrably untrue."

Defendants' motion asserts "that the allegations in paragraphs 12, 13, 15, 16 and 17 of the Complaint regarding site selection for regular family public housing projects in so-called 'Negro neighborhoods' are clearly and demonstrably untrue." Defendants' memorandum states that the affidavit of Mr. Humphrey, Deputy Executive Director of the Authority, and its attached exhibits "show clearly that CHA has not confined its selection of sites for regular family housing units to Negro neighborhoods" (p. 21), and that accordingly the "crucial" allegations of the complaint to the contrary "are clearly and demonstrably untrue." (p. 23)

The complaint's allegations of discriminatory site selection practices are dramatically supported and substantiated (and Mr. Humphrey's affidavit in this

respect is rendered irrelevant) by the counteraffidavits of Professor Philip Hauser of the University of Chicago, a renowned demographer, and Dr. Harold Baron, director of Research of the Chicago Urban League. Professor Hauser's affidavit shows that the "community area" figures used by Mr. Humphrey to establish the racial composition of the neighborhood in which a public housing project is located are without significance because community areas are too large and populous to be relevant to the considerations advanced in the complaint. Thus

Professor Hauser states:

"Community areas range in size from approximately 0.6 to 7.2 square miles and in population from approximately 3,400 to 140,000 persons. Some are so large in population that, were they to be incorporated as municipalities, they would be larger than any city in Illinois except Chicago itself. Community areas frequently have some historical identity as regions of the City of Chicago, but most contain many local areas or neighborhoods which differ greatly one from another.

"In respect of the considerations advanced in the complaint, particularly in paragraphs 10 and 18 thereof, community areas are too large, too populous and include too many disparate local areas or neighborhoods to constitute an appropriate unit for determining the racial composition of the relevant local area or neighborhood within which are located the public housing projects referred to."
(Professor Hauser's Affidavit, p. 3)

Professor Hauser concludes that with respect to the considerations advanced in the complaint, "the racial

composition of the relevant local areas or neighborhoods, within which are located the public housing projects referred to, may best be determined by using the individual United States census tract or tracts within which such projects are located." (Ibid)

Dr. Baron's affidavit gives such census tract information and discloses the site selection pattern. This affidavit, among other things, shows that for the period covered by the allegations of the complaint (from 1950 to the present), of the sites for 33 CHA housing projects,

(a) 25 and a substantial portion of another were in census tracts whose Negro population was in excess of 75% at the time of site selection;

(b) of the remaining 7 sites, 4 were not acquired and the projects completed until many years after site selection, at which time the Negro population in each of the census tracts was substantially in excess of 75%, and 2 are new projects whose sites have not yet been acquired; and

(c) only one of the 33 projects has involved site selection at a place and time that permitted actual completion of the project when the Negro population of the census tract was less than 84%; and all but 7 of such completed projects were, at the time of completion, in census tracts whose Negro population was in excess of 95%. (Dr. Baron's affidavit, p. 3-4)

Although only indirectly relevant to the complaint's allegations that a discriminatory site selection practice has been followed since 1950, it may be noted that a much larger proportion of the CHA's first 19 projects were in white neighborhoods. As discussed below in connection with the defendants' argument as to standing, the CHA practiced a different type of discrimination as to these projects -- it either refused to permit Negro families to occupy them at all, or deliberately limited the number of Negro families who were permitted to live in them.

It is thus established by the affidavits of Professor Hauser and Dr. Baron that the relevant population units for the purposes of this action are census tracts, and data respecting those tracts graphically

reveal the discriminatory site selection pattern alleged in the complaint. Such established facts require denial of defendants' motion on this ground -- because they resolve in plaintiffs' favor (or, at the very least, create an issue of material fact respecting) the "crucial" allegations of the complaint.

B. The argument that plaintiffs lack standing.

Defendants' argument as to standing is rested on three assertions of fact supported by affidavits:

- (1) The CHA's Standard Operating Manual provides there shall be no racial discrimination in tenant selection or placement (def. mem., p.2);
- (2) "[A]t all pertinent times the CHA owned and operated public housing projects in other than Negro neighborhoods where these plaintiffs could have been housed had they so requested" (p. 3-4); and
- (3) Plaintiffs either made no such request or were housed as requested (p. 4).

As will appear later, the counteraffidavits filed by plaintiffs dispute the last two of these factual assertions and show that notwithstanding the non-discrimination provisions of its Operating Manual, the CHA has in fact discriminated against Negroes in tenant selection and placement. In the initial portion of this discussion, however, we will show that the defendants' standing argument is incorrect as a matter of law, quite apart from the factual disputes.

The numerous cases decided in the Federal courts during the last 20 years in which Negro plaintiffs

have attacked various forms of racial discrimination and segregation by government agencies show clearly that the plaintiffs have standing to attack the municipally imposed residential segregation alleged here. In Singleton v. Board of Commissioners, 356 F.2d 771 (5th Cir., 1966), the Court said:

"The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and the right to, or a reasonable possibility of, future use." 356 F.2d, at 773.

Here the plaintiffs who are CHA tenants have used and are using the facilities of the public housing system operated by the CHA and all plaintiffs have a right to or a reasonable possibility of future use of such facilities. Accordingly, under the rule of Singleton, they have standing.

Bailey v. Patterson, 369 U.S. 31 (1962), cited by the defendants, in fact directly supports plaintiffs' standing. Bailey was a suit by Mississippi Negroes attacking discrimination in the facilities of common carriers. Defendants' memorandum quotes the following portion of the Court's opinion:

"Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part. McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 162, 163."

However, the defendants do not quote or even refer to the very next sentence in the opinion of the Court:

"But as passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment." 369 U.S. 31, 33.

With "passengers" changed to "tenants" and "transportation" changed to "housing", the latter holding of Bailey is squarely applicable here.

What seems so clear upon a general view is even plainer upon specific analysis.

First: As Negro tenants in and applicants for housing in CHA's public housing system, plaintiffs have standing to attack CHA's pattern of discrimination in the selection of sites for such facilities.

Plaintiffs do not in this action assert the right to live in any particular housing projects within or outside the Negro ghetto. Plaintiffs assert the right to live in a public housing system which is not infected and shaped by a policy of racial discrimination in the location of its facilities. The relief sought by the complaint is the discontinuance of racially discriminatory site selection. Such a policy of racial discrimination in the selection of sites violates the rights of all Negroes

who are eligible for CHA housing. Plaintiffs are members of that numerous class, and their alleged failure to specifically request assignment to CHA projects in white neighborhoods is irrelevant to such membership and has no bearing on their standing to sue.

In a series of school segregation cases the courts have rejected the precise argument defendants make here -- that particular Negro plaintiffs had no standing to sue because they had not specifically applied for admission to a white school or did not live closer to a white school than to a Negro school. Potts v. Flax, 313 F.2d 284 (C.A. 5, 1963) is illustrative. That case was a suit by two Negro parents attacking the segregated public school system of Ft. Worth, Texas. The defendants attacked the plaintiffs' standing to sue on the ground that their children had not specifically requested admission to an all-white school as the closest to the student's residence. The Court of Appeals rejected the argument:

"Contrary to the formal suggestion of mootness or want of parties filed with us by the Board, maintenance of a case making a frontal attack on a policy of system-wide segregation does not depend on the presence of one specific child making formal demand for admission to an all-white school as the one closest to the student's residence. Plans for desegregation often provide for this during the transitional stage. But the constitutional right asserted is not to attend a school closest to home, but to attend schools

which, near or far, are free of governmentally imposed racial distinctions. Incidents are not required to 'make' a case." 313 F.2d at 288, 289. (emphasis supplied).

Similarly, the thrust of plaintiffs' complaint here is their assertion of the right of access to a public housing system which is free of racial discrimination in the selection of sites. Plaintiffs do not assert the right to live in any particular CHA housing project nor do they ask to be assigned to CHA housing in white neighborhoods. Again, Potts. v. Flax is relevant:

"Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation." 313 F.2d, at 288-289 (emphasis supplied).

The same point is made in other cases. For example, in the New Orleans school case, Orleans Parish School Board v. Bush, 242 F.2d 156, 162 (5th Cir., 1957), the Court rejected the defendants' argument that the plaintiffs had not exhausted their administrative remedies with the comment,

"Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students. As patrons of the Orleans Parish School system they are undoubtedly entitled to have the district court pass on their right to seek relief."

And the Court of Appeals said in Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir., 1963), cert. den., 376 U.S. 910 (1964),

"Appellants do not seek the right to use those parts of segregated facilities that have been set aside for use by 'whites only' They seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without regard to race."

See also Charlottesville School Board v. Allen, 240 F.2d 59, (4th Cir. 1956), cert. den., 353 U.S. 910 (1957).

As Negro CHA tenants and applicants, plaintiffs clearly suffer legal harm and a violation of their personal rights under the Federal Constitution and statutes from the defendants' system-wide policy of racially discriminatory site selection. They suffer such harm without regard to where they are housed within the system and without regard to the preferences they have expressed in the past for particular housing assignments within the system. Like the plaintiffs in the school segregation cases cited, plaintiffs are patrons of governmentally provided facilities who have the right to have those facilities provided in a non-discriminatory way. They need not, to paraphrase Potts v. Flax, have created an incident to make a case before they become entitled to assert that right.

It should also be observed that the complaint seeks relief only with respect to the future continuation of the CHA's discriminatory site selection policy, and seeks

no relief with respect to the selection of sites for CHA housing already constructed. Plaintiffs and others who, under the rule of Singleton, have "the right to, or a reasonable possibility of, future use" of CHA housing to be constructed in the future, and who have constitutional and statutory rights to have such future projects built on sites selected without racial discrimination, have surely not permanently and irrevocably waived such rights by any alleged past failure to specifically ask for housing in existing CHA projects in white neighborhoods.

Second: Plaintiffs also have standing as persons who suffer harm from the CHA's re-enforcement of existing patterns of residential and school segregation, even on the assumption that they choose freely to live within the Negro ghetto.

Brown v. Board of Education, 347 U.S. 483 (1954), in holding that racially segregated schooling is inherently unequal schooling, relied upon the psychological harm to Negro pupils which results from the system of segregation. Paragraph 18 of the complaint alleges that, by reason of the CHA's racially discriminatory site selection policy, Negro CHA applicants and tenants living within the Negro ghetto suffer with special force the sociologically and psychologically detrimental consequences of residential segregation described in paragraph 10 of the complaint.

Thus plaintiffs have alleged that by reason of the CHA's discriminatory policy they are suffering a type of harm which is recognized by Brown to be a violation of personal legal rights when governmentally caused. Since the injury is suffered by plaintiffs even on the assumption that they choose freely to live within the Negro ghetto, their alleged past failure to specifically request housing outside the ghetto is plainly irrelevant to their standing to sue to end the discriminatory policy which helps to produce that injury.

Third: In any event, plaintiffs' failure to specifically request CHA housing in a white neighborhood does not deprive them of standing to sue because the CHA has made such requests futile by practicing racial discrimination in the selection and assignment of Negro tenants and by the discriminatory site selection policy alleged in the complaint.

(a) The counteraffidavits show that the CHA has practiced racial discrimination in the selection and placement of tenants and that, by reason of such discrimination, plaintiffs could not have been housed in projects located in white neighborhoods had they so requested. The affidavits of the individual plaintiffs show further that they were aware of the CHA's practices of racial discrimination in tenant selection and assignment

and for that reason did not make what plainly would have been futile requests. The Federal courts have in similar circumstances applied the rule that equity will not require a request which would have been vain and futile. See, for example, Charlottesville School Board v. Allen, 240 F.2d 59 (C.A. 4, 1956), cert. den. 353 U.S. 910 (1957).

The affidavit of Tamaara Tabb who, from 1953 to 1961 was supervisor of tenant selection for the CHA, shows that the CHA systematically excluded Negroes from the projects in white neighborhoods or admitted Negroes to those projects only on a token basis; that white families were admitted to certain other projects on a preferential basis (as appears from the affidavit of Dr. Baron, these were the projects in mixed or integrated neighborhoods); and that CHA interviewers were instructed to and did "guide" Negro families in making project preference choices in accordance with this discriminatory tenant selection and assignment system. Tamaara Tabb's detailed affidavit on this subject is corroborated by (i) the affidavit of J. S. Fuerst, Director of Research and Statistics for the CHA from 1946 to 1952; (ii) by the affidavit of Kale Williams, Executive Secretary of the American Friends Service Committee, describing admissions made in 1959 by defendant Alvin E. Rose, then and now Executive Director of the CHA, substantially acknowledging

systematic racial discrimination by the CHA in the selection and the assignment of Negroes to the few housing projects located in white neighborhoods; and (iii) by various documents of the CHA itself which are the subject of a request for admissions under Federal Rule 36, filed in this cause.

The affidavits of individual plaintiffs indicate, as one would expect, that the CHA's policy of racial discrimination was common knowledge in the community.

The affidavit of Dorothy Gautreaux shows that when she registered with the CHA she was in desperate need of housing, was aware of the CHA's policy of excluding Negroes from the public housing projects located in white neighborhoods and limiting the number of Negroes permitted to live in projects in mixed neighborhoods, believed that because of this policy she could not promptly obtain CHA housing in a white or mixed neighborhood, and, therefore, indicated on her registration card that she wanted an apartment in any CHA project. Mrs. Gautreaux' affidavit shows further that in 1953, when she completed her formal application, she and her husband were led to believe that their best chance of getting housing promptly was in Dearborn Homes and for this reason they indicated Dearborn Homes as their first preference and "any"

as their second choice. Because of their belief that the discriminatory policies of the CHA have remained in effect, Mrs. Gautreaux has never applied for transfer to a CHA project in a white or mixed neighborhood (which, under the rules of the CHA-- see Exhibits G and H to the request for admissions--she would not have been entitled to in any event).

The affidavit of plaintiff Doreatha Crenchaw similarly states that in 1953, when she first registered with the CHA, she was in desperate need of adequate housing and believed that if she applied for housing in white projects she would not be admitted. Her affidavit states further that she has examined a sheet called "Applicant's Project Interests", which is attached to her application but which is not in her handwriting, that she did not see this sheet at the time of her interview, that at the interview she was told that she had two choices, namely Altgeld or Henry Horner, and that she chose Henry Horner, still believing that she could not be admitted to housing in any white projects, and further that she has not applied for transfer to any white projects because of her belief that the CHA policy has not changed.

The affidavit of plaintiff Robert M. Fairfax highlights another aspect of the manner in which project preferences and transfer requests have been handled by the

CHA. Mr. Fairfax applied for housing in Altgeld Gardens in 1945, believing that this was the only CHA project in which he could be housed promptly, and that because the CHA did not permit Negroes to be housed in projects located in white neighborhoods at all or only in very limited numbers, he could not promptly obtain CHA housing in a white neighborhood. In 1946, Mr. Fairfax asked the then Project Manager of Altgeld Gardens whether he could obtain a transfer to a project located in a white or mixed neighborhood because he wished to live in such a neighborhood. He was told that such a transfer could be effected only if he obtained a family residing in such a project who would be willing to exchange dwelling units with him, a device reminiscent of the "grandfather" clause which at one stage of Southern history was relied upon to prevent Negroes from voting. See Guinn v. U.S., 238 U.S. 347 (1915). Mr. Fairfax' affidavit states that he made similar requests after 1946 and received substantially the same answers. Judging from the affidavit of Mr. Harry J. Schneider, evidently no record was made of these transfer requests by Mr. Fairfax. As noted above, CHA transfer regulations do not permit transfer from one project to another because of the desire of a Negro tenant to live in a white or integrated neighborhood.

The affidavit of plaintiff Odell Jones similarly evidences Mr. Jones' awareness of CHA policy respecting

the projects located in white neighborhoods. As in the case of Doreatha Crenshaw, Mr. Jones' "Project Interests" sheet was not filled out by him but by the interviewer, and there was no discussion with Mr. Jones concerning project preferences--he was simply told that he could be housed in Henry Horner.

The remaining plaintiffs, Eva and James Rodgers, who are applicants rather than tenants, are said not to have standing because of a rent delinquency stemming from a prior CHA tenancy. But the CHA's own rules do not make rent delinquency an automatic bar to tenancy--see Exhibit E to the request for admissions. And in any event, such delinquency being curable (one may surmise that it would be cured the moment tenancy were proffered conditional upon payment of the delinquency), the Rodgers have standing under the Singleton rule of "a reasonable possibility of future use."

The issue of the precise effect of a rent delinquency is obviously tangential to the central issue in the case. Accordingly, to obviate the injection of an irrelevant issue into the case, a motion has been filed asking leave of Court to join Jimmie Jones as an additional party plaintiff. Mrs. Jones is an applicant without any rent delinquency, and the granting of the motion will, therefore, eliminate any question concerning rent delinquency

from the case.

(b) Specific requests by the plaintiffs to be housed in CHA projects in white neighborhoods would have been futile for another reason, namely, the relative scarcity of apartments in white neighborhoods available to Negroes which resulted from the discriminatory site selection policy alleged in the complaint. Since 1950, as Dr. Baron's affidavit shows, the CHA has built virtually no regular family housing projects outside the Negro ghetto. By artificially and unconstitutionally limiting the choice of housing available in white neighborhoods, the CHA has deliberately discouraged the kind of requests which it now argues should be a prerequisite for standing to sue. If accepted, defendants' argument would have the interesting effect of creating a foolproof technique by which a municipal housing agency could insulate itself from attack on unconstitutional policies. The CHA could, for example, build one regular family housing project in white neighborhoods for every 100 such projects built in the Negro ghetto. Any Negroes who specifically requested housing outside the Negro ghetto could be placed on the waiting list provided for such housing when it became available (if ever), while all other persons, according to defendants' argument, would lack standing to complain of such obviously unconstitutional action. We cannot

believe that the law of standing permits such a result.

Fourth: The facts concerning plaintiffs' project preferences and transfer requests, on which defendants' standing argument is based, do not support defendants' conclusion that plaintiffs have never requested CHA housing in white neighborhoods or are in fact so housed.

By now it is surely apparent that the entire matter of requests for particular housing assignments by CHA tenants and applicants has been incompletely presented by the defendants' affidavits.

(a) At this stage, it is disputed which are Negro neighborhoods and which are white neighborhoods. The discussion above has shown how the defendants' use of overly-broad community areas has resulted in a misleading description of the racial character of the neighborhoods in which certain CHA projects are located. It seems clear, for example, that the project in which plaintiff Robert Fairfax is housed and from which he unsuccessfully sought to be transferred is in fact a Negro neighborhood.

(b) The preferences which the defendants assert have been expressed in the past by plaintiffs for individual housing assignments are, in many instances, ambiguous on their face. Several preferences were for "any" project and certain of the requests for transfers did not specify the project or neighborhood in which housing was desired.

(c) Even more important, the affidavits make it plain that the expressions of project preference, upon which defendants' standing argument is based in its entirety, cannot be taken at face value. As to this, the affidavit of Tamaara Tabb states:

"13. In accordance with CHA policy as set forth on the 'In-Category List,' CRO interviewers were instructed to and did significantly guide the "B" (Negro) family in making its project preference choices. This was done at various points: on initial registration, on interview, and in the course of subsequent re-interviews, for an applicant was permitted to change his project preferences at any time prior to becoming a CHA tenant. Such guidance was done by indicating that housing could be obtained more quickly in the projects suggested and by not mentioning others, the latter group consisting of those in which, in accordance with CHA policy, only "A" [white] families could be housed or "A" families were to be 'maximized'."

The effect of such "guidance" is dramatically illustrated by the affidavit of Doreatha Crenshaw. Mrs. Crenshaw is said (at p. 3 of the affidavit of Mr. Schneider) to have indicated on her formal application "a first preference for housing at any south side location and other preferences as Grace Abbott Homes, Jane Addams and Henry Horner Homes." Mrs. Crenshaw's affidavit states that she did not see her project preference sheet, that she did not fill it out, that it is not in her handwriting, and that the "only conversation I had with the interviewers about

where I was going to go was when they told me I had two choices, Altgeld or Henry Horner." (Affidavit of Doreatha Crenchaw, p. 2-3).

The affidavit of Robert M. Fairfax indicates that the written records relied upon by defendants are not complete and that at times requests for transfers and assignments by applicants and tenants have been handled by project managers without records being made. It is significant in this connection that the affidavit of Mr. Schneider (p. 3) speaks of the manner in which applications are handled and preferences obtained at the present time without any disclosure of what relevant rules and practices were at pertinent times in the past, specifically, at the various times, some of them more than 20 years ago, when the plaintiffs in this case made applications and allegedly indicated preferences.

* * *

Each of the first four arguments in this section establishes an independent ground which compels denial of defendants' motion on the issue of standing. As a fifth and separate ground, the foregoing discussion clearly shows that there are a number of material fact issues which bear on plaintiffs' standing, e.g., the showing that the CHA practiced racial discrimination in

refusing to assign Negroes to projects in white neighborhoods, the showing that the CHA has actively discouraged Negroes from requesting housing in white neighborhoods, has "guided" their preferences elsewhere, and has indirectly discouraged such requests by its discriminatory site selection policy; and the showing (e.g., in the cases of Doreatha Crenshaw and Robert Fairfax) that preferences allegedly expressed were not in fact expressed and that requests were made other than those listed in defendants' affidavits and shown by CHA's records. For this reason, too, under Federal Rule 56, defendants' motion on this ground must be denied.

C. The argument that this is not properly a class action.

Defendants argue next that even if the plaintiffs have standing the suit is not properly a class action, principally because of certain alleged conflicts of interest among members of the class. The argument is badly misconceived.

First: Class actions are clearly proper and particularly appropriate under F.R.C.P. 23 where relief is sought against large-scale racial discrimination.

The plaintiffs' fundamental complaint concerns the CHA's racially discriminatory policy in the selection of public housing sites. Plaintiffs make this complaint on behalf of all Negroes who are tenants or potential tenants of CHA's housing facilities. The class therefore comprises the named plaintiffs (present tenants of public housing facilities who have clearly demonstrated their qualifications for tenancy in the public housing system), all qualified Negro applicants presently on public housing waiting list, and all other qualified Negroes who are potential tenants of public housing facilities.

Although representatives of a class must share interests co-extensive with and not antagonistic to other

members of the class, the antagonism which disqualifies plaintiffs from suing on behalf of a class "must be as to the subject matter of the suit." 3 Moore, Federal Practice §23.07, citing Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944). In Dawson v. Delaney, 189 F.Supp. 416 (Del. 1960), the court disregarded conflicting interests among members of the class because "there is no conflict within the class as to the fundamental issue before the Court." (189 F.Supp. at 419.) Such is the case here. Although the effects of the discrimination complained of in this case may bear differently upon each member of the class plaintiffs represent, racial discrimination by its very nature is directed against an entire group. Discrimination, whether in schools or housing, is a group wrong and, as the cases have uniformly held, is appropriate for group-wide (i.e., class) relief -- and this notwithstanding differences and conflicts of view among the individual members of the group discriminated against.

The language of Federal Rule 23 itself plainly demonstrates the propriety of class actions in such cases of large-scale racial discrimination. It cannot be denied, for example, that "inconsistent or varying adjudications with respect to individual members of the class ...

would establish incompatible standards of conduct for the party opposing the class" (Rule 23(b)(1)(A)), for it would be unreasonable to hold that with respect to some potential tenants the CHA might select sites for public housing projects in a racially discriminatory manner, while with respect to other equally qualified tenants it could not. Moreover, "the party opposing the class [the CHA] has acted [selected sites on a discriminatory basis] or refused to act [refused to build housing projects outside the Negro Ghetto] on grounds generally applicable to the class [Negro tenants and potential tenants of public housing projects], thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" (Rule 23(b)(2)).

The appropriateness of this class action is supported by the note of the Advisory Committee on Rule 23, Federal Rules of Civil Procedure:

"... Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

"Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

The cases, of course, support this common-sense view. For example, in Potts v. Flax, 313 F.2d 284 (5th Cir. 1963), appellant sought the reversal of a district court order requiring the desegregation of certain public school facilities and argued, among other things, that a class action was inappropriate because each student must be treated individually by the school board. Notwithstanding the suit was brought on behalf of all Negro children in Fort Worth (313 F.2d, at 288), the Court of Appeals upheld the propriety of the class action in an opinion whose language may be adapted directly to this case:

"... a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves discrimination against a class as a class and this is assuredly appropriate for class relief." 313 F.2d, at 288-9 (emphasis is the Court's).

Second: The claimed conflicts among the members of the class do not defeat the class action.

The principal question in any class action is whether all members of the class share the right that is being asserted. Any class action involving a large number of persons inevitably involves diversities among individual members of the class. All human beings differ; but these

differences are irrelevant for class action purposes if they do not exist in respect of that right. A class action may be maintained unless the conflicts of interest among the members of the class reach "the subject matter of the suit." Redmond v. Commerce Trust Co., 144 F.2d 140,151 (8th Cir. 1944). The subject matter of this action is the CHA's confinement of public housing projects to areas within the Negro Ghetto, and the violation thereby of the Fourteenth Amendment and statutory rights of Negro patrons and potential patrons of the CHA's public housing system. Not one of the alleged conflicts within the class exists in respect of this subject matter.

Defendants assert that there is no identity of interest within the described class for four reasons:

(1) The applicants have indicated their preferences for those very areas in which sites for the proposed projects have been selected (p.9).

(2) Delay in the construction of public housing is more prejudicial to the interests of applicants than tenants (p.10).

(3) Delay in the construction of public housing may create conflicting attitudes among applicants (p.11).

(4) Present tenants cannot constitute a class because they are entitled to transfer to future projects

only on the basis of facts peculiar to each tenant (pp.10-11).

None of these asserted reasons for barring a class action withstands scrutiny:

(1) The "preferences" supposed to have been expressed by applicants do not establish any differences at all among the applicants in respect of the common right to be free from discrimination which is asserted by the complaint. The terms "south side," "southwest side" and "west side" locations (defendants' memorandum, p.9) are plainly too ambiguous to establish that the applicants prefer housing within the Negro Ghetto to housing outside of it. There is no showing that the applicants were asked the question material to this case -- whether they preferred housing sites in racially segregated neighborhoods. There is nothing to show, and there is no basis for presuming, that applicants on the waiting list are not interested in preventing the continuation and strengthening of residential segregation and opposed to site selection exclusively in the Ghetto. In any event, there is a showing (see the affidavits of Tamaara Tabb, Doreatha Crenshaw and Odell Jones) that project preferences are shaped -- if indeed they are not created --- by CHA interviewers, and accordingly, at this stage of the case, these supposed preferences establish

nothing at all.

(2) The concern over any delay in the construction of new units which some applicants may feel is not in conflict with the right of all members of the class to non-discriminatory selection of public housing sites. Taylor v. Board of Education of City School District, 191 F.Supp. 181 (S.D. N.Y. 1960), affd 294 F.2d 36 (2d Cir. 1961), cert. den. 368 U.S. 940 (1951), was an action against a school board to enjoin the construction of a new school in a racially segregated school zone. The old school to be replaced was obsolete and new facilities were needed. During the pendency of the action, the named plaintiffs withdrew from the public school system and received private tutoring. Although the action clearly caused a delay in the construction of much-needed facilities, to the evident concern of all who could not afford private tutoring, there is no suggestion in the Court's opinion that the plaintiffs could not adequately represent the interests of all Negro children in the school district. Rather, the Court focused on the principal issue of the maintenance of a racially segregated school system. Construction was delayed for the cogent reason that all powers of the school board "must be exercised in accordance with the demands of the Constitution." 191 F.Supp. at 197.

Other cases reject similar attempts to subordinate constitutional rights to considerations of expediency. For example, in Gibson v. Board of Public Instruction, 272 F.2d 763 (5th Cir. 1959), the refusal of the defendant Board to integrate the public schools was based on the Board's belief that "the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if ... the attendance of pupils ... remains unchanged." (246 F.2d 913,914 - an earlier related action.) Notwithstanding the findings of the Board, the Court ordered desegregation.

Similarly here, neither the urgent need to construct new facilities nor any other such expedient concern affords an excuse for or constitutes mitigation of the discriminatory conduct described in the complaint.

(3) The possibility that some Negroes presently on waiting lists might oppose bringing this action because of the delay it may produce raises the same consideration of expediency already discussed. Whatever delay might occur is the result of defendants' past improper conduct in selection of sites. Any large class may contain members who would prefer that their rights not be asserted. That fact, however, does not defeat the propriety of the class action. 2 Barron & Holtzoff, Federal Practice and

Procedure, §562. It would put a premium on defendants' discrimination if this Court were barred from passing upon questions of law and fact common to the entire class simply because that very discrimination may cause some members of the class to prefer to have the questions remain unadjudicated.

Indeed, it is well known that attempts to desegregate certain Southern school districts were met with open threats by state government officials to close the public schools within those districts. Prince Edward County, Virginia, is a notorious example of at least one case in which those threats were carried out. Certainly there may have been some Negroes who preferred a segregated school system to the risk of a system whose schools were closed altogether, and therefore preferred that no court litigation to end such segregation be initiated. Yet, defendants failed to cite a single instance from the many class actions brought in Southern courts in which this factor weighed against the propriety of the class action. The reason is clear. If this possible disagreement within that portion of the Negro community affected by government discrimination disqualified any Negroes from representing the affected class, the result would have undermined the effectiveness of Rule 23 in one of its most significant applications.

(4) Finally, defendants argue that there is no identity of interest among present CHA tenants because the right of each tenant to be housed in a particular unit depends solely upon facts peculiar to each tenant. Potts v. Flax, cited above, rejected a similar argument in these words:

"Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of segregation." (313 F.2d at 288.) (Emphasis supplied.)

In a different context (a class action to enforce equal employment opportunity rights under the Civil Rights Act of 1964) a recent district court decision rejected the argument that a class action was inappropriate because the named plaintiff was different from other members of the alleged class in that he was the only one to have exhausted the administrative remedies available under the Act.

"Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all of the members of the racial class. For example, if an employer's racially discriminatory preferences are merely one of several factors which enter into employment decisions, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory

policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class. The Court is of the opinion, therefore, that a significant question of fact common to all the members of the class exists in this case insofar as the Complaint seeks the removal of the alleged discriminatory policies." Hall v. Werthan Bag Co., 10 FR Serv. 2d 23 n.3 Case 1 (M.D. Tenn. 1966)(emphasis supplied).

In Frasier v. Board of Trustees, 134 F.Supp. 589 (N.D.N.C., 1955), aff'd 350 U.S. 979 (1956), action was brought seeking injunctive relief against the policy of the defendant Board in denying Negroes admission to the undergraduate schools of the University of North Carolina. The defendant Board, like defendants here, argued that the suit was not a proper class action because each individual applicant must be considered on his own merits. This argument was summarily rejected in language equally applicable to the argument of defendants here:

"The action in this instance is within the provisions of Rule 23(a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications. This applies to the plaintiffs in the pending case as well as to all Negroes who subsequently apply for admission."
134 F.Supp. at 593.

Defendants' citations are not to the contrary. Green v. School Board of City of Roanoke, 304 F.2d 118 (4th Cir., 1962), cited at page 11 of defendants' memorandum, held that plaintiffs there did "have the right to an injunction on behalf of the others similarly situated" (304 Fed. 118, at 124) even though the plaintiffs there, unlike the plaintiffs here, were seeking individual relief (transfer from a Negro to a white school) as well as class relief.

Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958), also cited at page 11 of defendants' memorandum, is inapposite because the named plaintiff there sought an order restoring the name of every challenged Negro voter to the voter rolls despite the fact that no evidence was adduced to support the qualification of any voter other than the named plaintiff. That case would be relevant here only if plaintiffs were seeking orders requiring their transfer (and the transfer of others as well) to a particular housing project, thereby bringing into issue individual qualifications for tenancy.

Contrast Reddix with Sharp v. Lucky, 252 F.2d 910 (5th Cir. 1958), decided the same day by the identical Fifth Circuit panel. In Sharp, as here, plaintiffs brought a class action for an injunction against the continued segregation of certain public facilities. The Court

sustained that class action in language appropriate to this case:

"Moreover, we think it quite clear that the complaint alleged a proper case for class action... [Sharp] may properly sue on behalf of all other Negro citizens, since they all have an identity of interest in having access to the public offices of the Parish on a non-segregated basis. Rule 23 F.R.C.P." 252 F.2d at 913.

Hansberry v. Lee, 311 U.S. 32 (1940), the last case cited on this point by defendants, did not involve governmental discrimination at all; the issue there was whether persons, not parties to or represented in earlier litigation, were bound by the prior judgment.

Each of the defendants' assertions concern the question of whether there is adequacy of representation in this class action. At best, these assertions raise issues of fact. In Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964), the defendants argued that a class action was improper because some members of the alleged class did not wish to be included in the suit. The Court said:

"Adequacy of representation is a question of fact, to be raised and resolved in the trial court in the usual manner (Warner v. First Nat. Bank, 236 F.2d 853, 858 (8th Cir., 1956); Weeks v. Bareco Oil Co., 125 F.2d 84, 93-94 (7th Cir. 1941), and assertions in defendants' brief in

this court are ineffectual to make a factual issue on plaintiffs' allegations of ability to protect the interests of the class, much less to disprove them." 329 F.2d at 914.

In Harris, as in this case, the alleged "conflicts" within the class were based on no more than unverified speculation. Even if it can be said, therefore, that there is a genuine issue of material fact with respect to the adequacy of representation, defendants' motion on this ground must be denied.

We submit, however, that defendants have not raised material issues of fact in respect of the common right asserted in the complaint. Defendants approach this action as if it concerned the placement of certain tenants in particular housing facilities. The defendants in Potts v. Flax and Frasier v. Board of Trustees were similarly mistaken with respect to the segregation of public school facilities. This action concerns discrimination against a class to which every plaintiff belongs -- the class of all Negro tenants and potential tenants of CHA's public housing facilities. Relief can no more be defeated by pointing to individual but irrelevant differences, or by speculating that some persons may fear construction delays more -- or view their self-interest differently -- than others, than it can be defeated in school segregation cases by showing that students differ or that some parents would prefer the segregated status quo for their children.*

*We should also note, contrary to any implications in defendants' memorandum, that a finding of an improper class action does not defeat the standing of the named plaintiffs to bring the action on their own behalf. 2 Barron & Holtzoff, Federal Practice and Procedure, §567.

D. The argument that plaintiffs are barred by laches.

Defendants appear to concede, in both their brief and Mr. Humphrey's affidavit, that no colorable claim of laches can be made with respect to the sites which were selected and approved in 1966 (referred to in paragraph 15 of the complaint). According to Mr. Humphrey's affidavit, all steps leading to approval of these projects took place during the months of June and July of 1966, only a few weeks before this action was commenced.

Defendants contend, however, that there is laches "at least as to the 'Five Proposed Projects'" approved in 1965 (defendants' memorandum, p. 19). To establish the affirmative defense of laches with respect to these 1965 projects defendants must show that (1) plaintiffs were guilty of inexcusable delay in bringing this action and (2) such delay resulted in prejudice to them.

Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965); Gutierrez v. Waterman Steam Ship Corp., 373 U.S. 206 (1963), rehearing denied 374 U.S. 858 (1963).

Nothing contained in defendants' affidavits establishes either inexcusable delay or prejudice.

To be guilty of inexcusable delay (sometimes

called "lack of diligence" or acquiescence") one must know of the matters about which he allegedly fails to make timely complaint. Tracerlab, Inc. v. Industrial Nucleonics Corporation, 313 F.2d 97 (1st Cir..1963); Amalgamated Dental Co. v. Lang Dental Mfg. Co., 200 F. Supp. 814 (N.D.Ill. 1961); Brass Rail v. Ye Brass Rail of Massachusetts, 43 F.Supp. 671 (D. Mass. 1938). But there is no allegation in defendants' affidavits or memorandum that any of the plaintiffs had actual knowledge of the 1965 approval of sites substantially before the commencement of this action. Moreover, the affidavits of several of the plaintiffs assert they had no such knowledge.

The only facts alleged by defendants that relate, even indirectly, to the issue of knowledge are contained in the affidavit of Mr. Humphrey. That affidavit states (p. 2) that public hearings regarding sites for the Five Proposed Projects were held in April, 1965 "pursuant to notice duly given" (the affidavit does not state how the notice was given, e.g., by a legal notice in the Law Bulletin or in another fashion), and that "numerous" news stories appeared in Chicago newspapers on or about that time (the affidavit does not state whether the stories were on the front pages of the newspapers or "buried"

in the back pages, whether the site locations were featured prominently in the stories, what the stories stated, etc.).

Defendants cite no authority (and do not even expressly argue) that such hearings and newspaper stories constitute a basis for charging plaintiffs and the class they represent with knowledge of the 1965 site approvals. In the Lang case cited above (200 F.Supp. 814), a patent infringement action, this Court rejected a defense of laches although the plaintiff there was shown to have read of the defendants' product in a trade journal (citing a statement of the Illinois Supreme Court that, "There is no laches where there is no knowledge...." 200 F.Supp., at 817). The Court held that the facts of which the plaintiff was shown to be aware did not constitute knowledge of the defendant's infringement. Accordingly, even if the plaintiffs were shown to have read the newspaper stories referred to (and there is no such allegation), such a showing would not amount to the required showing that plaintiffs had knowledge of the CHA's discriminatory site selection practices.

Moreover, in Lang the plaintiff was a presumably sophisticated corporation, aware of its rights. By

contrast, the plaintiffs in this case (as their affidavits clearly show) are not so sophisticated and aware.

"In the determination of the issue as to whether the complainant had knowledge or notice of the invasion of his rights, consideration may be given to his age, mentality, experience and general information." (27 Am. Jur.2d, Equity, Sec. 167, p. 711)

It is therefore unrealistic and unwarranted to charge plaintiffs even with knowledge of the facts which could be obtained only by attendance at hearings or by careful perusal of newspapers, let alone with knowledge of the discriminatory site selection practices of which they now complain. Accordingly, defendants' motion on this ground must be denied.

There is a second defect in the laches defense. Delay does not become laches unless it is attended by a prejudicial change of position on the part of the party asserting the defense. Absent such change of position, periods ranging from eighteen months, La Parr v. City of Rockford, Ill., 100 F.2d 564 (7th Cir. 1938), to fifteen years, City of Chicago Heights v. Public Service Co., 345 Ill. App. 393, 103 N.E.2d 519 (1952), have been held insufficient to sustain the defense of laches. While it is not entirely clear from defendants' memorandum, it does not

appear that defendants claim to have been prejudiced by reason of any steps taken by them prior to City Council approval of the sites for the "Five Proposed Projects." (It would seem plain that any attempt by plaintiffs to enjoin the activities of defendants prior to approval of the sites would have been premature. The activities of "finding, investigating and analyzing ... public housing sites" might well have resulted in a decision not to submit certain potential sites for City Council approval.) Nor does anything in the affidavit of Mr. Humphrey suggest that between April, 1965 (the time of City Council approval), and the filing of this action, defendants suffered the prejudicial change of position which is required to sustain the defense of laches. Thus, the element of prejudice to defendants is lacking and for this reason too defendants' motion on 'this ground must be denied.

Finally, an equitable defense such as laches is a defense best determined upon a full hearing of the issues. The frequent reversals by Courts of Appeals of summary judgments granted on the issue of laches, Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965); Tracerlab, Inc. v. Industrial Nucleonics Corporation, 313 F.2d 97 (1st Cir. 1963); Kaplan v. Joseph, 125 F.2d 602 (7th Cir. 1942),

demonstrates that more than lip service is paid to this rule. (The only case citation in this entire section of defendants memorandum is a deportation case which holds that on the facts of that case laches was not present.) These cases make it clear that defendants' motion cannot be sustained if the affidavits of the parties raise issues of material fact. As already noted, the affidavits of the plaintiffs and Mr. Humphrey do raise issues of fact both as to the factors of knowledge and prejudice. Since defendants appear to concede that the laches defense cannot even seriously be asserted as to the 1966 sites, their laches motion must be denied in its entirety.

II. Defendants' Two "Motion to Dismiss Arguments."

- A. The argument that Counts II and IV of the complaint do not state a claim for relief under the Civil Rights Act of 1964.

Defendants contend, at pages 11-13 of their memorandum, that Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, does not confer any judicially enforceable rights upon persons such as the plaintiffs in the present action. We believe that Section 601 clearly confers such rights.

The complaint alleges a racially discriminatory system of selection of sites for public housing in Chicago, with a direct and highly adverse series of effects upon plaintiffs and the class they represent. The complaint further alleges that defendants have applied for, received and used Federal financial assistance in support of such public housing.

Section 601 of the Civil Rights Act of 1964 provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The case of Lemon v. Bossier Parish School Board, 240 F. Supp. 709, reh. den. 240 F. Supp. 743 (W.D.La., 1965) (appeal pending), is a square holding that persons who are being subjected to discrimination under a federally-assisted program have standing to sue for relief under Section 601.

In Lemon, parents of Negro school children sued to enjoin a school board and its superintendent from discriminating against Negroes. In granting the injunction, the Court stated at pages 714-15:

"By Section 601 of that Act [Civil Rights Act of 1964, 42 U.S.C.A. §2000d] Congress expressly prohibited racial discrimination in any program receiving federal financial assistance * * *. When defendants received and accepted federal funds for maintenance and operation of their schools under 20 U.S.C.A. §§236-244 after the passage of the Civil Rights Act of 1964, they became bound by Section 601 and are now obligated to provide the education for which the payments were received, without racial discrimination. Plaintiffs, as pupils attending schools operated and maintained by these funds, are recipients of the rights conferred by Section 601, and as such are entitled to bring this suit. Section 601 gives plaintiffs standing to maintain this action as representatives of the class comprised of all children attending schools maintained and operated with federal financial assistance."

The Court in Lemon thus confirmed the right of persons

who allege that they have been subjected to discrimination in violation of Section 601 to bring suit, even though the Civil Rights Act of 1964 does not specifically provide for such suits.

The fundamental correctness of the result in Lemon is supported by the well-settled Supreme Court doctrine that courts will presume judicial power to secure federal statutory rights -- the availability of judicial relief being viewed as implicit in the Congressional enactment of the substantive right itself. For example, Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944), held that the Federal Railway Labor Act imposed on the labor organizations acting thereunder the duty to represent all employees without discrimination because of their race, and that the assertion of a right to a remedy for breach of this duty was of judicial cognizance. The Court declared, at page 207:

"That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."

In Leedom v. Kyne, 356 U.S. 184 (1958), the Supreme Court held that a federal district court had jurisdiction

of an original suit by an association of professional employees against the National Labor Relations Board to vacate a determination of the Board which included both professional and non-professional employees in a bargaining unit without taking a separate vote among the professional employees as expressly required by a provision of the National Labor Relations Act. The Supreme Court stated, at page 189, that the professional employees had been deprived

"of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

The Supreme Court rejected the contention that, because no remedy was expressly given for redress of a congressionally created right, the Act conferred "merely an abstract right which was not intended to be enforced by legal proceedings." The Court, quoting from an earlier case, summed up the point by saying (p. 189):

"The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated."

The language of Leedom v. Kyne is strikingly applicable to Section 601 of the Civil Rights Act of 1964. The prohibition in Section 601 is definite: No person in the United States shall, on the ground of race, be subjected to discrimination under any program or activity receiving federal financial assistance. The prohibition was and is appropriate to the aim of Congress. Thus the conclusion must be that enforcement was contemplated and that a federal district court has jurisdiction of an original suit to prevent deprivation of Section 601 rights.

A close parallel to Section 601 may be found in the development of a private remedy under Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b). The existence of a private remedy under that section and under Rule 10b-5 is now generally recognized. See III Loss, Securities Regulation p. 1763 (1961). In an early case, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa., 1946), the Court reasoned as follows (p. 513):

"It is not, and cannot be, questioned that the complaint sets forth conduct on the part of the Slavins directly in violation of the provisions of Sec. 10(b) of the Act and of Rule X-10B-5 which implements it. It is also true that there is no provision in Sec. 10 or elsewhere expressly allowing civil suits by persons injured as a result of violation of Sec. 10 or of the Rule.

However, 'The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect. * * *' Restatement, Torts, Vol. 2, Sec. 286."

The Court considered the general rule of law that civil liability for violation of a statute accrues to a member of a class for whose special benefit the statute was enacted, found that plaintiffs were members of the class (investors) for whose special benefit the statute was enacted, and sustained the right of plaintiffs to maintain their action.

There can be no doubt that Negroes were the class for whose special benefit the Civil Rights Act of 1964 was enacted. Congress wrote the Act into law with "the aim of protecting Negroes from discrimination." Heart of Atlanta Motel v. United States, 379 U.S. 241, 276 (1964) (Mr. Justice Black, concurring). Since Negroes are plaintiffs in the instant case, and since they are alleging that they are being subjected to discrimination directly in violation of the provisions of Section 601, the rationale of the Kardon case is persuasive that these Negro plaintiffs

have standing to maintain a civil action. To paraphrase the words of Mr. Justice Jackson in Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 240 (1949), there is nothing to suggest that, in enacting Section 601, "Congress intended to hold out to them an illusory right for which it was denying them a remedy."

Defendants rely on two cases to support their contention that "nothing in Title VI of the Civil Rights Act of 1964 confers any right to such judicial review upon persons such as the plaintiffs in the present action" (p. 12). The first is Green Street Association v. Daley, 250 F. Supp. 139 (N.D. Ill. 1966). Green Street is now pending on appeal before the Court of Appeals for the Seventh Circuit. One of the issues on appeal is the correctness of the opinion below as to Section 601 of the Civil Rights Act of 1964. We believe the error of the Court below on this issue appears most clearly from the following sentence of the trial court's opinion (250 F. Supp., at 146):

"The court agrees that the Civil Rights Act of 1964 was intended to prohibit discrimination against recipients of federal funds, and that plaintiffs are not such recipients. The Civil Rights Act of 1964, therefore, confers no legal or other rights on plaintiffs apart from the public as a whole."

As the trial court in Green Street itself points out, the "recipients" referred to in Title VI of the Act are the "various State and local agencies or governmental units." (250 F. Supp., at 146.) Such recipients are hardly apt to be subjected to discrimination on the ground of race.

The holding of the trial court in Green Street is thus that the Civil Rights Act of 1964 was intended to prohibit discrimination against public agencies. We respectfully submit that this holding is erroneous. The intent of the Civil Rights Act of 1964 was to prohibit discrimination against Negroes. The concern was with protecting human beings who are members of disadvantaged minority groups, not with protecting the recipients of federal funds, who are State and local agencies or governmental units.

Let us remember the language of Section 601:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The trial court in Green Street would change "person" in Section 601 to "recipient of federal funds." Not only

does such a change find no warrant in law, but it would result in a failure to protect the very persons for whose benefit the statute was enacted.

The second case cited by defendants on the Section 601 issue is Harrison-Halsted Community Group, Inc. vs. Housing and Home Finance Agency, 310 F. 2d 99 (7th Cir. 1962). In that case, a tract originally cleared for residential redevelopment was used instead as a university site. Plaintiffs, owners and residents in the area, complained of the switch on various grounds, including failure of the public agencies involved to follow statutory procedures, the secrecy and deception allegedly engaged in by the public officials, and the abrupt and arbitrary manner in which the change in plan was effected. The Court held, however, that plaintiffs' legal rights had not been violated. The nub of the case is stated at p. 105:

"The use to which plaintiffs desired the land to be put is undeniably a lawful public use. But, using the area acquired as a site for the Chicago Branch of the University of Illinois is likewise a lawful public use. Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses."

We see no resemblance between the facts of Harrison-Halsted and the facts alleged in the instant complaint. Nor

do we understand, with all due respect to counsel for defendants, how they can describe a case decided in 1962 as holding that the Civil Rights Act of 1964 confers no rights upon persons such as the plaintiffs.

When Congress declared in Section 601 of the Civil Rights Act of 1964 that no person in the United States shall, on the ground of race, be subjected to discrimination under any program or activity receiving federal financial assistance, Congress must have intended that any person who alleged that he was being subjected to such discrimination would have standing to bring suit in a federal court and obtain a hearing on the merits. The Lemon decision, bottomed upon the Supreme Court doctrine of Steele and Leedom, compels this view.

- B. The argument that Counts III and IV of the complaint do not state a claim for relief because they do not allege deliberate or purposeful conduct.

Finally, at pages 13-18 of their memorandum, defendants attack Counts III and IV of the complaint on the ground that these counts do not allege (as do Counts I and II) that the CHA has pursued its site selection policy since 1950 because it was deliberately seeking sites which would avoid the placement of Negro families in white neighborhoods. Defendants argue that since the CHA "is vested with broad discretion in the selection of public housing sites" (p. 14), only "the unlawful intention or purpose" (p. 17) to bring about segregation on the part of the CHA would justify judicial interference with its site selection practices. Without such unlawful intention or purpose, they say, "there is no discrimination in violation of any constitutional or statutory guaranty, and the federal courts have consistently so held since Brown v. Board of Education" (p. 17). Three cases involving the public schools are cited to evidence these allegedly consistent holdings (ibid).

The trouble with this argument is twofold: (1) the federal courts have not consistently so held; and (2) even if they had, cases involving essentially passive school

boards which decline to deal with a segregation pattern which is not of their own making provide but a superficial and misleading analogy to the CHA's self-created 16 year pattern of selecting sites virtually exclusively in Negro neighborhoods, and thereby creating the segregated public housing pattern of which plaintiffs complain.

Among the cases which have not "consistently so held" is Branche v. Board of Education of Hempstead, 204 F. Supp. 150 (E.D. N.Y. 1962). The Court there said that a public agency must deal with the inadequacy arising from "adventitious" (accidental) segregation, because the failure to deal with the condition "as really inflicts it as does any grosser imposition of it," and said that, confronted with the fact of segregation, a school board had the Constitutional duty to make the effort to mitigate it.

"The central constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action by an arm of the state cannot, alone, be decisive of the issue of deprivation of constitutional right. Education is compulsory in New York . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted. Failure to deal with a condition as really inflicts it as does any grosser imposition of it . . . So here, it is not enough to show that

residence accounts for the fact of segregation and to contend that therefore the segregation is ineluctable. The effort to mitigate the consequent educational inadequacy has not been made and to forgo that effort to deal with the inadequacy is to impose it in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation." 204 F. Supp. at 153, emphasis supplied.

In Blocker v. Board of Education of Manhasset, New York, 226 F. Supp. 208 (E.D. N.Y. 1964), a similar view was expressed:

"... can it be said that one type of segregation, having its basis in state law or evasive schemes to defeat desegregation, is to be proscribed, while another, having the same effect but another cause, is to be condoned? Surely, the Constitution is made of sturdier stuff." 226 F. Supp. at 223.

State courts, too, have recognized that a narrow concept of purposeful intent to bring about segregation is no longer the sole ground or basis for an action alleging governmental discrimination. In Jackson v. Pasadena City School District, 382 P 2d 878 (Sup. Ct., California, 1963), the Supreme Court of California, en banc, declared:

"Although it is alleged that the board was guilty of intentional discriminatory action, it should be pointed out that even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, school authorities will be confronted

with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." 382 P 2d, at 881-82, emphasis supplied.

Two cases decided in this Court are also relevant. In Webb v. Chicago Board of Education, No. 61 C 1569 (unreported, D.C. N.D. Ill.), Judge Hoffman, in a school desegregation case, concluded that the plaintiffs had not exhausted administrative remedies and dismissed the complaint for that reason. But the Judge added:

"Chicago cannot deny the existence of de facto segregation or excuse it on the pretext of a benign indifference . . . As has been suggested by the District Court for the Eastern District of New York in Branche v. Hemstead Board of Education, separation cannot be defended on the ground that it is the result of a high concentration of Negroes in the school district." (emphasis supplied)

And in Webb v. Board of Education of City of Chicago, 223 F. Supp. 466 (D.C. N.D. Ill. 1963), in denying a motion for a temporary injunction because "many facts upon which

plaintiffs' right to relief depends are in doubt" (233 F. Supp. at 469), Judge Marovitz discussed some of the cases relied upon in defendants' memorandum. Defendants quote at page 17 the statement that a showing of "intentional design" to maintain segregation on the part of the defendant school board would be the only basis for relief. But defendants do not quote Judge Marovitz' later statement that "passive gerrymandering may create an unconstitutionally segregated school" (223 F.Supp. at 469, emphasis supplied). Nor do they refer to his conclusion that,

" . . . there must be some affirmative action of 'segregating', to violate the Fourteenth Amendment, even if it is only the passive refusal to redistrict unreasonable boundaries."
223 F. Supp. at 469, emphasis supplied.

Plainly, the refusal of the CHA to build projects outside the Negro Ghetto is not "passive" -- a deliberate choice must be made by the CHA each time a new Ghetto site is selected. Nor is the CHA's conduct like a refusal to change existing boundaries -- it is rather the making of a change each time a new site is selected.

Thus, the federal courts have not "consistently so held." Nor is it surprising that a substantial body of authority has begun to interpret the mandate of Brown vs.

Board of Education as extending to situations beyond the narrow, deliberate type of segregation with which that case dealt. The Brown decision itself examined segregation from the point of view of the effect on the persons being segregated, and condemned segregation in categorical constitutional terms.

"Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." 347 U.S. 483, at 493.

And the Court also quoted a lower court finding that,

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law . . ." 347 U.S. 483, at 494.

Brown may thus be read as declaring that segregation is an evil; an evil which is the greater when it has the sanction of law, but an evil at all events.

Some later readings of Brown are precisely to this effect. In Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 (5th Cir. 1965), the Court said:

". . . In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum ("The

Constitution, in other words, does not require integration. It merely forbids discrimination.") in Briggs v. Elliott, E.D. S.C. 1955, 132 F. Supp. 776, 777, should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights . . ." 348 F.2d, at 730.

And in Hudson v. Leake County School Board, 11 Race Relations Law Reporter 178 (5th Cir. 1966) the Court said:

"We do not read the major premise of the decision of the Supreme Court in the first Brown case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal."

Other cases, as defendants' memorandum observes, contain language suggesting a narrower reading of Brown. These cases do not ordinarily involve, however, determinations made on a motion to dismiss or a motion for summary judgment. Rather they generally involve decisions on a motion for a temporary injunction (for example, Webb v. Board of Education, already cited), or decisions made after trial. In this latter category is Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ind. 1963), aff'd. 324 F 2d 209 (7th Cir. 1963). In Bell substantial evidence was introduced to show the reasons why school attendance

boundaries had been decided upon and the Court of Appeals was in turn dealing with a finding, based on evidence, that school boundaries were reasonably arrived at "in the light of the various factors involved such as density of population, distances that the students have to travel and the safety of the children, particularly in the lower grades . . ." 324 F.2d 209, at 213.

Accordingly, even if the analysis be confined to school cases, there is a substantial body of authority which recognizes that a narrow form of deliberate or intentional discriminatory conduct does not mark the outer periphery of the constitutional ban against racial discrimination; and even those cases which conclude that unconstitutional discrimination has not been shown generally do so only after a detailed evidentiary showing as to the reasonableness of the defendants' conduct. At the present stage of this case, therefore, Counts III and IV may solidly rest on the school segregation cases.

As already noted, however, the CHA's conduct is not comparable to that of the passive school board confronted with residential segregation. Whatever may be one's views of the constitutional duties of such a board, the CHA

plainly has a burden of justifying its self-created 16-year pattern of affirmative site selection.

Thompson v. Housing Authority of City of Miami, Florida, 251 F.Supp. 121 (S.D. Fla. 1956), cited by defendants, ^{/to} is not the contrary. In Thompson, the complaint's allegations that public housing projects were located on sites purposely selected to effect segregation were denied by a verified answer. A hearing was held on plaintiffs' motion for a temporary injunction at which oral and documentary evidence was received. The Court then ruled that, "The evidence produced on behalf of plaintiff failed to prove any of the averments of the complaint" (251 F.Supp. at 123), and denied the motion for temporary injunction. Thompson therefore affords no support for a motion to dismiss Counts III and IV since the only action taken by the Court was to deny a motion for temporary injunction after a hearing which produced no evidence to support the allegations of the complaint.

Moreover, Thompson involved the selection of a single group of sites in a single year. This case involves a pattern of site selection extending over a period of many years. The complaint here alleges not only that current sites are being chosen almost entirely in Negro neighborhoods, but that this has been the practice since at least 1950. It is this crucial factor - the continuity of a discriminatory site selection policy for more than a decade and a half - which not only distinguishes this case from Thompson, but also clearly places the burden of justification on defendants -- the burden, in the words of Branche, of "a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation."

Given the facts alleged in Counts III and IV of the complaint, it appears that site selection of public housing in Chicago is being governed, and has been governed for far too many years, by the racial composition of the surrounding neighborhoods. No other reasons have been advanced at this stage of the case for the failure to locate public housing in white neighborhoods. If such reasons exist defendants will have the opportunity to advance them in their answer and offer evidence in their support. The motion to dismiss Counts III and IV must be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that defendants' motions should be denied and they should be required to answer the complaint.

Respectfully submitted,

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Received a copy of the above Brief of Plaintiffs together with the Counteraffidavits referred to therein this 15th day of December, 1966.

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