

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,

Plaintiffs

v.

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

Defendants.

Nos. 66 C 1459
66 C 1460
(Consolidated)

FEDERAL DEFENDANTS' RESPONSE AND OBJECTIONS TO
PLAINTIFFS' PROPOSED ORDER SUBMITTED PURSUANT
TO THE COURT'S ORDER OF SEPTEMBER 10, 1974

In accordance with this Court's order of September 10, 1974, the federal defendants wish to register their strenuous objections to entry of plaintiffs' proposed order which was filed with the Court on September 11, 1974. The facts, which have been fully provided the plaintiffs through deposition in accordance with this Court's Order of May 6, 1974, make it manifestly clear that the Department of Housing and Urban Development has been and is continuing to furnish its best efforts to the Chicago Housing Authority in its efforts to increase the supply of low-income housing in the City of Chicago in a non-discriminatory manner. The facts make it clear that the Department is in full compliance with both the letter and the spirit of the final judgment order which was entered against the Department by this Court on September 11, 1973. Therefore, as plaintiffs' proposed order lacks any legal, factual or evidentiary support, the court should refuse to enter it, but rather should allow a final order which is being fully complied with by the federal defendants to remain in fact final.

As plaintiffs' proposed order simply ignores all prior responses of the federal defendants, and makes their same unilateral and unsupported assertions of entitlement to further relief, the federal defendants do not believe it is again necessary to reiterate the arguments which the government has previously set forth in their Response to Plaintiffs' Report to the Court, filed July 31, 1974; in their Brief in Opposition to Plaintiffs' Motion for a Hearing, filed April 23, 1974; in their letters to the plaintiffs' attorney, copies of which were furnished to the Court and filed with the Court as Exhibits A, B and C to the April 23rd pleading. Although the federal defendants must again address some of the reasons which make entry of plaintiffs' proposed order inappropriate, unnecessary and unlawful, they incorporate by reference all of those arguments contained in the prior pleadings as further basis for denial of plaintiffs' proposed order.

Paragraph one of the proposed order seeks to compel the Secretary to permit CHA's participation in the revised Section 23 Leasing Program. Plaintiffs are advised that under the Housing and Community Development Act of 1974 (HCD Act) which was signed into law by President Ford on August 22, 1974, the revised Section 23 leased housing program will be replaced by January 1, 1975 with Section 8 of the United States Housing Act of 1937. (Present authority under revised Section 23 expires upon implementation of Section 8, which must take place no later than January 1, 1975.) Thus, on August 22, 1974, Sheldon B. Lubar, Assistant Secretary-Commissioner, Housing Production and Mortgage Credit, and H. R. Crawford, Assistant Secretary for Housing Management, jointly issued Notice HPMO-FHA 74-28 to HUD field administrators and local housing authorities concerning revised processing instructions for revised Section 23 applications and projects effective as of that date. That notice advised that new construction and substantial rehabilitation applications and projects would be subject to the provisions of Section 8 of the HCD Act. Therefore, the notice stated that "It is

anticipated that no new construction or substantial rehabilitation applications or projects can be processed to the point of executing an Annual Contributions Contract before the expiration of that authority. . . . It is anticipated that the regulations under Section 8 will be published for comment by October 1, 1974. Thereafter, pending issuance of the final regulations (no later than January 1, 1975) applications and projects may be processed under the regulations published for comment and annual contributions contracts will be approved by Central Office on an individual basis if they meet the requirements of those regulations and the statute.

CHA had not, prior to August 22, 1974, made application for the Section 23 new-construction/substantial rehabilitation units (indeed they were ineligible to participate in the first allocation of revised Section 23 units under Assistant Secretary Lubar's memorandum of May 8, 1974 to all Regional Administrators). Thus, any CHA applications, if received, will be processed by HUD in accordance with the published regulations implementing Section 8. It is noted that numerous Illinois localities have submitted applications, which are in full conformity with Departmental regulations and administrative policies, to participate in the total state-wide allocation of 273 revised Section 23 "new" units.

Under the joint memorandum of August 22, 1974, previously referred to, applications and projects for leasing in existing housing may continue to be processed, whether or not under executed Annual Contributions Contracts, pursuant to the Regulations contained in HUD Handbook 7432.1. It is significant to note that CHA has recently sought to obtain a waiver of the requirement set forth in Mr. Lubar's May 8th memorandum as it applies to the state-wide allocation of approximately 450 revised Section 23 existing units. However, CHA has indicated that if such a waiver is granted, 90% of the units would be used for housing for the elderly, and CHA would

also require HUD approval of an increase of the Fair Market Rents for these units.

Paragraph 2 of the plaintiffs' proposed order seeks to compel a HUD decision on various sites which were submitted to HUD by CHA for the 204 units comprising Project 2-85. In a prior memoranda, the federal defendants informed plaintiffs that, in the Department's opinion, it was both reasonable and prudent to permit the Northeastern Illinois Planning Commission additional time to submit their comments on the proposed sites, so that the comments would be incorporated into the Department's environmental review under the National Environmental Policy Act--even though HUD could legally act at that point in time without NIPC comments. Although it is submitted that there is substantial justification for such a policy, particularly due to the fact that many scattered sites were the subject of review, the issue is now moot. On August 23, 1974, the Chicago Area Office notified CHA that the special environmental clearance for the 56 substitute sites in Project ILL. 2-85 had been completed, and that 38 sites had been approved for acquisition and that a noise study was being conducted as to the acceptability of another 11 sites.

With respect to Paragraph 4(a) of plaintiffs' proposed order, the federal defendants again point out that Congress has determined that the revised Section 23 program will expire no later than January 1, 1975, and for that reason, HUD is no longer processing applications for revised Section 23 new construction units. With respect to Paragraph 4(b), the Department can only reiterate the objection set forth in its prior brief--"There has thus been a full cycle with Mr. Polikoff suggesting to the Court that upon conclusion of discovery, he will recommend remedial steps to his present suggestion that HUD assume that task. HUD has no recommendations, as it

is in full compliance with this Court's Order of September 11, 1973, and for that reason there is no basis whatever for modification and/or amendment of that final order."

In addition to the federal defendants' objections to the specific paragraphs of plaintiffs' proposed order, the federal defendants wish to call to the Court's attention two more broadly-based objections to the entire course of action which the plaintiffs are urging upon the court.

First, plaintiffs suggest to the court that they need not demonstrate that HUD is not exerting its "best efforts" and that the Department is not complying with this Court's final judgment order against HUD, in order to be entitled to a "modification" of the final order. As plaintiffs apparently recognize, any necessity of offering proof that HUD is not exercising its best efforts would indeed draw them into the quagmire, as there is not a scintille of factual evidence in support of such an allegation. Thus plaintiffs explicitly state that they do not dispute that HUD is using its best efforts--which of course concedes that HUD is in full conformity with this Court's final judgment order.

Nevertheless, in spite of the fact that a final order was entered against HUD, plaintiffs claim that the Court should summarily enter an entirely different order against HUD, because they are not satisfied with the results of HUD's best efforts.

Regardless of federal law, federal regulations and the federal program role, it appears the only criterion by which the Court is to determine appropriate relief is the status of plaintiffs' current state of satisfaction. The federal defendants have long since informed the Court it is their firm and unwavering view that plaintiffs are not entitled to meander among statutes and regulations choosing those by which they, the defendants, and this Court will be guided, and disregarding those which are not to their suiting. Congress has written the legislation, and

Plaintiffs are not entitled to rewrite it. That is the reason why the final order against HUD directs it to use its best efforts, but specifies those best efforts are to be in conformity with federal statutes and regulations and the final orders entered in this case. Now, without even attempting to make a showing or to present evidence that HUD is not complying with the final order, the plaintiffs call for a new order directing that the low-rent housing program be administered not by the Secretary of HUD in accordance with law, but by the plaintiffs and their unsupported claims to further relief. It is submitted there is no basis for this masquerading "modification" of the final order against HUD presently entered by this Court.

The plaintiffs claim, as support for their theory that they need not challenge HUD's best efforts, the modification of the best efforts decree against CHA by the Court's Order of July 20, 1970. Plaintiffs assert that in that case "there was no finding of bad faith or of a failure to use best efforts. There was simply a determination that, on the facts disclosed to the Court, CHA's decision that it was not the proper time to submit sites to the City Council was not consistent with providing needed relief to the plaintiffs expeditiously." The federal defendants dispute this assertion. Although the language of the July 20th order did not set forth finding or determination, subsequent memoranda opinions by both this Court and the Court of Appeals shed light on the justification and rationale for its entry.

The Court of Appeals in its December 16, 1970 opinion affirming this Court's Order of July 20, 1970 noted that "the arguments put forward in favor of delaying submission were based on political considerations and community hostility, reasons which had been properly rejected by the lower court in the original litigation" and that "it was no abuse of discretion for the District Judge to impose deadlines for submission one year after the entry of the original best efforts order." It

is submitted that these findings were functionally equivalent to findings that CHA had failed "to use its best efforts to increase the supply of Dwelling Units as rapidly as possible as provided in the judgment order of July 1, 1969."

Moreover, the July 1, 1969 judgment order against CHA was explicit in stating that the District Court retained jurisdiction of the matter "for all purposes, including enforcement and issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order." Inclusion of such a provision in the judgment order was understandable, as it had taken five months to formulate the order, and all parties to that litigation realized some modifications might be necessary. On the contrary, the September 11, 1971 order against HUD was a final judgment order, which had been entered by this Court only after plaintiffs had argued unsuccessfully for two years to expand the scope of the order. Unless injunctive litigation is never to come to an end, it is submitted that a court should upset a final order only upon a finding that it is not being complied with, unless jurisdiction to modify or amend is specifically retained by the judgment order. Yet Mr. Polikoff addresses the primary and ultimate issue before this court by stating that he refuses to be drawn into that quagmire!

This Court in its memorandum opinion of October 1, 1971 certainly indicated that the original decree had been modified because CHA had not been exerting its best efforts. To quote an excerpt from that opinion:

"Conferences were held from time to time between attorneys for the plaintiffs and Chicago Housing Authority and its counsel, and at one of these in the spring of 1970, the Chairman of Chicago Housing Authority advised the plaintiffs that they would submit no sites to the City Council until after the municipal elections, one year later in the spring of 1971. The court was informed of this statement and also that the 'best efforts' of Chicago Housing Authority had resulted in no submissions to the City Council. It thus became apparent that the court could no longer rely on the 'best efforts' of Chicago Housing Authority and a new decree

was signed on July 1, 1971, which established a timetable as to when these sites were to be submitted. This decree Chicago Housing Authority decided to appeal, hoping that the appellate procedure would delay the performance of the timetable until after the municipal elections in the spring of 1971.

"They went screaming and protesting, as they had a legal right to do, first to the Court of Appeals, and that Court sustained the July, 1970 decree. Next, they went to the United States Supreme Court seeking to reverse the Court of Appeals, and the highest Court in the land denied them the relief sought. One final effort was made to the United States Supreme Court for a rehearing, seeking to have that Court reverse itself, which was denied. Having run the gamut, they returned to the District Court where prompt disclosure and submission was ordered. Only then did Chicago Housing Authority, with a gun to its head, comply, twenty months after the first decree and eight months after the second decree. Sites for seventeen hundred off units were finally disgorged and submitted to the City Council for its approval."

The federal defendants submit that the quoted excerpt from this Court's opinion provides the true scenario which led to entry of the "modified" order against CHA of July 20, 1971. Now, without the slightest factual or evidentiary basis that HUD has not been exerting its best efforts--indeed contrary to the overwhelming evidence which was produced by plaintiffs' attorney through deposition--plaintiffs now seek to overturn the final judgment order against the Department. Such an effort should be swiftly and unequivocally rebuffed.

The federal defendants submit that plaintiffs' attorney is well aware that there is no support in the record to "modify" the September 11, 1973 judgment order against HUD. However, recognizing this deficiency, plaintiffs' attorney has constructed a new stratagem by which he hopes to obtain the relief he seeks. In the new web plaintiffs' attorney is weaving, HUD and CHA have become joint tortfeasors, and thus have become jointly responsible for all wrongs found to have been committed and jointly responsible for all remedial action. It is true that this theory was

long ago specifically rejected in this case,^{1/} but apparently the magic result can still obtain by reason of the procedural action of Consolidation! Simply look at plaintiffs' most recent district court pleadings--HUD is to be responsible for the

1/ In this Court's opinion, filed September 11, 1970, dismissing plaintiffs' complaint against the Department of Housing and Urban Development, the court stated:

"The court is asked to extend the joint participation principle of Burton to the approval and funding, with attendant supervision, of the Department of Housing and Urban Development, an executive department of the federal government. In effect, under the Burton analogy, that the acts of the Chicago Housing Authority and the Chicago City Council were the acts of the federal government; that in the performance of their governmental functions they became the instrumentalities of the federal government and thus their acts became the acts of the federal government. To state such a proposition is to reveal its inapplicability. Except as the separate acts of each are the result of concerted action to commit the tort of discrimination, joint participation cannot be extended to separate and distinct political entities and sovereignties each of whom are autonomous in their governmental functions. . . . Even Hicks v. Weaver, 302 F. Supp. 619 (D.C. La. (1969)) does not so hold."

Nor might it be added does D. R. Smalley and Sons, Inc. v. United States, 372 F.2d 505 (Ct. Cl. 1967), cert. den. 389 U.S. 835, 88 S. Ct. 45, 19 L.Ed. 2d 97 (1967); Housing Corporation of America v. United States, 468 F.2d 922 (Ct. Cl. 1972). In reversing that dismissal, the Court of Appeals specifically noted that its holding was not based on the "joint participation doctrine set forth in Burton. Rather the court made it clear that its conclusion was that the Secretary's past actions constituted racially discriminatory conduct in their own right. Although the Court rejected as a defense to HUD liability the fact that the Department had made numerous and consistent efforts to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods, it was due to that reason that the appellate court suggested in that opinion that "the District Judge, in his wise discretion, might 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."

In other words, HUD's "wrong" was in fact simply a mistake, an error in judgment. Such a finding should be contrasted to the Court's finding of liability on the part of the Chicago Housing Authority! By its order of September 11, 1973, this Court attempted to tailor the remedy to the scope of the wrong. HUD's error has been entirely rectified by entry of the simple best efforts order which was suggested by the appellate court.

actions or inactions of CHA and the alleged deficiencies of the latter are apparently the basis for a new proposed final order against the Department. As this Court is well aware, HUD and CHA are separate defendants; there have been entirely separate liability findings; and there are separate remedial orders. As elemental a proposition of law as it is, plaintiffs apparently need to be reminded that consolidation does not joint tortfeasers make. And it is totally inappropriate to evaluate the actions of CHA to determine whether a modification of the final order against HUD is appropriate. (This Court is well aware of the fact that CHA has not been under a best efforts order since July 20, 1970, and the "best efforts" final order of September 11, 1973 is directed solely to the federal defendants.) Not only should plaintiffs' proposed order be rejected for all the reasons heretofore set forth, but also because it fails to recognize the inherent distinction between the two separate defendants.

The federal defendants are, of course, well aware of the recent opinion of the Seventh Circuit Court of Appeals reversing and remanding this Court's order of September 11, 1973. And the Court and all parties are aware that the Department has petitioned the appellate court for a rehearing with the suggestion that it be en banc. Although HUD would make argument that it would be more appropriate for the district court to await the outcome of appellate determinations, and, upon a remand to deal with this matter as one unitary whole, the department recognizes that the appellate court indicated in its opinion that the "intra-city portion of the plan may proceed without any further delay." The federal defendants dissent from that dicta, and urge the court to await the outcome of appellate determinations.

For the foregoing reasons, we ask the court to reject the plaintiffs' proposed order.

Respectfully submitted,

JAMES R. THOMPSON
United States Attorney

AFFIDAVIT OF MAILING

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

_____, being first duly sworn, on oath deposes and says that he is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 23rd day of September, 1974, he placed a copy of

FEDERAL DEFENDANTS' RESPONSE AND OBJECTIONS TO
PLAINTIFFS' PROPOSED ORDER SUBMITTED PURSUANT
TO THE COURT'S ORDER OF SEPTEMBER 10, 1974

in a Government franked envelope addressed to each of the following named individuals, and deposited each envelope in the United States mail chute, located in the United States Courthouse, Chicago, Illinois, on said date at the hour of about 4:30 p.m.

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SUBSCRIBED and SWORN TO before me
this 23rd day of September, 1974.

NOTARY PUBLIC