

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, ET AL.,

Plaintiffs-Appellants-
Cross-Appellees,

v.

CHICAGO HOUSING AUTHORITY,

Defendant-Appellee,

and

JAMES T. LYNN, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT,

Defendant-Appellee-
Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEE SECRETARY
OF HOUSING AND URBAN DEVELOPMENT

CARLA A. HILLS,
Assistant Attorney General,

JAMES R. THOMPSON,
United States Attorney,

STEPHEN F. EILPERIN,
ANTHONY J. STEINMEYER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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Defendants-Appellees.

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BRIEF FOR THE APPELLEE SECRETARY
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ISSUE PRESENTED

In providing a remedy for racial discrimination previously held to have existed in the Chicago public housing program, the district court ordered the Secretary of Housing and Urban Development to use his best efforts to cooperate with the Chicago Housing Authority ("CHA") in its efforts to increase the supply of dwelling units in conformity with federal statutes and regulations and the judgment entered in the companion case against CHA. The court declined to adopt or give further consideration to the plaintiffs' proposal for a metropolitan-wide remedial decree. The question presented

is whether, in so ruling, the district court abused its discretion.

STATEMENT OF THE CASE

In 1966, six individuals brought this action against the Housing Assistance Administration, then an agency of HUD, on behalf of the class of Black tenants in, and applicants for, family low-rent public housing projects in Chicago (Complaint, ¶¶ 3-5). The complaint alleged that HUD was "assisting in the carrying on of a racially discriminatory public housing system within the City of Chicago, Illinois" (Complaint, ¶ 2). Plaintiffs sought a declaratory judgment to that effect and an injunction against federal financial assistance to CHA "in support of the racially discriminatory aspects of the public housing system within the City of Chicago," together with "such other and further relief as the Court may deem just and equitable" (Complaint, pp. 15-16).

This action was stayed in the district court pending the initial disposition of the plaintiffs' companion suit against CHA. In that suit, the district court granted summary judgment against CHA finding that its site-selection and tenant-assignment practices were racially discriminatory. 296 F. Supp. 907 (N.D. Ill., 1969). Illinois Revised

Statute, Ch. 67 1/2, § 9 required City Council approval of each proposed public housing site. Before seeking that approval, CHA followed the practice of submitting proposed sites to the alderman in whose ward the site was located for his approval. This informal pre-clearance procedure was held discriminatory because, although CHA had selected forty-one sites in predominantly White areas and sixty-two sites in Black areas between 1955 and 1966, only two of the White sites, in contrast to forty-nine of the Black sites, had been approved by the alderman and the City Council. 296 F. Supp. at 911.

To remedy this discrimination, the district court issued an injunction on July 1, 1969, which required specified affirmative action by CHA. 304 F. Supp. 736 (N.D. Ill., 1969). In addition to enjoining CHA from using the past tenant-assignment and pre-clearance site-selection procedures, the order directed CHA to build its next 700 dwelling units in Chicago in the "general public housing area," i.e., those portions of Cook County located at least one mile from areas having a Black population of thirty percent or more. Thereafter, three-fourths of CHA's new units were to be built in the general public housing area, while the remaining one-fourth could be placed in the other portions of Cook County,

the "limited public housing area." CHA was also ordered to use its best efforts to increase the supply of dwelling units.

Later, this part of the decree was modified by ordering CHA to propose sites for 1,500 dwelling units by a specified deadline. That order was affirmed by this Court, 436 F. 2d 306, and the Supreme Court denied certiorari. 402 U.S. 922.

The district court then dismissed the action against HUD, but this Court reversed that decision and directed that summary judgment be entered for the plaintiffs. 448 F. 2d 731. This Court held that "HUD's knowing acquiescence in CHA's admittedly discriminatory housing program" violated the Fifth Amendment and the 1964 Civil Rights Act, 42 U.S.C. 2000d.

On remand from that decision, the district court enjoined HUD from releasing Model Cities funds to the City of Chicago until the City approved 700 sites for public housing. 332 F. Supp. 366. This Court reversed that order on the ground that it was improper to threaten the termination of one program, untainted by discrimination, in order to cure discrimination in a different program. 457 F. 2d 124.

In another remedial decree, the district court ordered CHA to proceed with the steps necessary to provide 1,500 dwelling units without regard to Illinois Revised Statute, Ch. 67 1/2, § 9, which required CHA to obtain the approval of the City Council before acquiring real property. 342 F. Supp. 827. That order was affirmed by this Court, 480 F. 2d 210, and the Supreme Court denied certiorari. 94 S. Ct. 895.

The present appeal arises from another remedial decree. On December 23, 1971, the district court ordered the parties "to attempt to formulate a comprehensive plan to remedy the past effects" of the discriminatory site-selection procedures (App. 6). If unable to agree, the parties were directed to file separate proposals.

Pursuant to this decree, HUD proposed the "best efforts" decree which the district court subsequently adopted (App. 8-13, 47-48). This order requires HUD to use its "best efforts to cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with" all applicable federal statutes, HUD rules and regulations, and the provisions of the judgment against CHA and all other final orders in this litigation (App. 13, 47-48).

Plaintiffs proposed a comprehensive plan pursuant to which CHA and HUD would be directed to use their best efforts to provide dwelling units outside the City in the portions of Cook, DuPage, and Lake Counties which comprise the Chicago Urbanized Area (App. 15-30). CHA would be ordered to develop these units with or without the consent of the other local housing authorities in the Urbanized Area. The proposed order also required semiannual progress reports by HUD and CHA to the district court. The order would remain effective until 60,000 dwelling units were provided (App. 29).

Following hearings on these proposals, the plaintiffs moved to defer entering any final order pending additional proceedings patterned upon those followed in Bradley v. Milliken, 484 F. 2d 215 (C.A. 6), certiorari granted, 94 S. Ct. 538 (1973) (App. 33-43). Under these proceedings, the district court was requested first to determine that metropolitan-wide relief was necessary because no remedy could be provided solely within the geographic limits of Chicago. Then the court would direct HUD and CHA to prepare a joint plan or separate plans for metropolitan-wide relief (App. 41). As part of this plan, HUD and CHA would recommend what other additional parties should be joined in this action to effectuate the relief.

After a further hearing, the district court denied plaintiffs' motion to defer entering a final decree and entered HUD's proposed "best efforts" decree. 363 F. Supp. 690 (App. 44-48). From that order, the plaintiffs appeal.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN DECLINING TO ADOPT
PLAINTIFFS' PROPOSED PLAN FOR METRO-
POLITAN RELIEF.

In framing an appropriate equitable remedy for racial discrimination, district courts must be accorded considerable discretion. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). As the Supreme Court emphasized in Swann, this evolving area of the law forces courts "to grapple with the flinty, intractable realities of day-to-day implementation of * * * constitutional commands," and this process, of necessity, requires considerable reliance "on the informed judgment of the district courts in the first instance." 402 U.S. at 6, 28. These general principles certainly apply to the present litigation, which has been pending before the same district court for eight years. Indeed, in initially holding HUD liable, this Court pointedly stated that it "would be extremely reluctant to interfere with the exercise of that District Judge's sound discretion in matters pertaining to this controversy * * *." Gautreaux v. Romney, 488 F. 2d 731, 734 (C.A. 7, 1971) (Gautreaux II).

A second equitable principle which is especially pertinent here, is that "the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 16. The only violation by HUD in this action, as determined by this Court in Gautreaux II, was limited to HUD's failure to enforce its site-selection policies in the low-rent public housing program within Chicago between 1950 and 1966. However, even before this Court held HUD liable, HUD was employing its leverage to achieve compliance with site selection policies which placed still greater emphasis upon scattered-site housing to avoid concentration of large projects in areas already racially imbalanced. See e.g., HUD's Low-Rent Housing Preconstruction Handbook, p. 8 (1969).^{1/} Moreover, in Gautreaux II, this Court acknowledged that HUD had acted in good faith and had made "numerous and consistent efforts" to persuade CHA to locate public housing in White neighborhoods, and had acquiesced in the locally selected sites only to ease "an admittedly urgent need for housing"^{2/} 448 F. 2d at 737. Although this Court held that

^{1/} Indeed, in 1966 HUD officials decided to reject five of the sites selected by CHA which were among those specifically challenged in this suit. The sites were rejected because they were in areas of high Black concentration and, in some cases, in areas also having a high concentration of public housing (Deposition of Joseph Burstein taken March 25, 1968, p. 105).

^{2/} CHA had proposed almost as many sites in White areas (41) as in Black areas (62) between 1950 and 1966. 296 F. Supp. at 911. Indeed, only CHA's lack of discrimination in this respect demonstrated the discriminatory impact of the pre-clearance procedure with the affected alderman -- the procedure which was the sole basis of CHA's liability for site selection.

HUD's conduct had nevertheless infringed plaintiffs' rights, it also emphasized (448 F. 2d at 740):

[O]ur holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.

This statement was reaffirmed in Gautreaux III.

Gautreaux v. Romney, 457 F. 2d 124, 126 (C.A. 7, 1972).

There, this Court held that the district court had abused its discretion by conditionally enjoining HUD from releasing funds under the Model Cities program, which was not tainted by discrimination, as a remedy for the wrongs found to exist in the separate public housing program. In Gautreaux III, then, this Court rejected an expansion of the remedial decree into untainted programs. In the present case, it should reject an attempted expansion into untainted geographic areas.

The plaintiffs do not contest these two established equitable principles relating to the scope of the district court's discretion and tailoring the remedy to fit the violation found. Instead, as to the first principle, they contend that the district court failed to exercise its discretion under

the erroneous view that it lacked power to order metropolitan-wide relief (Apts. Br. 12-26). As we will show, however, the court below did not hold it lacked authority to adopt plaintiffs' plan, but rather found that on the facts shown, such relief was unwarranted. We then show that this factual finding is amply supported. In so doing, we will demonstrate that plaintiffs' challenges to that finding ignore the principle of tailoring the remedy to the violation found. As Judge Pell suggested in his dissent in Gautreaux IV, plaintiffs proceed (Apts. Br. 26-44) as if "this case has now been transformed from one involving unconstitutional implementation of the Federal Low-Rent Housing Act into a case of claimed unconstitutional deprivation of low-rent housing." Gautreaux v. City of Chicago, 480 F. 2d 210, 219 (C.A. 7, 1973), certiorari denied, 94 S. Ct. 895 (1974).

The district court concluded that a remedial order extending beyond the City of Chicago "is simply unwarranted here because it goes far beyond the issues of this case" (App. 45). Further, the court found that "the factual basis for [plaintiffs'] request is an opinion of an urbanologist" which "is simply inadequate to support" the relief requested (App. 46). Moreover, the district court stated that relief crossing local political boundaries "may have been justified in Bradley" v. Milliken, 484 F. 2d 215 (C.A. 6), certiorari granted, 94 S. Ct. 538 (1973). All of these statements show

that the court below did not base its holding upon a view that it necessarily lacked authority in all circumstances to enter a decree affecting areas outside Chicago. Rather, the court, in its discretion, found such relief inappropriate on the facts of this case.

Before turning to those facts, however, plaintiffs' argument that an equity court can disregard local political boundaries in providing relief for housing discrimination should not pass entirely unchallenged. Such a decree would be unprecedented so far as we are aware. Plaintiffs rely upon reapportionment cases, where of course, judicial decrees often do alter political boundaries. Those cases are distinguishable, however, because the wrong is not confined to a single voting district: if one or more districts are under-represented, each of the others almost invariably is over-represented. Plaintiffs also rely upon school desegregation cases, but the fact that the Supreme Court granted certiorari in Bradley v. Milliken, supra, proves the substantiality of the as yet unresolved legal issues involved in that context. In all events, whatever the outcome of Bradley, it is by no means clear that the same result should be reached in the context of a public housing case, where the relationships between federal, state, and various local political entities are quite different and where the impact of a decree upon the innocent localities may well be different.

The district court did not decide these questions, nor need this Court. The issues are outlined here merely to show that it is an open question whether a court has the power to disregard political boundaries in a public housing case thereby imposing its order upon localities which have committed no wrong.

The facts of this case clearly do not warrant such a decree. The district court found that the factual basis for plaintiffs' proposal was "an opinion of an urbanologist that by the year 2000 the entire geographic area of the City of Chicago will be within the limited public housing area * * *" (App. 46). As CHA demonstrates in its brief (pp. 10-17), however, the district court's rejection of the opinion is certainly not clearly erroneous because the urbanologist, Professor Phillip M. Hauser, based his opinion upon the unsupported assumption that the current trend of racial change in Chicago would continue over the remainder of this century (see November 27, 1972, Tr. 86-89). In any event, Professor Houser indicated that plaintiffs' proposed public housing plan would not be sufficient, by itself, to alter the result projected from the current trend (November 27, 1972, Tr. 105-106).

Plaintiffs also rely upon statements by HUD and CHA officials reflecting the need to deal with urban problems on a metropolitan-wide basis (Apts. Br. 30-31). It does not follow, however, that to remedy past wrongs in the Chicago

public housing program, the district court should attempt to solve all urban low-income housing problems by judicial decree. Such an attempt would improperly supplant the normal and legitimate decisionmaking processes of federal, state, and local government.

This unwarranted extension of judicial power would violate the principle of tailoring the remedy to fit the wrong as enunciated in Swann and Gautreaux II and III. In addition, two other recent Supreme Court decisions indicate a reluctance to restrict governmental officials by sweeping affirmative injunctions based upon the past conduct of their predecessors in office. In Mayor of the City of Philadelphia v. Educational Equality League, 94 S. Ct. 1323 (1974), the Supreme Court reversed an injunction by which a lower court would supervise the mayor's appointments to a school board nominating panel to correct racially discriminatory appointments of the prior mayor. While the Supreme Court overturned the finding of discrimination, it also expressed "concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency * * *." 94 S. Ct. at 1330-1331. This same concern provided the basis for the decision in Spomer v. Littleton, 94 S. Ct. 685 (1974). In that case, this Court held that injunctive relief might properly be entered against a state prosecutor alleged to have acted in a purposefully

racially discriminatory manner. After the defendant prosecutor had been succeeded by a newly elected state attorney, the Supreme Court remanded the case to this Court for a determination of whether the dispute had been rendered moot. If the present case as in Mayor of Philadelphia and Spomer, the conduct providing the basis of dispute belongs to a bygone era, and a sweeping injunction inhibiting HUD's present and further conduct is unwarranted.

The Government's cross-appeal reflects a concern that the "best efforts" decree entered below might be interpreted to unduly restrict HUD's capacity to effect needed changes in present housing programs. The decree below directs HUD to utilize its best efforts in conformity with its statutes and regulations, as well as the judgment in the companion case. As we construe that order, then, it does not lock HUD into housing programs discontinued as ineffective or impede the implementation of housing program reforms in Chicago.

HUD's re-evaluation of its housing programs was initiated effective January 5, 1973, when HUD suspended further funding of new public housing programs nationwide, pending the results of a housing study to determine whether the programs were achieving Congressional housing objectives. That study has now been completed and its conclusions were made the subject of a

Presidential Message to Congress on September 19, 1973, 119
Cong. Rec. H8070 (93d Cong., 1st Sess.) (Daily ed.,
September 19, 1973).

In his Message, the President announced that the study found the programs have too often produced housing of very low quality and that they have been inequitable and wasteful. In accordance with the conclusions and recommendations of that Message, a number of actions are being taken or proposed.

1. HUD will continue the current practice of not accepting new applications or making new commitments under the 235, 236 and 101 programs, except to the extent necessary to meet bona fide commitments. In meeting those commitments it is expected that present balances of contract authority in the 236 and 101 programs will be virtually exhausted.

2. On September 29, 1973, the Secretary transmitted to the Congress the proposed "Housing Act of 1973." S. 2507 and H.R. 10688. The proposal in Title I of that bill sets forth findings that indicate that an entirely new approach -- direct cash assistance -- appears to be the most promising way of helping the poor obtain needed housing and authorizes a broadened experimental effort to determine the practicality of that approach and to evaluate different operational methods. Additionally the Bill in Title III would add a Section 8(g) to the United States Housing Act of 1937, as amended, so as to provide a program of new construction for low-income families during the period while the new approach is being developed.

3. The lifting of the suspension on the present Section 23 leasing program (42 U.S.C. 1421b). As a result of lifting of this suspension and in order to meet the bona fide commitments referred to above, the Department intends to process applications for an additional 200,000 units in fiscal 1974. This additional authorization when added to the number of units previously authorized indicates that the Government may issue commitments for roughly 300,000 units in fiscal 1974.

The actions described above reflect an effort to curtail the use of housing programs which were found after an extensive study to be wasteful and ineffective, to stress an existing housing program which is directed to the lowest income families served by any Federal housing program and to develop a new more effective method of assisting the Nation's lower income families to obtain a "decent home and suitable living environment." Certainly, these actions are within the Secretary's statutory authority to "exercise leadership at the direction of the President in coordination of Federal activities affecting housing and urban development." 42 U.S.C. 3532(b).

A remedial decree which locks HUD into continuing specific housing programs in Chicago after those programs have been abandoned as ineffective, or substantially revised throughout the rest of the nation, would certainly not be desirable.

A metropolitan-wide comprehensive decree, as sought by plaintiffs, would inevitably disrupt or supplant the normal and proper methods of evolving necessary housing program reforms. For this reason, too, the district court properly declined to embark upon the undertaking.

In sum, the district court properly exercised its discretion in entering a "best efforts" decree rather than the plaintiffs' comprehensive, metropolitan-wide program. This Court has twice suggested the appropriateness of the "best efforts" remedy. Unlike a metropolitan-wide plan, the decree below is appropriately tailored to the violations that were found to exist in the low-rent public housing site-selection policies solely within Chicago between 1950 and 1966.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CARLA A. HILLS,
Assistant Attorney General,

JAMES R. THOMPSON,
United States Attorney,

STEPHEN F. EILPERIN,
ANTHONY J. STEINMEYER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 1974,
I served the foregoing brief upon counsel for all other
parties by causing copies thereof to be mailed, air mail,
postage prepaid, to:

Alexander Polikoff, Esquire
109 N. Dearborn Street
Chicago, Illinois 60602

Patrick W. O'Brien, Esquire
Mayer Brown & Platt
231 S. LaSalle Street
Chicago, Illinois 60604

Anthony J. Steinmeyer
ANTHONY J. STEINMEYER
Attorney.