

HUP

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 74-1048 and 74-1049

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY and
JAMES T. LYNN, Successor to George
W. Romney, Secretary of the
Department of Housing and Urban
Development, et al.,

Defendants-Appellees.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS
TO BRIEF OF APPELLEE HUD

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The principle thrust of HUD's brief, apart from contentions already made by CHA (discussed below), is that the order of the district court should be affirmed because to grant any form of metropolitan relief would supposedly disrupt or supplant HUD's normal methods for evolving necessary housing program reforms. (p.17.) This assertion is wholly without merit. There is no more reason why a metropolitan remedial decree would disrupt any future housing program reforms than would the existing remedial

decrees limited to Chicago. Indeed, since HUD strongly endorses metropolitan approaches, one would have expected it to have preferred such a remedy in this case - as one means to such "reforms" - over a remedy confined to the City of Chicago. In any event, in the exercise of its continuing jurisdiction and at the instance of HUD or any other party, the district court would be free in either case to make whatever modifications of its decrees changed circumstances required. Moreover, what is sought is a remand for the purpose of developing an appropriate metropolitan remedial decree, not the implementation of a particular, already determined, form of decree. Thus, in future proceedings below to develop a metropolitan remedy, HUD will have ample opportunity to make whatever recommendations it wishes concerning the manner in which its programs, old or new, should be employed to implement full relief.*

(Meanwhile, of course, pending any hypothetical new developments - and pending as well the development of a metropolitan remedy - the decrees already entered against CHA and HUD continue in effect as a remedial effort within the City of Chicago. Those decrees now cover the leasing form of public housing for which the HUD brief (p.16) says the federal suspension of funds has now been

*In this connection it should be observed that what plaintiffs seek is an order directing the preparation of an appropriate metropolitan plan by the expert housing agencies themselves, that is, HUD and CHA, not by the court. (See A.33, ¶3.) For information as to the manner in which public housing programs have heretofore operated in the suburbs, see Plaintiffs' Exhibit 11.

lifted.)

HUD's brief makes two additional points (both previously argued by CHA) - that district courts must be accorded considerable discretion in framing an appropriate equitable remedy for racial segregation (p.7), and that the nature of the violation determines the scope of the equitable remedy. (p.8.) Using these two principles, HUD's analysis leads it to the conclusion that the district court did not abuse its discretion in ruling out all forms of metropolitan relief.

We have already essentially responded to these twin themes in our reply to CHA's brief. (See pages 8-9 and 11-13 of our reply brief directed to the CHA brief.) A district court's discretion in framing an equitable remedy in a racial desegregation case does not relieve it of the obligation to comply with standards laid down by the Supreme Court to govern the exercise of that discretion. The standards particularly relevant here are that district courts must consider the use of all available and reasonable techniques and methods to achieve the greatest possible degree of actual desegregation, and should weigh any proposed plan in the light of alternatives which might be more promising in their effectiveness. We also pointed out that notwithstanding the discretion district courts possess, the Supreme Court has not hesitated to direct that remedial plans adopted by district courts be set aside if, as here, alternative approaches more promising in their effectiveness have been disregarded.

As to the adage that the nature of the violation determines the scope of the remedy, we pointed out that it is the "nature" of the violation, not the "place," of which the adage speaks. We observed that the circumstance that the violation in this case took place within the political boundaries of the City of Chicago affords no reason for limiting the remedy to those boundaries, in the face of substantial and uncontradicted evidence that a metropolitan plan would be more promising in effectiveness to remedy the consequences of that violation than one confined within the City. The HUD brief is silent about this evidence. For example, HUD's brief does not mention its own representation to Judge Austin that a metropolitan remedy would be desirable (Transcript of February 2, 1974, pp. 4, 6 and 7), the statements of Secretary Romney that only metropolitan-wide solutions would be effective or of Assistant Secretary Simmons that it is impossible to solve central city problems in the central city alone, the evidence that 95% of the vacant land in the Chicago Metropolitan Area is to be found outside the City of Chicago, and so on. Instead, like CHA, HUD confines its discussion of the evidence to Professor Hauser's testimony. (p.12.) On that subject HUD is no more correct than CHA in asserting that the district court rejected Professor Hauser's opinion. (See our reply brief to CHA, p.3.)*

*HUD says Professor Hauser indicated that a proposed metropolitan plan would not be sufficient by itself to alter demographic trends in the metropolitan area. (p.12.) As the court said in Crow v. Brown, 332 F.Supp. 382 (D.C. Ga., 1971), respecting a proposed

(Footnote continued on page 5)

Thus, although HUD's conclusion is that the Court should reject an attempted expansion of the remedial decree into "untainted geographic areas" (p.9), HUD makes no real effort to explain why the "expansion" should be rejected in the face of the substantial and uncontradicted evidence that precisely such an "expansion" is a more promising avenue to the greatest possible degree of actual desegregation than confining the remedy to Chicago.

HUD does not contest the power of the district court to grant metropolitan wide relief; it merely says the question is "open." (p.12.) HUD does say (pp. 13-14) that two recent Supreme Court decisions indicate a reluctance to restrict government officials by affirmative injunctions based upon the past conduct of their predecessors in office, and it implies that such reluctance is relevant to the present case in which the conduct providing the

(Footnote continued from page 4)

remedial plan for public housing segregation,

"Some may say that this plan ... may not succeed. It is not for this Court to make such a determination. Unquestionably the design of the plan is to alleviate to some degree the crisis now at hand in Atlanta, and the goal of the plan is to preserve Atlanta's future as a city in which both whites and blacks may live." 332 F.Supp. at 384.

HUD also speaks as if plaintiffs were urging the district court to "solve all urban low income housing problems by judicial decree" (p.13), and implies that the case has now been transformed into a claimed unconstitutional deprivation of housing. (p.10.) Remedial new housing already having been determined to be the necessary form of the remedy in this case (see 304 F.Supp. at 741, Section VIII.A.), the point of the Hauser testimony, and all of the other evidence in support of a metropolitan remedy, is not to solve all urban low income housing problems but to increase in effectiveness the remedial effort to provide additional housing for the plaintiff class in non-segregated areas.

basis of the dispute is said to belong to a "bygone era." But two decades of school desegregation cases show that the duty of federal courts to see to it that the effects of racial segregation are eliminated is not affected by personnel changes or by the relegation of the conduct that caused the unremedied effects to a "bygone era." Neither of the two cases cited by HUD presents any question remotely resembling the issues posed at the remedial stage of racial segregation cases. In Spomer, the "wrongful conduct charged in the complaint is personal to [the state's attorney]" and the Court held that when the defendant left office the controversy became moot. Spomer v. Littleton, 94 Sup.Ct. 685, 689 (1974). In Mayor of the City of Philadelphia, the issue was not a remedy for racial segregation but "judicial oversight of discretionary appointments," the body to which challenged appointments had been made had long since been succeeded by successor bodies as to which no challenge was raised, the appointing mayor had been succeeded by another, and the Court in any event found no basis for the charge of racial discrimination. Mayor of the City of Philadelphia v. Educational Equality League, 94 Sup.Ct. 1323, 1330-34 (1974). The era of the public housing segregation which is at issue here will not be "bygone" until the effects of that segregation have been effectively remedied by the provision of an adequate amount of unsegregated public housing to which the plaintiff class has been afforded an opportunity to move.

Brief mention should be made of HUD's discussion of its

cross appeal. (pp. 14-17.) That appeal is clearly barred by the familiar doctrine that a party cannot complain about a step it itself induced the court to take. See, e.g., Law v. United States, 266 U.S. 494, 496 (1925); Mercellis v. Wilson, 235 U.S. 579, 583 (1915); Sanders v. Buchanan, 407 F.2d 161, 163 (10th Cir. 1969); Cypert v. Baker, 399 F.2d 927, 929-30 (10th Cir. 1968); Hanks v. United States, 388 F.2d 171, 173 (10th Cir. 1968); Emerman v. Cohen, 199 F.2d 857, 860 (2d Cir. 1952); Devine v. Zimmerman, 133 F.2d 850, 852 (8th Cir. 1943); Pitcairn v. Fisher, 78 F.2d 649, 650-51 (8th Cir. 1935); and Union Electric Light & Power Co. v. Snyder Estate Co., 65 F.2d 297, 302 (8th Cir. 1933). There can be no clearer case for application of the doctrine than an attempt to appeal from the entry of one's own proposed order. (Indeed, HUD's current brief says the district court properly exercised its discretion and asks that its judgment be affirmed. p.17.)

HUD's concern that its capacity to effect changes in housing programs might be restricted (p.14) has already been discussed. It should be obvious, one is tempted to add, that an agency's constitutional obligation to remedy constitutional wrongs is not to be ignored because it may wish to change its programs in the future; rather such changes should recognize and accommodate that obligation. The flexible powers of a court of equity will assure that that is done more certainly than reliance on good will or voluntary promises.

* * *

Five years after it was established that the plaintiffs were entitled to relief against CHA, more than two and a half years after it was similarly determined that they were entitled to relief against HUD, and nearly eight years after the commencement of this litigation, no actual relief has yet been provided to remedy the effects of the constitutional wrongs of CHA and HUD. Surely at that stage of a racial desegregation case it is incumbent upon a district court to explore every possible avenue to effective relief and to foreclose no feasible alternative that promises more effective relief than some other approach. Yet such a foreclosure is precisely what has happened here, and the record below presents no justification for it. The order denying any form of metropolitan relief must therefore be reversed.

Respectfully submitted,

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June 7, 1974

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NOTICE

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PLEASE TAKE NOTICE that we have this day filed with the
Clerk of the United States Court of Appeals for the Seventh
Circuit the Reply Brief of Plaintiffs-Appellants to Brief of

Appellee HUD, copies of which are attached hereto.



Alexander Polikoff
One of the Attorneys for Plaintiffs

June 7, 1974

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CERTIFICATE OF SERVICE

Alexander Polikoff, one of the attorneys for plaintiffs-appellants, hereby certifies that he served a copy of the foregoing Notice and Reply Brief of Plaintiffs-Appellants to Brief of Appellee HUD referred to therein upon the parties named in the Notice at the addresses there shown, by delivering a copy to Messrs. O'Brien and Schaefer and by mailing a copy, airmail, postage prepaid, to Messrs. Eilperin and Steinmeyer, this 7th day of June, 1974.


Alexander Polikoff