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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS AND ROBERT M. FAIRFAX, Plaintiffs,	)	
v.	)	NO. 66 C 1460
ROBERT C. WEAVER, Secretary of the Department of Housing and Urban Development of the United States, Defendant.	)	

MEMORANDUM AND AFFIDAVITS IN SUPPORT OF DEFENDANT"S MOTION TO DISMISS

Now comes the defendant Robert C. Weaver, Secretary of the Department of Housing and Urban Development of the United States by Edward V. Hanrahan,United States Attorney for the Northern District of Illinois, and files herewith his memorandum, together with affidavits and supporting exhibits in support of his pending motion to dismiss this cause.

INTRODUCTORY STATEMENT

It is important to consider the case within the framework of the general operation of the low-rent housing program under federal law, and in the light of the relationship of the Department of Housing and Urban Development (HUD) to the program of the Chicago Housing Authority (CHA). Attached hereto is an affidavit of Marie C. McGuire setting forth that relationship in detail, and showing the nature of HUD'S financial interest in the CHA projects, the amount of securities outstanding on CHA projects placed under contract from 1950 to the present, the consequences of a cut-off of Federal funds from these projects, and the fact that the CHA selects the sites for its projects. A further affidavit by Marie C. McGuire shows that none of these plaintiffs have exhausted the federal administrative procedure and possible remedy open to them.

The Housing Assistance Administration. The Housing Assistance Administration is an organizational unit of the Department of Housing and Urban Development charged with the administration of the low-rent housing program established by the United States Housing Act of 1937, 42 U.S.C. § 1401, et seq. The administration of this Act was originally vested by the terms thereof in the Administrator of the United States Housing Authority. Reorganization Plan No. 3 of 1947, 61 Stat. 954, 5 U.S.C. 133y, created the Public Housing Administration, to be headed by a Public Housing Commissioner; stated that the United States Housing Authority should be administered and known as the PHA; and transferred to the Public Housing Commissioner all of the functions of the Administrator of the United States Housing Authority.

The Department of Housing and Urban Development Act, effective November 9, 1965, P.L. 89-174, created the Department of Housing and Urban Development and transferred to the Secretary of the Department all the functions, powers, and duties of the PHA. The Secretary's Organization Order No. 12 transferred to the Assistant Secretary for Renewal and Housing Assistance the low-rent public housing program under the USHAct of 1937, and created the Housing Assistance Administration under said Assistant Secretary. The powers and authorities of the Secretary of Housing and Urban Development under the USHAct of 1937, with certain important exceptions, were delegated to the Assistant Secretary by the Secretary by order effective July 1, 1966, 31 F.R. 8967, and were, in turn, redelegated to the Deputy Assistant Secretary for Housing Assistance and other key officials.

The Chicago Housing Authority. The Chicago Housing Authority is a body corporate and politic of the State of Illinois, created pursuant to the Illinois Housing Authorities Law, Smith-Hurd Ill. Ann. St., Ch. 67 1/2. Under the Illinois Housing Authorities Law, the Chicago Housing Authority is authorized to accept financial assistance from the Federal Government to aid in the construction and operation of low-rent housing projects, and, to this end, to agree to conditions imposed by the Federal Government to obtain such assistance. Under an amendment to the Illinois Housing Authorities Law, enacted in 1949, in selecting sites for low-rent housing projects, Housing Authorities of Illinois cities having populations in excess of 500,000 may not acquire the sites until the governing body of the locality has been advised of the description of the property or interest therein and said governing body has approved acquisition thereof by the Authority.

General plan for development and operation of low-rent housing projects under the USHAct. It is the function of the Department of Housing and Urban Development (HUD) to extend Federal financial assistance to Local Housing Authorities for the construction and operation of low-rent housing projects by granting loans and making annual subsidy payments (called annual contributions) pursuant to a contract between the parties denominated an Annual Contributions Contract, which governs the relationships of the parties for 40 years. Under the Annual Contributions Contract, during the planning and early construction stages of a low-rent housing project, HUD makes direct loans, either from the fund created by section 17 of the USHAct, or by borrowings from the Treasury under section 20 of the USHAct, to the Housing Authority, taking in exchange a Note, denominated an Advance Note. When the costs of project planning or construction approximate $100,000, the Housing Authority sells on the market securities denominated Temporary Notes, and, with the proceeds thereof, pays off and retires any moneys borrowed on Advance Notes, using the balance obtained to continue with planning and construction. The Temporary Notes are made marketable by a HUD commitment to make moneys available, if necessary, to pay principal and interest as they become due.

Successive issues of Temporary Notes are marketed (each issue paying off and retiring the preceding issue) until the project approaches 80 to 90% of completion. At this time the projects are permanently financed by an issue of bonds, the proceeds of which pay off and retire the preceding Temporary Notes. The bonds mature serially over a 40-year period and are secured by a pledge of the HUD annual contributions, which, under section 22 of the USHAct, must continue until all the bonds are paid. The annual contributions, each year, in accordance with section 22(b) of the USHAct, are sufficient, with revenues from the project, to pay principal and interest to maturity. Under section 22 of the USHAct, the full faith and credit of the

United States is pledged to the payment of all amounts agreed to be paid by HUD as security for the Notes and Bonds.

a In practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance. a The USHAct contemplates and anticipates that the beneficiaries of the program (families of low income) cannot pay an economic rent, sufficient for the Local Housing Authorities such as the CHA to meet all operating costs and also pay off the capital costs of the projects. Under the plan of the USHAct, Housing Authorities, out of income derived from the projects, pay operating costs (including provision for reserves and payments in lieu of taxes) and if any amount of revenue is left after this disposition, the remaining amount (called Residual Receipts) is used toward payment of the capital debt. After Residual Receipts are so used, any further amount which is necessary to pay the principal and interest on the Bonds and Notes is met by the annual contribution, paid from funds appropriated yearly out of the Treasury of the United States.

Under the USHAct federally assisted projects may only be used to house low-income tenants. Under the Illinois Statute (section 25) the Chicago Housing Authority may charge rentals only "within the financial reach of persons who lack the amount of income which [the Authority] determines * * * to be necessary in order to obtain safe, sanitary and uncongested dwelling accommodations * * *." Thus, the CHA cannot raise its rents to an amount sufficient to pay debt service as well as operating expenses. b For the fiscal year ending

December 31, 1965, HUD paid 96.67% of the amount needed to pay the debt service on the projects of the CHA. b As of November 1, 1966, the Chicago Housing Authority has outstanding in the hands of private investors Notes and Bonds totaling $341,182,870.00, the primary security for which is the HUD annual contributions, and the secondary security the projects of CHA. The above amount includes all projects of the Chicago Housing Authority whether contracted before or after 1950.

The federally assisted low-rent housing projects of the Chicago Housing Authority, an Illinois municipal corporation, are planned, constructed, owned, and operated by the CHA, not the Federal agency. The members of the Board of Commissioners of the Housing Authority are local citizens appointed by the Mayor, with the consent of the Chicago City Council. The Housing Authority is wholly locally controlled except to the extent that it must meet the requirements of the Federal laws or the provisions of the Annual Contributions Contract. c Upon failure to live up to the requirements of the Federal law or certain provisions of the Annual Contributions Contract (see Part Two, Article V, thereof), the Federal Government reserves the right to demand title or possession of the projects. c

d Because of the substantial Federal financial investment, HUD also requires Housing Authorities to execute and record Declarations of Trust in favor of HUD and its Note or Bondholders on all project property, both real and personal, and on all income, rents, revenues, or other personalty held or used or derived from the projects. d/e For the same reason, HUD, under the Annual Contributions Contract, requires certain approvals by it of some of the actions taken by the Housing Authorities. One of these approvals relates to the Chicago Housing Authority's action which is the subject matter of this suit, i.e. site selection. e The HUD function is an approval only; it is not a selection.

Under section 1 of the USH Act it is declared to be the policy of the United States to vest in the Housing Authorities the maximum amount of responsibility in the administration of the low-rent housing program. This includes the right vested in the Housing Authorities to select sites on which to construct the projects. This right of the Housing Authorities is recognized in Part Two, section 103 of the Annual Contributions Contract between CHA and HUD, and has been a right recognized by administrative practices since the inception of the low-rent program, a practice of nearly 30 year's standing. f Section 103, together with section 102, of Part Two of the Annual Contributions Contract, also recognizes the right of HUD to approve or to disapprove a site selected by the Housing Authority. f

The Chicago Sites. HUD has approved the sites selected by the Chicago Housing Authority for the 1965 projects, referred to in the Complaint in this suit as "The Five Proposed Projects."[g] With respect to the sites for the 1966 projects, referred to in the Complaint as the "Twelve Proposed Projects," HUD is negotiating with the Chicago Housing Authority the question of approval of these sites.[h]

affidavit?

I

PLAINTIFFS LACK STANDING TO SUE.

1. Residents of public housing lack standing to seek judicial review of the federal assistance program.

Plaintiffs, on behalf of themselves and others similarly situated, seek a declaration that the CHA since 1950 has selected and is selecting sites for family low-rent projects only in Negro neighborhoods and not in white neighborhoods; that this is contrary to their rights under the Fifth Amendment and Section 601 of the Civil Rights Act of 1964; and that plaintiffs have the right to halt the employment of Federal funds in aid of the discriminatory aspects of the housing activities of the CHA. Plaintiffs demand an injunction against defendant to halt use of Federal funds in aid of the allegedly discriminatory aspects of the CHA housing program.

Plaintiffs do not possess the personal injury which would be required for any constitutional or statutory right to maintain this suit. In the first place, the alleged injury for which plaintiffs seek redress is the manner of selection of sites for low-rent housing projects. Site selection, however, is not a function of defendant; it is a function of the CHA which is not a defendant in this suit. Since neither defendant nor the branches of Housing and Urban Development under his office perform that function, he cannot be charged with inflicting an injury which results from the performance thereof.

(A)

Moreover, the nature of injury claimed by the plaintiffs in their complaint does not give them standing to insist on a curtailing of the expenditure of Federal funds. They do not come within the rule stated by the Court in Doremus v. Board of Education, 342 U.S. 429, 434, 96 L.Ed. 475,

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480 quoting from Massachusetts v. Mellon, 262 U.S. at 488, 67 L.Ed. 1085 that the

> "party who invokes the power [to restrain unconstitutional acts] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The Court further stated:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." Doremus v. Board of Education, supra, at page 479."

The courts have uniformly denied that private citizens, as such, have sufficient legal interest to enjoin or compel the acts of federal agencies based purely on a showing of public interest and not a direct and immediate financial interest. Frahn v. Tennessee Valley Authority, 41 F.Supp. 83 (1941).

The only complaint these plaintiffs have against the federal government is that federal funds are being misused by the recipient which is the CHA. As the Supreme Court stated in Frothingham v. Mellon, 262 U.S. 447 (1923):

> "(Where an interest) is shared with millions of others, (it) is comparatively minute and indeterminable * * * (and) so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." (p. 487)

Moreover, the acts of the federal government have in no way changed the legal status or the legal rights of these plaintiffs.

The acts of defendant are, and the acts of the former agencies were, merely to expend federal funds in the manner described in the introductory portion of this Memorandum. Courts have uniformly declined any standing to complain of the acts of federal agencies where plaintiffs claim that the use to which the funds were put by a local agency damaged the complaining parties. United Milk Producers of New Jersey v. Benson, (C.A.D.C., 1955) 225 F.(2d) 527; Kansas City Power and Light Company, Inc. v. McKay, (C.A.D.C., 1955) 225 F.(2d) 924; Allied City Wide, Inc. v. Cole, (C.A.D.C., 1956) 230 F.(2d) 827. The last two cases consider Title I of the Housing Act of 1949.

In any event let us assume that these plaintiffs are affected by the actions of this defendant. The whole tenor of Title I of the Housing Act of 1949 is to insure wise and fair use of federal funds. Hoffman v. Stevens, (D.C. Pa., 1959) 177 F.Supp. 898. Failure to observe the provisions of the act might give rise to a dispute between the plaintiffs and state authorities, not between these plaintiffs and the federal authorities.

United States Circuit Courts of Appeal in four circuits including the Seventh Circuit, have determined that a party not privy to the contract between the United States and a local public agency for Federal financial assistance under Title I of the Housing Act of 1949 (42 U.S.C. §1450 et seq.) has no standing to sue the federal agency regardless of his interest (property owner, taxpayer, relocatee, or affected business enterprise) in the urban renewal undertaking.

The Seventh Circuit dealt with this issue extensively in <u>Harrison-Halsted Community Group, Inc., et al</u>. v. <u>Housing and Home Finance Agency, et al</u>., 310 Fed. 2d 99 (7th Cir. 1962), cert. denied 373 U.S. 914, wherein numerous plaintiffs, including property owners, business interests and residents of the project area, sought a declaratory judgment and an injunction to prevent the defendant government agencies from proceeding with the urban renewal undertakings. Because the position of the plaintiffs in that case is so similar to the plaintiffs in the instant case, we quote directly from the opinion in the <u>Harrison-Halsted</u> case on this issue of standing to sue: -①

> "We think it is well settled that in a private suit in a Federal court, where it is claimed that a substantial Federal question is involved, it must clearly appear that defendant's acts constituted the invasion of plaintiffs' private legal rights. <u>Frothingham</u> v. <u>Mellon, Secretary of the Treasury, et al</u>., 262 U.S. 447. In the <u>Frothingham</u> case, a taxpayer brought a suit to enjoin expenditure of Federal funds under a Federal subsidy statute. The Court said, page 488: '. . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement, and not merely that he suffers in some indefinite way in common with people generally.'
>
> "The Federal Housing Act of 1949 is a subsidy statute which provides for Federal grants of aid to local governmental units. Both Senate and House Committee reports stated '. . . that every project assisted be a local undertaking, locally planned, locally approved, locally managed and designed to serve local needs.' (Senate Report No. 84, 81st Cong., 1st. Sess., p. 37) It is obvious that none of the plaintiffs is or was a party to the subsidy contract.

"When a subsidy application is approved by the Administrator of the HHFA, contracts are entered into by the Agency and the local governmental body, here, the Chicago Land Clearance Commission. Congress did provide certain standards to guide the Administrator in the exercise of his discretion. But, such provisions and regulations thereunder do not confer legal rights upon plaintiffs, as individuals, separate from their position as members of the general public.

"The Housing Act of 1949 contains no provision for a hearing before the HHFA. It contains no provision for a judicial review. Very recently, we held the Federal Communications Act of 1934, as amended, which contains no provision for a judicial review, barred the bringing of a private cause of action to recover damages for a violation of that Act. Lar Daly v. Columbia Broadcasting System (No. 13667), ____ F.2d ____."

In the Ninth Circuit, involving an action by residents of an urban redevelopment area to enjoin the local public agency from carrying out the redevelopment project on the ground that the agency had no feasible plan of relocation as required by the Housing Act of 1949, as amended, the Court stated:

"We find no indication that Congress intended this section of the Housing Act to give a right of action to those not a party to the contract between the Redevelopment Agency and the United States. This provision is but one of many obligations imposed upon the Redevelopment Agency by the United States as a condition to the granting of redevelopment funds and loans. 42 U.S.C. § 1455(c). Because of the complexity of urban renewal and the expertise of the Administrator of the Federal Housing and Home Finance Agency, Congress delegated to the Administrator the duty of enforcing the conditions of the Loan and Capital Grant Contract required by the Housing Act. See Hunter v. City of New York, Sup., 121 N.Y.S.2d 841 (1953).

"But, argues appellant, since the contract contained substantially the same requirements as Section 1455(c), they are third party beneficiaries under California law. This is not true because the contract, involving an agency of the United States and controlled by federal statutes, is governed by federal law. The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement. Gart v. Cole, 263 F.2d 244 (2d Cir., 1959); Allied-City Wide, Inc. v. Cole, 97 U.S. App. D.C. 277, 230 F.2d 827 (1956); cf. Pittsburgh Hotels Association v. Urban Redevelopment Authority of Pittsburgh, 309 F.2d 186 (3rd Cir., 1962)." Johnson, et al. v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872, at 874, (9th Cir. 1963).

The urban renewal cases to like effect in the Second and Third Circuits are cited in the above-quoted portion of the opinion in the Johnson case. See also Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2nd Cir. 1958), cert. den. 359 U.S. 967; and Berry v. Housing and Home Finance Agency, 340 F.2d 939 (2nd Cir. 1965).

2. Title VI of the Civil Rights Act of 1964 does not confer standing on plaintiffs to bring suit challenging the disbursement of Federal funds.

As recognized in Harrison-Halsted, in order for a suit to be maintained in a federal court, "it must clearly appear that defendant's acts constituted the invasion of plaintiff's private legal rights." 310 F.2d at 103. Since plaintiffs allege jurisdiction on the basis of the presence of a federal question, they must point to some federal law conferring a right to maintain this suit. Under Counts II and IV, they contend that their right to sue stems from the Civil Rights Act of 1964. (Under the remaining Counts, plaintiffs fail even to attempt to show standing.)

A like contention regarding the CivilRights Act was recently rejected by Judge Edwin A. Robson in Green Street Association v. Richard J. Daley, et al., (D.C.N.D.Ill., E. Div., No. 65 C 1645, decided February 10, 1966; on appeal, C.A. 7 No. 15619). In that suit to enjoin action by defendants in a proposed urban renewal project in Chicago, the Court held that private plaintiffs could not derive standing from that Act. That ruling was well supported both by the statute itself and applicable precedent.

Preliminarily, we note that "/t/ here are instances where an individual has no legal remedy even though a federal law affecting his interests may have been violated. Some statutes create merely public rights, enforceable only by the agency charged with their administration." Berry v. Housing and Home Finance Agency, 340 F.2d 939, 940 (C.A. 2). Thus in the Berry case, it was held that the owner of a hotel near an urban development project had no standing to enforce the provision of the Housing Act forbidding the inclusion of transient housing in such a project without a competent independent survey showing the need for such housing. 42 U.S.C. 1456(g). The court pointed out:

> "If local officials do not comply with § 1456(g) the Housing Agency can vindicate the public interest by withholding federal funds, but private hotel owners are given no remedy."

340 F.2d at 940.

The language and legislative history of Title VI of the Civil Rights Act of 1964 make it plain that this statute is also one which is to be enforced by the withholding of federal funds by the federal agency involved, and not by a private suit against the federal agency.

Plaintiffs contend that their right to sue is conferred by Section 601 of the Civil Rights Act of 1964, which provides that:

> "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 of activity receiving Federal financial assistance."

42 U.S.C. 2000d. Plaintiffs allege that the CHA projects in issue violate the statute in that site selection ~~section~~ tends to reinforce a segregated residential pattern in Chicago. This violation, plaintiffs conclude, confers on them a legal right to enjoin the defendant responsible for Federal assistance to CHA from further assistance to that local agency. no

The difficulty with this argument is that it overlooks the remaining sections of Title VI of the Civil Rights Act of 1964. These sections (Sections 602 and 603 of the Act, 42 U.S.C. 2000d-1, 2000d-2) establish an elaborate procedure which federal administrative officials must follow in using their control over the finances of federally-assisted programs to enforce the non-discrimination requirement of Section 601. Once the appropriate federal officials, having followed this procedure, authorize cut-off of funds, then Title VI provides for judicial review. See Section 603, 42 U.S.C. 2000d-2. Title VI was not intended to authorize a cut-off of federal funds by means of an individual injunctive suit bypassing the administrative procedure established by the statute.

no judicial review otherwise?

The procedure established by the Act for enforcement of Section 601 is detailed and explicit. The federal agency must advise the party guilty of discrimination of its failure to comply with Section 601 and the agency's regulations under it. 42 U.S.C. 2000d-1. The agency must make a determination that compliance cannot be secured by voluntary means.

Id. The agency has discretion to seek compliance by means other than a cut-off of funds. Id. If there is a cut-off, it must be preceded by a formal administrative hearing and an express administrative finding, based on the record, of a failure to comply. Id. This finding is subject to judicial review under the Administrative Procedure Act. Section 603, 42 U.S.C. 2000d-2. And the cut-off of funds may not become effective until 30 days after the head of the agency files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for the action. Section 602, 42 U.S.C. 2000d-1.

Section 602 of the Act requires each affected federal agency to effectuate Title VI by issuing regulations "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. 2000d-1. Pursuant to this statutory directive, the Housing and Home Finance Agency in 1964 issued a detailed set of regulations covering a broad range of programs administered by the Agency, including slum clearance and urban renewal under the Housing Act of 1949. 24 C.F.R., Part 1. These regulations contain further procedures for the enforcement of Title VI. Periodic compliance reports are required from recipients of federal aid. 24 C.F.R. 1.6(b). The agency must periodically review recipients' practices to determine whether they are in compliance. 24 C.F.R. 1.7(a). Recipients of aid are required to make available to the beneficiaries of the federally-assisted program relevant information concerning the protections of the Civil Rights Act of 1964, the regulations under it, and their applicability to the program. 24 C.F.R. 1.6(d).

The regulations additionally provide that persons who believe themselves to be subject to prohibited discrimination -- i.e., persons in the position of the plaintiffs here -- may file a written complaint with the Agency, not later than 90 days after the alleged discrimination. 24 C.F.R. 1.7(b). The Agency must then promptly investigate. 24 C.F.R. 1.7(c). If the Agency finds upon investigation that further action is not warranted, the complainant must be so notified in writing. 24 C.F.R. 1.7(d)(2). If investigation indicates a failure to comply, there must be an attempt to resolve the matter by informal means. 24 C.F.R. 1.7(d)(1).

If informal means of compliance fail, the Agency has the discretion -- in lieu of a cut-off of funds -- to refer the case to the Department of Justice for appropriate proceedings under other provisions of the Civil Rights Act or other Federal or State law. 24 C.F.R. 1.8(a). This action must receive the approval of the Administrator, and must be preceded by further efforts at voluntary compliance. 24 C.F.R. 1.8(d). In case a cut-off of funds is sought, the regulations make detailed provision for a full administrative hearing. 24 C.F.R. 1.8(c), 1.9, 1.10.

Plaintiffs here ignore the statutory procedure and regulations adopted in furtherance of statute, relying on the assumption that Section 601 implicitly confers on them the right to bring an injunctive action against federal officials administering federal financial assistance.

The statutory procedure cannot, however, be ignored. It was established for a definite purpose, which would be frustrated by plaintiffs' reading of the statute. The primary purpose of the statutory procedure was to make sure that the cut-off of federal funds is a "last resort, to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds." 110 Cong. Rec. 6544

(March 30, 1964) (Sen. Humphrey). It is for this reason that Congress directed the agencies to make all efforts to seek voluntary compliance, and, failing such efforts, gave the agencies discretion to attempt to eliminate the discrimination through other types of legal action, rather than through a cut-off of funds. 1/ If Section 601 is read to authorize a federal court suit to compel a cut-off of funds, the requirement of an administrative attempt to achieve voluntary compliance, or to find other means of enforcement, is bypassed. The requirement of a report to the appropriate committees of Congress before any cut-off takes effect is bypassed. Plaintiffs can only read Section 601 as conferring them with standing to sue by ignoring the procedures set forth in the very statute on which they rely.

1/ Senator Humphrey gave the following explanation of the provision of Section 602 authorizing the agency to seek compliance through legal means other than a cut-off of funds:

> Moreover, the purpose of title VI is not to cut off funds, but to end racial discrimination. This purpose is reflected in the requirement that any action taken by the Federal department or agency must be "consistent with the achievement of the objective of the statute authorizing the financial assistance in connection with which the action is taken." In general, cutoff of funds would not be consistent with the objectives of theFederal assistance statute if there are available other effective means of ending discrimination. And section 602, by authorizing the agency to achieve compliance "by any other means authorized by law" encourages agencies to find ways to end racial discrimination without refusing or terminating assistance.

110 Cong. Rec. 6544 (March 30, 1964).

The short of the matter is that Title VI of the Civil Rights Act of 1964 was intended to authorize federal officials to cut off federal funds on grounds of discrimination, and to provide an administrative procedure whereby the administrative action could be reviewed. Title VI was not designed to authorize a cut-off of funds by injunction at the instance of individual plaintiffs.

Certainly plaintiffs cannot derive standing from the Civil Rights Act of 1964 when their effort here is to thwart and by-pass the very procedures contemplated by that statute.

II

PLAINTIFFS FAILED TO EXHAUST THEIR POSSIBLE ADMINISTRATIVE REMEDY.

As discussed previously, pursuant to statutory authority regulations have been promulgated to effectuate Title VI of the Civil Rights Act of 1964, and to prevent discrimination in federally-assisted programs of HUD. 24 C.F.R. 1.1 etc. A recipient of federal funds such as the CHA

> " * * * in determining the location or types of Housing * * * which will be provided under any program or activity, or the class of persons to whom, or the situations in which, such housing * * * will be provided under any such program * * * may not, directly or through contractual or other arrangements, utilize criteria or methods of discrimination which have the effect of subjecting persons to discrimination because of their race * * * or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect persons of a particular race * * *." 24 C.F.R. 1.4(b)(2) (Emphasis supplied.)

Under section 1.7(b) of the same regulation,

> "Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this Part I may by himself or by a representative file with the responsible Agency official or his designee a written complaint. A complaint must be filed not later than 90 days from the date of the alleged discrimination unless the time for filing is extended by the responsible Agency official or his designee." (Emphasis supplied.)

Under section 1.7(c) an investigation by the Agency is then required as previously described. no - only conditionally

See p 16

As is shown by the affidavit of Marie C. McGuire, the plaintiffs failed to follow this procedure, and no allegation to the contrary is made in the Complaint.

The plaintiffs thus seek to by-pass not only the procedure set forth in the Civil Rights Act which the defendant is required to follow if funds are to be cut off as prayed for. Plaintiffs further seek the judicial relief before they have used the administrative route by which the defendant might otherwise consider and evaluate the Complaints raised here. Surely, before the courts will intervene to disrupt a major Federal program which in this case involves over $341,000,000 in commitments to date and many proposed units to house large numbers of needy people, there must be a prior opportunity afforded to the agency to weigh the Complaints. Surely it cannot be presumed that the defendant, a new Secretary of a new Department of the Federal Government, cannot intelligently and fairly appraise the evidence that plaintiffs and their counsel may have gathered.

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In Myers v. Bethlehem Shipbuilding Corp. 303 U.S. 41, 50-51 (1938) the Supreme Court referred to "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." However, in determining when that rule will be followed and when the doctrine will not be observed, three factors have been considered: (1) extent or lack of injury from pursuit of the administrative remedy; (2) degree of apparent clarity or doubt about administrative jurisdiction; and (3) involvement of specialized administrative understanding. Davis Administrative Law (1958 Ed.) #20.03, Vol. 3, p. 69. This test was adhered to in Lone Star Cement Corp. v. FTC, 339 F.2d 505 (9th Cir. 1964). When the administrative proceeding involves neither abnormal expense nor other irreparable harm, and when the issue of jurisdiction is either doubtful or dependent upon specialized understanding in the agency's field, requiring exhaustion is normally desirable. Davis, Administrative Law, (1958 Ed.) #20.03, Vol. 3, p. 70. The Supreme Court has so held, as in United States v. Sing Tuck, 194 U.S. 161, 179 (1904), where Mr. Justice Holmes, pointed out that, "Before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through."

Here, plaintiffs have a simple administrative route open to them. Presumably it would be far less costly than this litigation. As noted before in our introductory remarks, the "twelve proposed sites" (selected 1966) complained of have not yet been approved by defendant.

Plaintiffs complain of a practice going back many years, and cannot show what irreparable harm would befall them if they were required to make an administrative complaint. In this area where the defendant and his Department administer a vast nation-wide program and there can be no doubt of his authority to hear complaints of discrimination and to follow the procedures required of him by Congress, there exists that degree of specialized administrative understanding which should induce a court to require exhaustion of the administrative remedy. Chicago Automobile Trade Ass'n. v. Madden, 328 F.2d 766, 769 (7th Cir. 1964) cert. den. 377 U.S. 979; United States v. Ruzicka, 329 U.S. 287, 292-294 (1946).

Where Congress has provided defendant with many tools short of cutting off funds, he should be given the chance to consider whether they are required before the courts will consider the matters complained of.

In this regard, the case is one singularly appropriate for application of the doctrine of exhaustion.

III

THE COURT LACKS JURISDICTION.

sovereign immunity?

There is no specific statutory consent to bring an action such as this against the defendant. Without such consent no action may be brought. Minnesota v. United States, 305 U.S. 382 (1938); United States v. Sherwood, 312 U.S. 584 (1941); Lynch v. United States, 292 U.S. 571 (1934).

Plaintiffs in Counts I and III claim jurisdiction of this court under 28 U.S.C. §1331. In Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99 (7th Cir. 1962), cert. den. 373 U.S. 914 (1963), the Court of Appeals said (p. 103):

> " * * * in a private suit in a federal court, where it is claimed that a substantial federal question is involved, it must clearly appear that defendant's acts constituted the invasion of plaintiffs' legal rights."

H-H

In that case, where plaintiffs sought much the same type of relief as is sought here, the Court there held (p. 106):

> "As plaintiffs have failed to establish any standing to sue in this federal court action and have failed to raise a substantial federal question, the decision of the District Court, dismissing the amended complaint, must be and is affirmed."

Harrison-Halsted thus is dispositive of the claims in Counts I and III herein of jurisdiction under 28 U.S.C. §1331.

The issue raised by Counts II and IV of the Complaint is whether 28 U.S.C. 1343(4) provides jurisdiction of a case against this Federal defendant in the light of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. In asserting that those provisions grant jurisdiction against a Federal agency, plaintiffs make a fundamental error! The same Civil Rights Act of 1964 included very special provisions by which this defendant is to secure compliance with Section 601. As discussed in detail hereinabove, the statute has detailed requirements of warning to the party guilty of discrimination, administrative hearing to that party, and reporting to the Congress before any cut-off of funds. 42 U.S.C. 2000d-1; 2000d-2. Plaintiffs here would have the court read into 28 U.S.C. 2000d the intent of Congress to grant jurisdiction to the court under 28 U.S.C. 1343 (4) to thwart and by-pass the very procedure thus established by Congress. Not only do plaintiffs seek to thwart the administrative hearing thus available to CHA and the requirement of reports by this defendant to the Congress prior to cut-off, but they seek to thwart use of other and less drastic tools given to the Secretary to secure compliance short of cutting off funds. It cannot be doubted that such would be the effect of the injunctive relief prayed for in each Count of the Complaint here:

> "That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago. * * *"

Plaintiffs cannot pull themselves up by their own bootstraps by claiming jurisdiction by reference to one section of the Civil Rights

Act of 1964 so as to seek a form of relief in direct conflict with other provisions of the same Act. While it is conceded that Section 601 of that Act may, under some circumstances, give standing to private persons to seek relief against the local agency, Lemon v. Bossier Parish School Board, 240 F.Supp. 709 (W.D.La., 1965) the same provisions cannot be read together with 28 U.S.C. 1343(4) to grant either standing to plaintiffs to seek or jurisdiction to the Court to grant such relief against the involved Federal agency.

Accordingly the Court lacks jurisdiction of the subject matter in this suit against the Federal defendant.

IV

THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN PLAINTIFFS AND DEFENDANT UNDER THE FIFTH AMENDMENT OR SECTION 601 OF THE CIVIL RIGHTS ACT OF 1964

Plaintiffs seek a declaration that the Chicago Housing Authority is selecting sites in a racially discriminatory manner in violation of their rights under the Fifth Amendment and section 601 and that they have the right to halt the use of Federal funds "in connection with the racially discriminatory aspects of the public housing system" carried on by the Chicago Housing Authority. They seek to enjoin Federal financial assistance.

The Constitution, Art. 3, §2, limits the exercise of the judicial power to "cases and controversies." The Declaratory Judgment Act, 48 Stat. 955, (28 U.S.C. § 2201, 2202) is applicable to federal courts only in cases of actual controversy. The controversy must be justiciable, i.e., it must be definite and concrete touching the legal relationship of parties having adverse legal interests. Therefore, unless the complaint discloses some legal interest in the plaintiffs, no justiciable controversy is presented for decision. Frahn v. Tennessee Valley Authority, 41 F.Supp. 83 (1941); Public Service Comm. v. Wycoff, 344 U.S. 237 (1952).

The controversy between plaintiffs and defendant in this suit is not a justiciable controversy. The Department of Housing and Urban Development does not select the sites for low-rent housing projects in the City of Chicago. The Chicago Housing Authority selects the sites. Indeed under the law, the Annual Contributions Contract and administrative practice of thirty years' standing, the defendant has no right to dictate to the Chicago Housing Authority what site it shall choose. (Affidavit of Marie C. McGuire)

Since it is apparent that the selection of sites is done by the Chicago Housing Authority, plaintiffs' real controversy is with the Chicago Housing Authority, not the Federal Government. Employers Group of Motor Freight Carriers v. National War Labor Board, 143 F.2d 145 (CCA DC); National War Labor Board v. Montgomery Ward Co., 144 F.2d 528 (C.A. D.C.)

Specifically with reference to section 601 of the Civil Rights Act, that section must be read with Sec.602 thereof which grants certain rights to "recipients" of Federal financial assistance. That this category excludes plaintiffs was settled by this very court in Green Street Association, et al. v. Richard J. Daley, et al., No. 65 C 1645, decided on February 11, 1966. This court there stated:

> "The Civil Rights Act of 1964 does not contemplate persons such as the plaintiffs bringing actions such as the present one under the Act."

The court found there that the plaintiffs, not being "recipients", could not bring the action. Accordingly, it is clear that plaintiffs here cannot claim the existence of any justiciable controversy with the Federal agency administering the funds sought to be blocked by this action. Accordingly, the complaint fails to state a claim upon which relief can be granted.

V

THE COMPLAINT MUST BE DISMISSED FOR LACK OF AN INDISPENSABLE PARTY.

The gravamen of the plaintiffs' complaint is that the Chicago Housing Authority has selected and is continuing to select sites for low-rent housing projects in violation of plaintiffs' rights under the Fifth Amendment to the Constitution and 28 U.S.C. § 2000d. Plaintiffs themselves thus concede that the basis of their claimed injury is an action of the Chicago Housing Authority, not the named defendant in this suit.

Under the United States Housing Act of 1937, section 1, maximum responsibility for the administration of the low-rent housing program including the selection of sites is vested in the local agency, the Chicago Housing Authority. Further, the Department of Housing and Urban Development and the agencies that preceded it, in their annual contributions contract with the CHA and in established administrative regulations and policy of nearly 30 years standing has always conceded the right to select sites to Local Housing Authorities, retaining for the Federal agencies only the right to approve the sites <u>after</u> their selection. (Affidavit of Marie C. McGuire). Under the law, the contract, and the HUD regulations, the HUD, (including HAA), cannot and does not dictate to the Chicago Housing Authority what site it should choose. It has the right only to approve or to disapprove what the Chicago Housing Authority has done. It follows, therefore, that the Chicago Housing Authority, and not HUD, would be in a position to act respecting plaintiffs' claim for relief concerning discriminatory site selection.

Moreover, an injunction prohibiting the Secretary of HUD from extending Federal financial assistance to the Chicago Housing Authority, bottomed on a declaration that the CHA has selected and is continuing to select sites on an illegal and unconstitutional basis and that Federal funds should not be used in furtherance thereof, would drastically affect the rights of the Chicago Housing Authority. The complaint alleges that since 1950 the Chicago Housing Authority has been and is selecting sites in a racially discriminatory manner. The complaint demands that Federal funds be cut off if used to assist this action of the CHA. As drawn, the requested relief would prevent the HAA from extending annual contributions to the Chicago Housing Authority for some 71 projects containing thousands of units, all placed under contract in 1950 and succeeding years, should it be found that projects should be sited in White neighborhoods and Negro neighborhoods on some specified proportionate basis. The Chicago Housing Authority, being then unable to operate these projects for low-rent housing purposes, would have to convey to HAA title and possession.

Under these circumstances where the action complained of is the action of the Chicago Housing Authority and any relief granted by way of injunction would drastically affect the rights of the Chicago Housing Authority, the Chicago Housing Authority is an indispensable party. Rule 19, Federal Rules of Civil Procedure, Title 28, U.S.C. Without CHA as a party, the court is without jurisdiction. Balter v. Ickes, 89 F.2d 856, 858-9 (C.A. D.C.) involved a very analogous situation. See also Fulton Iron Co. v.

Larson, 171 F.2d 994, 998 (C.A. D.C.); State of Washington v. United States, 87 F. 2d 421 (C.A. 9); Money v. Wallin, 186 F.2d 411 (C.A. 3); Payne v. Fite, 184 F.2d 977, 980 (C.A. 5); Daggs v. Klein, 169 F.2d 174 (C.A. 9); Smart v. Woods, 184 F. 2d 714 (C.A. 6); Berlinsky v. Woods, 178 F.2d 265 (C.A. 4); Jacobs v. Office of Housing Expediter, 176 F.2d 338 (C.A. 7); Ainsworth v. Darn Ballroom Co., 157 F2d 97, 101 (C.A. 4).

Other cases to the same effect are Baltimore & O.R. Co. v. Chicago River & I.R. Co., 170 F. 2d 654, cert. den. 336 U.S. 944, 69 S. Ct. 811, 93 L. ed. 1101 (C.A. 7 1948); Gramatan-Sullivan, Inc. v. Koslow, 240 F.2d 523, cert. den. 353 U.S. 958, 1 L. ed. 2d 909, 77 S. Ct. 864 (C.A. 2 1957); Jarvis v. Shackelton Inhaler Co., 136 F.2d 116 (C.A. 6 1943).

In a substantially similar suit, wherein plaintiffs sought a declaratory judgment to determine whether or not the Public Housing Administration, predecessor to HAA, could give Federal financial assistance to the Savannah Housing Authority which plaintiffs alleged was operating its low-rent housing projects in a racially discriminatory manner, and for an injunction to halt Federal financial assistance, the Federal District Court for the District of Columbia granted a motion for summary judgment dismissing the Complaint. The United States Court of Appeals for the District of Columbia, sustaining the action of the lower court in the suit, Heyward, et al. v. Public Housing Administration, 214 F. 2d

222 (1954), stated at page 224:

"We think the important constitutional issues raised, which ought not to be disposed of in the absence of necessity, Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 549, 568, 67 S.Ct. 1409, 91 L. Ed. 1666, were not ready for decision. The construction and administration of the housing project is in the immediate control of the Savannah Housing Authority, which is not before the court. That agency formulated the challenged policy. Its plan has been approved by defendants but such approval is by way of contractual arrangements between the State and Federal agencies. Litigation which seeks judicial declaration of the constitutional invalidity of those arrangements ought not to proceed without opportunity to the State agency to be heard as a party. We do not now decide that the presence of the Savannah Housing Authority is indispensable, but in any event it is conditionally necessary within the meaning of Rule 19(b), Fed. R. Civ.P., 28 U.S.C.A. Compare Gauss v. Kirk, 91 U.S. App. D.C. 80, 198 F.2d 83.

"Rule 19(b) provides that when one not indispensable ought to be a party if complete relief is to be accorded between those who are, and is subject to the court's jurisdiction and can be made a party without depriving the court of jurisdiction of those before it, the court shall order him summoned to appear. The present case does not fall within this provision because the Savannah Housing Authority seems not to be subject to the jurisdiction of the court below. But the Rule further provides that in its discretion the court, in that situation, may proceed without such party. The court may also refuse to proceed without him, for discretion to proceed implies discretion not to do so. See Samuel Goldwyn, Inc. v. United Artists Corporation, 3 Cir., 113 F.2d 703, 707. With the controversy in its present status the proper course is for the District Court not to exercise jurisdiction in the absence of the Savannah Housing Authority. This would not involve an adjudication of the merits or foreclose the later exercise of discretion to entertain a suit in this jurisdiction in the absence of such Authority should later circumstances establish the appropriateness of such procedure. Opportunity is thus afforded plaintiffs to seek to bring both Federal and State agencies before a court of competent jurisdiction.'

The Heyward case thus reserved the question of whether a Housing Authority is an indispensable party to an action to declare whether HAA is in violation of the Constitution and to enjoin HAA from supplying Federal funds to an Authority alleged to be carrying out a racially discriminatory housing program. Plaintiffs in the instant suit actually seek declaratory judgment that CHA is in violation of the Constitution and the Civil Rights Act of 1964. In the light of Heyward, we submit that the Chicago Housing Authority is an indispensable party in the present suit.

CONCLUSION

For the reasons given, this cause should be dismissed (1) for lack of standing or capacity in plaintiffs to sue this defendant, (2) for failure of plaintiffs to exhaust their possible administrative remedy, (3) for lack of jurisdiction of this court over the subject matter of this action against a Federal defendant, (4) for failure of the Complaint to state a claim upon which relief can be granted, and (5) for failure of the Complaint to join CHA as an indispensable party.

In furtherance of the duty to administer a nation-wide housing program assisting the construction of housing for many thousands of our citizens who would otherwise be ill-housed, this defendant must oppose and the Court should dismiss this effort to curtail federal assistance to the major part of that program in Chicago.

Opposition to this suit in no way contradicts the dedication of this defendant and all involved Federal agencies to the effectuation of Section 601 of the Civil Rights Act of 1964 and to the proposition that

> "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." 42 U.S.C. § 2000d

But the manner by which that vital statutory policy may be effectuated has been carefully outlined by the Congress and given practical channels and standards by the administrative regulations adopted pursuant to the statute. In the words of Senator Humphrey during the debate on the 1964 Act,

> " * * * the purpose of title VI is not to cut off funds, but to end racial discrimination. * * * And section 602, by authorizing the agency to achieve compliance by any other means authorized by law encourages agencies to find ways to end racial discrimination without refusing or terminating assistance."
> 110 Cong. Rec. 6544 (March 30, 1964)

..rd that end, this defendant must remain free from the drastic injunctive order sought by plaintiffs, and must remain free to evaluate such claims or complaints of the plaintiffs that may be presented for his consideration.

Respectfully submitted,

EDWARD V. HANRAHAN,
United States Attorney.
Room 1500-South, Federal Bldg.
219 South Dearborn Street
Chicago, Illinois (60604)
353-5312

JBS/ab/rs

A F F I D A V I T   O F   M A I L I N G

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

, being first duly sworn, on oath deposes and says that he is employed in the office of the United States Attorney for the Northern District of Illinois; that on the 28th day of December , 1966 he placed a copy of:

MEMORANDUM AND AFFIDAVITS IN SUPPORT OF MOTION OF DEFENDANT TO DISMISS

in a Government franked envelope addressed to each of the following named individuals, and deposited each envelope in the United States mail chute, located in the United States Court House, Chicago, Illinois, on said date at the hour of about 3:30 P.M.

Mr. Charles R. Markels
One of the Attorneys for
Plaintiffs
120 South LaSalle Street
Chicago, Illinois 60603

SUBSCRIBED and SWORN TO before me
this day of December, 1966

NOTARY PUBLIC

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