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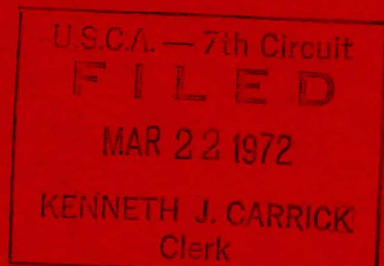
In the
United States Court of Appeals
For the Seventh Circuit

Nos. 71-1732, 1733, 1734 and 1807

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellees,
v.s.
GEORGE W. ROMNEY,
Defendant-Appellant,
and
CITY OF CHICAGO, CHICAGO HOUSING
AUTHORITY and CENTRAL ADVISORY
COUNCIL,
Intervenor-Appellants.

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

SUGGESTION OF
PLAINTIFFS FOR REHEARING IN BANC
and
PETITION FOR REHEARING



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 71-1732, 33, 34
and 71-1807

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees,

v.

GEORGE W. ROMNEY,

Defendant-Appellant,

and

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HOUSING AUTHORITY and CENTRAL
ADVISORY COUNCIL,

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SUGGESTION OF PLAINTIFFS FOR REHEARING
IN BANC

NOW COME plaintiffs, by their attorneys, and pursuant to
Rule 35(b) of the Federal Rules of Appellate Procedure
respectfully suggest the appropriateness of a rehearing in
banc with respect to plaintiffs petition for rehearing in

this cause of even date herewith.

In support of this suggestion plaintiffs state that this cause involves a question of exceptional importance as provided in Rule 35(a)(2) of the Federal Rules of Appellate Procedure. The dissenting opinion of Judge Sprecher correctly observes that the problem to which the District Court order is addressed is "crucial and monumental." (Slip opinion p.25.) The issues involve the proper administration of major federal programs in one of the nation's largest metropolitan areas in the context of already adjudicated, de jure violations of constitutional rights occurring, over a period of decades, with respect to "the most pressing unfulfilled need in our society." (Report of the President's Committee on Urban Housing, A Decent Home (1968), quoted in footnote 13 of the dissenting opinion, slip opinion p.25.) They also involve a uniquely difficult and complex effort by the District Judge to provide remedies for those violations. The opinion rendered by the Court in this case may affect the ability of federal courts across the country to deal effectively with that need and to provide such remedies.

For the foregoing reasons, the proceeding meets the requirements of Rule 35(a)(2) and rehearing in banc is therefore requested.

Respectfully submitted,



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One of the Attorneys for Plaintiffs

March 22, 1972

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

Intervenor-Appellants.

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

PETITION FOR REHEARING

Plaintiffs, by their attorneys, respectfully petition
this Court for a rehearing of the Court's judgment of March
8, 1972, for the following reasons:

I. THE MAJORITY OPINION ERRONEOUSLY TREATS
JUDGE AUSTIN'S ORDER AS A PUBLIC HOUSING
ORDER EXCLUSIVELY AND DISREGARDS THE
FINDING THAT THE CITY HAD FAILED TO MEET
THE RELOCATION PLAN REQUIREMENTS OF THE
MODEL CITIES PROGRAM

The majority opinion erroneously treats the case as if there were no infirmity in the Model Cities Program - as if the District Judge had taken a Model Cities Program that was "pure" and free of improper administration or wrongdoing and held it hostage for the cure of the separate Public Housing Program which was tainted by racial discrimination. The majority opinion states:

"There are no District Court findings that the Chicago Model Cities Program has been improperly administered ... " (Slip opinion 3.)

Again it says:

"The District Court here proceeded as though HUD, in some court proceeding, had been found guilty of some wrongdoing in administering the Model Cities Program in Chicago. This, of course, is not the case." (Id. 4.)

This treatment of the case is incorrect and unfair to Judge Austin. It is incorrect to say there are no District Court findings that the Model Cities Program had been improperly administered, and that HUD was not found guilty in a court proceeding of wrongdoing in administering the Chicago Model Cities Program.

The fact is that, after reviewing some of the evidence of HUD's requirements for funding the Model Cities Program (App. 19-22),* Judge Austin found, "that the planned release of the Model Cities funds was conditional." (App. 22.) He further found that, "the conditions set

*The Appendix and the Volume of Exhibits filed by the City of Chicago are cited "App." and "Ex. App.", respectively.

forth have not been met." (Ibid.) The "conditions set forth" were established by HUD as a means of providing "relocation feasibility" for the Model Cities Program. (Ex. App. 111-12.) Relocation feasibility requirements were stated with "precision" (Ex. App. 13) by HUD's Acting Regional Administrator based on a 71 page study (Ex. App. 3; only the first 6 pages are included in the Exhibits Volume), and were later restated in the "letter of intent" of May 12, 1971 (Ex. App. 17).^{*} "Relocation feasibility" is a requirement of a "relocation plan" without which, by statute, a Model Cities Program may not be funded. 42 U.S.C. §3303(a)(4). HUD regulations describe the relocation plan as an "essential component" of a Model Cities Program. (HUD Handbook MC 3165.1, p. 3; copy attached to plaintiffs' objections to the motion to suspend and vacate the order of October 1, 1971.)

Thus, Judge Austin found that conditions prescribed for relocation feasibility, an essential requirement for funding a Model Cities Program, were not met, but that HUD proposed to fund the Program anyway. This is a finding of "improper administration" and "wrongdoing" in the Model Cities Program. To release funds to the Model Cities Program when the requirements of that Program had not been met constitutes "improper

^{*}"Relocation feasibility" means adequate housing resources, for which HUD uses two tests: a housing replacement test and a family relocation test. (Ex. App. 8.) HUD's housing replacement policy "becomes effective for a city when the vacancy rate ... drops below 3%." (Id. 10.) "... [A]s long as the vacancy rate ... remains below 3%, the replacement policy will be applied." (Id. 11.) This policy in Chicago required the provision of a minimum of 4300 housing units for low income families by June 30, 1971, or very shortly thereafter. (Id. 14.)

administration" and "wrongdoing."*

Proceeding from its disregard of this finding, the majority opinion characterizes Judge Austin's order as threatening "the termination of a program [Model Cities] ... in order to bring about a cure of a separate program [Public Housing] ..." (Slip opinion 4.) Unquestionably a part of Judge Austin's intention was to bring about a "cure" of the Public Housing Program. But it is equally true that his intention was to enforce compliance with the relocation requirements of the Model Cities Program itself. That in the circumstances of this case the same action would lead to satisfying both objectives does not justify the majority in disregarding the second objective and proceeding as if it were not present.** The fact is that Judge Austin did not enter his order until it had been proved and he had found that there was a "taint" (although not a racial discrimination taint) in the Model Cities Program. It is metaphysical to say that his order seeks to cure the Public Housing but not the Model Cities taint; the order has the effect of doing both. However, the requirement it explicitly enforces, i.e., the provisions of the letter of intent of May 12, 1971, was imposed by HUD as a Model Cities Program requirement ("steps toward

*Once announced, rules, regulations, procedures, policies, etc. of an administrative agency, whether or not compelled by statute and whether or not discretionary, may not blithely be ignored by it. See Service v. Dulles, 354 U.S. 363, 372 (1956); United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969); United States v. Leichtfuss, 331 F.Supp. 723, 739 (N.D. Ill. 1971).

**Whatever Judge Austin's subjective intention, his decision, if correct, would have to be affirmed even if it were upon a ground not relied upon by him. Helvering v. Gorvian, 302 U.S. 238, 245 (1937); 222 East Chestnut Street Corp. v. Lakefront Realty Corp., 256 F.2d 513, 517 (7th Cir. 1958), cert. denied, 358 U.S. 907.

providing relocation feasibility for the Model Cities and Neighborhood Development Programs" - Ex. App. 111-12), not a Public Housing Program requirement.*

For these reasons it is respectfully submitted that the majority errs when it: (1) disregards the fact that HUD failed to comply with its own Model Cities requirements and that Judge Austin so found;** (2) asserts that in the proceeding below HUD was not found guilty of such failure; and (3) characterizes Judge Austin's order as intended to "bring about a cure" of the Public Housing Program while disregarding the fact that the order explicitly enforces a Model Cities Program requirement (although the order has - a characteristic which should be viewed as happy, not fatal - a dual curative effect).

*Plaintiffs include low income people who are applicants for desperately needed low income housing. They are well within the "zone of interests" to be protected by the relocation plan requirement of the Model Cities Statute. (See National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689, 693 (D.C. Cir. 1971) and cases there discussed.) HUD Model Cities regulations make it clear that such a plan must provide for the expansion of low income housing opportunities throughout the community, not just in the Model Cities area and not just for the persons to be displaced by the Model Cities Program itself, and that maximum use is to be made of the Public Housing Program to that end. (See, e.g., HUD Handbook MC 3165.1, supra, pp. 2-3; Appendix A thereto, p.3, ¶7; Ex. App. 7-9.) Accordingly, with HUD already before him in a case involving precisely the need for expanding low income housing opportunities, Judge Austin was entitled to enforce the Model Cities Program requirement in this case. HUD has never questioned (nor does the majority opinion) the standing of the plaintiffs to raise in this case the issue of the failure of the Chicago Model Cities Program to contain an adequate relocation plan.

**The dissenting opinion correctly states, "HUD had failed to comply with the rules and regulations which it had itself promulgated." Slip opinion 28.

II. HUD'S "CHANGE OF INTERPRETATION" DOES
NOT JUSTIFY THE MAJORITY OPINION'S
DISREGARD OF THE DISTRICT COURT'S
FINDING

Why does the majority opinion disregard Judge Austin's finding? The opinion does not say. But at oral argument HUD for the first time announced a new theory of the case. It abandoned its untenable position that its Model Cities relocation plan requirements had been met. Now it asserted instead that it had "changed its interpretation" of those requirements. Therefore, the majority may have reasoned, it was no longer the case that HUD requirements had not been met since the requirements had been changed.

If this is indeed the unstated premise of the majority opinion, it cannot stand analysis. For example, why did HUD not say what its new interpretation was? If not 4300 housing units, then what new number would meet HUD's housing replacement test for Chicago? The answer is that there was no "change of interpretation." There was simply a decision to fund the Model Cities Program even though the relocation feasibility requirement, previously established with "precision," was not met. This is clear from the admission of HUD's Regional Administrator:

"[I] was in no position to make an administrative judgment concerning the release of funds ..." (App. 77.)

Why was Mr. Vavoulis in no position to make that judgment? Because, over a period of many months, and on the basis of a half-inch thick, carefully documented study, HUD had already interpreted and applied the relocation plan requirement for the Model Cities Program in Chicago and Mr. Vavoulis had no new facts and no new study on which to predicate a "change of interpretation."

The Administrator's concern about the City's poor, to which the majority opinion refers (slip opinion 3), is no answer. Congress has determined that, notwithstanding concern for the poor, Model Cities Programs are not to be funded unless they include adequate relocation plans. HUD had no discretion to fund Chicago's Model Cities Program without determining that Chicago had an adequate relocation plan. That determination was never made because on the facts it could not be made. The letter of intent set forth "steps towards providing relocation feasibility" (Ex. App. 111-12, emphasis added), but those steps were not taken. The City and CHA, according to HUD itself, "failed to achieve the objectives" of the letter of intent. (Ex. B, brief of plaintiffs-appellees, p.1.)

It is true that HUD made this determination of ultimate failure in regard to its refusal to fund the Neighborhood Development Program (NDP). But we know that the relocation plan requirements for the two programs are the same, both from the statutory requirement of "equivalence" (42 U.S.C. §3307) and from HUD's regulations and interpretations of them. (HUD's Program Guide for Model Cities, HUD PG-47, p. 16, states, "The relocation plan [for Model Cities Programs] should include the relocation standards prescribed for urban renewal projects.")

The majority opinion notes the argument that if HUD could refuse to fund the NDP Program for failure to meet relocation requirements, it could hardly have been an abuse of discretion for Judge Austin to require HUD to take the same position with respect to the Model Cities Program since both programs have essentially the same relocation requirements. (Slip opinion 6.) But the majority's sole and

unsatisfactory answer to this argument is that "relocation and housing is the entire purpose of the NDP Program while they constitute only a small part of the Model Cities Program." (Ibid.)

This is an incorrect statement about the NDP Program.* It also creates the erroneous impression that housing and relocation are more important under the NDP than under the Model Cities Program.**

But apart from these errors, the argument totally misses the point. As

*The entire purpose of the NDP Program is not housing and relocation. The urban renewal [NDP] statute expressly authorizes up to 35% of urban renewal funds nationwide to be used in nonresidential areas for nonresidential purposes. 42 U.S.C. §1460(c)(10). In his comments on the Report to the Congress of the Comptroller General of the United States on the Urban Renewal Program, B-118754, October 2, 1970, Appendix I, p.2, the Under Secretary of HUD said:

"Housing is certainly a goal - an important goal - of urban renewal, but there are in addition other goals to be served, such as strengthening the economic base of cities, the encouragement of public facilities, the elimination of obsolescent land-use patterns, and the provision of job and business opportunities. It should be pointed out in this context that non-residential redevelopment activities are explicitly permitted in the law."

In fact, a substantial portion of the Chicago NDP was non-residential. Chicago NDP application, HUD Form 6270 (11-68), Program Number 111. A-1, dated March 9, 1970.

**The majority appears to have assumed erroneously that new housing is provided under NDP programs. The fact is that the statute expressly precludes use of NDP funds for such a purpose (by defining "project" as not including, with exceptions not here relevant, "the construction or improvement of any building" - 42 U.S.C. §1460(c)). HUD's Urban Renewal Handbook specifically makes the construction of housing an "ineligible cost" in an urban renewal project. RHA 7218.1, Chapter 1, pp. 1-2. (The only exception is site preparation for housing to be built on air rights, but even this "exception" is limited to site preparation and does not encompass actual construction of the housing. Urban Renewal Handbook, RHM 7209.1, p. 4.)

The pattern under both NDP and Model Cities Programs is to stimulate the provision of housing by the private market and other federal subsidy housing programs, not to provide housing directly. Ironically, the majority emphasizes that only about \$3,000,000 of the Model Cities money was earmarked for the direct provision of housing. (The majority's statement, slip opinion 2, that CHA provides no housing with Model

(continued on page 9.)

we have seen, notwithstanding differences between the two programs the relocation requirements are the same.* Accordingly, it is simply no answer to the plaintiffs' argument, correctly stated by the majority at page 6, to say that the purpose of the NDP Program is different than the purpose of the Model Cities Program and that therefore (by implication) the relocation requirements for the two programs are different. Such an answer is contrary to the statute, to HUD's regulations, and to HUD's consistent written interpretation of its regulations.

Even if we were to disregard the reality that there was no "change of interpretation" but simply a decision to fund the Model Cities Program notwithstanding non-compliance with relocation plan requirements, the result would be the same. HUD's discretion to reinterpret regulations cannot be exercised arbitrarily and is limited by the fair housing policies of the law. Shannon v. HUD, 436 F.2d 809, 819 (3rd Cir. 1970). Here, where the interpretation had been based on a carefully documented study and analysis, the "reinterpretation" apparently took place in the mind of the Regional Administrator, without documentation, without consideration of alternatives (e.g.,

(continued from page 8.)

Cities funds is incorrect. R. 426-27.) But the record does not show that any NDP money was earmarked for the direct provision of housing (and the fact is there was none). The stimulation of new housing is important under both programs, but not more so under NDP than under the Model Cities Program which can be funded only if the program contributes to a "substantial increase" in the supply of low income housing. 42 U.S.C. §3303(a)(3).

*The housing replacement requirement specifically applies to all HUD programs for which a relocation plan is required. (Ex. App. 9.)

conditional funding), and notwithstanding he was not, by his own explicit admission, in a position to make the "reinterpretation."

Moreover, the Administrator did not reinterpret the NDP regulation but cut off funding for non-compliance with it. The reinterpretation thus resulted in a requirement of 4300 new housing units for one program and the absence of such requirement for another program under regulations which, according to Congress, must be "equivalent."*

Even if HUD could somehow successfully negotiate this logical obstacle course, can it be said that it was an abuse of discretion for Judge Austin to take a different view? Professor Davis says that notwithstanding the deference due an administrative agency's interpretation or reinterpretation of its own regulations, there is a "continuing wide margin for judicial discretion." Davis, Administrative Law Treatise (1958), §30.12, p. 260. Though entitled to great weight, the administrative interpretation is "only one input in the interpretational equation." Zuber v. Allen, 396 U.S. 168, 192 (1969); Standard Oil Company of California v. Hickel, 317 F.Supp. 1192, 1197 (1970). Except with respect to internal housekeeping regulations it is not "tolerable doctrine" that merely because an agency authored a

*The Supreme Court has said:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936).

And this Court has said:

"Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily." NLRB v. Mall Tool Co., 119 F.2d 700, 702 (7th Cir. 1941).

regulation, it and it alone is entitled to interpret it. Starzec v. U.S., 145 Ct. Cl. 25, 31 (1959). In discussing the weight to be given the administrative interpretation Professor Davis says that a court may properly consider, among other factors, "judicial confidence in the particular agency - or lack of it, consistency or inconsistency of administrative policy, [and] the length of time the administrative interpretation has been outstanding ..." Davis, *supra.*, §30.13, pp. 262-63.

In light of the circumstances surrounding HUD's "change of interpretation," these factors tellingly support the view that, however this Court might have decided the issue, Judge Austin did not overstep the wide margin for judicial discretion in deciding as he did.

III. JUDGE AUSTIN DID NOT ABUSE HIS DISCRETION
EVEN IF THE ORDER IS TREATED AS A PUBLIC
HOUSING PROGRAM ORDER EXCLUSIVELY

Parts I and II above show that Judge Austin found "wrongdoing" in the Model Cities Program, that HUD's "change of interpretation" does not vitiate that finding, and that the majority erred when it disregarded it. However, even under the majority's view (i.e., treating the order exclusively as a Public Housing Program order), the conclusion that Judge Austin abused his discretion is unjustified.

So treating the case, the argument that Judge Austin possessed the power he exercised, and on the facts of the case did not abuse his discretion, is set forth in the dissenting opinion. We will not repeat Judge Sprecher's discussion of four "guidelines." (Slip opinion 17, 23, 28.) However, there are two considerations, mentioned only in passing

or not at all in the dissenting opinion, which further support its conclusion.

The first is the admission by HUD's Regional Administrator that he was in no position to make the administrative judgment to fund the Model Cities Program. Rarely are courts presented with an administrative decision which is admitted to be without its necessary foundation by the administrator himself. Can it be an abuse of judicial discretion to set such a decision aside? Neither the majority nor the dissenting opinion takes note of this admission.*

The second consideration is the position of both Congress and HUD with respect to the interests the majority says Judge Austin ignored. The majority opinion holds that Judge Austin abused his discretion because he ignored the interests of poor people, mostly black.** But Judge Austin is obviously not insensitive to the interests of poor blacks in Chicago, thousands of whom after all constitute the plaintiff class. (There are more than three times as many poor blacks on the waiting list for CHA housing alone than the 4,000 persons said to be

*The admission was not casual or inadvertent. It was coupled with the statement that Mr. Vavoulis advised the Mayor that nothing would change at that time, that he had raised a number of questions with the Mayor to which he was awaiting answers, and that he could not make a change [i.e., fund the Model Cities Program] until he had the answers. (App. 77.) Mr. Vavoulis also said that in making the decision, "We were not weighing the [Model Cities] program acceptability in relationship to the housing programs of the City ..." (App. 111.) But both the law and HUD's regulations appear to require precisely such a "weighing." See the statute and regulations quoted at slip opinion 21-22.

**The opinion says, "The rights of the many thousands of beneficiaries of the Model Cities Program were entirely ignored." (Slip opinion 4.) It concludes that Judge Austin "ignored the interests of poor people, mostly black, intended by Congress to be the beneficiaries of the Model Cities Programs ..." (Id. 5.)

employed by the City under the Model Cities Program. Slip opinion 9.) Why would he "ignore" such interests?

In 42 U.S.C. §3303(a)(4) Congress provided that Model Cities Programs should be funded only if they had adequate relocation plans. In other words, Congress has determined that notwithstanding the interests of the poor and black, Model Cities Programs are not in the general public interest and public monies should not be spent upon them if they lack adequate relocation plans. Even if his order is viewed solely as a Public Housing Program order, Judge Austin is surely not required to blind himself to that Congressional determination.

HUD also (until its last minute change of position) had determined not to fund the Model Cities Program, again notwithstanding the interests that Program seeks to serve. The majority opinion says, simply, "HUD was prepared" to release the Model Cities funds. (Slip opinion 3.) There is no indication in the majority opinion that HUD had consistently been unprepared to do so until it reversed itself at the last minute, admittedly without adequate ground to do so. Again Judge Austin was not required to blind himself to that fact.

Thus, both the Congressional mandate and HUD's administrative posture furnished support for Judge Austin's judgment. He did not "ignore" interests. He acted in conformity with Congressional and administrative determinations that the interests to be served by the Model Cities Program could not truly be served without adequate housing.

CONCLUSION

At stake here is a beleaguered district judge's ability to

vindicate federal constitutional rights in the face of local intransigence and federal noncooperation. The remedy in this case requires more housing, but federal judges cannot build housing. They can only try to make the appropriate local and federal agencies do so. This Judge Austin is trying to do. (See the orders attached as Exhibits C and D to the brief of plaintiffs-appellees.) But he needs all the weapons in the judicial arsenal to succeed.

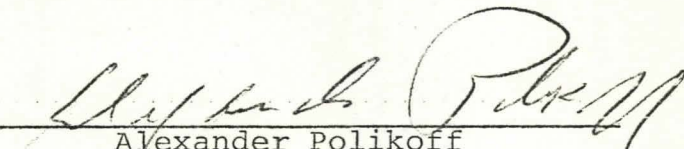
Judge Austin has been patient and cautious; he has exercised his discretion sparingly. (Slip opinion 10-11, 29.) This Court has expressed its "strong support" for his actions, has recognized that he is faced with "a difficult and time-consuming task, presenting unique problems for resolution," and has said it would be "extremely reluctant" to interfere with his exercise of sound discretion in this matter. 448 F.2d 731, at 734. In this phase of the case, whether or not his order is treated exclusively as a Public Housing Program order, Judge Austin acted only after it was demonstrated that HUD's own requirements for the provision of housing in connection with Model Cities Programs had not been complied with. Judge Sprecher correctly observes that in this ongoing matter there is no reason to believe that Judge Austin would not respond "carefully and prudently" to any need for adjustment or amendment of his order. (Slip opinion 29.) His prior order (304 F.Supp. at 741) makes clear his sensitivity to the need for such flexibility.

We think that due recognition of the course of this litigation, of the appalling nature of the problem with which it deals, of Judge Austin's patience and restraint, of the nature and quality of the

administrative decision be reversed, of the relevant provisions of statutes and regulations, and of the broad and flexible powers of equity courts when dealing with federal constitutional wrongs, - all dictate that the order appealed from be affirmed.

Respectfully submitted,

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