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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 72-1409, 72-1410

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.

REPLY BRIEF 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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REPLY BRIEF 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.

I.

THIS CASE IS CONTROLLED BY JAMES v. VALTIERRA.

Plaintiffs attack the City's reliance on *James* v. *Valtierra,* 402 U. S. 137 (1971), by arguing, initially, that there is a "factual dissimilarity between the California statewide referendum in *Valtierra* and the refusal of the Chicago City Council to even consider CHA's remaining proposed sites" (Appellees' Br., p. 31). The only distinction is that in *Valtierra,* an attempt was made to set aside a statute requiring popular approval of public housing sites; in *Gautreaux* an attempt is being made to set aside a statute requiring council approval of public housing sites. This is, of course, a distinction without a difference. Furthermore, plaintiffs' question-begging reference to "the refusal" of the council "to even consider" the remaining sites—even if it were true—would perhaps be relevant if this were a suit for mandamus, seeking to force council action; it is not such a suit.

?

Plaintiffs next argue that the *Valtierra* plaintiffs were seeking to prove racial discrimination, whereas here it has "already been established" (Appellees' Br., p. 31). But the argument is disingenuous, for discrimination there had been "established" in the district court exactly in the same way it has been "established" here: hearsay evidence (that is, affidavits) and statistics. Despite such "proof" in the district court, not one of the Justices of the Supreme Court was convinced that there was racial discrimination. Plaintiffs attempt to explain this fact—and the evidence—by asserting that the Court "treated" the case as if discrimination had not been proved. But surely, this suggests that the Justices were blind or lacking in integrity, for without question the "proof"—almost identical to that in this case—filled the record and could not be ignored. In point of fact, Justice Black stated that "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.

Two other cases are cited by the plaintiffs in an effort to explain away the similarity between *Valtierra* and this case. The first is *U. S.* v. *Scotland Neck City Board of*

Education, 407 U. S. 484 (1972), a school desegragation case. There, a state statute was passed, after a desegregation order, authorizing the creation of one specific school district to be carved out of a larger district in the process of ending a dual school system. The majority opinion states, at 489,

> "The District Court in this case concluded that Chapter 31 'was enacted with the effect of creating a refuge for white students of the Halifax County School system, and interferes with the desegregation of the Halifax County School system. . . .'
>
> "Our review of the record leads us to conclude that the District Court's determination was the only proper inference to be drawn from the facts of this case, and we thus reverse the judgment of the Court of Appeals."

But in *Valtierra,* Mr. Justice Black observed that "California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy" 402 U. S. at 141; obviously the Court did not view the approval requirement as a "refuge" designed to maintain segregation. Similarly, the approval requirement here long pre-dates the filing of the suit and the entry of the 1969 order. Some sites have been approved, others not. Paragraph 9 was clearly not enacted to provide a "refuge" for anyone.

Plaintiffs also argue that the distinction between *Valtierra* and this case is explained by dictum in *Sisters of Providence* v. *City of Evanston,* 335 F. Supp. 396 (N. D. Ill. 1972), where it is stated that "referendums . . . are a category unto themselves." 335 F. Supp. at 403. Plaintiffs are in error. *Sisters of Providence* concerned allegations that Evanston refused to rezone property "in an arbitrary and unconstitutional manner", 335 F. Supp. at 401. On a motion to dismiss, Judge Abraham L. Marovitz stated that Evanston could not "refuse to rezone for black projects where under the same circumstances it would have granted a variance to an all white project. The entire case may well revolve around the validity of the environmental reasons given by Evanston in denying the petition. . . ." *Ibid.*, 404.

No such considerations are present in this case, however, and the plaintiffs have, indeed, argued that the validity of the environmental reasons given by the City are irrelevant here.

Judge Marovitz did not simply dismiss *Valtierra*, as plaintiffs suggest, as a special situation; rather, he stated that *Valtierra* and *Ranjel* v. *City of Lansing*, 417 F. 2d 321 (6th Cir. 1969)—cited in the City's brief at p. 18—involved rights "not present in pure zoning cases". *Ibid.*, 403. He went on to note that

"the question of whether the land use requirements are arbitrary or not will be based on precisely the same criteria as would appear in a conventional 'garden variety' zoning case. . . ." *Ibid.*, 404.

Plaintiffs are rather stretching a point in appearing to suggest that this case is a "pure" or "garden variety" zoning case; it is an indication, perhaps, of how difficult they find it to get around *James* v. *Valtierra*. They do not dispute, it should be noted, the City's argument that both referendums and council votes are expressions of popular opinion, and "that the considerations found validly to support referendums (*e.g.*, local expenditures, tax revenues, public services . . . environmental and social values . . .) are relevant whether applied to a public referendum or a city council vote" (City's brief, p. 20).

Plaintiffs also use these cases in discussing the "effect theory" (Appellees' Brief, pp. 34 *et seq.*). Unfortunately, they obscure the issue by confusing decisions dealing with

remedial proceedings (as in *Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972)) with decisions establishing primary liability (as in *Valtierra*). Unequivocally the City's discussion of the developing concept of equal protection was in the context of primary liability, that is, the establishment of a constitutional violation. Thus, the City's brief notes that the Model Cities program has a greater "effect" on minority groups than on others (City's brief, pp. 25-26). Thus, too, the City's brief relies on *Ranjel, supra; Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F. 2d 291 (9th Cir. 1970); *Johnson* v. *New York State Education Dept.*, 449 F. 2d 871 (2d Cir. 1971); *English* v. *Town of Huntington*, 488 F. 2d 319 (2d Cir. 1971); and *Jefferson* v. *Hackney*, ... U. S. ...., 32 L. Ed. 2d 285 (1972); and, indeed, *Valtierra*. Plaintiffs make no effort to explain why these courts have found no denial of equal protection notwithstanding the fact that the relevant programs statistically have a greater effect on minority groups than on others.

It is not surprising that plaintiffs would use the "effect theory" as the vehicle in their attempt to buttress the frail evidentiary structure of their case. Nothing at all is said in defense of the "testimonial" evidence (the CHA depositions and affidavits concerning what other persons believed and intended). Consequently, it is upon the lower court's statistics and the "effect" they purportedly demonstrate, that plaintiffs build their case. They make "no apology" for the district court's reliance upon the statistics (Appellees' brief, p. 35n). But they are obviously disturbed when the City points out (City's brief, p. 12) that "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." This is, presumably, because 55% of elderly housing is in white neighborhoods and suggests, obviously,

— proximity rule

that whatever public motivation was, it was not *racially* defined. This may indicate a greater reluctance to have family housing than elderly housing, but this is not a *racial* distinction. Family housing, for example, clearly makes greater demands on land and services.

Although elderly housing was uncontestably left out of the court's statistics, plaintiffs are correct in stating that it was "considered" by the district court (Appellees' brief, p. 4). It was noted by the district court that applications for elderly housing were accepted first from persons living within a two-block radius of the site, with successive priorities given to persons living within concentric half-mile circles (Appendix C, City's Brief, p. A20). The court then immediately jumped to the conclusion that "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." *Ibid.* But if that was the reason for the "proximity rule", why then was it not also used for family housing? Curiously, no one ever suggested that it might simply be wise social policy to use the proximity rule for elderly housing because the elderly have a declining mobility, have perhaps a declining circle of near-by acquaintances, have less capacity to adjust to a new and unfamiliar location than have young families.

It is interesting that plaintiffs even mention this point in view of the fact that the Judgment Order, by its terms, specifically provides that "Not more than 50% of the Dwelling Units in all Public Housing Projects shall be made available to eligible *neighborhood* residents. . . ." (Appendix D, City's Brief, p. A35, emphasis supplied.) And most interesting of all is the following comment by the district judge, in response to a statement by a CHA attorney:

"THE COURT: Don't you understand, Mr. Tucker, that there is no obligation on the part of CHA to put black tenants in the buildings in white neighborhoods. There's a waiting list of white applicants who probably would be happy to go into—

"MR. TUCKER: That's correct, and there may or may not be black applicants who might be happy.

"THE COURT: Well, I mean, the point to me is that there is a waiting list of both kinds." Transcript, p. 456.

Obviously, the district court recognizes that a "proximity rule" need not indicate prejudice.

Of course, the point of all this is, that the statistical evidence here, whether it is used to indicate intent, or to establish a denial of equal protection in showing an "effect" on minorities, is insubstantial. It does not prove racial discrimination.

II.

THE ORDER OF APRIL 10 AND THE JUDGMENT ORDER IT PURPORTS TO ENFORCE INFLICT HARDSHIPS UPON THE COMMUNITY AT LARGE AND UPON THE POOR IN PARTICULAR TO A DEGREE THAT THEIR ENTRY CONSTITUTES AN ABUSE OF THE DISTRICT COURT'S DISCRETION.

Part III of plaintiffs' brief purports to answer the City's argument that the orders of 1972 and 1969 inflict needless and undeserved hardship, principally upon the poor.

Its total response to the City's detailed discussion of the special problems of the Spanish-speaking community (City's brief, pp. 28-30), is to state, almost as an afterthought, that an amicus brief was filed in the district court by Spanish-speaking organizations "supporting the prayer of the supplemental complaint (Appellees' brief, p. 44). Plaintiffs' failure to elaborate may be due to the fact that the amici say nothing whatever about the *location* of public housing, but only that there is a need for housing available to the Spanish-speaking. The amicus brief does seem to support the City's contention respecting the language problem, however, in that it complains that

> "Apparently there is no literature of any kind available in spanish from CHA regarding any public housing in Chicago, there are no known bilingual employees in CHA renting offices. . . ." Brief of Amici Curiae, p. 10.

Plainly, plaintiffs' unresponsiveness underlines the discomfort they feel in the face of the obvious hardship imposed on, at least, this community.

The plaintiffs then touch briefly upon the zoning-environmental considerations advanced in the City's brief (City's brief, pp. 26-27), but only long enough to misstate the evidence. Thus, it is implied that the City is overly concerned since only "some" of the sites submitted would require rezoning (Appellees' brief, p. 45). But the evidence indisputably shows that virtually all of the sites would require rezoning, either as to permitted use or as to minimum lot size. Transcript, pp. 79-167. For example, the testimony as to one site indicates that although it is in a residential district, designated as R3, the Chicago Zoning Ordinance requires that "In an R3 District, there shall be provided not less than 2,500 square feet of lot area per dwelling unit." Municipal Code of Chicago, Chapter 193A, Section 7.5-3. Nine units are proposed for the site, which would thus require 22,500 square feet in lot area. But the actual size of the lot, 157 feet by 125 feet, is only 19,625 square feet, deficient by 2,875 square feet. Transcript, pp. 119-120.

It is also stated that "sites had previously been routinely rezoned," citing, *e.g.*, City Ex. 1, p. 2 of attachment 3 thereto (Appellees' brief, p. 45). But an examination of

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1st example is Ex. No. 1, p. 4 of Ex A
in which CEH speaks of

that document indicates that it refers to a specific proposed planned development of 3,000 units of mixed-income housing, and that prior council approval of the acquisition of the area is required before zoning changes are made. If plaintiffs had an understanding of zoning, they might realize that a planned development, covering a large area, is far different from the wide-spread "spot zoning" that would be required by the sites submitted by CHA. It is anything but "routine rezoning."

Again, plaintiffs assert that the Department of Development and Planning of the City "found most of the sites to be 'suitable' for public housing". Appellees' brief, pp. 45, 10. But an examination of the document relied upon, which appears as an appendix to the April 10 order (342 F. Supp. 827, 832), clearly states that out of the original 235 sites submitted, ~~106—fewer than~~ half—were even suitable for "residential development"; the document says nothing whatever about suitability for public housing, or whether any of those remaining sites met any of the other requirements of the zoning ordinance. Under the April 10 order, of couse, there is no review whatever of sites selected in the future.

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So much for hardship. Plaintiffs, in the pursuit of ideology, demonstrate their insensitivity to community needs here as they did in the Model Cities case where they declared that such hardship was "the price one had to pay for progress." The answer is simple, they say; build in accordance with the 1969 order. Appellees' brief, p. 39. In other words, forget about the environment, forget about zoning, forget about increased population density, forget about diminished tax revenues, forget about unanticipated burdens on public services, go ahead and condemn private property. And, as a practical matter, we can also forget about rebuilding the inner city for, given the amount of housing needed to meet the shortage, and given the location of virtually all of the vacant or deteriorating land, it is nonsense to believe that there can be meaningful reconstruction when 75% of the available funding must be used outside of the inner city.

It is clear, as a result, that complex social problems cannot be resolved by simplistic, ad hoc decrees thinly based upon hearsay evidence and inaccurate statistics. A broader perspective that takes into consideration the consequences of its acts would better serve the poor and the community at large.

III.

THE SUPPLEMENTAL COMPLAINT ALLEGES NO FACTS WHICH SUPPORT JOINDER OF THESE DEFENDANTS FOR PURPOSES OF RELIEF IN THE CIRCUMSTANCES OF THIS CASE.

Plaintiffs' argument, in Part I of the brief, consists of the methodical demolition of a straw man. It is based, perhaps, upon a misapprehension of the nature of the City's theory with respect to improper joinder. The City does *not* make the rather arid point that a legislator or, indeed, the City itself may never, under any circumstances, be made a defendant in a law suit for purposes of relief. The City *does* say that where the legislator or the City has not been found to be guilty of a constitutional violation, the legislator or City are not properly joined for purposes of relief when the relevant function they perform is otherwise valid and not simply ministerial. (It is noteworthy that while the April 10 order is ostensibly based upon the City Council's alleged non-action, the order does not require action, rather it removes the power to act.) The cases cited in the plaintiffs' brief do not contradict this proposition; on the contrary, every single case supports the City's view.

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Most of the cases cited involve administrative personnel concerned with voter registration, *e.g., Louisana* v. *United*

States, 380 U. S. 145 (1965); faculty assignment, *e.g., United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086 (5th Cir. 1969); or drawing school district boundary lines, *e.g., Bradley* v. *School Board of Richmond, Virginia,* 324 F. Supp. 396 (E. D. Va. 1971); or otherwise involved ministerial tasks. Among the latter are, for example, *Franklin* v. *Quitman County Board of Education,* 288 F. Supp. 509 (N. D. Miss. 1968), where the court said, at 517:

> ". . . the County Board of Supervisors is required to issue school bonds if it finds all the jurisdictional facts to exist for so doing. . . .
> ". . . [O]nce the basic jurisdictional facts shall have been adjudicated by the Board of Supervisors as regarding a bond issue, all that remains is a mere ministerial duty to proceed with the issuance of legally authorized bonds."

Banks v. *Perk,* 341 F. Supp. 1175 (N. D. Ohio 1972), also cited by plaintiffs, concerns the issuance of building permits. When city officials discovered that permits they had approved were to be used for construction public housing, the permits were denied. The complaint there sought to restrain the defendants from "imposing any burdens on . . . public housing which are more onerous than those placed upon . . . any private housing, building or structure. . . ." *Ibid.,* 1177. The court ruled that

> "There was no factual basis on which to revoke the permits here in question. The revocations were arbitrary, capricious and not in the furtherance of any compelling government interest." *Ibid.,* 1179.

Why no
No showing
of interest
in non
action
here.

The case is thus hardly comparable to this case.

A final case of the type is a 1941 decision of this Circuit, *Connett* v. *City of Jerseyville,* 125 F. 2d 121, which plaintiffs, remarkably, assert that it permits affirmative relief "even with respect to the exercise of discretionary legislative functions". Appellees' brief, p. 28. What this Court did, in fact, say was that

> "When a court compels a city to do its duty as defined by statute, and to act, that does not control the discretion of the city as to how it shall act." *Ibid.*, 124.

Here plaintiffs seek not to compel performance of a duty, but rather to deprive the council of its discretion in the performance of that duty.

The remainder of the cases cited by the plaintiffs concern situations in which complicity in constitutional violations was clearly established. Thus, for example, in *Wright* v. *Council of City of Emporia,* 407 U. S. 451 (1972), the Court noted that

> "Only when it became clear—15 years after our decision in *Brown* v. *Board of Education,* 347 U. S. 483 —that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system. *Under these circumstances,* the power of the District Court to enjoin Emporia's withdrawal from that system need not rest upon an independent constitutional violation. The court's remedial power was invoked on the basis of a finding that the school system violated the Constitution, and since the city and the county constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system." *Ibid.*, 459-460, emphasis added.

Similarly, in *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484 (1972), the opinion states that

> "The District Court in this case concluded that [the statute establishing a new school district] 'was enacted with the effect of creating a refuge for white students of the Halifax County School system, and interferes with the desegregation of the . . . system . . .'
>
> "Our review of the record leads us to conclude that the District Court's determination was the only proper inference to be drawn from the facts of this case. . ." *Ibid.*, 489.

In a concurring opinion, Chief Justice Burger observed that

> "Scotland Neck had been a part of the county-wide school system for many years; special legislation had to be pushed through the North Carolina General Assembly to enable Scotland Neck to operate its own school system. The movement toward the creation of a separate school system in Scotland Neck was prompted solely by the likelihood of desegregation in the county, not by any change in the political status of the municipality." *Ibid.*, 492.

In sum, the circumstances under which a legislator or the City may be joined solely for purposes of relief require a finding of, at least, complicity in a constitutional violation, or a finding that the function performed is simply ministerial. Neither is present in this case.

It should be added that most of the cases relied upon by plaintiffs are southern school desegregation cases. The policy present in those cases thus is one of integration within any given school. This is, of course, exactly the opposite of the facts in this case, where the issue is where to place the buildings, not whether they will be integrated. Since 90% of the occupants of CHA family units are black (as is 90% of the waiting list), the units, no matter where located, will in no meaningful sense be integrated.

Moreover, apart from the different policies in the school cases, there is a functional difference between assigning students and locating buildings. The school buildings already exist. School district boundary lines are intangible and easily changed. Reassigning a student or redrawing a boundary does not affect third parties—no one's property is taken. City services are not affected. Public revenues are not affected. Population density controls are not affected. Therefore, the gap separating the school desegregation cases from this case is wide and must be kept in mind in evaluating plaintiffs' attempted analogy.

A final word is in order respecting plaintiffs' charge that certain of the City's points were not raised below (Appellees' brief, pp. 16, 30). Plaintiffs' charge is without merit. The City and the City defendants have regularly, throughout this litigation, been regarded, implicitly and explicitly as guilty of a violation; plaintiffs, court, and some codefendants all indulge in this attitude. Yet, the City defendants were not made parties to the principal case. They were allowed to intervene once for the limited purpose of defending the Model Cities program. They are now brought into the case only for the purpose of granting relief. This is the first time that the City has been able to point out the gross errors underpinning the 1969 order. Yet in that context it argues no new facts; rather, it points out the weaknesses apparent on the face of the memorandum opinion of 1969, as it would of any case alleged to be dispositive of a subsequent claim.

Moreover, despite plaintiffs' apparent concession that the City is not directly subject to the memorandum opinion and the judgment order of 1969 (Appellees' brief, p. 17), the judgment order asserts, in fact, that the City is (City's brief, Appendix D, p. A38). Clearly the evidence relied upon in the memorandum opinion may be reconsidered in determining whether the members of the city council are "bound." Moreover, a decree is always open to reconsideration in subsequent proceedings for enforcement, see *Lawrence Manufacturing Co.* v. *Janesville Hills,* 138 U. S. 552 (1890).

Plaintiffs also argue that the council's failure to consider all of the sites submitted cannot be attributed in any manner to an effort on the part of the City to protect its appeal in the Model Cities case (*Gautreaux* v. *Romney,* 457 F. 2d 124) because no one testified to this reason below, because the council might have continued to consider sites rather than take its regular summer recess, and because "more than 6 months . . . have elapsed since April 10." Appellees' brief, p. 30. First, there is no question that the district court was aware of all of the relevant dates, of the filings, and of the appeal. Second, to suggest that the council (after approving a substantial number of sites, many on its own initiative), demonstrated recalcitrance in taking a summer recess, is to bend over backwards in searching out a reason for stripping the council of its powers. And, finally, the suggestion that the council might have reviewed sites "in the more than 6 months that have elapsed since April 10", considering that, due to the April 10th order, it has not had the power to do so, is clearly specious and inappropriate to the serious issues in this case. ?

CONCLUSION.

For the reasons set out above, and those appearing in the City's brief heretofore filed, 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.

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