
In the
United States Court of Appeals
For the Seventh Circuit

Nos. 72-1409, 1410

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellees,

vs.

CITY OF CHICAGO and RICHARD J. DALEY, Mayor, etc.,
Defendants-Appellants,

and

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellees,

vs.

FRED B. ROTI, et al., Members of the City Council of the City of Chicago,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

—
Honorable
Richard B. Austin,
District Judge.

BRIEF AND APPENDIX FOR APPELLANTS CITY OF CHICAGO AND RICHARD J. DALEY, MAYOR, ETC., AND FRED B. ROTI, ET AL., MEMBERS OF THE CITY COUNCIL OF THE CITY OF CHICAGO.

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ISSUES PRESENTED FOR REVIEW.

1. Whether the City of Chicago, the Mayor of the City of Chicago, and the members of the City Council of the City of Chicago were properly joined as parties defendant solely for purposes of relief, where the record is

clear that they committed no violations of plaintiffs' constitutional rights.

2. Whether the power granted to the City Council of the City of Chicago under Paragraph 9, Chapter 67½, Illinois Revised Statutes, to approve public housing sites, may be set aside by the district court under the circumstances of this case for the purpose of granting relief.
3. Whether plaintiffs are entitled to the relief granted under the judgment order with respect to public housing site selection.
4. Whether the district court abused its discretion in entering the judgment order and the order of April 10, 1972, despite the tangible hardships they impose upon the public and, particularly, low-income residents of the inner city.

STATEMENT OF THE CASE.

This is an appeal from an order entered April 10, 1972, denying motions to dismiss the supplemental complaint, setting aside an Illinois statutory provision requiring local government approval prior to the acquisition of real property to be used for public housing, and directing the Chicago Housing Authority to proceed, without City Council approval, to "begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon. . . ."

In order to place in its proper context this most recent phase in this protracted litigation, it is necessary to begin with the district court's first reported decision in *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (1967). There the Court ruled (at 584) that

"To accept plaintiff's contention that allegation and proof of an intent to discriminate among the races is unnecessary is to conclude that the mere placement of public housing projects that will in all probability be occupied largely by tenants of a specific race in neighborhoods containing a significant number of residents of the same race is in itself an act of discrimination forbidden by the Fourteenth Amendment, regardless of the many other factors, imposed here by statute [footnote omitted], such as need, cost, and rehabilitation of deteriorating neighborhoods. The Constitution compels no such conclusion; rather it commands only that defendants administer the site selection aspect of their housing program untainted by any design to concentrate Negro or white tenants in some areas to the exclusion of other areas."

On February 10, 1969, the district court filed its memorandum opinion (296 F. Supp. 907; set out in Appendix C, p.

A13) in which it ruled in favor of the plaintiffs and against the defendant, the Chicago Housing Authority. At this time the City of Chicago, the Mayor and the Aldermen of the City of Chicago were not parties. None of the City's officials were called as a witness.

The memorandum opinion began by finding a violation in CHA's admitted practice of employing a racial quota in the assignment of tenants to four housing projects located in areas which were substantially "white." The opinion then proceeded to consider the question of housing site selection. The court's analysis began by eliminating from consideration all public housing for the elderly "of which 54½% are in substantially white neighborhoods." (296 F. Supp. 907, 911.) Restricting the inquiry to family units, the court noted that the vast majority—virtually all—of the family units were located in areas which were or soon would be substantially all black. The court, without more, concluded as follows (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."

The court noted that all sites selected by CHA must be approved by the City Council of the City of Chicago pursuant to Paragraph 9, Chapter 67½, Illinois Revised Statutes. CHA, it was alleged, would informally submit sites for family housing to the alderman in whose ward the site was located (at 910). On the basis of depositions taken from CHA officers, the court found that "Most aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes" (at 914). At the same time, the court found it (1) "undoubtedly that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and

urgent goals of low cost housing and urban renewal" (at 914), and that (2) "It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods" (*ibid.*).

The district court then went on to grant plaintiffs' motion for summary judgment. On July 1, 1969, the judgment order was entered (Appendix D, p. A28), dividing Cook County, Illinois, into two areas, the "Limited Public Housing Area" consisting of all census tracts having 30% or more non-white population and all tracts within one mile of any such tract; and the "General Public Housing Area" consisting of all remaining census tracts (304 F. Supp. 736, 737). CHA was enjoined from constructing any dwelling units in the Limited Area until 700 units had first been located in the General Area. Thereafter, construction is to proceed with at least 75% of all dwelling units to be constructed in the General Area, and 25% in the Limited Area.

It was not until March 5, 1971, that CHA submitted sites for consideration by the City Council (Plaintiffs' Ex. 1). The 235 sites, providing for some 1,450 dwelling units within the General Public Housing Area, were referred to the Council's Planning and Housing Committee. Subsequently, CHA withdrew 83 of the 235 sites for various reasons affecting their acceptability. During June of 1971 the Planning and Housing Committee held hearings on 43 of the 235 sites; the committee approved 12 sites and disapproved 31. Shortly thereafter, the City Council approved the 12 sites recommended by the committee, and also approved 32 additional sites in the General Public Housing Area which had not been in the CHA submission. The total thus approved by the Council between March and June of 1971 was 44 sites in the General Area (Plaintiffs' Ex. 1), yielding approximately 300 dwelling units (Transcript, p.

49). The Council then adjourned for its summer recess, holding only one regular meeting between June and September 15, 1971.

On September 17, 1971, plaintiffs moved to enjoin the funding of the Chicago Model Cities program. The requested order was entered, an appeal to this Court was filed, and the order was reversed on March 8, 1972 (*Gautreaux v. Romney*, 457 F. 2d 124, 7th Cir. 1972).

While the appeal referred to above was under advisement, however, plaintiffs filed a supplemental complaint (see Appendix A) adding as parties defendant for the first time the City of Chicago, the Mayor of the City of Chicago, and the fifty members of the City Council. The supplemental complaint purported to add these parties only for the purpose of granting relief to the plaintiffs. Motions to dismiss the supplemental complaint and to alter and amend the Judgment Order were filed. The district court then ordered defendants to file answers prior to disposition of the motions. Motions for a three-judge court (42 U. S. C., sec. 2281) and for a jury trial were denied. A hearing was then held, beginning on April 4, 1972.

Plaintiffs introduced a stipulation of facts (Plaintiffs' Ex. 1) and several other exhibits, then rested (Transcript, p. 68).

Defendants' case began with testimony as to the sites not approved (Transcript, pp. 69-199). They were shown to be in violation of the Chicago Zoning Ordinance, or otherwise burdensome upon public services, including school attendance.

Testimony was given as to the vast area from which any public housing is excluded by the lower court's order (City Exhibits 3C, 3D). Approximately 98 percent of all City-owned land, all acquired through demolition proceedings, is located within the Limited Public Housing Area (Transcript, pp. 211-215; City Ex. 3E). Approximately 75 to 80% of the residually-zoned vacant land in the City is

located within the Limited Public Housing Area (Transcript, p. 217; City Ex. 3F).

Defendants also introduced testimony as to the deterioration afflicting neighborhoods within the Limited Area. The need for new construction, the unavailability of private investment, and the necessary role of new public housing in stabilizing an area were all placed before the district court (Transcript, pp. 222-237, 285-313, 316-398; Kelley Group Ex. 2; Holman Ex. 2-22).

There was also testimony concerning the special problems affecting the Spanish-speaking community. Many Latin Americans live within the so-called buffer zone, the belt which includes all census tracts within one mile of tracts with a population that is 30 percent or more black. It was stated that language and cultural services available within the various Spanish-speaking communities could not be provided to Latin Americans forced to live in widely dispersed housing. Public housing, however, is not now available in these communities and, under the Judgment Order, may be constructed at a negligible rate (Transcript, pp. 345-392; Keane Ex. 1, 2A-2K).

At the conclusion of the hearing the district court denied defendants' motions and granted the relief sought by the plaintiffs. The order, entered April 10, 1972, and from which this appeal is taken, appears as Appendix B to this brief.

ARGUMENT.

I.

THE CITY OF CHICAGO, THE MAYOR OF THE CITY OF CHICAGO, AND THE SEVERAL MEMBERS OF THE CITY COUNCIL WERE IMPROPERLY JOINED AS PARTIES DEFENDANT FOR PURPOSES OF RELIEF IN THAT THEY HAVE NOT BEEN FOUND TO HAVE VIOLATED ANY RIGHT CLAIMED BY THE PLAINTIFFS, NOR HAVE THEIR OBJECTIVES IN THE LOCATION OF PUBLIC HOUSING BEEN FOUND TO BE UNCONSTITUTIONAL. THESE DEFENDANTS THEREFORE HAVE PROVIDED NO OBSTACLE TO THE DISTRICT COURT'S POWER TO GRANT APPROPRIATE RELIEF.

The April 10 order of the district court directs the Chicago Housing Authority to ignore that provision of Paragraph 9, Chapter 67½, Illinois Revised Statutes, which requires the approval of "the governing body of the municipality" prior to CHA's acquisition of real property. In so doing, the district court attempted to strip the city council of its legitimate authority without any finding that the council had a duty to carry out the dictates of either the memorandum opinion (296 F. Supp. 907) or the judgment order (304 F. Supp. 736) entered in earlier stages of this litigation.

Until the filing of the supplemental complaint on February 1, 1972, the City and its mayor and aldermen, were not parties to this suit. These defendants have never been formally charged with a violation of the constitutional or civil rights of the plaintiffs. Nor have they, of course, been allowed to contest the assumption that they have, in some way, participated in depriving the plaintiffs of some right. Nevertheless, it is a conclusion of law by the court

below that these defendants have violated "the rights of the plaintiffs and the class they represent under the equal protection clause of the Fourteenth Amendment to the United States Constitution" (Appendix B, p. A8).

That conclusion of law is insupportable. "It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Zenith Radio Corporation v. Hazeltine Research*, 395 U. S. 100, 110 (1969).

Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction

"is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The Supreme Court has described this provision as being "derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N. L. R. B.*, 324 U. S. 9, 14 (1945).

It is clear, of course, that these defendants are not in privity with CHA or with the Department of Housing and Urban Development, they are not represented by them, and are not subject to their control. And most certainly, they are not "identified with them in interest." Indeed, as the evidence indicates, these defendants have interests far broader than simply that of providing low-income housing. Moreover, there is no evidence, as the memorandum opinion of February 10, 1969, concedes, that these defendants were

"in active concert or participation" with CHA or HUD. Consequently, *res judicata* does not apply here.

Below, the plaintiffs asserted in their memorandum in opposition to the various motions to dismiss the supplemental complaint (at p. 2) "that if the *effect* of the operation of Section 9, Chapter 67½, Illinois Revised Statutes, has been and is to deny plaintiffs relief to which they are entitled, then plaintiffs may have the declaratory judgment they seek." However, each of the cases¹ cited in support of plaintiffs' claim involved administrative personnel whose functions were ministerial and were related only to the operation of a school system. No case has been cited which adds as a party for the purpose of granting relief a legislative body which, in a legislative and representative capacity, is concerned not simply with the operation of a public housing program, but which is also concerned with city-wide planning and zoning, with population density and environmental control, and with the provision of public services and the maintenance of a real estate tax base adequate to support such services.

Also, one of the cases relied upon, *Bradley v. School Board of Richmond, Virginia*, 324 F. Supp. 396 (E. D. Va. 1971), has recently been reversed by the United States Court of Appeals for the Fourth Circuit (72-1058, decided June 5, 1972). There the district court had allowed joinder of "parties needed for just adjudication", including the

1. *Louisiana v. United States*, 380 U. S. 145 (1965); *Haney v. County Board of Education of Sevier County*, 429 F. 2d 364 (8 Cir. 1970); *United States v. Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Cir. 1969); *Bradley v. School Board of Richmond Virginia*, 324 F. Supp. 396 (E. D. Va. 1971); *Aytch v. Mitchell*, 302 F. Supp. 1372 (E. D. Ark. 1971); *United States v. State of Texas*, 321 F. Supp. 1043 (E. D. Texas 1970); *Burleson v. County Board of Election Commissioners*, 308 F. Supp. 352 (E. D. Ark. 1970).

administrators of the county school systems adjoining Richmond. The Fourth Circuit, in reversing, noted that

"neither the record nor the opinion of the district court even suggests that there was ever joint interaction between any two of the units involved . . . for the purpose of keeping one unit relatively white by confining blacks to another." (Slip sheet opinion, p. 16.)

An examination of the memorandum opinion filed February 10, 1969, in this case (296 F. Supp. 907) leads to a similar conclusion. There were originally two practices alleged to be discriminatory, one in the assignment of tenants, the other in the selection of building sites. With the first of these practices, the assignment of tenants, the City defendants had no connection, and the council has no power, under paragraph 9, to control such assignment. Nothing was alleged to the contrary. The only evidence relating to the second practice, the selection of sites, is based upon either a statistical analysis of site location or upon numerous affidavits and depositions taken from CHA administrators. The latter, at least, must be considered hearsay to the extent they concern the motivation or intent of the City defendants. The court below admitted that

"sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal." (296 F. Supp. at 914.)

Further, the court conceded that

"It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods." (*Ibid.*)

The preceding quotation is interesting in that while it states that there is "no evidence" against any or all of the aldermen, it assumes, presumably on the basis of CHA

affidavits, that the aldermen were acting on what was somehow determined to be public sentiment. The fact is, of course, that there is no acceptable evidence of either aldermanic or public sentiment. Even the court's statistical analysis is open to question: in arriving at its conclusion that most blacks living in public housing were in "black" sites, the court first excluded all of the sites with public housing for the elderly. The sites for elderly housing are, as the court notes, evenly distributed, with approximately 55% in substantially white neighborhoods. Thus, even the court's statistics cast doubt upon the *racial* basis for public motivation.

Possibly in an effort to avoid such difficulties, it was argued below that

"plaintiffs need not establish and they do not intend to try to establish that there is a racially discriminatory motivation lying behind the obstacle of the City Council's veto power or, indeed, that there may not be benign reasons for the City Council not having acted on any individual sites. It is clear on the basis of the numerous cases we have cited to your Honor . . . that the Court has the power to enter the declaratory judgment we seek without proof of that kind of motivation and without proof that there may not be valid state reasons, benign state reasons, for nonaction." (Transcript, pp. 13-14.)

But it has been shown above that the cases referred to do not establish that judicial power. They do not permit joinder of a legislative body which, without proof of constitutional violation or of invalid objectives, is asserted to be an "obstacle" that is subject to judicial abatement at the whim of the plaintiffs. Moreover, Mr. Chief Justice Burger, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), has stated flatly for a unanimous Court (at 16):

"In seeking to define even in broad and general terms how far this remedial power extends it is important

to remember that judicial powers may be exercised only on the basis of a constitutional violation."

In the context of a school desegregation case, the Chief Justice suggested that it is conceivable that school officials might believe a racial quota useful.

"To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." (At 16.)

No constitutional violation with respect to site selection has been attributed to any defendants, much less the City defendants, in any stage of these proceedings. And, indeed, perhaps the administrative defendants (CHA and HUD) might have the power to establish some kind of racial quota in site selection apart from a constitutional violation. The question here is whether a court may do so, lacking proof of a violation, against a legislative body which has its own valid basis for action.

Finally, if the inquiry may be limited to the reason assigned by the court below, that is, city council recalcitrance, the order of April 10 indicates that the period of "inaction" is merely from July 1, 1971, until the date upon which the supplemental complaint was filed, February 10, 1972. As the evidence shows, CHA submitted 235 sites in the General Housing Area to the city council on March 5, 1971. The council held hearings with respect to 43 of the sites in June of 1971 and sites sufficient for approximately 300 units were approved. The council then adjourned for its summer recess; there was only one regular meeting between June 11 and September 15, 1971. On September 17, 1971, plaintiffs moved to enjoin HUD from funding the Chicago Model Cities program until sites were approved; certain of the City defendants intervened, the order was entered, and the intervenors appealed (*Gautreaux v. Rom-*

ney, 457 F. 2d 124, 7th Cir. 1972). Had the city council proceeded to consider sites—favorably or unfavorably—the appeal in *Gautreaux v. Romney* could well have become moot. The supplemental complaint joining the City defendants was filed February 10, 1972; the Model Cities case was not decided until March 8, 1972. Consequently, it is wholly unfair for the district court to consider this delay, under these circumstances, as an effort to “frustrate” the court’s will.

In sum: plaintiffs have never charged the City defendants with a violation of their constitutional rights. It has never been asserted that these defendants’ objectives in considering the location of public housing have been other than constitutional. No evidence has been offered indicating that the City defendants have been in “active concert or participation” with other defendants who may have been found to violate rights claimed by the plaintiffs. It was therefore improper to join the City defendants for the purpose of granting further relief in this matter.

II.

THE EFFECT OF THE OPERATION OF THE CITY COUNCIL’S AUTHORITY TO APPROVE PUBLIC HOUSING SITES DOES NOT DENY PLAINTIFFS ANY RELIEF TO WHICH THEY ARE ENTITLED.

The district court ruled as a matter of law that

“Under the evidence in this case, the effect of the operation of the foregoing provision of Section 9, Chapter 67½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from assuring that a full remedy is provided for the violations of federal constitutional rights which this Court’s memorandum opinion of February 10, 1969 found to have occurred.

This conclusion of law is curious inasmuch as it assumes that the democratic process is acceptable only if it rubber-stamps the plaintiffs’ view of how competing considerations are to be balanced. Plaintiffs’ view, apparently, is that planning and zoning, population density, availability of public services, and the property tax base, for example, are to be ignored if they stand in the way of any specific housing site.

However, implicit in the democratic process is the possibility that other considerations will be given a higher priority than those of any particular proponent, in this case, those of the plaintiffs and of the district court. That, at least, is the attitude of the United States Supreme Court. In *James v. Valtierra*, 402 U. S. 137 (1971), the Court was confronted with a situation analogous to that before this Court. In California, as in Illinois, public housing authorities had been established for the purpose of channeling federal financing made available under the United States Housing Act of 1937, 42 U. S. C., sections 1401 *et seq.* In place of the council approval required under Illinois law, California law provides “that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.” 402 U. S. at 139. After the defeat of several proposals, suit was brought to have the referendum requirement declared in violation of the Constitution as contravening the Supremacy Clause, the Privileges and Immunities Clause, and the Equal Protection Clause. A three-judge district court accepted the equal protection argument and enjoined operation of the referendum provision; on direct appeal, the Supreme Court reversed.

The three-judge court specifically considered the argument that the referendum provision, as it operates,

“denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a

referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protection clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision. . . ." *Valtierra v. Housing Authority*, 313 F. Supp. 1, 4 (N. D. Calif. 1970).

In addition, the so-called discriminatory effect of the provision was directly raised before the Supreme Court by the parties to the appeal. Thus, the appellees argued that

"While the Justices have sometimes disagreed as to whether it [residential segregation] is legally curable in its purely private form . . . there has never been a question that its legitimation by any form of governmental authority is unconstitutional. [Citing, *inter alia*, *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907, 304 F. Supp. 736 (N. D. Ill. 1969); *Hicks v. Weaver*, 302 F. Supp. 619 (E. D. La. 1969); *Kennedy Park Homes Assn., Inc. v. City of Lackawanna*, 436 F. 2d 108 (2d Cir. 1970).]" Brief of Appellees Anita Valtierra, et al., U. S. Supreme Court, October Term, 1970, Nos. 154, 226, p. 63.

It was also argued to the Court, again citing *Gautreaux* and the other cases, that

"The unequal burden of Article 34 is but one aspect of a pervasive pattern of racial discrimination. This pattern perpetuates residential segregation and discriminatorily denies to minorities a wide range of opportunities." Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., *Ibid.*, pp. 26-28.

Moreover, the record in *Valtierra* was filled with affidavits of individuals asserting that the motive behind the failure of the referendums was racial (Appendix, *James v. Valtierra*, U. S. Supreme Court, October Term, 1970, Nos. 154, 226, pp. 122-155). For example, in a manner similar to that in this case—and relied upon in the lower court's memoran-

dum opinion—the executive director of the San Mateo Housing Authority stated in an affidavit:

"It is the belief of the affiant that fear by middle and above income residents of a devaluation of property, coupled with social fears of minority and low-income family influx, preempts a possibility of a successful referendum." *Ibid.*, p. 122.

It is thus clear that all of the issues present in the instant case were before the Supreme Court when it took *Valtierra* under advisement. Notwithstanding the allegations and affidavits, Mr. Justice Black, writing for the Court, wrote:

"The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." (402 U. S. at 141.)

Observing that referendums "demonstrate devotion to democracy, not to bias, discrimination, or prejudice" (402 U. S. at 141), Justice Black went on to explain that

"This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.* It gives them a voice in decisions that will affect the future development of their own community.

* [Court's footnote.] Public low-rent housing projects are financed through bonds issued by the local housing authority. To be sure, the Federal Government contracts to make contributions sufficient to cover interest and principal, but the local government body must agree to provide all municipal services for the units and to waive all taxes on the property. The local services to be provided include schools, police, and fire protection, sewers, streets, drains, and lighting. Some of the cost is defrayed by the local governing body's receipt of 10% of the housing project rentals, but of

course the rentals are set artificially low. Both appellants and appellees agree that the building of federally financed low-cost housing entails costs to the local community. [Citations omitted.]”

There was a dissent to the Court’s judgment. Yet despite the allegations and the affidavits as supporting “proof” of discrimination, even these Justices found no racial dimension in the case.

Valtierra is not the only decision protecting the public right to determine the local impact of public housing. In *Ranjel v. City of Lansing*, 417 F. 2d 321 (6th Cir. 1969), cert. denied, 397 U. S. 980 (1970), a suit was brought by blacks and Mexican-Americans to enjoin a referendum on a “spot” zoning ordinance enacted by the city council to rezone a site in a one-family residence district so as to permit construction of low-rent townhouse and elderly units. The district court entered an order permanently enjoining a referendum on the ordinance which, on appeal to the Sixth Circuit, was reversed. The court of appeals noted that

“In holding that the referendum was motivated by racial factors, the District Court necessarily had to reach that conclusion by searching the minds of 15% of the electorate who signed the referendum petition, and the remaining 85% who were enjoined from voting, none of whom were called as witnesses to testify in the case.” (417 F. 2d at 323.)

In rejecting the opinion evidence relied upon by the district court in support of its findings as to discrimination, the Sixth Circuit stated that “if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial.” (417 F. 2d at 324.)

In *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291 (9th Cir. 1970), plaintiffs sought to set aside a referendum that had overturned

an ordinance rezoning a single-family district to permit development of federally financed low-income multifamily housing. Denying relief, the court of appeals answered plaintiffs’ contention that the purpose of the referendum was to discriminate racially by commenting that

“many environmental and social values are involved in determinations of land use. As the District Court noted, ‘* * * [T]here is no more reason to find that [rejection of rezoning] was done on the ground of invidious racial discrimination any more than on perfectly legitimate environmental grounds which are always and necessarily involved in zoning issues.’” (424 F. 2d at 295.)

Furthermore, the court stated that the question of the motivation for the referendum was not “an appropriate one for judicial inquiry.” (*Ibid.*) See also *Thompson v. Housing Authority*, 251 F. Supp. 121 (S. D. Fla. 1966), in which a preliminary injunction was denied on facts similar to those in this case; and *Johnson v. New York State Education Dept.*, 449 F. 2d 871 (2d Cir. 1971).

Clearly, the referendum procedure upheld in these cases is directly analogous to the city council consideration voided by the court below. The memorandum opinion specifically found that

“there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. Humphrey Dep. I, pp. 116-117; Rose Dep., p. 59. But even if the Aldermen’s informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing.” (296 F. Supp. at 914.)

Thus, the intention to discriminate² is based, as in the referendum cases, upon a claim of an "assessment of public opinion." The city council-referendum analogy is supported as well by the fact that the considerations found validly to support referendums (*e.g.*, local expenditures, tax revenues, public services: *Valtierra*; environmental and social values: *Southern Alameda*) are relevant whether applied to a public referendum or a city council vote.

The cases cited above establish a development in the concept of equal protection away from the simplistic identification of an "effect" that a program may have upon a minority group. In *English v. Town of Huntington*, 448 F. 2d 319 (2nd Cir. 1971), plaintiffs sought to block their eviction as a result of an urban renewal project. They alleged that there was a plan of the Town of Huntington to force blacks and Puerto Ricans out of the Town. In affirming denial of an injunction, Chief Judge Henry Friendly wrote:

"We do not think the mere fact that the occupants of these buildings are blacks and Puerto Ricans prevents the Town from taking action it would be constitutionally entitled to take if they were white. It is an unpleasant fact of life that housing like this will be occupied by poor people, and a still more unpleasant one that black and Puerto Rican citizens are over-represented in that group." (448 F. 2d at 324.)

More recently, in *Jefferson v. Hackney*, U. S., 32 L. Ed 2d 285 (1972), plaintiffs urged that equal protection was denied Negroes and Mexican-Americans in an aid-to-dependent-children program, where they comprised a higher percentage in that program than in other pro-

2. The evidence of intent was "composed mostly of uncontradicted admissions by CHA officials." 296 F. Supp. at 913. Assuming the probative value of such "admissions", they would of course be "uncontradicted"; the only other parties at that time were the plaintiffs who would not, of course, be inclined to challenge their truth.

grams, and other programs were funded at a more generous rate. The Court responded, at 297:

"The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment."

The lesson of these cases, particularly *James v. Valtierra*, is that whatever equal protection meant in 1969 when the memorandum opinion was filed in the court below, it has undergone considerable development; and further, they mean that any legal theory supporting the memorandum opinion no longer has validity. For these reasons, the city council's authority to approve public housing site selection should not be set aside but, rather, should be protected by this Court.³

III.

THE HARDSHIPS RESULTING FROM THE ORDER OF APRIL 10 AND THE JUDGMENT ORDER IT PURPORTS TO ENFORCE ARE SO GREAT THAT BOTH ORDERS CONSTITUTE ABUSES OF THE DISTRICT COURT'S DISCRETION.

Assuming *arguendo* that there is some basis in constitutional law for the judgment of the district court in this case, there remains the difficult question of the nature of relief available to the plaintiffs. The district court has sought to implement its judgment through a series of injunctions. The remedy of injunction is exercised, of course, in the sound discretion of the court. That discretion, how-

3. Cf. *System Federation No. 91 v. Wright*, 364 U. S. 642 (1961) in which it was held to be an abuse of discretion for the district court to fail to modify a decree after a change in the law.

ever, is not unbounded. Its contours are shaped by, among other factors, the public and social consequences of its exercise. Mr. Justice Douglas has observed that "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944). Unhappily, the injunctions entered below in this case have been characterized not by "adjustment and reconciliation", but by rigidity and fervor. The result has been needless and undeserved hardship, suffered by the community at large, irrespective of race and nationality.

Public housing has, from its beginnings, been closely tied to urban renewal. The declaration of policy that prefaces the Housing Act of 1937 states that its purpose is

"to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . ." 42 U. S. C. section 1401.

Almost two-thirds of the City of Chicago lies within the "Limited Public Housing Area." It has, obviously, been within that same area that most of the slum clearance has been carried out. That has been where most of the "unsafe and insanitary housing" in the City has been found. One witness below testified that of the land owned by the City (acquired through demolition proceedings), only 22 sites, representing two percent of the total, were located within the General Housing Area (Transcript, p. 213; City Ex. 3E). As aging buildings succumb to blight, they may be rehabilitated (but only rarely rehabilitated, due to high costs), or they must be demolished. Increasingly, buildings which no longer provide an adequate return on investment have been abandoned or transferred to public ownership in satisfaction of real estate tax liability. They, too, are inevitably demolished. The result has been a steady

attrition in the housing supply for low-income families, creating a shortage that has become critical.

In addition to its obvious contribution to the supply of housing, public housing has a less tangible, but nonetheless significant and valuable effect in stabilizing an area. Urban renewal demolition may wipe out the most pervasive pockets of blight, but it cannot halt the cancerous spread of that blight unless the vacant wastelands caused by demolition are redeveloped. One possible source of development is private investment; but experience has proven that few investors are willing to risk capital in the inner city. The alternative has been public investment, largely in the form of housing. The land is cheap; its use means that other, revenue-productive, land need not be retired so as to constrict further the real property tax base. The new construction improves the neighborhood and tends to lessen the burden of use on older buildings in the area; it thus tends also to halt the decline of the neighborhood.

But "benign" considerations are to be ignored, say the plaintiffs: the statistics indicate that too much housing is constructed in neighborhoods with a high black population. The Constitution forbids it, they say, and commands dispersal of blacks. (It is a paradox of contemporary times that while urban renewal is often attacked as "black removal", plaintiffs here demand the same result in the name, presumably, of reform.)

This means, of course, that vast areas of the inner city must remain vacant for, under the order entered by the court below July 1, 1969, no public housing may be erected in the Limited Housing Area (which encompasses the inner city) until 700 units are first built in the General Housing Area, and thereafter only on a 1-to-3 basis, one unit in the Limited Area for each additional three units in the General Area. Furthermore, the Housing and Urban Development Act of 1968 (42 U. S. C. Sec. 1455(f)) requires that 20

percent of new housing built in urban projects must be for low-income families; that 20 percent can, under the district court's order, be built only if three times that number is constructed in the General Housing Area. Not only must the available land thus remain indefinitely vacant, contributing to the further erosion of the inner city, but it must be replaced by land which must be purchased or acquired by condemnation, land which is revenue productive but which will become largely unproductive under public ownership.

The district court heard abundant testimony as to the need for immediate construction, all of it unrebutted. Clifford Kelley, Alderman of the Twentieth Ward in the City of Chicago, testified that there is "an immediate need for low income housing" (Transcript, p. 290). Speaking of his efforts in organizing the rehabilitation of existing structures in the area, he stated that

"due to the low income status of the people who live in the area, a private developer would have to charge too much rental in order to bring about a profit than the people there can afford to pay. And there is no interim financing." (Transcript, p. 291.)

Graphically to support his position, Alderman Kelley presented to the district court photographs of buildings in his ward (Kelley Group Exhibit 2) which were abandoned, gutted, and uninhabitable. While he believed that some were structurally sound and might be rehabilitated, he did not "want to give the wrong impression that many of these buildings can be rehabilitated. The greatest number of them will have to be demolished and there will have to be new construction" (Transcript, p. 297).

When asked on cross-examination why his colleagues found the district court's order objectionable, Kelley did not indicate that race was a factor; rather, it was his view that

"Many people feel that if they have property that is worth so much, that the value of it will be depreciated

by having low rental property in the area. That is the major reason given." (Transcript, p. 300.)

Claude W. B. Holman, Alderman of the Fourth Ward, also introduced photographs of deteriorating buildings in his ward (Holman Exhibits 2 through 19). Without the construction of new low-cost housing, the area would, he thought, "continue to deteriorate" and ultimately "become a ghost town." He added that the land is not being developed through private investment because

"it does not warrant the private developer to build houses that would be substantial and comparable to the new houses that the CHA has on its drawing boards. It wouldn't yield a return. That is the feedback that I get from the private developers." (Transcript, p. 323.)

Another way in which the district court's orders contribute to the inner city's deterioration is in their impact on the important federal policy implemented by the Model Cities Program. This program (42 U. S. C. Section 3301 *et seq.*) finances a broad range of social service projects including, for example, health care, child care, and education. Its avowed purpose is the rebuilding of the inner city. Obviously, to the extent that the district court's orders restrict reconstruction of housing in Model Cities areas lying within the Limited Housing Area, that program's effectiveness is correspondingly blunted. Plaintiffs contend that any "benign" considerations these defendants might have are irrelevant in determining whether a program is constitutional. The lower court's view is that a high statistical correlation between public housing sites and predominantly black residential areas is sufficient to prove "a deliberate policy to confine public housing" (296 F. Supp. at 910) to those areas. Together these positions raise the question of whether "benign" efforts to provide aid which will be generally available to a minority group can ever be

considered constitutional. Is Model Cities, then, itself unconstitutional?

It will be noted that most of the sites presented by CHA to the City Council were found, by the Department of Urban Renewal Staff, to be wanting. Many were in areas where the schools are already overcrowded. Many were in business or manufacturing areas, or on heavily-trafficked streets. Almost all, even those in otherwise residential areas, would be in violation of the City's comprehensive zoning ordinance.

The zoning consideration should not be minimized, principally because of the nature of Chicago's zoning ordinance. Zoning began as an extension of existing principles of the law of nuisances. Under early ordinances, cities were divided into residential, business, and manufacturing districts. Since nuisance was the core concept, a factory would not be permitted in a residential district because of the resulting harm to home owners, but nothing prevented the introduction of a one-family house in a manufacturing district because, presumably, there would be no harm to the adjacent factory. Under the impetus provided by decisions such as *Berman v. Parker*, 348 U. S. 26 (1954), the theoretical basis for zoning shifted from nuisance to planning considerations. A comprehensive plan is not specifically or exclusively concerned with nuisance or relative harm; rather, it considers matters such as population density patterns and projections, traffic patterns, localized need for services such as water and sewage, education, and the availability of services, both public and private, with relation to the particular population density that must be served. Thus, while under nuisance doctrines a one-family house might not offend a business district, under planning concepts a one-family house in a business district would clearly upset the balance between residential areas and the business,

commercial, or manufacturing areas required to serve them.

Similarly, residential districts are divided according to the population density allowed within each, ranging from single-family areas requiring not less than 6,250 square feet of lot area per dwelling unit, to high-density apartment building areas permitting 115 square feet of lot area per dwelling unit. The maintenance of these controls is critical to the continuance of the comprehensive plan. Under Illinois law, the determinative factor in the constitutional application of the zoning ordinance to any particular parcel of real estate is the "character of the neighborhood", cf. *LaSalle Nat. Bank v. County of Cook*, 12 Ill. 2d 40, 46-47 (1957). Therefore, should a nonconforming use or a nonconforming density be introduced in an area, it immediately affects the character of the neighborhood and inevitably leads to changes in the entire district, changes which disturb the balances created by the comprehensive plan.

For these reasons, the submission of sites sufficient for construction of 1,550 dwelling units with virtual disregard of the zoning ordinance is not something to be viewed casually by those charged with the preservation of the urban environment. Many sites are in commercial or manufacturing districts. Some are in business districts which allow residential development but which require that the ground floor of each structure be restricted to business uses. Most of those in residential districts do not meet the minimum lot size requirements. Yet, although the City painstakingly, site-by-site, went through the CHA submission to explain to the district court the individual objections, the district court again disregarded these environmental factors and found that recognition of such matters would "deny plaintiffs the relief to which they are entitled under the Judgment Order" (Appendix B, p. A8).

One group upon whom the court's orders impose a particular hardship is the Spanish-speaking people in the City of Chicago. Under the decree, the Limited Public Housing Area includes not only those census tracts in which the black population consists of 30 percent or more of the total, but also all census tracts within one mile of any such tract. It is within this one-mile peripheral zone—the “buffer zone”—that many Spanish speaking people live (Transcript, p. 378). Because of the language problem, special programs have been established for the benefit of this community. The Chicago Board of Education has instituted bilingual programs which teach English as a second language in an effort to aid in the integration of children and adults into the English-speaking community. The Chicago Public Library has supplied area branch libraries with a greater selection of Spanish language books than are otherwise available. “A tremendous amount of small businesses have been developed there, owned by Puerto Ricans and other Latin American people. . . .”(Transcript, p. 360). Approximately 150 police officers of Latin American descent are assigned to the district. Community workers “get the people in the area involved in problems of employment, housing, education, recreation” (Transcript, p. 377).

One witness described her experience upon arrival in the City:

When I came from Puerto Rico 17 or 18 years ago, we had all these special programs, and I came to an area where there were no Spanish—hardly any Spanish speaking people, so I had to struggle, I would say, much harder than they have to struggle in our area or in our schools because it took me, when I compare now, about five years to, you know, snap out of the fear and the whole complexity of, you know, adjusting to the city and to the whole situation. And when I compare it to them, like last year especially, that I was so much more in touch with—only with the ones that couldn't speak any English, they would come to me in September and

they couldn't speak or do anything for themselves and they would depend totally on me for everything, and then I could see in a couple of months the change, and they would not be so dependent on me and I could see that I was not as, you know, pressured and as—almost frustrated, because there was so much work to do in the beginning.” (Transcript, p. 371.)

“My sisters had, you know, had the usual tragic, you know, situation when you come to a place where there is no special help and no special programs or nothing, and at that time that was happening, so they dropped out of school, and I don't know, I often think that it was because, you know, it is very hard to get to a place where there is nothing and nobody really understanding, even though they were not mean or anything, the people, but nothing special and they couldn't take the whole situation, so they dropped out of school. And you know, some people are a little luckier so they make it.” (Transcript, p. 372.)

While the community thus has tangible value for Spanish-speaking people, it suffers, as do other areas, from a lack of adequate housing, and from the pervasive deterioration that characterizes old, overcrowded areas. There is, however, virtually no public housing in the area (Transcript, p. 388). Under the district court's decree, public housing may not be constructed within the buffer zone. Thus, the price that the Spanish-speaking people must pay if they need housing is the renunciation of all of the special services—public and private—available only in the community in which they live. Without question, they are primary victims of the decree of dispersal.

One witness testified that “to have political power we have to have our people together, and one of the things that we need—three things we need. We need education, economics and political power to get our community from the situation that the community finds itself in now” (Transcript, p. 363). It is interesting, in this connection, that

this Court has recently ruled that the Equal Protection Clause of the 14th amendment protects racial or ethnic groups from having ward lines drawn for the purpose of "diluting or minimizing the voting power" of any such group. *Cousins v. City Council*, 7th Cir., No. 71-1077, May 25, 1972, slip opinion, pp. 19, 20. Clearly, the forced dispersal of Spanish-speaking people—or, for that matter—black people, will have the same "effect": "diluting or minimizing the voting power of such group." Consequently, *Gautreaux* and *Cousins* are based upon mutually exclusive readings of the Equal Protection Clause which support, respectively, the district court's order to disperse and this Court's order to contain. The answer lies in Mr. Justice Rehnquist's recent observation in *Jefferson v. Hackney*, U. S., 32 L. Ed. 2d 285, 296:

"So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

CONCLUSION.

For the reasons set out above, these defendants respectfully ask this Court to reverse the judgment of the district court, and to remand the cause to the district court with directions to vacate its order of April 10, 1972, and its order of July 1, 1969, except insofar as the latter applies to CHA's tenant assignment procedures.

Respectfully submitted,

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APPENDIX A.

SUPPLEMENTAL COMPLAINT.

NOW COME plaintiffs, by their attorneys, and for their supplemental complaint against defendants state as follows:

1. Defendant Richard J. Daley resides within and is Mayor of the City of Chicago. Under Section 3-11-14, Chapter 24, Illinois Revised Statutes, the Mayor of the City of Chicago presides at meetings of the City Council of the City of Chicago ("City Council") and has the power to vote at such meetings under certain circumstances.

2. Defendants Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William Cousins Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszeuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda, and Jack I. Sperling are all of the duly elected and acting members of the City Council and reside in the City of Chicago.

3. Defendant City of Chicago ("City") is an Illinois municipal corporation having a population of more than

500,000 persons. The City Council is the governing body of the City.

4. On February 10, 1969, this Court issued its memorandum opinion in this cause. 296 F. Supp. 907.

5. On July 1, 1969, this Court entered its judgment order ("Judgment Order") in this cause. 304 F. Supp. 736.

6. On September 10, 1971, the Court of Appeals for the Seventh Circuit issued its opinion in this cause. 448 F. 2d 731. Pursuant thereto this Court entered its order of December 23, 1971.

7. The Judgment Order provides, among other things, that the defendant Chicago Housing Authority ("CHA") shall

"use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end . . ." (304 F. Supp. at 741.)

8. CHA's efforts to increase the supply of Dwelling Units as provided in the Judgment Order require CHA to acquire real property.

9. Section 9 of Chapter 67½, Illinois Revised Statutes, provides in part that no real property shall be acquired in a municipality having a population in excess of 500,000 by the housing authority within whose area of operation such municipality is located until the housing authority has advised the governing body of the municipality of the description of the real property proposed to be acquired and the governing body of the municipality has approved the acquisition thereof by the housing authority. Such provisions of said Section 9 are deemed by CHA to apply to its acquisitions of real property.

10. From July 1, 1969 until March 5, 1971, CHA did not advise the City Council of any real property proposed

to be acquired by it for the purpose of increasing the supply of Dwelling Units in conformity with the Judgment Order.

11. On March 1, 1971, this Court entered an order directing CHA to advise the City Council on or before March 5, 1971, of real property proposed to be acquired by it for the purpose of providing not fewer than 1500 Dwelling Units in conformity with the Judgment Order. On March 5, 1971 CHA complied with such order and did so advise the City Council.

12. On January 3, 1972 this Court entered an order directing CHA to file certain plans with the Court on or before January 18, February 2 and February 17, 1972, respectively. In its "Response" to paragraph 1 of such order, filed by CHA on January 18, 1972, CHA advised the Court as follows:

- (a) In June, 1971, the City Council approved the acquisition by CHA of real property said by CHA to be suitable for the provision of 302 Dwelling Units in conformity with the Judgment Order; and
- (b) Subject to the approval of the Department of Housing and Urban Development ("HUD") CHA proposes to acquire real property, the acquisition of which was so approved by the City Council in June, 1971, at 29 different locations, said to be suitable for the provision of 199 Dwelling Units in conformity with the Judgment Order.

13. Since June, 1971, the City Council has not approved the acquisition by CHA of any real property for the purpose of providing Dwelling Units in conformity with the Judgment Order.

14. Relying upon such lack of such approval and upon the provisions of Section 9, Chapter 67½, Illinois Revised

Statutes, CHA has not acquired real property for the provision of Dwelling Units in conformity with the Judgment Order. Such failure by CHA to acquire real property for such purpose has the effect of denying to the plaintiffs the relief to which they are entitled under the Judgment Order and of preventing this Court from providing a full remedy for the violations of federal constitutional rights which this Court's memorandum opinion of February 10, 1969, found to have occurred.

15. Paragraph 2 of this Court's order of January 3, 1972, requires CHA to file with the Court on or before February 2, 1972, a specific plan for the prompt acquisition by CHA, regardless of any action taken or not taken by the City Council, of such number of additional sites for Dwelling Units as will, when added to the sites approved by the City Council in June, 1971, permit CHA to provide the 1500 Dwelling Units referred to in this Court's order of March 1, 1971. Such order of January 3, 1972, further provides that a hearing for the consideration of such plan and the entry of further orders in connection therewith shall be held on February 17, 1972.

Wherefore, following such hearing on February 17, 1972, plaintiffs pray:

(a) for the entry of a declaratory judgment that under the circumstances set forth herein the effect of the operation of Section 9, Chapter 67½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from providing a full remedy for the violations of federal constitutional rights which the Court's memorandum opinion of February 10, 1969, found to have occurred;

(b) for the entry of an order directing CHA to acquire, regardless of any action taken or not taken by the City

Council, such additional sites for Dwelling Units as are specified in CHA's plan therefor to be filed on February 2, 1972, subject to such modifications therein as may be appropriate in light of the evidence adduced at such hearing of February 17, 1972;

(c) for the entry of an order directing CHA to provide Dwelling Units on such additional sites as rapidly as possible; and

(d) for the entry of an order granting plaintiffs such other and further relief as the Court may deem just and equitable.

APPENDIX B

ORDER.

Previous stages of this litigation are described in 296 F. Supp. 907, 304 F. Supp. 736, 436 F. 2d 306, and 448 F. 2d 731. The stage now to be dealt with follows a trial held with respect to the supplemental complaint filed on February 2, 1972, and the pleadings and motions relating thereto, and a hearing respecting "Plan II" of defendant Chicago Housing Authority ("CHA"), filed on February 2, 1972, pursuant to this Court's order of January 3, 1972, such trial and hearing having been consolidated by previous order of this Court. The phrases "Dwelling Unit" and "General Public Housing Area" shall have the same meaning herein as in the Court's judgment order of July 1, 1969 ("Judgment Order"), 304 F. Supp. 736. Based on the pleadings and the evidence the Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT.

A. Pursuant to previous orders of this Court CHA is under a duty to use its best efforts to increase the supply of Dwelling Units in conformity with the Judgment Order as rapidly as possible.

B. To that end, and pursuant to orders of this Court, on March 5, 1971 CHA submitted to the defendant members of the City Council ("Council") of the defendant City of Chicago ("City"), and to the Chicago Plan Commission, an agency of the City, proposed sites for the provision of not fewer than 1500 Dwelling Units.

C. Acquisition of such sites or alternative sites by CHA

is necessary to enable CHA to increase the supply of Dwelling Units in conformity with the Judgment Order as rapidly as possible.

D. Under the following provision of Section 9, Ch. 67½, Illinois Revised Statutes, CHA may not acquire real property until the acquisition thereof has been approved by the Council:

"If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority."

E. On and prior to July 1, 1971, the City (through two of its agencies) and the Council approved the acquisition of certain real property by CHA which is presently sufficient to provide fewer than 200 Dwelling Units in conformity with the Judgment Order.

F. Since July 1, 1971, no committee of the Council has conducted hearings with respect to, and neither the City nor the Council has approved the acquisition of, any real property by CHA for the purpose of providing Dwelling Units in conformity with the Judgment Order.

G. Such failure to conduct hearings and to approve any such acquisition since July 1, 1971 is unjustified, there having been no showing of supervening necessity therefor, or indeed any showing of any necessity or reason at all, and the evidence having shown that many of the sites referred to in paragraph B above are suitable for the provision of Dwelling Units.

H. Such failure to conduct hearings and approve acquisition has the effect of preventing CHA from providing additional Dwelling Units in conformity with the Judgment Order, thereby denying relief to the plaintiffs to which they are entitled and frustrating and preventing this Court from assuring that such relief is provided.

CONCLUSIONS OF LAW.

A. Under the evidence in this case, the effect of the failures of the City and Council since July 1, 1971 to approve any acquisition of real property by CHA for the purpose of providing additional Dwelling Units in conformity with the Judgment Order has been and continues to be to thwart the correction of federal constitutional wrongs. Such failures may not be permitted to thwart such correction. *Crow v. Brown*, 332 F. Supp. 382, 390-92 (N. D. Ga. 1971), and cases there cited; aff'd., F. 2d (5th Cir., Mar. 15, 1972, No. 71-3466). The affirmative obligation to seek means of disestablishing state-imposed segregation must be shared by all agencies or agents of the state. *Franklin v. Quitman County Board*, 288 F. Supp. 509, 519 (N. D. Miss. 1968).

B. Under the evidence in this case, taken together and viewed in their historical context, such failures of the City and the Council violate the rights of the plaintiffs and the class they represent under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Crow v. Brown, supra*, 332 F. Supp. at 392.

C. Under the evidence in this case, the effect of the operation of the foregoing provision of Section 9, Chapter 67½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from assuring that a full remedy is provided for the violations of federal

constitutional rights which this Court's memorandum opinion of February 10, 1969 found to have occurred.

D. Under the evidence in this case, the Court has the power and duty to take appropriate action to provide such remedy notwithstanding the foregoing provision of Section 9, Chapter 67½, Illinois Revised Statutes, and notwithstanding such failures of the City and the Council. *Louisiana v. United States*, 380 U. S. 145 (1965); *Haney v. County Board of Education*, 429 F. 2d 364 (8th Cir. 1970); *United States v. Greenwood School District*, 406 F. 2d 1086 (5th Cir. 1969); *Bradley v. School Board*, 324 F. Supp. 1372 (E. D. Ark. 1971); *United States v. Texas*, 321 F. Supp. 1043 (E. D. Tex. 1970); *Burleson v. County Board*, 308 F. Supp. 352 (E. D. Ark. 1970); *Crow v. Brown, supra*; *Kennedy Park Homes Ass'n. v. City of Lackawanna*, 318 F. Supp. 669 (W. D. N. Y.), aff'd., 436 F. 2d 108 (2d Cir. 1970); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291, 295-96 (9th Cir. 1970); *Hawkins v. Town of Shaw*, 437 F. 2d 1286, 1291-92 (5th Cir. 1971).

For the foregoing reasons it is hereby ordered:

1. The motions to dismiss the supplemental complaint and for jury trials be and the same hereby are denied.

2. Until the further order of this Court the following provision of Section 9, Chapter 67½, Illinois Revised Statutes, to wit:

"If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be ac-

quired, and the governing body of the municipality has approved the acquisition thereof by the housing authority.”

shall not be applicable to CHA's actions, including without limitation the acquisition of real property in the City of Chicago, taken for the purpose of providing Dwelling Units.

3A. Within 10 days from the date hereof the City shall file with the Court and serve upon Counsel for CHA, HUD and the plaintiffs the addresses of 106 sites referred to in plaintiff's Exhibit 8, the relevant page of which is attached hereto as Appendix 1.

3B. During the 20 days following such filing and service CHA shall receive, consider, and make available at its offices to the public for inspection, all comments from any source relating to such sites as are submitted to it in writing.

3C. Within 10 days following the end of such 20 day comment period CHA shall file with the Court, and serve upon HUD and counsel for the plaintiffs, a final list of such of the sites served upon it by the City under paragraph 3A hereof as in the judgment of CHA, taking into consideration both the comments received under paragraph 3B hereof and the need to effectuate the previous orders of this Court, are appropriate for the provision of Dwelling Units pursuant to such previous orders.

3D. Immediately upon such filing and service pursuant to paragraph 3C hereof, CHA shall begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon, including without limitation, (a) the preparation and submission of plans and proposals, including a so-called Development Plan, relating to HUD, (b) the acquisition of such sites, regardless of any action taken or not taken by the Council with

respect thereto, upon HUD's approval of such Development Plan, and (c) the provision of Dwelling Units thereon as promptly as may be.

4A. Within 15 days from the date hereof the City shall deliver to CHA a list of all the vacant, residentially zoned parcels of land in the General Public Housing Area of the City of which it has knowledge.

4B. Within 70 days from the date hereof CHA shall file with the Court and serve upon counsel for HUD, the City and the plaintiffs, a list of such sites as will in the judgment of CHA, when added to the sites approved by the Council in June, 1971, and the sites referred to in paragraph 3C hereof, be sufficient for the provision of an aggregate of 1500 Dwelling Units in conformity with the Judgment Order.

4C. During the 30 days following such filing and service CHA shall receive, consider and make available at its offices to the public for inspection, all comments from any source relating to such sites as are submitted to it in writing.

4D. Within 20 days following the end of such 30 day comment period CHA shall file with the Court and serve upon HUD and counsel for the plaintiffs a final list of such of the sites referred to in paragraph 4B hereof as in the judgment of CHA, taking into consideration both the comments received under paragraph 4C hereof and the need to effectuate the previous orders of this Court, are appropriate for the provision of the aggregate of 1500 Dwelling Units referred to in paragraph 4B hereof.

4E. Immediately upon such filing and service pursuant to paragraph 4D hereof, CHA shall begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon, including without limitation, (a) the preparation and submission of plans

and proposals, including a so-called Development Plan, relating thereto to HUD, (b) the acquisition of such sites, regardless of any action taken or not taken by the Council with respect thereto, upon HUD's approval of such Development Plan, and (c) the provision of Dwelling Units thereon as promptly as may be.

5. The Court retains jurisdiction over this matter for the entry of such further orders as may be appropriate to effectuate the provisions of this order or otherwise.

Enter

.....
Judge

April 10, 1972.

Certification Under Rule 54(b).

With respect to the foregoing order it is hereby certified in accordance with Rule 54(b) of the Federal Rules of Civil Procedure,

- (a) That the Court has directed the entry of a final judgment respecting a claim for relief under the supplemental complaint; and
- (b) That the Court has determined that there is no just reason for delay.

.....
Judge

April 10, 1972

APPENDIX C.

MEMORANDUM OPINION

AUSTIN, *District Judge*.

Plaintiffs, Negro tenants in or applicants for housing, sue on behalf of themselves and all others similarly situated alleging that defendants, the Chicago Housing Authority (CHA), a municipal corporation, and C. E. Humphrey, Executive Director of CHA, have violated their rights under the Fourteenth Amendment of the Constitution of the United States. Count I charges that defendants intentionally chose sites for family public housing and adopted tenant assignment procedures in violation of 42 U. S. C. Secs. 1981 and 1983 for the purpose of maintaining existing patterns of residential separation of races in Chicago. Count III alleges that regardless of their intentions defendants violated 42 U. S. C. Secs. 1981 and 1983 by failing to select family public housing sites in such locations as would alleviate existing patterns of residential separation. Counts II and IV repeat the allegations in Counts I and III respectively and demand relief under 42 U. S. C. Sec. 2000d (Section 601 of Title VI of the Civil Rights Act of 1964).

On March 2, 1967 this court denied defendants' motion to dismiss for failure to state a claim upon which relief can be granted as to Counts I and II and granted the motion as to Counts III and IV, 265 F. Supp. 582. Plaintiffs' remaining requests for relief include (1) a declaratory judgment pursuant to 28 U. S. C. Secs. 2201 and 2202 that defendants have selected sites in violation of plaintiffs' constitutional rights, (2) a permanent injunction against

the racially discriminatory aspects of the public housing system, (3) an order directing defendants to submit and carry out a plan for selection of future sites to eliminate these discriminatory aspects, and (4) a declaratory judgment that plaintiffs have the right under 42 U. S. C. Sec. 2000d to end the use of federal funds to perpetuate the racially discriminatory aspects of the public housing system and an injunction against such use. Since March 2, 1967 the parties have amassed thousands of pages of depositions, affidavits and exhibits. Both parties now move for summary judgment on Counts I and II.

I. Discriminatory Tenant Assignment Practices.

Plaintiffs charge that defendants have imposed quotas at four White family housing projects to keep the number of Negro families to a minimal level.

The Trumbull, Lathrop, Lawndale and Bridgeport projects were built before 1944 in areas which were then and are now substantially all White. Baron Affidavit, Exhibit A. Until 1954 CHA refused to permit Negro families to reside in these projects. Statement of Elizabeth Wood, Head of CHA until August 23, 1954. The Negro population in the four projects on December 31, 1967 represented respectively about 7%, 4%, 6% and 1% of the total. Stipulation, July 29, 1968. At present Negroes comprise about 90% of the tenants in CHA family housing projects and about 90% of the waiting list of 13,000 persons. CHA Sept. 20 Brief, p. 7, p. 18.

The disparity between the low number of Negro families in these projects and the high number of Negro applicants for all projects indicates that CHA has imposed a Negro quota. Alvin Rose, Executive Director (chief executive officer) of CHA from September 1957 to November 1967, testified on deposition that CHA devised "elastic quotas"

(p. 173) at the four projects which can more accurately be characterized as "fixed" (p. 180). Harry Schneider, Deputy Executive Director of CHA, formerly Director of Management from May 1950 to January 1968, testified that until May 22, 1968 these four projects were listed on CHA tenant selection forms as appropriate for "A families only," that is, White only. Schneider Dep., p. 77. He states that in these projects there are "controls" on the number of Negro applicants accepted (p. 75), that Negro population in these projects is now "fairly close" to the "appropriate maximum number" (p. 78), and that if, for example, Trumbull attained the level of 35 Negro families a "hold" would maintain the occupancy at that level (p. 84.) Mrs. Louise Webb, in charge of processing tenant applications for CHA, confirms Mr. Schneider's testimony that quotas are now in force. Webb Dep., p. 61.

CHA does not contradict these statements of its own officials. The "history of tension, threats of violence and violence" urged in justification by CHA cannot excuse a governmentally established policy of racial segregation. *Cooper v. Aaron*, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). In fact, the only violent incident mentioned by Mr. Schneider occurred in 1953, and Mr. Rose recalled that one incident indicating White hostility to Negroes occurred at Bridgeport in 1959. Schneider Dep., p. 63; Rose Dep., p. 163. Precautions taken in the wake of these incidents such as notifying the police and Human Relations Commission are no longer taken when Negroes are moved into the White projects. Schneider Dep., p. 82. These remote incidents do not show a clear threat of violence which might justify quotas as a very temporary expedient. In any case, CHA's quotas clearly have maintained Negro occupancy at a permanently low level. Therefore, plaintiffs are entitled to appropriate relief against the defendants' policy of denying applications to the four projects on the basis

of racial quotas. *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955).

II. Discriminatory Site Selection Procedures.

In choosing sites for public housing, the CHA is directed by statute to follow these criteria:

[E]limination of unsafe and unsanitary dwellings, the clearing and redevelopment of blighted and slum areas, the assembly of improved and unimproved land for development or redevelopment purposes, the conservation and rehabilitation of existing housing, and the provision of decent, safe, and sanitary housing accommodations. Ill. Rev. Stat., Ch. 67½, Sec. 8.2.

The City Council must approve all sites before they are acquired. Ill. Rev. Stat., Ch. 67½, Sec. 9. However, CHA is not compelled to acquire or build upon all sites thus approved. *Humphrey Dep.*, p. 107.

Plaintiffs charge that the procedure mainly used by defendants to maintain existing patterns of racial residential separation involved a pre-clearance arrangement under which CHA informally submitted sites for family housing to the City Council Alderman in whose ward the site was located. CHA admits the existence of this procedure. E. g., *Humphrey Aff't.*, p. 7. The Alderman to whom White sites were submitted allegedly vetoed these sites because the 90% Negro waiting list and occupancy rate would create a Negro population in the White area. Plaintiffs allege that the few White sites which escaped an Alderman's informal veto were rejected on racial grounds by the City Council when they were formally submitted by CHA for approval.

A. Statistics on Sites Considered and Selected.

As of July, 1968, CHA had in operation or development 54 family projects at 64 sites in Chicago consisting of 30,848 units. CHA Sept. 20 Brief, p. 7 (adopting figures in *Baron Aff't.* submitted by plaintiffs). Exclusive of the four segregated White projects, CHA's family housing tenants are 99% Negroes. Stipulation, July 29, 1968. Exclusive of the four projects, housing units now located in neighborhoods¹ between 50% and 100% Negro represent 99½% of the total units operated by CHA; units in neighborhoods between 75% and 100% Negro are 92% of the total; and units in areas over 95% Negro are two-thirds of the total. *Baron Aff't.*, Ex. A. A glance at a map depicting Negro areas of residence in Chicago confirms that the 50% to 90% Negro areas are almost without exception contiguous with 90% to 100% Negro areas and that the relatively small numbers of Chicago Negroes not concentrated in the over 90% areas are almost entirely concentrated in the over 50% areas. *Baron Aff't.*, Ex. F. Therefore, given the trend of Negro population movement, 99½% of CHA family units are located in areas which are or soon will be substantially all Negro. *Baron Aff't.*, Ex. G. 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.

1. Both parties adopt as accurate representations of Chicago's current neighborhoods the census tracts derived from the 1960 Census of Population and Housing, Chicago, published by U. S. Bureau of Census. *Baron Aff't.*; *Humphrey Aff't.* Chicago consists of 935 compact census tracts with a population of relatively uniform characteristics averaging 4,000 people. The census figures classify the races as White and Non-White, but both parties use the Non-White figure to represent Negroes since 97% of Chicago's Non-Whites are Negroes.

To sustain their burden of proving that defendants' past and present policies have deprived them of their constitutional rights, plaintiffs contend that, during the consideration of each of the five major family housing programs since 1954, White sites meeting all appropriate criteria were rejected for racial reasons. Mr. Humphrey's affidavit sets forth (a) the total number of sites initially selected by CHA which met criteria of slum clearance, cost limitations, accessibility to public facilities, and overall metropolitan planning (b) White sites initially selected which met these same criteria (c) the number of apartment units planned for the White sites initially selected as a percentage of the total apartment units planned for all sites selected, (d) White sites finally approved by the City Council, and (e) Negro sites approved.

	(a) Sites Initially Selected	(b) White Sites Initially Selected	(c) Per Cent of Units in White Sites Initially Selected	(d) White Sites Approved	(e) Negro* Sites Approved
1955 Program	25	4	45%	0	19
1956 Program	11	4	30%	0	5
1958 Program	11	2	31%	0	7
1965 Program	18	9	50%	0	9
1966 Program	38	22	50%	2	9

* The sites classified by Mr. Humphrey as in Negro neighborhoods were primarily in over 95% Negro neighborhoods, but a few sites so classified were in neighborhoods which were $\frac{1}{3}$ White.

Mr. Humphrey estimates that the sites selected initially by CHA for the five programs totalled 7,883 White housing units and 10,901 Negro units for a total of 18,784 units. One of the two White sites finally approved in 1966 included 400 units and was located on vacant land bounded on one side by a predominantly Negro area and partially occupied by dilapidated Negro shacks. Humphrey Dep. II, p. 190. The mere fortuity that this site was included in a 72.8% White census tract does not make it relevant to negate the inference of a policy against choosing sites in White neighborhoods. The other White site approved in 1966 was planned for 36 units. CHA did not proceed formally to submit for City Council approval seven White sites in 1965 because "the Aldermen in whose Wards those sites were located advised of community opposition and indicated they were opposed to such sites in their Wards." Humphrey Aff't., p. 6. One White site in the 1965 program was not submitted to the City Council because the City Department of Development and Planning advised against its acquisition, presumably because it conflicted with other urban planning projects. The only White site formally submitted was dropped from consideration by the City Council Committee on Planning and Housing. In 1966 the Department of Development and Planning advised against all 20 of the White sites not formally submitted because it "either (a) disapproved the site, (b) recommended deferment of (c) advised of Aldermanic opposition." Humphrey Aff't., p. 9. Since the Department merely assumed CHA's admitted former role in the pre-clearance procedure, it must be inferred in the absence of a suggestion to the contrary by defendants that only a minimal number of White sites in 1966 were disapproved because they conflicted with other urban development projects.

Additional family sites not included in the five programs were developed in 1963 in a Negro neighborhood (346 units)

and in 1965 in two White neighborhoods (12 units). CHA also operates 5,050 units of public housing for elderly persons of which 54½% are in substantially White neighborhoods. Fifty-seven per cent of 2,047 elderly housing units presently in development are in White neighborhoods. The Illinois statutory procedures applying to family housing projects, including the requirement of City Council approval, apply also to elderly housing projects. (Plaintiffs' Complaint is not directed to elderly housing.) But the relatively equal distribution between White and Negro elderly housing sites actually developed arises from circumstances which are not applicable to family housing sites. In selecting tenants for elderly housing Mr. Rose conceived a "proximity rule" under which the applications of persons living within a two block radius of the site of an elderly housing project were granted priority and successive priorities were given to persons living within concentric half mile circles. Rose Dep., p. 196. The "proximity rule" helped "very obviously" to obtain an Alderman's approval because it was a "fair assumption" that a White site would be occupied by Whites. Rose Dep., p. 197. CHA abandoned the "proximity rule" after the Commissioner of Public Housing Administration informed CHA that enforcement of the "proximity rule" would result in loss of federal funds. Letter of December 11, 1963, Rose Dep., Ex. 4. Before abandonment of the "proximity rule" the selection of elderly housing sites in White areas was consistent with a policy against placing Negroes in White neighborhoods, and after its abandonment a change to a policy of selecting all Negro sites would almost certainly have resulted in a loss of federal funds. Therefore, the circumstances surrounding the choice of sites for elderly housing tend to prove a purpose to perpetuate racial separation rather than to refute it. The mix of White and Negro elderly housing sites is not relevant except to show (as does

the nearly identical mix between White and Negro family sites initially selected by CHA) what would probably have happened in the absence of a policy of eliminating White sites on racial grounds.

No criterion, other than race, can plausibly explain the veto of over 99½% of the housing units located on the White sites which were initially selected on the basis of CHA's expert judgment and at the same time the rejection of only 10% or so of the units on Negro sites.

B. Testimony on Site Selection Criteria.

High CHA officials clearly understood the message of the statistics, and with commendable frankness some of them said so. While Executive Director, Mr. Rose testified in 1959 before the U. S. Commission on Civil Rights:

"Q. Because of the present location of the existing sites, then, the Council of Chicago is guilty of practicing to a certain degree segregated housing, is that true?

A. You are only agreeing with me.

Q. Well, somebody is guilty of contributing to the segregation of housing of people in the City of Chicago, because when you look at the present location of the housing projects, they are predominately within the Negro area.

A. That is true." Rose Dep., p. 9.

On July 16, 1966, Mr. Humphrey, who was then Deputy Executive Director, responded to a question from an Alderman in testimony before the City Council:

"Q. And did he then ask you why the Housing Authority hadn't presented any sites outside the segregated Negro neighborhoods?

A. I think he asked that question, yes.

Q. And did you answer that the reason was you couldn't find any suitable sites outside the Negro neighborhoods?

A. I didn't answer it that way at all.

Q. What answer did you give?

A. I answered it to the effect that he knew as well as I as to why we didn't have other sites; that he knew that if the site was approved by the alderman that it was included in the package and if it wasn't approved it wasn't included, and I added to that, incidentally, there are none in the package from your ward." Humphrey Dep., p. 133.

Mrs. Kathryn Moore, General Counsel of CHA, stated that in her opinion land in White areas equally suitable for development and often cheaper than land in Negro areas was unavailable solely because of the requirement of City Council approval. Moore Dep., p. 18 and Ex. 5.

CHA follows an unvarying policy "based upon actual experience in submitting sites to the City Council for approval" of informally clearing each site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman. Humphrey Aff't., p. 7; Humphrey Dep. I, p. 100; Rose Dep., p. 59. (There is some confusion whether the White sites eliminated from the 1955, 1956 and 1958 programs were formally submitted to the City Council or informally vetoed. Cf. Humphrey Aff't., pp. 4-6, with Humphrey Dep. I, pp. 98-100.) The statements of Mr. Humphrey and Mr. Rose quoted above indicate that they personally knew that this procedure would result in the veto on racial grounds of substantial numbers of White sites. Mr. Humphrey also stated on deposition:

"Q. Was the reason actually that you knew the City Council would probably not approve public housing sites in white neighborhoods ?

A. I said no doubt, there.

Q. You mean that was no doubt the case?

A. Well, I am assuming from what had been going on the last few years that you just couldn't go anywhere in the City of Chicago that you wanted to and acquire a site.

Q. Particularly in the white neighborhoods, I take it?

A. Right." Humphrey Dep. II, p. 204.

An uncontradicted affidavit claims that Mr. Charles Swibel, Chairman of the Board of Commissioners of CHA, stated in private conversations on numerous occasions that the City Council had CHA "over a barrel" and consequently CHA acquiesced in choosing sites in Negro neighborhoods. Berry Aff't. Since CHA directly denies none of these statements or numerous other statements to a similar effect cited in Plaintiffs' briefs, there is no genuine issue as to the truth of the fact that the pre-clearance procedure was known by CHA to result in the veto of substantial numbers of sites on racial grounds.

C. Legal Consequences of the Site Selection Policies.

On March 2, 1967 this court ruled that "plaintiffs, as present and future users of the system, have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves." 265 F. Supp. 582, 583. The statistics on the family housing sites considered during the five major programs show a very high probability, a near certainty, that many sites were vetoed on the basis of the racial composition of the site's neighborhood. In the face of these figures, CHA's failure to present a substantial or even a speculative indication that racial criteria were not used entitles plaintiffs to judgment as a matter of law. *Jones v. Georgia*, 389 U. S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25 (1967) (finding of discrimination based entirely on jury selection statistics and absence of explanation); *Hernandez v. Texas*, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954) (same). The additional evidence of intent, composed mostly of uncontradicted admissions by CHA officials, also establishes

plaintiffs' right to judgment as a matter of law either considered alone or in combination with the statistics. *Cypress v. Newport News General and Nonsectarian Hospital Assn.*, 375 F. 2d 648 (4th Cir. 1967).

Defendants urge that CHA officials never entertained racist attitudes and that "the racial character of the neighborhood has never been a factor in CHA's selection of a suitable site." *Humphrey Aff't.*, p. 2. In view of CHA's persistent selection of White sites at the initial stage before the pre-clearance procedure and the candor of its officials on deposition, these statements are undoubtedly true. It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued. *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. *Humphrey Dep. I*, pp. 116-117; *Rose Dep.*, p. 59. But even if the Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing. *U. S. v. School District 151*, 404 F. 2d 1125 (7th Cir. Dec. 17, 1968), at p. 11 of the slip sheet opinion; *cf. Reitman v. Mulkey*, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).

CHA finally contends that the impulse originating

and sustaining the policy against choosing White sites came from the City Council. But by incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate. It is no defense that the City Council's power to approve sites may as a matter of practical politics have compelled CHA to adopt the pre-clearance procedure which was known by CHA to incorporate a racial veto. In fact, even if CHA had not participated in the elimination of White sites, its officials were bound by the Constitution not to exercise CHA's discretion to decide to build upon sites which were chosen by some other agency on the basis of race. *Cooper v. Aaron*, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958); *Orleans Parish School Board v. Bush*, 268 F. 2d 78 (5th Cir. 1959). See also *U. S. v. School District 151*, *supra*, in which the court observed at footnote 7, "There is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record." Although neither the City Council nor its members individually are parties to this suit, they will be bound by any order entered in this case against CHA of which they have actual notice. FRCP 65(d).

III. RELIEF.

Plaintiffs' motion for summary judgment is granted on Count I; defendants' motion is denied.

A final judgment embracing all claims for relief shall not be entered for 30 days. During that time the parties should attempt to formulate a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's un-

constitutional site selection and tenant assignment procedures. If the parties cannot agree, each party shall submit a proposed judgment order.

Summary judgment is denied as to both parties on Count II. Although this court held on March 2, 1967 that Count II states a claim upon which relief can be granted under 42 U. S. C. Sec. 2000d (Section 601 of Title VI of the Civil Rights Act of 1964), judgment on Count II would, in the context of this case, determine the propriety of granting a narrow, drastic kind of relief—that of enjoining the use of federal funds. The Public Housing Administration has already taken a position against denying federal funds in reply to a rather scanty presentation protesting the selection of a few sites on the basis of racial composition of their neighborhoods. Letter of October 14, 1965 from Marie C. McGuire, Commission of PHA, to Rev. Jerome Hall of the West Side Federation, Swibel Dep., Ex. 3. In addition to the uncertainty of whether PHA would hold it appropriate to deny funds under the facts as they are now known, it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect. The use of a threatened denial of funds to coerce compliance with the Constitution, if coercion is necessary, would seem to be a less efficient remedy than an injunction available under Court I. Therefore, summary judgment is denied without precluding plaintiffs from showing on the basis of more facts that denial of federal funds is an appropriate form of relief.

Two further results of CHA's participation in a policy of maintaining existing patterns of residential separation of the races must be mentioned. First, as Dr. Baron's Affidavit discloses, the 188,000 White families eligible for public housing have understandably chosen in the main to forego their opportunity to obtain low cost housing rather

than to move into all Negro projects in all Negro neighborhoods. This is an ironic but predictable result of a segregationist policy of protecting Whites from less than half as many (76,000) eligible Negro families. Second, existing patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions.

APPENDIX D.

JUDGMENT ORDER.

AUSTIN, *District Judge.*

This matter coming on to be heard pursuant to this Court's Memorandum Opinion of February 10, 1969, D. C., 296 F. Supp. 907, and Orders entered on such date denying defendants' motions for summary judgment, denying plaintiffs' motion for summary judgment as to Count II of the Complaint, and granting plaintiffs' motion for summary judgment as to Count I of the Complaint, and

The Court having conferred with counsel for the parties and having determined that the several provisions of this judgment order are necessary to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures, to the end that plaintiffs and the class of persons represented by them, Negro tenants of and applicants for public housing in Chicago, shall have the full equitable relief to which they are entitled,

It is hereby ordered:

I. For purposes of this judgment order,

A. "CHA" shall mean the defendant, Chicago Housing Authority.

B. "Dwelling Unit" shall mean an apartment or single family residence which is to be initially made available to and occupied by a low-income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not

newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family. "Dwelling Units" include "Leased Dwelling Units" as hereinafter defined.

C. "Leased Dwelling Unit" shall mean a Dwelling Unit in a structure leased or partially leased by CHA from any person, firm or corporation.

D. "Limited Public Housing Area" shall mean that part of the County of Cook in the State of Illinois which lies either within census tracts of the United States Bureau of the Census having 30% or more non-white population, or within a distance of one mile from any point on the outer perimeter of any such census tract. "General Public Housing Area" shall mean the remaining part of the County of Cook in the State of Illinois. The terms "non-white" and "white" shall have the meaning given to such terms by the United States Bureau of the Census.

For the purposes of this subsection D, results of the 1970 and each subsequent census taken by the United States Bureau of the Census shall presumptively determine the non-white population of census tracts until results of a subsequent such census are officially published; provided, that any party may, on motion, offer evidence as to the non-white population of any census tract for the purpose of rebutting such presumption; and provided further, that Dwelling Units located or proposed to be located in any census tract subsequent to official publication of the results of the last previous such census shall be taken into account in determining the population of such census tract, and for such purpose it shall be assumed that such Dwelling Units will be occupied by non-whites at the rate of two persons per bedroom.

For the period from the date hereof until the official publication of such 1970 census results, the census tracts in the City of Chicago listed on Exhibit A, attached hereto, shall be presumed to have 30% or more non-white population; and, subject to evidence offered on motion by either party, the non-white population of census tracts in the County of Cook outside of the City of Chicago shall be presumed to be as stated in the 1960 census of the United States Bureau of the Census.

E. "Public Housing Project" shall mean any thirteen or more Dwelling Units which are located (1) in the same structure, (2) on the same lot or parcel of real estate, or (3) on two or more lots or parcels of real estate which are contiguous to one another, or are separated only by street, alleys, bodies of water, railroad tracks or the like.

II. Following the date of this judgment order CHA shall not authorize, approve or implement any plan for Dwelling Units, nor shall CHA seek any approval or request or accept any assistance from any government agency with respect thereto (including without limitation approval of the acquisition of any interest in real estate), unless such plan affirmatively requires that,

A. All Dwelling Units provided for in such plan shall be located in conformity with the provisions of Article III hereof, and

B. The activities to be performed in order to render such Dwelling Units available for occupancy (whether construction, purchase, rehabilitation, leasing or otherwise) shall take place at such times as will result in the location of such Dwelling Units in conformity with the provisions of Article III hereof.

III. Following the date of this judgment order CHA shall provide Dwelling Units as follows, and not otherwise:

A. The following Dwelling Units may be made available for occupancy without restriction imposed by this order:

(1) The 1458 Dwelling Units provided for by pending CHA projects III. 2-27, 2-28 (exclusive of Dwelling Units proposed to be located at 70th and Harper streets in the City of Chicago), 2-32, 2-33, 2-51, 2-64, 2-69 and 2-74.

(2) Leased Dwelling Units (but not more than two per structure) which have been occupied for at least six months prior to CHA's leasing the same by tenants who continue in occupancy following CHA's leasing thereof.

B. CHA shall not commence or cause to be commenced the construction of any Dwelling Units, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, until CHA shall have commenced or caused to be commenced, and shall be continuing or shall have completed, the construction of not less than 700 Dwelling Units located in the General Public Housing Area of the City of Chicago.

C. Subject to the provisions of Sub-shall not commence or cause to be commenced the construction of any Dwelling Units in any Limited Public Housing Area, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, unless within three months following such commencement of construction at least 75% of the Dwelling Units on which the CHA shall have commenced or caused to have commenced construction, and shall have continued or completed construction, since the commencement of construction

of the last of the 700 Dwelling Units referred to in subsection B of this Article III shall have been located (at the time of commencement of construction thereof) in the General Public Housing Area of the City of Chicago.

D. Subject to the provisions of subsection E of this Article III, no Leased Dwelling Unit shall be made available for occupancy in the Limited Public Housing Area of the City of Chicago (in addition to Leased Dwelling Units in such Area which are already occupied) unless, immediately following such occupancy, at least 75% of the Leased Dwelling Units then occupied are located in the General Public Housing Area of the City of Chicago; provided, that such number of Leased Dwelling Units located in the General Public Housing Area of the City of Chicago may be less than such 75% to the extent Dwelling Units other than Leased Dwelling Units have been occupied, or are under construction which is continuing, in the General Public Housing Area of the City of Chicago in excess of the 75% minimum requirement of subsection C of Article III hereof.

E. Not more than $33\frac{1}{3}\%$ of the Dwelling Units required by subsection C of this Article III to be located in the General Public Housing Area of the City of Chicago, and not more than $33\frac{1}{3}\%$ of the Leased Dwelling Units required by subsection D of this Article III to be located in the General Public Housing Area of the City of Chicago, may at the option of CHA, be planned for and located in the General Public Housing Area of the County of Cook in the State of Illinois, outside of the City of Chicago, provided that (whether or not constructed by CHA) the same are made available for occupancy by CHA to, and are occupied by, residents

of the City of Chicago who have applied for housing to CHA, and provided further that all such Dwelling Units comply with the provisions of Article IV of this order.

IV. Following the date of this judgment order CHA shall not concentrate large numbers of Dwelling Units in or near a single location. Without limiting the foregoing, unless part of a development specifically designed to assist in achieving the purposes hereof as to which the Court by order shall have given its approval,

A. No Public Housing Project shall contain Dwelling Units designed for occupancy by more than 120 persons, except that if it is impossible for CHA to provide within such limitation Dwelling Units which it is otherwise capable of providing, and if it will assist in achieving the purposes of this judgment order, a Public Housing Project may contain Dwelling Units designed for occupancy by not more than 240 persons.

B. No Dwelling Units shall be located in any census tract if, following such location, the aggregate number of apartments and single family residences theretofore made available to low-income, non-elderly families, directly or indirectly by or through CHA, in such census tract would constitute more than 15% of the total number of apartments and single family residences in such census tract; and

C. No Dwelling Units shall be provided above the third story in any structure except for families without children and except Leased Dwelling Units in a structure in which the number of Dwelling Units aggregates no more than 20% of the total number of apartments in such structure.

V. Within 30 days following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs evidence that CHA has modified its tenant assignment policy, adopted by CHA Board Resolution No. 68-CHA-232, a copy of which is attached hereto as Exhibit B, and its practices thereunder, to include all Leased Dwelling Units as a single "location" for the purposes thereof. Such policy and practices, as so modified, shall be applicable until the further order of this Court.

VI. Within 60 days following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs a tenant assignment plan. Such plan shall include, but need not be limited to, provisions having the following purpose and effect:

A. Such modifications, if any, shall be made in CHA's tenant assignment policy and practices as will assist in achieving the purposes of this judgment order.

B. New registrations on CHA's list of persons desiring housing (the "waiting list") shall be temporarily ended; a determination shall be made promptly as to which registrants remain eligible for and still desire public housing; intensive publicity shall then be employed in such manner as effectively to inform low-income families throughout the City of Chicago, including present CHA tenants, that substantial numbers of Dwelling Units will be made available in the General Public Housing Area of the City of Chicago pursuant to the provisions of this judgment order; and thereafter the "waiting list" shall be reopened to new registrants, including present CHA tenants who wish to apply for Dwelling Units in the General Public Housing Area.

C. Not more than 50% of the Dwelling Units in all Public Housing Projects shall be made available to eligible neighborhood residents, the remaining Dwelling Units to be made available for occupancy in accordance with subsection A of this Article VI.

D. Vacancies in CHA's Trumbull, Lathrop, Lawndale, and Bridgeport projects shall be filled in accordance with subsection A of this Article VI, except that such tenant assignment plan may contain provisions designed to assure that such projects do not become racially segregated.

E. Suitably detailed information shall be regularly filed with the Court and served upon counsel for the plaintiffs showing CHA's compliance with the provisions of this Article VI and such tenant assignment plan.

Following the filing and service of such tenant assignment plan the Court will enter such further order as it deems appropriate.

VII. Following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs, the Civil Rights Division of the United States Department of Justice, and the Regional Administrator of the Department of Housing and Urban Development, the following:

A. A statement of the following information respecting each location for one or more Dwelling Units, such statement to be filed and served not more than 10 days after any such location is approved by the Board of Commissioners of CHA (or by the appropriate CHA officer or employee with respect to any location not required to be approved by the Board of Commissioners) and prior to the formal submission

thereof to any other government agency or official for consideration or action:

(1) a map showing boundaries, placement in relation to adjacent streets and, where available street address;

(2) the area location (whether within the Limited or General Public Housing Area);

(3) the census tract number;

(4) the white and non-white population of such census tract;

(5) the aggregate number of apartments and single family residences theretofore made available to low-income, non-elderly families, directly or indirectly by or through CHA in such census tract;

(6) the aggregate number of apartments and single family residences in such census tract as reflected by the most recent census taken by the United States Bureau of the Census, supplemented by such information with respect thereto as is available to CHA from any other government agency or official (but the statement need not include such number if the number supplied with respect to the preceding paragraph (5) is zero);

(7) the total number of Dwelling Units proposed to be provided at such location;

(8) the number of structures, and the number of Dwelling Units in each, in which such Dwelling Units are proposed to be provided; and (9) such additional data as will show that such proposed Dwelling Units will be made available for occupancy in conformity with the provisions of Articles III and IV hereof, including without limitation, in the event such proposed Dwelling Units

would result in a Public Housing Project designed for occupancy by more than 120 persons, information showing that the provisions of subsection A of Article IV hereof have been met with respect to such Public Housing Project.

B. Statements setting forth any change in the information included under paragraphs (1), (2), (3), (5), (7), (8) or (9) in a statement filed and served pursuant to subsection A of this Article VII, and covering the period up to initial occupancy of all Dwelling Units at any location, such statements to be filed and served not more than 10 days after any such change occurs.

C. Statements covering the periods from the date hereof until December 31, 1969, and from the date hereof until the end of each calendar semi-annual period thereafter, containing such data as will show that (1) all plans for Dwelling Units during the period covered by such statements have been in conformity with the provisions of Article II hereof, and (2) all Dwelling Units provided during the period covered by such statements have been in conformity with the provisions of Article III and IV hereof, such statements to be filed and served not more than twenty days after the end of each calendar semi-annual period beginning with such period ended December 31, 1969.

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

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

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

IX. This order shall be binding upon CHA, its officers, agents, servants, employees, attorneys, and their successors, and upon those persons, including the members of the City Council of the City of Chicago, in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

X. This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order or any other matter.

XI. The costs of this action shall be taxed against CHA, subject to the further order of this Court.