
IN THE
UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 71-1732-33-44

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees,

v.

GEORGE W. ROMNEY,

and

CITY OF CHICAGO, CENTRAL ADVISORY
COUNCIL, and CHICAGO HOUSING
AUTHORITY,

Intervenor-Appellants.

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

Honorable Richard J. Austin, District Judge

BRIEF FOR INTERVENOR-APPELLANT
CHICAGO HOUSING AUTHORITY

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STATEMENT OF ISSUES

Whether the district court abused its discretion in enjoining the Secretary of the Department of Housing and Urban Development (HUD) from making funds available to the City of Chicago for that City's second year of Model Cities Programs (pursuant to the Demonstration Cities and Metropolitan Development Act of 1966) unless HUD certified to the district court that the City of Chicago had approved sites in white neighborhoods for no fewer than 700 low income public housing units (pursuant to the United States Housing Act of 1937) where the district court:

1. Recognized that the City may not timely approve the requisite number of public housing units in white neighborhoods and thus a cut off of funds would be required with a consequential "devastating effect" upon the poor citizens of Chicago intended as beneficiaries of the Models Cities Programs;

2. Ignored the requirements of Section 602 of the Civil Rights Act of 1964, the plain purpose of which is to protect the innocent beneficiaries of programs such as Models Cities Programs, not tainted with discriminatory practices, from having funds designed for such programs cut off to cure discriminatory practices in some other program such as low rent public housing; and

3. Disregarded an administrative determination by HUD which was supported by the record and based upon directly relevant statutory and decisional law.

STATEMENT OF THE CASE

Litigants

The plaintiff class consists of all tenants in, or applicants for, public housing in the City of Chicago. The only named defendant is the Secretary of the Department of Housing and Urban Development ("HUD"), who, among many other things, administers federal funds for the construction and maintenance of public housing within the City of Chicago.

At the present time, the district court has allowed three parties to intervene: The Chicago Housing Authority ("CHA"), The Central Advisory Council, and The City of Chicago.

CHA provides all of the low-income public housing within Chicago; the majority of its tenants are black. The Central Advisory Council is a not-for-profit corporation which is the official representative of CHA's tenants, having been selected as a result of a city-wide election. The Central Advisory Council is the only party to this proceeding which is the elected representative of the residents of CHA housing projects.

Relevant Federal Programs

There are several federal programs for providing housing and other services to urban areas. Two such programs are involved in this appeal.

(1) Low Rent Public Housing. Funds for the purpose of constructing, maintaining and achieving low rent housing are provided by the United States Housing Act of 1937 (42 U.S.C. § 1401, et seq.). The Secretary of HUD is charged with the administration of such funds.

CHA provides low rent public housing with monies received from the federal government under the Housing Act of 1937. CHA does not provide any housing, low rent or otherwise, with any funds distributed under the Model Cities Programs (Tr. 510).

(2) The Model Cities Programs are created by the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. § 3301, et seq.). Under these programs, the Secretary of HUD is authorized to grant funds for the purpose of enabling cities "to plan, develop, and conduct programs to improve their physical environment, increase their supply of adequate housing for low and moderate-income people, and provide educational and social services vital to health and welfare."

Pursuant to this legislation, The City of Chicago is carrying on a five-year model cities program. The program commenced in January, 1970; its second year is due to expire in December, 1971. Under the program, the city either has received or is to receive \$38 million per year to carry on services consistent with the legislation quoted above. These services include numerous education and job-training programs, health care centers, day care centers, and others; approximately 4,000 people are employed in carrying out the programs.

The direct beneficiaries of the model cities programs are the poor people of Chicago, many of whom are black and many of whom are members of the plaintiff class.

It is agreed, and the district found, that the model cities programs are an enormous benefit to the City in general and the poor people in particular, and that the effect of eliminating those programs would be "devastating" (Opinion pp. 8, 10)

The services funded by the model cities programs particularly benefit the 4,328 CHA tenant families at the Robert Taylor Homes (a population of 27,030) and the 1,444 tenant families at the Washington Park Homes (a population of 8,765). Each of these CHA developments and the total tenant population of 36,000 is within the Near South Side Model Cities Target Areas.

In addition, a very substantial percentage of the total population in CHA developments--about 150,000 people--are direct beneficiaries of one or more of the various model cities programs. (CHA Ex. 2)

Two specific programs financed by Model Cities monies are administered directly by CHA. One, the "Day Care Program", provides classroom supervision for a total enrollment of 200 children of the ages three to five years during the period 7:30 A.M. through 5:00 P.M. The parents of such children fall into one or more of the following categories: (a) job training programs for public assistance mothers; (b) handicapped mothers; and (c) those who are gainfully employed. The program serves CHA tenants (among others) in the Robert Taylor Homes (located at approximately 43rd and State Street) and in the Washington Park Homes (located at approximately 41st and Lake Park). In addition, the Day Care Program provides employment for 25 CHA tenants. The other, Project Threshold, provides counseling and advice to CHA tenants of Robert Taylor Homes and Washington Park Homes who are prospective home buyers. This counseling and advice helps such tenants to acquire their own homes and creates more housing opportunities in the CHA facilities served by the Project

Threshold Program. To date, the Project Threshold program has counseled and advised more than 400 prospective home buyers that reside in public housing, of which approximately 25 have purchased homes. (CHA Ex.2).

History of Litigation

On August 9, 1966, plaintiffs filed companion suits^{*/} against CHA and HUD. The theory of the suit against CHA was that CHA only provided low income housing to the black plaintiffs in all-black neighborhoods, in violation of their constitutional rights. The theory of the suit against HUD was that HUD, by providing financial assistance to CHA to maintain such segregated housing, conspired or participated with CHA to maintain segregated public housing.

Prosecution of the HUD case was stayed pending disposition of the CHA case. Summary judgment was thereafter entered for plaintiffs and against CHA (296 F.Supp. 907).

Then the case against HUD case resumed. The district court entered a judgment in favor of HUD and against the plaintiffs and dismissed the complaint.

^{*/} Gautreaux, et al. v. Chicago Housing Authority, N.D. Ill. E.D., No. 66C 1459; Gautreaux, et al. v. The Housing Assistance Administration (later Gautreaux, et al. v. George W. Romney, Secretary of the Department of Housing and Urban Development, N.D. Ill. E.E., No. 66C 1460.

Plaintiffs in the HUD case appealed the dismissal to this Court (Gautreaux, et al. v. Romney, No. 71-1073), and on September 10, 1971, this Court reversed the district court's order of dismissal, held that summary judgment should have been entered against HUD on the ground that it was assisting CHA to deprive plaintiffs of their constitutional rights, and ordered the case remanded to the District Court for the framing of appropriate relief.

Development of the Model Cities Programs in Chicago

In June, 1969, HUD approved a grant of \$38,159,000 for the period January 1, 1970 through December 31, 1970, to be used by the City of Chicago in administering model cities programs (Plf. Ex. 1). In approving this first year program, HUD stated that it expected The City of Chicago to comply with the district court's order in Gautreaux v. CHA, dealing with the location of public housing in white neighborhoods throughout the City.

An application for the continuance of Chicago's model cities program into a second year was thereafter made, again calling for an expenditure of \$38,000,000. At the time HUD was withholding or threatening to withhold from the City funding for various programs administered by HUD. One of the factors was the view that there was a shortage of housing for low-income families in the City of Chicago. As a result, on May 12, 1971, the City

and HUD executed a certain letter of intent (Plf. Ex. 4), setting forth various ways by which the housing deficit was to be corrected. Since one way of eliminating the deficit called for action by CHA, CHA also signed the May 12 letter of intent.

Under the letter of intent, the housing deficit was to be eliminated by making available specified numbers of housing units under various federal and state programs and mechanisms. The goal with respect to low-income public housing was approval of sites for 500 units by June 15, 1971, 350 additional units by September 15, 1971, and 850 additional units by December 15, 1971.

Shortly after the execution of the May 12, 1971 letter of intent, HUD ^{conditionally} approved the City's model cities program for the second "year," which was actually the six-month period July 1, 1971 through December 31, 1971. At about the same time, HUD released to the City \$12,000,000 of the \$38,000,000 which had been approved, leaving \$26,000,000 to be made available to the City within the six-month period that made up the second model cities "year."

By September 15, 1971, the goal for low-income public housing sites as set forth in the May 12, 1971 letter had not been achieved. However, sites for 288 low-income public housing units had been approved by the City in the "general" or white areas of Chicago.

Accordingly, Hud, in view of the progress in this program and the other programs, was prepared to release the remaining \$26,000,000 Model Cities monies to the City shortly after September 15, 1971. It would have done so but for this proceeding.

The Rule 62(c) Motion.

On September 17, 1971, plaintiffs in the case now before this Court--the HUD case--moved in the district court, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure^{*/} for an order restraining HUD from releasing to The City of Chicago the \$26,000,000 required to fund the remainder of the City's second year model cities programs. The theory of plaintiffs' motion was that the case was still technically in this Court (the decision in No. 71-1073 having been announced only seven days previously), that restraining the release of model cities funds might be an appropriate form of relief if and when the mandate went back to the district court and, therefore, the district court should enjoin that release now so that, upon the fashioning of a final decree, that option would still be available. Upon the filing of this motion, the City, CHA, and the Central Advisory Council were given leave to intervene by the district court.

Status of Proceedings as of the Filing of Rule 62(c) Motion

When the Rule 62(c) motion was filed, the following conditions existed:

^{*/} When an appeal is taken from...[a] final judgment...denying an injunction, the court in its discretion may...grant an injunction during the pendency of the appeal...

CHA, which operates with funds received from HUD under the Housing Act of 1937, had been adjudicated to have maintained segregated public housing, in violation of plaintiffs' rights. HUD, because it provided CHA with funds under the Housing Act of 1937, was adjudicated to have assisted CHA in violating plaintiffs' rights, and this Court had ordered that the district court fashion an appropriate decree against HUD.

The Hearing

At the Rule 62(c) hearing, plaintiff and the district court each candidly admitted that their intention was to apply pressure to the City of Chicago to compel it to approve CHA's housing sites. Referring to the time that had passed since the entry of the decree against CHA, the district judge noted that he had been trying to get the City to act on sites for public housing for 26 months (Tr. p. 60); and during plaintiffs' opening statement, their counsel, "confidently predict[ed] that if the Model Cities money is released without an appropriate string attached to it" (Tr. 41), the City would not approve the number of CHA sites by the December 15, 1971 target date in the May 12, 1971, letter of intent.

Plaintiffs' evidence was directed primarily toward showing that the City had not approved the number of sites as set forth in the May 12, 1967, letter of intent, and that HUD, being aware that the City had not so acted, was nonetheless prepared to release the remaining \$26,000,000 of second year Model Cities money to the City.

The decision to release the \$26,000,000 was that of George J. Vavoulis, HUD's Regional Director. Mr. Vavoulis testified that he knew that, as of September 15, 1971, the Chicago City Council had not approved the number of sites specified in the Letter of Intent, but that, in his considered judgment (1) he could not force the City Council into action by holding up release of the \$26,000,000, and (2) the devastating impact upon the City's poor which would follow cutting off the model cities programs would far outweigh the hope of spurring the City Council into action (Tr. 208-12).

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The only evidence on the issue of whether pressure sought by plaintiffs and imposed by the district court would or would not have the desired effect came from Mr. Vavoulis: he was not confident that it would and saw no reason why the poor people of Chicago should pay the price if it did not. He said he arrived at his conclusion to release the Model Cities funds "after witnessing what had been happening in Chicago, the posture of the Mayor, and actions of the City Council, that no amount of money that I would cut off from the City of Chicago would in any way effect [sic] the decisions of the City Council" (Tr. p. 210). Mr. Vavoulis said the release of the funds "had no relevancy*** to the rest of the housing program" (Tr. 218). He criticized the

City Council for "not facing up to their public housing responsibilities" (Tr. 212), said that the progress of the City had not been "the kind of progress I appreciate" but that since he assumed his duties in February, 1971, the rate of progress "went from zero to something" and he had to view his responsibilities in that context" (Tr. 181).

Mr. Vavoulis explained that when he became the HUD Regional Administrator for the area, including Chicago, he found that certain HUD funds had been cut off for the City of Chicago and said:

"I would like to point out that at the time I became Administrator, after visiting with the staff, raising questions about not only Chicago but Cleveland and other cities in the six states that I am the Administrator for, I raised questions as to why these funds were cut off, what studies that they had made to determine this administrative judgment, what the thrust and reasons for that were. Having been a former Mayor, I made an administrative decision that the responsibility of HUD, the intent of Congress, the release of Federal funds was to serve the public need, and for the department to take an arbitrary position and cut off all communications worked against the public interest.

"I asked my staff to immediately reestablish communications with the City of Chicago and other cities in the six-state area that I am the Administrator of to attempt to work out what it is that we had to do to accomplish in the public housing area, and shortly after I arrived in Chicago I established communications with the Mayor, with the Commissioner of Housing and Urban Development, with the Chairman of the Chicago Housing Authority, and set up the series of staff

meetings between the City and our department to enable them to negotiate and attempt to unlock the funds in order to further the programs that Congress had intended them to be used for." (Tr. 592-3).

Mr. Vavoulis testified that he was aware of the actions of a former Regional Administrator but that as a matter of "administrative judgment" he "did not agree with his procedures or his techniques" (Tr. 603).

HUD's memorandum to the District Court said:

"Although the City's performance to date has not come up to expectations, nevertheless, the City has made some progress in achieving the housing goals set forth in the Letter of Intent. HUD has determined that withholding the Model Cities funds at this time would have a negative effect on the continuing progress of the city in implementing the Letter of Intent." (p. 5)

* * * * *

"HUD has made the determination not to cancel the Model Cities program at this time because of the City's progress in achieving its housing goals under the Letter of Intent and because the funds will contribute to essential social services for inner-city residents. Moreover, in the June 21 letter from HUD to the Mayor, HUD continued to withhold the second year Neighborhood Development Program, */ which amounts to approximately \$20,000,000 in federal funds and HUD will not release those funds until the City has achieved substantial compliance with the Letter of Intent." (p. 6)

* * * * *

"***the release of the Model Cities funds***will benefit the public welfare and provide essential social services to the very people in the class which the plaintiffs purport to represent. Coalition for a United Community Action v. Romney, 316 F.Supp 742 (N.D. Ill. 1970). Staying the release of these funds for essential social services would not alleviate the problems presented in this case but, in fact, would aggravate the social problems which face low income and disadvantaged persons in the City of Chicago. The funds utilized in the various Model Cities Programs provide job opportunities for low income people; reduce dependency on welfare payments; improve educational facilities and programs; reduce incidents of crime and delinquency; enhance recreational and cultural opportunities; establish better access between homes and jobs; and generally, improve living conditions for the people who live in urban slums and blighted areas in the City. Title 42, United States Code, Section 3301." (pp. 8,9)

* * * * *

"While the City has not achieved the targeted housing goals set forth in the Letter of Intent as rapidly as anticipated, nevertheless there has been and continues to be, visible progress toward reaching those goals. Without doubt, the most sensitive element of that program is the approval of sites for public housing. An arbitrary withdrawal of the Model Cities funds at this time would serve only to shore up hostility to that program and impede further approval of public housing sites by the City Council." (pp. 12, 13)

* * * * *

"Since the City has shown continuing progress toward meeting the housing goals set forth in the Letter of Intent, and since the Model Cities money will contribute to essential social services for inner-city residents, HUD has determined that, on balance, it would not be in

the best interests of HUD or the citizens of Chicago to withhold the Model Cities funds at this time; and that such action would have an adverse impact upon the relations between HUD and the City of Chicago." (p. 13)

At the meeting between Mr. Vavoulis and counsel for the plaintiffs in September, 1971, the consequences of a cut off of Model Cities funds were discussed. Mr. Vavoulis pointed out that the Model Cities program was a program for social services, and said, "I can't, in my own sense of responsibility, deny the poor people of the City of Chicago these services. What would be gained?" The plaintiffs' attorney replied, "This is a price you pay for progress" (Tr. 614)

Plaintiffs offered no evidence on the subject of whether a cut off of Model Cities funds would activate the City Council to move faster in approving sites for low income public housing. They submitted a prediction of their counsel that if the Model Cities "money is released with an appropriate string, we will have those units". (Tr. 41) Plaintiffs did call one member of the City Council as a witness (Tr. 236-240), but his testimony did not touch upon what the City Council might or might not do if funds were cut off - he did not even testify what he would do.

At the conclusion of the hearing, the district court enjoined HUD from releasing the \$26,000,000 grant to the City. It held, however, that the City could qualify for the \$26,000,000 if HUD certified to the court that (1) the City had approved sites adequate to enable CHA to construct 700 units of public housing in general housing (i.e., white) areas of the City, (2) CHA was using its "best efforts" to proceed as rapidly as possible with the acquisition and development of the sites approved by the City.

SUMMARY OF ARGUMENT

There is no support for the action of the district court except a prediction of plaintiffs' counsel and the hedged and dubious hope of the district court - a hope hedged at the time of utterance by offering the City of Chicago as a scape-goat should that hope not be fulfilled.

The uncontradicted evidence was that the chancy means adopted in pursuit of a desirable end might fail thus surely threatening great harm to the poor beneficiaries of Model Cities programs. The district court thus failed in his duty as Chancellor to recognize the public interest involved, failed to balance the individual and collective interests before him, and was improperly insensitive to the qualities of mercy and practicality required of a Chancellor.

The district court also improperly disavowed the binding public policy of the United States as set forth in § 602 of the Civil Rights Act of 1964 by threatening the termination of a program not tainted by discriminatory practices to bring about the "cure" of a separate program found to have been so tainted. *discriminatory*
no

Finally, the district court illegally substituted its judgment for that of HUD in a matter where the record provided a solid basis for the action of HUD and none for that of the court.

ARGUMENT

THE OPINION AND ORDER BELOW CONSTITUTE A PATENT ABUSE OF JUDICIAL DISCRETION

1. The District Court Abused Its Discretion
Because It Ignored The Public Interest When
It Put At Risk The Social Services Provided
For The Poor People Of Chicago By The Model
Cities Programs

The district court recognized the threat to the poor people of Chicago occasioned by its order when it said:

"The Court agrees that failure to continue the Model Cities Program for the next three months would have a devastating effect on tens of thousands of the citizens of this City. Four thousand would lose their jobs and many other thousands would be deprived of the benefits derived from the Model Cities Program." (Opinion p.8)

But that court then washed its hands of responsibility for this possibility by declaring:

"Only the City of Chicago, by failing to comply with its undertakings, and neither the plaintiffs nor this Court, would be responsible for such a catastrophe *** Should the City fail to [meet the minimum requirements for approved housing sites] the court has pinpointed the responsibility for the devastating effect which may ensue." (Opinion pp.8,10)

The district court thus acknowledged that its order may wreak a catastrophe -- have a devastating effect -- upon the poor persons intended by Congress to be the beneficiaries of the Model Cities Programs. The district court acted in the teeth of uncontradicted testimony from the Regional Administrator of HUD that there is no reason to anticipate that the City will readily accede to the views of the court and HUD and approve the requisite number of sites or that, if it eventually does, it will do so before the social service programs financed by the Model Cities Programs will have been discontinued. The district court, we submit, therefore flaunted the "***familiar doctrine that the extent to which a court of equity may grant or withhold its aid and the manner of molding its remedies, may be affected by the public interest involved." United States v. Morgan, 307 U.S. 183, 194 (1939).

Flexibility is, of course, a hallmark of a district court's equitable powers to remedy past wrongs. The district court's order in this case, however, is marred by a rigidity foreign to the exercise of equitable jurisdiction. It is flawed by indifference to the "qualities of mercy and practicality [which] have made equity the instrument for nice adjustment and reconciliation between public interests and private needs as well as between competing private

claims." Swann v. Board of Education, 402 U.S. 1, 15 (1971) quoting from Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944).

The court's task in civil rights cases "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Swann v. Board of Education, 402 U.S. 1, 16 (1971). Instead of balancing the interests involved -- especially the interests of those persons, all poor and mostly black, intended by Congress as the beneficiaries of the Model Cities Programs -- the district court has turned its back on very substantial individual and collective interests in pursuit of a time table for the erection of public housing units in white areas which, however laudable, the evidence shows may not be achieved, or, if achieved, not achieved in time to prevent the "catastrophe" threatened by the district court's order.

The district court's order also rejects the recent admonition in Swann (402 U.S.ⁿ at p. 27) quoting from Green v. County School Board, 391 U.S. 430 at 439:

"The obligation of the District courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance."



The district court simply rejected the testimony of the Regional Administrator of HUD as to the "circumstances present". Also spurned by the district court was the option of negotiation and administrative pressure selected by HUD, which has had some success, for the option embodied in its opinion and order which the district court concedes may not work and, if it doesn't, will have catastrophic results for the poor people of the City of Chicago intended by Congress to be the beneficiaries of the Model Cities Programs.

2. The District Court Abused Its Discretion Because It Ignored The Clear And Binding Mandate Of §602 Of The Civil Rights Act of 1964.

Section 602 of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000d-1) states:

"Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non compliance has been so found, or (2) by any other means authorized by law... (Emphasis supplied.)

non-compliance found in MC program

In Board of Public Instruction v. Finch, 414 F 2d 1068 (5th Cir., 1969) the court vacated an order of the Secretary of Health Education and Welfare (HEW) which terminated the payment of all federal funds to a county school district. The cut off shut down three programs, each relating directly to education but, as here, otherwise separate. What the court said about the illegality of the HEW's action in that case demonstrates why the district court in this case abused its discretion by ignoring the applicable and binding law.

"***In order to affirm HEW's action, we would have to assume, contrary to the express mandate of 42 U.S.C.A. § 2000d-1, that defects in one part of a school system automatically infect the whole. Such an assumption in disregard of statutory requirements is inconsistent with both fundamental justice and with our judicial responsibilities." (414 F2d at p. 1074)

* * * * *

"The action of HEW in the proceedings below was clearly disruptive of the legislative scheme. The legislative history of 42 U.S.C.A. § 2000d-1 (§ 602 of the Act) indicates a Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination would be 'pinpoint[ed]***to the situation where discriminatory practices prevail.' 1964 U.S. Code Cong. & Adm. News, p. 2512. As said by Senator Long during the Senate debate;

'Proponents of the bill have continually made it clear that it is the intent of Title VI not to require wholesale cutoffs of Federal Funds from all Federal programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated.' 110 Cong. Rec. 7103 (1964).

"It is important to note that the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices."
(414 F2d at p. 1075, emphasis added)

* * * * *

"We note finally that the purpose of the Title VI cut-off is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a 'political entity or part thereof'), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal

money for unconstitutional ends. Under this procedure each program receives its own 'day in court.'" (414 F2d at p. 1078, emphasis added.)

The record below shows that HUD, as is its duty under § 602 of the Civil Rights Act of 1964, has considered the Model Cities Program on "its own merits", has given the Model Cities Program its "own 'day in court'". In accord with the public policy of the United States, and buttressed by the opinion of the Fifth Circuit in Finch, HUD has properly determined that "for the protection of the innocent beneficiaries" of Model Cities programs which are not "tainted by discriminatory practices," the necessary Model Cities funds should not be withheld*/

§ 602 of the Civil Rights Act of 1964 is a clear expression of the applicable law and of the public policy of the United States. The record of the proceeding below shows that HUD has complied with its letter and spirit but that the district court abused its discretion by ignoring both.

*/ The record shows that where HUD currently has concluded that federal funds should be withheld from the City of Chicago, as in the case of funds under yet another program, the Neighborhood Development Program, it has not hesitated to do so. CHA takes no position on the lawfulness of that action.

3. The Judgment Of HUD That Model Cities Funds Should Be Released Was Supported By The Evidence And The Applicable Law. The District Court's Judgment To The Contrary Was An Unwarranted Interference With The Administrative Process And An Abuse of Discretion.

The record of the proceeding below shows in detail why HUD determined to release the Model Cities funds to the City of Chicago. The very thought processes of the Regional Administrator were probed by extensive examination in open court. The record shows a careful weighing by HUD of all the relevant factors including the protection of the beneficiaries of Model Cities Programs against the possibility of non-action or delayed action by the City Council of Chicago. The only consideration given those beneficiaries by the district court in substituting its judgment for that of HUD is to declare that the fault for the catastrophe that threatens them will be not his but the City's should it occur. Counsel for plaintiffs also are braced for the withdrawal of Model Cities funds from the poor because that is the "price" the poor must pay for what plaintiffs' counsel describe as "progress".

Both plaintiffs' counsel and the district court ignore the fact that Congress has laid down a policy for all in § 602

of the Civil Rights Act and provided for its administration by HUD. And where, as here, HUD's decision "has 'warrant in the record' and a 'reasonable basis in law'" its judgment should be left alone by the judiciary whether exercising equitable or legal jurisdiction. Unemployment Comm'n v. Aragon, 329 U.S. 143, 153-4 (1946). HUD's inferences of fact should stand when, as here, they "have support in the record". Board v. Hearst Publications, 322 U.S. 111, 130 (1944). These guidelines provided by the Supreme Court for the guidance of lower courts in assessing administrative action were ignored by the district court when without warrant in the record and contrary to law it "indulged in an unwarranted incursion into the administrative domain". See United States v. Drum 368 U.S. 370, 386 (1962).

Robert L. Stern, in "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis", 58 Harv. L. Rev. 70, 106 (1944) wrote: "When Congress establishes an administrative agency and lays down general standards for it to follow, the agency has the function of filling in the interstices which have been deliberately left open. The duty of the courts in reviewing the administrative decision for error of law is to see that the agency has stayed within the bounds for the exercise of discretion fixed by Congress, and that it has applied the statutory standards and no others."

And, an eminent scholar of administrative law, Professor Nathaniel L. Nathanson of Northwestern University School of Law, says that the fundamental standards for judicial review must be "whether the agency has acted within the scope of the delegation and whether there was a rational basis for the exercise of its judgment." 3 Vand. L. Rev. 470, 489 (1950). Clearly, the applicable standards have been rejected by the district court: HUD Was unquestionably acting within the scope of the authority and discretion delegated to it and the exercise of its discretion was squarely based upon all of the circumstances including the statutory standard of § 602 of the Civil Rights of 1964.

What Justice Cardozo observed in Norwegian Nitrogen Prod. v. United States 288 U.S. 294, 315 (1933) is also pertinent:

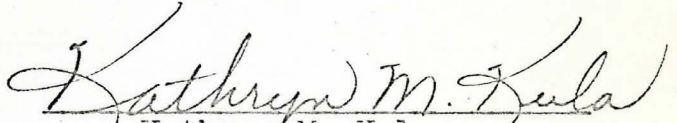
"The [administrative] practice has peculiar weight when it involves contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new".

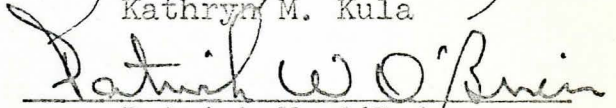
HUD's efforts in ending discrimination in those areas of its responsibilities involves the setting of much "machinery" in motion and much effort to make the many parts of the many programs administered by it "work efficiently and smoothly" while many phases of them "are yet untried and new". The order below simply drops a monkey wrench into this machinery.

To paraphrase the Supreme Court in F.C.C. v. Schreiber 381 U.S. 279, 291 (1965), "the question for decision [by this Court is] whether the [attempted] exercise of discretion by [HUD] was within permissible limits, not whether the District Judge's substituted judgment [is] deemed reasonable". We have shown above how the district court's order is unreasonable. But even if it be deemed reasonable, it must be reversed because, as we have seen, the attempted exercise of discretion by HUD was within permissible limits and the thwarting of it by the district court was, therefore, contrary to law.

CONCLUSION

For all of the above reasons, we respectfully submit that the district court's order of October 1, 1971, should be reversed.


Kathryn M. Kula


Patrick W. O'Brien

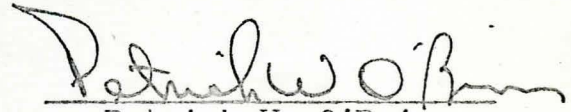

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PROOF OF SERVICE

Patrick W. O'Brien, one of the attorneys for Chicago Housing Authority, certifies that on November 12, 1971, he caused two copies of the above and foregoing brief to be served upon counsel for each party separately represented.


Patrick W. O'Brien

SUPPLEMENT TO BRIEF OF CHICAGO HOUSING AUTHORITY:

The Events of November 11, 1971

1. Appeals numbered 71-1732-33-34 are from an order of the district court of October 1, 1971. That order enjoined defendant George W. Romney, Secretary of Housing and Urban Development, (HUD), "[p]ending termination of the appeal of the plaintiffs from this court's orders of September 1, 1970, and October 21, 1970" from paying funds for Model Cities Programs of the City of Chicago unless certain conditions were met.

2. The appeal of the plaintiffs from the district court's orders of September 1, 1970, and October 21, 1970, was No. 71-1073 in this Court and the mandate in said appeal issued to the district court on November 11, 1971.

3. Hours after issuance of the mandate in the appeal numbered 71-1073, plaintiffs presented a motion in the district court, a copy of which is attached hereto as Exhibit A. Defendant HUD and the City of Chicago, Chicago Housing Authority and Central Advisory Council were all present and were once again given leave to intervene.

4. The district court considered the motion of plaintiffs and, on the record made prior to the entry of the order of October 1, 1971, including all of the objections and

argument of the parties, entered an order, a copy of which is attached hereto as Exhibit B.

5. There is no difference in the substance of the order of November 11, 1971, and the order of October 1, 1971, except that the order of November 11, 1971 is effective: "Pending further order of this Court* * *" and the order of October 1, 1971, was effective pending termination of the appeal numbered 71-1073.

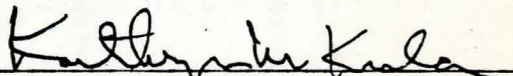
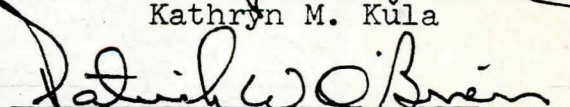
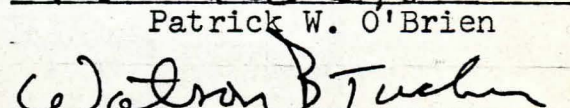
6. Today the briefs of Intervenor-Appellants in the appeals numbered 71-1732, 71-1733 and 71-1734 are being filed and it seems appropriate to inform this Court of the foregoing events.

7. As of the briefs of the intervenor-appellants with the Court, one or more of the intervenor-appellants will have filed Notices of Appeal from the district court's order of November 11, 1971, and a motion to consolidate those appeals with this will be presented.

8. The issues presented by an appeal from the order of November 11, 1971, are identical to the issues presented by the appeals from the order of October 1, 1971.

Respectfully submitted,

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