

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S.C.A.—7th Circuit
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DOROTHY GAUTREAUX, et al.,	)	Appeal from the United
	)	States District Court for
Plaintiffs-Appellees,	)	the Northern District of
	)	Illinois, Eastern
	)	Division
v.	)	No. 66 C 1459
	)	Hon. Marvin E. Aspen
CHICAGO HOUSING AUTHORITY,	)	
and Executive Director Joseph	)	No. 98 - 1807
Shuldiner in his official	)	
capacity,	)	
	)	
Defendants-Appellants.	)	

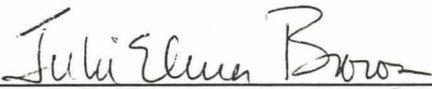
APPELLEES' MOTION TO DISMISS APPEAL

Appellees, Dorothy Gautreaux, et al., move the Court to dismiss the appeal of the Appellant, Chicago Housing Authority. In support hereof, Appellees submit the attached memorandum and state as follows:

1. The order appealed from is neither a final judgment appealable pursuant to 28 U.S.C. §1291, nor an appealable interlocutory order under 28 U.S.C. §1292.
2. Because the order is not appealable, the Court lacks jurisdiction and the appeal should be dismissed.

WHEREFORE, Appellees move the Court to dismiss the appeal.

Respectfully submitted,



One of the Attorneys for
Appellees

April 13, 1998

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that she caused a true and correct copy of the foregoing Appellees' Motion to Dismiss Appeal, with a copy of the memorandum referred to therein, to be served upon the attorneys shown on the attached service list by hand delivery or U. S. mail, as indicated, this 13th day of April, 1998, before 5:00 p.m.

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Shuldiner in his official	)	
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	)	
Defendants-Appellants.	)	

MEMORANDUM IN SUPPORT OF APPELLEES'
MOTION TO DISMISS APPEAL

Appellees, Dorothy Gautreaux, et al., by their attorneys, have moved to dismiss the appeal of Appellant Chicago Housing Authority ("CHA") from a February 23, 1998 ruling of the District Court upon CHA's motion to clarify the original judgment order (304 F. Supp. 736) in this case. The order appealed from being neither a final judgment appealable under 28 U.S.C. §1291, nor an appealable interlocutory order under 28 U.S.C. §1292, the Court lacks jurisdiction and the appeal should be dismissed.

Background

This is an appeal from the February 23, 1998 District Court ruling (attached as Exhibit A, hereinafter "February Order") on CHA's motion to clarify the original 1969 judgment order in this case. The judgment order followed an earlier order granting plaintiffs' motion for summary judgment and finding that CHA had engaged in intentional racial discrimination in, among other things, site selection for public housing. 296 F. Supp. 907.

As part of the remedy for the adjudicated discrimination the judgment order required that "Dwelling Units" provided by CHA in the future conform to specified locational rules, thereby to provide opportunities for plaintiff class members to live in non-black areas. 304 F. Supp. at 737-739. The judgment order defines "Dwelling Unit" as:

" . . . an apartment or single family residence which is to be initially made available to and occupied by a low-income, non elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family." 304 F. Supp. at 737.

CHA did not appeal from either the liability determination or the judgment order.

In September 1997 CHA asked the District Court to "clarify" that the judgment order "does not govern CHA's

HOPE VI programs and funding. . ." (Chicago Housing Authority's Emergency Motion to Clarify Injunction, attached as Exhibit B, p. 5.) "HOPE VI" is a federal demonstration program enacted by Congress in 1992.¹

In its February Order the District Court ruled that the judgment order covered Dwelling Units funded by HOPE VI in the same manner as other Dwelling Units. The February Order added no new requirements to those of the original judgment order respecting how or where Dwelling Units, including HOPE VI-funded Dwelling Units, should be provided.

In its briefs and argument CHA told the District Court it sought clarification only, not modification, of the judgment order. (CHA Reply Memorandum, attached as Exhibit C, pp. 2,3; Transcript of Oral Argument of February 10, 1998, attached as Exhibit D, p.37.)

CHA filed its notice of appeal on March 26, 1998.

¹ The HOPE VI program authorizes "grants to carry out an urban revitalization demonstration program involving major reconstruction of severely distressed or obsolete public housing." 42 U.S.C. §1437-1 (note), Pub.L. 102-389, Title II, 106 Stat. 1579. Funding may be used, among other things, for replacement housing, including public housing and Section 8 certificates. *Id.* According to the HUD HOPE VI Guidebook, one of the key elements is "Lessening concentrations of poverty by placing public housing in non-poverty neighborhoods, or by promoting mixed income communities where public housing once stood alone. . . ." HUD's Office of Public Housing Investment Guidebook on HOPE VI: Building Communities of Opportunity (1997), at 1.A.1. (emphasis in original).

I. The Order Clarifying the Original Judgment Order is Not a Final Judgment.

This Court has determined that post-judgment proceedings should be treated as "free-standing litigation." ACORN v. Illinois State Bd. of Elect., 75 F.3d 304, 306 (7th Cir. 1996). Post-judgment orders are treated as final judgments only when they conclude a discrete collateral proceeding, such as a proceeding to award attorneys' fees, Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1224 (7th Cir. 1993), or when an order "set[s] forth the steps . . . to comply with [an] injunction" previously entered. ACORN, 75 F.2d at 306. An order clarifying an injunction is thus not a final judgment appealable under 28 U.S.C. §1291. Major v. Orthopedic Equipment Co., Inc., 561 F.2d 1112 (4th Cir. 1977).

Here the February Order merely clarified that the original judgment order applied to Dwelling Units funded by the HOPE VI program; it set forth no steps to be taken by, nor in any way particularized the conduct required of, CHA. Litigation continues in the District Court on issues related to those addressed in this appeal. See below at pp. 9-10. The February Order is therefore not a final judgment.

II. An Order Clarifying an Injunction is Not Subject to Interlocutory Appeal.

A. Both CHA and the District Court Treated the CHA Motion as One to Clarify the Judgment Order.

Orders that merely interpret or clarify, rather than modify, an injunction may not be made the subject of an interlocutory appeal under 28 U.S.C. §1292(a)(1). ACORN, 75 F.3d at 306; Motorola, Inc. v. Computer Displays Int'l., Inc., 739 F.2d 1149, 1155 (7th Cir. 1984). Here, both CHA and the District Court treated the motion as one to interpret or clarify.

In its motion, titled "Emergency Motion to Clarify Injunction," CHA asked the Court to "clarify" that the original judgment order "does not govern HOPE VI funding and programs and that such funding and programs are not part of the relief granted to the plaintiffs in this case." (Exh. B, p.1.) CHA's motion repeatedly used the language of clarification and interpretation. For example, CHA took the position (Exh. B, par. 6) that the "proper interpretation of the judgment order is that" (emphasis added).

When plaintiffs contended that CHA was in reality seeking a modification of the judgment order and should therefore be held to the standards applicable to requests to modify an injunction (Plaintiffs' Response to CHA's Motion to Clarify, attached as Exhibit E, at 3 n.2), CHA responded:

"The CHA has not asked the Court to remove HOPE VI-funded units from the coverage of the Injunction, and it has no burden of persuading the Court that the coverage of the Injunction should be changed. Despite plaintiffs' wish to have the Court treat the Motion as a motion to modify, (Response at 3 n.1, 17), the Motion seeks an interpretation - not a modification - of the

Injunction. . .

. . . Before any modification of the injunction is considered, it must first be decided whether a modification is necessary. This will be determined, one way or the other, by the Court's ruling on the Motion." (Exh. B, pp. 2, 3, emphasis added.)

CHA should not now be permitted to assume a contrary position. See Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position", quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895).)

The District Court likewise treated the motion as one to clarify, "[T]he CHA has asked that we 'clarify' the judgment order and read it as not governing any use of HOPE VI funds" (Exhibit A, at 3). The District Court did not hold the CHA to the standards applicable to modifying an injunction. Cf. S.E.C. v. Investment Corp. of America, 369 F.2d. 383, 384 (7th Cir. 1966) ("In appearance, the relief sought was construction, and the district court declined to construe the injunction as [the defendant] requested. Language consistent with a request for modification and a denial thereof was not employed").

B. The Effect of the Order is Clarification and Does not Alter the Legal Relationship of the Parties.

In determining appealability this Court will of course look beyond labels. The standard is whether an order will

" . . . substantially alter the legal relationship originally contemplated by the parties An erroneous interpretation can have the same effect, and be just as devastating to a party, as an order explicitly modifying or refusing to modify an injunction. A true interpretation, on the other hand, does not change the parties' original relationship, but merely restates that relationship in new terms." (Motorola, 739 F.2d at 1155)

Here, the February Order does not alter the legal relationship of the parties. It sets forth no steps to be taken by, nor in any way particularizes the conduct required of, CHA. Relying upon the definition of "Dwelling Unit" in the original judgment order, the District Court merely made explicit what was already plain -- that the term "Dwelling Unit" applies to all public housing, however funded; Dwelling Units funded from HOPE VI grants are covered by the same restrictions that apply to all other Dwelling Units funded from other sources.

The February Order is not surprising given that:

(1) CHA itself conceded that HOPE VI-funded units come within the definition of "Dwelling Unit" in the judgment order - "no question about it" (Exh. C at 37); and (2) in submissions to HUD well before its motion to clarify CHA

consistently stated that HOPE VI housing would conform to Gautreaux court orders. An example is the following:

"The proposed new units will be built on scattered sites in community areas around the Cabrini-Green and in other sites throughout the Chicago metropolitan area in accordance with the consent decree and subsequent orders of the Gautreaux litigation."²

CHA's argument that the District Court should "interpret" the judgment order to exclude such units because of a perceived incompatibility between the purposes of HOPE VI and those of the judgment order was rejected by the District Court on the ground that there is no such incompatibility. "We see no incompatibility between the HOPE VI program and the judgment order." (Exh. A at 4.)

Thus, far from altering the legal relationships of the parties, the February Order merely confirmed that the definition of Dwelling Unit means what it says, and therefore applies to public housing funded by a later-enacted federal program. The Eighth Circuit addressed a similar issue in Mikel v. Gourley, 951 F.2d 166 (8th Cir. 1991), where the Court also considered an appeal from an order clarifying an injunction. After citing Motorola for the applicable legal standard (951 F.2d at 169), the Court explained why an interpretation applying an injunction to new regulations did not alter the relationship of the parties.

² Letter dated August 11, 1993, from CHA to HUD, quoted at Exh. C, p.16.

"Appellants argue that because of substantive changes since the 1977 injunction was issued, the district court's order was a modification. Appellants point to the fact that in 1977 telephone hearings were not authorized, but were added in 45 C.F.R. §205.10(a)(2)(1990). Additionally, the relocation of the Medicaid regulations to 42 C.F.R. §431.10 et seq. (1990) occurred after the 1977 permanent injunction. As a result of these substantive changes, according to appellants, the district court's order did substantially change the relationship of the parties.

We disagree. The district court's order merely clarified what the permanent injunction meant by "claimant delay" in light of the current availability of telephone hearings. The district court did not change the legal relationship between the parties because appellants are still required to issue final administrative decisions within 90 days unless claimant delay exists. No new or additional obligations were placed on appellants which would substantially change the terms or force of the injunction. By simply interpreting the meaning of its permanent injunction, the district court merely restated the parties' relationship in new terms, and thus clarified its original injunction. We lack jurisdiction to review an order clarifying an injunction." 951 F.2d at 169 (emphasis added).

III. Allowing This Appeal Would Subject This Court to Piecemeal Appeals on Related Issues.

The Court has stated, "We do not want to be besieged by successive appeals in injunctive proceedings." ACORN, 75 F.3d at 306. "Besieging" is exactly what is likely to ensue if the Court allows this appeal.

The District Court has before it plaintiffs' Motion for Further Relief. (Exhibit F, attached.) Briefing has been completed. While the motion covers several issues, portions of it are significantly intertwined with the February Order.

Conclusion

For the reasons stated, plaintiffs request the Court to dismiss CHA's appeal.

Respectfully submitted,

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April 13, 1998

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 66 C 1459
	)	
CHICAGO HOUSING AUTHORITY,	)	
	)	
Defendant.	)	

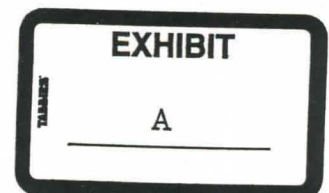
MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

Nearly thirty years ago, United States District Judge Richard B. Austin entered a judgment order against the Chicago Housing Authority (the CHA) with the hopes of correcting the effects of that agency's unconstitutional public housing site selection and tenant assignment procedures. *Gautreaux v. CHA*, 304 F. Supp. 736 (N.D. Ill. 1969). Blacks then made up 90% of the CHA's tenant base, but the CHA had deliberately restricted the number of blacks who could live in the four housing projects which were located in predominantly white areas, to the point where 93% to 99% of the tenants in those units were white. *Gautreaux v. CHA*, 296 F. Supp. 907, 909 (N.D. Ill. 1969). The other CHA units – the 99 1/2 % which were located in predominantly black areas – housed the rest of the CHA's tenants, 99% of whom were black. *See id.* at 910. This arrangement, ruled Judge Austin, violated the Fourteenth Amendment. *See id.* at 914. And in a comment worth recalling here for its relevance today, he wrote:

It is . . . undeniable that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and *urban renewal*. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued.

Id. (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)) (emphasis added).



The building block of Judge Austin's remedial judgment order was the Dwelling Unit, "an apartment or single family residence which is to be initially made available to and occupied by a low-income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA." *Gautreaux*, 304 F. Supp. at 737. He barred the CHA from "authoriz[ing], approv[ing], or implement[ing] any plan for Dwelling Units" or from "seek[ing] any approval or request or accept[ing] any assistance from any government agency with respect thereto" unless the plan's Dwelling Units were located in conformity with the order's requirements. *Id.* at 738. The order mandated that the CHA erect three Dwelling Units in a General Area (i.e. areas in Cook County with a white population of 70% or more) for every one Dwelling Unit it erected in a Limited Area (i.e. areas with a minority population of 30% or more), *id.* at 738-39, though it did not *require* any new construction. This ratio was later changed from 3-to-1 to 1-to-1.

In 1993, the CHA applied for and received \$50 million from the Department of Housing and Urban Development (HUD) under the auspices of the HOPE VI program (an acronym for Homeownership and Opportunity for People Everywhere). Congress created the HOPE VI program in 1992 with the goal of "empower[ing the] residents of severely distressed and obsolete public housing." S. REP. 102-356, at 70 (1992). It intended to accomplish this via a three-part plan: (1) eliminating and (in some form) replacing dilapidated public housing structures, (2) providing residents of those structures with the skills necessary to achieve self-sufficiency, and (3) instilling a sense of community activism in residents of the blighted areas. *See id.* at 71.

It is the first part which is now at issue, as the CHA believes that it must spend its HOPE VI construction funds exclusively in the "3 separately defined areas containing the community's most severely distressed projects," to which the 1992 HOPE VI appropriation refers. *See* Pub. L. No. 102-389, 106 Stat. 1579 (codified as a Note to 42 U.S.C. § 1473). This would mean, of

course, that any construction of new public housing units¹ would take place in the distressed areas, which, by unfortunate circumstance, are also Limited Areas as defined by the judgment order. Recognizing that the judgment order requires equal construction in the General and Limited Areas, the CHA has asked that we "clarify" the judgment order and read it as not governing any use of HOPE VI funds.

The plaintiffs take issue with this request. They have previously pointed out to this Court that the construction of new public housing units is no longer in vogue, *see Gautreaux v. CHA*, 981 F. Supp. 1091, 1093 (N.D. Ill. 1997), and the HOPE VI money may be one of the few remaining funding sources for the construction of desegregated housing. Of course, if construction funds permanently dry up (and if the plaintiffs do not succeed in convincing us to modify the judgment order, *see, e.g., id.* at 1093-94), then this particular effort to desegregate public housing in Chicago will come to an end. We need not contemplate this possibility today, however, for the dilemma posed by the CHA – that the HOPE VI program compels spending only in Limited Areas while the judgment order compels equal spending in General Areas – rests on an illusion.

The 1992 HOPE VI authorization contemplates an "urban revitalization demonstration program involving major reconstruction of severely distressed or obsolete public housing projects," which is to be focused on "up to 3 separately defined areas containing the community's most severely distressed projects." Pub. L. No. 102-389. This does not, however, amount to a

¹ The CHA attempts to draw a distinction between replacement construction – construction which does not add to the agency's aggregate housing stock – and wholly new construction; the CHA argues that the injunction only governs the latter. This distinction may, as the CHA claims, have great significance to other housing decisions, but the judgment order does not differentiate between reconstruction and new construction: it speaks simply of Dwelling Units "initially make available to and occupied by a low-income, non-elderly family, subsequent to the date hereof." *Gautreaux*, 304 F. Supp. at 737. Housing units constructed with HOPE VI funds obviously qualify, and the use of such funds for the ends of desegregation is in keeping with the sweeping nature of the judgment order, the terms of which are as broad as the violation which it was designed to correct.

requirement that all HOPE VI money must be spent physically within those distressed areas. One way to revitalize a distressed public housing neighborhood is to tear down some of the units there and rebuild them elsewhere, thereby lessening the concentration of public housing on the old site. See Pub. L. No. 104-134, 110 Stat. 1321 (the 1996 HOPE VI appropriation, providing funds for "replacement housing which will avoid or lessen concentration of very low-income families"); Pub. L. No. 104-204, 110 Stat. 2874 (the 1997 HOPE VI appropriation, providing for the same). HUD's HOPE VI Guidebook contemplates just such an approach, discussing "[p]ublic housing development (including on-site reconstruction *as well as construction of off-site housing*) funded by HOPE VI," Pls.' Br. Ex. D (Guidebook p. 1.D.1) (emphasis added), and the legislative history is in agreement, see S. REP. 102-356, at 73 ("The balance of the [demolished] units could be replaced through . . . traditional replacement means, including major reconstruction and *scattered-site development* [emphasis added]. . . ."). In a similar vein, the HOPE VI program also requires that some demolished public housing be replaced by Section 8 housing vouchers, see Pub. L. 103-124, which may be used without regard to the boundaries of the General or Limited Areas. See 42 U.S.C. § 1473f(r). We see no incompatibility between the HOPE VI program and the judgment order.

It is ironic that the CHA has chosen to argue that it must use the HOPE VI funds for urban renewal and to the exclusion of desegregation, for, as we observed earlier, in 1969 it attempted to characterize desegregation as a byproduct of urban renewal efforts. No matter: Congress and HUD, through HOPE VI, have afforded the CHA an opportunity both to revitalize distressed public housing neighborhoods and to desegregate public housing, and the CHA is duty-bound to vigorously pursue desegregation opportunities. See *Gautreaux*, 304 F. Supp. at 741 (judgment order Article VIII); see also *Gautreaux v. Landrieu*, 498 F. Supp. 1072, 1075 (N.D. Ill. 1980) ("Difficulty in attaining racially integrated public housing shall not be further condoned. . . . The CHA must have only one concern, housing in compliance with the repeated orders of this Court.").

We hold that the judgment order governs the CHA's use of HOPE VI funds. Accordingly, any construction of public housing in Cook County must conform to the judgment order's locational requirements. It is so ordered.



MARVIN E. ASPEN
United States District Judge

Dated 2/23/58

3

Dist. LEXIS 12924 at *5, n.3 (attached to Memorandum in Support of this Motion as Exhibit A).

3. The Court's reasoning applies with equal force to HUD's HOPE VI funding and programs, which are used by the CHA to revitalize existing distressed public housing projects in Limited Areas. The federal law that created HOPE VI was enacted in 1992, long after the judgment order was entered in this case in 1969.

4. The Court's prior opinions in this case decline to extend the Injunction to reach funds spent on revitalizing existing public housing in Limited Areas.

5. The parties have never treated the CHA's applications for HOPE VI funding in 1993, 1996 and 1997, and its use of HOPE VI funds, as governed by the judgment order. It is only recently that the plaintiffs and the Receiver began to assert that this Court has jurisdiction over HOPE VI.

6. The proper interpretation of the judgment order is that it has no application to the revitalization of existing public housing in Limited Areas, the activities funded by the HOPE VI program.

7. On September 18, 1997, HUD approved the CHA's implementation plan submitted with regard to funds the CHA had been awarded as a result of its 1993 HOPE VI application for the Cabrini redevelopment project; however, unlike its approval of the application itself, HUD's approval of the implementation plan is conditioned, *inter alia*, on the plaintiffs and this Court approving the implementation plan by October 18, 1997.

8. Prior to that time, HUD had not taken a similar position and had never insisted that the requirements of the Injunction and the order appointing the Receiver (for

example, the requirement that all applications for Gautreaux funds must be made by the Receiver) applied to HOPE VI funds or applications.

9. The condition now imposed by HUD that requires plaintiffs' and the Court's approval of an implementation plan for funds that have already been awarded (without such approval) is based on HUD's own interpretation of this Court's orders and the Injunction. If this Court determines that HOPE VI is not governed by the Injunction, HUD's interpretation is not correct, and the CHA will ask HUD to remove the condition that requires court approval and plaintiffs' approval.

10. The Cabrini project cannot meet the requirements of the Injunction. There is no possibility of creating an identical number of replacement units in the General Areas of the City, a point with which the plaintiffs do not disagree. Accordingly, in order to fulfill HUD's requirement, the CHA would be forced to negotiate with plaintiffs' counsel a waiver of the proscriptions of the Injunction with respect to the entire Cabrini project.

11. The CHA will be severely prejudiced and irreparably harmed if required to negotiate with the plaintiffs' counsel to obtain their approval, and Court approval, of the Cabrini project. Plaintiffs' counsel's public housing philosophy, that public housing residents should be integrated into the General Areas, is not consistent with the public policy and funding concerns that caused Congress to create HOPE VI. HOPE VI envisions redevelopment of existing distressed public housing high-rises through the creation of replacement units on-site, as well as through other more "unconventional" methods of creating housing.

12. In the past the CHA has been forced to negotiate with plaintiffs' counsel for approval of high-rise redevelopments, such as Horner and Lakefront, that were funded in whole or in part with "Gautreaux development money." As a result, the CHA's ends up with an agreed order to present to the Court, but not the program that it would have created without having to negotiate with plaintiff's counsel. While such a situation may be required with regard to "Gautreaux development money," it cannot be required with regard to funds designed to be used for initiatives outside of the scope of the Injunction.

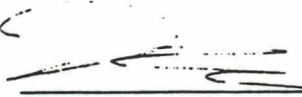
13. The CHA has a substantial probability of success on the merits of its Motion, based on the Court's August opinion on the Section 8 program. In addition, the CHA faces serious and irreparable harm including a sudden loss of control over major pending projects, if this matter is not resolved by October 18, 1997. All of this warrants the Court's treatment of the motion as an emergency.

WHEREFORE, the CHA respectfully asks the Court to clarify that the Injunction does not govern CHA's HOPE VI programs and funding, and that such funding and programs are not part of the relief provided to the class under the Injunction.

Dated: September 30, 1997

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	66 C 1459
	)	
v.	)	
	)	Hon. Marvin E. Aspen
CHICAGO HOUSING AUTHORITY,	)	
	)	
Defendant.	)	

**REPLY MEMORANDUM IN SUPPORT OF
CHA'S EMERGENCY MOTION TO CLARIFY INJUNCTION,
AND RESPONSE TO RECEIVER'S STATEMENT**

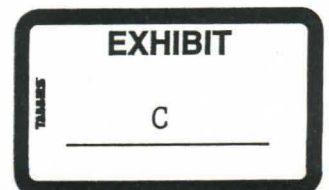
This Reply Memorandum responds to each of Parts I through IV of the Plaintiffs' Response to CHA Emergency Motion to Clarify Injunction (the "Response").

I. There Is No Need To "Clarify" The Motion.

The Chicago Housing Authority's Emergency Motion To Clarify Injunction (the "Motion") asks the Court to declare that the Injunction, properly interpreted, does not apply to replacement public housing units funded under HOPE VI. The CHA basically is asking the Court for a determination that the Injunction does not bar the CHA from applying for HOPE VI funds, as it has been doing for the past three years, and using those funds, as it is about to, in accordance with the terms and conditions of HOPE VI neighborhood revitalization programs approved by HUD.

**A. Neither The CHA Nor Plaintiffs
Have Moved To Modify The Injunction.**

The plaintiffs seek to "clarify" the issue in order to introduce issues that would only be relevant to a motion to modify the Injunction, such as whether the plaintiffs have received



“full relief” for the constitutional violation adjudicated in 1968, or whether the “principal objectives” of the Injunction have been met. Response at 11-17. They seek to “clarify” the issue raised by the Motion, and assert that “the issue is whether CHA advances any persuasive reason for removing [HOPE VI-funded units] from the coverage of the judgment order. . . .” Response at 3. The CHA has not asked the Court to remove HOPE VI-funded units from the coverage of the Injunction, and it has no burden of persuading the Court that the coverage of the Injunction should be changed. Despite plaintiffs’ wish to have the Court treat the Motion as a motion to modify, (Response at 3 n.1, 17), the Motion seeks an interpretation -- not a modification -- of the Injunction.

Plaintiffs also want to avoid the burden of filing their own motion to modify and proving the grounds for modification recently set forth by this Court in its opinion on Section 8 certificates. See Gautreaux, et al. v. CHA, et al., 1997 U.S. Dist. LEXIS 12924, *5-*8 (N.D. Ill. Aug. 26, 1997) (attached to Memorandum In Support Of The Chicago Housing Authority’s Emergency Motion To Clarify Injunction (the “Memorandum”) as Exhibit A). They argue that if the Court accepts the CHA’s interpretation that HOPE VI-funded units are beyond the scope of the Injunction, but agrees that the plaintiffs nevertheless are entitled to such additional relief, then (1) the Court has the inherent power to adjust the remedy under the current Injunction, (Response at 13-16), or (2) the Court could treat the Response as plaintiffs’ motion to modify the Injunction.¹ Response at 17. Before any modification of the Injunction is considered, it must

¹ Plaintiffs want the Court to treat the Response as a Motion to Modify only if the Court agrees with plaintiffs that they should win such a motion: “Should the Court be of the view that such housing is to be treated as a new and further remedy not presently covered by the judgment order, we request that Part III of this Response be accepted as plaintiffs’ motion for such an
(continued...)

first be decided whether a modification is necessary. This will be determined, one way or the other, by the Court's ruling on the Motion. The plaintiffs' effort to interject irrelevant issues should be rejected.

B. The Funding Source of New Construction Is Critical.

The plaintiffs argue that the CHA has improperly framed the issue as "whether the judgment order against CHA govern[s] HOPE VI funding and programs," (Response at 1), and that the correct issue is whether the construction of replacement units is covered by the Injunction. The plaintiffs propose that the applicability of the Injunction to the construction of new units does not turn on the particular HUD funding stream employed; that the construction of new units is expressly covered by the Injunction; and that the analysis ends there. Response at 3. In other words, plaintiffs want to separate out one part of a fully integrated, complex HOPE VI program and subject it to a set of rules that are inherently inconsistent with the programmatic requirements and goals of the program; and they see no adverse impact resulting from this.

The source of funding of the new units is HOPE VI and its requirements and goals must be considered in determining the scope of the Injunction. The HOPE VI program is designed to create viable neighborhoods through community-based rehabilitation and reconstruction projects where distressed housing is located, by (1) demolishing the worst buildings that economically cannot be rehabilitated; (2) creating mixed-income replacement housing; (3) requiring one-third of the demolished housing units to be replaced by Section 8 certificates; (4) requiring consideration of the preferences of public housing tenants; (5) allowing tenants to

¹(...continued)

exercise of the Court's equity power." Response at 17. They do not want to risk losing such a motion on the basis of the record they have made.

choose where they want to live; (6) requiring local government economic support of the program; (7) permitting the concurrent use of funding for community-based housing redevelopment and reconstruction of public housing provided under the Housing and Community Development Act of 1992, 42 U.S.C. § 5301 et seq.; and (8) providing substantial funds (20% of the grant plus 15% of that amount contributed by the City) for a community services program that has been approved by the Commission on National and Community Services, and for supportive services such as job training services. See HOPE VI and HUD HOPE VI Handbook (Attached to Memorandum as Exhibit B).

This is the public housing program that Congress is willing to fund. The construction of replacement housing is one part of Congress' complex solution for the poorest neighborhoods -- neighborhoods that are economically and socially isolated and contain severely distressed, high-density public housing. HOPE VI focuses on neighborhoods.² In contrast, the Injunction does not purport to provide a remedy for these neighborhoods located in Limited Areas. It provided for just the opposite: the creation of new scattered-site public housing in General Areas, originally on a three to one ratio, outside of the very neighborhoods that Congress

² This focus on specific neighborhoods is ignored by the plaintiffs throughout their Response, but it is critically important and cannot be denied. For example, as noted in 42 U.S.C. § 1437I (attached to the Memorandum as Exhibit B):

Pub. L. 102-389, Title II, Oct. 6, 1992, 106 Stat. 1579 provides . . . \$300,000,000 shall be for grants to carry out an urban revitalization demonstration program involving major reconstruction of severely distressed or obsolete public housing projects, to be administered by local public housing agencies: Provided, That such funding shall be made available to up to 15 cities. . . ; Provided further, That no more than \$50,000,000 shall be provided to each participating municipality; Provided further, That no more than 500 units shall be funded for each participating city and such units shall be located in up to 3 separately defined areas containing the community's most severely distressed projects, including family high-rise programs (emphasis added).

wants revitalized through its series of HOPE VI programs. The Injunction and HOPE VI cannot both govern the CHA's HOPE VI projects. Removing one part of the program and subjecting it to the locational requirements of the Injunction would destroy the entire HOPE VI program.³

**II. The Injunction, Properly Interpreted, Does Not
Apply to HOPE VI-Funded Public Housing Units.**

The CHA's position is that the Injunction applies to newly constructed units that add to the CHA's aggregate housing stock, and does not apply to replacement housing funded under a new federal program, initiated by Congress decades after the Injunction issued, and targeted at addressing the deterioration of large, public housing projects. Memorandum at 13-17. Plaintiffs would look only to one provision of the Injunction, the definition of "Dwelling Unit," defined as any unit of housing initially made available for occupancy after the entry of the Injunction, and to the absence of any provision that refers to "replacement" housing. Response at 2-3. Based on the theory that all newly-constructed public housing is the same, the plaintiffs end their inquiry and conclude that HOPE VI-funded units, being new construction, are covered by the Injunction. Response at 3.

³ Plaintiffs are clearly wrong in contending that there is no such inconsistency between the Injunction and HOPE VI because (1) HOPE VI has no locational requirements so that the CHA could choose to submit a plan that included building 50% of the new units in General Areas (Response at 4), or (2) the CHA could get a waiver of the Injunction's proscriptions in order to construct new units in Limited Areas. Response at 5-6. HOPE VI has clear locational requirements, see supra note 2, and any waiver process subjects the CHA to negotiating the contours and details of the entire program with the plaintiffs, who would seek to fashion the program so that it promotes their goal of integration. The plaintiffs' goal of achieving integration of public housing tenants in General Areas is absolutely inconsistent with the HOPE VI program that promotes both economic and racial integration through the revitalization of inner city neighborhoods. The Injunction should be looked at for what it requires and prohibits, not what could possibly happen if the CHA applied for a waiver of the Injunction. Plaintiffs' suggestion that a wavier could solve the problem merely highlights the fact that HOPE VI is inconsistent with the Injunction's locational restrictions.

The CHA does not disagree that a "Dwelling Unit" is a public housing unit made available for occupancy after the entry of the Injunction, and that HOPE VI-funded units, being made available for occupancy 30 years later, would come within the definition. But that only begins the inquiry as to the proper interpretation of the Injunction. Newly constructed housing units are treated differently by the local public housing agencies and the federal government: if the unit adds to an authority's housing stock, it is considered "new" housing; but if the unit replaces existing housing stock, it is considered "replacement" housing.⁴ HOPE VI deals exclusively with replacement housing, and even more specifically, with replacement housing built for a specific purpose.

The plaintiffs contend that there is no distinction between new and replacement housing. The absence in the Injunction of a reference to replacement housing is understandable; in 1969 replacement housing was not an issue. It is undisputed that the Injunction's remedy is to require the building of new units that would add to the CHA's 1969 public housing stock, and leaves the modernization and rehabilitation of pre-1969 public housing to the CHA. The Injunction does not directly answer the question of whether it covers or leaves to the CHA replacement of demolished public housing funded under a new federal law that focuses on the revival of neighborhoods, isolated in poverty and suffering from extremely distressed, high-density public

⁴ Many funding decisions depend on the size of a housing authority's aggregate housing stock, and the authority's competency record with regard to its aggregate housing stock. See 42 U.S.C. §§ 1437l(d)-(p), 1437p. For example, the criteria for receiving federal funding to add to or to demolish aggregate units of housing stock is distinct from the criteria that a housing authority must meet to receive funding to revitalize or rebuild its aggregate housing stock, and Congress each year specifies the amount of money available for these different tasks. See 42 U.S.C. §§ 1437b, 1437c, 1437l, 1437p.

housing. For this reason, the Injunction requires an interpretation to determine whether it prohibits the CHA from participating in this new federally-funded program.

The answer depends on analysis of the factors that courts take into account in interpreting injunctions, including the intent of the drafter of the injunction, and the history of its enforcement. These factors support the CHA's interpretation of the Injunction.

A. The Drafter's Intent.

The CHA's Memorandum demonstrates that Judge Austin, in crafting the Injunction, attempted to desegregate Chicago's public housing by forcing the CHA to increase the housing stock in the General Area, and not by requiring the destruction or the retirement over time of the housing stock in the Limited Areas, as he could have, or barring the CHA from receiving federal funding, as he was specifically requested to do by the plaintiffs. See Memorandum at 13-16.

The plaintiffs argue that the intent of the drafter of the Injunction is not relevant in interpreting the scope of relief provided under the Injunction: "The judgment order is not a consent decree to be construed or 'interpreted' as a bargain between parties . . . it is a remedial desegregation order entered after an adjudication of liability." Response at 10. This argument has been squarely rejected in this Circuit. Both parties cite to Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995), for the proposition that injunctions, "like other disputed writings, are to be construed in their proper context. . . ." Memorandum at 15; Response at 9 n.8. The injunction being interpreted in Youakim was a judgment order -- not a consent decree, 71 F.3d at 1283, and the goal in interpreting an injunction is to determine the intent of its drafter. See Florida East Coast Ry. Co. v. CSX Transp., Inc., 42 F.3d 1125, 1129-30 (7th Cir. 1994). Clearly

injunctions that result from adjudications are subject to judicial interpretation in the same way as consent decree judgments.

B. History of Enforcement.

The history of the enforcement of the Injunction, set forth in the CHA's Memorandum at 12-13, demonstrates not only the existence of a relevant distinction between development funding and modernization funding (such as HOPE VI), but also that the Injunction itself has been interpreted as respecting and even adopting that distinction.

(1) Federal Public Housing Regulatory Scheme.

It is the source of funding for any particular public housing project that distinguishes new from replacement housing. Compare 42 U.S.C. §§ 1437b, 1437c, 1437l, 1437p. A housing authority that has been granted funding for a particular purpose under a specific program cannot use that funding for any other purpose; the funds must be used in accordance with the terms and conditions of the program. Plaintiffs' assertion that "newly developed public housing, whatever its manner of development or source of funding" is all just "good, old, familiar public housing," (Response at 3, 4, 5) entirely ignores the regulatory scheme in which the Injunction has been enforced in the last two decades.

It also ignores the political fact that in 1969 the Congressional policy was to add to the nation's aggregate public housing stock, and today Congress has determined that it will not fund any increases to the existing public housing stock. See Plaintiffs' Motion To Modify, filed March 21, 1997, ¶ 4 ("virtually no new incremental funding for public housing construction is being provided by Congress").

Finally, plaintiffs' argument ignores the momentous change in the development of public housing that HOPE VI was intended to provide. As the HOPE VI Guidebook states:

HOPE VI was originally conceived as a demonstration program which would promote fundamental changes in the way PHAs developed and administered public housing, and in the way HUD related to those PHAs. Its purpose was and remains to revitalize severely distressed or obsolete public housing developments. HOPE VI is a key ingredient in the Department of Housing and Urban Development's Transformation of Public Housing efforts.

Exhibit B at 1.A.1, attached to Memorandum. There is no such thing as good old public housing that has existed unchanged from 1969.

(2) Prior Waivers

Plaintiffs also argue that two past waivers of the Injunction jointly sought by the parties in conjunction with the building of replacement units at Horner and Lawndale, demonstrate that the Injunction "covers" the building of replacement housing in Limited Areas. Response at 5, 8-9. Plaintiffs' reasoning is flawed. At the time the waivers were sought, the issue was not whether the Injunction covered the building of replacement housing in Limited Areas. The Lawndale units were built with "development" funds. Congress did not subject development funds to the same restrictions that it has now placed on HOPE VI funds. The development funds used at Lawndale could have been used to build scattered-site housing. Indeed the terms of the Injunction required the CHA to use those funds to build scattered-site housing. Because of the Injunction, the CHA had to seek a waiver (to which plaintiffs agreed) to use, in a Limited Area, funds that were otherwise available for scattered-site housing.

HOPE VI funds are not "otherwise available" for scattered-site housing. Such funds are made available only for specific, approved projects and no diversion of money from the

scattered-site housing program to the rehabilitation/reconstruction projects is required. The CHA does not have to seek a diversion of funds intended for building units in the General Areas, and, therefore, a waiver of the terms of the Injunction with regard to HOPE VI funding would not be necessary.⁵ No agreement among the parties and no order of this Court can alter the restrictions that Congress has placed on the use of HOPE VI funds. See Alliance To End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015 (1978). Plaintiffs' disagreement is with Congress's limitations on HOPE VI funding, not with the CHA. Cf. United States v. Board of Educ. of the City of Chicago, 11 F.3d 668 (7th Cir. 1993).

(3) Gautreaux v. Romney

The Memorandum refers to the Seventh Circuit's past treatment of a specially-funded program similar to HOPE VI, the Model Cities Program, in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1992). Memorandum at 13 n.9. Plaintiffs' response is that Model Cities funds were not used to build new housing. Response at 6 n.5. This is irrelevant to the import of Romney.

In Romney, the Gautreaux plaintiffs sought to bar HUD from releasing (i.e., the CHA from using) Model Cities funds. Those funds had been awarded to the CHA by HUD, and

⁵ Plaintiffs also argue that "[i]t would indeed be a novel application of equitable principles if defendant could avoid remedial obligations simply by changing the form of their programs." Response at 4 n.3. HOPE VI is not a CHA program. It is a federal program. Most local housing authorities' "programs" are defined by federal programs. Without federal funding, and compliance with the requirements of the federal programs, there would be no local public housing programs. The CHA has not changed its program from building scattered-site units in General Areas to building replacement units in Limited Areas. The first program is no longer being funded by Congress. Only the new program is being funded.

HUD was prepared to release \$26,000,000 to the CHA for use in accordance with the Model Cities legislation. Plaintiffs attempted to stop the release of funds to the CHA, arguing that the funds should not be released until the CHA came into compliance with (or at least into better compliance with) the Injunction. The Seventh Circuit ruled against the plaintiffs on the ground that the CHA's participation in a national demonstration program could not be conditioned on compliance with the Injunction, where the Injunction was designed to remedy a harm not related to the implementation of the demonstration program: "The District Court here proceeded [in enjoining the Model Cities Program] as though HUD, in some court proceeding, had been found guilty of some wrongdoing in administering the Model Cities Program in Chicago. This, of course, is not the case." Id. at 127.

Nor is it this case. No wrongdoing is associated with HOPE VI. HOPE VI, like the Model Cities Program, is a demonstration program created by Congress as an experiment in revitalizing certain urban neighborhoods, including in the case of Chicago, the neighborhoods in which the Robert Taylor Homes are located. As in Romney, the CHA's ability to participate in the HOPE VI program should not be conditioned on compliance with the Injunction, when the Injunction and HOPE VI were designed to remedy different harms.⁶

The plaintiffs have not sought to enjoin CHA's participation in the HOPE VI program or from spending any HOPE VI funds in a manner that does not accord with the

⁶ The harm resulting from the unconstitutional conduct of the CHA to which the Injunction was directed was the lack of opportunity for African Americans to reside in public housing in the General Areas. The remedy fashioned by Judge Austin was to require substantial new building in General Areas. HOPE VI's goal is to remedy conditions that did not exist in 1968 but that now exist in neighborhoods that have a concentration of poverty and high density public housing -- public housing that is no longer economically viable and which, under new federal rules, has to be demolished and replaced, rather than rehabilitated.

Injunction.⁷ However, the reality of the situation is the same as in Romney. The CHA cannot participate in HOPE VI and comply with the Injunction at the same time. The plaintiffs disingenuously claim that because HOPE VI has no locational requirements, the CHA could apply for a HOPE VI program that meets the terms of the Injunction (50% new units in General Areas).

Response at 20.

This ignores the requirement that HOPE VI programs concentrate on neighborhoods, as well as the highly competitive nature of HOPE VI. It is a voluntary program in which housing authorities compete for funding that is awarded based on the quality of the programs proposed by the authorities. The remedial scheme of the Injunction is so inconsistent with the programmatic requirements of the HOPE VI program that any application that provided for locating 50% of the units in General Areas would not meet HOPE VI requirements. The plaintiffs may not have filed a motion to enjoin the CHA's use of HOPE VI funds, but they are seeking the functional equivalent of such an injunction.

(4) Plaintiffs' Own Actions

The Memorandum pointed to certain actions of the plaintiffs that the CHA argued were consistent with its interpretation of the Injunction. Memorandum at 16-18. Plaintiffs disagree with the CHA's description of their conduct. Response at 5-8. The CHA stands by its version of the events as described in the Memorandum. Response at 7 n.6. However, the Motion does not require resolving factual disputes.

⁷ Of course, the Injunction, entered only a few months after the enactment of the Fair Housing Act, had the general goal of racial integration. Today, a suit like Gautreaux alleging racial segregation in federally-funded public housing would be brought against HUD under the Fair Housing Act.

Some actions of the plaintiffs, however, are not in dispute. First, the CHA pointed out that:

[I]n the recent litigation over Section 8, plaintiffs argued to this Court that funding for the scattered-site building program was almost exhausted. Motion To Modify Judgment Order, filed March 21, 1997, ¶ 4. This statement was made in the face of nearly \$120 million unspent dollars of HOPE VI funding, and the fact that the scattered-site building program permits building of scattered-site housing in the Limited Areas in which HOPE VI work is taking place. Thus, plaintiffs as recently as six months ago, did not appear to believe that HOPE VI money could be used for the Gautreaux scattered-site housing program or that HOPE VI was somehow governed by the Injunction.

Memorandum at 16. In response, the plaintiffs state that their “explicit reference, which CHA ignores, was to ‘incremental funding’ as one of two ‘principle’ (sic) remedial mechanisms.”⁸ Response at 8 n.7. The CHA respectfully disagrees. The principal theme of plaintiffs’ motion was that without the Section 8 remedy, the provision of a remedy under the Injunction would cease. See, e.g., Plaintiffs’ Reply Brief In Support Of Motion To Modify CHA Judgment Order, filed July 27, 1997, at 5 (“[There will not] be future HUD set-asides to fund scattered-sites, the Gautreaux Section 8 Program, or other Gautreaux desegregation opportunities.”) (emphasis added).

Virtually all of the CHA’s money comes from the federal government through HUD. Thus, the CHA interprets plaintiffs’ statement as meaning that, absent HUD’s Section 8 program, there is currently no federal funding available to be used for “Gautreaux desegregation opportunities.” This must mean that HOPE VI money is not available for Gautreaux desegrega-

⁸ Paragraph 4 of Plaintiffs’ Motion To Modify states that there is an “impending exhaustion of scattered-site funds (virtually no incremental funding for public housing construction is being provided).” Scattered-site building is, of course, the remedy provided by the Injunction. The above-quoted sentence appears to, at most, predict the ending of funding for the remedy provided in the Injunction. At the very least, the sentence links the scattered-site remedy to “incremental funding for public housing,” that is, to funding for new or aggregate increases in public housing.

tion opportunities. If the plaintiffs believed otherwise, they easily could have enlarged their motion to include both the Section 8 and HOPE VI programs, since their arguments would be substantially the same on each program. The undisputed fact is that the plaintiffs knew that years earlier the CHA had applied for and obtained HOPE VI funding, and they chose to limit their motion to Section 8.

Plaintiffs second telling act is their failure to act when the CHA applied for HOPE VI funding in 1993, 1996 and 1997. The 1987 order appointing the Receiver clearly prohibits the CHA from making "applications" for federally-funded "development programs." Order Appointing Receiver (August 14, 1987) at C, ¶ 2(a)(i).⁹ The CHA's HOPE VI applications were for programs that did not meet the locational requirements of the Injunction. Yet the plaintiffs did nothing. The plaintiffs agree that they did nothing but they excuse their inaction because, they say, they were respecting that the limits of the Injunction require a practical accommodation.

They state:

This is correct; a decent respect for the limits of the judgment order requires a practical accommodation -- to which CHA initially agreed -- between CHA's entitlement to control HOPE VI funds not subject to the judgment order (e.g., for social services) and the Receiver's responsibility respecting HOPE VI-funded new public housing that is subject to the order. Moreover, the applicability of the judgment order cannot be determined definitely at the HOPE VI application stage; HOPE VI applications, once granted, may be and have been subsequently amended before a final commitment of funds.

Response at 8.

⁹ The question of the Receiver's authority over HOPE VI programs is not yet ripe because it depends, in part, upon the interpretation of the Injunction sought here. If HOPE VI is not covered by the Injunction, it is axiomatic that the Receiver lacks authority to implement HOPE VI. As indicated in the Memorandum at 10 n.7, in the event that the Court determines that the Injunction covers HOPE VI, the CHA will ask the Court to clarify the Receiver's authority over HOPE VI, or alternatively to amend the order appointing the Receiver. Such motions would require extensive briefing by the parties.

What incredible back-pedaling. Each of the CHA's HOPE VI applications focused on a particular neighborhood that contained some of the worst public housing in the City, and asked for funding to revitalize that neighborhood in accordance with HOPE VI's complex requirements. Each called for the replacement of some demolished units with new units on site. All new construction was designated for neighborhoods that were in Limited Areas. No application called for the building of any new units in any General Area. The plaintiffs cannot seriously seek to excuse their inaction to a "respect for the limits of the [Injunction]" or to some possibility that the CHA's application at some later date would be metamorphosed into a proposal consistent with the Injunction.¹⁰

The bottom line is that neither the plaintiffs nor the Receiver seriously contested the CHA's right to apply for and implement HOPE VI programs outside the scope of the Injunction. The very best example of this is Cabrini Green. The plaintiffs admit that the HOPE VI Cabrini project has gone forward without any involvement of the Receiver because the CHA and the Receiver never entered into a contract under which the Receiver would act as "development manager." Response at 6. The plaintiffs then state that "since the Receiver is in fact involved in the development of the new public housing portion of Cabrini HOPE VI activities, it has chosen to continue to try to work out suitable arrangements with CHA without seeking the Court's intervention." Response at 6. The Receiver, however, has admitted that the CHA has

¹⁰ The notion that the plaintiffs have the right to enforce or not enforce the terms of the Injunction based on their own concept of a "decent respect" for the limits of the Injunction shows that the Injunction is ambiguous and requires a proper interpretation regarding its applicability. An injunction cannot be so vague and unenforceable that one of the parties is entitled to forego enforcement proceedings out of its own concept of a "decent respect" for the limits of the Injunction.

never entered into any contractual relationship with the Receiver, and that the Receiver has no role at Cabrini except for a minor role in connection with the negotiation of 40-year leases of privately-developed housing units in the Cabrini-Green areas. The Receiver's Statement Regarding the Chicago Housing Authority's Emergency Motion to Clarify Injunction filed December 19, 1997 ("Receiver's Statement") states:

The Receiver agreed to work with the CHA to prevent the loss of these units, despite the fact that the CHA did not involve the Receiver in the lease negotiations. The Receiver has prepared and submitted to HUD a development proposal to obtain final HUD approval.

Receiver's Statement at 9. There is no dispute that the Receiver has had no development role at Cabrini. Despite the fact that the Receiver has asked for a "developer's fee," based on the size of the entire Cabrini redevelopment project, as its "fee" for the minimal assistance it provided in connection with the lease of 140 units, the CHA has consistently refused to pay a developer's 3% fee to the Receiver. The fact is that the Receiver has had no role in the Cabrini HOPE VI project.

**III. Plaintiffs Have Neither Pleaded Nor
Proved a Basis for Modifying the Injunction.**

Plaintiffs have not filed a motion to modify the Injunction, and a brief in opposition to a motion cannot be transformed into a separate motion, yet they devote 7 pages and multiple page affidavits to arguing that HOPE VI-funded housing is needed to "reach the unachieved remedial goal in this case." Response at 11-17. While the plaintiffs purport to make the case for a modification to include HOPE VI-funded units, they fall short of even pleading the evidence required for the Court to even consider modifying the Injunction. Less than six months ago, this Court set forth the standard by which a motion to modify must be judged:

In order to prevail on a motion to modify the judgment order, the plaintiffs must show that the "principal objects" of the order have not been achieved. . . . Importantly, even if the

"principal objects" of the original order have not yet been fully achieved, we must consider whether other reasons outside the control of the defendant have prevented success and whether adherence to, rather than modification of, the current injunction may be the most fair alternative.

* * * *

While it might be expedient to simply accept the plaintiffs' assertion that "the vast majority of CHA's family public housing still consists of the same segregated units, in the still segregated neighborhoods," as well as the plaintiffs' unstated assumption that the allegedly segregative situation is entirely a result of CHA's original discrimination, we must insist on specific facts supported by evidence. For example, relevant information to test the first assertion would include the number of public housing projects that remain predominantly white and the number of projects located in the Limited Area and the General Area. If the evidence shows that segregation in public housing still exists, then we must explore the link between the current segregation and CHA's original discrimination, past remedial efforts (or lack thereof), current remedial efforts, and future plans. For example, we would examine the quantity and location of affordable land in the General Area remaining for site selection, the effects of private decision making on the current segregative state, and the effects of the shift in demographics over the years.

Gautreaux v. CHA, 1997 U.S. Dist. LEXIS 12924, *5-*8 (N.D. Ill. Aug. 26, 1997) (Attached to Memorandum as Exhibit A).

While the issue has no bearing on the Motion, the CHA points out that the plaintiffs' assertions and the "evidence" they cite do not address sufficiently whether there is existing segregation, and, if any, whether it can be proximately linked to the CHA's original discrimination. To show segregation, the plaintiffs state that 99½% of the CHA's total family units in 1968 were located in Limited Areas, and today the percentage is 85%. That does not establish that the CHA's public housing system is still segregated. The cited "statistic" would have to be compared against the growth of the African American population and the decline of the majority population that has occurred over the years. Segregation is a relative concept, depending upon, among other things, the demographics of the City and region as a whole,

patterns of residential segregation and/or desegregation within the City as a whole, the demographics of the CHA's tenant and applicant population, and the current demographics of the formerly all "White" CHA developments. See id; see also Freeman v. Pitts, 503 U.S. 467, 494-95, 112 S. Ct. 1430, 1447-48 (1992).

The plaintiffs have not addressed many of the factors the Court has stated must be considered with regard to the link between current alleged segregation and the CHA's past discrimination. They only argue that "[s]ince all of today's units located in Black neighborhoods are the identical units found by Judge Austin to have been wrongfully sited, today's racial imbalance in unit location is directly and causally linked to CHA's original wrong." Response at 12 (citation omitted). This clearly does not show a link between the past and the present.

The fact that the CHA has not demolished units in the Limited Areas does not demonstrate anything about the overall racial balance of Chicago's public housing system. Judge Austin did not order the CHA to tear down housing in Limited Areas, and in fact, he permitted the CHA to continue to erect new housing in Limited Areas. Moreover, any lack of progress during the past 10 years occurred on the Receiver's watch. Since the Receiver had free reign to construct public housing in General Areas, to the extent it was not able to build more units, it probably was not possible to build more. This alone severs the current statistics from the 1969 statistics.

Because the plaintiffs have not presented any evidence regarding all of the factors relevant to determining if the City's public housing system is still segregated, or any link to the CHA's conduct, the plaintiffs have not made even a prima facie case for modification.

IV. Federalism/Separation of Powers

The CHA has already submitted to HUD and HUD has already approved the CHA's HOPE VI plans that do not contemplate one-for-one scattered-site building,¹¹ and in fact require most of the building to take place in the Limited Areas. These plans are consistent with Congress's intended use of HOPE VI to revitalize neighborhoods such as those in the Limited Areas. Clearly, the imposition of the Injunction on HOPE VI would have perverse results in direct conflict with the goal of HOPE VI intended by Congress when it created the program. Memorandum at 18-19.

Finally, the CHA has the right and the responsibility to "make the most" of the federal funds that the federal government has made available to Chicago and the State of Illinois for assistance with public housing. Today, HOPE VI money is available for the revitalization and rehabilitation of certain neighborhoods in which large public housing projects are located. Funding that can be used for such projects may not be available in the future. For example, the CHA may not be able to use future funding for the development of more aggregate units of public housing in the Limited Areas that are now benefitting from HOPE VI. While a federal court can enjoin a housing authority from violating the constitution, it should not enjoin a housing authority from making efficient use of federal housing dollars. See Hoover v. Wagner, 47 F.3d 845, 850

¹¹ The HOPE VI application process required the CHA to submit its plans for HOPE VI funding at the time of the application; this is so because the HOPE VI program is a competitive funding program. The CHA could not have submitted as a part of its HOPE VI applications a plan to build one-for-one scattered-site housing, as required by the Injunction. HOPE VI's programmatic requirements would not permit such a plan. See supra note 2. And, even if HOPE VI would technically permit such a plan, it is clear that the CHA simply would not have been competitive with other housing authorities (and thus would not have obtained any HOPE VI funding) if it had submitted such a plan.

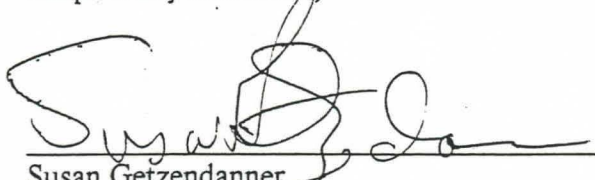
(7th Cir. 1995). The HOPE VI program has not been “tainted” with discrimination. Accordingly, the State of Illinois and the City of Chicago (through the CHA) should be permitted to maximize their use of federal funds over time, for the benefit of the collective interests of the CHA’s tenants, many of whom are plaintiffs in this case.¹²

¹² Cf. Romney, 457 F.2d at 127 (the district court should not have “ignored the interests of poor people, mostly black, intended by Congress to be the beneficiaries of the Model Cities Programs, while seeking enforcement of a timetable for the erection of housing units in white areas which, although laudable, could not be achieved in time to prevent the catastrophe threatened by the District Court’s order terminating federal funds to a program not found to be discriminatory.”)

Conclusion

For the reasons stated in its Memorandum and this Reply, the CHA respectfully requests that this Court grant the CHA's Emergency Motion to Clarify the Injunction and declare that the Injunction does not apply to the CHA's applications for and use of HOPE VI funds.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan Getzendanner", written over a horizontal line.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	Docket No. 66 C 1459
	)	No. 66 C 1460
Plaintiffs,	)	
	)	
vs.	)	Chicago, Illinois
	)	February 10, 1998
SAMUEL R. PIERCE, et al.,	)	10:30 o'clock a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - STATUS
BEFORE THE HON. MARVIN E. ASPEN

APPEARANCES:

For the Plaintiffs:	MR. ALEXANDER POLIKOFF Business and Professional People for the Public Interest (17 East Monroe Street Chicago, Illinois 60603)
For Defendant CHA:	SKADDEN ARPS SLATE MEAGHER & FLOM BY: MS. SUSAN GETZENDANNER (333 West Wacker Drive Chicago, Illinois 60606)
For Defendant Department of Housing and Urban Development:	MR. JOHN A. JENSEN (77 West Washington Street Chicago, Illinois 60604)

ALSO PRESENT: MR. MICHAEL SHAKMAN

MS. MARY M. GALLAGHER
Official Court Reporter
219 South Dearborn Street
Room No. 2524A
Chicago, Illinois 60604
(312) 663-0049



1 THE CLERK: 66 C 1459, Gautreaux versus CHA.

2 MS. GETZENDANNER: Good morning, Judge.

3 MR. POLIKOFF: Good morning, your Honor.

4 THE COURT: Good morning.

5 Okay. This is the motion of the CHA, so I guess the
6 CHA will go first, right?

7 MS. GETZENDANNER: Judge, if you have any questions, I
8 would be happy to answer them, otherwise I am content to rely
9 on the briefs, so long as I can go after these fellows.

10 THE COURT: Okay.

11 Anything you wish to say?

12 MR. POLIKOFF: I will be happy to start, your Honor.

13 THE COURT: All right.

14 MR. POLIKOFF: Thank you.

15 Your Honor, as we see it, CHA advances two basic
16 arguments to support its view that the judgment order does not
17 apply to new HOPE VI funded public housing. One is that the
18 order only covers funding that adds to the aggregate housing
19 stock, not replacement funding; and the other is that the
20 judgment order's locational requirements are incompatible with
21 HOPE VI. And if you were to rule that the order applies to new
22 HOPE VI housing, you would effectively eject CHA from the HOPE
23 VI ballgame.

24 I will address these two basic arguments momentarily
25 and persuade you, I believe, that the judgment order clearly

1 does cover replacement housing based on its language, its logic
2 and the conduct of the Court and the parties in carrying it
3 out. And we will also show that there is no incompatibility
4 whatsoever between the judgment order and HOPE VI.

5 But first I would like, in a few words, to place this
6 HOPE VI dispute within the larger framework of the litigation.

7 The Fisher and Hickman affidavits attached to our
8 brief demonstrate that a dramatic current racial imbalance
9 still persists in CHA's housing stock. Largely thanks to the
10 receivership and your subsequent orders, the figure has been
11 reduced from 99 percent to the middle 80's, but we've still got
12 a long way to go.

13 It is, of course, indisputable that sufficient
14 desegregated housing opportunities for plaintiff class families
15 have not been provided to enable anyone to say -- and CHA
16 doesn't even assert -- that this principle remedial purpose of
17 the judgment order has been achieved.

18 Under these circumstances, the law places the burden
19 on CHA, not the plaintiffs, to show that the current racial
20 imbalance is not traceable in a proximate way to the prior
21 violation. That's a quote, as you may recognize, from Freeman
22 versus Pitts, 503 U.S. at 494.

23 And subsequent to Freeman the Supreme Court in U.S. v.
24 Fordice reiterated the same point, quote, that the burden of
25 proof falls on the state, not the aggrieved plaintiffs, to

1 establish that it has dismantled its prior de jure segregated
2 system.

3 Therefore, your Honor, with a current racial imbalance
4 not shown by CHA to be divorced from its original
5 constitutional wrong and as yet unachieved principle remedial
6 purpose, the law stands flatly opposed to CHA's desire to have
7 the judgment order interpreted in a relief-limiting way.

8 We've set forth some of the relevant cases at pages 13
9 to 17 of our written response. CHA's reply brief doesn't
10 address those cases, doesn't even refer to CHA's continuing
11 desegregation obligation. And I suggest, your Honor, that
12 those cases provide the legal framework within which the CHA
13 arguments, to which I now turn on the HOPE VI matter, must be
14 considered.

15 The first of the two major CHA arguments that the
16 judgment order should be interpreted as not applying to
17 replacement housing, flies in the face of the unambiguous
18 language of the judgment order. Indeed, CHA concedes that HOPE
19 VI funded replacement housing is covered by the dwelling unit
20 definition in the judgment order.

21 CHA says -- and I quote from page 6 of its reply brief
22 -- quote, the CHA does not disagree that HOPE VI funded units
23 would come within the definition of dwelling unit in the
24 judgment order. It's perfectly understandable that CHA doesn't
25 disagree. That dwelling unit definition was obviously written

1 to cover every imagineable way in which CHA might provide new
2 housing -- and I am quoting now from the order -- directly or
3 indirectly, whether in a structure owned in whole or in part by
4 CHA, whether or not newly constructed, whether otherwise made
5 available by or through CHA.

6 Plainly, Judge Austin was strained not to overlook any
7 kind of new housing CHA might provide.)

8 THE COURT: How about replacement housing on the site
9 that's demolished?

10 MR. POLIKOFF: Replacement housing -- it is new
11 construction -- is covered by this, your Honor, clearly, new
12 housing initially made available after the date of the judgment
13 order. And as I will show you in a moment, you have already
14 ruled, already exercised jurisdiction over replacement housing
15 designed for precisely that purpose.

16 THE COURT: How does that differ from a situation
17 where CHA might rehab completely?

18 MR. POLIKOFF: Big difference, because the judgment
19 order says, -- "initially made available after the date of the
20 order."

21 As we pointed out in our briefs, we have not sought --
22 ever in this case we have not sought to stretch the judgment
23 order to cover a rehab of a prior unit.

24 We have only said, when you are putting up a new unit,
25 even if it's in replacement of a demolished unit, it's covered

1 by the language of the judgment order, which, as I point out,
2 CHA itself concedes.

3 THE COURT: As a practical matter, is there really any
4 difference between the two?

5 Let's assume a hypothetical of 100 units; CHA razes
6 the building, puts up another building of 100 units, or, CHA
7 takes that original building, really guts it, rehabs it and
8 comes up with 100 units. You're saying one would be treated
9 differently than the other?

10 MR. POLIKOFF: Enormous difference, your Honor. Why?

11 THE COURT: But as a practical matter, should there be
12 any difference?

13 MR. POLIKOFF: Yes, there should be, and I will tell
14 you why.

15 If CHA razes a 100-unit building and is going to build
16 100 new replacement units, it has the opportunity thereby to
17 provide relief for the plaintiff class, because the 100 new
18 units don't have to be built in the same place that the razed
19 building stands. If you're gutting a building and rehabbing it
20 on site, you don't have that opportunity.

21 So desegregation opportunities, relief for the
22 plaintiff class, can be provided by the new 100 units. You can
23 put 50 of them out there, 50 of them in here, under your
24 current orders 50/50, so we would get 50 units of desegregated
25 housing.

1 If, on the other hand, they are simply rehabbing a
2 building, we could have drafted the order differently -- I
3 don't know whether Judge Austin would have gone along -- but we
4 made a distinction right at the outset between -- and he made a
5 judgment order on his own, a judgment decision on his own, I am
6 not going to tell CHA how to run its existing housing stock.
7 They want to rehab it -- and we didn't oppose that. We never
8 argued for that.

9 The distinction then is the distinction between an
10 opportunity to provide remedial housing opportunities to the
11 plaintiff class through newly constructed housing which has no
12 locational requirements imposed upon it and rehabbing an
13 existing building which obviously isn't being moved.

14 From the look on your face, I'm not sure you're 100
15 percent persuaded, but --

16 THE COURT: Well, following your construction, CHA may
17 have the -- assuming that your construction is the one that
18 will be followed, CHA may have the very difficult task of
19 making a policy decision that would be more costly.

20 For example, if CHA decides that it wants to keep the
21 100 units in the hypothetical building that I suggested and the
22 cost to rehab those units is more than the cost to raze the
23 building and put up 100 new units, CHA would be in a position
24 of having to pay that extra cost in order to keep those units
25 at the same site.

1 MR. POLIKOFF: They may very well, your Honor, if the
2 economics worked out that way; they might work out differently.
3 But --

4 THE COURT: It's taxpayers' money that we're talking
5 about, though.

6 MR. POLIKOFF: Yes, but if CHA has an obligation to
7 provide desegregation housing opportunities to the plaintiff
8 class members, which it does, that decision as to which way to
9 go ought to include a consideration of that persisting CHA
10 obligation to provide desegregation.

11 Indeed, I would argue -- not here arguing this point,
12 but in a hypothetical situation I would argue that that
13 obligation to provide desegregation housing for the plaintiff
14 class should weigh very heavily in CHA's decision-making.

15 But we have not tried to get into that, your Honor.
16 And if they decide to rehab under the language of the order,
17 they are free to do it without consequences under the Gautreaux
18 orders.

19 I pointed out that your Honor is being asked to
20 interpret the order in a way that does violence to its
21 language. For the reasons we have just discussed, it also does
22 violence to the logic.

23 The purpose of the order can be served, i.e.,
24 desegregation housing opportunities provided to the plaintiff
25 class through replacement housing just as effectively as

1 through incremental housing. So the purpose of the order also
2 argues for not imposing the restrictive limitation on it that
3 CHA is proposing. Indeed, I would say that CHA's request to
4 you is at war not only with the language of the order, but also
5 with its logic.

6 Finally, and perhaps most tellingly, the Court and the
7 parties have already interpreted the judgment order to embrace
8 replacement housing, starting with the Court's order of
9 December 10, 1993. The order is cited and discussed in the
10 briefs, but I've made extra copies for the Court and counsel.
11 This is the order that HUD calls the nunc pro tunc order.

12 (Document tendered.)

13 MR. POLIKOFF: Do you need an extra copy?

14 MS. GETZENDANNER: Sure.

15 MR. POLIKOFF: On page 2 and 3 of this so-called nunc
16 pro tunc order, you see that paragraph -- it's at the bottom of
17 page 2 -- paragraph number 1 refers to CHA funding applications
18 for the familiar 18 units in Lawndale.

19 But paragraph 1 over at the top of page 3 now, your
20 Honor, also covers an additional 377 units. And two project
21 numbers are referenced there, which are at Washington Park,
22 which is at North Kenwood/Oakland, for 187 units, and Cabrini
23 Green for 190, making the total of 377.

24 Paragraph 2 of the order in the middle of page 3
25 authorizes the joint venture, led by Habitat as Receiver and

1 previously approved by the Court, to develop those 18 Lawndale
2 units. And then if you drop down to paragraph 4, at the bottom
3 of page 3, you see that that authorizes the same joint venture
4 to develop the 377 Washington Park and Cabrini units.

5 Now, your Honor, a couple of months before you entered
6 this order the funding for these same 377 units had begun to
7 come from HUD.

8 On September 10, 1993, HUD notified CHA that its
9 funding application for these Washington Park and Cabrini units
10 had been partially approved, quote -- and I emphasize this --
11 for replacement housing. That's in one of the letters that was
12 delivered to the Court and counsel early last week, and I
13 emphasize those replacement housing words. In other words,
14 your Honor, these 377 units were being funded with true
15 replacement, not incremental dollars.

16 Incidentally, the same HUD letter, which is signed by
17 Mr. Shuldiner, who was then in Washington with HUD, also says
18 -- and I am quoting -- these fund reservations are conditioned
19 upon agreement of the parties to the Gautreaux litigation and
20 approval by the Court of the entity that will develop these
21 replacement units, end quote.

22 So two months later, when the Court signed the nunc
23 pro tunc order you're holding in your lap, it was not only
24 authorizing the joint venture to develop true replacement
25 housing funded with replacement, not incremental dollars; it

1 was also satisfying the HUD requirement that the Court and the
2 Gautreaux parties agree on the entity to do the developing of
3 those 377 units.

4 By the way, your Honor, the Gautreaux-funded portion
5 of the 466 units at Horner, those are also true replacement
6 dollars, not incremental dollars.

7 Now, of course, we pointed out in our brief, referring
8 to this nunc pro tunc order, that true replacement housing
9 funding had already been subjected to the Court's orders.

10 Now, what does CHA say about that? Well, in its reply
11 brief CHA says correctly that the 18 Lawndale units are being
12 built with incremental funding. But CHA is then thunderously
13 silent about the Washington Park and Cabrini Green units,
14 thereby implying that the nunc pro tunc order relates only to
15 incremental funding and does not embrace true replacement
16 funding as well.

17 We are not favored with an observation from CHA,
18 therefore, your Honor, on the fact that the Court, with the
19 written approval of all the parties -- you will note that that
20 order was consented to in writing; the signature pages are also
21 in your lap, by all the parties. The Court and all the parties
22 already agreed upon an exercise by the Court of its
23 jurisdiction over true replacement housing.

24 Parenthetically, I want to note that this nunc pro
25 tunc order covers not only true replacement housing in a

1 non-HOPE VI context, which is Washington Park in North
2 Kenwood/Oakland, but it also covers replacement housing funding
3 to be used in a HOPE VI project at Cabrini Green, 190 out of
4 those 377 units.

5 It's true, those aren't HOPE VI dollars, but they are
6 dollars to be used in a HOPE VI project for the same
7 replacement housing purpose as HOPE VI dollars themselves may
8 be used.

9 In conclusion, your Honor, the replacement housing
10 horse has long since left the barn. The Court, with the
11 written concurrence of CHA and the other parties, has already
12 exercised judgment-ordered jurisdiction over replacement
13 housing, specifically including replacement housing for HOPE VI
14 projects. And you've done this not just in the nunc pro tunc
15 order but in subsequent orders.

16 As to the location of those replacement units, you
17 will note that paragraph 4 of that order refers to subsequent
18 orders having to do with location.

19 In the face, your Honor, of these several orders
20 relating to North Kenwood/Oakland, Cabrini, Henry Horner and
21 with the language of the judgment order concededly covering
22 replacement housing, while the rationale of the order supports
23 such coverage, it would be totally inappropriate to now reverse
24 field and act inconsistently with a whole series of the Court's
25 orders as well as extensive conduct of the parties based on

1 those orders.

2 I turn to the second major CHA argument, which is the
3 supposed incompatibility between HOPE VI and the judgment
4 order, a point made about a dozen times -- I counted them -- in
5 the CHA's briefs.

6 HOPE VI and the judgment order are said to be
7 inherently and absolutely inconsistent. We are told that CHA
8 could not hope to be competitive in HOPE VI awards if the
9 judgment order applied, and that denying CHA's motion is the
10 functional equivalent of enjoining CHA from HOPE VI
11 participation.

12 Simple answer to all this: It ain't true. It is not
13 true if one compares HOPE VI and judgment order language, and
14 it is not true if one looks at the competitive record of CHA in
15 HOPE VI competitions.

16 Let me turn to the language first. CHA says -- and
17 I'm quoting -- HOPE VI has clear locational requirements for
18 which proposition it cites and quotes the HOPE VI statute which
19 provides funding for addressing, as you know, severely
20 distressed or obsolete public housing projects, for the HOPE VI
21 statute does say the following: No more than 500 units shall
22 be provided to each participating city, and such units shall be
23 located in up to three separately defined areas containing the
24 community's most severely distressed projects, including family
25 high-rise projects, end quote. That's from the HOPE VI

1 statute, which is Exhibit B to CHA's brief.

2 And this is the locational requirement, the one I just
3 quoted, to which CHA refers when it says we are, quote, clearly
4 wrong in contending that HOPE VI has no locational requirements
5 for replacement housing.

6 But, your Honor, this locational requirement I just
7 quoted applies only to the 500 selected distressed or obsolete
8 units, not to their replacement units. That's perfectly clear
9 from the statutory, quote, such units, end quote, language that
10 I just quoted. Just read it; you can see it.

11 Moreover, the same statute specifically says
12 replacement housing may include tenant-based Section 8, which,
13 of course, can be located anywhere.

14 Now, if there were any doubt about the statutory
15 language point I am making, which there is not, there is a HUD
16 HOPE VI handbook, as you know, and that would resolve the
17 doubt.

18 For the guidebook says explicitly -- and the relevant pages are
19 in the exhibits to the briefs -- that replacement housing may
20 include, quote, construction of off-site housing, end quote,
21 and it says not one word about where off site.

22 And if there were any doubt about that, under the
23 heading Purpose of the HOPE VI Program, the guidebook includes
24 the following quote as a purpose: Lessening concentrations of
25 poverty by placing public housing in non-poverty neighborhoods.

1 Obviously the neighborhoods that contain the community's most
2 distressed and obsolete public housing units are not likely to
3 be non-poverty neighborhoods.

4 In short, your Honor, there exists no locational
5 requirement for HOPE VI replacement housing at all, and CHA is
6 simply wrong in implying that the locational requirement
7 applicable to the 500 selected distressed or obsolete units
8 applies to the replacement housing for those units.

9 Now, CHA then attempts to buttress this mistaken
10 argument with a flat-out misstatement, presumably designed to
11 show that contrary to the statutory and guidebook language,
12 replacement housing is confined to these severely distressed
13 neighborhoods.

14 Referring to each of CHA's HOPE VI applications, CHA
15 says at page 15 of its reply brief, "All new construction was
16 designated for neighborhoods that were in limited areas." And
17 again, "No application called for the building of any new units
18 in any general area."

19 From among many statements which demonstrate the
20 contrary, I will refer to but one which has to do with
21 replacement housing for Cabrini.

22 Here is what CHA said in its August 11, 1993
23 application to HUD, which is another of the letters that was
24 delivered to Court and counsel early last week. In this letter
25 CHA seeks HUD's approval to demolish the first building it

1 wanted to tear down at Cabrini. The sentence appears under the
2 heading, quote, Location of Replacement Units, and I now quote
3 the sentence: The proposed new units will be built on
4 scattered sites in community areas around the Cabrini Green and
5 in other sites throughout the Chicago metropolitan area in
6 accordance with the consent decree and subsequent orders of the
7 Gautreaux litigation, end quote. That statement and the others
8 like it cannot be reconciled with CHA's reply brief assertion
9 that all new construction was designated for limited areas.

10 I turn to the competitiveness issue, the other aspect
11 of this HOPE VI judgment order alleged incompatibility.
12 CHA won its initial HOPE VI award at the end of '93 in a
13 nationwide competition.

14 Now, look at the dates of the letters I've just
15 referred to. In August '93 CHA says, we're going to develop
16 replacement housing in accordance with Gautreaux. In September
17 CHA receives its first HOPE VI replacement housing funding from
18 HUD.

19 Moreover, we know what HUD believes from its own
20 lawyer's legal opinion; I'm quoting from Receiver Exhibit B.
21 Quote, in regard to the 377 replacement units for Cabrini and
22 Washington Park approved for funding by HUD in September of '93
23 and '94, the joint venture has clearly been authorized by Judge
24 Aspen. Still quoting, we also believe that any funds under
25 HOPE VI which go to replacement housing are currently a

1 Receiver responsibility. We do not believe the CHA currently
2 has any development authority for non-elderly units, end quote.

3 Now, both the joint venture and the Receiver are, of
4 course, obligated to adhere to the locational requirements of
5 the judgment order, so HUD's understanding that HOPE VI
6 replacement housing would be developed under Gautreaux clearly
7 didn't render CHA uncompetitive.

8 It didn't render it uncompetitive at first, when it
9 got the Cabrini award in '93, and it hasn't rendered it
10 uncompetitive since, for subsequent to its Cabrini award CHA
11 has received, as you know, two more HOPE VI awards: One for
12 Robert Taylor and one for Henry Horner, ABLA.

13 Thus, your Honor, a HUD that believes replacement
14 housing, including in HOPE VI projects, must be developed under
15 Gautreaux, has awarded CHA three separate HOPE VI grants.

16 What is there, then, to support the competitiveness
17 argument? In answer, your Honor, there's nothing but rhetoric.

18 In sum, there is no incompatibility between HOPE VI
19 and the judgment order. And CHA has not been uncompetitive,
20 even though HUD, not to mention CHA itself, has viewed the
21 judgment order's locational requirements as applicable to HOPE
22 VI public housing.

23 Now, before I conclude, having thus dealt with CHA's
24 two principle arguments, I would like to address a couple of
25 the CHA's subsidiary arguments very briefly, your Honor.

1 First, CHA says we haven't objected to its HOPE VI
2 applications and, therefore, we must not ourselves believe that
3 the judgment order covers new HOPE VI housing. And it derides
4 our explanation; namely, that the applications covered
5 non-housing matters as well that aren't covered by the judgment
6 order.

7 Since this isn't the waiver of rights argument but an
8 argument about what we believe, it's really not worth taking
9 much of your time, for we have told CHA unambiguously what we
10 believe. And I quote from our letter to CHA dated July 15,
11 '97, which is CHA Exhibit F. Quote, it remains the Gautreaux
12 position that court orders require the Receiver to develop all
13 public housing units even though HOPE VI funds are used, end
14 quote.

15 That is what we believe, that is what we have
16 consistently told CHA we believe, and no tortured analysis is
17 required to determine what we believe.

18 Second, CHA says in its reply brief that plaintiffs
19 admit that the HOPE VI Cabrini project has gone forward without
20 any involvement of the Receiver. And they add there is, quote,
21 no dispute that the Receiver has had, quote, no role in the
22 Cabrini HOPE VI project.

23 Your Honor, these assertions are simply not true. For
24 example, among many other things, as a direct recipient from
25 HUD of replacement housing for Cabrini, the Receiver is deeply

1 engaged in the development of the very first Cabrini
2 replacement units. These are the 44 units in the Mohawk North
3 development adjacent to Cabrini that you yourself drove right
4 by, and they were pointed out to you in the bus tour
5 Mr. Shuldiner took you on last year.

6 Now, recently Habitat submitted a public housing
7 development proposal to HUD as Receiver for CHA -- it says it
8 right on the cover -- for these very first replacement units in
9 that Mohawk North development. This is the October 24th
10 letter, also delivered to the Court and counsel last week.

11 These units, by the way, represent not only the first
12 replacement unit at Cabrini, but a potentially important
13 forward step toward mixed income housing for Gautreaux
14 plaintiff class families because they are part of and dispersed
15 throughout a market rate development.

16 Getting approval for these units from HUD is a big
17 deal, as you can easily see by the thickness of the development
18 proposal, which I'm not going to do anything more than show
19 you. These are two thick volumes. (Indicating.)

20 The cover page, which you received as part of the
21 letter that was given to you last week, says, CHA development
22 proposal, Cabrini extension, replacement units, 44 units, the
23 Habitat Company as Receiver for the Chicago Housing Authority
24 Scattered Sites Program, two volumes to get HUD approval for
25 those units. And it was Habitat, as Receiver, that submitted

1 that.

2 But another letter had to be sent, which was the
3 fourth and final letter delivered to you and counsel last week.
4 Why? Because on receipt of this huge two-volume development
5 proposal for the 44 Mohawk North replacement units, HUD pointed
6 out that a couple of the certifications contained in the
7 proposal, the development proposal, were made by CHA and not by
8 the joint venture.

9 You see, these first 44 units, replacement at Cabrini,
10 are part of the original 190 units your nunc pro tunc order
11 authorized the joint venture to develop. Under that order the
12 joint venture, not CHA, has development authority for the
13 units, so HUD wanted the certifications to come from the joint
14 venture, not from CHA. And that's what was done in the second
15 letter sent to HUD December 17, 1997. You have that letter and
16 what was delivered last week.

17 The letter explicitly says, by the way, that the
18 development proposal for these 44 units is submitted pursuant
19 to your order of ten years ago appointing Habitat as Receiver.

20 So much, your Honor, for the assertions that the
21 Cabrini HOPE VI project is going forward without any
22 involvement of the Receiver.

23 A final CHA subsidiary argument seeks to draw an
24 analogy between our current dispute here and your 1991
25 Kenwood/Oakland order as well as a Seventh Circuit decision in

1 Romney. Suffice it to say that our controversy here is about
2 developing new public housing, something clearly covered by the
3 judgment order, whereas the 1991 Kenwood/Oakland order involved
4 only rehabilitation of existing housing, something not covered
5 by the judgment order, as we discussed a few minutes ago, and
6 the Romney model city's order involved no housing at all.

7 Your Honor, you will be pleased to know I am ready to
8 conclude.

9 Even if in the face of the language of the judgment
10 order, the logic of the order and the conduct of the Court and
11 the parties under the order, you were to accept CHA's view that
12 the judgment order doesn't cover new HOPE VI housing, it would
13 be the responsibility of the Court, as we have argued in our
14 briefs, to exercise its, quote, inherent capacity to adjust
15 remedies under Freeman, 503 U.S. at 487, to see to it that the
16 remedial possibilities offered by the new HOPE VI funded public
17 housing aren't lost to the plaintiff class.

18 But given the language, the logic and the conduct of
19 the Court and the parties that we do have, the right answer is
20 not to reach that issue of inherent capacity to adjust
21 remedies, but simply to deny CHA's motion.

22 What is really at stake here, your Honor, is neither
23 the figment of a judgment order that fails to embrace
24 replacement housing, nor an imagined incompatibility between
25 the judgment order and HOPE VI.

1 What is really at stake is whether CHA shall be free
2 to replace its old high-rise ghettos with new low-rise ones
3 and, thereby, deny Gautreaux families the remedial
4 opportunities HOPE VI replacement housing holds out to them.

5 The judgment order in this case is all that prevents a
6 CHA, whose briefs don't even mention its desegregation
7 obligations, from once again taking great swaths of Chicago
8 neighborhoods and thousands of families who have not yet
9 received the relief they are entitled to, down the old familiar
10 path of least resistance to hyper-segregation and concentrated
11 poverty.

12 Happily, your Honor, the judgment order by reason of
13 its language, its logic and your enforcement orders entered
14 with the concurrence of all the parties, does stand in the way.

15 I thank you.

16 THE COURT: Thank you, Mr. Polikoff.

17 Before -- yes, Mr. Shakman, you want to say something
18 on behalf of the Receiver?

19 MR. SHAKMAN: Yes. On behalf of the Receiver, if you
20 would like to hear a little bit, we had some comments.

21 THE COURT: Sure.

22 MR. SHAKMAN: Really three points, your Honor.

23 First, Mr. Levin, who's present in court today and is
24 available to answer any questions the Court may have,
25 recognizes that he serves as the Court's agent and at the

1 Court's discretion. He has not sought to be and does not want
2 to be in an adversarial relationship with anybody, but he does
3 think to the extent he has information that bears on the issue
4 before the Court, it's appropriate that he present that to the
5 Court.

6 It's for that reason that we filed a brief on behalf
7 of the Receiver. And in the brief we pointed out that from the
8 beginning of the appearance on the radar screen of HOPE VI, the
9 Receiver has taken the position that he reads the Court's order
10 appointing the Receiver as requiring that the Receiver
11 construct all new housing that is not elderly housing, and that
12 that includes the HOPE VI program.

13 At times the CHA has agreed with that, and we have
14 attached a letter from Mr. Eisendrath that reflects that
15 agreement. At other times the CHA has not agreed with that, as
16 they do not agree now.

17 Throughout that process Mr. Levin has asked me to
18 emphasize his attitude has been to try to avoid unnecessary
19 disputes with the CHA or with anyone else and to find a way of
20 working through these problems. And he's often been able to do
21 that by agreement with the CHA; for example, by operating under
22 the title of development manager pursuant to an agreement with
23 the CHA, which has permitted him to fulfill what he understands
24 to be the obligation that he assumed when he became the Court's
25 Receiver, and to do so in a manner that has been acceptable to

1 the CHA and has avoided unnecessary disputes. That's point
2 one. I have two more points.

3 The second point I would like to make relates to
4 correcting some errors that are found in the CHA's last brief
5 that, of course, we didn't have an opportunity to respond to.
6 Part of those issues have been addressed by Mr. Polikoff and I
7 won't repeat what he has said. They relate to the Cabrini
8 Green project.

9 But one point he didn't focus on that the Receiver has
10 asked me to respond to, to mention, is this: The last brief
11 filed by the CHA states in passing, but it's one of those
12 passing comments that stings and hurts, that the Receiver has
13 sought to extract a three percent fee solely for its work on
14 these 44 townhouses that Mr. Polikoff just referred to.

15 The Receiver asked me to mention to the Court that its
16 involvement in Cabrini Green went way beyond that. It included
17 at least a thousand hours of effort, over a year-and-a-half in
18 planning the redevelopment project, in hiring architects, in
19 preparing the request for proposal that then generated ten
20 responses.

21 In reviewing all of those responses and meeting with
22 the city, with the Park District, with the Board of Education,
23 of course with HUD, of course with the CHA, and in formulating
24 plans and responding to a large redevelopment program, the
25 Receiver also developed initially in Kenwood/Oakland the

1 concept of using rental units on a long-term lease basis for
2 CHA resident housing, and that was then applied and that led to
3 this 44-unit development in Mohawk North that is actually the
4 first housing that -- new housing that Cabrini Green residents
5 have moved into.

6 When it came time to build the 44 units, the
7 Receiver's fee for that would have been \$120,000 computed at
8 the three percent rate. The CHA's brief does not mention that
9 the Receiver offered to accept less than that and, in fact,
10 accepted \$35,000. And the brief doesn't mention that this was
11 the first townhouse -- that the townhouse occasion was the
12 first occasion on which the Receiver could seek to be
13 compensated because it was the first project being built.

14 Perhaps this is more detail than the Court needs in
15 connection with the present motion. I simply wanted to put it
16 before the Court because we did not want to leave you with the
17 impression that those inappropriate comments by the CHA,
18 suggesting a mercenary attitude on the part of the Receiver,
19 were accurate.

20 Indeed, Mr. Eisendrath and Mr. Shuldiner, both of the
21 CHA, told the Receiver that they recognized that the Receiver
22 was entitled to be compensated for efforts made in connection
23 with Cabrini Green. The question was not whether but how it
24 should be structured, out of what project funds it should come.

25 So then I would like to come, if I may, to the third

1 point that the Receiver would like me to make. And he is, as I
2 mentioned, available in court to answer any questions the Court
3 may have.

4 The third point is this: That from the Receiver's own
5 experience in creating housing pursuant to the court order
6 appointing him as Receiver, he has something to say about
7 whether it is possible, as Mr. Polikoff says, or impossible, as
8 CHA says, to provide housing that meets both the goals of HOPE
9 VI and the goals of the Gautreaux receivership.

10 And what he has to say is this: If you look at the
11 material that's attached as Exhibit B to the initial motion
12 filed, the brief filed by CHA, it includes the guidebook
13 published by HUD. And the guidebook makes it quite clear that
14 the purposes of HOPE VI housing are, as Mr. Polikoff indicated,
15 quote, tearing down the eyesores that are often identified with
16 obsolete public housing and replacing them with homes that
17 complement the surrounding neighborhoods and are attractive and
18 marketable to the people they are intended to serve, end of
19 quote. And that they are, quote, intended to lessen
20 concentrations of poverty by placing public housing in non-
21 poverty neighborhoods or by promoting mixed-income communities
22 where public housing once stood, thereby ending the social and
23 economic isolation of public housing residents, end of quote.

24 What Mr. Levin would like me to mention to the Court
25 is that that is exactly what he has been doing in implementing

1 Gautreaux and in using HOPE VI funds, because ABLA and the
2 Horner Phase II are both Receiver projects that use HOPE VI
3 funds. So the notion of incompatibility is inconsistent with
4 what is actually happening in the field.

5 And in doing that, the objective that is reflected in
6 the HUD guidebook, which is a terribly important piece of
7 national policy as well as Gautreaux objective, of
8 deconcentrating and integrating public housing residents into
9 the community so that they have an opportunity for all of the
10 advantages that flow from that kind of deconcentration and that
11 kind of integration, economic, educational, employment
12 opportunities, many others -- that's precisely what the
13 Receiver has been doing in working with the community, because
14 there is an intensive community component in persuading
15 communities that CHA replacement housing will be an asset to
16 the community, in working with elected officials, in working
17 with HUD, in working with the CHA.

18 The message that I have been asked to deliver, and I
19 hope I have, is that there appears to be, to the Receiver, no
20 incompatibility whatsoever between those two programs; that is,
21 this Court's Gautreaux objectives and what the Receiver is
22 actually doing in implementing Gautreaux housing, in some cases
23 using HOPE VI funds.

24 If you have questions for Mr. Levin, he is available.

25 THE COURT: Thank you, Mr. Shakman.

1 Is there anybody from HUD here who wishes to address
2 the Court?

3 MR. JENSEN: Good morning, your Honor. I am Jon
4 Jensen. We did file a brief response.

5 THE COURT: I know you did.

6 MR. JENSEN: But we really had not been prepared to
7 address this particular issue, unless you had any questions for
8 us.

9 THE COURT: Well, by the fact that you have decided
10 not to file a brief and are not prepared to address the issue,
11 I take it that my ruling really is a non-issue as far as HUD is
12 concerned?

13 MR. JENSEN: I think that is true.

14 I guess the only point is, we decided -- HUD decided,
15 that is, to defer to the suggestion in CHA's original brief.
16 In a footnote in their brief they claim that the issue was not
17 who had development responsibility for HOPE VI funding but
18 whether HOPE VI funded activity was subject to the basic order
19 of the Court.

20 We had very definite opinions, very much reflected in
21 Mr. Shakman's brief of the Receiver, that indeed the Receiver
22 has all responsibility connected with the development, whether
23 HOPE VI or otherwise.

24 But CHA indicated in its footnote that that was not
25 the issue that was being presented to the Court. I think they

1 said that that would entail an entirely different briefing
2 schedule and -- a motion and entirely different briefing. HUD
3 as a department deferred to CHA's suggestion in that regard.

4 THE COURT: Thank you.

5 MR. JENSEN: Thank you.

6 THE COURT: Ms. Getzendanner?

7 (Brief pause.)

8 THE COURT: Let's take about a two-minute break for
9 this case so I can call one other case and let the lawyers go
10 on their way.

11 (Whereupon, the Court directed its attention to another
12 matter on its call, after which the following proceedings were
13 had herein:)

14 THE CLERK: Clerk 66 C 1459, Gautreaux versus CHA.

15 MS. GETZENDANNER: The CHA paid \$35,000 for these two
16 volumes. They have paid him nothing more, the Receiver.

17 The Receiver has no contract with respect to Cabrini
18 Green, he has no role with respect to Cabrini Green. He did
19 ask for a three percent fee based on the building of the
20 townhouses, and knowledge of that was more than the work he had
21 done for which he could be compensated. I believe that's what
22 he said. For the work where he could not be compensated, he
23 wanted that fee to cover that work and the CHA refused. It's
24 that simple.

25 There is no role for the Receiver at Cabrini Green and

1 that's been clear, I think, from the outset, since 1993.

2 To the extent that HOPE VI funds were made available
3 to this Court and to the Gautreaux plaintiffs, those were
4 pursuant to a set-aside that was negotiated back in 1993 when
5 HUD was still in the case.

6 Basically what happened was, HUD agreed to 350 units
7 that could be built with HOPE VI money, provided they got
8 credit under Gautreaux for it. And so that's what brought the
9 Gautreaux order into that 350 units.

10 HUD is no longer a party to the case, at least I don't
11 think -- has it been dismissed?

12 THE COURT: I believe so.

13 MS. GETZENDANNER: They're not here.

14 So the only time HOPE VI money has been used has been
15 for that, quote, replacement housing pursuant to a negotiated
16 deal between HUD, the Receiver and the plaintiff.

17 No other HOPE VI funds have been drawn down, nothing.
18 Nothing has been used at Cabrini Green. No HOPE VI funds are
19 used there. -- They haven't been drawn down yet. HUD is waiting
20 for the Court's order.

21 So there is no precedent here that HOPE VI funds have
22 been used willy-nilly for replacement housing. That's not what
23 has happened.

24 The public housing, a program that HOPE VI presents,
25 is wildly different from the Gautreaux judgment. We believe

1 there are geographic requirements in the HOPE VI program. The
2 whole thing talks about neighborhoods where distressed public
3 housing exists.

4 If CHA were to submit an application that met the
5 terms of the decree, it would provide 50 percent of any funds
6 used for new construction would be used in general areas. And,
7 Judge, it's the CHA's position that that is a non-starter.
8 That will not be approved by HUD.

9 THE COURT: I think HUD has had the opportunity to
10 speak to that point and apparently has chosen not to.

11 MS. GETZENDANNER: Pardon?

12 THE COURT: I say, HUD has had the opportunity to
13 speak to that point and apparently has chosen not to.

14 MS. GETZENDANNER: There's no question that we have a
15 letter from HUD that says that we cannot draw down the HOPE VI
16 funds unless we get this Court's approval, and that's what
17 drove us to file our motion. And we do not believe that the
18 Court has jurisdiction over the HOPE VI funds.

19 The HUD lawyer who wrote the letter, I am told, was
20 reprimanded for writing that letter. I don't think there's any
21 basis for HUD's conclusion that the injunction governs HOPE VI.

22 They looked at the order appointing the Receiver,
23 which is different. The Receiver has no authority if the
24 plaintiffs have no authority. So the fact that the Receiver's
25 order is broadly stated is not terribly relevant to what we are

1 raising with this Court, which is, what is the scope of this
2 injunction.

3 Now, I think the best way to talk about why HOPE VI
4 isn't covered by the injunction is to assume that it is. If
5 HOPE VI applies to -- or, I'm sorry, if the injunction applies
6 to HOPE VI, what will happen is that to present a competitive
7 application to HUD we will need a waiver from this Court. We
8 cannot submit a program that calls for 50 percent of new
9 construction in general areas.

10 It's the waiver process that is the most intrusive,
11 and we've spent a lot of time in our briefs talking about the
12 waiver process. But here's how it goes in reality: CHA needs
13 to get a waiver from the Court to do a HOPE VI program. That
14 means the Court will ask us to negotiate with Mr. Polikoff, as
15 plaintiffs' representative. And that's a perfectly appropriate
16 thing for the Court to do, to ask the parties to sit down --

17 THE COURT: It's gone on for a couple decades.

18 MS. GETZENDANNER: Yes, no question about it. So we
19 will sit down and negotiate.

20 Mr. Polikoff will begin the negotiations by first
21 examining what neighborhood it is we're focusing on; next, what
22 buildings do we want to demolish; next, what buildings do we
23 want to rehabilitate; next, where are we going to build the
24 replacement housing; and then it's going to go all the way down
25 to tenant selection and then to all of the other miscellaneous

1 things that were brought to the attention of the Court by the
2 Receiver in connection with Horner.

3 So the negotiation that would be required by the
4 Court, and properly so, would bring the plaintiffs into the
5 whole program. It's very intrusive. I don't think that their
6 statement that all they care about is new construction -- the
7 new construction of new units is just part of the whole. It's
8 part of the whole program designed by CHA.

9 So they are going to want to negotiate from the
10 beginning, and in order to get an agreed waiver we would have
11 to negotiate.

12 Now, when CHA negotiates and they agree on a waiver
13 and they bring it to you, they're not happy with that order.
14 That's what they've been able to negotiate. That's not what
15 they wanted, it's not what they hoped for, but it was what they
16 were able to negotiate. So you would be subjecting the entire
17 HOPE VI program to that process because you cannot expect any
18 application to meet the HOPE VI objectives and comply with the
19 injunction. -- The injunction will have to be waived.

20 And I think when you look at it that way, how can the
21 injunction cover this, this whole program, which is designed to
22 rehabilitate neighborhoods which are in limited areas? I don't
23 -- all the social services, for example -- 20 percent of the
24 funds have to be used for social services. I don't think you
25 can build the units in general areas and have social services

1 make any difference.

2 The whole thing is pointing to neighborhood
3 redevelopment and it's a new program. We cannot agree to waive
4 the HOPE VI requirements. CHA has no power to do that.

5 I think when HUD was in the case this Court had a lot
6 of authority because the HUD consent decree required them to
7 build so many new units, but that authority is now gone. The
8 Court can't tell HUD what to do, and I don't think the Court
9 would want to. I think that really would interfere with the
10 federalism concerns.

11 Mr. Polikoff argued in terms of HOPE VI presents an
12 opportunity for desegregation opportunities for his class.
13 HOPE VI does not provide a desegregation opportunity in the
14 general areas; it simply does not. And that's what the whole
15 injunction is tilted toward, building in general areas. It's a
16 way to achieve integration. It's a 30-year-old way; it's not
17 the way Congress is doing it today.

18 THE COURT: What about the language in the HOPE VI
19 manual? It seems to be consistent with the aims of the
20 plaintiffs.

21 MS. GETZENDANNER: Judge, think of the general areas
22 in the City of Chicago. How can building in the few remaining
23 general areas in the city help the reconstruction of the Robert
24 Taylor home neighborhood? It can't. It's unconnected. It's
25 not part of the program. It's an integrated program, it

1 requires demolition, rehabilitation, Section 8 certificates,
2 building of new replacement units and social services, job
3 training, the whole thing, all devoted to that neighborhood.
4 And the goal is to make it an economically diverse
5 neighborhood.

6 I don't think you can take a line out of a handbook
7 and ignore the legislative history, the language of the
8 statute, the fact that this is a new program that's supposed to
9 reform public housing policy. It's a brand new program. It's
10 never been before this Court before in this context directly:
11 Does HOPE VI apply? Is it governed by the injunction?

12 The CHA is required under HOPE VI to work with the
13 local government, which is the City of Chicago. There's no
14 requirement to -- there's no opportunity to use HOPE VI funds
15 for any remedial injunctive relief. After the Cisneros
16 set-aside for the 350 units, Congress amended the act and said
17 that's not going to happen again. So there really is no
18 opportunity to use those monies for the Gautreaux remedy.

19 We did not respond to the cases cited in
20 Mr. Polikoff's brief -- he made that point -- because they are
21 general statements and totally inconsistent with the Seventh
22 Circuit.

23 So if you look at the Seventh Circuit law, I don't
24 think since alliance to end repression, which was my case -- I
25 don't think there's been a consent decree that the Seventh

1 Circuit hasn't sent back for re-writing, which I think the
2 Rockford case -- or totally rejected; they set it aside. So no
3 consent decree has survived Seventh Circuit scrutiny.

4 I think there was a recent case --

5 THE COURT: CHA has never moved to terminate the
6 consent decree.

7 MS. GETZENDANNER: Nor do we want to, Judge.

8 THE COURT: With your track record in the Seventh
9 Circuit, it might be in your interest to do so.

10 (Laughter.)

11 MS. GETZENDANNER: We think that the evidentiary
12 battle necessary to establish the grounds for changing the
13 injunction would be very divisive for the community. You know,
14 is there segregation, who's responsible for it, what impact
15 does white flight have on it, what impact does any number of
16 factors have to do with it. We don't want that fight, Judge.
17 We don't want it for the community.

18 The Gautreaux remedy should stay in place. In the
19 event future funding is made available which would permit the
20 CHA to build housing in general areas, where we have an
21 opportunity to use that funding for that purpose, a Gautreaux
22 remedy will be there. Perhaps at that time we will move to
23 vacate the decree, but there is no need to do that now.

24 Just as the Court held that the Section 8 certificates
25 are not governed by this decree, there is no distinction

1 between that analysis and the HOPE VI funds.

2 We agree that the HOPE VI new construction, forgetting
3 that it is replacement housing, that does fall within the
4 definition of dwelling unit, no question about it. But we are
5 asking the Court to construe the injunction in a way that's
6 consistent with its requirements, and its requirements are
7 geographical.

8 Judge Austin required the building of housing in
9 general areas. He said, if you're going to build, build one
10 here and three there, and now it's 50/50. And those kinds of
11 requirements only are applicable to new housing, housing that
12 adds to the stock.

13 THE COURT: How do you square that with the language
14 that Mr. Polikoff read about replacement housing in the decree?

15 MS. GETZENDANNER: In the what?

16 THE COURT: How do you square that with the language
17 that Judge Austin used which specifically dealt with
18 replacement housing, the language that Mr. Polikoff read
19 before?

20 MS. GETZENDANNER: I don't recall him saying that.

21 THE COURT: Okay.

22 MS. GETZENDANNER: Surely the rehabilitation process
23 of existing housing was left to the CHA.

24 Mr. Polikoff, what did you say?

25 THE COURT: Well, he will have a chance in a minute.

1 MS. GETZENDANNER: I would like to respond. I just
2 don't recall what he said.

3 THE COURT: I will let you respond to that later, if
4 need be.

5 MS. GETZENDANNER: Okay.

6 I don't think that the Court should interpret the
7 order as applying to HOPE VI because it is, in effect, an
8 injunction against the CHA from applying for the funds. That's
9 exactly the essence of it.

10 The CHA knows they're not going to get funds if you're
11 going to build in general areas, so we can't apply. And we
12 would suggest to the Court that that's as a result of the court
13 order. And that raises concerns, federalism concerns,
14 separation of power concerns, which we have addressed in our
15 brief.

16 Judge, the program, the HOPE VI program, cannot be cut
17 into pieces. It's an integrated, complex solution. Congress
18 has said it's new, it's to reform a new way of thinking about
19 public housing. It is clearly designed to repair neighborhoods
20 that have been destroyed by distressed public housing.

21 There is no possibility that we can apply for funds
22 and expect to use those funds for general areas.

23 We've gone back and forth in our briefs about who said
24 what to whom. And again, we don't want an evidentiary battle
25 here, but there are some things that are in the record,

1 including the letters Mr. Polikoff sent to you. But there are
2 also clear indicia that plaintiffs have known for years that
3 HOPE VI funds were not considered to be under the injunction.

4 On July 11, 1996, Mr. Cisneros wrote to Mr. Polikoff,
5 and that's at Exhibit D attached to our original memorandum,
6 and he says, as a matter of law we cannot use HOPE VI funds as
7 a set-aside for Gautreaux. As a matter of law we can't do
8 that. A set-aside to the Receiver is not appropriate because
9 the statute in the first instance leaves to the public housing
10 authority's discretion whether it wants to apply for a HOPE VI
11 grant at all and how it would want to use the funds for which
12 it applies.

13 So that's a clear statement by the then secretary of
14 HUD that the HOPE VI money could not be used for the Gautreaux
15 remedy, and this is after the 1993 set-aside, which did get
16 through but which Congress then condemned with an amendment to
17 the law. I withdraw condemned. They made sure it wasn't going
18 to happen again.

19 So the plaintiffs have known. We think that their
20 application on the Section 8 certificates is pretty positive
21 proof that they didn't think HOPE VI was governed.

22 There's nothing in the record that should be binding
23 on the CHA that their view is that the injunction covers HOPE
24 VI funds. I don't think there's anything in Edwin Eisendrath's
25 letter from several years ago; I don't think there's anything

1 in the record that should be binding on the CHA.

2 The CHA has taken the position since 1993 that HOPE VI
3 funds are outside the scope of the decree.

4 Thank you.

5 THE COURT: Thank you, Ms. Getzendanner.

6 I have a couple of questions of Mr. Polikoff, which I
7 will let you respond to, if you wish.

8 First of all, as a practical matter, assuming that the
9 social service and job training dollars of HOPE VI are used in
10 the area where the housing is demolished, how will the social
11 service and job training dollars be available in the general
12 areas? Is that a logistical problem?

13 MR. POLIKOFF: It isn't a problem because the
14 objective is not one that's required or even sought. I have an
15 example of that at Horner, which I will give you in a moment.
16 Even though it's not a HOPE VI project, it presents the
17 identical question you're raising.

18 I want to make it clear at the outset, in answering
19 your question, that as I think is plain but it keeps getting
20 blurred in CHA's written and oral presentations, we are not
21 talking about all of HOPE VI funding and programs, including
22 specifically the one you used in your question, the social
23 service programs. We have not suggested, are not suggesting,
24 we do not intend to suggest that your orders cover in any way
25 the social service programs --

1 THE COURT: No, and I understand that completely.

2 MR. POLIKOFF: Okay.

3 THE COURT: I am just concerned about whether the
4 persons in the new housing in the general areas will, by
5 necessity, not have the benefit of the HOPE VI dollars for
6 these other ancillary activities.

7 MR. POLIKOFF: It's up to CHA, your Honor, and I refer
8 to the example of Horner. In Horner a vote was taken -- which
9 is not a HOPE VI project but which CHA acknowledges in its
10 brief in many respects is like a HOPE VI project.

11 The tenants were given an opportunity to express their
12 choice with respect to the form of replacement housing, on
13 site, in the neighborhood, in other neighborhoods, scattered
14 site or Section 8. Roughly about half chose one, half chose
15 the other. So half of the Horner people have been dispersed to
16 other neighborhoods of the city.

17 Are the job training dollars, if there were any at
18 Horner, all the social services activities at Horner, to follow
19 those people to West Rogers Park? That's for CHA to decide or
20 not to decide. I think it's pretty clear that they are not.

21 Indeed, there was supposed to be a family needs
22 assessment taken under the Horner consent decree of all of the
23 people, and my understanding is it's pretty well decided not to
24 take such an assessment of people who have chosen to leave.
25 But even if it is taken, not to follow up the services.

1 Ms. Getzendanner is right when she says there is a
2 neighborhood focus to HOPE VI activities, and the focus on the
3 neighborhood of the job training dollars would be perfectly
4 appropriate.

5 If CHA wanted to offer any of those social services to
6 people who moved, it would be up to them. They could do that;
7 nothing to prevent them. We are not asserting, have not
8 asserted, any claim by a Gautreaux on anything but the
9 replacement housing, where it's located.

10 THE COURT: Okay.

11 Ms. Getzendanner --

12 MR. POLIKOFF: By the way, I want to add a footnote to
13 what I just said. That's consistent with the language of HOPE
14 VI. HOPE VI talks, as I quoted to you, about replacement
15 housing going into non-poverty neighborhoods. There is not one
16 indication in the statute or the guidebook that the HOPE VI
17 proponent, in this case CHA, has got to follow those people
18 into non-poverty neighborhoods with job training.

19 ~~The~~ whole theory of desegregation is that if you
20 enable families to move into non-poverty neighborhoods, they
21 would be forced to get into places where security is better,
22 where access to jobs is better, where schools is better and
23 they have a lesser need by reason of their location for social
24 services.

25 THE COURT: You quoted some language earlier of Judge

1 Austin's that applied to replacement housing in particular.

2 Ms. Getzendanner, I think --

3 MR. POLIKOFF: Yes. I think Ms. Getzendanner is -- it
4 pains me to say this, your Honor -- right and that we were not
5 right in this respect.

6 THE COURT: All right.

7 MR. POLIKOFF: I think what she is referring to and
8 what you were asking about was language that I quoted from the
9 judgment order.

10 THE COURT: Okay.

11 MR. POLIKOFF: And it referred -- it didn't use the
12 word replacement. It did talk in terms of housing provided
13 directly or indirectly by CHA, whether in a structure owned in
14 whole or in part by CHA, whether or not newly constructed or
15 not, et cetera. It did not use the word replacement.

16 THE COURT: It did not use the word replacement.
17 Okay. That's fine.

18 It's your contention that that language embraces
19 replacement housing, is that correct?

20 MR. POLIKOFF: Well, not only the language embraces
21 it, but as I argued, that's the rational thrust of the order,
22 because through replacement housing you can provide
23 desegregation opportunities. But, also, that your prior
24 orders, the nunc pro tunc and subsequent orders --

25 THE COURT: I understand my prior orders. I just want

1 to make sure we all have the same reference to Judge Austin's
2 --

3 MR. POLIKOFF: When I say embraces -- answer you
4 affirmatively by saying, yes, it's my contention it embraces
5 replacement housing, I mean that not because it says that in so
6 many words, but that it obviously sought to cover all kinds of
7 housing provided by CHA which could be used to provide
8 desegregation opportunities, and replacement housing answers
9 that description.

10 THE COURT: Okay. Thank you.

11 MR. POLIKOFF: Thank you, your Honor.

12 THE COURT: Do you want to reply to either of those
13 points, Ms. Getzendanner?

14 MS. GETZENDANNER: No. I'm happy to have his
15 concession.

16 MR. SHAKMAN: Mr. Levin asked me if I would poke my
17 nose in for a moment. May I?

18 THE COURT: Sure.

19 MR. SHAKMAN: He asked me to make this point, that
20 Cabrini, Horner II, which is a HOPE VI program, and ABLA, which
21 involves HOPE VI money, none of those required a waiver from
22 Gautreaux to permit a HOPE VI application. He asked me to
23 underscore that point for the Court.

24 Therefore, the statement that automatically you must
25 have a Gautreaux waiver in order to implement a HOPE VI

1 activity, for example, in those revitalizing areas, is not
2 correct.

3 And I am going to resist the urge to further debate
4 the scope of the --

5 THE COURT: You don't have to debate any ancillary
6 issues. I understand your position.

7 MR. POLIKOFF: Your Honor, might I make one more
8 observation?

9 THE COURT: Yes.

10 MR. POLIKOFF: Ms. Getzendanner has repeatedly said,
11 both today and in the briefs, they couldn't file a HOPE VI
12 application that provided 50/50. The answer is that in your
13 Horner order you have clearly recognized that housing on site,
14 if done under the right conditions imposed by your orders, as
15 at Horner, mixed income and so on, under revitalizing
16 conditions, is an alternative way of providing desegregation
17 opportunities to the plaintiffs. And the Horner precedent
18 stands against the contention that the only way is to do 50/50.

19 THE COURT: Okay. Thank you.

20 MS. GETZENDANNER: Your Honor, I just make the
21 observation that there's your orders to which we could agree --
22 CHA could agree to those orders. The CHA cannot agree to
23 divert money from HOPE VI to general areas.

24 THE COURT: Okay. Thank you very much.

25 I will rule in due course and due course will be soon.

1 Thank you.

2 MR. POLIKOFF: Thank you, your Honor.

3 (Which were all the proceedings had at the hearing of
4 the within cause on the day and date hereof.)

5 CERTIFICATE

6 I HEREBY CERTIFY that the foregoing is a true,
7 correct and complete transcript of the proceedings had at the
8 hearing of the aforementioned cause on the day and date hereof.

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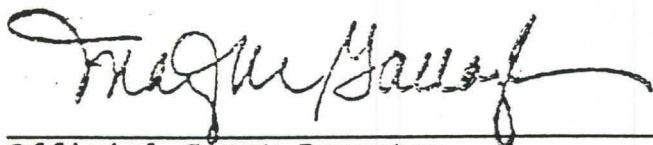
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U.S. District Court
Northern District of Illinois
Eastern Division

3/5/97
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

DEC 19 1997

Judge Marvin E. Aspen
U.S. District Court

DOROTHY GAUTREAUX, et al.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY,

Defendant.

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) 66 C 1459
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PLAINTIFFS' RESPONSE
TO
CHA EMERGENCY MOTION TO CLARIFY INJUNCTION

Part I of this Response clarifies the issue presented by CHA's motion. Part II responds to the four arguments advanced in support of the motion, and shows that the development of new public housing funded by HOPE VI is subject to the judgment order. Part III, together with the affidavits of Professor Paul Fischer and Philip Hickman attached as Exhibits A and B, respectively, shows that even were the Court to adopt CHA's view that HOPE VI-funded new public housing is not now subject to the judgment order, plaintiffs would be entitled to have the Court adjust the remedy in this case so as to embrace such housing. Part IV shows that the judgment order, applied to HOPE VI-funded new public housing, implicates no separation of powers or federalism concerns.

I. Clarification of the Issue

CHA's motion and memorandum frame the issue as whether the judgment order against CHA "govern[s] HOPE VI funding and programs," contending that "such funding and

EXHIBIT

E

programs are not part of the relief granted to the plaintiffs in this case." (CHA Motion 1.)

However, plaintiffs have never asserted that the judgment order governs HOPE VI "funding and programs." They have asserted only that if and to the extent CHA uses HOPE VI funding to develop new public housing, the order applies to such housing.¹ The applicability of the judgment order to new public housing does not turn on the particular HUD funding stream employed; such a constricted reading of the order would be incompatible with its remedial purpose and broad language.

The judgment order is not limited to specific HUD funding programs or specific sources of CHA funds; there is no mention of "Gautreaux development money" as it is styled in CHA's papers. The judgment order governs development of new public housing regardless of funding source:

"CHA shall not authorize, approve or implement any plan for Dwelling Units, nor . . . seek any approval or request or accept any assistance from any government agency with respect thereto . . . unless such plan affirmatively requires . . . [adherence to the locational requirements of the judgment order]." 304 F.Supp. at 738 (emphasis added).

The judgment order does, however, distinguish between newly developed and existing housing. "Dwelling Unit" is defined as an apartment or single-family residence,

"initially made available to and occupied by a low-income non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family." 304 F.Supp. at 737 (emphasis added).

CHA incorrectly says, "'Dwelling Unit' is defined broadly as including each and every unit of

¹ HOPE VI is a voluntary program. As discussed below, CHA has received three HOPE VI grants. As far as plaintiffs are aware, no other CHA HOPE VI applications are pending.

family public housing in the CHA system . . ." (CHA Memorandum 14.) This ignores the critical language, "initially made available . . . subsequent to the date hereof . . ." (emphasis added). The excised language draws a bright line between public housing in existence before the date of the judgment order, and that developed ("initially made available") after the date of the order. The latter (newly developed public housing, whatever its manner of development or source of funding) is subject to the judgment order; the former, whatever CHA's activities with respect to it (repair, rehabilitation, demolition, etc.) is not.

The HOPE VI program authorizes many types of activities, for example, social services, and rehabilitation and demolition of existing public housing. Plaintiffs have not asserted that the judgment order governs such activities. They contend only that to the extent HOPE VI funds are used to develop new public housing, the HOPE VI source of funding does not remove the development of such housing from the ambit of the order.

Thus, the issue before the Court is not whether the judgment order "governs CHA's HOPE VI funding and programs"; the issue is whether CHA advances any persuasive reason for removing from the coverage of the judgment order an activity -- development of HOPE VI-funded new public housing -- to which the order on its face undeniably applies.²

² While CHA purports to request "clarification" of the judgment order, what it really seeks is modification of the order to eliminate certain development activity that is presently covered. CHA's motion thus implicates the standards applicable to a defendant seeking to modify a judgment order. See U.S. v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968) ("[A] decree ... may not be changed in the interests of the defendants if the purposes of the litigation ... have not been fully achieved"). See also U.S. v. Local 560 (I.B.T.), 974 F.2d 315, 331 n. 9 (3d Cir. 1992).

II. New HOPE VI-Funded Public Housing is Subject to the Judgment Order

On what grounds does CHA contend that new public housing funded by HOPE VI should be excluded from the judgment order? Four reasons are advanced in paragraphs 3-6 of CHA's motion, supported by pages 11-18 of CHA's memorandum. First, CHA says HOPE VI was enacted after the judgment order was entered. (Motion par. 3.) Referring to the Court's recent statement that because the Section 8 program did not exist when the judgment order was entered, that program was not part of the relief provided to the plaintiff class, CHA says the Court's reasoning applies with equal force to HOPE VI (id).

Not so. Public housing was in existence in 1969, and remains public housing whether funded by HOPE VI or otherwise. The HOPE VI legislation explicitly refers to "conventional" public housing as a permitted HOPE VI activity. (CHA Exhibit B, 42 Sec. 1437l, p. 256.) HUD's HOPE VI Guidebook says the development of HOPE VI funded public housing "must be" in accordance with the familiar rules and regulations (24 CFR part 941) that govern non-HOPE VI-funded public housing. (Exhibit C, attached.) The Guidebook also authorizes such housing to be located anywhere -- the new housing need not be located on or near the site of the housing it replaces (id). In other words, HOPE VI-funded public housing remains good, old, familiar public housing, governed by the same laws and regulations as public housing funded in other ways.

Thus, the Court's reasoning respecting Section 8 not only does not apply with "equal force," it cannot be said to apply at all, to HOPE VI-funded new public housing.³

³ It would indeed be a novel application of equitable principles if defendants could avoid remedial obligations simply by changing the form of their programs. Even if HOPE VI-funded new public housing were to be viewed as a "new and further remed[y]" not covered

Second, CHA says that a prior opinion of this Court declined to extend the judgment order to reach funds planned to be spent on revitalizing existing public housing in limited areas. (Motion par. 4.)

CHA's reference is to the Court's 1991 order denying plaintiffs' motion to delay then-planned rehabilitation of four CHA high-rises in North Kenwood-Oakland.⁴ However, at issue in that instance was CHA's plan to rehabilitate existing high-rise housing (initially made available before July 1, 1969), not to develop new public housing; the Court's order turned not on the source of the rehabilitation funds, but on the fact that rehabilitation of existing public housing was not covered by the judgment order.

In contrast, when CHA's approach to revitalizing existing public housing in a limited area did involve demolition of existing and replacement with new public housing, all parties joined in seeking an order from this Court authorizing the Receiver to construct eighteen replacement public housing units in Lawndale. This "precedent" shows that until the present controversy the parties have indeed viewed the judgment order as governing the development

by the judgment order, Freeman v. Pitts, 503 U.S. 467, 492 (1992), the Court would still have to consider the contribution such housing could make to attaining the as-yet-unachieved remedial goal in this case, and whether its "inherent capacity to adjust remedies," Freeman, 503 U.S. at 487, should therefore lead it to bring such housing within the ambit of the judgment order. This issue is discussed in Part III below, but it is one the Court need not reach because good, old, familiar public housing, whatever its funding source, is covered by the judgment order.

⁴ Plaintiffs sought an order under both the consent decree with HUD and the judgment order against CHA staying rehabilitation and directing HUD, CHA and the Receiver to cooperate in a scattered site development plan for North-Kenwood Oakland. The Court said, "[I]t is not apparent to us that plaintiffs will necessarily lose what they seek without an order from the court." (CHA Ex. I.) The Court was prescient. Following plaintiffs' Motion for Further Relief filed on August 5, 1991, and the ensuing negotiations, CHA's plan to rehabilitate the four high-rises was abandoned and scattered site construction was authorized in North Kenwood-Oakland by this Court's order of June 3, 1996. (CHA Ex. H.)

of new public housing in limited areas as replacement for to-be-demolished public housing.⁵

Third, CHA says plaintiffs' course of conduct respecting HOPE VI shows that plaintiffs themselves do not understand the judgment order to govern HOPE VI-funded new public housing. (Memo. 16.) The facts belie CHA's assertion.

The first of CHA's four HOPE VI applications was submitted in 1993 for Cabrini-Green and proposed both new (replacement) public housing as well as a variety of other activities. When, after the fact, plaintiffs and the Receiver learned that CHA had applied for HOPE VI funding for Cabrini-Green and proposed to use some of the monies for new housing, the Receiver and CHA agreed --

"that as Receiver under the court order in the Gautreaux case, you will perform the function of CHA's 'development manager' for the Cabrini-Green development program, including the HOPE VI program, similar to the manner in which you are functioning in the Henry Horner Homes development program." (Exhibit D, attached.)

After lengthy negotiations CHA declined to enter into the contemplated development management agreement; however, since the Receiver is in fact involved in the development of the new public housing portion of Cabrini HOPE VI activities, it has chosen to continue to try to work out suitable arrangements with CHA without seeking the Court's intervention.

(Receiver's Statement 7-9.)

CHA's second HOPE VI application (in 1996, for Horner/ABLA) proposed only new public housing, 200 units at ABLA and 150 at Horner. In this instance, therefore, CHA and

⁵ The Court's order of 12/10/93 actually authorized a joint venture between the Receiver and an affiliate of CHA to develop the Lawndale and certain other units. The joint venture is under the overall management of the Receiver and is further discussed below. The Model Cities decision cited by CHA in this context does not offer an analogy, for "CHA does not provide any housing, low rent or otherwise, with any funds distributed under the Model Cities Programs." Gautreaux v. Romney, 457 F.2d 124, 126 (7th Cir. 1972).

the plaintiffs executed an agreement "up front" that the HOPE VI public housing funds, if received, would only be spent upon the mutual agreement of the parties, with this Court to resolve any disagreement. (Exhibit E, attached.) Thereafter, CHA and the Receiver entered into a development management agreement for the 350 proposed HOPE VI-funded new public housing units which, among other things, provides:

"... after seeking approval from counsel for the Gautreaux plaintiffs, [Habitat] shall prepare a request to the U.S. District Court for permission to build replacement public housing in the ABLA area by declaring it a "Revitalizing Area."

(Exhibit F, attached, p. 2.)

As to CHA's third HOPE VI application (for Robert Taylor Homes, also in 1996) plaintiffs were advised by CHA that no new public housing was proposed, and therefore raised no question concerning it.⁶

Finally, in 1997 CHA's HOPE VI application for ABLA was another "mixed" request, with some funds for new public housing, some not. Plaintiffs therefore sought CHA's acknowledgment that "court orders require the Receiver to develop all public housing units, including any to be developed at ABLA, even though HOPE VI funds are used." (Exhibit G, attached.) CHA declined the requested acknowledgment, but because the CHA application was rejected by HUD there was no occasion to pursue the ABLA request further.

Far from showing that plaintiffs do not believe HOPE VI-funded new public housing is subject to the judgment order, plaintiffs' conduct demonstrates the contrary. CHA points

⁶ In the preparation of this Response plaintiffs learned that they were either misadvised by CHA or misunderstood the advice -- that new (replacement) housing was in fact proposed but not on-site. Plaintiffs are now advised that housing development has not yet begun under the Taylor application and that CHA is currently engaged in amending or refining it.

out that plaintiffs have not objected to CHA's HOPE VI applications (Memo. 16), and have not treated them as subject to the judgment order. (Motion, par. 5.) This is correct; a decent respect for the limits of the judgment order requires a practical accommodation -- to which CHA initially agreed -- between CHA's entitlement to control HOPE VI funds not subject to the judgment order (e.g., for social services) and the Receiver's responsibility respecting HOPE VI-funded new public housing that is subject to the order. Moreover, the applicability of the judgment order cannot be determined definitively at the HOPE VI application stage; HOPE VI applications, once granted, may be and have been subsequently amended before a final commitment of funds. (Thus HUD only raised the question of this Court's approval at a stage of the Cabrini HOPE VI process that followed the initial application by several years.)⁷

Fourth, CHA says "[t]he proper interpretation of the judgment order is that it has no application to the revitalization of existing public housing in Limited Areas, the activities funded by the HOPE VI program." (Motion par. 6.) This is true with respect to HOPE VI dollars devoted to other activities than new public housing, since the judgment order does not cover such other activities. However, as the Lawndale and Horner instances (among others) illustrate, to the extent revitalizing public housing in limited areas is to be accomplished by replacing it with new public housing, the judgment order does apply to the development of

⁷ CHA also strives to base an argument upon our reference to the impending exhaustion of scattered site funding. (Memo. 16.) But our explicit reference, which CHA ignores, was to "incremental funding" as one of two "principle" remedial mechanisms. (Plaintiffs' Motion filed 3/21/97, p. 2.) As the Fischer and Hickman affidavits show, incremental funding accounts for over 2,500 remedial units, whereas replacement housing funding and HOPE VI funding account for fewer than 1,000 units each. CHA's "argument" would of course apply as well to the replacement housing funding (Hickman affidavit, par. 3), much of which has already been subjected to this Court's orders.

such new housing.

CHA also incorrectly "interprets" the judgment order as limited to "regulation of the aggregate increase in the supply of CHA's housing stock." (Memo. 13-14, 16.) There is no basis for this "aggregate increase" theory, either in the language of the judgment order or in the practice of the parties. There was no "aggregate increase" in connection with the Court's Lawndale or Henry Horner orders (the aggregate number of units in each case remained unchanged), and in North Kenwood-Oakland there is to be an aggregate decrease from the several hundred units to be demolished to 241 new units to be provided.⁸

* * *

Thus, CHA's four arguments are misdirected to a circumstance that does not exist -- an imagined attempt by plaintiffs to govern or control HOPE VI funding for social services, demolition and other activities. With respect to the use of HOPE VI funding for new public housing, the arguments fail completely to support CHA's theory that the judgment order does not apply to new public housing which is (a) to be provided in limited or revitalizing areas as replacement for housing to be demolished, or (b) which is funded by some new or different HUD funding stream than the one or ones in existence in 1969.

⁸ CHA cites Youakim v. McDonald, 71 F.3d 1274 (7th Cir. 1995), cert. denied, 116 S.Ct. 2571 (1996). Youakim is indeed relevant. It says injunctions must be construed, like other disputed writings, in their proper context, and that courts will at times find that conduct violates an injunction if it threatens the spirit if not the literal language . . ." 71 F.3d at 1283. Of particular relevance is Youakim's admonition to pay "proper heed to the nature of plaintiffs' claim in the underlying litigation . . ." Id. at 1285. Here plaintiffs claim was about the location of CHA's new public housing; it had nothing to do with the particular funding stream for the housing.

A final point bears on all four of CHA's arguments, singly and collectively. The judgment order is not a consent decree to be construed or "interpreted" as a bargain between parties. It is a remedial desegregation order entered after an adjudication of liability. Such an order is "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" Missouri v. Jenkins, 515 U.S. 70, 88 (1995), quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974). The position victims in this case "would have occupied" is that of having a choice of public housing located in white or integrated as well as black neighborhoods. The judgment order seeks to provide that choice, over time, by requiring portions of new public housing to be provided in white or integrated neighborhoods and, more recently, in revitalizing areas as well.⁹

If enough public housing, properly located to bring about "restoration," has not yet been provided, the Court may ask whether HOPE VI-funded new public housing can

⁹ For example, respecting the Horner Revitalizing Area the Court said:

"The Court being cognizant that the principle remedial purpose of the orders previously entered in these consolidated cases has been and is to provide plaintiff class families with desegregated housing opportunities; and

The Court also being cognizant that on occasion it has permitted public or assisted housing to be provided in census tracts other than the General Public Housing Area upon a sufficient showing of "revitalizing" circumstances such that a responsible forecast of economic integration, with a longer term possibility of racial desegregation, could be made; and

The Court being of the view that such a forecast can be made with respect to the HRA if the terms and conditions of this order are met . . ."
(Order of August 14, 1995, p. 2.)

As the Court knows, the terms and conditions included a requirement for mixed-income tenancy.

contribute to reaching the as-yet-unachieved remedial objective. We address this question in Part III below.

III. HOPE VI-Funded New Public Housing is Needed to Reach the Unachieved Remedial Goal in this Case and Should Therefore be Subject to the Judgment Order

Should the Court adopt CHA's view that the development of HOPE VI-funded new public housing is a "new and further remedy" under Freeman v. Pitts, 503 U.S. 467, 492 (1992), not covered by the judgment order, that would not end the inquiry. Because such housing is needed to provide plaintiffs the relief to which the Court has already determined they are entitled, the Court should in that event subject such housing to the requirements of the judgment order.

The attached affidavits of Professor Paul Fischer (Exhibit A) and Philip Hickman (Exhibit B) provide data respecting CHA's family public housing in operation or under construction as of November 26, 1997. In 1969 Judge Austin determined that, excluding four segregated White projects, housing units located in census tracts between 50% and 100% Black represented 99-1/2% of CHA's total family units then in operation or development. 296 F. Supp. at 910. This determination was a predicate for Judge Austin's liability determination and for the subsequent entry of the judgment order. 296 F. Supp. at 910; 304 F. Supp. at 737. Making "conservative" (i.e., favorable to CHA) assumptions, the comparable percentage as of November 26, 1997 is 85.2%.¹⁰ Thus, although some progress has been

¹⁰ CHA's total family units in operation or under construction as of 11/26/97 were 31,873. Sections I-V of Fischer Exhibit X. The units in census tracts between 50 and 100% Black were 27,149, consisting of units so located shown in Sections I and II, and the 18

made, there remains a long way to go before the vestiges of CHA's segregated system will be eliminated. Since virtually all of today's units located in Black neighborhoods are the identical units found by Judge Austin to have been wrongfully sited (Section I of Fischer Exhibit X), today's racial imbalance in unit location is directly and causally linked to CHA's original wrong. (The units are still overwhelmingly -- 97% -- occupied by Blacks. Exhibit H, attached.)

The Fischer and Hickman affidavits also show that CHA's constitutional violation will not be fully remedied even with all the public housing funds currently available to the Receiver, and even assuming that each of the units developed with these funds is located in a general area, or in a revitalizing area with full "credit" given. Thus, even if it is assumed that all funding for new public housing presently available to the Receiver results in the development of remedial units, more than four of every five of CHA's family units would

Lawndale units in Section V, of Fischer Exhibit X. Thus 27,149/31,873 is 85.2%.

This computation makes several assumptions favorable to CHA. First, it uses 50+% Black as the criterion for Black-area units, even though Judge Austin himself later determined that the remedial criterion should be 30%.

Second, it ignores the fact that some of the apparent "progress," that attributable to demolition, is statistical only, for while demolishing Black-area units improves the arithmetic picture it provides no remedial units.

Third, it gives CHA "credit" for all 364 replacement units in revitalizing areas. (Exhibit B, par. 3.) This treats a long term hope for racial integration as if it were a present reality. Fairer alternatives would be to omit revitalizing area units from the computation, or to give CHA "credit" for such units only as integration is achieved.

Fourth, Judge Austin excluded the four White projects from his computation but we have included them as remedial units, as well as units which because of demographic change are now in census tracts with less than 50% Black population (e.g., the 130 Cabrini Extension units in census tract 818).

still be units determined by Judge Austin to have been unlawfully sited.¹¹ Since HOPE VI is one of the few funding vehicles currently available for new public housing (Exhibit B, par. 4), to exclude HOPE VI-funded new public housing from the mix of remedial units would likely eviscerate any prospect that plaintiffs will ever receive the relief intended by the judgment order.

Under these circumstances the law is clear and compelling that plaintiffs are entitled to the "new and further" remedy (if it be so viewed). CHA has been adjudicated a constitutional wrongdoer. Green v. County School Bd., 391 U.S. 430; 435 (1968), holds that a school district so adjudicated, which has not yet fully disestablished segregation, has an ongoing mandatory responsibility to eliminate all vestiges of its dual system. Freeman makes it clear that the Green duty continues to apply to local government bodies who have not yet completely disestablished their segregated systems. Freeman, 503 U.S. at 472, 474.

In such a case a district court's duty is to enter orders that will so far as possible eliminate segregatory effects. Louisiana v. United States, 380 U.S. 145 (1965). The duty is a continuing one.

"[W]hatever [desegregation] plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." Green, 391 U.S. at 439.

"[T]he remedial power of a federal court that adopts a desegregation plan is not thereafter limited to enforcement of the details of the original plan." United States v. Lawrence County School Dist., 799 F.2d 1031, 1043 (5th Cir. 1986).

See also, United States v. United Shoe Mach. Corp., 391 U.S. 244, 251 (1968),

¹¹ Treating all units referred to in paragraphs 2 and 3 of the Hickman affidavit as remedial units except for the 18 Lawndale units already under construction in a limited area, the arithmetic is 27,149/32,583 or 83.3%.

"If the decree has not, . . . after 10 years, achieved its 'principal objects,' . . . the time has come to prescribe other, and if necessary more definitive, means to achieve the result."

We quote at some length from the Fifth Circuit's opinion in Lawrence County because it is so relevant to CHA's basic contention that plaintiffs are entitled only to the remedial order originally issued, narrowly interpreted:

"The Board and the United States both contend that once a court orders a school board to comply with a desegregation plan the court has power only to insist on compliance with its order. The court they state, "may not grant broader and entirely different 'relief than contemplated in an extant decree previously determined by this court to be constitutionally adequate.'" . . . We do not agree.

While judicial remedies for unconstitutional action must be targeted to elimination of the unconstitutional chancre, the remedial power of a federal court that adopts a desegregation plan is not thereafter limited to enforcement of the details of the original plan . . . [T]he adoption of the plan does not exhaust the power of the court to direct elimination of vestiges of segregation that remain or become apparent only after the plan has been put into place . . .

'A school district with a history of operation of de jure segregated schools is under a continuing constitutional obligation to eradicate the vestiges of that dual school system. The failure sufficiently to satisfy this obligation continues the constitutional violation. . . . Inasmuch as an injunctive decree is drafted in light of what the court believes will be the future course of events, a court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to insure that the decree accomplishes its intended result.'" (799 F.2d at 1042-46, emphasis added, citations omitted.)

Certain principles relating to a district court's "redrafting" duty emerge from Freeman. First, the defendant "bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." Freeman, 503 U.S. at 494. Accord, U.S. v. Fordice, 505 U.S. 717, 739 (1992) ("Brown and its progeny . . . established that the burden of proof falls on the State, and not the aggrieved plaintiffs, to establish that it has

dismantled its prior de jure segregated system.") The Fischer and Hickman affidavits show that CHA cannot shoulder this Freeman burden with respect to the present racial imbalance in the location of CHA's family public housing units. The vast majority of such housing remains in the still-segregated original locations; sufficient housing in non-segregated locations to redress the imbalance has not yet been provided.

Second, "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman, 503 U.S. at 485. Freeman adds, "Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors," 503 U.S. at 494; here, however, as the Fischer and Hickman affidavits show, the imbalance has never been remedied. As applied to CHA, therefore, the principle is that CHA has a continuing duty to take "all steps necessary" to eliminate the vestiges of its unconstitutional de jure system. Because the original racial imbalance attributable to the de jure violation has never been remedied, post-1969 demographic changes do not relieve CHA of its "all steps necessary" duty.¹²

¹² Based on Freeman the Supreme Court vacated a judgment of the Tenth Circuit Court of Appeals and remanded for further consideration. 503 U.S. 978 (1992). Following consideration of Freeman the Tenth Circuit reinstated its prior opinion, Brown v. Board of Education of Topeka, 978 F.2d 585 (10th Cir. 1992), after which the Supreme Court denied certiorari. 509 U.S. 903 (1993.) Brown provides a helpful gloss on these two Freeman principles:

"Neither Dowell nor Freeman suggests that the plaintiffs in the remedial phase of school desegregation litigation must make a new showing of discriminatory intent in order to obtain relief from a current condition of segregation." 978 F.2d at 589.

"The Constitution does not permit the courts to ignore today's reality because it

Third, a court should give "particular" attention to the defendant's record of compliance, addressing itself to whether the defendant has "complied in good faith with the desegregation decree since it was entered. . .," Freeman, 503 U.S. at 491-92 (quoting from Board of Education v. Dowell, 498 U.S. at 249-50), because, as Freeman says, the defendant's obligation amounts to "an affirmative commitment to comply in good faith with the entirety of a desegregation plan. . ." Id. at 499.

This Court should therefore give particular attention to CHA's sorry compliance record: for years a recalcitrant CHA had to be subjected to a series of implementation orders (see, e.g., 436 F.2d 306; 384 F.Supp. 37, 38 ("the effect and import of my orders have been avoided and frustrated for over five years")); and for more years it failed so abysmally to perform its desegregation duties that a Receiver had ultimately to be appointed, a step CHA vigorously and successfully twice opposed, and to which it agreed on the third occasion only at the eleventh hour.

Following appointment of the Receiver, CHA became obligated to "provide full cooperation and assistance" to the Receiver. (Order of 8/14/87, par. 7.) Yet as the Court is aware the Receiver recently felt compelled to file an emergency motion and since then, notwithstanding the Court's urging cooperation, CHA has not offered the degree of cooperation that would be desirable. (For an example, see Exhibit I, attached.) Moreover,

is temporally distant from the initial finding [of violation]. Temporal distance matters only to the extent that changes across that time period, unconnected to the de jure's system lingering effects, are responsible for what is observable today." 978 F.2d at 590.

Accord (as to temporal distance), Keyes v. School District No. 1, 413 U.S. 189, 210-11 (1973).

CHA's post-Receivership efforts to provide remedial housing on its own have failed to such an extent that they can hardly be called good faith.¹³

These three Freeman principles, applied to the facts respecting the persistence of the locational imbalance caused by CHA's original violation, demonstrate that even were HOPE VI-funded new public housing to be viewed as a "new and further remedy" not covered by the judgment order (a view, we emphasize, we do not believe to be justified), plaintiffs would be entitled to have the Court exercise its "inherent capacity to adjust remedies," Freeman, 503 U.S. at 487, to embrace HOPE VI-funded new public housing within the judgment order. Should the Court be of the view that such housing is to be treated as a new and further remedy not presently covered by the judgment order, we request that Part III of this Response be accepted as plaintiffs' motion for such an exercise of the Court's equity power.

¹³ CHA requested and was given authority to demonstrate its own development ability through the "CHA Demonstration Program," an agreed-upon, court-sanctioned transfer of development authority from the Receiver to CHA for 350 new public housing units. (Order of 3/9/90.) After CHA failed to get development underway in the allotted two years, the agreement was extended for two years more. (Order of 3/6/92.) With time running and still no progress in sight, a joint venture between Habitat and a CHA affiliate was created "to speed up the process of transferring from the Receiver to CHA [Habitat's] acquired development experience." (Exhibit J, attached.) This "teaching" effort has come to naught, as the Statement of the Receiver shows. (Statement 4, n. 2.) The Demonstration Program and the joint venture are thus two additional instances of CHA's failure to carry out its remedial responsibilities.

Recognizing that since the last demonstration program and creation of the joint venture CHA has undergone a management change, the Receiver suggests another demonstration program opportunity for CHA. (Statement 10-11.) If this is what CHA would like, plaintiffs too are willing to work out another such opportunity, so that present CHA management can show whether, under current conditions and in compliance with its judgment order responsibilities, CHA is able to perform effectively some of the development tasks now assigned to the Receiver.

IV. The Judgment Order's Coverage of HOPE VI-Funded Public Housing Implicates No Separation of Powers or Federalism Concerns

The first of CHA's two separation of powers arguments is that an interpretation of the judgment order that "requires the CHA to use its HOPE VI funds in compliance with the building program set forth in the [judgment order] raises serious [but unidentified] separation of powers concerns." (Memo. 18.) However, in the first of three cases cited by CHA in this context, the judgment order "restrict[ed] the executive branch of the federal government in the performance of its constitutional responsibilities . . ." Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1009-10 (7th Cir. 1984). Here no action of the federal government is restricted at all. Unlike a "remarkable judicial intervention in vital executive functions . . . precipitating a . . . confrontation between the judicial and executive branches" (Alliance, 742 F.2d at 1009-1010, 1015, 1019), the judgment order does not restrict HUD in any way in the performance of its HOPE VI responsibilities.¹⁴

¹⁴ Neither does the judgment order rewrite Congress' HOPE VI rules, as CHA perhaps implies in its reference to Mobil Oil. (Memo. 18.) Moreover, the very language CHA misquotes makes it clear that Congress does not view HOPE VI as overriding court orders. See CHA Exhibit B, page 1.C.7, reading in full, "[N]one of such [HOPE VI] funds shall be used directly or indirectly by granting competitive advantage in awards to settle litigation or pay judgments unless expressly permitted herein." (Emphasis added to language omitted by CHA.) This Congressional language does not exempt HOPE VI funding from desegregation or other court orders; it merely prohibits giving a competitive advantage to desegregation or other litigants, as CHA was given in 1996 for its Horner/ABLA application. (As a result of plaintiffs' willingness to treat the 1996 award to CHA as "comparable relief" under the consent decree with HUD, CHA was given an "absolute priority" to the 1996 funds.) Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17 (1971), where, with reference to a statute that referred explicitly to judicial power, the Supreme Court found "no suggestion of an intention to . . . withdraw from courts their historic remedial powers." Nor, finally, does the judgment order require a non-party (HUD) to fund any of the defendant's (here CHA's) activities, the point at issue in CHA's last-cited case, Chicago Board of Education. (Memo. 18.)

Neither does the judgment order mandate CHA to take any steps that conflict with HOPE VI, since HOPE VI authorizes its funds to be used for new public housing, subjects that housing to the familiar public housing statutory and regulatory scheme, and permits the housing to be located anywhere, off as well as on site.

CHA implies that the Cabrini HOPE VI project may founder because there is "no possibility of creating an identical number of replacement units in the General Area . . ." (Motion par. 10), but there is no basis in the judgment order or the history of this case for that in terrorem prediction. The judgment order is flexible enough for CHA to make any proposal it wishes respecting the new public housing parts of its proposed plans: Article IV allows the Court to approve projects which are not required to meet Article IV limitations, and the Court retains jurisdiction under Article X "for all purposes," including "modifying or supplementing the terms of this order . . ." because of "changes in conditions . . ." or "any other matter."

Ignoring these provisions CHA says, "The Injunction does not permit building in Revitalizing Areas . . . Thus, compliance with the Injunction is not possible." (Memo. 4.) History, of course, teaches the contrary: in both the Horner and North Kenwood-Oakland Revitalizing Areas the Court, at the behest of the parties (including CHA), authorized the Receiver to develop new public housing.

CHA's other separation of powers point is that absent a finding that HOPE VI violates the Fourteenth Amendment, "forc[ing]" CHA to submit to a waiver process "to comply with federal law in the use of its HOPE VI monies" conflicts with the HOPE VI "focus" on local governing body approval. (Memo. 18-19.) But CHA is not forced to submit to a waiver

process to so comply, and there is no such "focus."

Without a waiver CHA and the Receiver could simply choose to locate HOPE VI-funded new public housing in accordance with the judgment order (as modified by the "fifty-fifty" order of this Court of 10/29/82). If in particular circumstances it were desired to locate HOPE VI-funded new public housing otherwise than in conformity with the 10/29/82 order and a waiver were therefore sought, there would be no incompatibility between HOPE VI -- which imposes no requirement as to the location of new public housing -- and a judgment order waiver.¹⁵

As to the supposed "focus" on local government approval, such approval is merely one of many HOPE VI requirements. Indeed, no public housing, however funded, can be built unless local government approval is secured. 42 USC Sec. 1437c(e)(2).

CHA's federalism concern likewise relates to "requiring" CHA to submit to a waiver process (Memo. 19), and what has already been said about waivers applies here as well. CHA says that the waiver process "improperly cede[s] some of the CHA's prioritizing power . . ." (Memo. 19), and does not lead to "the program that it would have created without having

¹⁵ The examples of Lawndale, Henry Horner and North Kenwood-Oakland show that obtaining Court approval in such a circumstance is hardly an unworkable requirement; CHA's bare, conclusory assertion provides no reason to doubt that it will be workable at Cabrini as well. Nor is court approval required for an entire HOPE VI project, as CHA implies is the case at Cabrini (Motion pars. 11, 12), or for "initiatives outside of the scope" of the judgment order. (Motion 4.) At most, approval may be required respecting the location of new public housing which becomes part of the Cabrini and other projects, but only as to that part and only if CHA and the Receiver wish to depart from the "fifty-fifty" locational rule.

CHA says plaintiffs' counsel's "public housing philosophy" is not consistent with HOPE VI. (Motion par. 11.) What is relevant is the judgment order, not counsel's philosophy.

to negotiate . . ." (Motion 4.) Of course the issue is not whether CHA winds up with the program it "would have created" were it not under a continuing obligation to desegregate its public housing system. Desegregation must be one of CHA's "prioritizing" obligations -- regardless of what its priorities might otherwise have been -- including taking "all steps necessary" to achieve desegregation, an obligation unmentioned in CHA's motion or memorandum.

In any case, the underlying judgment order is a remedy for a Fourteenth Amendment violation. As the Supreme Court has made clear, no federalism concerns at all are raised by requiring the wrongdoer to apply to court when it wishes to modify such an order.

"The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment [citation omitted]. Nor are principles of federalism abrogated by the decree." Milliken v. Bradley, 433 U.S. 267, 291 (1977).¹⁶

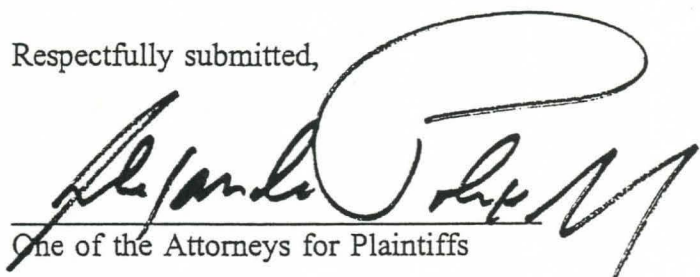
Conclusion

The judgment order applies to all newly developed public housing, whatever its funding source; CHA's four arguments to the contrary, based in good part on a mischaracterization of the issue, are wholly unpersuasive. However, even if the judgment

¹⁶ CHA's two "federalism" cases (Memo. 19) support no different view. In Hoover v. Wagner, 47 F.3d 845 (7th Cir. 1995) an injunction against a state judge and a city police chief was denied for want of equity; the reasons included that what the plaintiffs sought would be "close to . . . an advisory opinion" amounting to "an empty command" to avoid committing errors in enforcing an injunction, as well as an interference with an ongoing state court proceeding (*id.* at 851). And in ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995), an injunction against Illinois' refusal to comply with the motor voter law was upheld as a "proper remedy, and of course a lawful one." 56 F.3d at 798. Stripped from the injunction was a single paragraph that required Illinois to do more than the law required (*id.*).

order were to be viewed as not now covering HOPE VI-funded new public housing, plaintiffs would be entitled to have the Court exercise its inherent equity power to adjust the remedy in this case to embrace such housing. CHA's motion should therefore be denied.

Respectfully submitted,


One of the Attorneys for Plaintiffs

December 19, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
MAR 18 1998

Judge Marvin E. Aspen
U.S. District Court

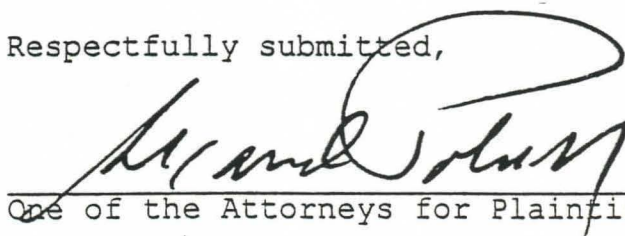
DOROTHY GAUTREAUX, et al.,)
)
Plaintiffs,)
)
v.) 66 C 1459
)
CHICAGO HOUSING AUTHORITY,)
)
Defendant.)

MOTION FOR FURTHER RELIEF

Now come plaintiffs, by their attorneys, and respectfully request the Court to enter an order, in the form of the proposed order attached hereto, to the end of assuring that the Receiver is provided by CHA with the cooperation and assistance mandated by this Court's order of August 14, 1987.

In support hereof plaintiffs attached their memorandum and supporting affidavits.

Respectfully submitted,


One of the Attorneys for Plaintiffs

March 18, 1998

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Plaintiffs,)
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v.) 66 C 1459
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CHICAGO HOUSING AUTHORITY,)
)
Defendant.)

MEMORANDUM
IN SUPPORT OF
PLAINTIFFS' MOTION FOR FURTHER RELIEF

Introduction

The affidavits attached hereto of Daniel Levin and Philip A. Hickman, officers of the Receiver, demonstrate that:

- (A) Prior to March 10, 1998, CHA pursued a course of conduct violative of the Court's August 14, 1987 order mandating that CHA extend "full cooperation and assistance" to the Receiver, with the consequence of seriously interfering with and impeding the work of the Receivership; and
- (B) On March 10, 1998, CHA's Executive Director engaged in the conduct described in the Receiver's letter to the Court of March 13, 1998.

Plaintiffs' immediate objective is to assure that the Receiver is enabled to do its job. We are cognizant that HUD's General Counsel has written the Court that HUD neither directed CHA to take any action that would violate the Court's order nor

condones any action that would (Laster letter to Polikoff, 3/16/98), and that -- without denying any of the statements attributed to him in the Receiver's March 13, 1998, letter -- Mr. Shuldiner has written the Court saying that CHA is both mindful and respectful of the Court's orders and would pursue new directions only after receiving the Court's permission.

Under these circumstances, reserving their right to initiate contempt proceedings (including against HUD), for the present plaintiffs seek an exercise of the Court's "inherent capacity" to effectuate its own orders (Freeman v. Pitts, 503 U.S. 467, 487 (1992)) through the entry of an order in the form proposed, articulating the "ground rules" for the already mandated full cooperation and assistance that are essential to the Receiver's effective performance of its assigned task.

The Requested Order

As explained in the attached affidavits, CHA's course of conduct has in multiple ways impeded the Receiver in the performance of its task. Examples (only) of this course of conduct include:

- (1) Withholding (by refusal to provide signatures requested by HUD) over \$7 million of available funding for non-elderly housing.
- (2) Making commitments to tenants respecting non-elderly housing proposed to be developed by CHA without the consent or participation of the Receiver.

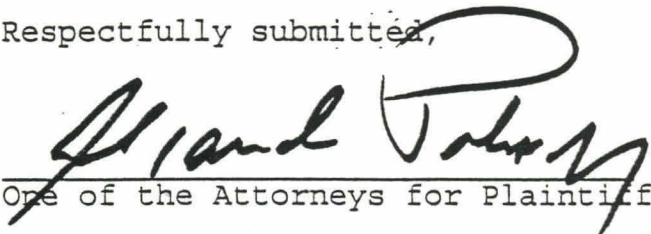
- (3) Entering into negotiations with others, and taking numerous other preliminary steps (including, without limitation, hiring of architects and others, and submission to the Chicago Plan Commission of proposals) respecting non-elderly housing proposed to be developed by CHA without the consent or participation of the Receiver.
- (4) Making applications for funding for non-elderly housing proposed to be developed by CHA without the participation or consent of the Receiver.
- (5) Making plans for the development of non-elderly housing in areas that violate the locational requirements in this Court's orders.
- (6) Refusing to provide information to the Receiver respecting CHA-initiated non-elderly housing development activities.
- (7) Threatening retaliation against the Receiver if the Receiver did not agree to give up responsibility for new non-elderly housing development to the CHA.

As stated in the Receiver's March 13 letter to the Court, *the Receiver cannot perform its Court-ordered responsibilities effectively and expeditiously if these frustrations of commission and omission are not remedied.*

Conclusion

Accordingly, plaintiffs respectfully request that the Court enter the proposed order attached hereto.

Respectfully submitted,


One of the Attorneys for Plaintiffs

March 18, 1998

Alexander Polikoff
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312/641-5570; fax: 312/641-5454

IN THE UNITED STATES DISTRICT COURT
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DOROTHY GAUTREAUX, et al.,)
)
 Plaintiffs,)
)
 v.) 66 C 1459
)
CHICAGO HOUSING AUTHORITY,)
)
 Defendant.)

PROPOSED ORDER

This matter coming on to be heard on Plaintiffs' Motion for Further Relief, and the Court being cognizant that:

- (A) In its order of August 14, 1987 ("Receivership Order") the Court defined the "scattered site program" as including all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of this action, and appointed Daniel Levin and The Habitat Company jointly as receiver ("Receiver") to develop and administer such scattered site program as effectively and expeditiously as possible in compliance with the Court's orders;
- (B) In the Receivership Order the Court also ordered that the Receiver should have and exercise all powers of CHA respecting the scattered site program necessary and incident to the development and administration of such program, and without limitation specified some of such

powers ("Housing Development Activities");

(C) In the Receivership Order the Court further ordered that CHA, its agents, servants and employees, should provide full cooperation and assistance to and not interfere with the Receiver in the performance of the Receiver's responsibilities under the order, including without limitation providing full access to all information, records, documents, and files relating to the scattered site program; and

(D) The Plaintiffs have filed a motion and supporting affidavits showing that, among other things:

(i) CHA has failed to recognize the Receiver's exclusive authority over Housing Development Activities;

(ii) CHA has failed to provide full cooperation and assistance to the Receiver, as required by the Receivership Order, including by failing to provide approvals to the United States Department of Housing and Urban Development ("HUD") needed to cause HUD to release funds to the Receiver for Housing Development Activities, as a result of which more than \$7 million in funds needed by the Receiver for such Activities has been withheld;

(iii) CHA has initiated and pursued Housing Development Activities that fall within the responsibility of the Receiver under the Receivership Order,

including without limitation at CHA's Cabrini-Green, Darrow and Robert Taylor Homes developments, and including the submission of a proposal to the Chicago Plan Commission for approval of a planned unit development for the construction of over 100 units of non-elderly housing at the Darrow development, all without prior consultation with or consent from the Receiver; and

- (iv) These and other activities of the CHA have impaired the Receiver's ability to carry out the Housing Development Activities assigned to the Receiver by the Receivership Order;

And the Court having heard the presentations of the parties with respect to the foregoing and being persuaded that it will aid in the achievement of the objectives of the Receivership Order and the Judgment Order in this case (304 F.Supp. 736) to further particularize the manner in which CHA's cooperation and assistance to the Receiver shall be provided:

NOW, THEREFORE, IT IS HEREBY ORDERED:

- (1) CHA, its officers, agents, servants, employees, attorneys, and persons in active concert or participation with them who receive actual notice of this order (collectively "CHA"), shall forthwith cease any and all activities incident to the development of non-elderly public housing ("Housing Development

Activities" as defined in paragraph B hereof), including without limitation entering into negotiations, making commitments to tenants or others, or seeking financing or other approvals with respect thereto.

- (2) Within 14 days from the date hereof CHA shall provide the Receiver with full information in writing and all documents relating to Housing Development Activities in which CHA has engaged since May 26, 1995.
- (3) Whenever from time to time requested by the Receiver CHA shall make any of its agents, servants and employees available at reasonable times and upon reasonable notice to meet with the Receiver for the purpose of responding fully to all questions concerning Housing Development Activities asked of such agents, servants or employees.
- (4) CHA shall forthwith execute all documents as requested by the Receiver or the Department of Housing and Urban Development ("HUD") which may be necessary or appropriate to transfer or assist in the transfer to the authority of the Receiver all funding or accounts for Housing Development Activities as to which CHA may now or in the future have any claim of authority, and subject to normal HUD requirements shall cooperate fully with the Receiver and HUD in effecting such transfer(s).

- (5) CHA shall make no application for funding capable of being used for Housing Development Activities without the express written consent of the Receiver, and shall advise and consult with the Receiver respecting the availability or potential availability of any such funding promptly upon learning thereof.
- (6) Within 28 days from the date hereof CHA shall furnish the Receiver and plaintiffs' counsel with a written statement of CHA's plans for the vigorous pursuit of desegregation opportunities, and provide them with all relevant information and documents relating thereto, and to funds available to CHA (including HOPE VI funds) that are capable of being employed in that pursuit.
- (8) The Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order.

Enter:

Judge

March __, 1998