

file

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18681

DOROTHY GAUTREAUX, et. al.,

Plaintiffs-Appellees

v.

THE CHICAGO HOUSING AUTHORITY, et. al.,

Defendants-Appellants.

On Appeal from the Judgment of the United
States District Court for the Northern
District of Illinois

CERTIFICATE OF SERVICE

Alexander Polikoff certifies that on September 23,
1970, three copies of the Brief of Plaintiffs-Appellees were
delivered to the attorneys for Defendants-Appellants.



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Dated: September 23, 1970

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BRIEF OF PLAINTIFFS-APPELLEES

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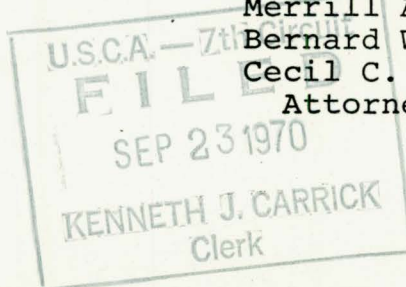


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STATEMENT OF THE ISSUE PRESENTED

Whether, more than a year following entry of a judgment order requiring the Chicago Housing Authority ("CHA") to use its best efforts to increase the supply of new housing units "as rapidly as possible" (so that CHA might thereby begin to

remedy the wrongs caused by its operation of a de jure racially segregated public housing system), the District Court erred in ordering CHA, after affording it full opportunity to present all relevant evidence, to refer sites for new housing units to the Chicago Plan Commission and to advise the Chicago City Council of the same as a means of implementing the best efforts provision of the judgment order.

STATEMENT OF THE CASE

Although the facts are not in dispute, CHA's "Statement of the Case" is inaccurate and incomplete and therefore gives a seriously distorted picture of the "case." The following statement of facts is required to remedy this distortion.

1. On February 10, 1969 plaintiffs' motion for summary judgment was granted. The accompanying opinion (Gautreaux v. Chicago Housing Authority, 296 F.Supp. 907) found that CHA had violated the constitutional rights of the plaintiff class by operating a segregated public housing system pursuant to "a deliberate policy to separate the races." (296 F.Supp. at 914.)

2. On July 1, 1969 a judgment order was entered pursuant to the February 10 opinion. (304 F.Supp. 736.) CHA's wrongs of the past were to be remedied by requiring CHA to use its best efforts to build new, unsegregated housing "as rapidly as possible" and to "take all steps necessary to that end ..." (A-6.)* (The judgment order was supplemented or modified by five orders entered on September 12, 1969, September 15, 1969, October 20, 1969, October 23, 1969 and November 24, 1969, respectively. See docket entries as of those dates.)

* "A" refers to Appellants' Appendix, and the following number to the page or pages in the Appendix.

3. Illinois law (Chapter 67-1/2, §9, Ill. Rev. Stats. 1969) provides that CHA may not acquire any interest in real property without first giving advice of the proposed acquisition to the Chicago City Council and receiving the Council's approval.

4. In May, 1970, CHA's Chairman informed plaintiffs' counsel that "CHA did not intend to advise the City Council of sites appropriate for Dwelling Units ... prior to the Chicago mayoralty election scheduled to be held in April, 1971." (A-18.)

5. Following such advice a conference with Judge Austin was agreed to and arranged by counsel for both parties. (A-18.) In particular, counsel agreed that the conference should be held in the Judge's chambers "rather than appear before him in open court on his motion call." (A-24-25; Transcript of Proceedings of August 13, 1970, p.16.)

6. The agreed conference was set, after consultation with Judge Austin's clerk, for June 2, 1970, and the date was confirmed by letter dated May 20, 1970, from plaintiffs' counsel to CHA's counsel. (A-24-25.)

7. CHA's counsel confirmed in writing that the June 2 conference in chambers was agreed to (A-26-27), and stated that:

- (a) CHA would be prepared at that time "to respond fully on June 2nd in Judge Austin's chambers" to plaintiffs' requests for information (A-26), and, in addition,
- (b) CHA was "eager" to discuss at the conference the "broader issues you allude to in your letter" [the proposed deferral until after the 1971 mayoralty election of advice to the City Council]. (A-27.)

8. The conference was in fact held on June 2, and was participated in by CHA without objection as to notice, procedure, its location in chambers and not open court, or as to any other matter. (A-22.)

9. Judge Austin inquired whether CHA desired to have the conference proceedings transcribed by a court reporter. CHA said that it did not. (Transcript of Proceedings of August 13, 1970, p.2.)

10. Four subsequent conferences were held on June 16, 1970, June 26, 1970, July 13, 1970 and July 20, 1970, respectively. (A-18.) Each of these conference dates was set by agreement of counsel and Judge Austin, without objection by any party, to hear further argument and evidence respecting CHA's proposed deferral of advice to the Chicago City Council. (A-19.)

11. The conference of June 16, 1970 was continued at the specific request of CHA counsel because, she said, the CHA Chairman wished to make a presentation to Judge Austin. (A-19.)

12. At the conference of June 26, 1970 presentations to Judge Austin were made by the CHA Chairman (Charles R. Swibel), a Commissioner of CHA (Professor Richard C. Wade) and counsel for both parties. (A-19-20.) Plaintiffs' counsel requested the Court to express its view that CHA should submit already approved sites to the City Council for the necessary action, but said that they did not seek a formal order to that effect. (Transcript of Proceedings of August 13, 1970, pp.13-14.) Plaintiffs' counsel argued that further deferral of such submission of sites was impractical and undesirable (A-20), while CHA argued the contrary. (CHA br. 7.)

13. The June 26 conference was again continued (until July 13) for the specific purpose of enabling CHA to present whatever additional evidence it wished. (A-20.)

14. On July 13 counsel for CHA requested a further continuance for the purpose of introducing testimony of one Dr. Greeley, who was not then present in court. (A-20.) Prior to July 13 no request was made to Judge Austin for a continuance of the conference previously scheduled for that date (A-20), although CHA's counsel knew on July 8 that Dr. Greeley could not testify on July 13. (A-12.) Judge Austin heard the statements of counsel for CHA as to the subject matter of Dr. Greeley's proposed testimony, stated that such testimony would be repetitive of arguments previously made by Professor Wade and other CHA representatives, and declined to further continue the proceedings. (A-20; Transcript of Proceedings of August 13, 1970, p.4.)

15. At the conclusion of the conference of July 13, 1970 Judge Austin stated (a) that in his view an order in form similar to that proposed by counsel for plaintiffs and attached to his letter dated July 13, 1970 was appropriate, (b) that CHA should not defer any longer the necessary steps to acquire appropriate sites for Dwelling Units, and (c) that advice to

the Chicago City Council with respect thereto should be given by September 1, 1970. CHA counsel stated that CHA might prefer that a direction respecting advice to the City Council be embodied in a written order and that she would advise counsel for plaintiffs within 24 hours as to whether such a written order was desired. The parties and Judge Austin agreed to continue the matter to July 20, 1970 for the purpose of signing an order providing for a written report by CHA and, if desired by CHA, an order providing for advice to the Chicago City Council. (A-21.)

16. CHA counsel advised plaintiffs' counsel on or about July 14 or 15, 1970 that a written order respecting advice by CHA to the Chicago City Council was desired. (A-21.) A final conference was then held on July 20, 1970, during which Judge Austin changed the date for advice to the City Council from September 1, 1970 to September 20, 1970, at the request of CHA (Transcript of Proceedings of August 13, 1970, p.15), and then signed the order appealed from. (A-21.)

SUMMARY OF ARGUMENT

The order appealed from was entered following conferences agreed to and participated in without objection by CHA, and only after CHA was afforded a full opportunity to present whatever evidence it wished. Accordingly the order was not entered "without notice" and "without a hearing" as CHA asserts. (CHA br. 5.) Moreover, since CHA specifically invited the order appealed from, it cannot for that separate reason complain of its entry.

The order was also well within the District Court's inherent discretionary power to specify the time or manner of enforcement of its final judgment order of July 1, 1969, and it would have been an abuse of discretion and a violation of established legal principles for the District Court to have countenanced further

delay in the enforcement of the constitutional rights of the plaintiff class for the impermissible political and community hostility reasons advanced by CHA.

I. CHA'S ARGUMENT THAT IT LACKED
PROPER NOTICE AND WAS DENIED
A HEARING IS BASELESS

CHA argues that it lacked notice "that the court would consider modifying the 'best efforts' requirement ... [to increase the supply of Dwelling Units as rapidly as possible] of the original judgment order with a specific timetable" (CHA br. 15-16), and that it was denied a hearing on this question. (Id. 18.)

It is charitable to call this argument disingenuous. It amounts to asserting that CHA lacked proper notice and was denied a hearing respecting (1) an order whose entry it requested, and which would not have been entered but for such request, (2) on a subject it was "eager" to discuss before Judge Austin, (3) in a form of proceeding it preferred and agreed to, and (4) in which Judge Austin bent over backwards to give it a full opportunity to present all the evidence it wished.

(1) CHA Requested the Entry of the Order
Appealed From

Plaintiffs did not seek a written order directing CHA to advise the City Council of its already selected sites, but merely an informal expression of views by Judge Austin that

that should be done. (Transcript of Proceedings of August 13, 1970, pp.13-14.) When the Judge, having first heard the arguments of both sides (A-20, CHA br. 7), expressed his view that there should be no further delay, CHA requested a formal, written order. (A-21.)

It is clear that, but for CHA's request, the July 20 order would have been confined to a non-controversial report. (Ibid.)* Accordingly, if the entry of the July 20 order was in any respect erroneous (the following sections of this brief will show plainly that it was not), the error was induced by CHA and cannot be urged by it. "This is so elementary as not to require the citations of authorities," Devine v. Zimmerman, 133 F.2d 850, 852 (CA 8, 1943), but for examples of the application of the doctrine see Law v. United States, 266 U.S. 494, 496, 69 L.Ed. 401, 402 (1925); Mercellis v. Wilson, 235 U.S. 579, 583, 59 L.Ed. 370, 371 (1915); Cypert v. Baker, 399 F.2d 927, 929-30 (CA 10, 1968); Hanks v. United States, 388 F.2d

*Judge Austin's express but informally stated views would not of course have been an injunction, even though CHA might have feared that a failure to comply with them would have led to a formal order. "[A] defendant's apprehension that conduct on his part may ultimately be restrained is not an 'injunction' within §1292(a)(1)." Taylor v. Board of Education, 288 F.2d 600, 603 (CA 2, 1961). Had no order been entered and had CHA failed to comply with the Judge's express but informally stated views, plaintiffs would presumably have then moved for entry of a formal order. We could speculate as to what fault CHA might have found with that proceeding, but that would be hypothetical. The critical, historical fact remains that CHA, not plaintiffs, invited entry of the order appealed from.

171, 173 (CA 10, 1968); Emerman v. Cohen, 199 F.2d 857, 860 (CA 2, 1952); Pitcairn v. Fisher, 78 F.2d 649, 650-51 (CA 8, 1935); and Union Electric Light & Power Co. v. Snyder Estate Co., 65 F.2d 297, 302 (CA 8, 1933).

- (2) CHA Knew the Subject of the Conference was "Timetable" and was "Eager" to Discuss that Subject

CHA's suggestion that it lacked proper notice of the subject matter of the conferences and was surprised by Judge Austin's action is wholly indefensible. CHA says that the conferences were for the purpose of information only (CHA br. 18), and that "CHA was led to believe that it was participating in conferences dealing with the providing of information to plaintiffs and the court." (A-21.) This is belied by the written statement of CHA's own counsel that not only would CHA "respond fully" as to information (A-26), but also and in addition that CHA was "eager" to discuss the broader issues - i.e., timing of the submission of sites to the City Council. (A-27.)

The pretense that the subject of the timing of submission of sites to the City Council arose suddenly and by surprise also appears in such CHA statements as, "The intent of the court to impose deadlines was ... first articulated at the conference of July 13, 1970" (CHA br. 17). What this means is that, having heard the arguments of both sides in the previous conferences (CHA br. 7, 16) as well as on July 13, the Court first expressed

its own view - i.e., decided the issue which had been argued - on July 13. What CHA's argument really boils down to is that CHA was "surprised" that, after four days of argument, Judge Austin agreed with the plaintiffs. Inconsistently with its argument, CHA concedes that the conference of June 26 "did involve a discussion of the timing of presenting sites to the City Council of Chicago for approval." (CHA br. 16.)*

The fact is of course that CHA agreed to attend the conferences with Judge Austin for the very purpose of discussing precisely the question of timetable. It was CHA's proposed deferral of advice to the City Council until after the mayoralty election in April, 1971 that precipitated the conferences in the first place (A-18) and led plaintiffs to argue against deferral. (A-20.) CHA itself represented to Judge Austin that the next steps to be taken by it were the referral of proposed sites to the Chicago Plan Commission and advice of the same to the City Council (A-7-8), and admits that it argued that it was

*Of course CHA could not have been certain that Judge Austin would agree with plaintiffs that CHA should desist from its proposal to wait until after the mayoralty election before taking the next step to increase the supply of dwelling units. But it is disingenuous for CHA to assert that it thought plaintiffs were "only seeking information" (CHA br. 16) and not an expression from Judge Austin on the issue of timing. Plaintiffs' counsel's letter of May 20 (two weeks before the first conference) made it perfectly clear that information was wanted in advance of the conference as a predicate for discussion of "the broader questions" (i.e., timetable). (A-25.) CHA's counsel then supplied some of the information, said CHA would respond fully with the remainder at the conference, and, in addition, was "eager to discuss the broader issues." (A-27.)

"impractical" not to defer these steps. (CHA br. 7.) In short, it is not too much to say that "timetable" was the subject of the conferences. The facts belie CHA's assertion that it lacked "notice" of what the proceedings were about.

(3) CHA "Preferred" and Agreed to a Proceeding
in Chambers Rather than One in Open Court

Even if there had been any surprise (and there clearly was none), it was the result of the agreement that it was "preferable to see the Judge in chambers rather than appear before him in open court on his motion call." (A-24-25.) It is plain that because of what it viewed as the sensitive nature of the matter, CHA wished to avoid publicity. (If Judge Austin had decided not to require CHA to submit sites promptly to the City Council, CHA would still have "lost" in a public relations sense if its reasons for delay had to be publicly stated.) Judge Austin said it "became apparent to me as to why they [CHA] didn't [want a court reporter present]." (Transcript of Proceedings of August 13, 1970, p.2.) Had CHA not preferred the course of conferences in chambers there would have been a formal written motion in open court. CHA cannot now complain of the informality of a procedure which it itself had a hand in choosing and "preferred" to a more formal procedure.

(4) CHA was Given a Full Opportunity to
Present All the Evidence it Wanted

There were five conferences - some for the specific purpose of permitting CHA to present additional evidence. (A-21-22.)

Thus, CHA did not lack an opportunity to offer whatever evidence it wished. Moreover, it declined Judge Austin's invitation to have the proceedings transcribed. (Transcript of Proceedings of August 13, 1970, p.2.) Clearly CHA cannot assign its own decision in this regard as error. (See the authorities cited under subsection (2) above.) Accordingly, CHA's assertion of no "hearing" really reduces to a complaint that Judge Austin did not grant a further continuance to hear testimony of a proposed witness, Dr. Greeley.

As to this, it appears that Dr. Greeley was not offered as a witness at any of the three conferences prior to July 13, that the conferences of June 26 and July 13 were set for the specific purpose of permitting CHA to offer such further evidence as it wished, that as early as July 8 CHA counsel knew that Dr. Greeley would be unavailable on July 13 (A-12) but that no continuance on that account was requested prior to the 13th (A-20), and that it was not until the parties had appeared in Judge Austin's chambers on July 13 that such a request was made. (A-20.)

Under these circumstances, and particularly in view of the fact that Dr. Greeley's proposed testimony was repetitive of that already given by the Chairman of CHA and Professor Wade (A-20), it was clearly within Judge Austin's discretion not to grant still a further continuance.

* * *

For all of the foregoing reasons CHA's argument that it lacked notice and an opportunity to be heard respecting the July 20 order is baseless. CHA's cases on this point are as irrelevant as its argument is unmeritorious. None involves an issuing court's "continuing supervision" of a final injunctive order. System Federation No. 91 v. Wright, 364 U.S. 642, 5 L.Ed.2d 349, 353 (1961). The case given the most detailed treatment by CHA (CHA br. 19-21) condemned granting a motion for summary judgment after a hearing confined to a motion for a preliminary injunction during which the trial court "admonished the parties to limit their proof to that issue," and excluded evidence "material only on the merits ..." Progress Development Corporation, 286 F.2d 222, 233 (CA 7, 1961). Here there was no surprise as there was in Progress, here there was a full opportunity to present evidence, as there was not in Progress, and here CHA invited the entry of the order appealed from, which was not the case in Progress. Similarly, Greene, Sims and Capital City Gas Co. (CHA br. 19-22) involve factual situations totally unlike the one presented here.

II. ENTRY OF THE ORDER APPEALED FROM
WAS WELL WITHIN THE DISCRETION
OF JUDGE AUSTIN

CHA's final argument is that Judge Austin should have "abstained" from exercising federal jurisdiction on "such an obviously discretionary matter as the most opportune time to present building sites to the Chicago City Council for approval," (CHA br. 27), and that his entry of the July 20 order was therefore "an abuse of judicial discretion." (CHA br. 31.)

A brief review of the situation confronting Judge Austin on July 20 may be appropriate in responding to this argument.

1. CHA had practiced both racially discriminatory tenant assignment (296 F.Supp. at 909) and racially discriminatory site selection (296 F.Supp. at 910) in the operation of the Chicago public housing system. As Judge Austin had stated (296 F.Supp. at 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 knew that its procedures resulted in racially discriminatory patterns (296 F.Supp. at 912-13) and yet continued those procedures.

2. There was no finding of subjective racism on the part of CHA officials, and it was undenied that sites were chosen to serve goals of low-cost housing and urban renewal. But the Court said 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. at 914.)

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

"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."

4. Since the segregation of the past could not be remedied by relocating previously constructed buildings, the remedy could only take effect as new, unsegregated housing was built or acquired. No new housing would mean no remedy for the past violation of plaintiffs' constitutional rights. Accordingly, except as new housing was supplied, the judgment order was so much paper.
5. During the period of over a year following entry of the judgment order, not one proposed site for family public housing has been put into the pipeline by CHA. (Of course acquisition of a site is only the first step in producing a housing unit and delay in the first step means even greater delay in the actual provision of housing for the plaintiff class.) But by June 1, 1970 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. (A-37.)
6. Then CHA's Chairman took the position that CHA would not submit any proposed sites to the City Council prior to the Chicago mayoralty election in April, 1971. (A-18.) This would mean a further delay of almost another year. 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. The question according to Chairman Swibel was still one of "timing" (A-38) - but now the asserted reason was to delay submission until "sufficient feasible sites have 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." (A-38-30.) This was said to be necessary to avoid flight to the suburbs by the white residents of Chicago. (A-39.)

7. The credibility gap between the Chairman's original statement of purely political reasons (see Transcript of Proceedings of August 13, 1970, p. 17, 18) and those in his subsequently prepared statement of June 26 was heightened by the fact that another Commissioner - Professor Richard Wade - put the issue at the same June 26 conference in the identical terms originally 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." (A-43.)

8. It is of course apparent that if Chairman Swibel's originally stated reason was the real one, CHA was again playing politics instead of going about its business of providing housing, in direct violation both of the Court's original determination as to political considerations and of the best efforts provision of the judgment order. If on the other hand the "suburban site" reason were to be credited, it would mean indefinite delay. Notwithstanding CHA's lengthy discussion of its "metropolitan approach" (CHA br. 7-10), the fact is that more than a year after entry of the judgment order of July 1, 1969 there are no agreements in existence or in prospect which could lead to public housing for Chicago residents on such suburban sites.*

*CHA has no jurisdiction outside the City of Chicago except by mutual agreement with other housing authorities (Ill. Rev. Stat. ch. 67-1/2, §27c). No such agreements have been reached by CHA and the record does not show any possibility of reaching such agreements. (A-26, 28-31.) In sharp contrast are the Chicago sites for over 1500 sorely needed Dwelling Units which have been approved by the Department of Housing and Urban Development and are ready for referral to the Chicago Plan Commission and advice to the Chicago City Council. (A-7-8.) It is instructive that CHA makes much of "political realities" and "community opposition" in Chicago, but avoids any reference to the identical considerations in other communities which make any prospect of voluntary mutual agreement on suburban sites highly problematical for the foreseeable future.

No suburban sites have even been identified - 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. Moreover, as determined during the conferences, if the "flight to the suburbs" argument had any validity at all the problems could be handled by strong public statements of intention to locate sites and build in the suburbs. (Transcript of Proceedings of August 13, 1970, p.20.)

9. In addition, the Court was advised that the Department of Housing and Urban Development had "waited expectantly for the Authority [CHA] to have the sites approved by the City Council," and considered CHA's proposed delay "to be quite a serious matter." The Department even said the proposed delay might involve its ability to hold CHA's reservation for Dwelling Units, thus putting into question CHA's ability to provide the Dwelling Units at any time. Letter dated July 9, 1970 from Francis D. Fisher to C. E. Humphrey, Attached to Record Item No. 12. See also HUD's attitude and the City's commitment to build "immediately" the 1500 new family units of public housing as expressed in the correspondence between HUD and Mayor Daley, Attached to Record Item No. 22.)
10. Thus, during the more than one year since the judgment order was entered, plaintiffs' constitutional rights had been in the deep freeze. Not a single site has been proposed to the City Council and Judge Austin plainly believed that CHA had not been diligent in complying with the judgment order. (Transcript of Proceedings of August 13, 1970, pp. 6, 9-10.) Although CHA's business is to select and propose sites and then to build public housing thereon, plaintiffs' rights to non-segregated public housing, previously denied by CHA's slavish adherence to "political realities," were now to be sacrificed again by CHA to another set of "political realities."

Such was the July 20 situation confronting Judge Austin. The question is, was it an abuse of judicial discretion for Judge Austin to react as he did.

The discretionary power of a federal court to vindicate federal constitutional rights denied or delayed by state officials

really needs no citation of authority other than the Prince Edward County school case. There the district court refused to countenance further delay in complying with a school desegregation order because "further delay ... would create an irreparable loss." Allen v. County School Board of Prince Edward County, 207 F.Supp. 349, 351 (E D Va. 1962). The court held that the public schools of Prince Edward County could not remain closed while other public schools remained open at the expense of the taxpayers, and it granted appropriate relief. 207 F.Supp. at 355. The Court of Appeals reversed, Griffin v. Board of Supervisors, 322 F.2d 332 (CA 4, 1963), but the Supreme Court upheld the District Court's exercise of its discretionary powers and invited it to use those powers to the utmost to vindicate the constitutional rights of the plaintiffs, promptly and effectively:

"The District Court enjoined the county officials from paying county tuition grants or giving tax exemptions and from processing applications for state tuition grants so long as the county's public schools remained closed. We have no doubt of the power of the court to give this relief to enforce the discontinuance of the county's racially discriminatory practices. ... For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Griffin v. School Board of Prince Edward County, 377 U.S. 218, 232-33, 12 L.Ed.2d 256, 266 (1964).

One need only compare an order to levy taxes with an order to

submit already selected sites to the Chicago City Council to realize that we are dealing here with an a fortiori case.

But the Supreme Court went even further:

"The District Court held that 'the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers.' ... At the same time the court gave notice that it would later consider an order to accomplish this purpose if the public schools were not reopened by September 7, 1962. That day has long passed, and the schools are still closed. On remand, therefore, the court may find it necessary to consider further such an order. An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them. The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." 377 U.S. at 233-34, 12 L.Ed.2d at 266-67 (emphasis added).

The Supreme Court reversed the judgment of the Court of Appeals, affirmed the judgment of the district court and remanded the cause to the district court "with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools." 377 U.S. at 234, 12 L.Ed.2d at 267.

Although further citation of authority should be unnecessary to show that Judge Austin's order of July 20 was well within his

discretion, it may be noted that to vindicate constitutional rights as against recalcitrant state officials courts have even drawn school desegregation plans, Bush v. Orleans Parish School Board, 204 F.Supp. 568, 569 (ED La 1962), and legislative reapportionment plans, Germano v. Kerner, 247 F.Supp. 141, 143 (ND Ill. 1965). How much clearer is it that a court can order submission of already selected sites to a City Council, especially where submission is being delayed for vague "political" and "community attitude" reasons.

Moreover, such reasons do not constitute a valid state policy which might conceivably call into play the "abstention" doctrine which CHA invokes (see the discussion of CHA's cases, infra), but are reasons which have explicitly been declared impermissible as a ground for delaying the enforcement of constitutional rights. Thus, in Coppedge v. Franklin Board of Education, 293 F.Supp. 356 (EDNC 1968), aff'd. 404 F.2d 1177 (CA 4, 1968), the court observed that the School Board's claims of "impracticability," the very word used by CHA, were (like CHA's) "stated in broad generalizations" (293 F.Supp. at 361) and said in 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. [citations omitted.] 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." 293 F.Supp. at 364 (emphasis added).

Similarly, in United States v. Bertie County Board of Education, 293 F.Supp. 1276, 1280-81 (EDNC 1968), the Court stated:

"It is axiomatic that the constitutional rights of Negro children may not be restricted because of opposition to their implementation [citations omitted] ... 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." (emphasis added.)

In addition, Judge Austin's opinion of February, 1969, binding on CHA, advised CHA that community or aldermanic attitudes were not a permissible reason for denying or delaying the rights of the plaintiffs. (296 F.Supp. at 914.) This Court has itself clearly stated:

"Fundamental rights may not be ... made dependent on elections." U.S. v. School District 151, 404 F.2d 1125, 1133 (CA 7, 1969).*

*CHA makes much of its "non-racist" attitude. But the fact that CHA's conduct continues to reflect more concern about politics than about the constitutional rights of its tenants and applicants suggests the witches in Macbeth who "keep the word of promise to our ear, and break it to our hope." (Act V, Scene 8.) In
(Continued on page 21.)

CHA's cases are not, of course, to the contrary. Indeed a goodly number of them refuse to invoke the abstention doctrine (McNeese, Bush, Holmes) since "cases involving constitutional rights are frequently inappropriate for the exercise of the abstention doctrine." (CHA br. 26.) Moreover, the rightful role of the abstention doctrine is to avoid needless friction with state policies. Here we do not even have any articulated policies of CHA to consider - merely a proposal, "stated in broad generalizations," to delay carrying out a court order for vague, speculative, and in any event impermissible political and community attitude reasons. (It is a case, therefore, of "unquestionable abuse" in McQuillin's language - CHA br. 23 - who is speaking, incidentally, of grants of discretionary authority from a legislature, not of compliance with court orders. 2 McQuillan, Municipal Corporations §10.03.)

CHA also asserts that Judge Austin lacked the "experience, information and expertise" to pass upon the "details" of the "sensitive matters" involved in public housing. (CHA br. 23.) The assertion is less than fair to Judge Austin who has had this case before him for over four years, who has reviewed

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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 Supreme Court nonetheless upheld an order denying the requested moratorium and said that the community's "hostility to racial desegregation" was not a relevant factor. (358 U.S. at 7.)

hundreds of pages of briefs and thousands of pages of depositions and documentary evidence, who spent over four and a half months on the formulation of a detailed and comprehensive plan to end public housing segregation in Chicago (a decree whose precision and fairness may be measured by the fact that CHA did not appeal from it), and who then devoted many hours over five separate conferences to consider the narrow question of the timing of the ministerial act of submission of sites to the Chicago City Council.

In System Federation No. 91 v. Wright, 364 U.S. 642, 647-48, 5 L.Ed.2d 349, 353 (1961), the Court said that a District Court has "wide discretion" in exercising continuing supervision over an injunction issued by it, and added that an injunction always requires "continuing willingness [by the issuing court] to apply its powers and processes on behalf of the party who obtained that equitable relief."

For Judge Austin to have countenanced continued and indefinite delay in taking the first step toward remedying the wrongs done to the plaintiff class would not only have impugned his own opinion of February 10, 1969 and his judgment order of July 1, 1969, but would have flown in the face of the principles articulated in Prince Edward, Cooper, Coppedge, Bertie, and the host of other cases which have made it clear that constitutional rights to be free of racial discrimination

can no longer be denied or delayed for reasons of politics or community hostility. It is submitted that it would have been an abuse of discretion if Judge Austin had not heeded those principles.*

CONCLUSION

For decades a public housing system in a major metropolitan area has been operated by CHA on a deliberately discriminatory basis. As current newspaper stories show, that system is now one of the cancers in the vitals of our City.

For well over a year CHA has been under court order to begin to right its wrongs of the past by building new unsegregated housing "as rapidly as possible." It was told over a year ago that political considerations and community attitudes were impermissible reasons for not doing so. The present appeal, based precisely and solely upon such impermissible considerations, is frivolous on that account. Surely this Court will not permit the sorry story of interminable delay by recalcitrant school officials to be repeated in the housing

*In Board of Education v. Groves, 261 F.2d 527, 528 (CA 4, 1958), a school desegregation case, the court explicitly rejected the argument that courts have no discretion to modify desegregation plans formulated by school authorities in good faith and said that the district judge might not "disregard his own responsibility to determine not only whether a plan is offered in good faith but whether it is reasonable in all its aspects ..."

field. Surely the nation has learned the awful price to be paid for permitting courts to be used as instruments to frustrate, rather than to effectuate promptly, court-ordered peaceful change.

We think (1) that the order appealed from should be affirmed, (2) that in view of the passage of time the judgment of this Court should remand the cause to the District Court with directions to specify new and early dates for referral of sites to the Chicago Plan Commission and advice of the same to the Chicago City Council, and (3) that pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure the Court should further order that its mandate issue immediately and not be stayed.

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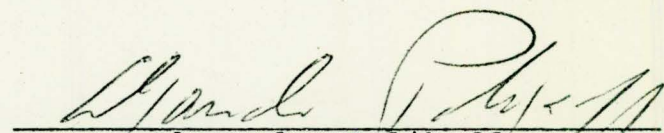
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