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Plaintiffs-Appellees,

VS.

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Defendants-Appellants. )

## VACATE GRANTING OF STAY

1. Plaintiffs themselves are the members of the public most vitally affected by this litigation -- the entire class of Negro tenants in or applicants for public housing. The

fact is that the granting of the stay, under the circumstances of this case, involves continuing irreparable injury to the constitutional rights of plaintiffs, whereas denying the stay involves no irreparable injury -- indeed no injury at all -- to defendants or to the public generally.

2. The discretion of the trial Court, exercised on the basis of his full knowledge of the case, should be given full weight and not reversed by this Court (absent an abuse of that discretion, which the facts will show was certainly not involved here).

It may be pointed out that a substantial part of defendants' "mootness" argument, like most of defendants' other difficulties, is self-created. Had defendants appealed immediately from the order of July 20, 1970, instead of waiting until twenty-five of the thirty-day appeal period had elapsed, an accelerated appeal schedule would have minimized the problems which the defendants now assert as a basis for a stay.

This case, like the school desegregation cases which are so poignantly in point, has reached a stage at which delay has become a substantive issue. The undisputed facts indicated to Judge Austin that defendants seek such delay for impermissible political reasons, to the prejudice of plaintiffs' constitutional rights. For a full understanding, a brief review of the case leading to the order appealed from is necessary.

The Opinion of February 10, 1969

After motions for summary judgment had been filed by both the plaintiffs and defendants, following extensive discovery, the filing of affidavits, and lengthy briefing, the trial Court issued its opinion of February 10, 1969 (reported at 296 F.Supp. 907). The critical findings, which have become law of the case, were:

1. CHA had practiced both racially discriminatory tenant assignment (by imposing Negro quotas in the four so-called "white" family housing projects) (296 F.Supp. 909) and racially discriminatory site selection (for example, 99-1/2% of CHA family units were in areas which were or would soon be substantially all-Negro) (296 F.Supp. 910).

2. The Illinois statute requires approval of sites by the Chicago City Council before acquisition by the CHA (Ill.Rev. Stat. ch. 67-1/2, §9). However, CHA is not required to acquire or build on all sites so approved (296 F.Supp. 910). Nevertheless, for nearly 15 years CHA cooperated with the City Council's opposition to public housing (virtually all Negro-occupied) in white areas of the city, by "pre-screening" and other practices which kept public housing out of such white areas (296 F.Supp. 911-13). As Judge Austin stated (296 F.Supp. 910):

"It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas

came about without the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas."

CHA in fact knew that its procedures resulted in racially discriminatory patterns (296 F.Supp. 912-13) and yet continued with those procedures.

3. There was it is true no finding of racist attitudes on the part of CHA officials, and it was similarly undenied that sites were chosen primarily to serve goals of low-cost housing and urban renewal. But the Court determined that "a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued." (296 F.Supp. 914)

4. The fact that the policy against white-area sites emanated from the City Council constituted no defense for CHA (296 F.Supp. 914):

"But by incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate. It is no defense that the City Council's power to approve sites may as a matter of practical politics have compelled CHA to adopt the pre-clearance procedure which was known by CHA to incorporate a racial veto. In fact, even if CHA had not participated in the elimination of White sites, its officials were bound by the Constitution not to exercise CHA's discretion to decide to build upon sites which were chosen by some other agency on the basis of race. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Orleans Parish School Board v. Bush*, 268 F.2d 78 (5th Cir. 1959)."

It is critical to the present issue that CHA had taken the position then -- as it does now -- that "practical politics" and "community opposition" were justifications for not putting public housing in white areas. That position was rejected by the trial Court, and such rejection has also become law of the case. CHA is again seeking to peddle its old wine, and not even in new bottles.

Accordingly, the Court directed the parties "to formulate a comprehensive plan to prohibit the future use and to remedy the past defects of CHA's unconstitutional site selection and tenant assignment procedures." (296 F.Supp. 914).

The Judgment Order of July 1, 1969

During the next several months each of the parties separately, the parties meeting together, and the parties meeting with the trial Court essayed to formulate a plan meeting the Court's directives of February 10, 1969. The Judgment Order entered July 1, 1969 essentially followed the pattern suggested by plaintiffs and provided in relevant part (all references are to section numbers of the Judgment Order):

1. Apart from completion of dwelling units involved in then-pending CHA projects (III.A), the next 700 family public housing units (III.B) and thereafter at least three-fourths of all future family public housing units (III.C) are required

to be built in the General Public Housing Area of the City of Chicago. That term is defined so as to require placement outside of (a) areas having at least 30% non-white population (which was considered to be a possible "tipping point" which might lead to substantially all-Negro occupancy) and (b) areas within one mile thereof (a buffer-zone concept for the same purpose) (I.D).

2. Future public housing has to be low-rise (IV.C), relatively small in project size (IV.A), and low-density (IV.B). These provisions were directed at elimination of the "high-rise ghetto" or large projects which would create their own segregated enclaves.

3. In recognition of the metropolitan nature of the housing problem, a provision was included (at plaintiffs' suggestion, incidentally) under which CHA would get a credit (amounting to not more than one-third of the required General Public Housing Area units) for public housing units built in white-occupied areas of Cook County outside of the City of Chicago, provided that such units were actually occupied by residents of Chicago who were CHA applicants (III.E). The prospect of such suburban sites is a matter now sought to be emphasized by defendants as a reason for further delay, but as presented by defendants it is a false and misleading issue and was known to be such by the trial Court. What CHA has not disclosed to this Court (but what the trial Court was

fully familiar with) is that CHA has no jurisdiction whatever outside of the City of Chicago except by mutual agreement with other housing authorities (Ill.Rev.Stat. ch. 67-1/2, §27c). No such agreements have ever been reached by CHA or are even at the point of serious discussion, as disclosed by defendants' own "Chronology of Site Selection Procedures" dated June 2, 1970 and attached to the affidavit of Alexander Polikoff (hereinafter "Polikoff Affidavit"), which comprised part of plaintiffs' Answer to Defendants' Motion before the trial Court to vacate the July 20, 1970 order (this Affidavit and supporting material comprises Exhibit F of Defendants' Motion for Stay filed in this Court). See also the May 25, 1970 letter of CHA's General Counsel attached to the Polikoff Affidavit and confirming the same facts. Even the location of prospective suburban sites for housing (a time-consuming activity of itself) is not beyond the authorization and discussion stage -- in sharp contrast to the package of City of Chicago sites which is ready for submission. See CHA Resolution 70-CHA-105 adopted June 25, 1970 attached to the Polikoff Affidavit. It is of course instructive that CHA makes much of the "political realities" and "community opposition" in Chicago, but carefully avoids any reference to the identical considerations in other communities, which make any prospect of voluntary mutual agreement on suburban sites a non-reality for the foreseeable future. This too was a

matter brought before the trial Court.

4. Several provisions were made in the Judgment Order for revised tenant assignment practices to eliminate further discrimination (VI).

5. Continuing reporting requirements are imposed on CHA at regular intervals (VII).

6. Article VIII, which is perhaps most relevant to the issues before this Court, is sufficiently important -- and brief -- to be quoted in full:

"CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,

"A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including make applications for allocations of federal funds and carrying out all necessary planning and development; and

"B. CHA is hereby permanently enjoined from invidious discrimination on the basis of race in the conduct or operation of its public housing system, including without limitation the 'pre-clearance procedure' described in the Court's Memorandum Opinion of February 10, 1969."

### The Post-Judgment Order Period

During the nearly fourteen months since the Judgment Order was entered, not one proposed site for family public housing has been put into the pipeline by CHA (it is of course apparent that acquisition of a site is only the first step in producing a housing unit and that delay in the first step means even greater delay in the actual provision of housing for the plaintiff class). This is true even though the United States Department of Housing and Urban Development (the funding agency, "HUD") had authorized CHA to construct 1,500 family units (May 25, 1970 letter from CHA's General Counsel attached to the Polikoff affidavit) and even though the only reasons for not taking the first step are CHA's own self-created reasons.

During the post-Judgment Order period several other orders (not material here) were entered modifying the July 1, 1969 order. Defendants advised plaintiffs and the Court informally that the availability of sites was being determined, the assumption was that defendants were proceeding in good faith to implement the "best efforts . . . as rapidly as possible" provisions of the Judgment Order, and no enforcement efforts were undertaken.

By June 1, 1970 the CHA had not only identified and located sites complying with the Judgment Order, but HUD had approved 263 of such sites which would provide an estimated

1,580 dwelling units, 799 of them requiring no zoning changes (see CHA's Chronology of Site Selection Procedures of June 2, 1970 as well as the schedule attached to the June 22, 1970 letter from CHA's General Counsel, each attached to the Polikoff Affidavit). Then the Chairman of the CHA, Charles Swibel, advised counsel for plaintiffs that CHA did not intend to submit any proposed sites to the City Council prior to the Chicago aldermanic elections and the Chicago mayoralty election scheduled for April 1971 (Polikoff Affidavit Par. 3). Plaintiffs' counsel then requested and defendants' counsel agreed to confer with Judge Austin promptly. By agreement, this and the subsequent conferences (five in all) were conducted in chambers, with full participation by counsel for both parties, and without objection to the form or manner of proceeding or any elements of notice (Polikoff Affidavit, Pars. 1, 2).

When the CHA Chairman came before Judge Austin on June 26, 1970, he shifted his ground from the purely political election considerations originally asserted by him as the basis for delay (it may be recalled that the trial Court's February 10, 1969 opinion stated, and it is binding on the parties, that political considerations are not a justifiable criterion for CHA's decisions as to proceeding with public housing in white areas; see point 4 under "The Opinion of February 10" in this motion). The question according to Chairman Swibel was still one of "timing" (see his statement of June 26, 1970 attached to

the Polikoff Affidavit) -- but now the asserted reason was to delay submission until "sufficient feasible sites had been located outside the city for the one-third of the dwellings scheduled for the general public housing area" and until "the suburban sites will be submitted to the respective governing bodies for their approval." This was said to be necessary to avoid flight to the suburbs by the white residents of Chicago. The trial Court, aware of the considerations previously referred to (under point 3 of the "Judgment Order" section of this motion), was well within his discretion in giving little if any weight to the Chairman's assertion. The credibility gap between the Chairman's original statement of purely political reasons and those in his subsequently prepared statement of June 26 is heightened by the fact that another Commissioner -- Professor Richard Wade -- put the issue at the same June 26 conference in the identical terms originally (and more candidly) stated by the Chairman:

"At our hearing before you with the ACLU on June 26, I raised the question of the political implications of introducing sites in the City Council for public housing in white areas. I suggested that my responsibility as a Commissioner of the Authority was to get as much low-income housing built as possible within our jurisdiction. I also indicated that it was my judgment that submission of the sites at the present time would make public housing the central issue of upcoming campaigns and it was my fear that the ultimate result would be that less housing would be built. There is abundant historical evidence that resistance to public housing in white areas has been used by political candidates for partisan political purposes."

(July 9, 1970 letter to Judge Austin attached to the Polikoff Affidavit). The "outside expert" now sought to be relied on by defendants was scheduled by CHA to have been present at the July 13 conference for submission of his views; when he was not, the content of his proposed testimony was provided to the Court by defendants' counsel and was considered by the Court to be merely cumulative of that already presented by the CHA Commissioners.

After hearing the full presentation of reasons from CHA, the Court's determination was to require that CHA move promptly to do its part of the job of furnishing public housing in the City of Chicago. It is of course apparent that if Chairman Swibel's originally stated reason (as confirmed by Commissioner Wade's statement) is the real one (and of course the trial Court need not have credited the other, subsequent, written statement of reasons under the circumstances), CHA is again playing politics instead of going about its business of providing housing. This is in direct violation both of the Court's original determination that political considerations cannot govern where plaintiffs' constitutional rights suffer and of the Court's non-appealed "best efforts . . . as rapidly as possible" Judgment Order. If on the other hand the specious "suburban site" reason were to be credited, it would mean indefinite delay. There are no agreements in existence or in prospect which could lead to public housing for Chicago residents on such suburban

sites. No suburban sites have even been located -- a significant fact in view of the many months it took CHA to complete its site survey in the City of Chicago after the Judgment Order was entered. As Judge Austin stated in response to the "flight to the suburbs" argument when made during the June 26 conference, if that argument had any validity at all, the problem could just as well be handled by strong statement of intention to locate sites and build in the suburbs, rather than by a transparently empty announcement of prospective sites which are not imminent at all.

In either case, the trial Court heard the considerations advanced by the parties fully, spending many hours over a span of five weeks. On the last two dates, July 13 and July 20, 1970, the Court convened specially during the vacation period for the sole purpose of hearing this matter (Polikoff Affidavit Par. 11). At the conclusion of the July 13, 1970 conference, the Court stated that in his view an order requiring CHA to file a progress report (as requested by plaintiffs) was appropriate, that CHA should not defer any longer than necessary steps to acquire sites, and that submission to the City Council should be made by September 1, 1970. Counsel for plaintiffs did not request an order to the latter effect, stating that we believed CHA would comply with the Court's stated views. However, Counsel for CHA stated that CHA itself might prefer that such a direction be embodied in a written order. The matter was

continued to July 20, 1970 by agreement for the entry of an order providing for a written report by CHA and, if desired by CHA, an order providing for submission to the City Council. (Polikoff Affidavit Par. 9).

During the next two days counsel for CHA advised that a written order as to submission to the City Council was in fact desired by CHA. (Polikoff Affidavit Par. 10). Thus the fact is that the order now complained of was in fact entered at the request of defendants' counsel. (We do not of course agree that the order was in error -- we believe its propriety is beyond question -- but if error did exist, a more appropriate case for rejection of defendants' position on grounds of "invited error" could not be imagined.) More than twenty days later, defendants (through newly-appearing counsel) moved inter alia to vacate the July 20 order, claiming lack of an opportunity to be heard (that motion was, apart from its deficiencies on the merits, untimely under the 10-day requirement of Rule 59b, F.R.C.P.). That and defendants' other motions were denied after hearing. Then defendants on August 14, 1970 filed a notice of appeal from the July 20, 1970 order and moved before Judge Austin for a stay. That motion was denied and defendants' motion for a stay by this Court followed.

The Applicable Considerations  
For Vacating The Stay Order

Viewed against the backdrop of the entire case, and not simply the partial presentation contained in defendants' motion, plaintiffs submit that the stay should be vacated and no stay entered pending the appeal. As we began by stating, this would be the case on the facts for several independent reasons (even if the case law did not, as it does, support plaintiffs' argument for denial of a stay):

1. Defendants' business is to select and propose sites and then to build public housing thereon. During the fourteen months since the Judgment Order was entered, plaintiffs' constitutional rights have been in the deep freeze -- not a single site has been proposed to the City Council. Plaintiffs' rights to non-segregated public housing, already denied by defendants' past slavish adherence to "political realities," are being sacrificed to a new set of "political realities." It may even be the same old set. But the real reality is that to grant a stay serves the very cause of delay which has become the critical issue in the case. Even on the accelerated briefing and argument schedule provided by this Court's August 19 order, the realities of time required for decision and the opportunity for further appeal mean that the impermissible political considerations which are so important to defendants would in effect prevail. The parallel of the school desegregation cases is distressingly apt.

2. Defendants have the sites ready for submission now. What is the irreparable injury -- or any real injury at all -- to defendants which would be caused by starting the machinery by submission to the City Council? The burden is on defendants to establish such injury; mere assertions (all that are present here) will not suffice. All the facts established to the trial Court's satisfaction that the real risk of injury would be that caused to the plaintiff class by further delay.

3. In the real sense the July 20, 1970 order is a true "status quo" order and should not be stayed. For many years defendants were producing a substantial flow of public housing -- unconstitutionally located to be sure, but housing nonetheless. That flow was interrupted only to permit housing to be provided constitutionally. The Judgment Order and the July 20, 1970 order were and are intended to require resumption of that flow and a restoration of the real "status quo." It is defendants' refusal which is blocking that result.

4. Defendants' claim of "mootness" is largely a bootstrap argument. They waited until after a motion to vacate might properly be made to file such a motion; they waited until the 30-day appeal period had nearly expired to file this appeal. They should not be permitted to use their own delays as the basis for a stay serving political purposes.

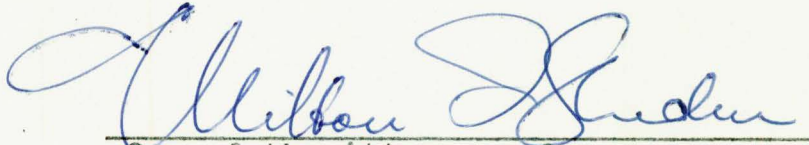
5. In summary, the issue is plainly one of resolving competing considerations, a task for which the trial Court was particularly suited in view of his having lived with this case for some four years. Under those circumstances, and with no abuse of that discretion appearing, the discretionary judgment made by the trial Court in denying the stay should be upheld.

CHA makes much of its "non-racist" attitudes. But the fact is that its conduct continues to reflect more concern about politics than about its "constituents" -- the plaintiff class of public housing tenants and applicants -- and their constitutional rights. In Cooper v. Aaron, 358 U.S. 1 (1958), the Little Rock School Board was not only non-racist in attitude but displayed "entire good faith." It sought a temporary moratorium on desegregation of public schools because of "extreme public hostility" (358 U.S. at 12). The United States Supreme Court nonetheless upheld an order denying the requested moratorium, saying that the community's "hostility to racial desegregation" was not a relevant factor (358 U.S. at 7).

For the reasons stated in this motion, we respectfully request that the Court reconsider and vacate its order of August 19, 1970 insofar as it stayed the operation of the trial Court's July 20, 1970 order. Because the applicable case law is

instructive and supports that request, we also respectfully request leave to file instanter the enclosed brief statement of law.

Respectfully submitted,

  
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, ODELL JONES,  
DOREATHA R. CRENCHEW, EVA RODGERS,  
JAMES RODGERS, ROBERT M. FAIRFAX  
and JIMMIE JONES,  
Plaintiffs-Appellees,

No. 18681

vs.

THE CHICAGO HOUSING AUTHORITY, a  
corporation, and C. E. HUMPHREY,  
Executive Director,

Defendants-Appellants

U.S.C.A. — 7th Circuit

FILED

AUG 20 1970

KENNETH J. CARRICK  
Clerk

) Appeal from the United  
) States District Court  
) for the Northern District  
) of Illinois, Eastern  
) Division  
)

NOTICE OF MOTION

To: Mayer, Brown & Platt  
Kathryn M. Kula  
Attorneys for Chicago Housing Authority  
231 South La Salle Street  
Chicago, Illinois 60604

YOU ARE HEREBY NOTIFIED that on August 20, 1970, plaintiffs shall file the Motion attached hereto in the United States Court of Appeals For The Seventh Circuit.



One of the Attorneys for Plaintiffs

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Alexander Polikoff  
Charles R. Markels  
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PROOF OF SERVICE

Received a copy of the foregoing  
Notice and attached Motion.  
August 20, 1970.

Mayer, Brown & Platt and  
Kathryn M. Kula, Attorneys  
for Defendants-Appellants

By: 

APPEALS  
IT  
FILED  
AUG 20 1970  
KENNETH J. CARRICK  
) Clerk

KENNETH J. CARRICK  
Clerk

VS.

Defendants-Appellants

I. POLITICAL OR ADMINISTRATIVE CONSIDERATIONS, AND PROBLEMS OF COMMUNITY HOSTILITY, ARE INSUFFICIENT GROUNDS FOR STAY WHERE CONSTITUTIONAL RIGHTS ARE INVOLVED.

The United States Supreme Court's decision in Cooper v. Aaron, 358 U.S. 1 (1958), has already been referred to. Similarly,

in Coppedge v. Franklin County Board of Education, 293 F.Supp. 356, 364 (E.D.N.C. 1968), aff'd 404 F.2d 1177 (4th Cir. 1968), the court denied a stay using language which might well have been written precisely for this case:

"The defendants' conduct in this case . . . is a reflection of the marked community hostility to desegregation which brought about the initial rejection by this court and the Court of Appeals for the Fourth Circuit of defendants' freedom of choice plan. It is now well settled, however, that community hostility to desegregation, even in the form of the probability or threat of white pupils fleeing from districts in which Negroes significantly outnumber them, does not provide a legal defense against desegregation . . . . The court specifically holds that the duty of affirmative action to comply with the letter and spirit of the orders of this Court applies and will continue to apply irrespective of the filing of any further appeals, motions for a stay, or other proceedings, until such time as such Orders have been set aside by a court of competent jurisdiction." [Emphasis supplied.]

That decision to deny a stay was upheld by the Fourth Circuit Court of Appeals; see 404 F.2d 1177, 1179 (4th Cir. 1968). Indeed, the Court of Appeals (having denied the stay) later held that the Board's subsequent compliance with the order made the matter moot. *Id.* The teaching of Coppedge is plainly that constitutional rights to non-segregated facilities must prevail over concerns as to possible mootness.

Similarly, in United States v. Bertie County Board of Education, 293 F.Supp. 1276, 1281 (E.D.N.C. 1968), the Court stated:

"Unless the school board can demonstrate the existence of non-racial administrative obstacles, unrelated to

community attitudes, which make immediate conversion to a unitary system practically unfeasible, the command of the Green case [for desegregation now] must be implemented immediately."

And in Taylor v. Board of Education of New Rochelle, 195 F.Supp. 231, 238 (S.D.N.Y. 1961), aff'd 294 F.2d 36 (2d Cir. 1961), the Court rejected a stay for the same reasons:

"The determination of whether to grant a stay rests in the Court's discretion and requires a balancing of the equities of the particular situation. It is incumbent upon the defendants to prove that they will be irreparably injured if a stay is not granted..... In this instance, this Court is being asked to weigh the constitutional rights of the plaintiffs against the administrative convenience of the Board of Education and to rule in favor of the latter. Merely to state the proposition is to reject it."

II. DEFENDANTS HAVE MADE NO SHOWING OF IRREPARABLE INJURY; INSTEAD, A STAY CONTINUES THE IRREPARABLE INJURY TO PLAINTIFFS.

Both Coppedge v. Franklin County Board of Education, 293 F.Supp. 356, 362 (E.D.N.C. 1968), aff'd 404 F.2d 1177 (4th Cir. 1968) and Taylor v. Board of Education, etc., of New Rochelle, 195 F.Supp. 231, 238 (S.D.N.Y. 1961), aff'd 294 F.2d 36 (2d Cir. 1961), cert. den. 368 U.S. 940 (1962), properly place the burden of demonstrating irreparable injury on the party seeking the stay. Defendants have made no such showing before either the trial Court or this Court, relying instead on mere assertions of such injury -- assertions belied by the facts. This Court's order of August 19, 1970 correctly referred to defendants' "assertion" of irreparable injury -- but assertions are not enough. Mere suspicion of future injury is insufficient to support a motion for

a stay of an order pending appeal. Mesabi Iron Company v. Reserve Mining Company, 268 F.2d 782 (8th Cir. 1959).

As stated in plaintiffs' motion, defendants' non-action -- the total suspension of acquiring sites for low-income housing since the date of entry of the Judgment Order of July 1, 1969 -- has defeated the purposes for which this suit was brought. The defendants' change of the true status quo has, like the suspension of school classes in the famous Prince Edward County school litigation (whose major history is described in Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964)), continued to deny to plaintiffs their constitutional rights to non-segregated public facilities. Further delay as sought by defendants would, as in Prince Edward County, create an irreparable injury for the plaintiffs in this case; the low-income black families who wish to live in non-segregated public housing. What Judge Lewis said in one of the district court proceedings in Prince Edward County [see Allen v. County School Board of Prince Edward County, 207 F.Supp. 349, 351 (1962)] in refusing further delay by abstension is quite applicable in the context of the present case:

"This is a suit in equity instituted by the infant plaintiffs requesting this court to declare and insure them, and all others similarly situated their constitutional rights. To further abstain is to further delay -- and further delay in the formal education of 1,700 children would create an irreparable loss.

Similarly, to grant a stay and further deny the plaintiffs in this case the right to live in decent non-segregated housing

would be a continuing irreparable injury to them.

III. THE LOWER COURT'S EXERCISE OF ITS SOUND DISCRETION IN DENYING A STAY SHOULD BE SUPPORTED BY THIS COURT.

Rule 62(c), F.R.C.P. provides in part:

"When an appeal is taken from an interlocutory or final judgment granting . . . an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security for the rights of the adverse party."

To the same effect Rule 8(a) of the Rules of the United States Courts of Appeal provides in part:

"Application for . . . an order suspending an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court."

As Professor Moore points out, the structure of the rules is such that motions to stay should first be considered by the trial Court, which is familiar with the action and which should exercise its sound discretion, with the abuse of that discretion being the sole issue before the appellate court. "No action of the court pursuant to Rule 62(c) should be disturbed by the appellate court unless there has been an abuse of discretion."

7 J. Moore, Federal Practice §62.05, at 1366 (2d ed). See Unicon Management Corp. v. Koppers Co., 366 F.2d 199 (2d Cir. 1966). This had been the rule even prior to the adoption of the modern rules of practice. See Cumberland T. & T. Co. v.

Louisiana Pub. Serv. Comm'n., 260 U.S. 212, 219 (1922):

"[T]he court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record. Records in cases like this are often very voluminous. Such is the record in this case."