
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 72-1409, 1410, 1485 and 1486 (Consolidated)

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellees,

vs.

CHICAGO HOUSING AUTHORITY, et al.,

Defendants-Appellants.

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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX
FOR THE APPELLANT CHA

Patrick W. O'Brien
Watson B. Tucker
231 South LaSalle Street
Chicago, Illinois 60604
ST 2-0600

OF COUNSEL:

Kathryn M. Kula
Mayer, Brown & Platt

Plaintiffs argue (p. 15) that since the Order of April 10, 1972, relieved CHA of the "burden" of obtaining City Council approval of sites, removed that "obstacle", they need not answer the arguments in CHA's brief. Plaintiffs also say it is "something of a mystery" why CHA appealed from that order. Their suggested solution is the fact that the Mayor of Chicago appoints the CHA Commissioners (p. 15).

These remarks underscore why CHA has appealed and why it will continue to exercise that right with respect to orders against it which, as in the case of the Order of April 10, 1972, are not only an abuse of discretion but hold out no hope of alleviating any of the problems pertaining to the provision of public housing for poor people. CHA has a duty to use its best efforts to comply with Court orders. CHA also has a duty to resist and oppose plaintiffs' simplistic theories and unhelpful rhetoric which not only impede analysis of difficult questions but bog CHA down in endless and useless hearings.

The plaintiffs' notion that the CHA will be or has been assisted in the discharge of its duties by the Order of April 10, 1972 has no basis in reality. This is because, as we pointed out in our opening brief (pp. 3, 4), the state

law which the CHA has been order to disregard, is not the sole basis of the power of the City Council to approve or disapprove CHA's recommendations of sites for public housing. The primary grant of power in this regard for federally financed, public housing is found in federal law - the United States Housing Act of 1937, as amended (47 U.S.C. § 1401, et seq.). Each federally financed public housing unit in the City of Chicago must be included in the "Cooperation Agreement" with the City required by the Housing Act. Neither CHA nor any other housing authority can build a single unit in any city unless that unit is covered by a Cooperation Agreement with that city.

Prior to enactment of the State statute in question, each new public housing project in the City of Chicago required either a new Cooperation Agreement or a specific addition to the existing Cooperation Agreement. The State statute did not give the City more power than it had: it only made it possible for the City and the CHA to enter into a blanket Cooperation Agreement which did not have to be amended or added to every time a new project was commenced. Plaintiffs ignore these facts.

As we pointed out in our opening brief (pp. 13, 14) both the City and HUD raised questions below as to their view of operations by the CHA under the order on CHA to

"by-pass" the City. Thus, the City asked whether the existing blanket Cooperation Agreement between CHA and the City - which was entered into only because of the existence of the State statute - was still valid (April 4-5, Tr. p. 404). And HUD counsel pointed out that the "unique" by-passing of the City Council, among other things, may present difficulties in obtaining the required favorable opinion of bond counsel (April 4-5, Tr. p. 532).

The Order of April 10 relieves CHA of nothing. It mandates a course of action for CHA which may cause CHA additional problems both with the City and HUD and which there is no evidence to suggest will produce one additional unit of public housing.

CHA has appealed because plaintiffs' continuous efforts to obtain orders directed at CHA are a waste of time: plaintiffs had their relief against CHA in 1969 and all the subsequent proceedings and orders against only CHA have been useless. In CHA's opening brief we described a time wasting May 28, 1972 hearing which involved CHA's efforts to comply with so much of the April 10 order as directed CHA to consider written comments about proposed sites (pp. 11-13). An equally fruitless hearing, two days long, took place

on September 28 and 29, 1972.^{*/} It involved the March 17, 1972 "Response" of CHA to Part III of the Order entered upon CHA on January 3, 1972 (A 21).^{**/} During the six months prior to that hearing, plaintiffs had filed no objections to the CHA "Response".

At the outset of the September 28, 29 hearing CHA protested, stating: "There is nothing before this Court this morning. We are not at issue on anything at all" (SA 8). The Court said: "All there is this morning is [that] a long time ago we set this date for a hearing" (SA 8). CHA also said that proceeding with the "hearing" would be a waste of time, that it would be "just another bear-baiting exercise where the CHA is hauled in and criticized" (SA 9). This prediction proved sound.

At the hearing the General Counsel, Executive Director and the Chairman of the CHA, an employee of HUD and a Sociology Professor from the University of Chicago were

^{*/} Portions of the transcript to which reference is made below are included in CHA's Supplementary Appendix ("SA") attached hereto.

^{**/} This refers to p. 21 of the Appendix to CHA's opening brief.

called by plaintiffs as witnesses with respect to CHA's "Response". At its conclusion plaintiffs presented the Order set forth in CHA's Supplementary Appendix attached hereto (SA 1). That order merely directed (SA 2, 3) CHA to straighten out any administrative problems in connection with CHA's December 1971 application to HUD (A 22) for an additional reservation for 3,500 units of family public housing.*/ The following colloquy then occurred:

"THE COURT: Any vigorous objections to this proposed order?

"MR. O'BRIEN: Judge, what I said in opening argument, that this proceeding is going to be a waste of time has been proven true * * * we have been here beating and flapping the air for two days -

"THE COURT: And increasing the deficit of the CHA.

"MR. O'BRIEN: That is right. * * * and what does he finally ask your Honor to do? To tell the CHA to do something that it already thought it had done, is vigorously attempting to cure any claimed defect in what it had done. There is no basis for any kind of an order on CHA to do anything.

* * * *

*/ On September 28, 1972, CHA had been informed from the witness stand - for the first time - that at least one HUD official thought its 1971 application was not in proper form (SA 12, 13). The next day CHA wrote HUD requesting clarification (CHA Ex. 3, 9/29/72, SA 4).

"THE COURT: Well, we did find out that there wasn't an acceptable application for 3,500 units on file at HUD. We found that out.

"MR. O'BRIEN: * * * That man who said that, Judge, was four layers or three layers away from Mr. Waner. Now we have taken steps. All we can do when we hear there is a problem -

* * *

"THE COURT: Well, if the money ever comes in, at least the record is clear there is a pending application, or will be, I hope.

"MR. O'BRIEN: But in any event, Judge, we think this is a silly order on this record and your Honor should not sign it or any other order against CHA.

"THE COURT: I would like to have something to preserve for posterity as to what I did with my time for the past two days, and this order may tend to do that. So that if somebody asks me what I was doing during the [28th] and [29th] of September, I'll say, 'Well, lookit here,' and then I would have a record.

"MR. O'BRIEN: Well, Judge, I guess that is important.

"THE COURT: All right.."

The order was then signed.

The order on appeal will solve no problems. On the contrary, it opens the door to a whole new set of difficulties for CHA because the applicable federal law is ignored and the order does not deal with the reality that the CHA is just one of the necessary parties in the construction of public housing.

The cause of integrated public housing is not advanced by more orders on the CHA. Plaintiffs obtained their full measure of relief against CHA in 1969. CHA has scrupulously obeyed that order and every other final order upon it since then. However, CHA did advise the District Court on March 17, 1972, as follows:

"It is appropriate, in CHA's view, to close its response to Part III of this Court's order of January 3, 1972, with its recommendation that this Court's order of July, 1969 ought to be amended in the following particulars:

- (a) Eliminate the limitations on public housing outside the City of Chicago;
- (b) Eliminate the buffer zone; areas which would have fallen within it should be redefined to fall within the General Public Housing Area; and
- (c) Revise the ratio of units built in the General Public Housing Area to those in the Limited Public Housing Area to 1 to 3 instead of 3 to 1.

Such modifications of the decree provide the best hope for increasing the supply of public housing in the City of Chicago.

It is the further judgment of CHA that the soundest criteria for the location of a substantial number of additional low-income family public housing units in the Chicago metropolitan area (the counties of Cook, Kane, DuPage, McHenry, Lake and Will) are as follows:

- (1) Where the eligible families live;
- (2) Where the potential sources of employment are located.

Along with the foregoing there should be a program for the development of a reasonable number of units on scattered sites so that experience may be gained on the issue of whether the scattered sites approach is a workable solution for the provision of substantial additions to the supply of low-income family public housing." (A 24-25).

As plaintiffs note (p. 16), CHA has since filed a motion to amend the 1969 decree which is now pending below.

CHA can be ordered to plan and report and hailed into court for scrutiny but there is no basis in the evidence for plaintiffs' assumption that an order upon CHA to bypass the City Council of Chicago can produce one additional unit of public housing. "The measure of any desegregation plan is its effectiveness", Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 38 (1971). The vice of plaintiffs' approach is that plaintiffs do not present effective - realistic - plans which recognize the limits upon the powers of CHA and sensible parameters for the exercise of the judicial function. Instead, they persist in offering up CHA as a scapegoat for the failure of their ill advised strategy even while seizing upon CHA as their chosen instrument for change.*/

*/ Pending below is plaintiffs' motion for an order in which CHA is plaintiffs' instrument for the provision of 60,000 units of public housing in the Chicago Urbanized Area.

For the above reasons, and those set forth in our opening brief, the District Court's order of April 10, 1972, should be reversed.

Respectfully submitted,

CHICAGO HOUSING AUTHORITY

By Patrick W. O'Brien

Watson B. Tucker

231 South LaSalle Street
Suite 1955
Chicago, Illinois 60604
ST 2-0600

Its Attorneys

Of Counsel:

Kathryn M. Kula
Mayer, Brown & Platt

SUPPLEMENTAL APPENDIX TO
REPLY BRIEF OF CHA

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ORDER

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judgment order), and that CHA has submitted or shortly will submit such development plans to HUD for approval; and

It further appearing from the evidence that CHA has previously applied to HUD for an additional reservation for 3500 Dwelling Units but that such application may be technically defective; and,

The Court having retained jurisdiction of this matter for all purposes, specifically including enforcement of this Court's judgment order of July 1, 1969, which order, among other things, obligates CHA to "use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of [such] judgment order," and directs CHA to "take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development", and,

It appearing to the Court that pursuant to such reservation of jurisdiction further orders are necessary to enforce such judgment order and "to remedy the past effects of CHA's unconstitutional site selection" as provided in this Court's memorandum opinion of February 10, 1969:

IT IS HEREBY ORDERED:

1. Within 15 days from the date hereof CHA shall either obtain written confirmation from HUD that its pending application for a reservation for 3500 Dwelling Units is acceptable in its present form as a valid application for such number of Dwelling

Units, or shall resubmit such application to HUD in appropriate form.

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

ENTER:

s/ Richard B. Austin
United States Judge

September 29, 1972

BOARD OF COMMISSIONERS
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EXECUTIVE OFFICE
55 W. CERMAK RD.
CHICAGO, ILLINOIS 60616
TEL. 791-8500

Chicago Housing Authority

C. E. HUMPHREY
EXECUTIVE DIRECTOR

September 29, 1972

Mr. John L. Waner, Director
Chicago Area Office
Department of Housing and
Urban Development
17 North Dearborn Street
Chicago, Illinois 60602

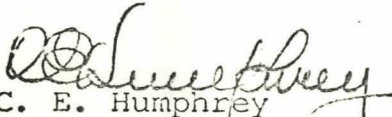
Dear Mr. Waner:

On December 28, 1971, CHA submitted to you a Request for Unit Allocation -- Family Housing for 3,500 units of family housing for the year 1972. Actually this was a resubmittal of our earlier application in accordance with your letter of August 12, 1971 requesting the resubmission to cover revised regulations instituting the Site Selection Criteria. In the nine months since that resubmission we have had no communication from HUD as to any deficiencies in the documents submitted.

Understandably, we were astounded yesterday to hear Mr. Woodrin Kee state, while testifying in the Federal Court case of Gautreaux, et al v. CHA, that CHA's December 28, 1971 submittal was incomplete and could not be considered as a legitimate application for an allocation of additional units.

We are requesting an immediate explanation of HUD's position in this matter.

Very truly yours,


C. E. Humphrey
Executive Director

THE CLERK: 66 C 1459, consolidated cause,
Gautreaux v. CHA, hearing with regard to 7,000 units.

MR. POLIKOFF: Good morning, your Honor. The
plaintiffs are ready to proceed.

MR. O'BRIEN: Good morning, Judge.

Your Honor, I would like to make a short
remark in reply to --

THE COURT: I am going to have everybody make
some remarks. I don't care whether they are short or
long. I have got the whole day to give to you.

MR. O'BRIEN: Well, first, Judge, on March 17th,
some months ago, CHA filed its response to Part 3 of
your order of January 3, 1972. It has been in the
courthouse and in the hands of the attorneys for the
plaintiff ever since. In brief --

THE COURT: And I see that you filed your response
on a very appropriate day for you, Mr. O'Brien, St.
Patrick's Day.

MR. O'BRIEN: That is right.

THE COURT: A good time for any O'Brien to file a
pleading.

MR. O'BRIEN: And oddly, although I am sure it
is obvious, Mr. Polikoff says he is ready to proceed
but I don't know what he is about to proceed with.

THE COURT: I don't, either, but maybe if you will give him a chance to talk, he will tell us.

I am interested in finding out what this proceeding is about.

MR. O'BRIEN: I just want to state for the record, Judge, that there has been some months gone by since we filed our response. That response, in effect, said that we cannot proceed with planning for 7,000 units, there is no money, there is no allocation and there is no suitable land.

THE COURT: You can't proceed with that until you know about the 1500 units.

MR. O'BRIEN: We alluded to problems with respect to the 1500 which, of course, we have been proceeding with in accordance with all previous orders of the Court and that is not before the Court.

We have been reporting regularly. We get no objections to our progress reports.

THE COURT: I am interested in finding out from you and HUD as to if there are 1500 units available and what is being done in regard to getting money for them or building them. I just want a report on what is going on.

MR. O'BRIEN: Judge, we filed a report on June 30,

pursuant to the order of April 16th, which stated in detail the exact situation with respect to the 1500 units for which there is an allocation, for which there is a reservation, and there is another quarterly report for the quarter ending September 30 and it will be filed, and I can state for the record that the report will show that there is with HUD, or approved by CHA, 1500 units in accord with the order. The details of it are due in the report for the period ending September 30.

I don't view this proceeding this morning as involving that issue whatsoever.

My problem is that I have had until this moment in court no response, no criticism from the plaintiffs with respect to our response filed on March 17th, the 7,000 unit response. I presume they are displeased. I presume they are unhappy, but in what particular regard they are unhappy or displeased, I don't know.

THE COURT: Well, maybe Mr. Polikoff will tell you if you will give him a chance.

MR. O'BRIEN: And furthermore, of course, Judge, your order of July of '69, if further orders are being sought, and I have said this on another occasion, we are entitled to notice of the order being sought. There

is no motion before this Court this morning. There is nothing before this Court this morning. We are not at issue on anything at all.

THE COURT: All there is this morning is a long time ago we set this date for a hearing.

MR. O'BRIEN: That is right, and I don't know what the issues are. I have sought to find out and I was unable to find out, and I think I should not hear what the issues are of a hearing when the hearing commences.

Apparently Mr. Polikoff has got Professor Hauser here, a plaintiffs' witness. About what? I don't know.

THE COURT: I don't know either.

MR. O'BRIEN: And for all of those reasons, Judge, I object to proceeding with any kind of a hearing until we frame some issues.

THE COURT: Have you something to say, Mr. HUD?

MR. MURRAY: No, your Honor. At this point in time we have not been brought into issue and until we are I would like to reserve any remarks.

THE COURT: All right.

Will you proceed to roll up this ball of wax, Mr. Polikoff, and tell me what in your opinion we are going to do today.

we told in those reports, without any objection or exception ever being taken, what happened.

Mr. Polikoff knows full well that this very morning they are acting at the CHA, I hope, it is on the agenda, on the last development plan. To waste our time to come into court on that, it is a waste of the taxpayers' money, Judge, and it is a waste of whoever it is that finances this case for the ACLU. We are not going anywhere. We are under no notice. This duplicates previous orders of the Court. It is just another bear-baiting exercise where the CHA is hauled in and criticized, and I take exception for all of those reasons to having any kind of a hearing this morning whatsoever. There is nothing before your Honor except Mr. Polikoff's continuing slow burn over the fact that life isn't going the way he wants it to go.

THE COURT: It isn't going the way I want it to go either.

MR. O'BRIEN: And it is not going the way I want it to go, Judge, but that, as somebody once said, I think, is pretty much life. If it is our fault, if CHA is doing something wrong, if we are not using our best

efforts, Mr. Polikoff knows what to do and he hasn't done it yet and he doesn't dare, because he would lose and he knows it.

THE COURT: Now I guess --

MR. POLIKOFF: This is not a tennis game, but how about one or two moments of response?

THE COURT: It may be not tennis, but how about ping pong?

MR. POLIKOFF: O.K., that is more fashionable now anyway.

I wasn't here, as your Honor may recall, on August 7, so I am not privy to what may have been said orally at that time.

If you did say that you were not going to hear that matter at that time I was unaware of it.

I do wish to point out that the issue, the same issue that is raised by the motion is raised, as I pointed out, in the March 17th response of CHA. We don't have to rely on the motion for that.

I also, at this now famous luncheon, want to remind Mr. O'Brien, contrary to his recollection, that we did talk about the three to one ratio being in issue and, indeed, he requested me, and I said I would probably do it, I didn't promise but I said I

MR. MURRAY: The purpose of that was to refute Mr. Swibel's testimony.

THE COURT: I know.

By the way, how long has that been up there?

MR. POLIKOFF: The final briefs are due, I think, next month, and it is anybody's guess when oral argument will take place.

THE COURT: All right.

MR. O'BRIEN: Mr. Humphrey, please.

THE COURT: You have heretofore been sworn.

You may be seated.

C. E. HUMPHREY,

having been previously duly sworn, was called as a witness by CHA and testified further as follows:

DIRECT EXAMINATION

BY MR. O'BRIEN:

Q Would you state your full name, please, sir.

A C. E. Humphrey.

Q And where do you live, Mr. Humphrey?

A I live in Lombard, Illinois.

Q And what is your business or profession?

THE COURT: We got that out of him this morning when he was on the stand.

MR. O'BRIEN: All right, sir.

THE COURT: He is the same Mr. Humphrey.

MR. O'BRIEN: Actually, Judge, I was stalling while we looked for an exhibit and that is the first stall I will admit in the course of this proceedings, Judge.

THE COURT: O.K.

Now you will stipulate that he is the same Mr. Humphrey?

MR. POLIKOFF: Yes.

BY MR. O'BRIEN:

Q Mr. Humphrey, I show you a document previously marked Chicago Housing Authority Exhibit 2 for identification as of this date, and ask you, sir, what it is or what is it?

A It is a request to HUD for unit allocation for family housing.

Q Is that request for a reservation of 3500 units of low income family public housing from CHA to HUD, in your view, sir?

A Yes.

Q Prior to hearing the testimony of Mr. Kee, sir, were you aware that HUD or anyone at HUD, rather, deemed your form of application for this 3500 reserva-

tion in some way deficient or insufficient?

A This is the first I heard of anything like that.

THE COURT: Having heard about it, what are you going to do about it?

THE WITNESS: I don't think it is deficient. I think the information that they ask for is right there with the application.

THE COURT: All right, the answer is that you are not going to do anything about it?

THE WITNESS: Not unless they tell us something that we have submitted is not correct, and they haven't done so.

THE COURT: That is what I thought your answer would be.

Go ahead.

BY MR. O'BRIEN:

Q Now, sir, with respect to this 3500 unit reservation, did you participate in the decision to apply for that particular number of units in addition to the 1500 already reserved?

A Yes.

Q What was the basis of the selection of the number 3500?

in the plaintiffs' judgment, to enter appropriate orders respecting the way in which housing is built, if it is built; so that if the Brooke Amendment problem is solved and housing goes forward, it will be built in the manner you prescribe and if it is stopped, it will be stopped here and everywhere else in the country.

So in my judgment, while it has been interesting and educational, I think that the whole subject of the Brooke Amendment is not relevant for purposes of the order to be entered. I therefore propose two things, No. 1, that your Honor enter the form of order that I have proposed and I have read to you in full the ordering paragraph. The only other paragraph says the Court retains jurisdiction for the entry, pursuant to notice, if such further order --

THE COURT: That paragraph I would like to leave out.

MR. POLIKOFF: And the second thing is that I would like the opportunity, with Mr. Murray, to appear before you at 2:00 o'clock on Monday either for a report or for a request that I have already mentioned.

THE COURT: I will be here.

MR. POLIKOFF: Thank you, your Honor.

THE COURT: Any vigorous objections to this proposed order?

MR. O'BRIEN: Judge, what I said in opening argument, that this proceeding is going to be a waste of time, has now been proven true by Mr. Polikoff's statement. He has completely retreated. Things that he knew or could have found out very simply without wasting your Honor's time and my time and Miss Kula's time and Mr. Tucker's time and, in fact, Mr. Polikoff's time, the time of the press, the time of your staff, we have been here beating and flapping the air for two days --

THE COURT: And increasing the deficit of the CHA.

MR. O'BRIEN: That is right. He handed me a great biglong order and he talks about what we said at lunch. He fills the record with verbiage and what does he finally ask your Honor to do? To tell the CHA to do something that it already thought it had done, is vigorously attempting to cure any claimed defect in what it had done. There is no basis for any kind of an order on CHA to do anything.

The record has been loaded up with information that if Mr. Polikoff would only read our quarterly reports he would already have known it. This record supports totally what we said in our response No. 3.

THE COURT: Well, we did find out that there wasn't an acceptable application for 3500 units on

file at HUD. We found that out.

MR. O'BRIEN: We found that out, Judge, but even if -- if that is true. That man who said that, Judge, was four layers or three layers away from Mr. Waner. Now we have taken steps.

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All we can do when we hear there is a problem --

THE COURT: Yes, but if that hadn't been developed in this Court, why, there wouldn't have been any steps taken.

MR. O'BRIEN: Probably not, Judge. And you know something? It probably wouldn't have made any difference, because there is no allocation out of which to make reservations right now, and that is clear. The record is indisputable.

THE COURT: Well, if the money ever comes in, at least the record is clear there is a pending application, or will be, I hope.

MR. O'BRIEN: But there is an old phrase, Judge, the mountain labored and brought forth a mouse, and Mr. Polikoff heaved and strained and a mouse came into the Courtroom and the mouse was the little issue of whether our application is in proper form. And I would hope that next time we are having the delivery of an elephant that it would be an elephant and not a mouse.

THE COURT: Now you are getting political.

MR. O'BRIEN: I hadn't intended to, Judge. My comparison was the mouse and the elephant and not the elephant and the donkey.

But in any event, Judge, we think this is a silly order on this record and your Honor should not sign it or any other order against CHA.

THE COURT: I would like to have something to preserve for posterity as to what I did with my time for the past two days, and this order may tend to do that. So that if somebody asks me what I was doing during the 27th and 28th of September, I'll say, "Well, lookit here," and then I would have a record.

MR. O'BRIEN: Well, Judge, I guess that is important.

THE COURT: All right.

MR. O'BRIEN: Thank you.

THE COURT: Anything to say, HUD?

MR. MURRAY: One minute, your Honor.

As your Honor will recall, I appeared before this Court many times in these proceedings and it has always been the posture and position of my client, the Department of Housing and Urban Development and the Secretary, that we will utilize our best efforts in implementing this Court's orders and this Court's

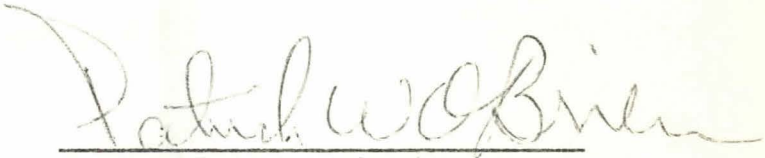
CERTIFICATE OF SERVICE

I hereby certify that on November 13, 1972,
I served copies of the foregoing Reply Brief for the
Appellant, Chicago Housing Authority upon counsel for the
other appellants, and for the appellees, by mailing same,
with postage fully prepaid, to:

Alexander Polikoff, Esq.
109 North Dearborn Street
Chicago, Illinois 60602

Edward T. Joyce
Attorney for Edward R. Vrdolyak
77 West Washington Street
Chicago, Illinois 60602

Richard L. Curry
Corporation Counsel of
the City of Chicago
511 City Hall
Chicago, Illinois 60602


Patrick W. O'Brien