

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

DOROTHY GAUTREUX, *et al.*

Plaintiffs,

V.

CHICAGO HOUSING AUTHORITY and
JOSEPH SHULDINER, Executive Director,

Defendants.

66 C 1459

Hon. Marvin E. Aspen

NOTICE OF FILING

TO: Counsel on attached service list

Please take notice that on March, 12 1999, the attached **Lakefront Community Organization's Reply In Support Of Its Second Motion To Intervene** was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, a copy of which is herewith served upon you.

One of the Attorneys for the Lakefront
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Certificate of Service

I, Charles R. Petrof, certify that I caused to be served a copy of **Lakefront Community Organization's Reply In Support Of Its Second Motion To Intervene** upon the counsel on the attached service list by depositing the same in the U.S. mail at 111 W. Jackson, Chicago, Illinois 60604 with proper postage prepaid on March 12, 1999.



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there are eligible displaced Lakefront tenant families who have not been offered the replacement housing promised in the Revised Agreement.

No one disputes that the LCO satisfies the requirements of Rule 24(a)(2) to intervene as a matter of right. All parties agree that (1) timely application for intervention was made; (2) the LCO has an interest relating to the subject matter of the action; (3) that interest could be potentially impaired by disposition of the action; and (4) without intervention, no adequate representation exists for the LCO.¹ Because the LCO's motion satisfies the criteria of Rule 24(a)(2), the intervention should be granted without the additional strictures that plaintiff's counsel and Habitat would impose.

I. THE LCO HAS STANDING TO SUE FOR BREACH OF CONTRACT.

As one of parties that negotiated and signed the 1995 Revised Agreement, the LCO plainly has standing to sue for breach of that Agreement. Home Savings Assn. of Kansas City v. State Bank of Woodstock, 763 F. Supp. 292, 300 (N.D. Ill. 1991). All parties agree that any suit on the Revised Agreement must be brought in this Court, because of the Agreement's relationship to the CHA's obligations under Gautreaux. And no one seriously contends that either of the existing parties (the class plaintiffs and the CHA) or Habitat as CHA's Receiver can adequately represent the LCO's interests.

Plaintiffs' counsel argues, however, that the LCO should not be allowed to "present its concerns about the Receiver's performance" unless it can show that there are more

¹ Habitat does not dispute that inadequate representation exists for the LCO if the Revised Agreement is enforceable. Habitat's argument on this point is based solely on the contention that the Revised Agreement is unenforceable. See Receiver's Statement Concerning the Lakefront Community Organization's Second Motion to Intervene (Rec. Statement) at 13.

eligible displaced Lakefront tenant families than there are completed replacement units. Plaintiff's Response to Second Motion of the Lakefront Community Organization to Intervene (Pl. Resp.) at 2. That argument ignores the substance of the LCO's complaint, which is not merely that the LCO has "concerns" about Habitat's performance, but that the Revised Agreement has been breached. It further ignores that the Revised Agreement does not call for the construction of only enough replacement housing to meet the needs of eligible displaced Lakefront tenant families, but instead requires construction sufficient "for the provision of replacement housing units for each public housing unit to be demolished." Revised Agreement ¶ 2, attached as Exhibit B to LCO's Complaint. To satisfy this requirement, the Revised Agreement requires the construction of 441 hard public housing units (¶¶ 4,5 and 6) and the distribution of 302 Section 8 Certificates (¶ 7).

There is thus no legal or factual basis for the additional hurdles plaintiffs' counsel would erect before the LCO can be heard.

II. THE LCO'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

We do not take issue with Habitat's contention that, on a motion to intervene, the proposed intervenor's complaint should be judged by the same standards that apply to a motion to dismiss under Rule 12(b)(6). Rec. Statement at 2. Under those standards, the Court must accept the well-pleaded allegations of the complaint as true, and must view them in the light most favorable to the LCO. Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990). All reasonable inferences that follow from the allegations of the complaint must also be taken as true. Corcoran v. Chicago Park District, 875 F.2d 609, 611 (7th Cir. 1989). Moreover, the Court should consider only the complaint, not a defendant's challenges to or refutations of the complaint, or

defendant's own set of allegations. Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987). To prevail on Rule 12(b)(6) grounds, a defendant must show beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accordingly, defendants must overcome "a high barrier" to prevail. Gomez, 811 F.2d. at 1040.

A. The Revised Agreement Is Enforceable.

Habitat argues that the Revised Agreement "suffer[s] from the same problem that the Court found with the proposed Cabrini-Green consent decree last August: CHA had no authority to make the promises it made to the tenants, including promises that the Receiver would develop units on any particular time schedule." Rec. Statement at 5-6. In fact, there is no comparison between the proposed Cabrini-Green consent decree, which was arrived at in litigation in which Habitat had no involvement, and the Revised Agreement, which all the Gautreaux parties – and Habitat – have until now endorsed.

The Revised Agreement was signed by the CHA and the LCO in September 1995. Intervenor Lakefront Community Organization's Complaint ("Complaint") at ¶ 18 and Revised Agreement attached as Exhibit B to LCO's Complaint. The Revised Agreement provided that the four Lakefront high-rises that had been vacated 10 years earlier for rehabbing would instead be demolished (Revised Agreement ¶¶ 1, 3) and 441 units of replacement public housing built: 141 units in North Kenwood-Oakland (¶6), 200 scattered-site units outside North Kenwood-Oakland (¶5), and 80-100 units and a community center on the site of the Lakefront high-rises after they were demolished (¶4). The Revised Agreement was clearly entered into with the Gautreaux litigation in mind. All the construction was to be done by CHA through the "Gautreaux-

appointed Receiver” (i.e., Habitat); and the 141 North Kenwood units were “already funded pursuant to the Gautreaux Consent Decree” (§§ 4, 5, and 6). Moreover, this Court’s approval was required for the construction of all but the 200 scattered-site units outside the North Kenwood-Oakland area and for the parties’ proposed tenant selection and assignment plan (§3).

Less than a year after the Revised Agreement was signed, Alexander Polikoff (counsel for the Gautreaux plaintiff class) and Daniel Levin (chairman of Habitat) sent a letter to William Wilen, then employed by the Legal Assistance Foundation of Chicago and acting as the attorney for the LCO, stating that, if the former Lakefront tenants became dissatisfied with the pace of development of the North Kenwood-Oakland replacement housing, both plaintiffs’ counsel and Habitat would support a request by the tenants for a hearing in front of this Court. Complaint at ¶20 and Complaint Exhibit C.

Ten days later, plaintiffs’ counsel, the CHA, and the U.S. Department of Housing and Urban Development filed a joint motion requesting that this Court authorize the construction of the 241 units slated for North Kenwood-Oakland and the site of the four Lakefront high-rises under the “Revitalizing Area” criteria of the Gautreaux consent decree. Complaint Exhibit D. The joint motion described the terms of the Revised Agreement and attached a complete copy as an exhibit. Id. at ¶¶6-9. The joint motion also recited that “[m]ovants are authorized to represent to the Court that the Receiver supports this motion.” Id. at ¶12. In its order granting the joint motion, this Court made specific note of the fact that Habitat and Mr. Levin had “represented to the Court that they had examined the proposal respecting the appropriate number of public housing units to be provided therein and the conditions to be made applicable thereto, and that they support the Joint Motion.” Complaint Exhibit E.

Taken together, these facts show that Habitat knew of and endorsed the Revised Agreement, which expressly provided for Habitat's role. Neither its letter to the LCO nor the joint motion contain any hint that Habitat viewed the Revised Agreement as an unenforceable, ultra vires agreement by CHA. Habitat's attempt to compare the Revised Agreement to the proposed consent decree in Cabrini-Green is revisionist history, and should be rejected.

B. CHA Breached the Revised Agreement

In its Statement, Habitat argues that the CHA (or Habitat as CHA's Receiver) has not breached the Revised Agreement. Habitat offers various theories in support of its claim of non-breach, including that:

- Habitat was not obliged to do anything but "commence" construction of any of the 341 off-site units, which it has done by building 73 units, with 24 more slated for completion by February 2000. Rec. Statement at 8; Reid Affid. ¶¶4-6.
- Habitat was not obliged to do anything at all, because the conditions set forth in Paragraph 3 were never satisfied (except for obtaining the waiver from this Court). Rec. Statement at 8.
- Even if the conditions of Paragraph 3 were satisfied, Habitat would have at least 20 months from that date, and maybe longer, to complete the construction of the off-site units. Rec. Statement at 9.
- The LCO cannot sue to enforce the Revised Agreement until it gives CHA 60 days' notice under Paragraph 15. Rec. Statement at 9.

All of Habitat's "non-breach" arguments rest on misreadings of the Revised Agreement and misconceptions about the LCO's complaint.

1. **The breach at issue is the premature demolition of the Lakefront high-rises, not the failure to adhere to Paragraph 15's timetable for off-site, pre-demolition construction.**

Habitat assumes that the breach the LCO complains of is the failure to build 441 units within 10 months of the demolition of the Lakefront high-rises, and spends several pages demonstrating that the Revised Agreement imposes no such obligation. Rec. Statement at 7-9. To the contrary, the LCO complains that the breach is demolishing the Lakefront high-rises without satisfying the conditions of Paragraph 3 or building the off-site units on the schedule described in Paragraph 15, which is what the last sentence of Paragraph 3 requires.²

The LCO's interpretation is borne out by the interlocking obligations and timetables set out in the Revised Agreement. First, Paragraph 3 requires the CHA to complete three undertakings: (1) secure funding for the unfunded replacement housing;³ (2) obtain site control for the units to be located in North Kenwood-Oakland; and (3) secure the appropriate waivers from this Court.

Paragraph 15 then sets out the timetable for completing the construction or rehabilitation of the off-site replacement units once those three conditions are fulfilled. The work must begin within 10 months after the CHA obtains the necessary funding, site control, and waiver described in Paragraph 3, and must be completed within a "a reasonable time, as that term is defined by current construction industry standards" If the work is not completed 10

² That sentence reads, "If the conditions set forth in this paragraph 3 and in paragraph 15 below are satisfied, CHA shall demolish the four remaining Lakefront properties."

³ Subparagraph 3(a) requires funding for the construction of the 80-100 units to be built on the site of the Lakefront high-rises and for the 200 units to be built outside North Kenwood-Oakland. Funding for the 141 units to be built in North Kenwood-Oakland was already provided for under the Gautreaux consent decree. (Revised Agreement ¶ 6.)

months after it begins, the LCO may give CHA 60 days' notice and sue.

Finally, Paragraph 3 provides that "[i]f the conditions set forth in this paragraph 3 and in paragraph 15 below are satisfied, CHA shall demolish the four remaining Lakefront properties." In other words, demolition is not to occur until the requisite funding, site control, and waiver have been secured, and the off-site construction called for in Paragraph 15 is completed. That sequence makes sense, because the CHA was clearly interested in demolishing the vacant high-rises, and would be motivated to work with the Receiver to fulfill the conditions and construct the off-site replacement housing promptly so that demolition could proceed.⁴

When CHA demolished the Lakefront high-rises in December 1998, without fulfilling the conditions of Paragraph 3 (apart from obtaining the waiver) and without building all of the off-site units as provided for in Paragraphs 3 and 15, it breached the Revised Agreement. Moreover, CHA's breach cannot be remedied by invoking either of the Revised Agreement's interim, pre-demolition enforcement provisions. Paragraph 14, which gives the LCO the option of nullifying the Revised Agreement and reinstating its 1986 predecessor if the pre-conditions of Paragraph 3 are not satisfied, is a dead letter: the 1986 agreement contemplated that all of the lakefront buildings would be rehabilitated -- and there is no possibility of rehabilitating buildings that no longer exist. Paragraph 15, which would have allowed the LCO to sue CHA (on 60 days'

⁴ The lack of any deadline for constructing the 80-100 units on the site of the high-rises also makes sense. Once the buildings were demolished (which could not happen until the 341 off-site units were built), the CHA would have every incentive to build on the demolition site, rather than having vacant, rubble-strewn land in the midst of a Revitalizing Area.

notice) for failing to meet the off-site construction schedule, never kicked in because the triggering event -- the satisfaction of the conditions of Paragraph 3 -- did not happen.⁵

2. **As a result of CHA's breach, there is no longer any contractual remedy for the failure to build any of the off-site replacement housing, nor any incentive to build the 80-100 on-site units in a timely fashion.**

This explanation of how the provisions of the Revised Agreement interrelate shows that the premature demolition of the Lakefront high-rises (i.e. demolition before Paragraph 3's conditions were satisfied and the 341 off-site public housing units were built) violates the Agreement. Habitat is mistaken in arguing that the sole remedy even theoretically available for that complete breach is notice and a suit to enforce the off-site construction timetable set out in Paragraph 15.

Moreover, because CHA went ahead with the demolition without satisfying any of its pre-demolition obligations, the basic incentive to build the on-site units has also been destroyed. Under the Revised Agreement as written, CHA and/or Habitat would have had the necessary funding secured, and the necessary sites under its control; the North Kenwood-Oakland and scattered site units would have been built; and CHA would have had no reason to delay completion of the redevelopment effort -- building 100 units and a community center back on the high-rise site to erase the last reminder of the blight caused by the vacant high-rises.

Now there is no timetable for any of the construction called for under the Revised Agreement. All we know for sure is that 35 units of the original 141 have been built in North

⁵ The parties disagree about whether CHA and/or Habitat have actually obtained site control for all 141 of the North Kenwood-Oakland units. But there is no disagreement that at least 124 of the other 200 off-site units are entirely unfunded. Rec. Statement at 11; Reid Affid. ¶ 8.

Kenwood-Oakland (Reid Affid. at ¶ 4) and that 38 scattered-site units have been built elsewhere in the City (*id.* at ¶ 6). Habitat hopes that 24 additional units in North Kenwood-Oakland will be ready in early 2000. *Id.* at ¶ 5. The remaining 344 units are variously “in the planning stage,” in the site-acquisition process, ten months away from having RFP’s out to developers, or wholly unfunded. *Id.* at ¶¶ 4, 6. Habitat insists that the 10-month deadline suggested in the LCO’s complaint is unrealistic – and that may be true. But it does not follow that no deadline should be imposed for any of the obligations CHA and Habitat undertook in the Revised Agreement and have failed to fulfill.

3. Injunctive relief is the appropriate remedy for the breach.

The remedy for the breach identified in the LCO’s complaint is not money damages (which are incalculable), nor specific performance of any particular contract term (because no term governs the situation where demolition has occurred with virtually all of the conditions for undertaking it unsatisfied). Rather the LCO seeks an enforceable commitment from CHA (or Habitat as CHA’s Receiver) to build all the replacement units called for under the Revised Agreement within some definite period of time.

Nor is it impossible to determine what the timetable should look like. The Revised Agreement contemplated that the funding, site-control, and waiver criteria could be satisfied by January 1, 1996, a little more than three months after the Agreement was signed. Ex. B, ¶ 14. Habitat says the process was delayed by strong opposition in the North Kenwood-Oakland community, but that it has now developed “support and approval” from the North Kenwood-Oakland Conservation Community Council, the Fourth Ward Alderman, and the City Council. Rec. Statement at 12. So the original timetable could be reinstated. Moreover, the parties

thought that, once funding, site-control, and the waiver were secured, construction of the off-site units could begin in 10 months and be completed in another 10 months thereafter. Revised Agreement ¶ 15. Some of that work has already occurred. Finally, the only impediment to building the on-site units and community center was that the demolition was not scheduled to occur until the off-site units had been built. Now that demolition has occurred, the land for the final phase of construction is also available, and it too should be addressed.

The LCO does not mean to prejudge the merits of the case, but only to suggest that some deadline, to which CHA and Habitat would adhere in the absence of extraordinary circumstances, is both appropriate and feasible. Otherwise the commitment to build replacement housing under the Revised Agreement -- which CHA made, Habitat endorsed, and all the Gautreaux parties presented to this Court when they sought the waiver for those units that required it -- will not be worth the paper it was written on.

III. HABITAT'S OBJECTIONS TO THE RELIEF SOUGHT ARE NOT RELEVANT TO LCO'S RIGHT TO INTERVENE.

In its Statement, Habitat argues that the relief the LCO requested in its complaint is "impossible and unwise." Rec. Statement at 9.⁶ These are largely merits issues, not issues relating to the LCO's motion to intervene. Habitat admits as much. Rec. Statement at 10, n.10.

⁶ Habitat uses the word "impossible" in a loose sense. It does not, and could not, assert that performance of the Revised Agreement has become legally impossible. Felbinger and Co. v. Traiforos, 76 Ill. App. 3d 725, 733-34, 394 N.E.2d 1283, 1289-90 (1st Dist. 1979). In fact, elsewhere in its Statement, Habitat maintains that it is performing and intends to complete the development called for in the Revised Agreement under its own, unspecified timetable. Rec. Statement at 2.

The only points that need to be made at this stage are the following. First, the 10-month deadline in LCO's complaint is merely a suggestion, based on the terms the parties themselves used in the Revised Agreement and on Habitat's representation that it has finally managed to quell community opposition. The 10-month timetable is no more unalterable as a demand than a plea for damages "in excess of" some substantial dollar amount would be. Second, the LCO does not hold Habitat directly responsible for the breach -- indeed it did not name Habitat as a defendant in its Complaint. The LCO's Complaint is directed at CHA, which went ahead with demolition in violation of the Revised Agreement. Habitat is implicated only because some of CHA obligations under the Revised Agreement (including the construction of the new non-elderly public housing units) have been assigned to Habitat as CHA's Receiver. We recognize, for example, that it is CHA's responsibility, not Habitat's, to seek governmental funding for public housing and, if such funding is not forthcoming, to find alternative ways to finance the construction. Finally, the LCO has been diligent in searching for non-judicial ways to resolve these issues -- first by negotiating the 1986 agreement, then by negotiating the 1995 Revised Agreement, and finally by engaging in meetings and discussions with CHA and Habitat that have, unfortunately, not proved fruitful.

Thirteen years after the Lakefront high-rises were vacated, the LCO is no closer to having what it bargained for than it was at the outset. The LCO therefore seeks the Court's assistance in setting a definite, enforceable deadline for the construction of all 441 units of replacement housing called for under the Revised Agreement.

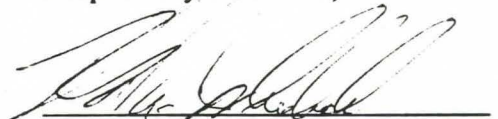
CONCLUSION

This Court should grant LCO's motion to intervene because CHA's commitment to build 441 replacement units of public housing relates to the CHA's desegregation obligations under Gautreaux, and no one but the LCO is prepared to enforce that commitment. The CHA does not oppose the motion. Plaintiff's counsel appears not to oppose the motion either, although it would require the LCO to produce families to fill the as-yet unbuilt replacement units. There is no factual or legal basis for that additional requirement.

Finally, Habitat acknowledges that the LCO should be given the opportunity to be heard, but attacks the sufficiency of the LCO's complaint and the wisdom of providing relief. But the Complaint states a viable claim under Rule 12(b)(6), and the scope of relief is a merits – not an intervention – issue.

The LCO should be permitted to intervene to present its claim for breach of the Revised Agreement to this Court.

Respectfully submitted,


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